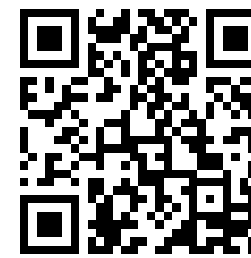

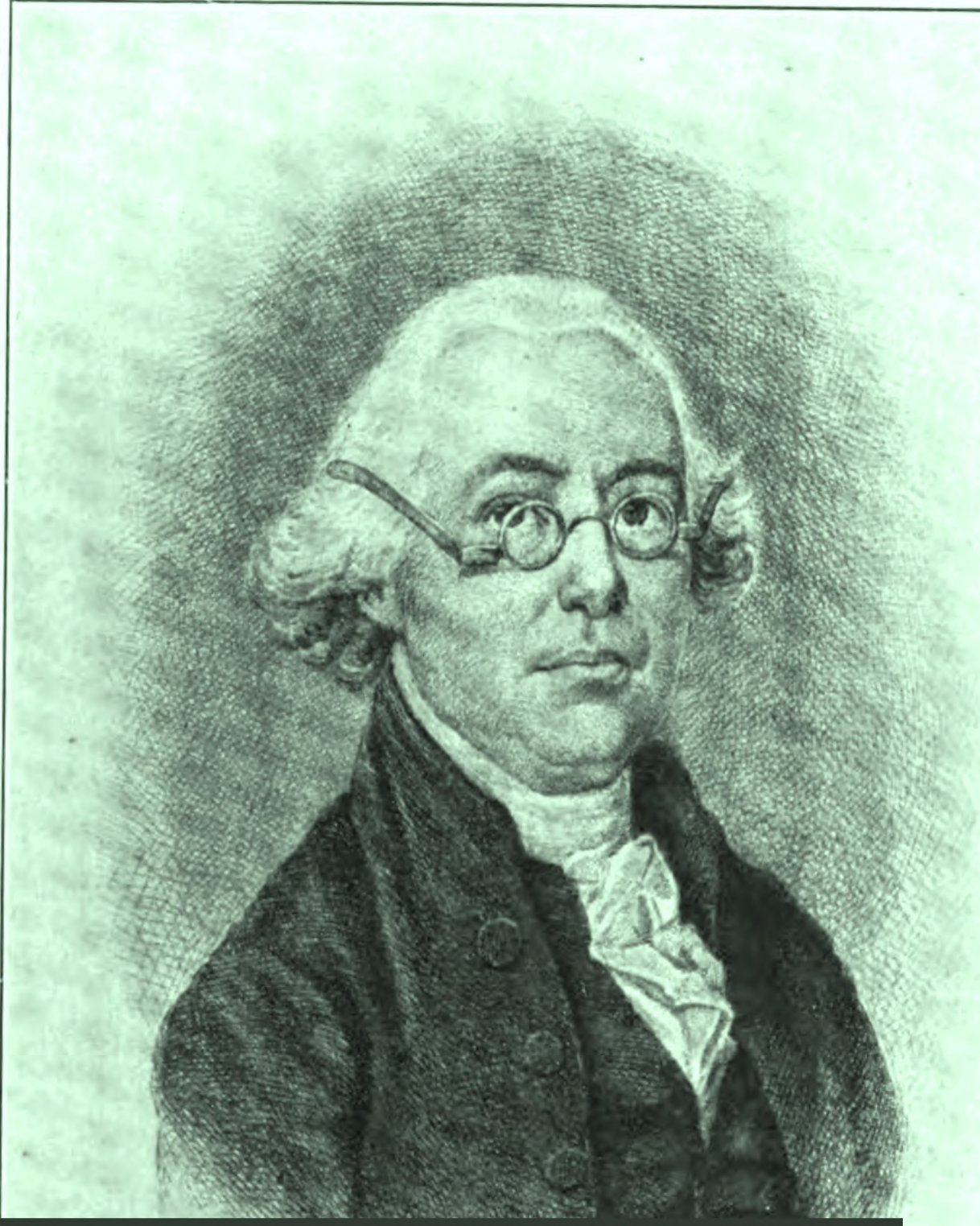

The Green bag

Horace Williams Fuller, Thomas Tileston Baldwin, Sydney Russell Wrightington, Arthur Weightman Spencer

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THE GREEN BAG

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Covering the Higher and
the Lighter Literature
of the Law

SYDNEY R. WRIGHTINGTON - Editor
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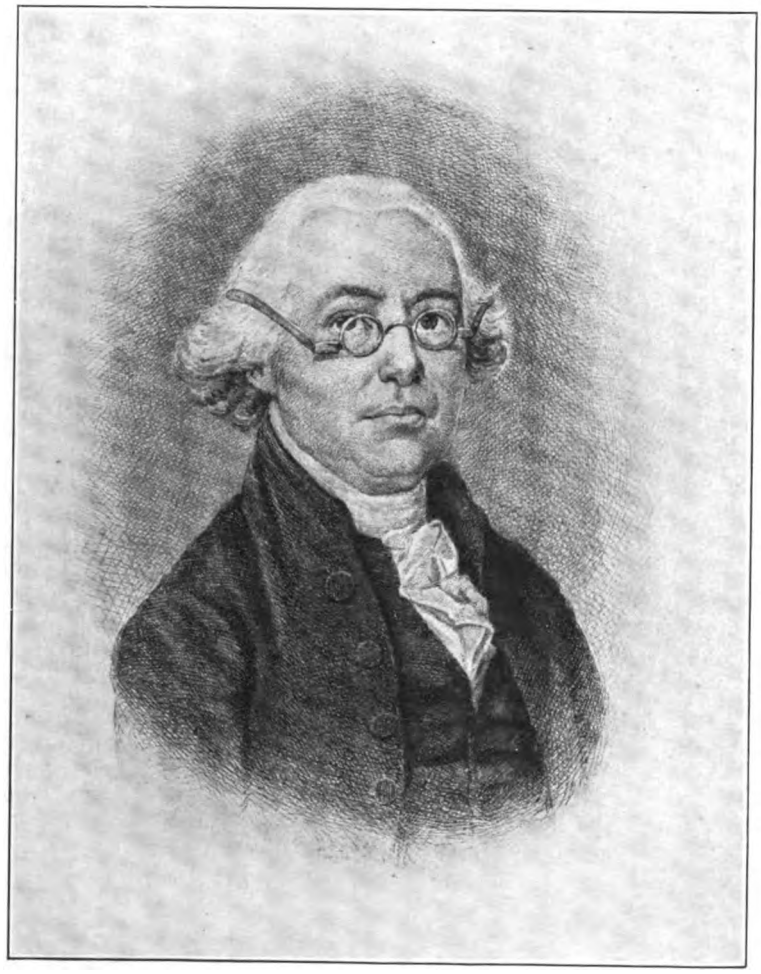

JAMES WILSON

The Green Bag

VOL. XIX. No. 1 BOSTON JANUARY, 1907

JAMES WILSON, NATION-BUILDER

BY LUCIEN HUGH ALEXANDER[1]

OF but one man in all our history can it be said that his hand was on the Declaration, his spirit in our Constitution, and his intellect in the decrees of the nation's highest court. Yet this man, James Wilson, the friend of Washington, of Franklin and of Hamilton, warrior, patriot, statesman and jurist, publicist, political scientist and orator of luminous mind and unrivalled learning, constitution-maker and nation-builder, as a result of one of those strange periodic cataclysms in the political thought of our people on great fundamental questions of national policy, was swept from popular view at his death, in 1798, by the great wave of anti-federalism which was then gathering force, and which so shortly afterwards engulfed the nation. For more than a century, except by the deepest students of our law and history, he was forgotten; but the great principles of republican government, which he personified and which he had been so potent a power in crystallizing into concrete form in the Constitution, stood immovable through the storm and stress, the shock and clash, of political warfare, which not only hurled popular heroes from their pedestals, but finally plunged the Republic into the greatest civil war of any nation or time; and now, from the shades of popular oblivion, after three generations of neglect, James Wilson is emerging luminous and transcendent.

[1] This monograph will be biographic, and not propagandic, as was the author's article *sub nomine*, "*James Wilson, Patriot, and the Wilson Doctrine*" in the 1906 mid November issue of *The North American Review*.

No man, certainly no American citizen, more than a century after his death has received such a spontaneous tribute of respect and veneration as was paid him during the three days of last November, commencing on November 20th, at Edenton, North Carolina, with the disinterment of his remains from their resting place at the side of his friend and colleague on the Bench of the Supreme Court of the United States, Justice James Iredell, at whose home he died. At the peaceful Iredell-Johnston family grave-yard on the "Hays" plantation gathered Chief Justice Clark and other distinguished sons of North Carolina with representatives of Pennsylvania headed by Major-General Gobin, the highest officer of the Pennsylvania militia, which Wilson himself once commanded. After brief but impressive ceremonies, including prayer by the Reverend Dr. Drane, addresses by General Gobin and the Lieutenant-Governor of North Carolina, and the reading of Pennsylvania's request for the body, signed by Governor Pennypacker, Chief Justice Mitchell, United States Senators Knox and Penrose, the Mayor of Philadelphia, the Chancellor of the Law Association of Philadelphia, the Provost of the University of Pennsylvania and other representative citizens, including the executors of Wilson's last surviving descendant, and of the reply thereto by Hon. John G. Wood, owner of the "Hays" plantation, the remains, covered by a thirteen stars flag, were transferred to a special train and conveyed to Norfolk, Viriginia, the nearest seaport, under escort of the Pennsylvania and North Carolina parties, the latter including the

Chief Justice and Lieutenant-Governor, the president of the state Historical Society and delegations from the societies of the Cincinnati and Sons of the Revolution.

At Norfolk, the remains, in a severely plain but massive cedar coffin of colonial design, provided by the Saint Andrews Society of Philadelphia, were received by Captain Fechteler, U. S. N., commanding the United States man-of-war, *Dubuque*, under orders from the Navy Department to convey the body of General Wilson to Philadelphia, according it all the honors of his rank. As blue jackets of the United States Navy carried the coffin on board the U. S. S. *Dubuque*, the flag was half-masted, the bugle call sounded, and a major-general's salute of thirteen guns fired, the United States marines attached to the man-of-war being drawn up in line and presenting arms. The remains lay in state on the main deck covered by a Union Jack, under guard by marines until their arrival at Philadelphia. As the *Dubuque* sailed from Norfolk, every man-of-war in the harbor half-masted its flag, and the forts fired a major-general's salute. The saluting was repeated as the *Dubuque* passed the fortifications on the Delaware, and as the body was brought ashore at Philadelphia, the *Dubuque* again fired thirteen minute guns, and an Italian battleship lying in the harbor, as a mark of respect to James Wilson and the nation which was honoring his memory, half-masted its flag. The bell at Independence Hall at once began to toll, and so continued until the burial.

On landing, the remains were met by the Governor of Pennsylvania, Admiral Craig of the United States Navy, Colonel Dickinson, commander of the marines at League Island Navy Yard, representatives of the municipal government, as well as by thousands of citizens. A battalion of United States marines served as a guard of honor to Independence Hall to which place the coffin was carried by blue jackets of the navy; and there the remains lay in state at the sacred spot where Wilson, living, had achieved his greatest triumphs. A wreath from the President of the United States was placed upon the coffin and this with a thirteen stars flag from the Pennsylvania Society of the Sons of the Revolution was buried with the body.

On November 22, at 1.30 P.M., the body, guarded by the City Troop, was escorted from Independence Hall to Christ Church by an imposing procession. The coffin, which was carried according to an old time custom, was followed on foot by the venerable Chief Justice of the United States, Hon. Melville W. Fuller and Associate Justices White, Holmes and Day, by the then Attorney-General of the United States, now Mr. Justice Moody, and other high federal and state officials, including representatives of the Congress, also by a delegation from the American Bar Association, headed by its president, Hon. Alton B. Parker, the last nominee of the Democratic party for the presidency, and by Hon. Joseph H. Choate, the last American Ambassador to Great Britain, by Dr. S. Weir Mitchell, who was the author of the movement to bring Wilson's body home to Pennsylvania, and who had himself some years before gone to North Carolina and located the grave, also by delegations from the Pennsylvania Bar Association, the Bar Association of the city of New York, the Law Association of Philadelphia, the Wilson Law Club of the University of Pennsylvania, etc., by the color guard of the Sons of the Revolution with their flags and banners, and representatives of virtually all patriotic societies in Pennsylvania. At the tomb of Benjamin Franklin, Wilson's friend and collaborator, the cortege halted in silence for an instant. At Christ Church the procession entered through the tower room, and with stately tread moved up the aisle as "My Country 'tis of Thee" was sung as a processional. The Chief Justice and Associate Justices of the Supreme Court of the United States sat in the pew occupied by Washington in

the days when Philadelphia was the nation's capital. No more intellectual audience ever gathered in America nor was ever a greater galaxy of speakers assembled on one occasion — all had come to pay their homage and voice their tributes to the immortal patriot whose intellect, more than that of any other one man, over a century before had put in motion, under Divine guidance, the forces which have ever since shaped the destinies of the nation. After religious services had been conducted by Bishop Mackay-Smith, tributes were delivered from the chancel by the following:

Governor Pennypacker, for the Commonwealth of Pennsylvania; Samuel Dickson, Esq., for the Bar of Pennsylvania; Dean William Draper Lewis, for the University of Pennsylvania; S. Wier Mitchell, M.D., LL.D., for American Literature; Andrew Carnegie, LL.D., for Scotch-American citizenship; President of the American Bar Association, Hon. Alton B. Parker, for the American Bar; Senator Philander C. Knox, for the Congress; Mr. Justice White, of the Supreme Court of the United States, for the Judiciary; Attorney-General of the United States, Hon. William H. Moody, for the nation, and who had been selected by the President to represent the Executive Department of the government. The oration was delivered by Hon. Hampton L. Carson, the Attorney-General of Pennsylvania and historian of the Supreme Court of the United States.

The speakers without exception rose to the full measure of this the most patriotic ceremony within the memory of any now living, and which in impressive simplicity and dignity has probably never been equalled anywhere. At the conclusion of the memorial services the body, escorted by the officers of the City Troop, which organization in 1779 at the Fort Wilson riot saved Wilson's life, and followed by the Chief Justice and Associate Justices of the United States, by the Governor and Chief Justice of Pennsylvania and by federal and state Bench and Bar, as well as by the delegates of the patriotic societies, including the Colonial Dames of America and the Daughters of the Revolution, and surrounded by the color guard of the Sons of the Revolution, passed for the last time through the portals of Christ Church where, living, Wilson had worshiped, as the strains of Kipling's recessional rang through the the old church — "Lest we forget, lest we forget." The interment was immediately effected in the same grave with Wilson's wife, close to the south wall of the edifice — "the Westminster Abbey of America," and near the tombs of other revolutionary patriots. Thus was James Wilson, the rising prophet of a new dynasty of constitution interpreters, after more than a century of neglect, brought to his own, his ashes were buried; but *he* was resurrected, and none can doubt but that his spirit and doctrine will ever live as an all potent force in our future national life.

"That man is more than clod, is more than cell,
This solemn tread, this throng of crowding great
This stirring pomp and pageantry of State,
With boom of gun and long toll of the bell,
Proclaim! How slight the sting of death! The knell
That echoes at some lonely churchyard gate,
Neither the clay disturbs, nor thoughts elate,
That, from the very grave, rush forth to tell
To generations of the sons of men
The truths that free, that glorious things inspire;
Our heritage thus saved from fall of night!
Oh, wondrous immortality! The pen
Hath written, and the words, a kindling fire,
Beacon the people's path in living light."[1]

[1] These lines entitled "On the Re-burial of a Signer of the Declaration of Independence, JAMES WILSON. Christ Church, Philadelphia, November 22, 1906," were penned by Mr. Harvey M. Watts of Philadelphia, after attending the Wilson Memorial Services and witnessing the procession and other functions incident to Wilson's re-burial, and he has kindly consented to their publication for the first time in THE GREEN BAG.

Although a warrior of the Revolution, James Wilson's civil services have overshadowed every other feature of his life, and the historian of the future must record that more than any of his compatriots, more than Washington, Franklin, Madison, or even Hamilton, his intellect shaped the destinies of the nation in those crisal formative years of the Republic.

Theodore Roosevelt, since the days of James Madison, the most fertile of all our presidents in initiative power, delving back through the pages of history, has recognized in James Wilson the great constitution-maker and interpreter, and in these words acclaims his own appreciation of his worth:

"I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson."

And it is indeed upon a solid foundation of constructive achievement, that James Wilson's fame rests. An adopted son of Pennsylvania and America, he, the sturdy scion of the clans of Scotland, stands as the Old World's most able, potent, and powerful contribution to American freedom and world-wide civil liberty.

Born of godly parentage, on the 14th of September, 1742, in or near St. Andrew's, Scotland, the ancient capital of the Pictish kingdom, it was but natural that the civil conditions then dominating Scotland should have had a marked influence upon the development of his character. The Scottish Reformation had already made its impress upon the religious life of the people; and Wilson was reared and grew to manhood amid those stirring scenes following the Jacobite rebellion of 1745–46, which resulted in the arbitrary suppression under form of law, not only of many Highland customs dear to the people, but of the Highland language itself, and in the conversion by the nobility of the lands into sheep walks and deer parks, thereby compelling migration, unless the farmers were willing to remain as tenants at will under oppressive conditions.

Of his parentage, at the present time little is positively known, but a careful examination by his future biographers of the but partially explored and widely scattered wealth of manuscripts, will no doubt lead to more extended information. Letters from his widowed mother, Aleson Landale Wilson, who never crossed to the New World, indicate that his parents had educated him with a view to the ministry, and they also evidence her religious fervor and deep interest in the welfare of her son. His own filial devotion never ceased, and he continued to aid in her support, even when he himself was in dire financial straits.

There is at present a slight though non-presumptive doubt in the mind of the writer as to whether James Wilson's father was one James Wilson, of whom we have but scant information, or Alexander Wilson, the distinguished Professor of Astronomy at the University of Glasgow, for both had sons at Glasgow named James Wilson about the time the American James Wilson was a student there. The James Wilson, Sr., referred to was not a resident of St. Andrews, but of Douglas Parish in the County of Clydesdale; and all the probabilities indicate that the father of James Wilson, the American patriot, was Professor Alexander Wilson who was located at St. Andrews at the time of the birth there of the American James Wilson in 1742. This Alexander Wilson was born at St. Andrews in 1714, his father being Patrick Wilson, the town clerk; and it was from St. Andrews University he was graduated in 1733 with the degree of M.A., also receiving from it in 1772 the honorary degree of M.D. Shortly prior to 1760, he engaged in business in Glasgow and in the latter year became the first professor of astronomy in its University. He had a deep philosophic mind and materially advanced the science of astronomy; indeed it was he who in 1769 made the celebrated discovery regarding solar spots and was the

first to demonstrate the now accepted theory concerning them, an account of which appeared in "The Philosophical Transactions" of the Royal Society of London in 1774. He was also an author of a number of philosophical and scientific pamphlets, and died at Edinburgh on October 18, 1786. His second son was named James Wilson.

In November, 1757, our James Wilson, then fifteen years of age, matriculated at the ancient University of St. Andrews, even then hoary with more than three centuries of learning. He there, in competition with nine other applicants, gained one of the four vacant bursaries; but he soon after entered the University of Glasgow, and from thence went to the University of Edinburgh, where he came in contact with four of the greatest minds in Scotland. Here he was thrown in close association with James Watt, of steam engine fame, who in 1762 had made his historic experiments with the Newcomen engine, and there also in 1763 he was under the celebrated Dr. Hugh Blair, the Regius Professor of rhetoric, and in 1765 he took the course in logic under Professor John Stevenson, as well as one in moral philosophy under the no less distinguished Professor Adam Ferguson, — "Fighting Ferguson," who in 1745 was chaplain of the famous "Black Watch" regiment. Dr. Ferguson was himself a St. Andrews man of profound learning and of great mental and physical vigor; Sir William Hamilton described his ethical teaching as an inculcation "in a great measure of the need of the warrior spirit in the moral life." In 1761 he published a pamphlet on the importance of a Scotch militia, and in 1762 organized a club, since historic, to aid in the establishment of the militia. Such in part was the environment and equipment Scotland furnished the intellectual giant she sent forth to battle for religious and civil liberty in the New World.

The dominant characteristics of Wilson's life indicate that while in Scotland he must have become at least a residuary legatee of the teachings of St. Andrews' great political scientist, George Buchanan, who, even two hundred years before Wilson's day, as pointed out by Andrew Carnegie, the present Lord Rector of St. Andrews, proclaimed in Britain in his "*De Jure Regni*," that all power resided in the people, and that kings were only to be upheld so long as they wrought the people's good, — a book which was suppressed by Parliament in 1584, but which became a standard authority in the hands of the men of the Long Parliament, and contained doctrines afterwards adopted by John Milton

Wilson's great power in America resulted in part from his superb educational equipment,—without it he could never have wielded the dominant influence he did in the great Constitutional convention of 1787. A manuscript letter from one of his teachers shows in one sentence that he was not only Scotch to the core, but that he had a due regard for physical exercise, for it contains a reference to the interesting fact that, when professor and pupil last golfed together, Wilson was able to best his older countryman "on every round" of the links at St. Andrews. Wilson's career may not answer the Carnegie inquiry as to "Why are the Scotch so *very* Scotch?" but it evidences the tremendous pertinacious power of Scotch blood, which since Wilson's day has ever played an important part in the making of America. Wilson emigrated to America in 1765, but though thoroughly American in spirit he ever kept green the memory of his Scotch antecedents, and early joined the Saint Andrew's Society of Philadelphia, serving as its president from 1786 to 1796.

Landing in New York, he for a time remained there; but, deeply impressed by the proceedings of the Stamp Act Congress, and the important part played therein by John Dickinson of Pennsylvania, the author of the celebrated *Farmer's Letters*, he journeyed to Philadelphia, arriving in 1766, and soon became a teacher in the College of

Philadelphia, afterwards the University of Pennsylvania, which in that year conferred upon him the degree of Master of Arts, he having passed in the classics the best examination of anyone to that date. Shortly after this he took up the study of law in the office of John Dickinson, and was admitted to the Bar in 1767. He at once began practice at Reading, Pa., but soon removed to Carlisle, Pa., where from 1770 to 1774 he had the largest practice at the Bar, the docket showing that of the 819 cases in those five years, Wilson appeared in 346 of them. He was thoroughly established in his profession before the Revolution, having early taken a place among the leaders, as the result of an argument in an important land case between one Samuel Wallace, whom he represented, and the proprietors of Pennsylvania. In 1772 he married Rachel, daughter of William Bird, a wealthy iron founder of Birdsborough, Pa.

Wilson rapidly forged to the front as a great leader. In July, 1774, he was a delegate to the Pennsylvania Provincial Meeting of Deputies at Philadelphia, as well as to the Provincial Convention which also met there in January, 1775, but his greatest service to the development of the spirit of freedom in America, has so far been overlooked by historians. Yet what he did was a service which undoubtedly did more to crystallize a spirit of independence among the great leaders of thought in the American colonies than any other one thing. This was in August, 1774, when the first Continental Congress assembled in Philadelphia. Wilson was not a member of it, although the Pennsylvania Convention of July, 1774, had recommended that the Assembly elect him a delegate, but there was distributed among the delegates to the Congress a printed pamphlet of forty pages,[1] from his pen, bearing date, the 17th of August, 1774, and in which with convincing logic, supported by exhaustive authorities, he demonstrated that the British Parliament possessed no legislative authority over the American colonies. In his prefatory remarks he said:

"Many will, perhaps, be surprised to see the legislative authority of the British parliament over the colonies denied *in every instance*. Those the writer informs, that, when he began this piece, he would probably have been surprised at such an opinion himself; for that it was the *result*, and not the *occasion*, of his disquisitions. He entered upon them with a view and expectation of being able to trace some constitutional line between those cases in which we ought, and those in which we ought not, to acknowledge the power of parliament over us. In the prosecution of his inquiries, he became fully convinced that such a line does not exist; and that there can be no medium between acknowledging and denying that power in all cases. Which of these two alternatives is most consistent with law, with the principles of liberty, and with the happiness of the colonies, let the public determine. To them the writer submits his sentiments, with that respectful deference to their judgment, which, in all questions affecting them, every individual should pay."

In this argument, thus published to the world twenty-three months in advance of the Declaration of Independence, Wilson made use of the phrase "All men are by nature equal and free."

Again in the Pennsylvania Provincial Convention of January, 1775, in a speech[1] which in the years to come will find its place as one of the most highly prized deliverances of any American patriot orator, he declared that the ministers of George III had "abused his majesty's confidence, brought discredit upon his government, and derogated from his justice," and that "appalled with guilt and fear, they skulk behind the throne," and he asserted that all the force then being employed by the British Government in the colonies "is force unwarranted by any act of Parliament; unsup-

[1] See same in full, Vol. II, Wilson's Works (Andrews' ed.), pp 501–543.

[1] Wilson's Works (Andrews' ed.), Vol. II, pp. 545–565.

ported by any principle of common law; unauthorized by any commission from the crown," and then he said "if all this is true, — and I flatter myself it appears to be true, — can anyone hesitate to say that to resist such force is lawful, and that both the letter and spirit of the British Constitution justify such resistance?" At this point with great forensic power he showed that George III, "forgetting his character and his dignity has stepped forth and openly avowed and taken part" in the "iniquitous conduct" of his ministers. Then, asking "What has been the consequence?" he thundered, "The distinction between him and his ministers has been lost; but they have not been raised to his situation, — *he has sunk to theirs.*" Compared with the boldness and courage of this utterance in the metropolis of America, Patrick Henry's famous "— and George III may profit by their example" sinks to insignificance. In this same convention Wilson proposed resolutions as follows:

"That the acts of the British Parliament for altering the charter and constitution of the colony of Massachusetts Bay, . . . for shutting the port of Boston, and for quartering soldiers on the inhabitants of the colonies are unconstitutional and void. . . . That all force employed to carry such unjust and illegal attempts into execution is force without authority; and that it is the right of British subjects to resist such force; that this right is founded both upon the letter and the spirit of the British constitution."

Wilson's pamphlet of August, 1774, must have been carried by the delegates to the first continental Congress into every American colony, and the arguments contained in it, thus disseminated from one end of the developing nation to the other, could not but have had an all-potent influence in crystallizing that spirit of resistance which later culminated in the Revolution. It demonstrated with irrefragable argument that under the circumstances rebellion by the colonists was legally lawful, and therefore would not constitute the participants rebels. The authentic and indisputable Mecklenburg resolutions of May 31, 1775, — to say nothing of the disputed and so far unproved resolves of May 20, 1775, — are clearly based on the arguments advanced by Wilson, as is the great Declaration of Independence.

So rapidly had James Wilson advanced in popular fame that in May, 1775, although in America less than a decade and but thirty-two years of age, he was selected with Benjamin Franklin, a Pennsylvania delegate to the Continental Congress, to which he was successively re-elected in November, 1775, July, 1776, and March, 1777, although he was superseded at the election of September, 1777, partly as a result of gross misrepresentation as to his course in the matter of the Declaration of Independence. Indeed many historians, improperly absorbing the popular notion of that time, incorrectly assert that Wilson was opposed to Independence, being unaware of his arguments during the two preceding years and failing to recognize that in the Continental Congress until a few days before the Declaration, he was bound by stringent instructions from the Pennsylvania Assembly, the constituted authority electing him to Congress. Wilson's subsequent demand in the United States Constitutional Convention, for the popular election of United States senators, and his unalterable opposition to their election by legislative bodies, may readily be traced to his forcible realization in 1776 of the fact that a legislative assembly does not always represent the popular will. Until June 14, 1776, he was bound by the instructions of the Pennsylvania Assembly of November 4, 1775, which closed with this imperative mandate:

"Though the oppressive measure of the British Parliament and administration, have compelled us to resist their violence by force of arms, yet we strictly enjoin you that you, in behalf of this colony, dissent from, and utterly reject any propositions, should

such be made, that may cause or lead to a separation from our Mother Country, or a change of the form of this Government."

It was impossible for Wilson or any other Pennsylvania delegate to vote for Independence while bound by such drastic instructions. Wilson's true attitude, fortunately for his fame, is set forth not only in his arguments, cited *supra*, but in what is perhaps the most extraordinary certificate ever given by members of a representative body in defence of the course of a co-member, and which the writer recently located in the Archives of the National Government. This document, now for the first time published, and dated "Congress Chambers, Philadelphia, June 20, 1776," bears the names, *inter alia*, of John Hancock, Thomas Jefferson and John Adams, and is as follows:

"WHEREAS it has been represented to the Congress that Reports have been circulated concerning Mr. Wilson, one of the Delegates of Pennsylvania to the Disadvantage of his Publick Character and the Misrepresentations have been made for his Conduct in Congress,

"We the Subscribers Members of Congress do therefore certify, that in a late Debate in this House upon a Proposition to declare these Colonies free and independent States Mr. Wilson after having stated the Progress of the Dispute between Great Britain and the Colonies, declared it to be his opinion that the Colonies would stand justified before God and the World in declaring an absolute Separation from Great Britain forever; and that he believed a Majority of the People of Pennsylvania were in Favour of Independence, but that the Sense of the Assembly (the only representative Body then existing in the Province) as delivered to him by their Instructions, was against the Proposition, that he wished the Question to be postponed, because he had Reason to believe the People of Pennsylvania would soon have an Opportunity of expressing their Sentiments upon this Point and he thought the People ought to have an Opportunity given them to Signify their opinion in a regular Way upon a Matter of such Importance — and because the Delegates of other Colonies were bound by Instructions to disagree to the Proposition and he thought it right that the Constituents of these Delegates should also have an Opportunity of deliberating on the said Proposition, and communicating their Opinions thereon to their respective Representatives in Congress — The Question was resumed and debated the Day but one after Mr. Wilson delivered these Sentiments, when the Instructions of the Assembly referred to were altered and new Instructions given to the Delegates of Pennsylvania. Mr. Wilson then observ'd that being un-restrained, if the Question was put he should vote for it; but he still wished a Determination on it to be postponed for a short time until the Deputies of the People of Pennsylvania who were to meet should give their explicit Opinion upon this Point so important and interesting to themselves and their Posterity; and also urged the Propriety of postponing the Question for the Purpose of giving the Constituents of several Colonies an Opportunity of removing their respective Instructions, whereby Unanimity would probably be obtained.

"SAMUEL ADAMS, JOHN HANCOCK; WM. WHIPPLE; THOS. JEFFERSON; THOS. NELSON, JUR.; BENJ.ª HARRISON; WILLIAM FLOYD; JOHN ALSOP; FRANCIS LEWIS; JOSEPH HEWES; ROBERT TREAT PAINE; WILLIAM ELLERY; J. ROGERS; HENRY WISNER; T. STONE; EDWARD RUTLEDGE; ARTHUR MIDDLETON; THOMAS WILLING; FRANCIS LIGHTFOOT LEE; ROBERT MORRIS; JOHN ADAMS; STEP: HOPKINS."

"CONGRESS CHAMBERS, *Philadelphia, the 20th. June* 1776."

The delegates of several colonies were bound by instructions similar to those given by the Assembly of Pennsylvania; among these were the delegates from New York New Jersey, Maryland, and Delaware. Wilson, with his keen foresight realizing that the Declaration would not be practically effective, and might indeed prove abortive, if not supported unanimously by the colonies, was straining every energy to secure an expression of the will of the people, whose temper he knew and trusted, and whom he had for so long a time, by resistless logic, been preparing for the great step. Finally under pressure from the people,

headed by a petition from Wilson's home county, Cumberland, the Pennsylvania Assembly yielded, and on June 14, sent new instructions to the delegates in Congress, concluding as follows:

"The situation of public affairs is since so greatly altered, that we now think ourselves justifiable in removing the restrictions laid upon you."

On the same day Delaware took similar action. On June 19, a Pennsylvania Provincial Conference assembled, composed of committees of the people from the various counties, and on June 24 its members for themselves and their constituents announced their "willingness to concur in a vote of the Congress declaring the United Colonies free and independent States." Wilson's policy was being speedily vindicated. On June 21, the day after the certificate by Hancock, Jefferson, etc., concerning Wilson's course, had been given, New Jersey authorized her delegates to concur in declaring Independence. Three days later the Pennsylvania Conference took the similar action noted *supra*. On June 28, Maryland concurred.

Thus was Wilson successful in holding off the vote until every state save one, New York, was swung into line for Richard Henry Lee's resolution, which was adopted July 2, 1776, and which constitutes the real Declaration of Independence, the resolution being as follows:

"RESOLVED, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved."

Thus on the 2d of July, every State save New York, concurred in the resolution declaring Independence; but the delegates of New York were still bound by their instructions; unanimity had not yet been secured and was still imperilled.

On July fourth the Declaration in support of Independence (drawn by the committee of which Jefferson had been made chairman, because Lee of Virginia had been called away by the illness of his wife) was adopted by the vote of all the states save New York, and the old Liberty Bell pealed forth. The Biblical prophecy emblazoned on its side when it was cast in the mold, — "AND YE SHALL . . . PROCLAIM LIBERTY THROUGHOUT ALL THE LAND UNTO ALL THE INHABITANTS THEREOF" — was fulfilled

The seed sown through Wilson's pamphlet of August, 1774, had not only grown, but had taken deep root and was bearing its fruits.

On July 15th there was laid before the Congress a resolution unanimously adopted by "The Convention of the Representatives of the State of New York," dated July 9th, as follows:

"That the reasons assigned by the Continental Congress for declaring the United Colonies free and independent states are cogent and conclusive, and that while we lament the cruel necessity which has rendered that measure unavoidable, we approve the same, and will at the risk of our lives and fortunes join with the other colonies in supporting it."

Thus, at last, was unanimity secured The American Colonies were for the first time united, — the Declaration of Independence was a reality. *James Wilson's first great mission to America had been achieved.*

(To be continued.)

PHILADELPHIA, PA., December, 1906.

THE LAWYER'S PATRON SAINT

By Lewis M. Miller

On Albion's shore,
In the mythical days of long, long ago,
When everything happened that's worth while to know,
Dwelt a wonderful lawyer, learned and wise.
He was wont to pore
Every day, o'er and o'er
His ponderous volumes of black-letter lore.
And he learned by heart,
From his calf-bound books,
All his misty-cal art,
With its hooks and its crooks,
Its ins and its outs, its crannies and nooks.

Though so skillful and wise
In every device,
He never descended to artful pretense;
And his bosom the while
Was as free from all guile,
As that of the babe of a century hence.
No widow he'd wronged; no orphan betrayed;
No heir had be robbed of his lawful estate;
No criminal shielded from punishment due;
Nor taken a pound for a shilling or two.
Yea, a model man, in his townsmen's eyes,
Was this wonderful lawyer so learned and wise.

But there's naught in this world that conceals not a flaw,
And 'twas so with the life of this man of the law.
'Twas no common affliction that made him complain,
Not a twinge of the gout, nor a plebeian pain:
He was deeply distressed and redoubled his plaints,
When he thought that, among the whole number of saints,
His profession had none upon whom to rely,
When assistance was needed or danger was nigh.
'Twas a very hard case,
Yea, a downright disgrace,
That the lawyer should have no attorney in heaven.
Every other profession
Enjoyed intercession
From its saints, sometimes five, six, or seven.
E'en the lowliest cobbler that handled an awl,
On St. Crispin for needed assistance might call.
He was sorely perplexed,
Not to say somewhat vexed,
Till he thought of a plan full of promise and hope:
He would hasten away,
Without stop or delay,
And would lay his sad case 'fore His Reverence, the Pope.
For he thought that the Pope would heed his complaints
And assign his profession at least one of these saints,
That have little to do,
But to pass in review
'Round the throne with a hymn and a palm-branch or two.

So at once he set forth, nor tarried for sleep;
He traversed the land and he sailed o'er the deep.
Like Æneas of old, who once too set his sail
For Italia's shore, he encountered a gale.
By the waves of the sea he was tumbled about,
Till his outside seemed in and his inside seemed out.
He wished himself home
With his leather-bound tome,
A treatise on real estate, certain and fixed,
Not unstable as water and dreadfully mixed.

He at last did arrive,
Rather dead than alive,
In the city of Cæsar, and Virgil, and those.
Never stopping for lunch,
Or e'en crackers to munch,
He went straight for the Pope without chang- his clothes.
The Pope heard his case from beginning to end.
"My son," he replied, "little aid can I lend,
For the saints all have prior engagements to fill;
But your case is so hard, what I can do I will."
When this he had said,
The lawyer he led,
Blindfolded with care, to a church near at hand,
Where, in long solemn rows,
Stood the statues of those
Who'd been turned into saints by the sword and the brand.

"Walk thrice 'round this church," said His Holiness then;
"Pass along by these statues of saintliest men;
Repeat Pater Nosters aloud all the while,
From the time when you start, till you stop in the aisle;
Then stretch forth your arms and the first you embrace
Shall be your own saint." With a trembling pace,
The lawyer went 'round,
And never a sound
Save his loud Pater Nosters was heard in the place.

When his round he had made,
Not a whit he delayed,
But made a quick rush for a saint near the wall;
But, alas, the sad luck!
For his eager foot struck
Against a projection, which caused him to fall.
As headlong he went,
With mind still intent
On securing a saint for the lawyers to plead,
Himself forward he threw,
Just missed the saint's shoe,
And embraced the old Devil crouching near the saint's feet.

LANSING, MICH., December, 1906.

THE MODERN CONCEPTION OF ANIMUS

By Brooks Adams

I APPREHEND that law is not a science in itself, in the sense that it is not a self-developing growth springing from certain immutable principles of justice. Law, on the contrary, expresses a resultant of social forces, these forces being effects of the pressure of an environment upon any given community. Environment shapes competition in all its various forms, and environment, therefore, molds the human will.

Were an environment constant a single dominant class, suited to its requirements, would, perhaps, be evolved, and that class might enunciate a consistent legal code, because nothing would deflect its will from the path of self-interest. But as all nature is in ceaseless change, the will of no class is ever unopposed, and this opposition becomes complex in proportion to the complexity of civilization, and the multiplicity of conflicting energies. At length, in an intricately organized society, like our own, these energies so conflict as often apparently to neutralize each other. Then bewildering contradictions ensue.

Meanwhile the human mind, because of its mechanism, acts under limitations. One limitation is that it cannot conceive of an effect without a cause, and therefore lawyers are constrained to assign some cause for the phenomena presented by the law. Following the path of least resistance, they take refuge in precedent, and suppose as the cause of each judicial decision some preceding determination from which the one in question may be deduced by logical reasoning. Unless I err profoundly, the economist might equally reasonably attempt to deduce the prices which rule to-day from those which ruled last year or last century, without considering the modifications of the environment caused by mechanical inventions.

If we are to comprehend the weltering mass which we call the modern law we must seek the true and not the conventional causes of which it is the effect. These causes, in my judgment, are external social conditions constraining the human volition. In the volition, when stimulated by the environment, we have not only the energy which enunciates the law, and afterward enforces it, but we have the element upon which the law operates. It is the volition, as the cause of all our acts, which the law punishes, restrains, or interprets, and it is the quality of the volition upon which the law acts which determines the categories into which the corpus juris is divided. As Lord Hale said above two centuries ago, "For it is the mind that makes the taking of another's goods to be a felony, or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact." Pleas of the Crown, I, 508.

Some twenty-five years since, Mr. Justice Holmes wrote a most learned and brilliant book to prove that, "The law has nothing to do with the actual state of the parties' minds. . . . It must go by externals and judge parties by their conduct." The Common Law, 309.

From one point of view this statement is incontrovertible since we can become conscious of nothing save through the senses, whether the subject of which we are conscious be the mind of another or the action of which that mind is the cause. It would have hardly been necessary to write a book to prove this truism. But if the words be taken in their popular signification, I con-

ceive them to be open to criticism. I apprehend that the law is always primarily engaged with the state of the parties' minds, and only secondarily with acts which are but the effects of volition, and therefore no more than evidence of the mind's action, which is the matter in issue.

It is the animus which controls human actions, and it is therefore the animus which limits legal responsibility. Accordingly proof of the animus is the crucial point in most litigation, and it is toward controlling this proof that courts have directed their attention. To this end judges have laid down rules of evidence and imagined definitions, for according as words such as malice, motive, and intent are explained to juries, and as evidence is admitted or excluded, so must debtors pay or escape from payment, and criminals be acquitted or condemned. Lastly, it is needless to insist further on the obvious fact that, in making their rulings, courts must, from the very necessity of their being, conform to the behests of that power without whose support their decrees would be as impotent as are the protests of the prisoners at their bar when the judiciary serves as the mouthpiece of resistless physical force.

Occasionally when a class is strong to wantonness it repudiates responsibility for a certain animus toward those in its power, while admitting responsibility for the same animus toward others who can resist. In the early middle ages the gentry seem to have declined to compensate their villeins for most torts, and very recently, in Priestley *v.* Fowler 3 M. & W. 1, capitalists in Great Britain disclaimed responsibility to their servants for the negligence of their fellow servants, though they admitted responsibility toward the public for due care on the part of those they employed. Lord Abinger stated the reason for this decision with an almost brutal frankness. He thought this claim of labor "alarming" because it might prove very costly to the employer. Ordinarily, however, a dominant class does not proceed thus directly to its end because of fear of consequences. It prefers indirection, reorganizing courts, modifying rules of evidence, and twisting definitions. Perhaps of all methods the exclusion of evidence is the easiest and subtlest. As Bentham pointed out nearly a century ago, "Evidence is the basis of justice; exclude evidence and you exclude justice." Rationale of Judicial Evidence, Book IX, Pt. 3, Chap. I.

And obviously this is sound, for the whole truth can only be known when all the facts which may have influenced the minds of the parties are known. Man's ideal of pure justice has always been, and still is, an absolute sovereign exercising universal jurisdiction, before whose tribunal all evidence is competent. Such is the divinity.

Nevertheless, in practice men object to disclose what it is their interest to hide, and therefore the effort of every dominant class is so to shape the rules of evidence as to suit their own ends. In order to explain to you this process I shall begin with early times and touch on some of the more conspicuous social fluctuations, noting the legal changes which have accompanied them.

We speak of the middle ages as barbarous, but when I read mediæval philosophy or contemplate mediæval law, I sometimes ponder on the meaning of the word civilization. At least this much is clear, if the ideal of justice is a perfect jurisdiction, Rome or the middle ages approached that ideal more closely than we.

The Roman emperor, sitting as a judge, exercised a very perfect jurisdiction, for he inquired directly into the condition of the mind, not restricting himself to secondary or circumstantial evidence of the mind's content. He would examine the accused concerning a thought, and, if he found the mind corrupt, he would inflict punishment. Heresy was one form of criminal thinking, treason was another, and when the State needed his evidence the accused had no more privileges than any other witness.

Nor does the sinner suppose that he will be excused from criminating himself on the day of final judgment.

While the middle ages evolved no such complete single jurisdiction as that of Rome, they reached the same result by the coöperation of Church and State. The Church regulated thought, while the State concerned itself more particularly with physical force. This was inevitable when war was chronic. Thus the middle ages contemplated a perfect jurisdiction, while we boast of our failure to approach an ideal of justice, not only by narrowly limiting our jurisdictions, but by avowing our preference for circumstantial evidence of the condition of the mind.

Nothing can be more salutary as a check upon modern self-complacency than to recur in a philosophical spirit to the history of the past. If we are ever to comprehend anything of the scientific aspect of our early law we must bear in mind that, until after the close of the twelfth century, the so-called common-law courts played but a very subordinate part in the economy of English life. Glanvill became chief justice in 1180, and in Glanvill's time the common law still remained almost purely a martial code. The army, in the shape of a territorial militia, represented the rent of the land. Hence the King's courts, on the civil side, dealt chiefly with tenures. They also took cognizance of such forms of debt as soldiers might be interested in collecting, or of such losses as landlords might meet with. As cattle stealing was rife and the aristocracy owned cattle, the law helped them to recover a specific chattel, such as a cow which had been stolen, or, in debt, an action lay for the price of the wool they had clipped from their sheep, or maybe for a quarter's rent from some burgher who did not pay in service. A few simple processes, nevertheless, sufficed for the wants of a population of military farmers. These hardly touched the relations of domestic life or of commerce.

Controversies concerning capital and labor, finance and trade, were generally disposed of in the merchants' courts of the incorporated towns or in the Jewry, or Exchequer of the Jews, down to a period long subsequent to Glanvill, while the litigation both civil and criminal which now goes to the police court then went to the courts of the manors. The Church, however, transacted the bulk of the business.

The spiritual courts had jurisdiction over domestic relations, over matters testamentary, over many breaches of contract involving fraud, over most corporate law, since most corporations were religious, over most controversies to which a priest was a party, and over a multitude of purely intellectual crimes such as heresy and witchcraft. Furthermore the Church presided over that highly important branch of lay procedure, the ordeal.

Nor was this, perhaps, the larger or the more important portion of the judicial functions of the Church. The King's courts undertook to deal with crimes of violence. A man might be appealed of felony in which case he defended himself by combat, and, if he prevailed, the law held that God had given him the victory because his heart was pure. The Church looked closer into the matter. It examined the mind of the accused at first hand. A man victorious in the duel had yet to confess and obtain absolution. If he did not confess, or if he lied in confession, or if having admitted his guilt he evaded penance, he was subject to excommunication, a punishment akin to outlawry, the most grievous sentence, next to death, pronounced in the middle ages.

The Church reasoned rigorously. Disregarding the act, it sought directly the cause of the act, that is to say the volition. Posing to itself as its end the discovery of the animus which stimulated the accused, the Church did not pretend to content itself with secondary evidence. It demanded the best evidence; that is to say the evidence of the only witness who knew the facts of his own knowledge, and accordingly the whole

legal system of the Church was based on confession and on discovery.

Take, for example, homicide. The penitential canons recognized three classes of homicide. First, the voluntary, or as we should say, homicide with malice aforethought. Second, the involuntary, or accidental, but where guilt could be imputed to the defendant through negligence, or because the killing followed as the consequence of some unlawful act. Third, where the killing was inevitable, as in necessary self-defense or the defense of another.

These penitential canons were very ancient but they were commented upon by Bernard of Pavia, the most celebrated canonist of the twelfth century, and from Bernard Bracton took this definition of the felonious mind. "But that is homicide, if it be done from malignity or the delight of shedding human blood, although he be justly slain, nevertheless he sins mortally on account of his corrupt intention." Bracton, De Corona, C. 4 §2.

Thus Church and State agreed as to what constituted crime. They differed as to the procedure by which crime should be proved. They agreed that an act can never intrinsically constitute either a crime, a tort, or a contract. An act can only be evidence from which a criminal, a tortious, or a contracting mind can be inferred. So much being admitted, it follows that the value of the law as a weapon by which victory may be won in the struggle for supremacy, hinges largely on the methods employed first, to obtain evidence, and secondly, to admit or exclude evidence after it is obtained. Each dominant class, during its ascendancy, uses such methods as conduce to its success.

Consider the attitude of Church and State toward crime. In last analysis the power of a priesthood rests on popular faith in the cogency of their curse, and in the efficacy of their intercession. Hence incredulity is the greatest danger to a hierarcy, and therefore heresy is to it the blackest crime. But incredulity is an intellectual condition which may yield no outward trace, and accordingly it followed that, during the period of crisis as the Reformation approached, evidence to prove incredulity had to be extorted by inquisition under coercion. The effect of these conditions was that the Church, when strong, began its system of inquiry with the confessional, and ended with the Holy Office.

Ecclesiastical punishments followed the same sequence of cause and effect. Murder, while condemned by the Church, did not menace its existence. Therefore a priest who committed murder was only imprisoned, according to the canon law; but a priest who became a heretic struck at the vitals of sacerdotal power. The heretic was delivered to the secular arm to be burned alive. He who was suspected of heresy might be examined under torture.

The State, on the other hand, resting on physical force and not on faith, has always been relatively indifferent to incredulity, but sensitive to attacks on order. As I have said, the Church viewed murder and felony somewhat leniently. A clerk, during the middle ages, convicted of a crime for which a layman would have been hanged, was returned to the ordinary to be imprisoned. These diocesan prisons were always a grievance to the laity who vehemently distrusted the good faith of the bishops in the punishment of clerical delinquents.

Conversely, where the State felt alarm, a thought became a capital offense, precisely as a thought became a capital offense under ecclesiastical law where the Church apprehended peril. For centuries the common law punished the mere "imagining" the King's death by hanging with torture, and the King, where he found it convenient to do so, investigated the function of "imagination" by methods as coercive as those employed by the Church to discover heresy.

Even in our own day, although the State no longer extracts evidence from conspirators by the methods used to obtain avowals

from Guy Fawkes, it arrives at the same end indirectly. It does not hesitate to intimidate one of several persons accused of felony, by threats of punishment or bribes of immunity, in order to obtain confessions which shall incriminate those whom he, who is tormented, is bound by every instinct of decency to protect.

Nor is this all. Although for one man to "imagine" another's death, unless that other be the King, has never been a crime, it is criminal for two or more to "imagine" a murder in unison, although no step be taken to effect the homicide and no harm ensue. The same is true of the imagination of any other crime. The offense of conspiracy consists in thinking in forbidden ways, just as heresy consisted in thinking in forbidden ways, and this power of pure thought to be a crime in itself, to turn what would otherwise be innocent into guilt which the State will punish, pervades the whole law.

A striking illustration of this proposition is offered by the modern conception of motive as controlling the animus, and therefore the guilt or innocence of an act. Under the later Tudors, when the English gentry demanded the execution of those suspected of crimes of violence, almost without permitting a defense, the courts elaborated a doctrine of intent to effect the object.

They laid it down that the human being must not only be presumed to foresee the natural consequences of his acts, but must be presumed to know the law, and, consequently, however innocently he may commit a deed which the law denounces as a crime, if, when he did the deed, his intention was to do that thing, knowing what he was doing, he was guilty. For instance, suppose a woman knowing that her child was starving took from the person of another property to the value of more than twelve pence, intending to deprive the owner of the property by using it to feed the child, suppose that when she took the property she honestly believed that the law condoned the offense in view of the exigency, she would none the less have been held to have committed a felony, having the animus furandi, and would have been hanged.

The modern jurist, who deals with very powerful takers, tends towards another view of this problem of the animus. Suppose a wealthy man to be one of a wealthy board of directors of a wealthy institution, which holds in trust vast sums of money for rich and poor alike. Suppose this man enters into transactions beyond the scope of his agency, knowing them to be beyond the scope of his agency and therefore *ultra vires*, suppose that to conduct these transactions he pays fifty thousand dollars of his own money on behalf of the institution, and subsequently that he reimburses himself, in combination with others, from trust funds which he knows were not intended to be used for that purpose when they were confided to him. On indictment for larceny or embezzlement such a man is permitted to demonstrate his innocence as matter of law, by showing that throughout these transactions he was actuated by a good motive, and that he honestly believed that, in the eye of the law, the end he contemplated justified the means he used. Thus, though his intent was to take what did not belong to him, his motive being good, his animus became innocent. People *v.* Perkins, N.Y. Sup. Ct. 113 App. Div. 329.

Conversely, an evil motive may convert what would otherwise be an innocent act into a crime. In Milwaukee four newspapers competed for advertising. One of these, published by the Journal Company, raised its rates. The other three then argeed that whosoever, in future, should pay the Journal Company these rates, should pay the same to them, and that whosoever should decline to pay these rates, should be allowed to continue advertising with them upon the old terms. Upon information brought under a Wisconsin statute, for combining maliciously to injure the Journal

Company, the intent to injure was admitted by the three papers, and injury was proved by the Journal Company. The only question at issue, therefore, was the motive which underlay this intent to injure.

The judges seem to have been agreed that, if the motive which led the three papers to combine were an honest desire to make money for themselves by fair competition in trade, the drawing away the customers of the Journal Company to its injury, or even to its ruin, was a justifiable, if not, from a public standpoint, a praiseworthy act. If, on the contrary, the motive which was the cause of the forming of the intent to injure in the minds of the combination, was malevolent, and not the hope of bettering their own condition, then these same acts which otherwise would be innocent, were guilty. State *v.* Durner, 110 Wisconsin 189. Aikens *v.* Wisconsin, 195 U.S. 194.

I wish to make my meaning clear. The act, which is popularly called the crime, I apprehend to be only evidence from which the malicious animus may be inferred which makes the act criminal. The act taken alone, being only an effect and not a cause, is neutral, its guilt or innocence must depend upon the character of an antecedent volition.

I take the act to be only the point at which society has found it, as a business speculation, profitable ordinarily to interfere with trains of thought. Before the thought has acquired the energy to find expression in an act, experience has proved that repression does not justify its cost. In fine, this is a matter of administration. Adapting themselves to circumstances, lawyers, like Blackstone, have defined crimes by the acts which prove that malicious thinking has culminated in a certain phenomenon; and they have adjusted punishments, roughly speaking, in proportion to the amount of trouble which any particular form of malice gives the public at any particular time. Depravity has little to do with the question. For instance, a starving thief may, through terror, if interrupted, commit a homicide; while a ruffian who intends to kill in cold blood may be stopped by arrest before he can complete his murder. Evidently the latter is the worse, and yet, as between the two, he would probably be punished most who had caused most trouble.

All this is true, and yet the fundamental conception of crime remains the same. The crime is malicious thinking. Without malice there can be, in theory, no crime, and Church and State have always agreed in their right to punish malice when dangerous, whether the malice be open or secret, and to apportion punishment to its energy. The Church branded heresy as a mortal sin, and punished it capitally. Yet though she always insisted upon her right to examine into the condition of the corrupt mind, she usually dealt leniently with doubters who made no scandal.

Similarly the State will to-day punish the bare avowal of a belief in so-called anarchy, because anarchy is dangerous; and every State has always inquired, on occasion, into the traitorous mind, by tendering oaths of allegiance and the like, and punishing non-jurors if expedient, although it may not usually object to condoning passive disloyalty.

Nothing can be clearer, therefore, than that abstract principles of eternal justice, and tenderness for the rights of freemen, have had little to do with the development of our legal principles or our procedure. The law has been moulded by more prosaic causes, and these causes have been the self-interest of successive dominant classes of the population as they have risen to power. These dominant classes have named the judges who have manipulated evidence, who have defined crimes, and who have made and interpreted precedents. They also have controlled legislatures and have passed statutes to effect their purpose when the courts could not do their bidding.

On the whole these rulers of England have preferred not to expose their own

mental processes to direct examination, though they have used the inquisitorial process freely enough on others when they saw their profit in so doing. In short, by one familiar with both subjects, the economic history of England may be read in her legal procedure as freely as in a specialist's treatise, like Roger's "History of Agriculture and Prices."

Each change in the form of competition may be recognized in its legal counterpart. Thus for economic causes the trial by combat faded into the trial by jury, the prerogative and the common law courts of the middle ages melted into the courts we know which dispense all kinds of justice, the early criminal law was replaced by the Tudor criminal law, and that in turn has been metamorphosed within a century; finally the old rules of evidence, contrived to exclude the testimony of those who could prove a debt, have been so changed by the rise of a powerful moneyed class that all evidence has been made competent calculated to be useful in holding a debtor.

These inferences may be justified upon the most casual examination of English economic development.

With William the Conqueror a military system came in based upon the payment of rent by military service, therefore public interest dictated that land should be held by those able to defend it. What we should call the abstract right and wrong of a claim to title was largely immaterial; the vital matter to determine was which of two claimants could provide the better soldier, for after all soldiers were the rent returned by the land. Hence it was perfectly logical that the writ of right should be tried by duel and not by jury. But it was not only disputes concerning land which were tried by the duel, appeals or accusations of crime were also so tried, and we have now to reconcile Bracton's notion of the consenting mind in crime or tort, which he borrowed from the canonists, with what appears to us so crude a method of discovering a mental condition as a physical combat. From the soldier's point of view nothing could have been at once more logical and more advantageous.

Let us take treason. Suppose a man killed the King, and set up accident, unaccompanied by negligence, or in other words an unconsenting mind. The facts might speak for themselves. In that case he was held to be innocent. For example, in 1100 A.D. Walter Tirrel killed William Rufus with an arrow shot at a stag by the King's order. Coke, in commenting on treason, in his Third Institute, cited this case as an example of innocent homicide, since Tirrel did not "imagine" the King's death.

But suppose a case where the attitude of the mind was in dispute, for example the case of Andrew Harclay, Earl of Carlisle, who was one of the best officers of Edward II. Harclay was suspected of tampering with the Bruce, was arrested by treachery tried by a special commission, and condemned to have his heart and bowels "whence come your treasonous thoughts" torn out and burned to ashes.

Harclay may or may not have been guilty of imagining the death of the King, but no one save himself could know the truth, and to Harclay and to others so situated it seemed reasonable that he should prove his innocence by the combat. He was not allowed to do so, nor could he adduce any proof of innocence save his word, which his judges were pretty certain to reject since they were probably sent to convict him that his estate might be forfeited. After the murder of Edward Second convictions for treason formed one of the most lucrative sources of revenue, and finally the limit of endurance seems to have been reached when, in 1347, a knight was executed for treason for having imprisoned a fellow subject until he paid him £90. Then the barons protested that if they could not prove an innocent animus by the combat, at least they would not submit to being found guilty without

evidence of what was tantamount to appearing in arms. In 1351 Parliament passed the famous statute which provided that the accusation of imagining the King's death could only be sustained by evidence of an overt act from which the inference of a guilty purpose might be drawn. I wish to impress this on you: the crime of treason still consisted in the mental condition of imagining the King's death, the statute only altered the evidence by which the thought could be shown. And to-day the crime of treason in England may be a pure thought.

I have some confidence in stating this proposition categorically, since I conceive that Erskine established it beyond controversy in the memorable trial of Hardy in 1794.

Assuming, therefore, this much to be conceded, we have now to consider the effect that this limitation upon the competency of evidence has had upon the conduct of causes. I think you will find that the courts in interpreting the statute have only registered the degree of social pressure for conviction. I give an illustration or two.

Probably the most unpopular measure of Pitt's long administration was the prosecution of Hardy, Horne, Tooke, and others, to which I have referred; and the most significant feature of the phenomena which followed was that Eyre C. J., who afterward presided, attended the preliminary hearing before the Privy Council and gave it as his opinion that, on the evidence there produced, the prisoners were guilty. When Eyre, however, came to try the causes he found the evidence of the guilty mind less clear. The indictments alleged, as an overt act, that the prisoners had conspired to bring on a revolution by calling a convention, but it was not alleged that they conspired directly against the King's life. The treason was, therefore, constructive. Especially in London popular feeling ran passionately high. Sir John Scott, afterwards Lord Eldon, who, as attorney general, conducted the government's case, used afterward to tell how he was hooted every night as he left the court, how once the crowd rushed at him as he entered his carriage crying out to kill him, and how Erskine had to interfere.

Up to that time no trial for treason had ever occupied more than a single day. In this case, Sir John Scott occupied nine hours in his opening speech alone. On Saturday morning at two o'clock the court adjourned for twelve hours to allow Erskine to prepare his argument; all through the trial the presiding chief justice had leaned pretty decidedly toward the government. Erskine rose at two on Saturday afternoon; he spoke seven hours. When he closed a tremendous and irrepressible acclamation burst forth in the court which spread throughout an immense multitude in the streets, the crowds being so dense that it was long before the judges could reach their carriages.

Under this stimulant, which possibly the malevolent might call fear, Eyre learned to doubt the soundness of the impressions received in the atmosphere of the Council Chamber, with the result that he so charged the jury as to insure a triumphant acquittal.

Now I will take a case where the current ran in the opposite direction, and draw your attention to the ruling which it produced. After the discovery of the Rye House plot in 1683, Charles Second became nearly absolute, and in the plentitude of their power the Tories selected certain conspicuous Whigs for destruction; among others Algernon Sidney. The overt act laid was the writing of a philosophical treatise on the lawfulness of resistance by the subject to the sovereign. The treatise had never been finished, much less printed or published, and was only found on seizure of the accused's papers. To obtain a conviction it was necessary to hold, as matter of law, that transcribing with one's own hand a thought which was never conveyed to another, was an overt act. This seems a contradiction in terms, for the written words, if uncom-

municated, are certainly only a thought, but Jeffries C. J. held that *scribere est aggere*, and Sidney was beheaded.

Subsequently Jeffries died in the Tower, but he could never be induced to express the slightest contrition for the atrocities of the famous "Bloody Assizes," protesting "that all the blood he had shed fell short of the King's command."

An even more illuminating case is that of the Carthusian monks under Henry VIII in 1535. The issue between the monks and the Crown was in substance the ownership of the conventual estates of England, which was the largest mass of property in the kingdom. All the rising laymen of the period were interested in the confiscation, and, indeed, most of the chief landed estates of the modern British peerage had their foundation in grants of conventual land. The pressure, therefore, upon the courts for the conviction of contumacious monks was violent and produced suggestive results.

Among the statutes passed by Parliament, to enable the crown to conduct the eviction of the monks was that of 1534, which made it treason to maliciously imagine or attempt to deprive the King of his dignity or title. One of his titles was Supreme Head of the Anglican Church.

The sternest resistance to acknowledging Henry VIII as Supreme Head on earth of the Anglican Church, came from the Carthusian monastery of London. Thomas Cromwell, therefore, who was then prime minister, determined to make an example. On May 29, 1534, the oath of supremacy had been tendered the Carthusian monks, which they had taken under certain reservations. To break their resolution Cromwell sent the Prior Houghton and some of the brethren to the Tower, and there examined them. Finding them unyielding, Cromwell caused the prior, two monks of the order, and a fourth recalcitrant to be indicted for treason, on the charge that they "did, on 26 April, 27 Henry VIII, at the Tower of London, . . . openly declare and say, 'the King, our sovereign lord, is not the Supreme Head in earth of the Church of England.'" The prisoners pleaded not guilty. An old account of the trial relates that "The jury could not agree to condemn these four religious persons, because their consciences proved them they did not it maliciously. The judges thereupon resolved them, that whosoever denied the supremacy denied it maliciously, and the expressing of the word maliciously in the act was a void limit and restraint of the construction of the words and intention of the offense." Finally a verdict of guilty was obtained, and the criminals were executed.

In this case, if correctly reported, the court, to obtain a conviction, excluded the evidence of the animus tendered by the defense. According to this ruling the mere repetition of the words by an imbecile would have constituted the crime. I think these three cases sufficiently illustrate the effect of pressure of environment in trials for treason. If we now advance to felony, trespass, and contract, we shall find the same phenomenon always appearing, only thrown less sharply into prominence because of the less intensity of the conflict generating the litigation. It being admitted that acts can be proved tending to show that a felony or a trespass has been committed, or a contract made by a given individual or individuals, that is to say, the facts being established, the whole question at issue is the mental condition of the parties, and as this mental condition can only be ascertained by others through the senses, the animus, except when a man testifies to his own thoughts, must be a matter to be inferred from circumstances. Accordingly the rules of evidence have been shaped with a view to protect the strong and expose the weak.

To understand the historical demonstration of this proposition we must first realize the conditions under which those men lived who made the mediæval common law. The feudal gentry were a predatory and very largely a migratory class, whose path

to fortune lay through war and robbery. The Normans migrated to England, and many English afterward migrated to France or Palestine, but whether they sought wealth and power by conquest abroad, or by cattle driving and abducting women at home, their first necessity was that conviction for acts of violence should be difficult, and their second that they should have fully open to them the defense of innocent animus.

At the beginning of the thirteenth century, when the records open, the crown cases came before the justices in Eyre upon presentments by a jury who answered questions propounded to them by the court. Prosecutions naturally fell into three categories. First, as in Tirrel's case, the homicide being established, the facts might indicate an innocent mind so clearly that the jury would return no felony, and the King would pardon. The following example occurred in 1214 A.D.

"Roger of Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the King, and the King moved by pity pardoned him the death. So let him be set free." Selden Soc. Pleas of the Crown, Case 114.

Or, a homicide having been committed, suspicion rested upon a man as accessory. Were he appealed by some one who could do battle, he might clear himself by the duel, or if the appellor or he himself were unable to fight, or if he were prosecuted by the Government upon general suspicion, he underwent the ordeal. But failure at the ordeal seems to have been very rare.

"William Trenchebof was said to have handed to Inger of Faldingthorpe the knife wherewith [Inger] slew Wido Foliot. He is suspected thereof [by jurors]. Let him purge himself by the water that he was not consenting [to the death]. He has failed and is hanged." Selden Soc. Select Pleas of the Crown Case, 116.

Under the mediæval system, the physical facts could seldom have been in much doubt, for, as a rule, felonies came up on appeal, and appeals, or accusations by private persons, were not entertained unless the appellor could make oath to having actually seen the deed.

In 1201 Denise, wife of Anthony, appealed Nicholas Kam of the death of her husband, but the court "considered that Denise's appeal is null, for in it she does not say that she saw the deed." Selden Soc. Pleas of the Crown, Case 1.

But, the fact of the homicide being admitted, the animus still remained in doubt, and the appellee could prove his innocence by battle, supposing, of course, that no incapacity upon either side necessitated the ordeal.

In the following case in 1203 the assault must have been notorious.

William, John's son, appeals Walter, son of Ralph Hose, for that when [William's] Lord Guy of Shawbury and [William] had come from attending the pleas of our Lord the King in the county court of Shropshire, there came five men in the forest of Haughmond and there in the King's peace and wickedly assaulted his Lord Guy, and so that [Walter] who was the fourth among those five, wounded Guy, and was accessory with the others in force and aid so that Guy his lord was killed, and after having wounded his lord he [Walter] came to William and held him so that he could not aid his lord; and this he offers to deraign against him as the court shall consider. And Walter comes and defends all of it word by word as the court, &c. It is considered that there be battle between them. The battle is waged." Selden Soc. Pleas of the Crown, Case 80.

These cases expose the whole theory of mediæval criminal law and evidence, as opposed to ecclesiastical law and evidence which favored the astute man as compared with the fighting man. A more perfect system for protecting the class which evolved

it could hardly be conceived. That class lived largely by, what we should call, crimes of violence; therefore it was essential that conviction for trespass *vi et armis*, for highway robbery, for arson, and for homicide should be difficult. And so we find that normally the perpetrator of a felony could only be accused by an eye witness, and that when brought to trial and the facts of the crime established, the prisoner could prove an innocent animus by judgment of God, invoked through battle.

Presently, as the jury came in, a stage was reached where the appellee in felony had the choice of telling his own story, or of resorting at once to the combat. If he went into the evidence the court might dismiss the appeal.

In 1220 the Earl of Winchester, through his bailiff, appealed John of Marston for felony, because he had abducted one Maud, the Earl's ward. Marston appeared and defended the felony, "but was willing to tell the truth."

His defense in substance was that the Earl wishing to retain Maud's estate in his family, took steps to make Maud a nun, whereupon the lady sent for John and having told him the story, married him. Thereafter the Earl's party seized Maud intending to carry her on horseback to a convent, which he, John, could not prevent, being inferior in force to the enemy. Then Maud slipped off her horse and ran to John who rode away with her, and this was the felony complained of.

After further testimony the court adjourned pending the arrival of witnesses. Selden Soc. Pleas of the Crown, Case 202.

You perceive what the administration of criminal justice amounted to as against the armed class. Mr. Maitland, the learned editor of the Selden Society's Pleas of the Crown, certainly does not exaggerate when he says in his preface, "In the first place criminal justice was extremely ineffectual; the punishment of a criminal was a rare event; the law may have been cruel for, in our eyes, it was capricious; it made use of the irrational ordeal; but bloody it was not." The ordeal favored the defendant quite as much as the duel for, according to Mr. Maitland, "Success at the ordeal seems to have been far commoner than failure; indeed, only one single case of failure has been found." This case I have cited and, I may add, it was evidently the failure of a person of bad character and little consequence, whom the county wished to get rid of. Selden Soc. Pleas of the Crown, XXIV.

In a former lecture I have pointed out some of the causes which led to the substitution of the jury for the combat, but beside these there were others, all connected with the crusades which opened up the eastern trade. In 1099 the Christians took Jerusalem, and within two generations the chartered towns were springing up all over Europe; but the chartered towns were centers of industry and commerce, and centers of industry and commerce have always been *foci* of incredulity. In 1163, just before Glanvill became chief justice, heresy grew so rife in the South of France that repression became necessary, and about a generation later this repression took the extreme form of the crusade led by Simon de Montfort against the Albigeois. Montfort, who was created Earl of Leicester by King John in 1206, was invested with the County of Toulouse by the Fourth Lateran Council in 1215; but even Montfort could do little with the legal procedure at hand. Already the Church recognized that to extirpate heresy some process more effective than the ordeal was needed. Accordingly this same council abolished the ordeal and the Church addressed itself to organizing the Inquisition. The abolition of the ordeal, however, paralyzed the machinery of the duel, for without the ordeal those appellors who, from incapacity, were unable to fight, were left without remedy. Therefore trial by combat hardly survived the year 1220. Mr. Maitland says that after John's reign, which ended in 1216, "the justices seem to have delighted in quashing appeals." Selden Soc. Pleas of the Crown, XXIV.

Nevertheless the introduction of the jury far from lessening the advantages of the martial aristocracy, possibly increased them for, in the first place, the benefit of the clergy came in with the jury, and the benefit of the clergy meant practical immunity for all persons of standing and opulence; and, in the second, apart from the benefit of the clergy, the jury itself was a singularly perfect instrument for the protection of the gentry. Not only were the sheriffs who selected the panel invariably considerable land holders, but the sheriffs always returned landlords on important occasions as jurors. Moreover a great family had an influence in its own county which made the conviction of one of its members for any ordinary crime by a local jury impossible. Such men only incurred risk if they marauded far from home.

I will illustrate by a case which arose as late as 1502, just as feudal society collapsed. The abduction of heiresses was a peculiarly aristocratic crime, and so popular that Parliament by statute, 3 Henry 7, c. 2, made abduction a capital felony, and allowed the wife to prosecute the husband.

The Vernon family flourished greatly in the fifteenth century. William Vernon had been Knight Constable of England, and his son, Sir Henry, Lord of Haddon, was High Sheriff of Derbyshire, was intimate with the King, was made by Henry VII one of the trustees of his will, and was, beside, the Governor of the Prince of Wales, who lived much with him at Haddon. Apparently, it became convenient to Sir Henry to provide for a nephew, for about 1500 William and Roger Vernon seized Margaret Kebell, an heiress, carried her off with a troop of a hundred armed men, and afterward married her by force to Roger.

Margaret was irreconcilable, and as soon as she recovered her liberty prosecuted Roger at the assizes at Derby in 1502. As the editor of the Star Chamber Cases of the Selden Society observes: "In Derbyshire, as may be imagined, it was hopeless to expect a successful prosecution of a Vernon on a charge of this nature. The defendants were acquitted."

Defeated here Margaret tried the Star Chamber. In the Star Chamber the defendants could be interrogated and there was no jury. The Star Chamber had, however, no capital jurisdiction. Perhaps because Roger and William were worthless, Margaret seems not to have prosecuted them, but she pursued Sir Henry as an accessory, and it cost him dear. He was convicted and paid £900 for a pardon, a sum which, I suppose, may represent about $30,000 of our money. Kebell *v.* Vernon, Selden Soc. Select Cases in the Star Chamber 130.

Contrasting these two prosecutions, the one at common law and the other before a prerogative court, the reason is plain enough why the landlords always clamored for what they called the "safe guards" of the common law. A century before the Vernon trials, in 1415, Parliament formally protested to Henry V that their rights were violated because their pleas were decided in the Star Chamber upon the oath and examination of the parties, according to the form of the civil law and the law of the Holy Church, in subversion of the common law. Rotulus Parliamenti, 3 Hen. 5, v. 4, p. 84.

And they certainly had some cause, for in matters of finance, as well as in criminal matters, the gentry seem to have fared hardly before the prerogative courts. A curious case reported by the Selden Society illustrates their grievance. See Lord Edward *v.* Prior of Gisburn, Jewish Exchequer 39, 40.

Such was the operation of the common law while feudal society cohered. Those who made this law were a semi-predatory class, dwelling in fortified houses. In the sixteenth century, as the effect of the use of gunpowder, the discovery of the ocean passage to India and of the silver of America, this class fell. The last remnants of the feudal baronage were destroyed by Henry VIII, and the old military aristocracy was

replaced by the unarmed country gentleman. This squirarchy were, speaking broadly, a somewhat inert and peaceful race with little martial instinct, as was demonstrated in the Cromwellian wars when the Royalists failed to produce a single formidable regiment, or a single able officer. The peculiarities of the Tudor gentry were instantly reflected in the Tudor criminal law.

When it no longer paid to keep up bands of armed retainers, when the castellated mansion had passed away, when Haddon Hall became the open manor house which we know, the landlord found himself in peril whenever he rode abroad. Instead of robbing, he was pillaged. The roads were bad and infested with highwaymen, communication was exceedingly slow and difficult, the arrest of marauders almost impossible. The gentry lived in terror of their lives, and this terror shaped their criminal code. Nothing in Europe was so bloodthirsty. In 1810 Sir Samuel Romilly asserted that in no country in the world were so many human actions punished with death as in England.

Perhaps the two most sanguinary of these statutes were the 23 Henry VIII, c. 1, and the 8 Eliz. c. 4. The one made robbery, and the other stealing from the person more than the value of twelve pence, capital without benefit of clergy.

Consider what these enactments meant. The taking of any property by violence on a road or in a house, was punished with death, even though the property were taken under the honest belief that the taker had a right to redress his own wrong, and though he afterward returned what he had taken. For example, suppose a creditor had visited his debtor to collect a debt and, payment being refused, had thrust the debtor aside and taking from the table a penny had left the house with the purpose of applying the penny to his claim. And suppose this creditor when walking away had reflected upon what he had done, and returning had restored the penny. I apprehend he would, under Popham, assuredly have been convicted and hanged.

Theoretically the accused could give evidence in defense of an absence of the animus furandi, or felonious intent, but society in the sixteenth century demanded that in this class of crimes conviction should follow upon the act, and took effectual means to exclude all mitigating testimony. The whole mediæval common law procedure was changed. Under Henry VIII and Elizabeth, the accused was allowed neither counsel nor witnesses, and though, in the seventeenth century, this practice was so far relaxed as to permit the prisoner to question persons whom he could induce to attend the trial, these persons were not sworn, and obtained little credit. Moreover he had to face the judge. It was a legal convention that the presiding justice acted as counsel for the accused. In reality he saw to it that the law should take its course. Lord Campbell has thus described Popham, C. J., at the assizes, who was appointed to the Bench in 1592.

"The reproach urged against him was, extreme severity to prisoners. He was notorious as a 'hanging judge.' Not only was he keen to convict in cases prosecuted by the government, but in ordinary larcenies, and, above all, in highway robberies, there was little chance of an acquittal before him. . . . Lives of the Chief Justices, 1, 219.

When he had obtained a conviction he uniformly let the law take its course, because, as Aubrey observed, "If he was the death of a few score of such gentry, he preserved the lives and livelihoods of more thousands of travelers, who owed their safety to this judge's severity." Aubrey, III, 498.

Before such a judge, the accused without counsel and without witnesses could hardly escape, for if he tried to defend himself or gave evidence in his own behalf he was subjected to a ruthless cross-examination from

the Bench. If you care to know how far judges went in this direction, I advise you to read Popham's examination of Garnet, who was tried as an accessory to the Gunpowder plot, or Jeffries' conduct at the trial of Alice Lady Lisle. Alice Lisle was indicted for treason for harboring two fugitives from Sedgmore. She testified that she did so in ignorance of their presence at the battle. The accused was tried as an accessory, before the conviction of the principals; therefore there was no direct evidence even to prove the criminality of the men she received. Jeffries cured the defect by storming at the jury when they disagreed because of their doubt as to the *scienter*, threatening to shut them up without food or water. Jefferies then sentenced her "to be drawn on a hurdle to the place of execution, where your body is to be burned alive till you be dead."

Lord Coke protested against depriving the accused of witnesses, and declared there was no shadow of authority for such an outrage, 3 Institute 79, but Coke though technically right was in substance wrong. The criminal common law procedure, under Henry VIII and Elizabeth, was an improved Star Chamber practice, against which the gentry railed while they robbed, but which they adopted when others robbed them.

Few more ingenious codes for the arbitrary punishment of a subject class were ever invented than the English criminal law during several generations. Making a multitude of petty misdemeanors capital had the effect of withdrawing all extenuating circumstances from the jury and making the judge the real arbiter of the prisoner's fate.

Whether the act charged was a malignant murder, or the pilfering of thirteen pence by a starving mother to feed a dying child, made no difference. The motive actuating the offense was disregarded. The punishment was death. The infliction of punishment lay with the agent of the dominant class; that is to say with the judge; and accordingly you will find that the ratio of executions to convictions varied, precisely in proportion to the terror inspired in the landlords by crimes of violence.

From about 1535 when the convents were dissolved, England swarmed with vagrants. No effective police existed. During the rest of Henry's reign an average of two thousand persons were hanged annually. Under Elizabeth, to the mortification of Lord Bacon, the number fell to no more than four hundred, but as late as 1772 above half of those convicted were executed. Just then scientific road building began. John Metcalf constructed his first stretch of turnpike in 1765, his last in 1792. During this quarter of a century England acquired tolerable roads, arrests were facilitated, and the effect was immediately apparent in the law. Between 1802 and 1808 about one in eight of those sentenced were hanged, and in May, 1808, Sir Samuel Romilly moved in Parliament for the repeal of the act of Queen Elizabeth which made stealing of above twelve pence from the person capital.

The inferences to be drawn from these facts are palpable. No one could mistake them. In the fifteenth century gunpowder made castles untenable, and in the sixteenth the open manor house came into use. This change indicated a revolution in economic competition, and following on this revolution a modification of the instincts of the governing class supervened. They disarmed. Being thereafter unable to protect themselves they made savage criminal laws that others might the better protect them. In the nineteenth century English domestic life was again remodeled by improvements in transportation which induced the organization of a perfected police. Forthwith the modern criminal law appeared from which the death penalty has been nearly eliminated, and in which "motive," whose office is to ameliorate the doctrine of intent, plays so large a part. Evidently, applied science is the true basis of the principles of jurisprudence.

Passing now from crime to tort precisely

the same phenomena appear, and precisely the same analysis of the operation of mechanical causes will reconcile the contradictions of the law. I will take, for illustration, trespass. As you know, trespass may be viewed as a crime or as a tort, and normally, that is to say when the power of the litigants is nearly balanced, the law holds the human being responsible to others for voluntary acts resulting in injury. Therefore, the fact of a trespass by an individual to the person of another being established, the issue is, animus.

Scott *v.* Shepard is in point 2 Wm. Blackstone, 892. The plaintiff having been injured by a squib, the court was called upon to decide who, among several who had thrown it, was liable for the damage. The judges held him to be liable whose volition had concurred with the act.

Suppose now, on the contrary, the conditions to be abnormal, that is, suppose one litigant to belong to a favored, the other to a servile class; you will find the law favoring the stronger precisely in the ratio of his strength. The strong will exact as much and concede as little as may be.

Going back to the twelfth century we find the military class dominant, and below them the villeins. Among the soldiers the King acted as arbitrator, but each landlord dispensed justice to his serfs. This is what followed. The landlord in theory admitted no liability to anyone, save to him who could overcome him in fight. To members of his own class, indeed, who were unable to fight, he yielded the ordeal, but the result remained the same. He had convenient means at hand of disproving guilty animus. The villein could not appeal to the combat, and, I apprehend, was without remedy for a master's tort, save such relief as his lord conceded to him in his own courts, as a measure of precaution to keep him from attempting assassination.

If a noble committed a tort against another noble, it was usually intentional. The early cases of trespass are apt to be for murder and arson with a band of a hundred men. Literally *vi et armis*. For such a trespass a soldier might be appealed of felony. If in the duel he prevailed he escaped with his booty, if conquered he paid with his life and property.

In the manor courts, where the serfs tried their causes, a very different system prevailed. Men there had to prove that they did not beat each others' horses, or slander each others' wives, just as in a modern police court; but these serfs though they could sue each other for torts seem, as I have said, to have had very imperfect redress against the privileged class. On the other hand if you will turn over the records of the manorial courts published by the Selden Society you will find endless actions by the lord against his villeins for trespasses of cattle and the like, and a very strict accountability enforced. Apparently no plea of due diligence was admitted. And the reason is plain. The lord did not care to go to the expense of fencing his land so, having the power, he threw the burden of protecting his property on those who could not resist. Through such causes as these the theory of absolute accountability in trespass probably became evolved.

Gradually as the power of the unarmed classes grew with their wealth, the landlords were forced to yield more and more until they too began to resort to the King's courts for relief against smiths who pricked their horses when shoeing, or ferrymen who upset them in a river, but throughout the centuries you will always observe that he who on the whole had the greatest power was also he who had the best of those legal principles which we laboriously derive from a murky past.

I cannot now stop to analyze the cases in detail. You will find most of them discussed in Mr. Justice Holmes' book, and also to some extent in Stanley *v.* Powell, 1 Q. B. (1901), 86. The conclusion I draw from them is simple. When a feudal aristocracy were forced to yield something, they

yielded as little as possible, and if you read the cases from this standpoint you can reconcile them very well. I will take a few examples. In trespass, in the courts of common law, they took care that all the world should be held to a strict accountability for straying cattle, just as they had held their serfs accountable in their own courts, because they were more likely to be trespassed upon by others in this manner than to trespass themselves. Also being trained to arms they were not apt to hurt others unintentionally when using them. Accordingly the shopkeeper who shot badly with his bow and arrow could look for little mercy from the law. The court was clear that bad-markmanship was conclusive evidence of a reprehensible animus or negligence.

"If one is shooting at butts, and the bow shakes in his hands, . . . if he wounds one by shooting, he shall have a good action of trespass, against him, and yet the shooting was lawful, and the wrong which the other receives was against his will." Y. B. 6 Ed. IV., 7 pl. 18, A. D. 1466.

Conversely though the privileged class might insist on absolute responsibility in trespass where the trespass consisted in injuring unfenced crops with straying pigs, or in wounding a bystander by bad shooting, it was quite another matter when the trespass touched themselves. The books teem with cases in point. English country gentlemen have always been great sportsmen. But the best huntsman's hounds will sometimes follow the chase, though called back, and the best horseman will sometimes lose control of a horse, wherefore these contingencies were under the particular protection of the judiciary.

In Millen *v.* Fawdry Latch, 119, decided in 1624, suit was brought for chasing sheep with a dog upon the plaintiff's land. The defendant answered that the plaintiff's sheep strayed upon his land, and his dog chased them off, and that the dog, in pursuit of the sheep and against the defendant's will, followed the sheep upon the plaintiff's land. There was a demurrer.

Crew C. J. distinguished a case in the year books where a defendant had been held liable for letting thorns fall on the plaintiff's premises, by observing that the cases differed since it is impossible, if a dog or horse will not obey, to recall him. And Doderidge, in the same cause, probably stated a very old test of due care in hunting, when he said: "If the deer come into my land out of the forest, and I chase them with dogs, it is excuse enough for me to wind my horn to recall the dogs, because by this the warden of the forest has notice that a deer is being chased."

Long afterward the rule laid down by Crew C. J. touching responsibility for runaway horses was affirmed in Gibbons *v.* Pepper, 1 Ld. Raym. 38; and it always continued to be the law. A man whose horse became restive from causes beyond his control was not held responsible unless it could be proved that the animal was known to be dangerous. I commend you to compare this leniency which the courts showed toward accidents which might befall a country gentleman with the sternness of the same courts towards innkeepers and especially carriers, for the carrier, in the old days, was a carter and a very inconsiderable person. Southcote's case, 4 Rep. 83 b, and Morse *v.* Slue, 2 Keble 72, are examples. In Morse *v.* Slue it appeared that though the master of a ship had kept a proper guard, thieves had stolen from the cargo while the vessel lay in the Thames. Holt argued that it would be inconvenient to merchants were the master not held liable, since they trusted him, and they could seldom prove default on his part. Lord Hale sustained Holt, because the London merchants, next the landlords, were the most important power in the kingdom.[1] It was very

[1] See also Pasley *v.* Freeman, 3 Term 51, in which the law of deceit was stretched to favor the merchant class.

annoying for these magnates to lose their goods on the road or in inns, and it was even more annoying to have always to insure before taking a journey or making a consignment. It was both simpler and cheaper to cause the courts to hold that carriers and innkeepers were insurers, and accordingly this was done. In commenting on these cases Mr. Justice Holmes has acutely and judiciously observed:

"One adversely inclined might say that it was one of many signs that the law was administered in the interest of the upper classes. It has been shown above that if a man was a common carrier he could be charged for negligence without an assumpsit. The same judge who threw out that intimation established in another case that he could be sued if he refused to shoe a horse on reasonable request. Common carriers and common innkeepers were liable in like case, and Lord Holt stated the principle. 'If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies.' An attempt to apply this doctrine generally at the present day would be thought monstrous. But it formed part of a consistent scheme for holding those who followed useful callings up to the mark." The Common Law, 203.

Not a little learning and ingenuity has been expended by learned commentators in tracing the history of the legal principles relating to carriers and innkeepers from times as remote as Rome; and doubtless under similar conditions like phenomena are developed in the law. Nevertheless, it is relevant to mark that the legal responsibility of the carrier as an insurer extended no further than was convenient to the powers who made the law. Landlords and merchants alike suffered from losses by carriers and innkeepers on land, therefore these were held liable absolutely, and were not allowed to show that the animus was innocent; but at the point where the interests of the magnates diverged, the law lost energy. The merchants, for ships at sea, repudiated the common law responsibility of carriers on land, and insisted that those who freighted goods upon ocean going ships should do their own insuring. They regulated their liabilities by the easy code of the admiralty.

As time went on lawyers, as is their wont, began to deduce principles from these curiously irreconcilable decisions, one of the most amusing of which is that which was spun from the case of Leame *v.* Bray, 3 East, 593, decided in 1803. The plaintiff one dark night when driving, was injured by the defendant who was also driving, but on the wrong side of the road. With a singular impudence the defendant set up his own blameworthy animus as a defense, since he contended that he could not commit a trespass unless he had acted wilfully. Negligence, he maintained, could not amount to trespass. Mr. Justice Gross undertook to reconcile all the cases from the year books, and finally came to the conclusion that trespass would always lie for damage caused by the direct act of the defendant. This decision of Justice Gross was long cited as authority for the dogma that he who trespasses is liable absolutely, and such was the ruling, as I understand it, of the presiding judge at *nisi prius* in the case of Wakeman *v.* Robinson 1 Bing. 213.

The ancient ecclesiastical canons as I have explained defined two classes of reprehensible minds, the one active, or malevolent, the other passive, or negligent; and, according to Lord Hale, it is this division which ordinarily separates the crime from the tort.

The law usually infers that when a man commits an act he contemplates the natural consequences thereof, and is to be held responsible therefor, unless he can excuse himself, and making excuse is part of his case. This I take to have been the condition of the law touching trespass down to Wakeman *v.* Robinson or the time of the building of the railways, and I have now to call your attention to a beautiful example

of the manner in which courts use evidence to favor a dominant class.

Wakeman *v.* Robinson, decided in 1823, just at the time when the construction of the Liverpool and Manchester Railway was begun, was a driving accident, like Leame *v.* Bray, and, on the authority of Leame *v.* Bray, the presiding judge ruled at *nisi prius* that "this being an action of trespass it was immaterial whether the act was willful or accidental," that the defendant was liable for the injury, and there was a verdict accordingly. On the argument before the full Bench, the chief justice thought that the defense of an innocent animus, or due care, was always open. At the trial it had been excluded, nevertheless he held the verdict to be right because it appeared from the testimony reported that the defendant had been negligent.

From this reasoning I infer that, up to 1830, when the first railway was opened, the parties to an action for damages for trespass to the person stood upon equal terms; that is to say, that when the plaintiff had proved an apparently unexcused injury, the burden rested on the defendant to exculpate himself.

The Reform Bill of 1832 marked the downfall of the landed class in Great Britain, and forthwith centralized capital assumed control of the kingdom. Lord Abinger, among the judges, seems to have been the most sensitive to the new impulsion. Under the conditions which had prevailed before the introduction of steam, masters had recognized a general responsibility for the negligence of their servants in the course of their employment, and this responsibility had not been felt to be particularly onerous. But when masses of labor collected in the service of railways and factories, it became clear that were masters made to answer for the animus of their servants among themselves, the results of their carelessness would certainly be costly, and might even impair dividends. Therefore, in 1837, Lord Abinger repudiated this responsibility in Priestley *v.* Fowler 3 M. & W. 1. In 1842 Chief Justice Shaw followed Priestley *v.* Fowler in Farwell *v.* Boston & Worcester R.R. 4 Metc. 49, and this decision marks an economic revolution in Massachusetts as sharply as did Taltarum's case in England in 1472, when the feudal system broke down.

Chief Justice Shaw's genius lay in his instinct for the social center of gravity, and keeping close to this he favored the defense in negligence cases for the rest of his life. He took a second long step in 1850, when he decided Brown *v.* Kendall, 6 Cush. 292.

In Brown *v.* Kendall the plaintiff had been injured by an accidental blow from the defendant's stick while the defendant was trying to separate two fighting dogs. The chief justice took this opportunity to manipulate the burden of proof. He held it to be insufficient for the plaintiff to show that he had been injured by the defendant, apparently without fault of his own, he insisted that the plaintiff must go further and prove affirmatively that the accident was caused by the reprehensible animus of the defendant. In other words, he must show before he could recover that the defendant had been lacking in that care for others which the ecclesiastical law exacted from all men. I need not point out the advantage this gave the defendant. To a certain extent the railway is an insurer of the passenger, provided, in jurisdictions like Massachusetts, he can demonstrate that neither by word nor deed does he in any degree contribute to the disaster which befalls him; but in its relations with the public at large, or its own employees, the railway is under no such disability, and plaintiffs, especially those who are poor, may often find it impossible to prove negligence, the more so as most of the evidence is likely to be under the corporation's control.

During the third quarter of the nineteenth century the power of centralized wealth grew almost unchecked, and appears to have culminated about 1870. As usual, the culminating point was marked by a decision.

In Murphy *v.* Deane, 101 Mass. 455, decided in 1869, the Supreme Court of this Commonwealth reached the limit. They then held that it was not enough that the plaintiff should prove the injury, that he had been in no apparent fault, and that the defendant had been guilty of negligence, but he must also demonstrate that by no act, that is to say by no thought of his, had he so directly contributed to the misfortune, that had he thought otherwise the accident would not have happened. The judiciary could go no further unless they were prepared to hold that traveling in a train was conclusive evidence of a reprehensible animus. In Murphy *v.* Deane the scale tipped far, since it established as the measure of legal responsibility between plaintiff and defendant, that the smallest inadvertence on the part of the plaintiff might counterbalance the utmost disregard of life, short of wanton recklessness, on the part of the defendant.

Apparently during some years the judiciary were misled in estimating the relative energy of the forces, the resultant of whose conflict it is their function to express. This phenomenon is not unusual, and its effects are often serious. The culminating decision had hardly been rendered in 1869 before a reaction set in which still continues. Between 1870 and 1880 Parliament passed three important statutes all drawn to curb centralized capital, in 1871, the Trade Union Act, in 1875 an act to protect strikers against indictments for conspiracy, and in 1880 the Employers' Liability Act. If you wish to see how completely this last statute prostrated Priestley *v.* Fowler you can read Thomas *v.* Quartermain 18 Q.B.D. 685.

Of late America has distanced England in this direction. Most states have adopted the principle of the employers' liability to servants, in 1887 Congress passed the Interstate Commerce Act, in 1890 the Sherman Anti-Trust Law, and last year the Rate Bill. Yet this seems only the beginning.

Most striking of all is the National Employers' Liability Act, which was approved June 11, 1906. This statute reverses the policy of that portion of the judiciary represented by the Massachusetts court and suggests a reaction reaching the center of the social equilibrium, a reaction similar to that indicated in Great Britain by the unopposed passage through the Commons of the bill overthrowing the Taff Vale decision.

In the second section of the American statute Congress has enacted that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence. . . . All questions of negligence and contributory negligence shall be for the jury."

The whole movement is of the deepest interest to the lawyer, but what must fix our attention here is the effort of the public to enforce stricter canons for judging the animus of corporations, either civilly or criminally, where their acts touch the health or the safety of the citizen.

In this momentous conflict the determination of the animus underlying negligence plays a foremost part. The courts have attempted more or less openly to assume this function themselves. The legislatures seek to restore the jury to its office. As the courts have formulated the law they have so burdened the plaintiff that human life is cheap, so cheap that it is cheaper than railway equipment; therefore the railways economize on equipment and buy the lives of those immolated. The result is that approximately one hundred thousand persons are killed or injured annually in railway accidents, relatively few of which are unpreventable. Had the courts adopted an opposite construction of the law, and held railways absolutely responsible for all injuries inflicted by them unless they could demonstrate complete absence of blame, it is at least conceivable that accidents would have been found more costly than prevention.

However this may be as a speculation, lawyers have to deal with the law as it stands. Probably the opposition to a series of sweeping enactments throughout the Union, drawn in the spirit of the National Employers' Liability Act and designed to overturn the doctrine of contributory negligence, would meet with such opposition that this would prove not to be a practicable path toward relief.

The tendency seems rather in the direction of government inspection and control; toward boards empowered to enforce an expenditure upon track and equipment adequate to ensure a definite standard of efficiency. Obviously such legislation, like the "Safety Appliance Act," the "Pure Food Act," and the "Meat Inspection Act," would vastly expand the Federal jurisdiction by giving the national government authority to enforce an expenditure of what has, hitherto, been deemed private income, for public purposes, without compensation and without the owner's consent.

The developments of the future lie beyond the limits of this article. To-day I wish to confine myself to recommending to you a certain method of analysis when attacking legal problems. I refer to the initial process of separating the matter to be proved from the evidence by which you shall prove it. I apprehend that usually, in your practice, you will find the thing you have to prove is a mental condition, however veiled the issue may be by circumstances. If this proposition be sound the problem which will demand your promptest attention will be to investigate how freely the courts will admit testimony to show that mental condition, or how completely they will exclude the adversary's testimony upon your objection.

At the risk of being prolix, I shall illustrate my meaning by examining one or two famous cases, which have been often cited as instances where the courts have excluded evidence of animus in negligence and held defendants to an absolute accountability. The first of these is Rylands *v.* Fletcher, L. R. 3 H. L. C. 330. There a flood occurred because of a break in a reservoir, caused by certain disused shafts which had been sunk in neighboring property. The chancellor held that evidence of proper construction was immaterial, that the defendant was bound to keep safely a dangerous substance which he had collected on his land, and that he should have known of the existence of the shafts.

Nothing can be plainer than that this decision only excluded a certain class of testimony to prove a blameless animus. Had the defendant's evidence tended to show that the reservoir being originally of sound construction, its masonry had been shattered by the use of explosives in the plaintiff's shafts, and that because of this injury the flood ensued, I suppose that the testimony would have been held to be material.

Another example is Shipley *v.* Fifty Associates, 101 Mass. 251. There it appeared that the plaintiff when walking in a public street had been injured by snow falling from the defendant's house. The defendant wished to prove, as evidence of blamelessness, that his house was properly constructed and that the snow fell from natural and unpreventable causes. The court held him liable for the injury, rejecting the testimony he offered as immaterial. The issue again is plain. It was the character of the defendant's animus toward his neighbor. Having built a house upon a public street where all men freely walked, the defendant had not fulfilled his duty by leaving a dangerous mass of matter upon his roof whence it might fall and injure the passer. If he so built his house, he was bound to remove the snow. Not to do so was blameworthy. Here again I apprehend the relations of the parties would have been changed, had the defendant been prepared to show that his house stood back from the street, and that the plaintiff had been injured when walking upon the defen dant's land.

Finally, I recommend you to read Lossee *v.* Buchanan, 51 N. Y., 476, where various dicta in Rylands *v.* Fletcher are criticised.

An analogous analysis may be applied to the issue of "reasonableness" where one of two parties is under a servitude and the government intervenes to correct the inequality.

Let us take the railway rate. A rate is imposed upon the public by a superior power. The complainant has no alternative but to pay, for transportation is to him a necessity. The question presented is whether that price, fixed by a corporation through an exercise of a delegated attribute of sovereignty, is a reasonable manifestation of a volition.

I apprehend that no rate can be intrinsically reasonable or unreasonable. It is only reasonable or the reverse according as it may conform to an intellectual conception existing in the mind of the tribunal having jurisdiction of the cause.

That intellectual conception is an effect of a social environment, which, indeed, is the cause that the rate should exist at all. All the facts which constitute that environment are more or less relevant as bearing upon the ideal standard which shall finally measure "reasonableness," and among these facts are the mental attitude of the parties to the case, together with the rate itself. The rate must be analyzed, its component parts shown, and inferences must be drawn therefrom to explain the motives which controlled the volition of him who made it. For, in such cases, volition is a most important factor in the litigation.

He who makes a rate has the intent to raise money from the public and this intent is lawful if the amount raised be "reasonable" and the motive be only to obtain a revenue. But supposing the rate maker act from mixed motives, one of which is, in fixing upon that particular rate, to combine with another corporation as a monopoly to control prices; I apprehend that for entertaining this secret motive the rate maker may be indicted and imprisoned, although the rate, in absolute amount, may be "reasonable."

The inference is that a rate, by itself, can hardly be a direct issue. It is evidence bearing upon the issues directly involved, which are always a series of intellectual conceptions. These conceptions are to be created or analyzed by the aid of facts, of which the rate is one.

To try a cause involving the "reasonableness" of rates, the first task is to adduce and marshal evidence which shall create a certain ideal standard of "reasonableness" which shall meet your purpose. Then the particular rate complained of is to be introduced to prove that the standard which has been created in the mind of the tribunal is not enforced.

The second task is to analyze the volition of the rate maker, by the aid of all evidence both direct and circumstantial, in order to show a corrupt animus, because of which animus any rate he might impose, whether high or low, would be an unlawful, or even a criminal act.

Approaching thus dispassionately the seething caldron of modern competition we soon perceive that courts can no more escape from the constraint of their environments, than can railways, trade unions, money lenders, manufacturers, or the tides of the ocean. The law which regulates a society must be as fluid as is the society which creates the law. Hence in periods of rapid change courts can follow no inflexible rules, they can be bound by no precedents which lead from fixed premises to an inexorable conclusion. They are creatures of circumstances and must yield to the force which created and which upholds them, like all else in nature.

Recognizing this necessity, I take it to be the lawyer's part to study the causes of which judicial judgments are the effect, to the end that he may learn to measure intelligently the relative energy of the forces locked in the controversies in which he may

participate. His advice to his clients will measure the sagacity of his conclusions, for, as a general rule, you may be assured that that party will prevail before courts of justice whose cause embodies power rather than logic.

Finally, I have once more to impress upon you that among the infinite number of causes which go to make up a resultant of social forces at any given instant of time, none are probably so cogent as the applied sciences. These manifestly largely shape the form which economic competition takes as it varies from decade to decade, and as the form of the competition varies, so must the attributes of the dominant class who make judges, pass statutes, and promulgate the law.

Thus dominant classes rise, culminate, and decline, in obedience to the demands of an ever restless nature, and I commend to you to ponder on the imprint which the ebb and flow of this social tide leaves upon the law. You will find, if I mistake not, that the law is regularly wrenched, more or less violently, from its logical path, to facilitate the rise of each new species of the competitive man, and that it is again dislocated to accelerate that species' fall. Therefore, would you fathom the meaning of the mass of contradictory precedents with which you have to deal, you should first examine the mechanism which makes each contradiction as inevitable as is the rising and setting of the sun.

Starting from these premises I apprehend that you can explain judgments if you cannot reconcile them. You can learn to understand why contradictory decisions have been made precisely as you can understand why in one age the open manor house replaced the castle, and in another the railway replaced the stage coach. But should you ignore these great fundamental motors of human life, and approach the law as though it were a science apart and self-developing, evolved from internal and immutable principles of its own which can be reconciled by logic as they expand, I fear that your efforts will resemble those of the mediæval schoolmen who sought to explain the universe by means of the syllogism.

BOSTON, MASS., December, 1906.

NEW ENGLAND TOWN LAW

A DIGEST OF STATUTES AND DECISIONS CONCERNING TOWNS AND TOWN OFFICERS, BY JAMES S. GARLAND, ESQ., OF THE MASSACHUSETTS BAR. THE BOSTON BOOK CO., 1906. 950 pp. $6.50.

By Henry Ware

MR. GARLAND'S recent work on "New England Town Law" is a book which should prove interesting to several classes of readers. To the student of political history and institutions, to the town official, and to the practising lawyer, this volume offers in condensed form a description of the historical growth and functions of the New England town, the duties of the various town officers, and a reference to the more important decisions bearing upon such duties.

The arrangement of the book is novel, but well adapted to the scope of the work. After a general introduction, Mr. Garland has taken up each of the six New England states separately, and given, under the titles of the various town officers, an account of the statutes relating to the duties of that officer. Often the statute is quoted in full, and always with a reference to the official volume. Brief statements of decisions are inserted under the appropriate statutes.

As a handbook for town officials in any of the New England states this work ought to be very useful, and there is little doubt that Mr. Garland will realize the hope expressed in his preface that the book will prove of service to "those excellent public servants, whose labors are so poorly paid, and often so little appreciated." An overseer of the poor, for example, if in doubt as to the scope of his duties, could find grouped together under the heading of his particular state and office a digest of the statutes governing his actions, together with a statement of the decisions helping to define such duties. If he failed to find any decisions of his own state, he could turn to the corresponding title under the headings of the other states and there find set out the duties of the overseers of the poor in those jurisdictions, with possibly a decision of such state throwing some light on his own duties.

While the citation of authorities is not so extensive, perhaps, as it might have been if the volume had dealt with the municipal law of only one of the New England states, it nevertheless covers much of the ground and represents a considerable amount of industry on the part of the author. Under the duties of assessors of taxes, for example, are cited a number of cases on questions of domicile, of what kind of property is exempt from taxation, and of what constitutes real estate, machinery, and the like. Similarly, under the duties of a town clerk with reference to the recording of mortgages of personal property is found a digest of many of the authorities relating to chattel mortgages in general and to the rights of parties in unrecorded mortgages.

It is this extended citation of authorities that gives the book one of its chief points of usefulness for the practising lawyer. Without overlooking the assistance which a lawyer would get from using the book merely as an index to the statutes bearing on the questions of town law (and when it comes to hunting for statutes, an index can seldom be too full), it is probable that a lawyer would find the most use for the book as a collection of authorities. For this reason it is somewhat to be regretted that, owing very likely to the limitations which made it necessary to produce a compact volume, the author could not have made it more easy for the lawyer to find all the learning that is collected between the two covers of the book. There are many citations which might well go undiscovered, unless the book were read with more care than a busy man in search of authorities

would have time to give. To take, for example, the question of domicile, cases on this subject are scattered through the Massachusetts section of the book under the separate titles of assessors of taxes, overseers of the poor, and voters. If a second edition is to be published, and it is desired to bring the book up to the highest standard of usefulness for the bar, it is hoped that it will contain, if not a table of cases, at least a much more generous index to the decisions.

The chief interest of the book, however, lies in its description of the unique system of government which has grown up among the towns of New England. Much has been written about the New England town, but not until the appearance of Mr. Garland's work has there been furnished such a full statement of the various functions of the different town officials and such a chance to observe, by comparison, the different lines along which the town system has developed in the several New England states. In his introduction, which covers some eighty pages, Mr. Garland discusses the origin and growth of the towns and compares the different provisions for town government now in force in New England.

Beginning with a description of the towns as they existed in the days of the early settlers, when the town and parish were one, and the town meeting voted the minister's salary and the repairs on the meeting-house, when the "common" was really used for common pasturage and when the affairs of the little settlement were comparatively few and simple, the introduction traces the effect on the town government of the growing population, showing the early introduction of the practice of choosing selectmen to attend to certain of the details of administration, thus avoiding the necessity of frequent meetings of the inhabitants themselves. As the affairs of the community became more complicated, with the introduction of systems of water supply, drainage, and the like, and the necessity for better police and fire protection, the duties of the selectmen and other town officials grew, and Mr. Garland gives not only an interesting account of this growth, but also a painstaking description of the various functions now exercised by the towns, and of the relations between the town and the state. In this description no words are wasted and an astonishing amount of information has been condensed within the limits of the introduction.

While the details of administration are intrusted to the selectmen and other officials, the essential powers of government have always been kept by the inhabitants themselves. It is the voters in town meeting who decide how much to spend and what to spend it for, and it can readily be seen that in a town of any great size this matter of directing the general affairs and of appropriating money for the various municipal purposes would soon come to require more thought and study than most of the voters would or could give. If the average voter should be asked how much money would be required to run the water department, or to keep the streets in repair for a year, or to maintain the public schools (questions on which he is called upon to vote in town meeting), he would, in all probability, be at a loss for an answer. Questions of this kind must, in the nature of things, be determined largely by a few men who have the time and facilities to look into them, and thus there has grown up in the system of town government a custom (for it is only a custom and not referred to, so far as the writer is aware, in any statute) of appointing certain persons to examine the subjects to be voted on and to make their recommendations at or before the town meeting. The by-laws of some towns even provide that questions of appropriating money shall not be acted upon in town meeting until the committee on appropriations (a body not recognized by statute) has passed upon them. In other towns all the subjects to come up in town meeting,

whether involving the appropriation of money or not, are looked into beforehand, either by the selectmen or by a "warrant committee" appointed at the beginning of the year by the moderator, and their recommendations, together with a statement of the situation, are sometimes reported to the town in print before the meeting. It must not be supposed that such recommendations are always implicitly followed, but they do serve, to a very large extent, to simplify the business of town meeting, and to make it possible to continue the system of town government long after the affairs of a town have grown too complicated for the unaided understanding of most of the voters.

And the future of the system of town government? When a town grows too large for the voters to meet and settle their affairs in a deliberative assembly, it usually gets a city charter, and there is at once introduced into the municipal government that system of representation which has so many drawbacks. Even in those fortunate cities where party politics are kept out of municipal affairs, the practice of compromises and log-rolling is apt to appear, and the representative of one constituency may, for the purpose of securing support for measures beneficial to his constituency rather than to the whole city, trade his vote and countenance measures and extravagances which, as a private citizen, he would condemn. The desire to please one's constituency and thus secure a reëlection is a temptation which does not beset the voters of a town; they legislate for themselves and do not need reëlection.

Again, in a city government there is apt to be an idea that those in office, the "administration," must make a good showing and keep down the tax rate. While this, to a certain extent, acts as a check on extravagance, it also has a tendency to cripple certain departments of the city government, and work which ought to be done is sometimes sacrificed for expenditures which it is more politic for the administration to make. Moreover, an administration can frequently escape the burden and odium of its extravagances by borrowing money instead of raising it by taxation, and thus a city is apt to become burdened with a debt for current expenses which ought, on sound financial principles, to be paid when they were incurred. In a town, on the other hand, the voters are their own "administration," and the desire to make a good showing to a constituency of electors does not exist.

These and other considerations have led some of the New England towns to cling tenaciously to their form of town government even after their size would warrant the adoption of a form of representative city government. In this connection it is particularly interesting to notice the step which the city of Newport, Rhode Island, has just taken to go back, to a certain extent, to the town meeting system in order to escape some of the disadvantages of a representative form of government in the hands of a small body of men. The city has adopted a modified system of town government, intended to meet the difficulties of applying the regular town meeting system to a large community. Instead of allowing all the voters of Newport to meet and manage the municipal affairs, the new charter [1] requires them to select 195 of their number, that is, about as many as can comfortably meet as a deliberative body, and this selected body then proceeds, much like the 200 voters which might gather in any town meeting, to direct the affairs of the municipality. Other voters may speak but not vote, at such meeting. This select body elects the important municipal officers (except the mayor and aldermen), appropriates money, and, generally speaking, exercises the powers vested in towns in town meeting. There is also a

[1] Public Laws, chap. 1392, passed April 19 1906.

mayor and board of five aldermen, but their duties are mostly ministerial, resembling to a certain extent those of selectmen. This new system goes into effect January 7, 1907, and its results will be watched with much interest.

Another interesting example of a large municipality clinging to the form of town government, and one which Mr. Garland speaks of in his book, is that of the town of Brookline, Massachusetts, a town having over 4000 voters and appropriating annually over $1,300,000. Seven or eight years ago an overcrowded town meeting drew attention to the dangers attending the administration of the affairs of so large a municipality under the town meeting system. Many changes were discussed, and finally the town decided to remain under the old system, but to ask the legislature to provide it with a kind of safety valve in case an occasion should arise when the old system became unmanageable. The safety valve is, in substance, this: If any meeting is overcrowded, a vote passed at such meeting may, within a short time, upon the petition of a certain number of voters, be submitted to be balloted upon by all the voters of the town at an election conducted like an election for officers.[1] Although the legislature granted this request in 1901,[2] the town has never yet had occasion to act under it, for the largest attendance at town meeting since the passage of the statute has been 401, while an attendance of 700 is required before the statute becomes operative. This expedient adopted in the case of the town of Brookline seems to offer a solution to the problem which is pressing on those towns that are growing to the dimensions of cities, but that still wish to keep to the time-honored system of the New England town meeting.

BOSTON, MASS, December, 1906.

[1] Similar provisions for a general vote are contained in the Newport charter.

[2] Act of 1901, chap. 201.

THE SEGREGATION OF JAPANESE STUDENTS BY THE SCHOOL AUTHORITIES OF SAN FRANCISCO

By Charles Cheney Hyde,

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THE action of the Board of Education of San Francisco in passing a rule October 11th last, requiring all pupils of Mongolian descent in that city to attend the Oriental School on Clay Street, was made a ground of protest by the Japanese Ambassador at Washington, Viscount Aoki, on October 26th, as an alleged infraction of the treaty of 1894 between the United States and Japan.

The School Law of California of 1903 provides that:

"Trustees shall have the power to exclude all children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese or Mongolian children must not be admitted into any other school." [1]

In pursuance of this rule, the School Board of San Francisco passed the order in question which affected ninety-three students who attended various schools in that city from July 1, 1906, until the following October.[2]

The action taken by the school authorities in view of the protest of the Japanese government raises certain important inquiries which it is the purpose of the writer to discuss: First, the method of determining whether there has been a violation of the treaty of 1894; secondly, the interpretation of the treaty; thirdly, the validity of the treaty, or of such portions thereof as might be construed to sustain the contentions of Japan; fourthly, the liability of the United States to Japan for acts of the authorities of California which might be shown to be in violation of the treaty.

It is provided in Article VI of the Constitution of the United States that

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." [1]

The reason for the presence of these provisions should be observed. With reference thereto George Ticknor Curtis says:

"It is a remarkable circumstance that this provision was originally proposed by a very earnest advocate of the rights of the States — Luther Martin. His design, however, was to supply a substitute for a power over State legislation, which had been embraced in the Virginia plan, and which was to be exercised through a negative by the national legislature upon all laws of the States contravening, in their opinion, the Articles of Union or the treaties subsisting under the authority of the Union. The purpose of the substitute was to change a legislative into a judicial power, by transferring from the national legislature to the judiciary the right of determining whether a State law supposed to be in conflict with the Constitution, laws, or treaties of the Union should be inoperative or valid. By extending the obligation to regard the requirements of the

[1] Art. 10, § 1662, School Law of Calif. 1903.

[2] Report of A. Althmann, President of Board of Education of San Francisco, to D. S. Richardson, Foreign Secretary to Consulate of Japan, Oct. 30, 1906, cited in *San Francisco Chronicle*, Oct. 31, 1906. It appears that twenty-five out of the ninety-three students were born in the United States, of Japanese parentage; the remaining sixty-eight were born abroad. Report of the Secretary of Commerce and Labor to the President, Nov. 26, 1906.

[1] Art. VI, par. 2, Constitution of U. S.

national Constitution and laws to the judges of the state tribunals, their supremacy in all the judicatures of the country was secured."[1]

Judge Story says of the same Article:

"It is notorious that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the States under the confederation. They were deemed by the States not as laws, but like requisitions of mere moral obligation, and dependent upon the good-will of the States for their execution. Congress, indeed, remonstrated against this construction, as unfounded in principle and justice. But their voice was not heard. Power and right were separated; the argument was all on one side, but the power was on the other. It was probably to obviate this very difficulty that this clause was inserted in the Constitution.[2] The propriety of this clause would seem to result from the very nature of the Constitution. If it was to establish a national government, that government ought, to the extent of its powers and rights, to be supreme. . . . It is to be considered that treaties constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited by reprisals or war. It is, therefore, indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws."[3]

It is a benefit to the alien resident in the United States that whenever he may believe that his rights under a treaty are infringed by the act of a single state he may secure a judicial interpretation of the treaty by a competent tribunal. The fact that such an inquiry may be made by a court which is independent of the political department of the government, and free to consider the question of infringement on its merits, is a means of protection to the foreigner. If his contention is sustained, the court, in pursuance of a constitutional provision, will pronounce null and void, and therefore inoperative, any local ordinance or state law which it finds to be in violation of the treaty. Because this means of redress is open to the alien, the United States is justified in requiring that an alleged violation of a treaty by the act of a state should be made the subject of judicial inquiry in an American court before being asserted as a ground for diplomatic intervention. Such has been our constant practice.[1]

In a note to the Chinese Minister, May 27, 1890, the Secretary of State, Mr. Blaine, in reply to a protest from the Chinese government against an ordinance of San Francisco, requiring Chinese subjects there residing to remove from their existing homes and places of business to a particular part of that city, as a violation of Article III, of the treaty of 1880 said:

"Meanwhile, may I ask your attention to the sixth article of the Constitution of the United States, which places treaties on the same juridical basis as laws and makes them the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. By the second section of the third article the judicial power of the United States is made to extend to all cases arising under the treaties. Under these provisions, and the statutes of the United States passed to give them effect, it is believed that the Chinese who are said to have been arrested under the

[1] Constitutional History of the U. S. by George Ticknor Curtis, 2nd ed., p. 554. Cited in C. H. Butler's Treaty-Making Power of the United States, § 264.

[2] Story's Commentaries on the Constitution, 5th ed. § 1838.

[3] id. §§ 1837, 1838.

See also C H. Butler's Treaty-Making Power of the United States, § 271

[1] See the reply of Mr. Jay, when Secretary of Foreign Affairs, to the complaint of Sir John Temple, Dec. 11, 1787, that an action of trespass had been instituted against a British subject in violation of the treaty of peace of 1783. 3 MS. Am. Let. 306, Moore's Dig. of Int. Law, § 760.

Mr. Bayard, Sec. of State, to Baron Fava, Italian Min , Dec. 18, 1888, MS. Notes to Italy VIII, 315 —Moore's Dig Int. Law § 760.

order in question may, in an application to the courts for release from imprisonment or detention, speedily obtain a decision as to their rights and the legality of the order."[1]

Advantageous as it may be from every point of view, both to the alien and to our own government, that an American tribunal should determine whether a foreigner residing in the United States has been prevented from enjoying the exercise of a treaty right, it cannot be said that the decision of such a question by such a tribunal can fully determine the rightfulness of the claim advanced. When the decision of the court denies the contention of the alien, his government is not bound by the judicial interpretation of the treaty. If, for example, the federal courts should decide that the action of the school authorities of San Francisco was not in contravention of the treaty of 1894 with respect to Japanese subjects there residing, the Emperor of Japan would not be under any obligation to accept the decision as decisive of the rights of his subjects. This exact situation was forcibly commented on by Mr. Blaine in writing to Mr. Comly in Hawaii, June 30, 1881:

"I am not aware whether or not a treaty, according to the Hawaiian Constitution, is, as with us, a supreme law of the land, upon the construction of which — the proper case occurring — every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated and carried into practical execution, this government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian government of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling."[1]

It is not unreasonable for a state to feel itself free from any obligation to yield to the interpretation given to the provisions of a treaty by a local tribunal of the other contracting party. The right of a court to do justice between nations — to render, for example, a decision as to the meaning of a treaty, and which shall be legally binding on the signatories thereto, must be founded on their mutual consent. This fact is now generally appreciated by civilized states. It is one of the reasons why nations are willing to agree that disputes concerning the interpretation of treaties, and which can not be adjusted through diplomatic channels, may be referred to international courts of arbitration, such as the permanent Tribunal at The Hague.

On the other hand, by reason of the learning and integrity of the Supreme Court of the United States, and, therefore, on account of the strong probability that its interpretation of the treaty of 1894 would be the true interpretation, and such as an international court of arbitration would render under similar circumstances, it is not unlikely that the Japanese Government would yield to the decision of that tribunal and admit the correctness of its views. In the present controversy, therefore, it is not to be anticipated that a decision by the highest court of the United States adverse to the contentions of Japan would be regarded by that government as arbitrary, or unreasonable, or as not decisive of the rights of the high contracting parties.

The true interpretation of the treaty of 1894 is a complex task. In the first place the intention of the United States, as well

[1] For. Rel. 1890, p 221.

See also note of Mr. Hay, Sec. of State, to Signor Carignani, Italian chargé, Aug. 24, 1901, For. Rel. 1901, 308.

[1] For. Rel. U. S. 1881, pages 624, 625, Moore's Dig. Int. Law, § 760.

as of Japan, at the time of the negotiation of the treaty must be carefully considered. It seems to have been the purpose of our government at that time to recognize Japan as a member of the family of civilized states, fully possessed of the means of exercising all of the functions, and consequently entitled to enjoy all of the privileges of such a state. The present understanding of the United States as to what that purpose was is reflected in a telegram of Secretary Root to Ambassador Wright, dated October 23rd last, which according to press dispatches, contained the statement:

"You may assure the government of Japan in most positive terms that the government of the United States will not for a moment entertain the idea of any treatment toward the Japanese people other than that accorded to the people of the most friendly European nations, and that there is no reason to suppose that the people of the United States desire our government to take any different course."[1]

The text of the treaty deserves careful examination. Article I contains the provision that:

"The citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property. . . . In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects, or citizens or subjects of the most favored nation."

Article II provides in detail for reciprocal freedom of commerce and navigation between the territories of the two nations; it specifies the rights of trade to be enjoyed by each, stating that the citizens and subjects of the two nations may:

"Own or hire and occupy houses, manufactories, warehouses, shops and premises which may be necessary for them, and lease land for residential and commercial purposes, comforming themselves to the laws, police and customs regulations of the country like native citizens or subjects."

Finally it is provided in the same Article that:

"The stipulations contained in this and the preceding Article do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries."

Article XIX provides that the treaty shall go into operation July 17, 1899, and remain in effect for twelve years from that date and that either nation:

"Shall have the right, at any time thereafter, to give notice to the other of its intention to terminate the same, and at the expiration of twelve months after such notice is given this Treaty shall wholly cease and determine."[1]

The treaty contains no express provision as to the education of citizens or subjects of either state. It is contended, however, that the right to reside in the United States includes the right to enjoy public educational advantages as a privilege relating to residence. It is urged that the right to enjoy public school facilities is generally regarded in this country as one incidental to that of residence; that citizens of our own land believe that they have a right to send their children to a public school because of residence in immediate proximity to it. Whether residence in a particular neighborhood or community, according to a national custom, gives to the inhabitant, irrespective of his

[1] *Boston Transcript*, Oct. 29, 1906.

[1] Treaties of the United States in Force: 1904, *Japan*.

nationality, the privilege of enjoying the school of that particular neighborhood or community, is a matter for serious consideration. That the fact of residence does include this right is a widely popular belief. It has become fixed among our people. The efficiency of a public school or of the school system of a particular community is often the controlling influence in the choice of the family abode.[1]

No attempt has been made in California to deprive residents of any race or nationality of the privilege of public education. That fact, it is urged, is decisive of the claim that California itself regards the right of enjoying public educational advantages as closely allied to and connected with that of residence. It is said that by reason of the custom there in vogue, of opening the public schools to all residents, the educational privilege must, by virtue of the most favored nation clause, be afforded to Japanese pupils on as liberal and desirable terms as it is to those of native or foreign descent; that segregation, therefore, amounts to unlawful and unjust discrimination when applied to aliens of any one race.

[1] Judge Deady, of the United States Circuit Court, in the District of Oregon, had occasion to comment on the scope of the right of residence given by a treaty to aliens, in a decision pronouncing invalid an act of the legislature of Oregon, approved Oct. 16, 1872, for the prohibiting of the employment of Chinese laborers on the improvement of streets and public works in that state. He said: "Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and to labor for a living. . . . . In Chapman *v.* Toy Long, 4 Saw. 36, this court in considering these provisions of this treaty said: 'The right to reside in the country, with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers.'" (5 Saw. 554, at 570).

It is contended also that segregation is a substantial, as well as technical injustice. It is claimed by the Japanese Association of America, according to a letter addressed to President Roosevelt, and made public by the Secretary of the Japanese Consulate in San Francisco, that:

'Said action will have the effect to exclude Japanese children from public schools, for the reason that it is not possible for them to go from their various homes scattered throughout the city, to the so-called 'Oriental' school, located as it is, in a place remote, and almost inaccessible, in the heart of the burned district." [1]

It is maintained also that the privilege extended to pupils of other foreign nationalities to associate with American students in the San Francisco schools is one highly useful and valuable to the resident alien who may thus be enabled the more readily to assimilate American ideals, and acquire a mastery of the English language. It is added, with greater feeling, that a rule of restriction which segregates Japanese, not with aliens of highly civilized nations, but with Chinese, who, for the most part, are excluded from the United States, and who are regarded as unfit for American citizenship, and with Indians, who are the dependent wards of the state, creates a distinction which is clearly invidious; that the enforcement of the rule is an emphatic challenge of the social status of the Japanese, wholly out of harmony with the spirit and purpose of the treaty of 1894.

[1] *New York Sun*, Dec. 10, 1906.

"The Oriental School, the school set apart for the Chinese, Japanese and Korean children, is in the burned section. . . . The conditions in San Francisco are such, owing to the great conflagration, that it would not be possible even for grown children living at remote distances to attend this school. If the action of the Board stands, then, and if no schools are provided in addition to the one mentioned, it seems that a number of Japanese children will be prevented from attending the public schools and will have to resort to private instruction." Report of the Secretary of Commerce and Labor to the President, November 26, 1906.

Finally, it is contended that the excellence of the Oriental School as compared with other schools, and any peculiar fitness it may possess for the training of Japanese pupils, are matters unrelated to the question at issue, which concerns solely a comparison of the educational advantages afforded to Japanese and other resident aliens. This line of argument confines itself to the interpretation of the treaty, brushing aside as irrelevant any discussion of the rights, which according to the law of nations a state may have with respect to resident aliens. The justice of this must be admitted. The present inquiry does not relate to the right of a nation to exclude aliens of any race from its territory, or to regulate the education of those who are admitted to residence. It is not concerned with the economic benefits or evils resulting from the presence of large numbers of Japanese on our Pacific coast. Nor does it deal with the question as to the wisdom of a policy which resulted in the execution and ratification of the treaty of 1894. It must be obvious that between nations as between individual men the proper interpretation of a contract is not ascertained by reference to the convenience or inconvenience with which either party may perform an obligation alleged thereunder.[1]

In a word, the Japanese contention is that by the treaty the right of residence is secured; that that right includes the right to enjoy the same public school facilities as are accorded residents of other nationalities; that this is admitted by the San Francisco authorities, but that in the regulation of this right, by the process of segregation of Japanese with Indians and Chinese, there is denied a vital privilege or liberty as highly appreciated as it is generally enjoyed, by students of European and other nationalities.

[1] "It is commonly said that a country observes the stipulations of a treaty no longer than it suits its interests or its convenience to observe them; but this has never been universally true in modern times, and I am happy to believe it is less true to-day than ever before. (The Practice of Diplomacy by John W. Foster, p. 291.)

Attention is called, however, to the broad provision in Article II, that the previous stipulations do not "affect the laws, ordinances and regulations with regard to . . . police and public security" which were then in force, or might thereafter be enacted by either country. This suggests the inquiry whether the segregation of Japanese students may be properly deemed a police measure, or one for the benefit of public security. It is urged that if it were shown that by reason of the difference of race, the presence of the Mongolian and Caucasian pupils in the same schools of lower grades engendered mutual ill-will, physical antagonism, violence of passion, or diversion from study to a perceptible degree, the public security and the moral welfare of students of both races would demand their separation, and that without the regard to the causes of demoralization. It is said that the legislature of the state must always be deemed to be the natural judge of what conditions menace the public security, and that to it must be imputed *prima facie*, good faith in attempting by enactment to protect the same. Hence, it is urged that the California statute and the local ordinance in pursuance thereof should be regarded, not as an arbitrary discrimination against resident subjects of a friendly state, but simply as an earnest effort on the part of a conscientious law-making body to promote the security of the public — that is, of all persons of whatever race living in the state. It is maintained, therefore, that in scrutinizing acts done in alleged violation of the treaty, a court should be slow to overrule the judgment of the legislature as to what conditions might threaten the public security; that a mere disagreement on that point between the court and the legislature should be insufficient to sustain the charge of violation of the treaty, unless the court should conclude that the legislature had been not only unwise, but also unreasonable and clearly arbitrary in its view.

The provision for the enactment and enforcing of measures for police protection and

public security indicates that the negotiators of the treaty considered it vital, that notwithstanding the generous treatment accorded the citizens and subjects of the high contracting parties, both Japan and the United States should not be precluded from exercising a broad control over their domestic institutions, whenever the public safety of either state might seem to require it. In the absence of any stipulation to the contrary, it was left to each country to determine the time and circumstances when its public security might be endangered, and what restrictions ought to be placed on the privileges afforded by the treaty.

The violation of a treaty by a party thereto is a serious offense. It indicates oftentimes bad faith on the part of the offender, as well as national disregard of a legal duty to a friendly power. It imposes on the offender a consequent duty to make reparation to the aggrieved state or its citizen. The nature of such reparation varies according to the nature of the wrong done. If no reparation be forthcoming, in the absence of any international force capable of enforcing justice, the aggrieved state often takes it upon itself to secure by its own means what it has been denied. The ultimate result may be war. Because of the very seriousness, both of the offense itself and of the consequences which it may entail, nations are naturally reluctant to admit the violation of a treaty. If the alleged violation relate to a question of interpretation, the matter is given utmost consideration from every point of view before admission of infringement is to be expected. In our own country the decision of our courts on the question as to the infringement of a treaty, as has been already shown, is justly regarded as the guide for the political department. Lack of candor on the part of a state to admit violation of an international duty arising from undisputed facts and definitely imposed by international law is always to be keenly deplored. Nevertheless, the propriety of declining to admit the violation of a treaty without the most careful investigation, and until after thorough judicial inquiry, cannot be questioned.

On the assumption, however, that there has been a violation of the treaty of 1894, it is worth while to consider our national duty to Japan. It has been observed by some that if California cannot, according to the true interpretation of the treaty, segregate Japanese students, the compact is not binding upon the United States or any part thereof, because the federal government lacks the power to make such an agreement with any foreign state. This argument attempts to limit the treaty-making power of the President and Senate. It questions the scope of the authority of the national agents in dealing with international affairs.

The constitutional limitation of the treaty-making power has long been a matter of conjecture. The fact that such a limitation exists has been recognized by our Secretaries of State as well as by the courts. In 1881, Mr. Blaine, when Secretary of State wrote to the Chinese Minister at Washington that a treaty:

"must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation."[1]

In 1886, Secretary Bayard said:

"Were the question whether a treaty provision which gives to aliens rights to real estate in the states to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the Federal government, and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other contracting

[1] For. Rel. U. S. 1881, p. 337.

powers, it may be municipally inoperative because it deals with matters in the states as to which the Federal government has no power to deal. That a treaty, however, can give to aliens such rights has been repeatedly affirmed by the Supreme Court of the United States." [1]

In the decisions of the Supreme Court of the United States relating to the supremacy of a treaty of the United States over the statutes of a particular state there has been constant recognition of the vastness of the scope of the treaty-making power.[2] In the case of Geofroy *v.* Riggs,[3] the court through Mr. Justice Field said:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

While the constitutional limitation has been frequently admitted, it is of great practical significance that in no case has the Supreme Court ever denied the validity of a treaty. Adverting to this fact Mr. Charles Henry Butler says:

"The Supreme Court possesses the greatest judicial powers that have ever been vested in any court of any nation. It is not only fully conscious of the great powers which it possesses and of its right to use them, but it is extremely jealous, as it should be, of its rights and powers. One of the few declarations that this court ever made in derogation of its own supreme judicial power was that if the Supreme Court possesses the power to declare a treaty void, it will never exercise it but in a very clear case indeed. That question has never been decided, because such a 'clear case' never has been presented to the court as would justify the exercise of the power, if it does exist."

And further,

"The question is not likely to arise, as, in the natural course of events, it is hardly possible, for two reasons, that any treaty will be made which the Supreme Court would be justified in declaring void: first, because the mere possession of power does not necessarily imply its misuse, and the executive department of this government, as a general rule, acts in accordance with American policy and American principles; secondly, because the governmental checks upon the exercise of the power, and upon the carrying out of treaty stipulations, practically prevent such misuse." [1]

Lack of space forbids discussion of the broad question as to what may be the bounds of the treaty-making power. To what extent, if any, the federal government may by treaty lawfully compel affirmative action by a particular State is not here sought to be determined. It is merely submitted, that in view of the experience of our country it appears to be unlikely that our federal courts would conclude that it was beyond the scope of the powers of the President and the Senate to contract with Japan that its subjects resident in the United States might attend the same public schools as were open to our native citizens, or to aliens of any other states.

On the supposition that the treaty has been violated by the California authorities, inquiry is made as to the responsibility of

[1] 160 MS. Dom. Let. 441, cited in Moore's Dig. Int. Law, § 738.

See also works of John C. Calhoun, edited by R. K. Cralle, N. Y., 1888, Vol. I, p. 252, cited in C. H. Butler's Treaty-Making Power, § 481.

[2] Ware *v.* Hylton, 3 Dall. 199; Chirac *v.* Chirac, 2 Wheat. 259; Hauenstein *v.* Lynham, 100 U. S. 483.

[3] 133 U. S. 258 at 267.

[1] C. H. Butler's Treaty-Making Power of the United States, §§ 460, 461.

the United States to Japan for the acts of a state. It is a fundamental principle of the law of nations that an ultimate responsibility can be found, and must be found, in whatever land society exists, for all wrongs committed against a foreign nation or its subjects. The lodgment of that responsibility is necessarily said to exist in the government which controls the place in question, and which has charge of its foreign relations.

The control of the foreign relations of a state is essential to its very existence, and one of the conditions upon which its recognition as a member of the family of nations depends. Civilized states are unwilling to deal with communities, however perfect their local government may be, which do not clearly possess the right to enter into diplomatic relations. When the United States had the right and capacity to become a state, and, therefore, claimed recognition as such by the powers of Europe, its entrance into the family of nations was on the implied assumption that it was, from an international point of view, a political entity, having the power to deal with foreign affairs, and possessing control at home.

If it be true then that the United States government alone can deal with foreign states, and enter into treaties with them, its responsibility for treaty infractions throughout its territory is on the theory that it is in supreme control of whatever relates to the outside world. In the contemplation of foreign governments the official of any state of our Republic, in so far as his acts relate to foreign affairs, is the official of the nation, because he is supposedly subject to its control whenever he deals with any international matter. In his message of December 9, 1891, President Harrison said:

"It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights." [1]

In a word, then, the right of a state to control its foreign relations is based on the power to control them, and the power to control implies a duty to take whatever steps may be necessary to actually control. Hence, a state cannot escape liability to a foreign government, arising, for example, from the act of a municipal authority, on the ground that the state has not exercised its power by legislation or otherwise to check or prevent the alleged wrong. In his recent annual message, President Roosevelt recognizes clearly the power lodged in the federal government to control whatever may relate to our treaty obligations, and the duty resulting from such a possession. Because of the existence of this admitted duty, he urges Congressional action to establish the provisions necessary to that end. He says:

"One of the great embarrassments attending the performance of our international obligations is the fact that the statutes of the United States are entirely inadequate. They fail to give to the national government sufficiently ample power, through United States courts and by the use of the army and navy, to protect aliens in the rights secured to them under solemn treaties which are the law of the land. I therefore earnestly recommend that the criminal and civil statutes of the United States be so amended and added to as to enable the President,

[1] Westlake's Int. Law, Part 1, Peace, p. 22.

[1] For. Rel. U. S., 1891, vi.

acting for the United States government, which is responsible in our international relations, to enforce the rights of aliens under treaties.[1]"

On July 26, 1875, Mr. Robert Bunch, who was Minister Resident of Great Britain to Columbia, rendered an award as umpire in the arbitration of the claim of the United States against Columbia for damages arising from the occupation in the state of Panama, of the American steamer *Montijo*. In reply to the contention that the government of Columbia was not responsible for an act by the constituent state of Panama, he said:

"It cannot be denied that the treaties under which the residence of foreigners in Columbia is authorized, and their rights during such residence defined and assured, are made with the general government, and not with the separate States of which the Union is composed. The same practice obtains in the United States, in Switzerland, and in all countries in which the federal system is adopted. In the event, then, of the violation of a treaty stipulation, it is evident that a recourse must be had to the entity with which the international engagements were made. There is no one else to whom application can be directed. For treaty purposes the separate states are non-existent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government. . . . If this rule, which the undersigned believes to be beyond dispute, be correctly laid down, it follows that in every case of international wrong the general government of this republic has a very close connection with the proceedings of the separate States of the Union. As it, and it alone, is responsible to foreign nations, it is bound to show in every case that it has done its best to obtain satisfaction from the aggressor."[2]

In cases of mob violence where foreign governments have sought reparation from our government for injuries to the persons and property of their subjects in the United States, the precise question as to the liability of the nation for the action or lack of action by state authorities, has been somewhat confused. Our government has constantly denied national liability, although from reasons of humanity or beneficence it has made generous compensation to indemnify the sufferers or their representatives. Denial of liability has been in the nature of a demurrer on the facts shown. It is not the purpose of the writer to discuss what may be the duty of a state according to international law, with respect to acts of mob violence committed against the persons and property of resident aliens. It is submitted, however, that neither the existence of a duty, nor the extent of the scope of a duty, which one government may owe to another, whether arising from a treaty, or from the general principles of international law, depends upon the extent of control it has seen fit to exercise over any of the agencies of government employed in its territory. If our government in sincerity wishes to do exact justice in its relations with foreign countries; if it desires their esteem and regard, it must be compelled to fling aside as untenable in law, and as unworthy of an enlightened nation, the slightest pretense that lack of necessary legislation or of proper machinery of government is a defense for not fulfilling the functions of government.

Again, assuming that there may have been a violation of the treaty of 1894, as well as that the United States is responsible for the acts of the authorities of California of such a kind, the means which the United States might find it necessary to employ to insure in future the observance of the treaty is not in theory of international importance. That is entirely a local affair. Practically, however, Japan might keenly regret to find our government put to vast expense, or forced to adopt extraordinary means in order to give to the subjects of the

[1] President Roosevelt, annual message, Dec. 4, 1906.

[2] *The Montijo*, Moore's International Arbitrations of U. S., pp. 1439, 1440.

Mikado full enjoyment of school privileges identical with those shared by pupils of other races. By reason of its traditional regard for our country, Japan might have little desire to create serious difficulties for the United States in order to secure what might prove to be merely a technical, rather than a substantially beneficial observance of the compact. More cogent still might be the appreciation by Japan of the unwisdom of insisting on the enjoyment by its subjects in California of rights the very exercise of which might arouse deep popular prejudice and open hostility towards the Japanese throughout our Pacific coast. Once assured, however, that its claim was recognized by our federal courts as a proper interpretation of the treaty of 1894, and that the rule of segregation was unlawful, Japan might consent to enter into a new treaty and forego the exercise of the particular educational right. It is unprofitable to speculate as to what might be the policy of the Mikado's Empire. Certain it is, however, that the Japanese government would be entitled to insist as a matter of justice, that for the sacrifice of rights acquired by the present treaty there should be substituted some other privilege of equal value, or that there should be surrendered by the United States an equivalent benefit. Our government could not expect Japan to give up something of value for nothing. Without attempting to measure by any system of nice balances the value of what our country might wish Japan to abandon, it must be apparent to anyone who examines carefully the treaty of 1894, that vast and important privileges are therein provided for the citizens and subjects of the high contracting parties. It is needless to consider for which nation they may afford the greater benefit. They do, however, open the way for close social and commercial intercourse befitting the relations of two civilized powers bordering on the same seas. The question, therefore, suggests itself whether a new treaty between the United States and Japan mutually restricting to any substantial degree the privileges afforded by the convention of 1894 might not, in so far as it checked the commercial and social activities of the two countries, retard proportionately their good relations in a political sense. For what price the United States, already an Asiatic power, with yearnings for an increasing Oriental trade, ought to forfeit, or even weaken the warm friendship of Japan is an inquiry for the consideration of the diplomat rather than of the lawyer.

In conclusion it may be said:

First: the contention of Japan as to the meaning of the treaty and alleging violation thereof by the authorities of San Francisco, is one peculiarly adapted for the consideration of a judicial tribunal. An interpretation by the Supreme Court of the United States not only would be impartial and just on the merits of the question, but also might meet with the acquiescence of Japan.

Secondly: it is extremely improbable that the United States courts would regard the treaty as invalid even in part; nor would the question as to the validity of the treaty be regarded as related to that concerning the interpretation of the articles which are supposed to sustain the Japanese contention.

Thirdly: if the treaty should be found to be violated, the liability of the United States would be manifest, irrespective of the fact that the acts of infringement were committed by the authorities of a state.

Fourthly: if the treaty should be found to be violated, Japan would technically have a right to insist upon the enjoyment of the privileges denied, irrespective of the difficulty which such enjoyment might cause the United States. If Japan were called upon to forego existing rights in the negotiation of a new treaty, that country could rightfully insist either upon the sacrifice by the United States of rights of like value, or upon the receipt from the United States of compensating benefits.

Finally: the chief practical inquiry is one

of interpretation. That is made difficult by the absence from the treaty of any reference to the education of the citizens or subjects of the two nations. The right to enjoy public educational advantages may be related to the right of residence, or it may have been so regarded by the authorities of California. In any event, the treatment of Japanese pupils differs from that accorded subjects of other nationalities. On the other hand, the scope of the reserved right to enact laws for police and public security needs careful consideration. Whatever be the true interpretation of the compact of 1894, it is confidently believed that both throughout the United States and Japan the conviction will be deepened that a treaty is the supreme law of this land.

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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, and anecdotes.

THE REPORT OF THE ATTORNEY-GENERAL.

THE publication of the advance sheets of the report of the Attorney-General of the United States for the year 1906, calls attention to two matters in particular of interest to the profession.

Mr. Moody renews his recommendation of a provision granting the United States the right to a review upon questions of law in criminal cases. Within the last year there have been several instances showing the great public interest in such a law. The blow which wounded most was the decision of Judge Humphrey of Chicago, under an indictment against the beef packers which has been given such notoriety, but other enactments of Congress are called to attention, which have been rendered nugatory by the adverse decision of inferior tribunals. There seems little reason for opposition to this recommendation, and it is hoped that by public discussion the attention of Congress will be forcibly directed to this amendment of the law. Indeed, the most recent reports indicate the likelihood of some legislation on this subject at the present session.

The most striking feature of the report, however, is the publication of the results of the litigation instituted by the United States under the Sherman Anti-Trust Law and Interstate Commerce Law. The public has realized that under the present administration much more energy has been shown in these prosecutions, but the exact extent of its accomplishments and the importance of some of the points determined had not been fully appreciated. From the date of the enactment of the Sherman Act Law to the beginning of President Roosevelt's administration in 1901, sixteen proceedings were begun and have been concluded. Five of them were indictments in all of which the government failed, and eleven were petitions in equity in which the government prevailed in eight and failed in three. Under the present administration twenty-three proceedings have been begun, seven of which have been concluded and sixteen are pending. Ten of these were indictments, and thirteen petitions in equity. In the seven which have been concluded the government had prevailed. It is to be noted, however, that some of the others have been practically abandoned.

Prosecutions under the Interstate Commerce Act have also been exceedingly vigorous. Seventy-seven indictments have been returned, of which fifty-three are pending and two have been disposed of, with the result of eighteen convictions, three discontinuances, two verdicts of not guilty, and one demurrer to indictment sustained. Upon these indictments, thirteen corporations and seventeen individuals have been found guilty. The total amount of fines imposed upon these indictments has been $416,125. Since publication of the report the largest single fine namely, $168,000, has been imposed upon and paid by the American Sugar Refining Company and its subsidiary companies, making a total of over $600,000 imposed in one year.

LABOR INJUNCTIONS.

THE insistence of labor unions on reform in the issue of injunctions, though open to criticism in many respects, has forced upon the public attention an apparent abuse of this equitable process and an extraordinarily artificial situation which has resulted therefrom. In a recent article in the *Times Magazine* for December, on the effects of labor injunctions, it is stated that in Chicago where this litigation has been most conspicuous and extensive,

attorneys have printed blanks for bills for injunction in labor disputes which are granted by the court as a formal adjunct to every strike. The statistics as to the number of these injunctions issued in the last few years is certainly startling, but the most striking statement of the author is that the labor officials have ceased to regard these injunctions as worthy of their attention. It is said that they do not attempt to oppose the application or give any heed to the terms of the injunction since experience has taught them that in practice they are not strictly enforced, and in very few instances, it is said, the attorneys for the plaintiffs succeed in punishing violaters for contempt. This is a new phase of the argument against the indiscriminate use of the exceptional process of equity, for if familiarity is to breed contempt, which the dictates of policy allows to go unpunished, there is a new danger confronting our courts of justice.

JUDGE BREWER ON MUNICIPAL BONDS.

ANOTHER blow at the legal trickster, and that from a high authority, came in the recent address of Justice David J. Brewer of the United States Supreme Court at the meeting at the People's Forum at New Rochelle, New York, in which he called attention to the enormous issues of municipal bonds being put into circulation and the consequent increase in the tendency to contest the validity of these issues by every possible device. He is reported to have said "nearly all the litigation in respect to municipal bonds has ceased to be conducted along the higher levels of honorable and fair dealings but has sunk to the lower levels of smaller technicalities and trivial omissions. On the one hand stands Shylock waiting for his pound of flesh, and on the other hand the legal trickster, who strives to make the omission to cross a 't' or dot an 'i' an excuse for repudiating what was fairly issued and honestly earned. It is not too much to say that the reckless issue of bonds has not only burned the future, induced extravagance in the present, but has also lowered the general moral tone." Any lawyer who has engaged in the lucrative but somewhat wearisome occupation of passing upon the validity of the municipal bonds and has become familiar with the extraordinarily technical problems which have been litigated will appreciate the force of Judge Brewer's contention.

PRACTICE REFORM.

FEW of our readers outside the state of Illinois will realize that its legal practice is nearer the pure practice of the old English common law than any other jurisdiction, not excepting England itself and its colonies. The conservatism or indifference which has maintained this ancient system of pleading and practice is, however, being awakened by the report of a commission appointed to suggest reforms in practice and by the submission of a special jury act by the Chicago Bar Association to the coming session of the legislature. The absurdly extended contest over the empanelling of jurors in some hotly contested criminal cases in Chicago in the last few years has emphasized the necessity for the latter reform. Other states which are considering the same problem will be interested in the details of this act which it is impossible to discuss at length here. The *National Corporation Reporter* says, however, "It doubtless will secure a much more intelligent class of jurors, and, in the hands of a judge who has a wholesome contempt for the jury system and who will allow special juries with great liberality, the law may lead to excellent results. It does not remedy and does not attempt to remedy the most serious evil of the jury system — the evasion of service by those most competent to serve, on one pretext or another. This can be met only by a radical reform which would remove the serious hardships necessarily incident to the system as it now exists, the mere enumeration of which would tax the space at our disposal." A suggestion, however, that it will be better to impose a charge or fine upon those claiming exemption and to increase the fees paid those who serve seems unlikely to be effective since it would be impossible to offer adequate financial inducement for services, and the very ones who are the most desired on the panel would find it easiest to escape.

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

The recent legal magazines keep up to their usual level of excellence in a wide range of articles. Among the papers of general interest to all concerned with the law, James H. Tufts' address on the relation of psychology to our conception of justice is one of the most noteworthy. His thesis that we are treating men with more regard for their real personality and less according to abstract rules gets interesting confirmation in Herbert E. Boyle's article on "Extenuating Circumstances in French Law," and A. M. Hamilton's paper on the probation system. General readers will also be interested in C. A. Hereschoff Bartlett's views on "Dissenting Opinions," although few probably will be inclined to go to such length in condemnation as he does.

ADMINISTRATIVE LAW. In "Executive Judgments and Executive Legislation," *Harvard Law Review* (V. xx, p. 116), Edmund M. Parker examines some of the judicial answers to the questions, How far are the decisions of executive officers conclusive? and, To what extent and in what cases are such decisions reviewable by the courts? He criticizes many decisions of the United States and Massachusetts Supreme Courts as having given unsatisfactory and confusing answers on these matters, largely owing "to improvident attempts to formulate in the cases actually before them a rule or rules which shall not only dispose of the case at Bar in a satisfactory manner, but also serve as a guide for the disposal of future cases." Several examples are given of the result of this tendency.

ADMIRALTY. Under the title "Limitation of Liability of Vessel Owners," in the December *Yale Law Journal* (V. xvi, p. 84), James D. Dewell, Jr., gives really a criticism of the teaching of Admiralty in the Law Schools. He considers it strange that owners permit their cases growing out of accidents on vessels to be tried in common law courts before juries, where the liability is unlimited, when under the Act of Congress of 1851 a petition to limit liability to the value of the vessel can be filed in the United States District Court and in almost every case that result be secured.

"The only way I can account for it is that the law of Admiralty has been but meagerly taught in the universities and consequently lawyers, no matter how great their ability to try cases, have, because of this lack of training, not selected the proper forum and in many instances have consequently got their clients into expensive and prolonged litigation."

Interesting examples of the advantages thus secured are given. Mr. Dewell concludes his article thus:

"It is to be regretted that just because the law of Admiralty does not seem to open a field for money-making to the average student, the universities should deny the students the benefit of the broadening culture derived from the study of this branch of the law. It is strange, too, that when the universities do add this branch of the law to their curriculum, they generally select someone to teach it who has never practiced it. There is no part of jurisprudence, if properly presented to a class, that would create so much interest and enthusiasm and would consequently have such a tendency to help students in all other branches of the law, as the study of Admiralty. It would take the students to every shore, get them interested in something beyond their state border line, and make them feel that they were becoming a part of this law of nations which has helped to civilize the sea commerce of the world and has had much to do with the advancement and enlightenment of the peoples of the earth."

AGENCY (Delegation of Authority). Prof. Floyd R. Mechem writes in the December *Michigan Law Review* (V. v, p. 94) on "Dele-

gation of Authority by an Agent." The general rule forbidding such delegation and the cases in which it is allowable are discussed carefully with copious citations, but the minute discussion of the mutual rights and obligations of principal, agent and subagent is reserved for further consideration.

AGENCY (Forgery by Agent of Charitable Corporation). "The Rule in the Clarkson Home Cases," by Frederick Dwight, in the December *Columbia Law Review* (V. vi, p. 556) is a criticism of a decision by the New York Court of Appeals. A charitable institution had some registered railroad bonds. The treasurer forged the necessary votes and powers of attorney to secure a transfer of the bonds and absconded with the proceeds. Both charitable institution and the railroad company were absolutely free from intentional wrong-doing or even negligence, but the court required the railroad to stand the loss. The court regarded the law as elementary. Mr. Dwight in an interesting paper argues for a contrary result on both practical and legal grounds.

AGENCY. "The Vice Principal Doctrine in Illinois," by George Haven Miller, November *Illinois Law Review* (V. i, p. 242).

BANKRUPTCY. "The Rights of the Trustee under section 67A of the National Bankruptcy Act," by Garrard Glenn. *Columbia Law Review* (V. vi, p. 562).

BANKRUPTCY. "The Provincial Insolvency Bill," by Chunilal M. Gaudlie, *Bombay Law Reporter* (V. viii, p. 337).

BILLS AND NOTES. "A Consideration of the Uniform Negotiable Instrument Law," by John D. Milliken, *American Lawyer* (V. xiv, p. 346).

BIOGRAPHY. "Alexander Hamilton," by Emory Speer. *Yale Law Journal* (V. xvi, p. 94).

BIOGRAPHY (Lindsey). "Ben B. Lindsey: The Just Judge," by Lincoln Steffens, December *McClures* (V. xxviii, p. 162). A continuation of the account of the methods of the judge of Denver's Juvenile Court noticed in preceding numbers.

BIOGRAPHY (Jeffreys). "Jeffreys of the Bloody Assizes," by Charles Whibley, a brief well written sketch, December *Harper's* (V. cxiv, p. 143).

BIOGRAPHY. "Massachusetts Bench and Bar," by Stephen O. Sherman and Weston F. Hutchins, December *New England* (V. xxxv, p. 449). A continuation of series of reminiscences and anecdotes of Massachusetts lawyers previously noted.

CARRIERS. "The Law of Carriers," by Dewitt C. Moore, Matthew Bender & Co., Albany, 1906. Price, $6.30.

A glance at the title page of Mr. Moore's work on Carriers will show at once the ambitious character of the undertaking. The author has endeavored to cover in a single volume of less than a thousand pages "the principles and rules applicable to carriers of goods, passengers, live-stock, common carriers, connecting carriers, and interstate transportation, and the methods and procedure for their enforcement."

Mr. Moore has fallen into the prevailing habit of American law-book writers of making a text which is a compilation of the headnotes of cases, — a kind of digest put in narrative form. He has not made a particularly effective analysis of the subject; and he has not made any distinctly original contribution to the literature of the law. One cannot turn to his pages for a theory; one can find what has been decided on particular points in particular cases. About nine thousand cases are cited in this work.

The author's chief attention seems to have been given to the carrier in his capacity of bailee. The duties and obligations arising out of public calling have been but slightly noticed; yet that is a phase of the subject that is of growing importance, and the principles underlying public calling will explain many of the distinctive features of carrier law.

A single chapter only is given to interstate transportation; and the cases cited therein do not seem to constitute an exhaustive collection. A suggestion is thrown out that the Railroad Rate Act of 1906 may be unconstitutional; but the great subject of rate regulation is not discussed at all. The text of the act is printed, followed by an elaborate index of the act

The author has furnished a book which will be useful to the practitioner as an aid to finding cases in point. The large number of cases collected, and a good and really serviceable index assure this. A lack of plan, however, in the arrangement of citations in the foot-notes will hamper somewhat those who use the book. It is, nevertheless, only fair to say that the work is as good as the average American law book. S. H. E. F.

CARRIERS. "Laws Relating to Bills of Lading," by T. B. Paton, *American Lawyer* (V. xiv, p. 360).

CHATTEL MORTGAGES. "Evidence Admissible to Prove a Sale a Mortgage," by J. A. Soldanha, *Bombay Law Reporter* (V. viii, p. 320).

CHARITABLE CORPORATION (see Agency).

CONSTITUTIONAL LAW. Edwin Maxey, in the December *Yale Law Journal* (V. xvi, p. 90) treats the "Exclusion of Japanese Children from the Public Schools of San Francisco." He declares that requiring them to attend the Oriental Schools is a discrimination against Japanese subjects, violating the treaty between Japan and this country, and that the California statute under which the Board of Education acted is unconstitutional as being in conflict with the treaty.

"If, then, the state court does its duty, a solution for the difficulty can readily be found.

"But suppose that the state court allows itself to be blinded by the race prejudice which influenced the legislature to pass the statute, the litigation can be prolonged to such a degree that the Japanese may readily conclude that we are not acting in good faith, for it is hardly fair to expect that the Japanese people will understand that our federal government which is entrusted with the making of treaties cannot also secure obedience to their provisions upon the part of its subordinate divisions."

CONSTITUTIONAL LAW (Railroad Rate Legislation). "The Power of Congress to Prescribe Railroad Rates," by Frank W. Hackett, December *Harvard Law Review* (V. xx, p. 127).

CONSTITUTIONAL LAW. "Freedom of the Executive in Exercising Governmental Functions from Control of the Judiciary," by John Campbell, *American Lawyer* (V. xiv, p. 503).

CONSTITUTIONAL LAW. "Life, Liberty and Property," by O. H. Myrick, *Central Law Journal* (V. lxiii, p. 373).

COPYRIGHT. "Proposed Copyright Legislation," by Hugh K. Wagner, *Law Notes* (V. x, p. 165).

CRIMINAL LAW (French). Herbert E. Boyle has in the October *Juridical Review* (V. xviii, p. 259) Part I of an article on "Extenuating Circumstances in French Law."

"French Criminal Law makes a distinction between 'aggravating circumstances' and 'extenuating circumstances.' The former consist of such facts as make a felony or misdemeanor more serious in its nature, and which consequently tend to increase the sentence — for instance, if a crime be committed in the night time, or by more persons than one, or by breaking into premises, using skeleton keys, etc., or if the offenders carried weapons or threatened to use them. In these, and other similar cases, the particular circumstances tend to make the punishment heavier (*Penal Code*, 361).

"The effect of 'extenuating circumstances,' on the other hand, is to modify the *punishment*, without modifying the *nature of the offense*, for it is as the result of a *judicial* appreciation, and not a *legal* one, that a crime is merely punished with a 'correctional' or 'police' penalty; moreover, Article 1 of the Penal Code classifies offenses according to the penalties laid down by the law, and not according to those which the judge may inflict (*Garraud*, Traité du Droit Criminel).

"If the arguments at the trial disclose one or more 'aggravating circumstances' not stated in the Indictment, the President of the court must put this question to the jury: — 'Did the accused commit the crime under such and such circumstances?' Should both 'aggravating' and 'extenuating' circumstances arise in the same case, the former must first be considered, and then the latter, in meting out the punishment.

"Under the system of extenuating circum-

stances, judges and juries are invested with a discretionary power which enables them, by their own individual appreciation, to modify whatever of harshness there may be in the law.

" Extenuating circumstances, therefore, are really in the nature of *judicial excuses* which the legislature has not specifically defined, and the appreciation of which it has left to the discretion of the judge and jury. They differ in many respects from *legal excuses*, which are collateral facts previously ascertained by the law.

" It is evident that extenuating circumstances cannot be foreseen by the legislature, but are facts which the judge has a right (and, indeed, under the Code it is his duty to do so) of ascertaining in all cases; and when once recognized they should naturally have the effect of diminishing the penalty attached by law to the offense. It is evident that a man who steals the property of another merely to gratify his own desire is far more culpable, morally, than one who steals to satisfy the cravings of himself and his starving family.

" Shortly stated, the effect of the law is: —

" (1) The creation of a maximum and minimum of punishment, between which the judge has the power of exercising his discretion.

" (2) The institution of the system of extenuating circumstances, enabling the judge to decrease the penalty below the minimum fixed by the law."

The history and mode of operation of this system are given in this first instalment.

CRIMINAL LAW (Probation System). The Massachusetts system of probation for minor offenders, now adopted in many other states, has attracted the attention of practical men in Great Britain, says A. M. Hamilton in an article in the *Juridical Review* (V. xviii, p. 221) entitled " Probationary Guardianship of Offenders." There is in fact a Probation of First Offenders Act, but it is lacking in the feature of guardianship, provisions looking to that end having been struck out by Parliament. Two experiments in the American system have been made in Scotland in recent years, in Dundee and Glasgow, with results that commend the system, but legal scruples as to competency have, however, prevented these attempts from being more than partial. Mr. Hamilton fully approves the system but finds that legislative aid will be necessary to extend it beyond very narrow limits in Great Britain.

DIPLOMACY. " Newfoundland and her Fishing Rights," by A. B. Morine, *Canada Law Journal* (V. xlii, p. 737).

DIVORCE. " The Divorce Problem and Recent Decisions of the U. S. Supreme Court," by D. D. Murphy, *American Lawyer* (V. xiv, p. 499).

DIVORCE. In the November *Illinois Law Review* (V. i, p. 219). Henry Schofield publishes an analysis of " The Doctrine of Haddock *v.* Haddock." The author states the rule of the case to be as follows:

" Under the law between the States, established by the Constitution of the United States, the mere domicil within a state, at the time of the institution of divorce proceedings therein, of only one of the parties to a marriage, the other party being, and having been continuously, domiciled in the state of the matrimonial domicil, is not enough to give that state power, or jurisdiction, to grant an interstate dissolution of that marriage."

He states the syllogism of the minority to be as follows: —

" Major premise: If a judicial decree is conclusive in the state where it was pronounced, it is equally conclusive in every other state.

" Minor premise: This Connecticut judicial divorce decree is conclusive in the state of Connecticut.

" Conclusion: This Connecticut judicial divorce decree is conclusive in every other state."

The author argues that the full faith and credit section of the Constitution did not change the rules of international law regulating the jurisdiction of a court of one state to pronounce a judgment entitled to enforcement in the courts of another state. If it be true, therefore, that the Connecticut court did not have jurisdiction to grant an interstate divorce it follows that it did not have jurisdiction to grant a state divorce. The author submits that it could not have been within the contemplation of the Federal Constitution that a husband and wife could be so domiciled in different states that no state in the Union can have power to so deal with

their controversy that each state must give full credit to the sentence pronounced.

The author approves of the decision of the majority as the beginning of the end of a scandalous condition of divorce law and procedure and thinks that in view of the opposition of their colleagues the majority performed a grand work.

EGYPTIAN LAW. "The Egyptian Capitulations and Their Reform," II, in the October *Juridical Review* (V. xviii, p. 235), concludes a discussion of the legal position of foreigners in Egypt and needed changes in the agreements relating thereto.

EQUITY JURISDICTION. A "Manual on the Principles of Equity," by John Indermaur. Sixth edition by Charles Thwaites, Furnival Press, London, 1906. Although this book relates chiefly to English practice it comprises a summary of equity jurisdiction which, within its limited scope, may be of value to students in this country. Our practitioners, however, probably prefer a text book citing decisions in the United States.

EQUITY JURISDICTION. "Latent Equities," by George A. Lee, *Albany Law Journal* (V. lxviii, p. 290).

FRAUDULENT CONVEYANCES. "Improbable Stories of Acquisition or Hoarding of Money," *Law Notes* (V. x, p. 167).

HISTORY. "Colonial Courts of Somerset County," by Vice-Chancellor Bergen of New Jersey, December *New Jersey Law Journal* (V. xxix, p. 358).

HISTORY (Judge and Jury). In the November *Law Magazine and Review* (V. xxxii, p. 72) G. Glover Alexander concludes his historical article, "The Province of the Judge and of the Jury."

INFANCY. "The Statutory Prohibition of the Sale of Infants' Real Estate Contrary to the Provisions of Instruments giving them Title," by Samuel Huntington, *Albany Law Journal* (V. lxviii, p. 305).

INSURANCE. "Liability of Insurance Company when the Assured Makes True Statements and the Insurance Physician or Examining Physician Inserts False Reports," by Charles Mendelhall, *Central Law Journal* (V. lxiii, p. 450).

INTERNATIONAL LAW. The October *Juridical Review* (V. xviii, p. 273) has a learned article on "British Nationality and Naturalization," by G. Addison Smith, who analyzes the common and statute law in regard to British citizenship.

INTERNATIONAL LAW (The Berlin Conference). Under the title "The International Law Association at Berlin," T. Baty gives an interesting summary of the doings of the recent conference in that city in the November *Law Magazine and Review* (V. xxxii, p. 87).

INTERNATIONAL LAW (Private Property at Sea). At the Berlin Conference, in October, of the International Law Association, Mr. Justice W. R. Kennedy of the English Bench read an interesting paper on "The Exemption of Private Property at Sea from Capture in Time of War," which is printed in the November *Law Magazine and Review* (V. xxxii, p. 28). The paper is not a controversial one, but sets forth clearly and impartially what the author thinks the most important points to be considered before the change can be accepted, with a brief statement of the history of the question and the principles which he thinks must govern its solution. The paper closes with a few suggestions in regard to future attempts to reach some agreement on the matter.

"The first of these is that with the consideration by the nations of this question of the immunity of enemy's property at sea from capture in war, should be linked the consideration of the subject of contraband of war. It has been truly said that, as long as it remains in its present chaotic condition, we must have constant bickering between belligerents and neutrals, and that if a great maritime war broke out powerful commercial states might find themselves drawn into hostilities almost against their will. The dangerous, and, to neutrals, very troublesome uncertainty that exists at present in regard to the treatment of articles which are *ancipitis* (or, *promiscui*) *usus*, ought to be remedied. It can be satisfactorily remedied only by an in-

ternational agreement, classifying contraband definitely and completely. . . .

"The relevancy of the question of contraband to the subject of our enquiry is this. It appears to me that, if the arbitrary decision of any belligerent (as is at present the case) may include every important article of commerce, such as provisions, trade materials, fuel, etc., in the list of contraband, little can be gained by a general exemption of private property from capture at sea. It appears to me also, that it conceivably might make a great difference to the view which some nations would be willing to adopt in regard to the proposed change, if it were definitely settled law that some, at any rate, of the principal articles of sea-borne commerce, and, especially, food for human consumption and the raw materials required by peaceful industries, could never lawfully be treated as contraband of war unless the captor could show that the particular cargo was destined for use for naval or military purposes of the enemy either in the region of actual operation or elsewhere.

"And, further, with the question of the exemption of enemy's private property from capture at sea, should there not be considered the property of a definite pronouncement that the bombardment by naval forces of defenceless and unfortified towns and places on the sea coast, or the threat of such bombardment in order to secure the levy of contributions or compliance with requisitions should be forbidden? Some jurists, I believe, hold that by the tacit consent of nations, such conduct has already come into the category of forbidden operations. I cannot see sufficient justification for the view. . . . It is highly desirable the matter should be finally concluded by common agreement. The settlement of this question as well as the classification of contraband might do something, at any rate, to influence favorably some of the maritime powers in their consideration of the immunity of private property at sea as a question of policy.

"Lastly, I venture to add that, although agreement as to a general immunity of private property of the enemy at sea may prove to be impossible, the collected representatives of the various members of the family of nations might be asked to consider whether some modification of the present system might not advantageously be adopted, in the form of a particular exemption in favor of the vessels of the great steamship lines which carry mails and passengers everywhere along established routes, and upon whose continued regularity of service the intercourse and intercommunication of large portions of the globe are absolutely dependent. Effective guarantees must, of course, be taken against abuse of such a peculiar freedom, but it ought not to be impossible to frame such guarantees. It cannot be doubted that the arrangement would confer a very great boon upon mankind."

JURISPRUDENCE. "The Power to Regulate Corporations and Commerce: A Discussion of the Existence, Basis, Nature and Scope of the Common Law of the United States," by Frank Hendrick. 8vo, pp. lxxii, 516, G. P. Putnam's Sons, New York, 1906.

The sub-title of this book reads: "A discussion of the existence, basis, nature and scope of the Common Law of the United States," yet though much space and apparently much painstaking effort have been devoted to the establishing of this thesis, viz: that there is a "Federal common law," the author has treated somewhat inadequately the leading case of Western Union Telegraph Company *v.* Call Publishing Co., 181 U. S. 92; and has cited it to support a proposition which a careful reading and analysis seems hardly to justify. Though he shows a considerable acquaintance with much of the case law dealing with questions of constitutional law and conflict of laws, and cites some two thousand cases, he seems to have been led away by his zeal to establish his thesis, and the cases cited as authority cannot always be relied upon to bear out the statement in the text.

The author shows much industry and learning, but it may be questioned if a great deal of the material is not extraneous and somewhat remote. It would seem that the power to regulate corporations and commerce could be discussed without giving the history of the Germanic *comitatus*, the Anglo-Saxon Witanagemot or the law reforms of Henry II.

The plan of development of the subject is not entirely clear, and logical development is

interfered with by the bringing in of remote matter. It would seem that the author, who has undoubtedly investigated his subject carefully, would have produced a more valuable book if he had confined himself more closely to the cases and the law, and had not gone so far afield into early English constitutional history and philosophical treatises on government.

JURISPRUDENCE. "Some Contributions of Psychology to the Conception of Justice," the presidential address of James H. Tufts at the annual meeting of the Western Philosophical Association, is printed in the December *Michigan Law Review* (V. v, p. 79). His thesis is that the law and society should be and are continually getting away from the idea of treating human beings as mere abstractions; that no man is properly dealt with by rule; that one gets justice only when his own peculiar makeup is considered. In Mr. Tufts' own words:

"The history of law has been a gradual introduction of a more psychological standpoint. That is, it has dealt more with the real man, less with a fictitious self analogous to the old metaphysical substances and essences; but there is still room for progress."

The attitude of the American people towards the problem of the just distribution of wealth is keenly set forth as follows:

"In this full sense of justice, I think no one can fail to see not merely that our system is not just, but that no distribution of property is likely to be just. We may remove some of the inequalities, we may require decent sanitation and honest food, we may heed 'the bitter cry of the children,' handicapped by premature toil and indecent surroundings, we may give to all the best of education, we may even, if we please, attempt to restore equality by taking over as a community the land, or the means of production; but even then I believe no system of distribution in property can be devised which will be true to all the complex life of its members — which will be fully just.

"Indeed, we may go on to say that the American people does not care very strongly that this is so. This may be due in some cases to a religious conviction that the social order with all its inequalities is divinely ordained; in others, to an optimistic blinking of the facts; but I believe that there is a more widely operative reason. The American prefers an economic order in which there are prizes and blanks, to an order in which every man will draw out in proportion to what he puts in. He prefers an exciting game to a sure but tame return of his investment. He may call for a 'square deal,' but we must remember that a 'square deal' in the great American game from which the metaphor is taken is not designed to make the game less one of chance. It is designed to give full scope to luck and nerve. A game in which every player was sure to win, but also sure to win just what he had put in, would be equitable, but it would not be a game. The American suspects that the measures advocated as giving juster distribution may somehow rob life of its excitement and its passion. Possibly he may even think that the very strain of the process develops some elements of character which he fears to lose. But whatever the motive, in the hope of better luck next time, or of a better start for his children, or in the very stress and struggle, he thinks little of the justice or injustice of it all."

JURISPRUDENCE. "The Judiciary System of the New State, as Suggested by the Judicial Systems of the States Lying East of the Mississippi River," by Ezra Brainerd, Jr., *American Lawyer* (V. xiv, p. 363).

JURISPRUDENCE. "Evolution of Law by Judicial Decision," by Robert G. Street, *American Lawyer* (V. xiv, p. 490).

JURISPRUDENCE (Philippines). "Some Legal Aspects of the Philippines," by James H. Blount, *American Lawyer* (V. xiv, p. 495).

JURY REFORM (England). T. R. Bridgwater in "Our Jury System Reformed," November *Law Magazine and Review* (V. xxxii, p. 66), makes some suggestions for changes in the English jury system.

JUVENILE COURTS. "Fair Play for Wayward Children," by Alice Katherine Fallows, December *Century* (V. lxxiii, p. 253). An account of juvenile court work in several cities.

JUVENILE COURTS (see Biography).

LEGISLATION. "Ordinances and Resolution Distinguished as Relate to Legislative and Ministerial Acts on the Part of the Council or Governing Legislative Body," by Eugene McQuillen, *Central Law Journal* (V. lxiii, p. 413).

LITERATURE. "Legends from Old Newgate," by George H. Hubbard, December *New England* (V. xxxv, p. 488). An entertaining account of the famous English prison.

LITERATURE. "Coroner's Quest Law," by Francis Watt, *Bombay Law Reporter* (V. viii, p. 317).

MARRIAGE. "Mixed Marriages," by Herman Cohen, *Bombay Law Reporter* (V. viii, p. 281).

MASTER AND SERVANT (see Torts).

MORTGAGES. "New York Mortgages and the Recording Acts," by Edgar Logan, *Columbia Law Review* (V. vi, p. 547).

MORTGAGES (see Chattel Mortgages).

PARTNERSHIP. "The Indian Law of Partnership," by Surendra Nath Ray, *Bombay Law Reporter* (V. viii, p. 304).

PRACTICE. "Trial Tactics," by Andrew J. Hirschl. T. H. Flood & Co., Chicago, 1906. $2.50 net. This is an interesting and suggestive commentary on practical work in preparing and trying litigated cases. It differs from Wellman's "Art of Cross-Examination" in that it covers all the work in connection with a case. It has also the merit of treating of subjects not easily found in legal text books, and will be of especial value to the student or young practitioner in presenting in brief compass what must usually be learned by long and painful experience. Though the author evidently has in mind Illinois practice, and some parts of the book for that reason may be confusing to students in other jurisdictions, most of the discussion is of general interest since it really concerns that hardest of all problems, the application of common sense to the technical requirements of successful trial practice.

PRACTICE. "Affidavits in Attachment," by Raymond D. Thurber, *Bench and Bar* (V. vii, p. 55).

PRACTICE. "Arguments of Counsel," by Morton J. Stevenson, *Central Law Journal* (V. lxiii, p. 398).

PROPERTY (see Mortgages).

PUBLIC POLICY (Constitutional Amendments). Defects in our Constitution and amendments required are the subject of "The Next Constitutional Convention of the United States," by Chief Justice Walter Clark of North Carolina, in the December *Yale Law Journal* (V. xvi, p. 65).

"The glaring defect in the Constitution was that it was not democratic. It gave, . . . the people — to the governed — the selection of only one-sixth of the government, to wit, one-half — by far the weaker half — of the Legislative Department. The other half, the Senate, was made elective at second hand by the State Legislatures, and the Senators were given not only longer terms, but greater power, for all presidential appointments, and treaties, were subjected to confirmation by the Senate.

"The President was intended to be elected at a still further remove from the people, by being chosen by electors, who, it was expected, would be selected by the State Legislatures. The President thus was to be selected at third hand, as it were. . . . The intention was that the electors should make independent choice, but public opinion forced the transfer of the choice of electors from the Legislatures to the ballot-box, and then made of them mere figure-heads, with no power but to voice the will of the people, who thus captured the Executive Department. That Department, with the House of Representatives, mark today the extent of the share of the people in this government.

"The Judiciary were placed a step still further removed from the popular choice. The Judges were to be selected at fourth hand by a President (intended to be selected at third hand) and subject to confirmation by a Senate chosen at second hand. And to make the Judiciary absolutely impervious to any consideration of the 'consent of the governed,' they are appointed for life.

"It will be seen at a glance that a Constitution so devised was intended not to express,

but to suppress, or at least disregard, the wishes and the consent of the governed. It was admirably adapted for what has come to pass — the absolute domination of the government by the 'business interests' which, controlling vast amounts of capital and intent on more, can secure the election of Senators by the small constituencies, the Legislatures which elect them, and can dictate the appointment of the Judges, and if they fail in that, the Senate, chosen under their auspices, can defeat the nomination."

It is high time, thinks Justice Clark, for a Constitutional Convention. The situation being as above described, "the sole remedy possible is by amendment of the Constitution to make it democratic, and place the selection of these preponderating bodies in the hands of the people.

"First, the election of Senators should be given to the people. Even then consolidated wealth will secure some of the Senators; but it would not be able, as now, at all times to count with absolute certainty upon a majority of the Senate as its creatures."

The system of electing the President should be to divide the electoral vote of each state according to the popular vote for each candidate, giving each his pro rata of the electoral vote on that basis, the odd elector being apportioned to the candidate having the largest fraction. . . . but the result would be that the choice of President would no longer be restricted to two or three states, as in our past history, and is likely to be always the case as long as the whole electoral vote of two or three large pivotal states must swing to one side or other and determine the result.

But the most necessary change is to diminish the overwhelming power of the Supreme Court. Its power of declaring laws unconstitutional he believes to be a usurpation, although he admits that their power, however illegally grasped originally, may have been too long acquiesced in to be now questioned. "If so, the only remedy which can be applied is to make the judges elective, and for a term of years, for no people can permit its will to be denied, and its destinies shaped, by men it did not choose and over whose conduct it has no control, by reason of its having no power to change them and select other agents at the close of a fixed term."

PUBLIC POLICY (Dissenting Opinions). C. A. Hereschoff Bartlett writes in the November *Law Magazine and Review* (V. xxxii, p. 54) a slashing article on "Dissenting Opinions." He has no good word to say for them; to him they but mean that the dissenting judge is obstinate.

"Certainty of the law is the life of the law, and where principles are so unsettled and disputed as to enable the highest courts to be almost equally divided, the tendency is to lessen the dignity and authority of judicial decision. Any system is wrong which permits the rendering of dissenting opinions and printing them in public reports of cases — in permitting anything more than the rendering of the judgment of the court as a court."

He holds in horror the frequency in American reports of the dissenting opinion and "the rarity with which dissenting opinions are found in England is one of the reassuring features of the greatness, stability, and learning of the English judiciary."

He almost wishes that the same drastic measures could be used to secure unanimity in courts that are sometimes used with juries.

"For instance, Stephen, in mentioning some curious old customs, tells us that in addition to being kept together until unanimously agreed, if the jury eat or drink at all, or have any eatables about them without the consent of the court, and before verdict, they are finable. Not only this, but it is laid down in the books that if jurors do not agree in their verdict before judges are about to leave town, although they may not be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. How refreshing it would be, in case of our learned judges in courts of final resort not agreeing on their final judgment, that they should not either have food or drink, but in addition should be coerced by being transported from town to town in a cart! Certainly such a spectacle, while it would not lend to the judicial dignity of the court, might be a successful and speedy means of putting an end to dissenting opinions."

PUBLIC POLICY (Injunctions). "Effects of Labor Injunctions," by Luke Grant, De-

cember *Times Magazine* (V. I, p. 68), see editorial page.

PUBLIC POLICY. "The Abuse of the Homestead Law," by H. J. Hughes, *American Lawyer* (V. xiv, p. 350).

PUBLIC POLICY. "Legal Experiments for Increasing the Population," by G. S. Holmestead, *Canadian Law Review* (V. v, p. 417).

PUBLIC POLICY. "Exigencies which Seem to Require the Calling of a Constitutional Convention in Missouri," by T. A. Sherwood, *Central Law Journal* (V. lxiii, p. 431).

PUBLIC POLICY (See Criminal Law and International Law).

RAILROADS. "The Law of Railroad Rate Regulation," with Special Reference to American Legislation, full discussion of Procedure and Approved Forms, by Joseph H. Beale, Jr., and Bruce Wyman, pp. lii, 1285. Wm. J. Nagle, Boston, 1906. $6.00.

One of the questions of greatest public interest during the past year has been the question of railroad rate regulation by the government of the United States. After much agitation and discussion, and considerable pressure and counter-pressure, the Railroad Rate Act of 1906, amending and extending the scope of the functions of the Interstate Commerce Commission under the Interstate Commerce Act of 1887, was passed. Unlike many questions exciting popular interest, this question of railroad rate regulation is peculiarly a legal question, and, as is natural today in this country, agitation of the question has resulted in the production of a vast amount of literature dealing with it.

It is particularly gratifying under these circumstances to find one book that is of value, and that adds something to the literature of the law. The authors very truly say that "A treatise which merely collected and discussed judicial decisions upon railroad rates would be a very imperfect work. The law of railroad rates is based upon the general principles of public service law and cannot be mastered without an adequate knowledge of that law. The first task of the authors, therefore, has been to give a sufficient though concise view of such portions of the primary obligations of those in public employment, and particularly of carriers, as bears essentially on the problem of rates." For this purpose the authors are unusually well fitted. Professor Beale has for many years, and Professor Wyman has more recently, devoted much time and attention to the study of the duties, obligations, liabilities, and privileges attendant on the participation by corporations in the profession of public service.

This topic is taken up in Book I, entitled "Fundamental Principles Governing Railroad Service," which covers some 290 pages. Chapter I, an "Historical Introduction," clearly and in an interesting manner brings out the fundamental distinctions between public callings and private callings, the early recognition of the distinctions, and the development of them in the course of time. Attention may also be called to Chapter IV, an interesting chapter on the "Public Profession of the Common Carrier."

The remainder of the volume is divided into two books: Book II dealing with "Regulation of Rates in Accordance with Common Law Principles;" and Book III with "Regulation of Railroad Rates by Legislation." The chief original contribution of the authors is contained in Book II, no full collection of cases or statement of the theory underlying regulation in accordance with common law principles ever having been attempted before. This covers more than five hundred pages of the volume, and is the major portion of the work.

In Book III, a first chapter is given to a brief history of statutory regulations in England and in the United States. In succeeding chapters the Interstate Commerce Act, with the amendments by the Act of 1906, is given in full, and elaborate annotations covering the decisions of the Interstate Commerce Commission and of the courts follow each section of the statute. At the same time, references are given to earlier chapters of the book in which the subject matter of the section has been discussed in its common law aspect. This annotation of the act should prove of considerable value.

Six chapters are given to a statement, with notes, of state statutes. In each of these chapters the state statutes are given only as they deal with a particular topic; extortion-

ate rates; personal discrimination; prohibition of undue discrimination; local discrimination; regulation by state railroad commissions; and provisions for court review.

In the second part of Book III, the constitutionality of statutory regulation is considered.

The chief fault to be found with the work is one which the authors frankly admit in their preface, it was prepared with some haste. It would serve no useful purpose, however, to point out small inaccuracies.

The book on the other hand shows what so few American law books show — careful original and logical analysis of the subject matter; and a consistent theory underlying the whole. It avoids in a large part what we frequently have occasion to find fault with in law books — the making of a text from a putting together of head notes.

The book should prove of use not only to those who may have occasion to practice before the Interstate Commerce Commission on rate cases, but also to those who have presented to them questions involving the principles of public service, and of the somewhat narrower law of carriers.

Some twenty-three hundred cases are cited, and a workable index has been furnished.

RAILROAD (see Jurisprudence and Carriers).

RECORDING ACTS (see Mortgages).

STATUTES. "Suggested Amendment to the Election Law," by C. B. Labalt, *Canada Law Journal* (V. xlii, p. 697).

STATUTES (England). "The West Riding Judgment," by G. A. Ring, Attorney General for the Isle of Man, in the November *Law Magazine and Review* (V. xxxii, p. 1), discusses a recent judgment of the Court of Appeal of much importance in questions arising out of the education acts.

STATUTES (England). Under the title "The Truck Acts," in the *Juridical Review* (V. xviii, p. 247), John H. Romanes surveys the existing English law of that subject as embodied in statute and decision.

TORTS. In the December *Harvard Law Review* (V. xx, p. 91), Francis H. Bohlen gives the second and final installment of his article on "Voluntary Assumption of Risk," this section treating solely the law of master and servant. After analyzing the English and American cases he concludes:

"Thus it has been seen that while in England the pressure of the servant's necessities has finally come to be regarded as destructive of his free will when placed in a position where he must either encounter some probable though not imminently threatening danger, or else give up his employment, the American cases stoutly deny it any such effect. It may well be that the different economic conditions of the two countries may account for this. In England work has become, especially during the development of the present position of English courts on this point, increasingly difficult to obtain. The loss to a workman of his job is a very real misfortune, the fear of losing it a very pressing species of compulsion. On the other hand, in America as yet there is normally no dearth of work for competent workmen. If one job is dangerous, another can probably be found. Add to this the known tendency of American workmen to take desperate chances touching their safety, and it may well be that in the vast majority of cases any real pressure arising from fear of loss of employment is practically non-existent; and the risk is encountered through mere thoughtless recklessness or disinclination to leave a position in other respects satisfactory. That which in England effectually coerces and controls the will may well have no such effect in America."

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.)

CARRIERS. (Protection of Passengers.) Mass. — In Ormandroyd *v.* Fitchburg & L. St. R. Company, 78 North Eastern, 739, the degree of care which must be exercised by a carrier in the protection of passengers from injury is considered

It appeared that on the Fourth of July, a patriotically inclined citizen had been discharging a cannon from four o'clock in the morning until about half past five in the afternoon, as often as it could be loaded, which operation required from five to fifteen minutes. That during the time of such celebration, defendant's cars had been passing the locality, and that the cannon was loaded with blank cartridges, and was in a yard quite a distance from the street, sending out when it was fired, "a jet of flame and volume of smoke as far as the sidewalk." During the afternoon, a passenger on a street car which was passing the lot where the cannon was stationed, was injured by being struck by some of the wadding of the cannon. It was held that the carrier was not liable, as it had no reason to anticipate any dangers to its passengers from such a source.

The opinion states, "Nor was it bound to stop its car and investigate for the purpose of seeing whether the cannon was properly loaded or pointed. The firing had been going on all day, and in the absence of any indication to the contrary, defendant had a right to assume that it was not a hostile demonstration against travelers on the highway, but a simple ebullition of patriotic emotion. . . . To require a street railway corporation to have a general oversight of the details of such exhibitions along the line of the highway on the anniversary of the Declaration of Independence, would be unreasonable. Such care would be inconsistent with the proper transaction of the business."

In conclusion the court states that the case widely differs from those where the carrier has reason to anticipate dangers from a crowd of rioters or other outside parties or causes.

INSURANCE. (Beneficiaries — Widow.) Miss. — In Grand Lodge, K. P. of North and South America and Europe, Asia and Africa *v.* Smith, 42 So., 89, it is held that where insured was coerced into a marriage, and never thereafter cohabitated or visited with his pretended wife, she was not his widow within the spirit and terms of an insurance certificate, payable to his widow. The court limits its determination of the lady's status to the money claim in suit and points out that authorities on collateral attack on a marriage are not in point.

This decision does not lay down any rules for the construction of policies of insurance or of certificates or by laws in mutual benefit associations. Nor does it in any degree open the door to let in evidence that the assured, when he made the insurance payable to his widow, meant any other person than his real legal widow. The question before the court was not as to the intention of the deceased, but was solely the dry legal question of who was in law the man's widow. And the determination was simply that the pretended marriage in this case was under such strenuous duress (since "every movement at it and preceding it was under the coercion of pistols and bludgeons") that it was in reality void, and could be treated as a nullity by a court of equity even in a wholly collateral proceeding. It has been held that under by-laws of a mutual benefit association providing that the proceeds of a member's certificate would be paid to his widow, the legal widow is entitled to the benefit, and no extrinsic evidence is admissible to show that another woman, with whom the member had gone through a marriage ceremony and cohabited for a long time prior to his death, was intended as the beneficiary, and this was so even though the date of his membership was after he had left his real wife and was living with the other woman. (Cooley, Briefs on Insurance, Vol. iv, page 3735, citing Bolton v. Bolton, 73 Me. 299.) The principal case is in no way contrary to the rule so laid down. F. T. C.

INSURANCE. (Evidence — Declarations.) **Penn.** — In Nophsker *v.* Supreme Council of Royal Arcanum, 64 Atlantic, 788, it is held that in an action on a life policy defended on the ground of false representations by the insured as to his health, it is competent to show declarations made by him prior to the date of the policy, as suffering from a disease, where he denied ever having had such a disease in his application for the policy.

In the lower court the offer of such evidence was excluded. Counsel for plaintiff cited in support of the ruling certain New York cases, but the Supreme Court points out that such decisions were afterwards overruled and distinguished by the New York Court of Appeals in Swift *v.* Mass. Mut. Life Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522, where it was held that in an action on a policy of life insurance, "evidence of declarations made to third parties by the insured at a time prior to and not remote from his examination and in connection with facts or acts exhibiting his then state of health, is competent on the question as to the truthfulness of statements made by him to the examining physician as to his knowledge that he had or had not had a certain disease or symptoms of it."

This case follows a proper distinction, originally made clear in the New York case cited; there are however later cases, e.g. Smith v. N. B. Society, 123 N. Y. 85, 25 N. E. 197; Towne v. Towne, 191 Ill. 478, 61 N. E. 426. But the important modern question in the use of such declarations is usually in their aspect as admissions of a party or predecessor in interest. In this aspect the recent article of Mr. A. M. Kales, 6 Columbia Law Review, 509, exhaustively considers them; and the statements of principle made in 2 Wigmore on Evidence, § 1081, should be regarded as modified to meet the conclusions of that article. J. H. W.

From the court's reliance upon Swift v. Mass. Ins. Co. supra, it seems that an important distinction was overlooked. In Swift v. Co., the statements of the insured that he was ill, were offered not to prove the illness but to prove knowledge on his part of the illness which was otherwise shown to exist. This knowledge was material since the insured in his application had not asserted health positively, but simply his belief that he was well. 19 Am. and Eng. Ency. Law (2d ed.) 62. But in Nophsker v. Royal Arcanum the statements were used to show the disease; knowledge was immaterial as health was warranted. Thus in the Swift Case the declarations were admissible under the exception to the hearsay rule permitting the use of statements evidencing a state of mind. Wigmore, Evidence, §1725 et seq. In the Nophsker case the declarations were admissible as statements of present physical condition. Wigmore, Evidence, §1718 et seq. But by a minority view, prevailing in New York, the statements in the Nophsker case would be excluded because not made to a physician. Roche v. Co., 105 N. Y. 294; Wigmore, Evidence, §1719. That such is the law in New York is not at all inconsistent with the Swift case, where a different exception to the hearsay rule was involved. But it shows that the Pennsylvania court failed to discriminate the two exceptions, and also that the New York law upon which the Pennsylvania court placed reliance was and is squarely against its decision. But in unconsciously repudiating the New York rule, and following the orthodox and more liberal view, judicial intuition seems to have led the Pennsylvania court aright. C. B. Whittier.

INSURANCE. (Estoppel — Conduct of Agent.) **Iowa.** — Another case concerning the extent to which an insurance company is bound by the acts and representations of an agent is that of Kimbro *v.* New York Life Insurance Company, 108 N. W. 1025. The facts showed that the insured made application through the insurer's local agent, giving him a note for the premium, the policy applied for being of a form or class known as an "accumulation policy," but that the company, moved by something appearing in the application or the medical examiner's report, failed to act immediately on the application and wrote to the medical examiner asking that a closer investigation be made as to the applicant's habits respecting the use of intoxicants. At length the home office decided not to issue the policy applied for, but executed another form of contract known as an "adjustable accumulation policy," insuring the applicant's life subject to the condition that if he died within a specified term of years the company's liability should be limited to a certain sum, less than the face of the policy. Such policy, executed in due form, was forwarded to the agent, accompanied by a letter calling his attention to the change and directing him to submit the policy to the applicant with proper explanations. Thereupon the agent wrote the applicant that the policy had arrived and that he would call and deliver it, and in a postscript he added, "I was afraid for a little while owing to a great deal of inspection being made that you might be rejected, but am glad to say that the policy is here." Before maturity of the note, and before acquiring any knowledge of the facts in regard to the policy, the insured died. Three days before the death of the applicant the

insurer's branch office in the state, learning of the situation, directed the agent to return the policy and subsequently informed the home office of insured's death and the home office gave directions to have the local agent mark the notes "canceled" and return them to the administrator. The local agent then wrote the applicant's widow, who was the beneficiary, stating that deceased had applied for insurance and gave a note, but that the company having declined the application, the notes were returned. Under these facts the court held that the company was liable on the policy under the principle of estoppel, and in reaching this conclusion it is said, "the agent's hand was the company's hand, his office was its office, and his promises and assurances the promises and assurances of his principal notwithstanding any undisclosed instructions or limitations existing in his contract of employment." Reference is made to Ins. Co. *v.* Stone (Kan.), 58 Pac. 986, and International Trust Co. *v.* Ins. Co., 71 Fed. 81, 17 C. C. A. 608.

MUNICIPAL CORPORATIONS. (Nuisance.) **Iowa.** — In Wheeler *v.* City of Ft. Dodge, 108 N. W, 1057, a city is held liable for personal injuries to a pedestrian which arose under an unusual state of facts.

Preparatory to a celebration of the Fourth of July, the city council by resolution granted an organization known as the "Commercial Club" the privilege of the streets, and pursuant to such authority the Commercial Club induced a manager of entertainments to visit the city with one of his exhibitions, and his coming and the proposed "slide for life" by a young woman under his management, were advertised as one of the attractions of the celebration. A wire on which the performance was to be executed was erected early in the day or during the evening of the previous day, stretching from the roof of the court house, which stood flush with the sidewalk, downward, and outward and across the street where it was fastened near the ground to a telephone pole.

The apparatus was erected and was seen by various members of the council and other city officers, and, as a crowd gathered to witness the performance, police officers guarded the street under the rope, in an attempt to keep the carriageway clear, but no attempt was made to rope off any part of the sidewalk beneath the slide, nor was the public excluded therefrom.

In order to make the slide, the performer was attached to the wire by a harness which was placed about her body and from which a strap was attached to a pulley running loose along the wire. At the appointed time a large crowd had assembled, and by reason of some defect in the harness the performer fell, fatally injuring herself, and striking and injuring a pedestrian. It was shown that plaintiff did not know of the proposed slide, and was injured while standing on the sidewalk beneath the wire. It was held that the wire under the circumstances constituted a nuisance, and that the city having permitted the street to be obstructed, was chargeable with notice of the nuisance, and, in legal effect, the creator thereof.

In support of the principle, the court cites, Bohen *v.* Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564, where a city was held liable for injury to a traveler on the sidewalk by the fall of an awning which projected into the street space from an abutting building, and also Hume *v.* Mayor, 74 N. Y. 264, and, Drake *v.* Lowell, 13 Metc. (Mass.), 292

A somewhat similar case referred to in the opinion is Richmond *v.* Smith (Va.) 43 S E. 346, where the city acting by its council, assumed to permit certain streets to be occupied by structures of various kinds for the use of a street fair, and as a part of the entertainment a "cake walk" was performed upon a platform surrounded by a railing. The crowd gathered to view the "classic performance," filled the sidewalk and pressed against the railing, which broke, injuring plaintiff, and in holding the city liable the court says, "It was the duty of the city to abate the nuisance, and the sin of permission in granting the permit cannot be less than the sin of omission in failing to discharge its duty"

A contention that the conclusion reached by the court was inconsistent with a former decision, Ball *v.* Woodbine, 61 Iowa, 83, 15 N. W. 846, 47 Am. Rep. 805, where a city was held not liable for the act of its officers in discharging fire works or failing to prevent such discharge, whereby plaintiff was injured, is held untenable, the essence of the complaint in such case having been either the personal misconduct of certain persons who happened to be officers, or the failure of such officers to properly police the city, while in the case at bar the cause of action was a nuisance created and existing in the streets by the act of the city in violation of its duty to keep the streets free from nuisances.

As bearing on the general question as to the liability of the city under the circumstances, reference is made to Grove *v.* Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; Hughes *v* Fon Du Lac (Wis.) 41 N. W. 408; Wells *v.* Brooklyn (Sup.) 41 N. Y. Supp. 143; Wood on Nuisance, § 472; Champlin *v.* Village of Penn Yan, 34 Hun (N. Y.) 33; Wilbert *v.* Sheboygan (Wis.) 99 N. W. 331;2

Dillon's Mun. Corp. 660, and note; Arthur *v.* Cohoes, 9 N. Y. Supp. (Sup.) 160; Young *v.* Rothrock, 121 Iowa, 588, 96 N. W. 1105; Langan *v.* Atchison, 35 Kan. 318, 11 Pac. 38, 57 Am. Rep. 165; Hart *v.* Board (N. J. Sup.) 29 Atl. 490; Speir *v.* Brooklyn (N. Y.) 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664; Landau *v.* N. Y. (N. Y.) 72 N. E. 631; Thomas on Neg. p. 996; Larson *v.* Grand Forks (Dak.) 19 N. W. 416; Thompson on Negligence, § 1234; Wynn *v.* Yonkers, 80 App. Div 217, 80 N. Y Supp. 257; State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Baltimore *v.* Marriott 9 Md. 160; Fort Worth *v.* Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840; Harper *v.* Milwaukee, 30 Wis. 365.

RAILROADS. (Injuries to Licensee.) Iowa. — The rule that even as to a licensee known to be on railroad property, or whose presence may reasonably be expected, the company owes a duty to avoid acts of negligence affirmative and active in character, and that a licensee is one who goes upon the grounds or tracks for purposes other than transportation, by permission express or implied, is applied in Croft *v.* Chicago, R. I. & P. Ry. Company, 108 N. W. 1053, where it is held that where the wife of a station agent was accustomed to assist her husband with the work in the station office, which was known to the officers of the road in charge of the division and not objected to by them, she was a licensee and the road liable for injuries to her while in the office, owing to a derailment of a train, caused by running it at a dangerous speed over a defective track near the station.

As to what permission is sufficient to constitute one a licensee, the court cites, Murphy *v.* Railway, 38 Iowa, 539; Kay *v.* Railway, 65 Pa. 269, 3 Am. Rep. 628; Berry *v.* Railway, 124 Mo. 223, 25 S. W. 229.

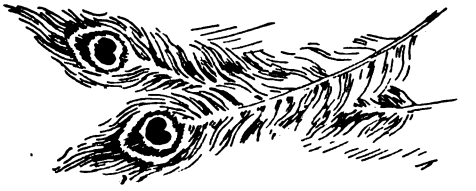
SCHOOLS AND SCHOOL DISTRICTS. (Reasonableness of Regulations.) Wash. — The troubles of a high school secret fraternity were brought before the Supreme Court of Washington in Wayland *v.* Board of School Directors of District No. 1 of Seattle, 86 Pac. 642. The school board being opposed to secret fraternities, enacted a rule that all students who should thereafter become members of any high school fraternity should be denied all the privileges of the high school except those of the class room. Plaintiff, together with other students, subsequently joined a secret fraternity, known as the Gamma Eta Kappa, and the board in the enforcement of the rule denied such students participation in athletic, literary, military, and similar school organizations. The meetings of the fraternity were held at the homes of the members after school hours, and with parental consent. The trial court denied plaintiff's right to an injunction, and on appeal, the Supreme Court, after reviewing the facts, cites Ballingers Ann. Codes & Sta. §§ 2334, 2339, and 2362, providing in substance, that pupils shall comply with the regulations established for the government of the schools and submit to the authority of teachers, and authorizing school directors to adopt and enforce such regulations as may be deemed essential to the well-being of the school; and holds that the school board had not exceeded its lawful authority. The argument of plaintiff emphasized the fact that the meetings were held after school hours and at the homes of the members, but the court said: "The board has not invaded the homes of any pupils, nor have they sought to interfere with parental custody or control, and has not said that these fraternities shall not meet at the various homes, nor have they attempted to control students out of school hours . . . and it would be difficult to confer a broader discretionary power than that conferred by the statutes. State *ex rel.* Stallard *v.* White, 82 Ind. 278, 42 Am. Rep. 496, is referred to as the only case mentioned, seeming to be related to the questions involved, in which the Supreme Court of Indiana held that the officers and trustees of Purdue University, a state institution, could not require an applicant, otherwise qualified, to sign a pledge relative to membership in Greek fraternities as a condition precedent to his admission as a student, and it is held that such case did not support the contentions of plaintiff, inasmuch as members of the "Gamma Eta Kappa" fraternity had not been refused admission to the high school, but the authorities had merely endeavored to exercise governmental control. The court employs a quotation from State *ex rel.* Stallard *v.* White, where it is said: "The admission of students in a public educational institution is one thing, and the government and control of students after they are admitted, and have become subject to the rules of the institution, is another thing."

TORTS. (Libel — Practice.) Mass. — A case showing the burden upon one slandered in a foreign tongue is illustrated by Romano *v.* Devito, 78 N. E. 105. The original declaration in the case was in the English language, and it appeared that the words spoken were in the Italian language. The court then suggested that if that were so, there was a variance, whereupon plaintiff was permitted to amend by setting forth in Italian the words spoken and he then rested. Counsel for defendant then asked for a ruling that there was no evidence that the foreign words set forth in the declaration were spoken by the defendant,

and further, that there was no evidence as to the meaning of the foreign words. A verdict was returned for the defendant and on appeal the Supreme Court says: "There is no doubt that when libelous words are written in a foreign language they should be set out in that language and translation given, and it is also necessary to prove that the translation of the foreign words in the declaration is correct." In support of these principles the following cases are cited: Hickley *v.* Grosjean, 6 Blackf. (Ind.) 351; Wormouth *v.* Cramer, 3 Wend. (N. Y.) 394; Keenholtz *v.* Becker, 3 Denio (N. Y.) 346.

TRADE UNIONS. (**Strikes.**) **Mass.** — Another case involving the rights of organized labor is Pickett *v.* Walsh, 78 N. E. 753. The facts as gathered from the opinion show that bricklayers' and masons' unions in the city of Boston and vicinity adopted a rule that no bricklayer or mason should work for any firm or contractor who would not employ bricklayers or masons to do the pointing of brick, terra cotta, and stone masonry, the trade of brick and stone pointing being one which in the neighborhood of the city of Boston had been carried on to some extent as a separate trade for about one hundred years, and there being at the time of the adoption of the rule in question about forty-five men engaged in that trade in the city and vicinity. As shown by the evidence, the trade of a brick or stone pointer consists in going over a building (generally when it is first erected) to clean it and to put a finish on the mortar of the joints. After the adoption of the rule, the unions ordered a strike on a building being erected by contractors who were having the pointing done by pointers instead of by bricklayers or masons, and caused a strike on a building which was being erected by general contractors because on another building which was being erected by such contractors the pointing was being done by one other than a member of the unions, under a contract between such person and the owner of the building. Several pointers then sued to enjoin the officers of the unions from conspiring to interfere with plaintiffs in pursuing their trade, and it was held that the unions might lawfully compete for the additional work of pointing the buildings in the exercise of their right of competition and might lawfully refuse to lay brick and stone unless given the work of pointing, though the contractors might prefer to give the work to regular pointers, and though the effect of complying with the demands of the unions apparently operated to destroy the pointers' business; but it was further held that the unions could not legally strike merely because the contractors were working on a building on which work was being done by non-union pointers employed by the owners of the building, inasmuch as the organized laborers' right of coercion is limited to strikes on persons with whom the organization has a trade dispute. At the commencement of the discussion as to the first point this right of one or more citizens to pursue his or their calling as he or they see fit is said to be limited by the existence of the same right in all other citizens. Another general principle is stated to the effect that the result of the power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals, or, in other words, that there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do, and reference is made to the case put in Allen *v.* Flood (1898) A. C. 1, 165, of a butler refusing to renew a contract of services because the cook was personally distasteful to him, whereupon, in order to secure the services of the butler, the master refrains from reëngaging the cook, whose term of service also had expired and in this connection it is said: "We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason, however arbitrary. But it is established in this commonwealth that it is not legal for an employer to agree with a union to discharge a non-union workman for an arbitrary cause at the request of the union." The court then proceeds to the question as to whether the unions had a right to refuse to lay bricks or stone where the pointing of the materials laid by the union is given to others, and it is considered that the effect of such position on the part of the union is to demand all the work or none. In sustaining the right of the unions in such respect, the court says: "So far as the labor unions are concerned the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others, the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor unions' acts. That is true wherever a strike is successful. . . . Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiff's business. It

is then considered that the fact that the business of plaintiff was destroyed by the acts of defendants is not decisive of the illegality of them, and reference is made to Martell *v.* White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341, where it was said in regard to the right of a citizen to pursue his business without interference by a combination to destroy it that, speaking generally, competition in business is to be permitted, although frequently disastrous to those engaged in it. "It is always selfish, often sharp, and sometimes deadly." As concerns the strike of the union bricklayers and stone masons employed by the contractor on other buildings because the contractor was doing work on a building on which work was being done by pointers employed by the owners thereof, it is held that such strike was unlawful, in that it contained an element similar to a sympathetic strike, a boycott, and a blacklisting, namely: "It is a refusal to work for A, with whom the strikers have no dispute, because A works for B with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands. . . . It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in the unions' favor." The conclusion is then reached that such a strike is not a justifiable interference with the right of the pointers to pursue their calling, and that the right of organized labor to coerce is limited to strikes on persons with whom the organization has a trade dispute, and the court remarks that only two cases to the contrary have been cited, namely, Bohn Mfg. Co. *v.* Hollis, 54 Minn. 232, 55 N. W. 119, 21 L. R. A. 337, 40 Am. St. Rep. 319, and Clothing Co. *v.* Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440, and that the first was overruled in Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 632 R. A. 753, 103 Am. St. Rep. 477. The conclusion reached is supported by a large number of authorities, including My Maryland Lodge *v.* Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477; Purington *v.* Hinchliff (Ill.) 76 N. E. 47, 2 L. R. A. (N. S.) 824; Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Crump *v.* Commonwealth, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Purvis *v.* United Brotherhood of Carpenters (Pa.) 63 Atl. 585; Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.



THE LIGHTER SIDE

COURT-HOUSE HUMOR

By Ben Winslow

ONE does not expect to find humor of a mirth provoking quality within the somber walls of a court-house where only the most serious business is transacted. For this reason the spontaneous flashes of wit that occasionally come to brighten the dismal proceedings of the criminal courts or the monotonous routine of the civil courts are more striking than any other class. Because of the surroundings and its unexpectedness, the court-house *bon mot* is more laughable than the jest of the stage or street.

Court-house humor is, for the most part, supplied by nervous defendants or witnesses for or against him, and, as the following collection will show, the quick-witted son of Erin supplies his share.

The excellent work of a very successful criminal lawyer secured the complete exoneration of a man who had been arrested for stealing a pair of trousers, and he was told to step out of the dock. The prisoner did not stir. Again he was told to step out, but he did not move. His counsel went over to him and asked:

"Why don't you step out, you've been acquitted?"

"I can't," he replied in a stage whisper that was heard throughout the court-room, "the owner of the pants is out there and I've got 'em on."

An Irishman, whose name is not material, brought suit for damages against his employer. The employee, while performing his duties, had been kicked by one of the animals belonging to the employer.

"Were you careful in attending the animal?" asked the defending counsel.

"Yes, sir," replied the witness.

"And you didn't prod him on the legs with the fork?"

"No, sir."

"Or excite him in any way?"

"No, sir."

"Then, sir," asked the lawyer, "what reason can you give for him having kicked you?"

"Because he was a mule, sir," responded the witness.

A bicycle policeman of the same nationality appeared against a man he had arrested for fast riding.

"How fast was he going?" asked the judge.

"Pretty fast," answered the policeman.

"As fast as a man can run?"

"Yis, your honor, he was going as fast as two min can run."

An Irishman was arraigned before a police court judge on a charge of assault and battery.

"Are you guilty or not guilty?" asked the clerk, when he finished reading the charge, to which the prisoner replied:

"How the devil can I tell until I hear the evidence?"

Patrick O'Rourke, a familiar character who was known to practically everyone in his town, had occasion to appear before a police magistrate to answer a charge of larceny. After hearing the testimony of two witnesses who said they saw Pat take the goods, the magistrate said:

"Well Pat, I think you are guilty."

"And phat makes you think that?" asked Pat.

"These two men who say they saw you take the goods."

"And is that all?" asked Pat, in surprise. "Why mon, I can bring two hundred min who will swear they didn't see me take them."

A homeless, friendless, and moneyless tramp had been arrested for burglary.

When he was arraigned before a magistrate, he was told that he might select counsel from the five lawyers present, at the expense of the county. The tramp looked at the five lawyers and then, turning to the judge, said:

"Your honor, I guess I might as well plead guilty."

General Gilmore Marston, a once famous New Hampshire lawyer, is credited with having furnished this excellent bit of court-house humor.

During the trial of a civil suit, one of a firm of three lawyers took exception to the ruling of the judge on a motion that had been denied. He remonstrated with such force and persistence that he was fined ten dollars for contempt of court. Another of the firm took up the objection with the result that he too was fined ten dollars. The senior member of the firm stepped into the breach and attempted to alter the court's views, and a similar fine was imposed upon him.

General Marston, who had been an attentive listener during the trial, rose from his seat and advanced to the clerk's desk. From his pocket he took a large roll of bills and pealing off two ten dollars notes, laid them on the clerk's desk.

"May I ask what that is for?" said the judge.

"I want you to distinctly understand," said General Marston, "that I have twice as much contempt for this damn court as any one here, and I'm paying for it."

Corporation Lawyers. — "Horse-thief" has for the present been superseded as a term of opprobrium by "corporation lawyer." It is not actionable yet to call a citizen a corporation lawyer, but it is felt — even the President feels it — that it is a very hard name to give him. All existing lawyers may be classified in two groups: those whose practice includes work for corporations and those whose practice doesn't. Most of the ablest and best lawyers are included in the former group, which also includes, no doubt, some who are able but not so good.

The lawyers, since the foundation of our government, have given the country a large proportion of its political leaders. Undoubtedly they will continue to do so, but for the present the fact that the ablest of them work for corporations has considerably affected their availability as political guides. We do not see that the abatement of their political influence or eligibility for office has as yet resulted in any marked advantage to the State. Mr. Roosevelt is not a lawyer, but there are those who consider that he would not be any less a useful President if his mind had been fed a bit on law while it was still growing. Mr. Odell is not a lawyer, nor Mr. McCarren, nor Mr. Fingy Conners, nor Mr. Murphy, nor Mr. Hearst. We bet, though, that five lawyers could easily be found in New York state (and corporation lawyers at that) in whose hands political leadership and office could be entrusted just as safely as to the five patriots mentioned.

Much might be said in favor of excluding men in active business from office, and even of depriving them of the right to vote, on the ground that their business interests made it impossible for them to form impartial judgments of what course would best promote the public welfare. There is far less reason for prejudice against lawyers in public life, for an honest lawyer when he takes office takes the people for his client, and the more he knows by previous experience about corporations the better qualified he is to represent the people when their interests and the interests of corporations clash. — *Life.*

Thoughtful of Him. — "Did ye get damages fer being in that railway accident, Bill?"

"Sure; fifty dollars for me and fifty fer the missus."

"The missus? I didn't hear she was hurt."

"She wasn't; but I had the presence o' mind to fetch her one on the head with me foot." — *Harper's Weekly.*

Tactful Eloquence. — A certain rather impulsive and hasty spoken lawyer was defending a man before a jury in an assault case, wherein the defendant had severely beaten his prosecutor. The defense was that he had extreme provocation in that the latter had

vilely abused and insulted the accused in a manner no manly person could endure. The eloquent advocate concluded: " Now, gentlemen, let me say that my client was resenting a gross insult. You, Mr. O'Brien (pointing to an Irish juror), suppose I had some words with you and called you a d—n dirty Irish blackguard; wouldn't you resent it? And you, Mr. Walton (addressing an extremely bald-headed juror), suppose I shook my fist in your face and called you a dirty old bald-headed blackguard; wouldn't you try to whip me? And you, Mr. Wagner (pointing to a German sitting next), suppose I had called you a fat old Dutch blackguard; wouldn't you knock me down? In short, gentlemen, suppose I were to quarrel with any one of you and were to call you the particular kind of a blackguard that you are, wouldn't you assert your manhood and thrash me soundly? Of course you would."

The New England Calf. — In a new volume of the *American Criminal Reports*, now in the hands of the printer, Mr. John F. Geeting makes an editorial criticism on the practice of courts in blindly following precedents, in which he reproduces the following poem:

One day through the primeval wood,
A calf walked home, as good calves should;
But made a trail all bent askew,
A crooked trail as all calves do.

Since then two hundred years have fled,
And, I infer, the calf is dead.
And from that day o'er hill and glade
Through those old woods a path was made;
And many men wound in and out,
And dodged, and turned, and bent about
And uttered words of righteous wrath
Because 'twas such a crooked path.

This forest path became a lane,
That bent, and turned, and turned again;
This crooked lane became a road,
Where many a poor horse with his load
Toiled on beneath the burning sun,
And traveled some three miles in one,
And thus, a century and a half
They trod in the footsteps of that calf.

The years passed on in swiftness fleet,
The road became a village street;
And this, before men were aware,
A city's crowded thoroughfare.
And soon the central street was this
Of a renowned metropolis.
And men two centuries and a half
Trod in the footsteps of that calf.

Each day a hundred thousand rout
Followed the zigzag calf about;
And o'er this crooked journey went
The traffic of a continent.
A hundred thousand men were led
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;
For such reverence is lent
To well established precedent.

Men are prone to go it blind
Along the calf paths of the mind,
And work away from sun to sun
To do what other men have done.
They follow in the beaten track,
And out, and in, and forth, and back,
And still their devious course pursue,
To keep the path that others do.
But how the wise old wood gods laugh
Who saw the first primeval calf;
Ah! many things this tale might teach,
But I am not ordained to preach.

Patient. — Two prisoners were convicted of a capital offense before an English judge; and when the judge came to pronounce sentence he very magnanimously announced that the prisoners could select the kind of trees upon which to hang. One of the prisoners was an Englishman. He replied that he preferred " The sturdy oak — emblematic of the strength and solidity of England." The other was an Irishman. He was asked what tree he would select; and his reply was, " The hookleberry bush." " That's not tall enough," replied the judge. " Well, in faith," said Pat, " Oi'ill wait ointil it grows taller thin."

Long Life. — A Cleveland subscriber thought the following statistics gleaned from one of his cases worth preserving, as showing that the practice of law is conductive to long life. How lucrative it may be is another question, but that lawyers are long-lived seems established by it.

It was a case appealed from the Probate Court, pending eleven years, which was called for trial, two lawyers on behalf of the executor and three lawyers on the other side. Some one speaking about age, I took the ages of each one, also their weights, as follows:

	Years.	Weight in Pounds.
J. H. H.	69	196
W. S. K.	75	240
J. S. G.	78	155
H. J. C.	69	235
Myself	66	170
Total	357	996
Average age and weight:	$71\frac{2}{5}$	$199\frac{1}{5}$

The executor, also a lawyer, was not present in court but his age is 82 years, making an average age for the six lawyers concerned $73\frac{1}{6}$ years.

An Epitaph. — "Stern death has cast into abeyance here
A most renowned conveyancer;
Then lightly on his head be laid
The sod that he so oft conveyed.
In certain faith and hope he sure is,
His soul, like a scintilla juris,
In nubibus expectant lies,
To raise a freehold in the skies."

Smell Paid for in Sound. — Jean Libau was an old French cook who in his wanderings stumbled upon a prosperous Maine town, and decided to set up business in an old roadhouse which had been vacant for several months. The Frenchman met with marked success; but, being of a rather miserly disposition, he was much annoyed by a very eccentric and also saving neighbor who lived about a mile away. This man had formed a habit of coming down twice a day to catch the spicy and wholesome odors wafted from Jean's kitchen, and for many months he claimed they kept him thriving and hearty.

This bothered Jean greatly, and he brought the matter before the court. When the case came up for trial, the judge inquired of the defendant the amount of cash he had on his person, and on receiving the reply, "A half, a quarter, and a dime," requested that it be handed over to him.

After jingling the coin loudly in his hand for a moment, his honor asked the plaintiff whether, in his opinion, he had received justice, and the cook answered that he had not.

"Well," said the judge, "he smelled your dinner, and you've heard the chink of his money, and that is the nearest I can come to what is popularly known as the square deal in this case." — *Boston Herald.*

Perfect Legal Proof. — "John, I've lost our marriage certificate."

"Oh, never mind; any of those receipted millinery bills will prove the ceremony." — *Judy.*

The Other Way Round. — In a trolley accident in New England an Irishman was badly hurt. The next day a lawyer called on him and asked if he intended to sue the company for damages.

"Damages?" said Pat, looking feebly over his bandages. "Sure, I have thim already. I'd loike to sue the railway for repairs, sor, av ye'll take the case." — *Youth's Companion.*

All of the Truth, at Least. — Fifty years ago there lived in Woodstock, N. H., a man by the name of Thomas Booise (or Boise), who was noted for his ready wit.

At one time he was called as a witness on a case in court in Plymouth, N. H. After the lawyers had fired all sorts of questions at him without getting much satisfaction, the judge took him in hand.

"Mr. Booise," said the judge, "have you told the whole truth in this matter?"

"Yes, sir; yes, sir, I have, and I guess just a little mite more." — *Boston Herald.*

W. L. Moody

The Green Bag

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MR. JUSTICE MOODY

By Hon. Herbert Parker

WHEN William H. Moody accepted a nomination as member of the Fifty-fourth Congress, mingled with an unanimous sentiment of confidence in the excellent public service he would surely render to his country, there was an often expressed regret that the Bar of Massachusetts was to lose an advocate and lawyer, already marked as of conspicuous ability and of constantly growing power and influence.

Essex County, of preëminent fame in our jurisprudence because of the distinguished judges and lawyers she has given to the state, had produced no son, who, in promise and actual accomplishment, was held in greater respect or higher repute, either in the community or in the courts of justice.

That Mr. Moody himself deplored the prospective interruption of his professional work, and his retirement from interests upon which his mind and heart were alike concentrated, is well known to those friends with whom he spoke freely. Modest as he was, and is, in his estimate of himself, thinking only of the joy in the completion of one service, as he passed to like accomplishment of the next, he never stayed to contemplate his own attainments, or to give even the briefest pause for self-commendation; yet he could not have been unconscious of the extraordinary and deserved professional success he had secured. He was advised of it by the verdicts of juries in almost daily trials; it was declared to him by the rescripts of the Supreme Court, again and again, affirming the conclusions of his legal sagacity, and of his compelling force in presentation and argument of propositions sustained by his wide research in the law, and made, often for the first time, applicable to some new phase of litigation, or to the establishment of some important property or personal right.

He was called, by his election to Congress, to a wholly new and untried field of duty. He realized that he was leaving associations very dear to him, and, for a time at least, laying aside congenial labors which had excited and engaged his earnest and exclusive effort. To many of us he said in going, that it was but for a brief time, and he consoled himself for what he spoke of as a sort of exile, by the thought of his early return to his professional work, which he assured us was the sole ambition and desire of his life.

We saw better than he then did that he must inevitably become such an active and vital part of the administration of national affairs, and be so compelled to have responsible participation in their progress as to forbid his withdrawal, even if he would. The event was inevitable; his constituents would not permit him to surrender their commission, nor could he abandon great causes, which he had undertaken, to the defeat which must have been sustained without his tireless, powerful, and constant support.

His tenure in office as Representative in Congress had not run its course before he was called to undertake the administration of the world-encircling duties of Secretary of the Navy; from thence he was summoned to assume the enormous and exacting responsibilities of the office of Attorney-General of the United States; from thence, at last, to take the oath of highest service and most exalted authority that citizen can ever as-

sume, on the Bench of the Supreme Court of our nation.

Not then are we to read his life story as it might have been forecast in the volumes of the reported decisions of the courts of Massachusetts, admirable as that record certainly would have been, nor is it to be marked, as we had thought it to have been, by distinguished professional or public achievements within the borders of his native state.

Distinctly of the type, but the highest type, of New England character and intellect, we have no surprise, but only pride and gratification in the almost unprecedented series of honors that have been worthily conferred upon him, and though we cannot now write of him from the impulse of that daily observation which we might have enjoyed, we venture to believe, knowing the unchanging fidelity of his love for his native soil, that he rejoices, as we do, in his New England birthright, heredity, and environment, and we are confident that our countrymen have realized and have recognized as proudly as we do the virtue and the value of that heritage.

No one who has known Mr. Justice Moody, as we must now entitle him, can think or speak of him without the warmth of ardent friendship; dominant and obvious as have been his intellectual powers, the humanity of the man, the generous qualities of friend and associate have been no less conspicuous and constant; yet there need be no fear that the prejudice of friendship can over-color the impressive incidents of his life, manifest to the world. In this instance friendship does not create or imagine incidents or qualities, we do but take note of them as they have been demonstrated, and in their own light contemplate their significance.

Graduated from Harvard University in the class of 1876, he had proved himself a brilliant and diligent student. He had also taken active and enthusiastic part in the joys of outdoor life and of athletic sport, an interest still keen as ever in his later years. He completed his preparation for the Bar at the Harvard Law School and in the office of the late Richard H. Dana, who had done equal battle with Rufus Choate, the most brilliant of the sons of Essex. Of Mr. Moody's examination, conducted under the old system of oral interrogation by members of the Bar, it is related that his wide reading, marvelous accuracy of memory, and readiness of statement had almost confused his would-be instructors, who, with discreet expedition, admitted him to practice with highest commendation.

We have sought in vain for the story of his first case, its nature, its procedure, and its result. That it brought him many and constant clients is certain, and that is the significant and desirable event of a young lawyer's first trial. He instantly gained public recognition for sagacity, fidelity, ability, resourcefulness, and success in litigation, for always as a trial lawyer he has shown his supremest excellence. In the early years of his practice he was elected district attorney for the county of Essex, and the Commonwealth never had more fearless or more efficient prosecuting officer. A recital of the notable cases he conducted would far outrun the necessary limitations of our space. The conviction of the Haverhill officials for corrupt conspiracy is a never-to-be-forgotten proof of his extraordinary power of marshaling facts before a jury, and there was a no less notable triumph in his sustaining the verdict before the Supreme Court. Great moral, even physical courage, was required of him in this prosecution, brought against persons of much influence, of widely extended relations in the community, reaching even to personal friends and associates of the prosecutor. The qualities of the future Attorney General were markedly forecast in many aspects of these proceedings.

The case which brought Mr. Moody into widest public recognition was that of the trial of Lizzie Borden of Fall River for the murder of her parents. He was retained for the Commonwealth in association with District-Attorney Knowlton, late attorney general of this state. The evidence relied on by

the prosecution was in large part circumstantial, of course most safely convincing if its predicates are established, but requiring logical powers of the highest order for its presentation. We have had frequent occasion to consult the verbatim reports of this trial, and it is to be regretted that they cannot yet be published, for more instructive discussions on contested points of evidence are not to be found in any books than those contributed by Mr. Moody in this case. His arguments are evidently, for the most part, extemporaneous, yet they disclose his singularly accurate and concise diction, his clear, forceful, and convincing analysis; indeed, it will excite wonder in the lawyer who reads the records that the contentions of the Commonwealth in some particulars were not sustained by the court. The result of the trial must have been much affected by the exclusion of some evidence offered by the state. Certainly Mr. Moody's arguments for its admission, and the weight of authority offered in its support, have left regrets that the issue could not have come for final decision to the full court.

Before Mr. Moody's departure for his congressional service, he had become one of the very first trial lawyers in the state, ranking even with those whose fame is part of the proud history and tradition of our Bar.

He knows his fellow-men, his perceptions are as keen as his human sympathies, and his alert mind gave him wonderful control over hostile witnesses, who could neither resist nor elude his attacks in search of the truth. His cross-examinations are among the finest example of that most effective, yet most hazardous, feature of a trial. His arguments on fact were as convincing as the result of chemical analysis, precise as mathematical demonstration, aggressive, invigorated by caustic comment on the errors or misconceptions of his adversary, enlivened by shrewd humor, exhibiting always the saving quality of an infallible common sense. He had regard always to the tribunal before which he presented his cause, as well as to the cause itself. Sincere, earnest, unpretentious, his vigorous, upright manhood was as potent in bringing him success at the Bar as it has been, and is, in making him one of the commanding figures in our national life, holding the unquestioning confidence of President and of people.

In Congress he served no novitiate of passive acquiescence in party policy. Trained to the highest capacity in debate, he was at once the recognized equal of his most experienced colleagues. His influence was immediately felt on the floor, in committee room, and in conference. He had inflexible faith in the genius of New England, conscious, even rejoicing, in its stern and somewhat provincial morality. Through absolute candor and readiness to consider other view points, even other prejudices, however, he won the confidence, respect, and affection of those whose party and political principles were the very antitheses of his own, qualities which gave effect to his effort in as high degree as his acknowledged mental powers and influence. Intimate and trusted confidant of that astute parliamentarian and party leader, Mr. Cannon, he was easily among the first of the leaders of the House of Representatives. He boldly challenged and fearlessly denounced the disfranchisement of the negro in the South, and demanded that the offending states should suffer the logical penalty of what he declared to be a plain evasion of the spirit and principle of the Federal Constitution. Independent in decision and action, he sometimes differed, frankly, with his political associates, and often in contested election cases successfully disputed decisions of committees which were tainted by political prejudice or interest in behalf of his own party. He fearlessly adhered to the conclusions which his own judgment dictated, nor ever surrendered such conclusion to personal or political interest. Not otherwise would he have held himself fit representative of Massachusetts; not otherwise would he have deserved or retained the unwavering, enthusiastic approval of his constituents.

Throughout his entire active life, and especially since so much of it has been given to public service, he has been conspicuous in the national and state campaigns. His reputation as an orator, the universal esteem of the people, made him one of the foremost and most effective advocates of the policies of his party. The enthusiasm of his own neighbors in the towns of Essex was no greater than that which attended his appearance before vast meetings of his fellow citizens of the West or of the Pacific coast.

Four times elected to the lower House of Congress, tireless in his devotion to those duties, he gained wide knowledge of the varied administrations of national affairs. It was not surprising that one who had so long looked out past the capes of the Merrimac to the ocean, should have been called to direct the courses of our ships at sea. He knew the brave men who sailed out of Gloucester to the stormiest waters of the world. He had heard from their lips the tales of heroism that Connolly has made immortal. He had the most profound and real interest in the welfare of the seamen, and in the maintenance of our navy at the highest degree of efficiency in ships and men, and in the extension and protection of our commercial interests the world over. With characteristic energy, diligent study, investigation, and observation, he fitted himself to conduct with admirable success the administration of the Navy Department. He sought only the counsel of those best qualified to aid him. He adopted only that which should respond to the most rigid requirements of efficient service.

The coming years shall testify to the wisdom of his foresight in the strategic establishment of naval stations in Caribbean and Pacific seas. With the universal approval of his countrymen, he discharged the duties of Secretary of the Navy, and then was called to assume even weightier cares and responsibilities.

Coming to his own best loved field of effort, he assumed the duties of chief law officer of the nation, for throughout all the diversities of experience in public office, his dominant impulse, instinct, and ambition, has been to give his life service to the administration of the law.

The Attorney General sits constantly by the side of the President. With no cabinet officer has he more close or necessarily confidential official relations. Though upon a word or message of the Secretary of State, incident to foreign diplomatic relations, peace or war may be the issue, yet the utterance of that portentious word awaits the advice of the Attorney General.

The ultimate exercise of the authoritative functions of the Secretary of the Interior, affecting industrial questions of highest importance to millions of citizens, the adoption of a measure relating to the national funds or currency by the Secretary of the Treasury, touching the very life currents of national finance, again depends upon the final sanction of the Attorney General. Such are the ordinary cares, such the normal duties of the office, requiring both learning in the law and incessant attention to the executive control of the national affairs.

When Mr. Knox, in June, 1904, after a brilliant administration, gave place to his successor, one of less energy, courage, and self-reliance than Mr. Moody might well have been appalled by the forecast of duties that lay before him. No complacent enjoyment of the prestige of a powerful and honorable office, no superficial approval of the individual work of a multitude of subordinates, was either possible from the condition of public affairs, and the aroused sentiment of the people, or tolerable to the man who had so undertaken a task of signal importance at a truly critical period in the history of our country. In the days of Hamilton, the Treasury Department was doubtless the field of most momentous executive action, and so we believe during the past few years the Department of the Attorney General has been the scene of executive responsibilities of the very first importance.

The accumulations of unmeasured wealth by corporations, a result, in part, legitimately due to extraordinary national prosperity, had excited grave apprehension in others than those who denounce all acquisitions of property in which they have no share. Students of political economy were rightfully alarmed that activities of corporate ambition or avarice threatened to overthrow the protective barriers and safeguards of the law itself, and to build up a dominion of wealth that would array class against class, by arrogance of power upon the one side, and oppression and despair upon the other. Such fears, well or ill founded, aroused an intense popular agitation, reasonable at least, in the belief that unrestrained combinations of wealth or corporate energy, especially in relation to the production or distribution of the necessities of life, or to the agencies of transportation, were a serious menace to the welfare of the country.

Combinations and monopolies of a magnitude never before conceived in finance, or industrial enterprises, were in efficient operation through the instrumentalities of corporations, themselves the creatures of the law. Federal and state legislation, at best a laggard behind the tireless energy of self-interest and desire for gain, had sought, with more or less effective phrase, to restrain a manifest, existent, and increasing evil. The Congress, reflecting a popular demand, enacted the "Sherman Anti-Trust Law" and the so-called "Elkins Rebate Law," dealing with the subject, in so far as it lay within the limitations of federal jurisdiction, necessarily confined, for the most part, to territorial and interstate commercial conditions. But the written law, unless it be animated by the vigorous life of executive action, might as well be inscribed upon the walls of the sealed tombs of Assyrian or Theban kings. Unless it be put into fearless, relentless execution, it is truly but a dead letter, as a stone given to a people crying for bread.

The anti-trust laws required for their enforcement a plan of campaign, a policy, an activity, as extended in operation as the field of the evil they sought to eradicate and punish. Any isolated action must have been futile. Sporadic proceedings by district attorneys, at best, changed the scene rather than the nature of the wrong. From the Attorney General with his commanding view point, his control of the entire operation of the law, successful plan and action must emanate. Mr. Attorney-General Olney, type of the finest quality of New England lawyer and statesman, Mr. Attorney-General Knox, accomplished lawyer of great experience and resource, had instituted many proceedings in law and equity, criminal and civil, but the great work had only intermittent and indifferent success. Never was greater opportunity offered, never graver responsibility committed to public officer, than to the new Attorney General succeeding Senator Knox. The vigorous enforcement of the law meant far more than an incident, favorable or unfavorable, to a political party. The issue was to determine whether corporations, through the power that the law had given them, and through the magnitude of their interests so acquired, could ignore or subvert the law itself.

Soberly, gravely, with a concentration and sagacity that omitted no detail of exact and careful investigation and preparation, that neglected no consideration of the vast resources of wealth and intelligence, controlled by the offenders, the Attorney General entered upon a series of prosecutions, many of which have already resulted in the complete vindication of the law and the cause of the people. It was at once manifest that his acumen and learning as a profound lawyer had ripened into fullest development rather than deteriorated through the varied duties of his public life.

Encouraged by the ardent sympathy of the President, assisted by the special appropriation of five hundred thousand dollars, he has pursued wrongdoers from the scenes of their defiant or secret misdeeds, in the phosphate fields of Florida to the mining

camps of Alaska, from the oil wells of Ohio to the lumber yards of the Hawaiian Isands. With relentless energy he has followed the trail of the monopoly from state to state, and torn the truth from the deceptive language of traffic agreements with great railroad corporations, and revealed the forbidden rebates, however hidden, or by whatsoever innocent name it sought apparently innocuous expression.

We are justified in claiming that his devotion to a great purpose has been attended with a notable measure of success, which has come from his stern condemnation of the violation of the law whose minister he is, from his unswerving fidelity to duty, from his sincere belief in the justice of his cause, and from his ardent faith in the principle that our government is established to preserve and defend the equal rights of all men under the law.

Following almost the very words of his earnest exposition and statement of the law, in arguments that will be remembered in the traditions of our courts, it has been established by final adjudications:

That the buying of raw material in different states, manufacturing and again selling it beyond the state of its manufacture is interstate commerce and is within the prohibition of the Sherman law.

That a corporation formed for the purpose of holding securities, and so the control of competing public service corporations, is a mere subterfuge, and so cannot escape the restraints of that law.

That a corporation may be required to disclose to the public authority, by whose favor it lives, its books and records, showing its manner of business, and that it cannot plead immunity against self-incrimination.

We cannot attempt to present even a summary of the docket of the cases instituted or carried forward by him. Decisions have been obtained giving absolute assurance to the people that the supposed reign of the destructive trust and monopoly approaches its end, and the people have come to know, at last, that the law is mightier than its creatures. Through the insistence of the Attorney General, those offenders to whom a fine of whatever magnitude would appear to be a mere financial incident of their profitable business, have ruefully discovered that law breaking means personal ignominy, hardship, and mortification of the flesh.

Mr. Moody quickly apprehended that the rebates allowed by the railroad systems were used as a most potent, though elusive, factor in the maintenance of monopolies and unlawful trusts. He has used the provisions of the Elkins Act with constant and far-reaching efficiency, as is manifest in the significant recital of twenty-seven indictments presented for receiving rebates, resulting in seven convictions, one acquittal, and nineteen cases pending; twenty indictments for granting rebates, with four convictions. In one case a defendant corporation was fined forty thousand dollars, two individual defendants ten thousand dollars each, two corporations were each fined fifteen thousand dollars, and one corporation penalized in the sum of one hundred and eight thousand dollars, and individual defendants subjected to a fine of six thousand dollars. Five indictments were presented for conspiracy to obtain rebates, a form of proceeding where, upon conviction, the penalty of imprisonment might be imposed, and from these prosecutions three convictions have resulted with aggregate fines of thirty-six thousand dollars and with terms of imprisonment in the jail.

Even this brief epitome of the service and achievements of the Attorney General must include at least a passing reference to his attention to other cares of scarcely less moment. He has had historic share in solving or forecasting many of the complex and ominous conditions of our insular relations, so delicate and so pregnant with issues which no man can fully anticipate. To so construe our Constitution as to make it embrace both citizens and subjects and still preserve its intrinsic character, has required a power of

discrimination in interpretation for which even the Attorney General's genius might not have sufficed but for the authority of the Supreme Court. Under those decrees he has been the safe adviser of a governor-general in dealing with the subtile races of the mysterious East who can have, as yet, little comprehension, either of the spirit or the benefits of our laws. Again he has had occasion to enforce our American statutory enactments upon the foreign soil of Panama, where the laborer has learned to know the same protection as that won for the toiler within our own states.

A vigorous man with vigorous mind, with strong heart and physique, alone could have sustained the burden of care and the strain of effort that were the constant attendants of his two years of memorable service as Attorney General. If anyone shall captiously assert that we have used terms of eulogy rather than discriminating analysis in this story, we are justified by the mere recital of facts, and by the reflection that his administration has moved those whose policies are opposed to those of his own party to words of unanimous approval. And so, fittingly and deservedly, without taint of partisanship or prejudice, he has been elevated to a seat of judicial authority now world wide both in territorial and moral jurisdiction.

We are wont to deplore the fact that the learning, wisdom, and effort, even of the most eminent men cannot survive to those who outlive them, and that there can be no accumulations of experience and knowledge, through the added quota of each human life. Happily this reflection does not here depress us, for we are assured that through the coming years, in his contributions to the decisions of the court, there will be left, proof against fading memory, the permanent evidences of his sound learning, virile conscience, and inflexible justice, which are the living, vivid characteristics of Mr. Moody as lawyer, legislator, cabinet officer, and judge.

WORCESTER, MASS., January, 1907.

CONSTITUTIONAL ASPECTS OF EMPLOYERS' LIABILITY LEGISLATION

By Ernst Freund

THE subject of employers' liability bids fair to remain before our legislative bodies until at least the standard of the English Workmen's Compensation Act of 1897 shall have been approximately reached. In the meanwhile, the example of Germany and of other countries of continental Europe will keep before the public mind compulsory insurance as the ultimate solution of the problem of protection against accident. For this solution we are certainly not ready. For it is difficult to conceive of a legal requirement to contribute to an insurance fund that would be practically or constitutionally justifiable without covering a territory at least coextensive with the ordinary range of the migration of workmen. Insurance in other words must be, as it is in other countries, national; but national legislation is in America for the present obviously impossible. The whole subject of compulsory insurance must therefore be relegated to a somewhat remote future.

Even the adoption of the principle of the English legislation will involve a wide departure from the common law, and as such, like any other radical innovation, will have to justify itself as being conformable to constitutional limitations. The requirement of due process has practically come to mean that the legislature may enact nothing that is at variance with elementary principles of justice. It requires considerable care to adjust a new idea in legislation to these principles — more care than our methods of statutory enactment are sure to warrant. The new plan may appear plausible enough as an abstract proposition, while its elaboration in terms of a statute may reveal serious flaws and perhaps enough of injustice to invite judicial condemnation. It is therefore an advantage that the question of the validity of employers' liability of a very advanced type can be discussed on the basis of a bill which speaks with some degree of authority.

In pursuance of a resolve of the legislature of Massachusetts of 1903, a committee was appointed to examine and consider the laws concerning the legal relations between employers and employees. This committee embodied in its report, dated January, 1904, a bill, which is based in its main features upon the English act of 1897. This bill was introduced in the sessions of 1904 and 1905, but failed to pass.

The bill makes every employer belonging to one of the classes specified by it, liable for any personal injury happening to an employee while performing duties growing out of or incidental to his employment, unless the injury be due to the employee's own wilful or fraudulent misconduct. The employment must be on, or in, or about a railroad, a street railway, a factory, a workshop, a warehouse, a mine, a quarry, engineering work, or any building which is being constructed, repaired, altered, or improved by means of a scaffolding, temporary staging or ladder, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof. The act provides for payment of lump sums in case of death, and for weekly payments in case of total or partial incapacity. Maximum amounts are fixed, and the weekly payments are subject to review from time to time. All questions arising under the act as to liability to pay, or amount or duration of compensation, are to be settled by arbitration. The employee has his option to proceed independently of

the act to recover damages, where he has a cause of action by common law or by other statutes.

This brief statement of the main provisions of the bill suggests at least three difficulties which require consideration: the mode of procedure by which controversies are to be decided, the list of employments to which the act is to apply, and the rule of absolute liability which the bill adopts.

1. It will be noticed that the bill makes no provision for trial by jury. The arbitrator is to have the powers of an auditor (§ 23 of bill); but while ordinarily, under the statutes of Massachusetts, the report of an auditor appears to be only *prima facie* evidence of the facts found by him, the present bill provides that the memorandum filed by the arbitrator shall for all purposes have the same force and effect as a judgment of the court, subject to correction by order of a justice of the Superior Court (§ 26 of bill).

How can this exclusive method of settling disputes under the act be reconciled with the Massachusetts Declaration of Rights, which guarantees trial by jury in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced?

It is true that the workman submits voluntarily to the act, since his common law remedies, if any, remain intact; if he wishes to avail himself of the benefits of the statute, he may have to take them upon such terms as they are offered. It may therefore be that he cannot complain of any violation of his constitutional right to trial by jury.

It is otherwise with regard to the employer. It may be more advantageous to him to go before an arbitrator than before a jury, but it is still more advantageous to escape liability altogether; while therefore he might be willing to waive a jury, if he could be compelled to submit to some tribunal, the denial of the right to jury trial may be used by him to have the whole act declared unconstitutional. This has been the fate of measures of other states which sought to compel submission to arbitration (State *v.* Divine, 98 N. C. 778, St. L. I. M. & So. R. R. Co. *v.* Williams, 49 Ark. 492). It would incumber the operation of the act very little if the employer were given his constitutional right to demand a jury, since there would be little inducement for him to avail himself of it.

2. The second questionable feature of the proposed legislation is its scope as shown by the list of employments to which it is to apply. The selection of the railroad business for a burden of liability heavier than the ordinary has been upheld as legitimate, in view of the obvious danger to life and limb which is inseparable from it (see especially 174 U. S. 76). The English act of 1897 was made to apply to a number of industries that had previously by reason of their hazardous character, been subject to statutory regulations.[1] But what principle underlies the list of trades and employments of the Massachusetts bill? If it may not be demanded that all equally dangerous kinds of work be included, at least it should be required that all employments which the bill selects should show some special feature of danger. How on this principle can the inclusion of every workshop be justified? There are simple handicraft trades carried on without the use of mechanical power which present no special hazard whatever. In these the employer is placed under strict liability, while the much more dangerous employment of the dock laborer is outside of the bill. To impose a heavy economic burden upon the small tailor or baker, from which the proprietor of a great mercantile establishment or hotel is exempt, is a discrimination which it is difficult to justify.

It is well known how often the singling out of certain trades or avocations has been a stumbling block to legislation, how readily

[1] It is true that this basis of selection was abandoned when, in 1900, the law was extended to all agricultural employments.

the courts have seized upon the element of discrimination to annul inconvenient statutes. To avoid this very obvious risk, a workmen's compensation act ought to be based upon some clear and intelligible, and as far as possible unimpeachable, principle of classification. Such a principle, however, is not apparent in the Massachusetts bill.

3. The third difficulty to which attention should be called concerns the manner and extent of the application of the essential principle of the bill, namely, the rule of absolute liability.

It is clear that the liability created is quite independent of fault, for not even proof of an irresistible force, or of an act of God, will relieve the employer, but only the wilful or fraudulent misconduct of the employee. The bill therefore goes beyond the measure of liability established by the first radical accident legislation, that imposed upon railroads by the Prussian law of 1838, which allowed the defense of inevitable outward accident, and the principle of which has since been extended in Germany to other hazardous employments. It hardly goes, however, beyond the English act of 1897, under which the workman loses his right to compensation if the injury is due to his own "serious and wilful misconduct."

A statute of Nebraska imposes upon railroad companies, with reference to their passengers, a rule of liability at least as rigorous as that of the Massachusetts bill; for it excepts only cases where the injury results from the violation on the part of the passenger of some express rule of the company, or from his criminal negligence, which has been defined as flagrant and reckless disregard of one's own safety, and indifference to injury liable to follow. The validity of the statute has been sustained both by the highest court of the state and by the Supreme Court of the United States (183 U. S. 582). The federal Supreme Court has also recognized the rule of absolute liability in case of damage done to property by fire escaping from railroad locomotives (165 U. S. 1). On the other hand, the absolute liability, irrespective of negligence, of railroad companies for live stock killed or injured by the operation of trains has generally been held to be unconstitutional (58 Ala. 594, 8 Mont. 271, 6 Utah 253, 5 Wyo. 430, 2 Idaho 540, 1 Wash. St. 206, question left open in 18 Colo. 600). In view of the decisions in the live stock cases, it cannot be said that the validity of absolute liability is settled beyond question, even within the narrow limits of existing legislation.

But the example of railroad liability is not a sufficient support for the proposed Massachusetts legislation. The railroad business is not only exceptionally hazardous, but it is regularly carried on upon such a scale, that the burden of meeting the risk of accidental losses that must be expected to arise in connection with its operation, may be justly treated as part of its legitimate expense account.

The Massachusetts bill, however, applies to every workshop in which manual manufacturing labor is carried on. But to a small concern the basic principle of absolute liability, that he should bear the losses ordinarily accompanying an undertaking who reaps the main benefit from it, finds only a very imperfect application, if any. The resources of the small employer are often not materially greater than those of his employees, and, if so, it is altogether unjustifiable to visit upon him the consequences of their carelessness when he himself has used the utmost care. The English Departmental Committee on Workmen's Compensation, in its report of 1904, very forcibly calls attention to the hardship inflicted upon the small employer by the Workmen's Compensation Acts of 1897 and 1900:

"The financial position of a small farmer and the possible ruin that might be entailed upon him in the event of a serious accident happening to a laborer employed by him should be considered. For instance, a small farmer may not possess £300 capital and the annual profits from his farm available for

the support of himself and his family may not exceed £52 a year, and yet he might be called upon to pay the maximum compensation of £1 a week during period of disablement, or £300 in case of death arising from an accident to a laborer to whom he was paying harvest wages, which would absorb all his available income for a lengthened period, or the whole of his capital."

And further, in view of the fact that in all but the very largest establishments, absolute liability means indirectly compulsory insurance, and that insurance companies often fix a minimum premium: "A small farmer who only employs an extra man for the haytime may not pay more than £10 a year for labor, and one who employs, say, a lad all the year round and a man for the haytime, may not exceed £25 in his outgoings for labor, and yet either would have to pay as much for a policy as an employer who pays £100 or £150 in wages." (English Report, §§ 279, 292–294.)

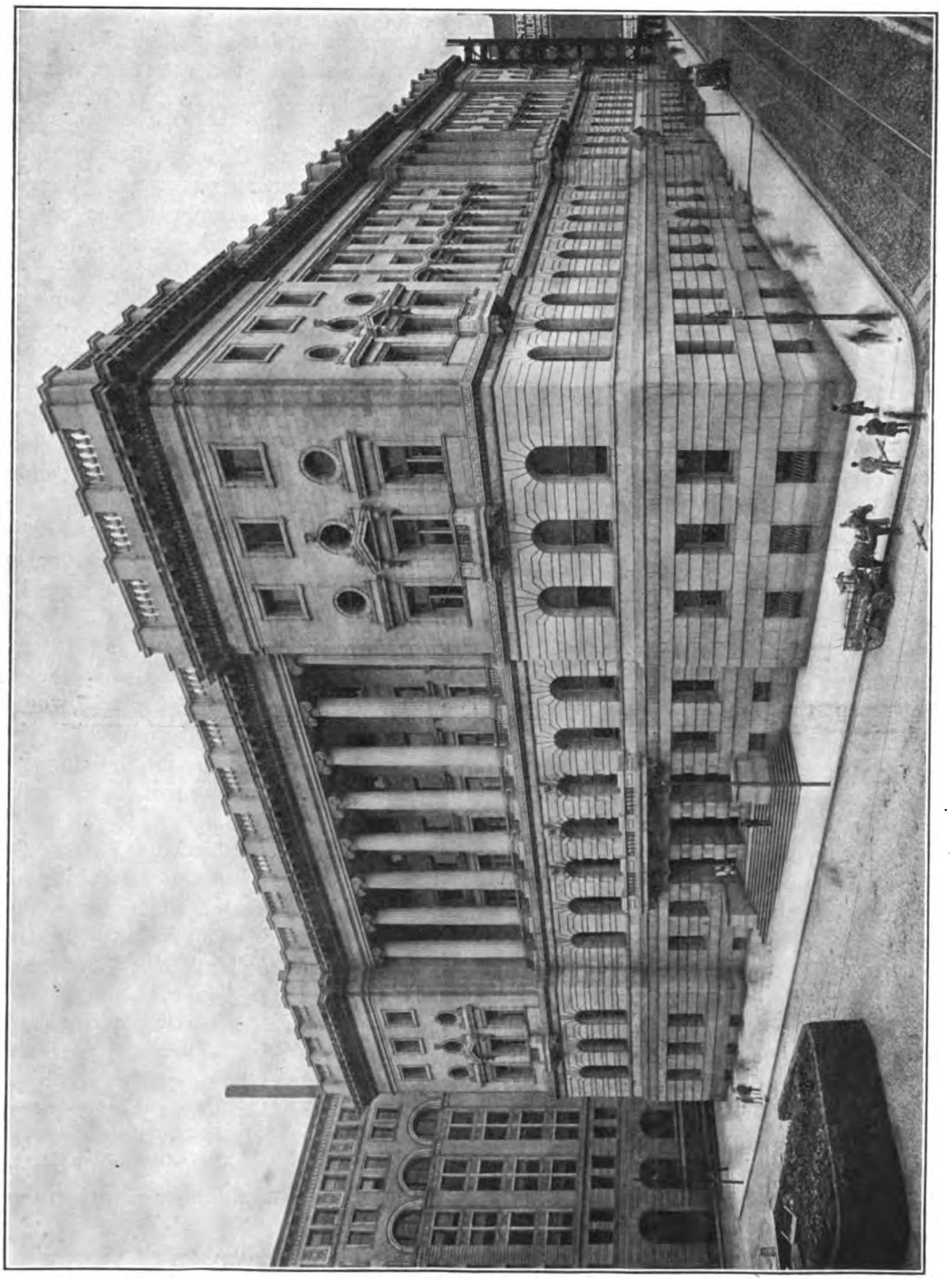
Under the Massachusetts bill the hardship to the small employer would even be greater, since the amounts payable are higher. It fixes the maximum of weekly payments at $10, while in England it is £1, *i.e.*, less than one half; the maximum amount payable to dependents in case of fatal accident at $2000, while in England it is £300, *i.e.*, one fourth less; the expenses of burial and last sickness at a maximum of $200, while in France the maximum is frs. 100, *i.e.*, one tenth of the amount proposed for Massachusetts. The liberality of the framers of the Massachusetts measure is out of proportion to the difference in money value or standard of living.

If the heavy burden placed by the English law upon the small employers has not been felt as an intolerable grievance, it is only because, as the Committee Report informs us, with regard to them, the act has remained in practice inoperative. But an American court would be compelled to inquire whether the impracticability of the measure does not point to a radical defect in its principle, and it might possibly come to the conclusion that a rule that can be sustained when applied to an industrial establishment conducted upon a large scale may be opposed to that equality of right which the Constitution guarantees, when it becomes a question simply of making A bear the burden of B's misfortune.

Even, therefore, if the absolute liability of railroad companies were universally or unqualifiedly conceded, it would not commit any court to the wholesale acceptance of the principle in all other possible applications. If the proposed bill should meet the approval of the legislature, the courts of Massachusetts, in passing upon its validity, would have before them a novel problem and a free hand in dealing with it. And it is difficult to see how this particular measure, in view of the objections pointed out, can be sustained.

It is, however, also true that none of these objections presents insuperable obstacles. The necessary provision for jury trial would probably not seriously interfere with the operation of the act; a more intelligible principle of selection of employments could easily be found, and, above all, employers on a small scale should be relieved. This would be in accordance with the legislation of Germany, France, Italy, and other countries. The discrimination in favor of the small employer has also received the sanction of the Supreme Court of the United States (185 U. S. 203), so that it would be constitutionally safe. The bill proposed for Massachusetts goes beyond the rule of liability recognized in any other country, and there is no good reason why the first American movement in the right direction should not be of a more conservative character.

CHICAGO, ILL., January, 1907.



THE BALTIMORE COURT HOUSE

THE BALTIMORE COURT HOUSE

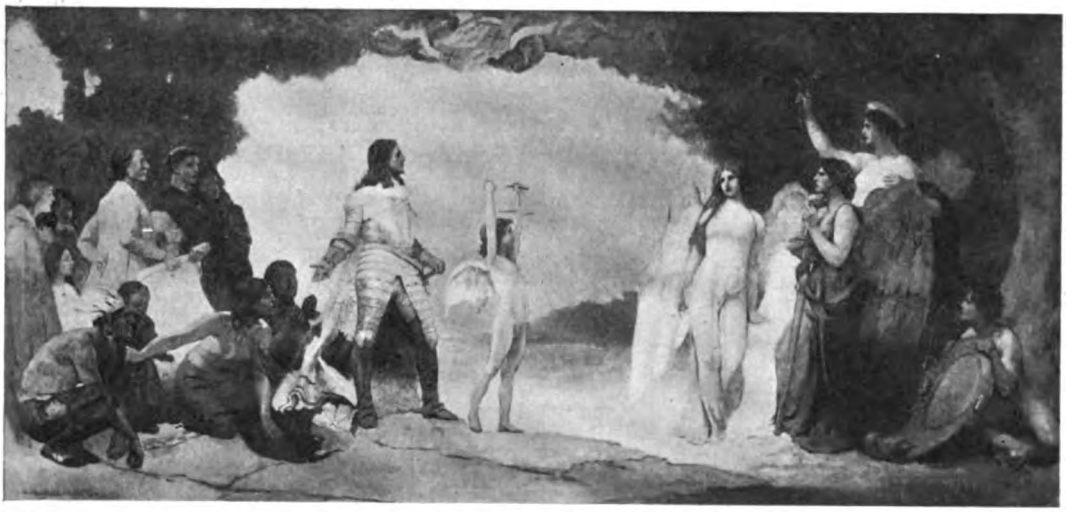
By Gertrude B. Knipp

CHALLENGING immediate attention by its impressive dignity, its classic beauty, the Baltimore Court House has been invested with additional interest since the great fire of two years ago which ate out the heart of the business section of the city. The building stands at the very edge of the burnt district; the office buildings that were separated by a narrow footway from its west front were burned to the ground, and the skyscrapers facing the south front were left blackened shells. That the Court House was not destroyed was due partly to the heroic efforts of the men who stubbornly fought the advance of the flames, and partly to a fortunate veering about of the wind. The building was designed by the Baltimore architects, J. B. Noel Wyatt and Wm. G. Nolting, and occupies an entire block. In general, the plan followed is that of a hollow square, with wings across the center. It is 312 feet long, 191 feet wide, and at its highest point measures 105 feet. It was erected at a total cost of $2,250,000.

The Renaissance classic style of architecture chosen by the designers made possible a building in which beauty of line and impressiveness of form have been harmoniously combined. Their plan was realized in white marble, and if Giotto's Tower is a poem, a building like this Hall of Justice possesses the qualities of the epic. Of its many strikingly beautiful features the great loggia with its eight huge monoliths, over the main entrance on Calvert Street — the east front of the building — is the first to catch the eye. The other entrances while less imposing, are entirely in harmony. The great doors beneath the loggia are of bronze, and the vestibule into which they open is of rare beauty, with its many arches and vaults springing from piers of Old Convent Sienna marble. Broad stairways of Tennessee marble and of beautifully wrought bronze lead to the mezzanine floor and to the two upper stories. The corridors are finished in marble, polished Italian and white marble prevailing, but monotony has been avoided by the treatment of the main vestibules in mellow tinted Numidian and Sienna marbles. The court rooms are finished in marble or in hard woods, and the qualities of dignity and appropriateness which characterize the exterior are equally striking traits of the interior. As was fitting, the skill of both designer and builder was especially lavished on the room set apart for the Supreme Bench, an imposing rotunda-like apartment in which the gleam of warm hued marbles, in columns and panels and alcoves, is taken up and reflected back by the rich dark woods of the furnishings. All of the city courts, the record offices and other offices connected with the courts, are under the one roof. The bar library is housed in the building, also, in apartments in which quiet richness of finish combines with architectural fitness.

When the building was completed and turned over to the city early in January, in 1900, all that was lacking to round out its beauty were mural paintings which should suggest typical events or periods in the history of city or state, or should symbolize the purposes of the structure itself. A beginning was soon made, and three of the representative American mural painters have been engaged on the decorations, so far — Charles Yardley Turner, Edwin H. Blashfield, and John La Farge. As Mr. Turner is a native of Baltimore, though not at present a resident, and as his early art training was received at the Maryland Institute, it was especially appropriate that he be chosen to do the first decorations that were placed in the building. He was afterwards commissioned to do another series, and the two constitute the decoration of the vestibule

leading to the criminal court. For his first theme, he selected the landing of Leonard Calvert and the Maryland colonists, at the mouth of the Potomac in the spring of 1634. a squaw and a brave test with eager curiosity the strange new implements. In the third panel the artist has indicated the determination of the colonists to make their



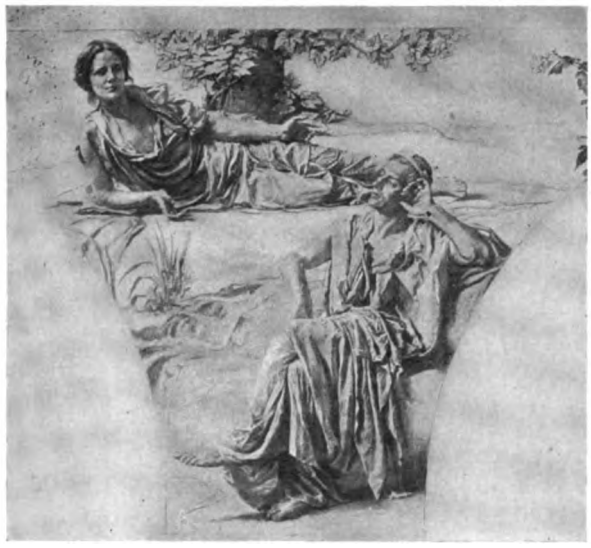
THE EDICT OF TOLERATION, 1649
By Edwin H. Blashfield

WASHINGTON RESIGNING HIS COMMISSION, 1783
By Edwin H. Blashfield

Governor Calvert is represented in the central panel in the group, bartering with the friendly tribe of Indians, the Yaocomicos, for the strip of land the colonists received from them in exchange for axes, hoes, and cloth, and on which they founded the city of St. Mary's. The domestic side of Indian life is suggested in another panel in which home in the new land, in a picture in which a little family group is watching a departing ship.

For the subject of his second series, Mr. Turner chose one of the most dramatic incidents in colonial history, the Maryland tea-party, which differed from the historic Boston function in taking place in the

broad daylight and without any attempt at masquerading. And no single event could have suggested more succinctly the protests of the Marylanders at the oppressions of the Mother Country than does the burning of the brig *Peggy Stewart* with its cargo of tea, in the harbor of Annapolis, on October 18, 1774, by its owner, Anthony Stewart, at the instigation of his indignant fellow-colonists. Charles Carroll, of Carrollton, as the leader of the "Committee of Safety," is represented in the foreground of the central panel. Opposite him is Dr. Charles Alexander Warfield, then a young man in his twenties, but the leader and spokesman of that fearless band of patriots who erected a gallows before the home of the owner of the brig, and, with this object lesson before his eyes, told him that the only alternative to hanging would be his burning of the brig. Anthony Stewart, in his shirt sleeves, stands out clearly in the adjoining panel, while in the third picture a group of men and women in the picturesque garb of the time watch the conflagration from the lawn of the Stewart house. The brig itself is suggested by the clouds of smoke and the flames that curl upward in the background.



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NUMA
By John La Farge

In the Peggy Stewart series, as in the Calvert series, the pictures are fitted into the panels into which the wall is divided by its lining of golden tinted Numidian marble pilasters, and its Sienna wainscoting. There are no breaks in the composition, subsidiary groups occupying the less important spaces. The figures are life size, and the entire composition covers a space about sixty feet in length. Russet tones give the dominant note to the pictures, and the color harmonies of the corridor, the mellow golden lights of the polished marbles, the deeper more varied tones of the paintings, have an alluring charm that the reproduction in black and white can only suggest.

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MAHOMET
By John La Farge

Mr. Edwin H. Blashfield, to whom the commissions to decorate the room of the Court of Common Pleas and the Circuit room were given, is represented by two paintings that are strikingly dissimilar in conception and in execution. In the one he has pictured Washington resigning his commission as general-in-chief of the army,

December 23, 1783, to the national Congress then in session at Annapolis. For the other, he has gone back to the beginnings of Maryland history, and has represented the Edict of Toleration promulgated by the Maryland colonists in 1649. In the Washington series, the coloring is fresh, vivid, and unrestrained. The figures stand out boldly from the background, with almost startling vividness, an effect for which the unrelieved flatness of the wall surface is largely responsible. In the Edict the coloring is much richer. It is quiet, subdued and restful. The Washington series is dramatic, but the Edict makes a stronger and more direct appeal artistically.

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CONFUCIUS
By John La Farge

As to the significance of the pictures, both subjects have been treated symbolically rather than historically. In the central panel of the Washington series, Washington is represented as placing his commission at the feet of an enthroned figure of Columbia. The female figure opposite, garbed in the colors of the state, typifies the Commonwealth of Maryland. War, sheathing her sword, is seen back of this figure, and Resistance to Oppression is symbolized by the figure that is breaking a rod. The logical followers of a proclamation of peace, Prosperity with the horn of plenty, and Commerce, are pictured to the right of the commander-in-chief of the army. In one of the side panels, officers of the infantry, artillery, and cavalry are depicted presenting arms; and in the other are a magistrate in wig and gown, with representatives of the allied forces. The symbolism of the Edict of Toleration is best explained in Mr. Blashfield's own words read at the unveiling of the painting: "What I intended to suggest was simply Lord Baltimore commending his people to Wisdom, Justice, and Mercy. Wisdom holds out the olive branch of peace to the tolerant. Behind Lord Baltimore, a Catholic priest and a Protestant pastor hold between them the Edict of Toleration. A negress and an Indian squaw crouch behind Baltimore, and lay hold of his mantle of gold and black (the colors of the Commonwealth). To right and left and in the side panels are other figures of colonists introduced simply to fill out the composition decoratively. At the side of Justice a boy holds a shield with the date 1649, the

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LYCURGUS
By John La Farge

year of the edict. In the center of the decoration, a nude boy holds the scales level, as a symbol of equity, and points upward at the motto of the Baltimores, "Thou hast covered us with the shield of thy good will."

Confucius, Numa Pompilius, Lycurgus and Mahomet. He has used some of the richest colors on the artist's palette, but they are transmuted into satisfying harmony through the mediumof the clear gold of the back-

BARTER WITH INDIANS FOR LAND IN SOUTHERN MARYLAND, 1634
By C. Y. Turner

THE BURNING OF THE PEGGY STEWART, ANNAPOLIS, MD., 1774
By C. Y. Turner

The background is woodland with a suggestion of the Bay."

Quite different again are the La Farge paintings, which are set in the spandrels in the vestibule at the western front of the building. Like the Turner corridor, this too is lined with Numidian and Old Convent Sienna marbles, which make a rich setting for the mural decorations, in which Mr. La Farge has pictured the ancient lawgivers, ground. His characterizations are distinct and forceful, and each of the groups makes a direct personal appeal. He has chosen to select the source of inspiration rather than symbolize the utterance of decree, and in each instance a discriminating regard for both history and tradition distinguishes his conception. Confucius, for instance, appears seated upon the traditional apricot altar, which is symbolized by the tree in

the background. He is accompanied by two attendants, and is represented as drawing inspiration for his reflections from the music of the kin, the instrument he holds on his lap. Lycurgus is pictured in the act of consulting the oracle at Delphi to obtain divine sanction of his laws to the Spartans, before he disappears from the knowledge of men. Numa Pompilius listens to the wisdom which falls from the lips of the nymph, Egeria, and Mahomet, heavily veiled, sits between the two favorite grandsons who, according to tradition, became his playfellows in Paradise. The conventional enclosure of a garden and the symbolical cypress and palm appear in the background.

These decorations by Turner, by Blashfield, and by La Farge are but the beginning of what the future holds in store, it is hoped, for the Baltimore Court House. If the fulfillment of the future measures up to the promise made by present achievement, and there is every reason to believe that it will, this epic in stone, through the agency of the mural artist, is destined to become not only a profoundly inspiring reminder of the inheritances from the past, but a source of inspiration to ennobled living as well.

BALTIMORE, MD., January, 1907.

THE MERCY OF THE COURT OF BURGOMASTERS AND SCHEPENS

(STATE *v.* JASPER ABRAHAMZEN & HENDRICK JANZEN[1])

By Lee M. Friedman

EVEN as far back as the early Dutch days New York was an attractive port for sea-tossed mariners. The liquor was good, the public houses many, and the people easy-going, and inclined to wink at the ordinary social relaxations with which jolly sailor folk were wont to celebrate the successful ending of a long three months' voyage from the Fatherland. In the good old days of the administration of the Honorable Cornelis Van Tienhoven, in the office of schout,[2] New Amsterdam had been famed at home and abroad as a "wide open" town. But the steady-going, solid burghers had demanded a reform. They charged corruption in the police. The Honorable Cornelis was relieved from service, and left for parts unknown. Thereupon "the Commalty, and Burgomasters & Schepens" of New Amsterdam all dutifully petitioned the Honorable Peter Stuyvesant, the director general, and the Honorable Council of the New Netherlands for the appointment of some "honorable, learned, and fit, person from among the Burghery, or inhabitants," as sheriff of this city, "to fill the vacancy."

It took time, but the reformers were patient. By 1663 the old churchwarden, Pieter Tonneman, was in full swing as schout, and New Amsterdam was no longer a place where the thirsty could tipple after hours, or godless joy run riot unsuppressed.

The new order was well established by the April day of 1663 when the good ship *The Purmerland Church* from Amsterdam dropped anchor in the lower harbor of the city. It had been a long and a hard voyage. The sailors lusted for the land and there was no keeping them aboard until the ship could anchor next morning at the West India Company's dock. The cook, and the boatswain, the carpenter, the sailmaker, the cooper, and each and every sailor man of them all, made for the shore for a jolly night in town. Old Jasper Abrahamzen, the sailmaker, and Hendrick Janzen, the cooper, were even more eager and jollier than the youngsters of the crew. They remembered the good old days long ago which they had spent in little New Amsterdam. With these days in mind, after the fashion of sea folk, they had fed the youngsters of the ship on stories of the joys and attractions they would show them when once again they landed.

Dismay and despair, however, were their lot. The taverns had closed for the night. Not a drink, not even supper could they get, and all the time their money was burning holes in their pockets. When they bombarded the inn doors, the virtuous publicans from upper windows sadly warned them to be off. The faint-hearted among them returned to their ship. The bolder spirits wandered around until hunger drove them back. Finally there were left only Jasper and Hendrick, and in desperation and to save their reputations, as good and true sailor men, they resolved to force the situation.

"With great violence, force and hostility" they broke into the house of Rendel Huit, and "demanded from, forced and threatened, yea, with a naked knife, the aforesaid Rendel Huit's wife, who was alone in the house, that she should give them to eat and to drink, notwithstanding she gave them for answer, that she had not any such, nor tapped. Wherewith, not being content, they went to the cupboard, and cut food for them-

[1] 4 R. N. A. 231.

[2] Sheriff.

selves against the aforesaid woman's will and consent."

After they had eaten they proceeded to Joris Wolsy's house where he was entertaining his good friends, Ely Douty and Ritzert Cornewel. With blows and violence Jasper and Hendrick forced themselves into the house; "demanding drink, so that the above named, Joris Wolsy and with him Ely Douty and Ritzel Cornewel, had enough to do to put them out of the house." From there they visited the old house, formerly the tavern, and now the dwelling of a goodly old burgher, Herr Carel Van Brugge. Here "they committed the same force and violence, demanding drink from the above named Carel. Though Carel Van Brugge said he did not tap, and kept no taphouse, and that they should go away, they disregarded this. They continued their violence in a manner indecent to be mentioned, so that the above named, Carel Van Brugge, assisted by the aforesaid, Ely Douty and Ritzel Cornewel, had enough to do, before they could get Hendrick Janzen and his associate out of the house, not without tearing a flap or fall of his unmentionables, which they removed in the shoving out of his body."

Not content with this, the precious pair then cut loose generally. They proceeded "with foul and bad words, unfit to be named" to abuse the Domine Drisius "and other honorables and respectable persons." They assaulted "one Huybert Verschie," and when the mate who had been sent to fetch them back to the ship came across them at last near "the Weighscales," they threatened him with a knife so that he was forced to flee for his life. By this time the whole town was aroused. As usual, the last man to appear on the scene was his Honor, the schout. With the help of half of the town the Honorable Pieter marched Jasper and Hendrick away to prison. There they sat for a day or two while the town hummed and buzzed with the excitment of it all. Then these poor bewildered sailors were brought into court. In the presence of the schout, the herren burgomasters, and the schepens, they were interrogated, and cross-interrogated. "Of course, they did it." "They admitted it all." "They said again they did it." "Then they answered yes to everything." "Why did they do it?" "Well, they just did it, that was all."

Such simplicity puzzled the good judges. They adjourned to think it over. Some one had a brilliant idea. They would enter a plea for each of the offenders. So formally they caused to be entered on the Court Records for each in answer to the respective complaints that, "He answers, he has nothing against it, requesting mercy not justice."

Upon this plea the Honorable Court gave judgment "all this ought not, and cannot be tolerated or allowed in a well regulated place and city such as this is, where justice is administered, but must be corrected and punished as an example to other violent and disorderly persons, so that this city and place may be purged of all such. Therefore the court of this city, administering *justice* in the name, and on behalf, of the High and Mighty Lord States General of of the United Netherlands, the Honorable Lord Directors of the Privileged West India Company and the Honorable Director General and Council of New Netherlands, decree, as they hereby do," that the above named Jasper Abrahamzen and Hendrick Janzen, for their committed violence, hostility, and villainies, shall be taken to the place where criminal justice is usually executed, and be there fastened to a stake, severely scourged, and banished for the term of twenty-five years out of this city's jurisdiction; and further in the costs and mises of justice, which each prisoner shall pay before he is released.

BOSTON, MASS., January, 1907.

A QUESTION OF RATIFICATION IN INSURANCE LAW

By Frederick T. Case

It seems to be the opinion more or less generally among insurance attorneys that even after loss an assured may ratify the unauthorized act of his broker or agent in obtaining for him a policy of insurance. Such is stated to be the rule in Mr. Clement's recent book on fire insurance,[1] and as recently as last February a decision adopting this same rule was handed down at special term in the New York Supreme Court.[2] In that case an insurance broker acting for a property owner had obtained for his principal certain insurance and had actually delivered the policies to him. His authority in the matter was of course thereby exhausted, and any further action on his part in relation to the assured's insurance was wholly unwarranted and not binding.[3] But he was thereafter notified by one of the companies on the risk that its policy must be cancelled, as it declined to carry the risk, and he immediately made application in assured's name for a like amount of insurance in another company, and the application was accepted. Before the assured heard of the transaction, his property burned, and thereupon he forthwith "elected" to ratify the agent's act in taking out the additional insurance — and the learned judge supported him in his election. After holding, from some evidence that does not appear, that the agent did have authority, the court said, without citing any cases however, that even apart from such authority, "the defendants cannot assert that the intended contract, made with the agent for the principal, was no contract, when the principal has confirmed the agency."

Any such doctrine produces a most anomalous situation as far as the principle and theory of the law is concerned, and immediately raises a protest from those who like to regard the law as a science. For when was the contract completed? Surely not after the loss, because it is a clear principle of insurance law that one cannot take out insurance on property that he knows is already destroyed. Surely not before the loss, because at that time neither the person insured nor any one having authority from him was a party to the contract or even knew of its existence. Thus there was no mutuality, and no meeting of minds until after the fire had happened, nor until there was no longer any property to which the insurance could attach, and then it was obviously too late to take out insurance. The situation is the same as if my neighbor, without consulting or notifying me, takes out a policy of insurance in my name upon my house. There is clearly no contract with me, for I never consented or agreed to the insurance, knew nothing of its existence, and of course cannot be required to pay the premium for it. Nor was my neighbor a party to the contract for he took it out in my name, did not agree himself to pay the premium, and did not for a moment claim or admit that he had any other interest or obligation in the contract than to obtain it for me. The insurance company, to be sure, believed he was my duly authorized agent, believed that there was a complete contract binding on it and on me, but their belief and their acting on that belief could not make such man my agent. The sum total of the transaction is that one of the two contracting parties never entered into the contract — a stranger purported to agree to it for him. If nothing else were ever heard of the policy of insurance so taken out except perhaps a suit by the insurance company to recover the amount of

[1] Clement on Insurance Vol. II, p. 481.

[2] Bauer *v.* Firemen's Fund Ins. Co., N. Y. Law Journal, Feb. 2, 1906.

[3] Wilson *v.* New Hampshire Fire Ins. Co., 140 Mass. 210.

the premiums from the apparent assured, it would be readily admitted that there was no contract in existence. The insurer might possibly have a remedy against the person who deceived it, and persuaded it to issue the policy by representing that he was the agent of the assured, but there could be no contractual right because no contract had ever come into being.

It may be said, however, that all this discussion is fanciful, and that an unauthorized person will not take out insurance on another's property in that other person's name except in the inconsiderable number of cases where the proper relief is a commission in lunacy for the unauthorized agent, rather than litigation between the ostensible parties to the contract. But this is not true, for there are at least three distinct instances of this sort of unauthorized action that are daily occurences in the insurance world. Perhaps the one most frequently seen is where an agent or broker takes out a policy as a renewal of one just expiring. He was authorized to take out the original one, and having kept the date of its expiration on his books, he assumes that the assured will desire a renewal. He accordingly takes out the new policy and offers it to the assured, who in almost every instance will ratify the act and take the insurance. Another instance is where the broker arms himself with a policy on a person's property as a preliminary to asking that person for the privilege of acting as his agent in placing his insurance — the idea being that his claims for the business will have greater force by reason of being backed up by a policy already prepared and actually issued. The last of the three instances that I shall mention is that apparently involved in the decision of the New York Supreme Court above quoted. That is, where the agent's authority has been exhausted by having taken out, and delivered to the assured, policies for the full amount that he was required to obtain. Thereafter he is no more an agent of the assured than a total stranger would be,[1] and yet, upon learning that one company desires to get off the risk, he promptly applies for and obtains insurance in the name of his former principal to take the place of that which is to be cancelled.

Usually, of course the assured learns of the supposed agent's acts and either ratifies or repudiates them before loss and before the position of the parties has changed. But in the exceptional case loss happens before he learns of the insurance and consequently before he has become a party to the contract. And the question is, can he then ratify and take the benefit of his quasi-agent's acts? The position of the parties has changed, insurance could no longer be granted by the company or obtained by the property owner — can he nevertheless by some retroaction and ratification do what he could not at present do? There was no completed contract of insurance between the parties before the loss and none could be made after the loss — will the insurer nevertheless be compelled, solely at the option of the other party, to pay for the loss, just as if there had been a binding contract?

No very satisfactory answer to these questions can be found in the authorities. As far back as the early year books and in the old Roman law we find the maxim "*ratihabitio retro turahitur et mandato comparatur*," and we find the courts down to the present day continually reiterating the doctrine that ratification of an agent's acts amounts to the same thing as an original authorization. Even if this maxim is sound without qualification, still it and the decisions to like effect merely go to show the effect or result of ratification and do not even pretend to

[1] Wilson *v.* New Hampshire Fire Ins. Co., 140 Mass. 210; Herman *v.* Niagara Fire Ins. Co. 100 N. Y. 411; Stebbins *v.* Lancashire Ins. Co. 60 N. H. 65.

determine in what instances one *may* ratify and when one may not.[1]

One of the earliest decisions as to ratification in insurance law is the well-known case of Hagedorn v. Oliverson.[2] There the plaintiff took out a policy of insurance "as well in his own name as for and in the name of all and every other person and persons to whom the same doth, may, or shall appertain, etc." One Schroeder, was the person interested in the property at the time of the fire, and he does not appear to have authorized or known of the insurance until after the loss, but the court held that he could recover for his loss, the action of course being brought in the name of the assured as trustee for Schroeder, the real beneficiary. But it should be carefully noted that here there was a completed contract between the insurance company and the person who had obtained the insurance in his own name and paid the premium, although, to be sure, it was largely, if not wholly, for the benefit of the undisclosed owner of the property. Le Blanc, J., in his opinion, said: "This, it must be remembered, is a question between the plaintiff and the underwriter, and not Schroeder and the underwriter, and unless we saw that the underwriter would not have been entitled to retain the premium, we cannot say that the plaintiff is not entitled to his contract, unless it could be shown that this is a mere gaming policy." Thus the basis of the decision is that there was an actual contract in existence before the loss, and the only difficulty arising after the loss was as to who could enforce it. Under such circumstances the only real question is between the person who took out the policy and the one who claims to be the beneficiary for whom the insurance was effected, and, of course, as between those two, the beneficiary should be allowed after loss, as well as before, to elect to take advantage of the insurance which the other obtained for him.

Precisely like the case of Hagedorn *v.* Oliverson are all of the other and later insurance decisions that are usually cited as the principal authorities for the general rule that even after loss an assured may in any case ratify the unauthorized act of his broker or agent in obtaining for him a policy of insurance.[1] For in each of those cases the person effecting the insurance was part owner or bailee and took it in his own name, and thus at once made a complete contract — although in each case it was for the benefit of an unnamed beneficiary, who later took advantage of it by a so-called ratification after loss. It must be obvious, therefore, that upon these authorities alone the rule will have to be stated less broadly, and may well be worded thus: "Where a part owner of property, or a commission agent having it in charge, or any other person having an interest in the property, effects insurance in his own name for the benefit of himself and all others concerned, the latter may even after loss ratify such act and elect to take advantage of the insurance."

This seems to be as far as any of the decisions go in permitting ratification in these cases, although it must be admitted that the language in some of the opinions is broader. For example, in Larsen *v.* Thuringia American Ins. Co.,[2] the Supreme Court of Illinois in a fire insurance case, said, "The general rule seems to be, that one may ratify that which is done by another if he could have done the same thing in the first instance." In that case the assured's broker or agent after exhausting his authority by

[1] On the subject of ratification generally see Professor Wambaugh's article in the Harvard Law Review, Vol. IX, p. 60 *et seq.* It is not the purpose of the present article to take up the many conflicting views as to ratification generally, or indeed to do any more than consider ratification as applied to a single problem in insurance law.

[2] 2 M. & S. 485.

[1] Waring *v.* Indemnity Fire Ins. Co., 45 N. Y. 606; Stillwell *v.* Staples, 19 N. Y. 401; Marts *v.* Cumberland Ins. Co. 15 Vroom (N. J.) 478; Southern Cold Storage Co. *v.* A. F. Dachman & Co., (Texas, 1903) 73 S. W. 545.

(1904) 208 Ill. 166.

obtaining and delivering the desired amount of insurance to the assured, undertook to cancel or release the policy in suit and take out new ones in another company. The assured did not learn of this transaction until after the fire, and then he gave up the old policy, accepted the new one and was actually paid for his loss under it. After that he endeavored to collect also on the old policy as well, and of course the court held that he had ratified the unauthorized act of his agent in making the substitution. The new policy was not in suit and the only ratification involved in the case, therefore, was that of the agent's act in cancelling or releasing the original policy; the court merely held that the assured might at any time by ratifying his agent's acts give up and release his rights in the first policy, and no question of creating new rights by ratification came up or was considered.

This question of one's power to take advantage after loss of a previously uncompleted contract of insurance has been necessarily involved in principle if not in precise terms in a number of decisions of which Stebbins *v.* Lancashire Insurance Company[1] is the leading case. There the assured's agent had procured and delivered to assured certain policies of insurance, but later at the direction of one of the companies he undertook to give up its policy and to substitute that of the Lancashire in its place. The assured did not hear of the transaction till after the loss, and then believing the substitution to have been effective, he elected to stand upon it, and brought his action upon the later substituted policy. But the court held against him, and in a unanimous and careful opinion said:

"The Lancashire policy never became a binding contract. When insurance on the plaintiff's building to the required amount had been secured in the Commercial Union and North British companies the plaintiff's application had been filled, and no authority remained for placing other insurance, upon the property. The Lancashire policy, therefore, was unauthorized by the plaintiff, and, although written in good faith by the authorized agents of the company, and designed as a substitute for the North British policy, it could have no operative force until it was accepted by the plaintiff. It was not an acceptance of a proposition for a contract of insurance, like the case of a policy issued on a previous application, which, as in the cases cited by the plaintiff, takes effect upon the acceptance of the application. As neither the plaintiff nor his agent had any knowledge of the existence of the policy previous to the fire, it was not an existing contract of insurance when the loss happened and subsequent delivery was ineffectual to give it validity."

The court did not in so many words talk about *ratification*, but the facts clearly show a ratification (if there ever can be one) of the previously incomplete contract, and yet the court expressly refuses to allow a recovery, and gives as the ground of its refusal the fact that the new policy had not become a binding contract at the time of the fire, and that it could not become operative through subsequent delivery by the company's agent to the assured. And to the same effect are a number of other decisions not necessary to quote, which were all in cases of attempted substitution of one policy for another by an agent who had no authority from the assured for the purpose.[1]

[1] 60 N. H. 65.

[1] Wilson *v.* New Hampshire Fire Ins. Co., 140 Mass. 210; Martin *v.* Ins. Co., 106 Tenn. 523; Partridge *v.* Milwaukee Mechanics Ins. Co., 13 App. Div. (N. Y.) 519, 525; Lancashire Ins. Co. *v.* Nill, 114 Pa. St. 248, 251. In the last named case the court, after holding that the original policy was not cancelled by the attempted substitution of the Lancashire policy for it, aptly summed up the situation thus: "But if the Clinton policy was still in force on the 11th of August, 1882, two days after the fire, the action of Brown & Beggs (the insurance agents) in the delivery of the Lancashire policy as a substitute for that of the Clinton company, was a mere attempt to shift the loss from the company upon whom it had fallen to the other which, at the time of the fire, had assumed no responsibility."

We can therefore make a further addition to our rule of ratification, and it will then read thus: "Where a part owner of property, or a commission agent having it in charge, or any other person having an interest in the property, effects insurance in his own name for the benefit of himself and all others concerned, the latter may even after loss ratify such act and elect to take advantage of the insurance. But where an unauthorized agent or other stranger applies for and obtains a policy of insurance in the name of the property owner, and the latter does not ratify the agent's act and accept the insurance before loss, there is no valid binding contract of insurance and the property owner cannot thereafter by ratification or otherwise acquire any rights against the insurer without the latter's consent."

In this form it is believed the rule accords with theory and principle and is supported by ample authority.

New York, N. Y., January, 1907.

JAMES WILSON — NATION BUILDER[1]

By Lucien Hugh Alexander

PART II

THE Declaration of Independence a reality, Wilson's energies, with those of all the patriot fathers, were at once concentrated upon the herculean task of making that Declaration effective and Independence a reality.

Wilson was among the first to recognize the necessity for efficient military organization; and we can understand that the example of the strenuous Professor Ferguson at Edinburgh in urging the importance of a Scotch militia[2] had a powerful influence upon his course. For more than a year in advance of the Declaration of Independence he had taken an active part in organizing a militia in Pennsylvania — "Associators," as they were called — and early in 1775 he raised a battalion of troops in his home county, Cumberland, receiving his commission as colonel of the same on May 31, 1775, and with which, in 1776, he took part in the New Jersey campaign. But the urgent calls for his services in Congress compelled him, as one of the chief executive officers of the government, to devote himself to civil duties there. At that time, as is well known, Congress through committees discharged the executive duties which now devolve upon the President of the United States and his cabinet officers; and the Board of War, of which Wilson was an original member, really served in the capacity, as the President now does, of commander-in-chief of the army and navy. Such a system was cumbersome, responsibility was divided and could not readily be fixed. Wilson's realization of its essential weaknesses in practical operation no doubt led him to propose a single executive for the nation in the great Constitutional Convention of 1787, and to insist upon it with all the vigor he possessed "as giving the most energy, dispatch, and responsibility."

[1] Continued from the January number.

[2] P. 5 *supra*.

The record of James Wilson's services during the early years of the Continental Congress is buried in the original documents of the period. Historians have but little more than scratched the surface of the mines of revolutionary information, which are now so thoroughly, yet so slowly, being made accessible through the classification, indexing, and printing of the wealth of manuscripts by national and state authorities, historical societies, and private enterprise, under the leadership of W. C. Ford, Chief of the Division of Manuscripts, Library of Congress. The true history of those stirring times is yet to be written; and no one has as yet explored the archives with a view to differentiating Wilson's services and isolating them in a connected narrative. But wherever brought to view, they gleam with scintillating brilliancy, and the documents of the period are replete with testimony that the patriotic men of his time knew and valued his worth. It will be through the historian of the future that Americans will fully learn how much they owe to this wonderful man, who in the crisal years of 1775, '76 and '77, though then less than thirty-five years of age, by untiring energy, infinite attention to detail and wise statesmanship, although battling against seemingly overwhelming odds, fostered among the people and in Congress those faint sparks of nationalism, which finally burst into flame and eventually made of the thirteen struggling colonies a great and powerful nation.

The mere journal of the Continental Congress, while he was a delegate, is a startling index of how he labored and of what he did. It discloses that his influence constantly increased, and that gradually he became a member of every committee of vital importance and served on more than did any other delegate. That this is not generally known is no doubt owing to the fact that the indexing of

the journal and other documents of the period is most deficient, necessitating a painstaking reading of the body of the record in order to get even clues to what he did.

Commencing less than three weeks from the day he first took his seat in Congress, May 15, 1775, the journal discloses that he was elected by ballot with Rutledge, Jay, Lee, and Johnson, a member of the committee of five, to consider and report upon an important communication from the Colony of Massachusetts Bay (June 3). He soon became a member of other committees: of three, to draft a communication on behalf of Congress to the inhabitants of Jamaica explaining the situation (June 3); of five, with Philip Schuyler and Patrick Henry, concerning papers on Indian affairs, transmitted by the New York Convention, and to report steps to be taken for securing and preserving the friendship of the Indian Nations (June 16); of five, with John Adams and Rutledge, on printing bills of credit, having plate made and contracting with the engravers (June 23). Within two months he was also unanimously elected with Benjamin Franklin and Patrick Henry, one of three commissioners to prepare articles to pacify the Indians (July 13).

Then in quick succession he became a member of the following committees, *inter alia*: of one, concerning tent supplies, etc., for the army (July 19); of two, with Thomas McKean, to prepare bonds for the Continental treasurers to execute (July 28); of five, to inquire into the state of the Colony of Virginia and to report provisions necessary for its defense (Nov. 10); of three, with Richard Henry Lee and Livingston, to draft a declaration in answer to sundry illegal ministerial proclamations concerning America (Nov. 13); of seven, with Rutledge, John Adams, Livingston, and Franklin, to consider letter from Washington regarding disposal of such vessels and cargoes "belonging to the enemy, as shall fall into the hands of or be taken by the inhabitants of the United Colonies" (Nov. 17); on plans for trade with the Indians (Nov. 23); of three, with Livingston and Jay, Wilson, chairman, on thanks of Congress to the three generals in the Northern Department for their services (Nov. 30); of three, with Jay and Livingston, on letter from Lord Stirling (Dec. 8).

During a part of this time he was away on business of the Colonies and a number of communications from him were received and acted upon by Congress.

In 1776 his labors and influence increased. During that year he served, among other committees, upon the following, the membership of each being usually three or five, though sometimes but two: to take into consideration the state of the Colonies (Jan. 10); to prepare instructions for the officers in the recruiting service, of which Wilson was chairman (Jan. 11); on letter from Washington (Jan. 15); to draft a letter to the Canadians (Jan. 23); to prepare an address to the inhabitants of the United Colonies (Jan. 24); on sundry Indian affairs (Jan. 27); to contract for supplies for prisoners (Feb. 6); concerning support of prisoners (Feb. 6); to examine the capitulations entered into with prisoners and to see that they be observed, to have officers' paroles taken and the orders of Congress punctually executed regarding prisoners (Feb. 7); to contract for rations for troops (Feb. 8); to consider into what departments the Middle and Southern Colonies ought to be formed "in order that the military operations of the Colonies may be carried on in a regular and systematic manner" (Feb. 13); to report the best method of subsisting the troops in New York and the money necessary to send thither (Feb, 13).

On Feb. 13 the committee on the address to the Colonies, appointed Jan. 24, presented its report. This report was written by James Wilson,[1] and although apparently unnoted by American historians, it is one of the most illuminating documents of the pre-Declaration period. James Madison, in writing to a

[1] See same in Wilson's handwriting, "Papers of the Continental Congress," Vol. 24, folios 217–232.

copy of this address, in his note book No. 1, says:

"This address was drawn by Mr. Wilson, who informed the transcriber [Madison] that it was meant to lead the public mind into the idea of Independence, of which the necessity was plainly foreseen by Congress."

This document from beginning to end rings with the spirit of patriotism and there is hardly a line but is worthy of repetition. Space, however, will permit of but a few quotations. At the outset we have a clear enunciation by Wilson of the teachings of George Buchanan[1] of Saint Andrews:

"That all Power was originally in the People — that all the Powers of government are derived from them — that all Power, which they have not disposed of, still continues theirs — are Maxims of the English Constitution, which, we presume, will not be disputed. The Share of Power, which the King derives from the People, or in other words, the Prerogative of the Crown, is well known and precisely ascertained: It is the same in Great Britain and in the Colonies. The Share of Power, which the House of Commons derives from the People, is likewise well known: The Manner in which it is conveyed is by election. But the House of Commons is not elected by the Colonists; and therefore, from them that Body can derive no Authority.

"Besides; the Powers, which the House of Commons receives from its Constituents, are entrusted by the Colonists to their Assemblies in the several Provinces. Those Assemblies have Authority to propose and assent to Laws for the Government of their Electors, in the same manner as the House of Commons has Authority to propose and assent to Laws for the Government of the Inhabitants of Great Britain. Now the same collective Body cannot delegate the same Powers to distinct representative Bodies. The undeniable Result is, that the House of Commons neither has nor can have any Power deriv'd from the Inhabitants of these Colonies."

Then Wilson continues with resistless logic:

"In the Instance of imposing Taxes, this Doctrine is clear and familiar: It is true and just in every other Instance. If it would be incongruous and absurd, that the same Property should be liable *to* be taxed by two Bodies independent of each other; would less incongruity and Absurdity ensue, if the same Offence were to be subjected to different and perhaps inconsistent Punishments? Suppose the punishment directed by the Laws of one Body be death, and that directed by those of the other Body be Banishment for Life; how could both punishments be inflicted? . . .

"The sentence of universal Slavery gone forth against you is; that *the British Parliament have Power to make Laws*, WITHOUT YOUR CONSENT, *binding you in* ALL *Cases whatever*. Your Fortunes, your Liberties, your Reputations, your Lives, every Thing that can render you and your Posterity happy, all are the Objects of the Laws. . . . In Proportion, however, as your Oppressions were multiplied and increased, your Opposition to them became firm and vigourous. . . . Many of the Injuries flowing from the unconstitutional and ill-advised Acts of the British Legislature, affected all the Provinces equally; and even in those Cases, in which the Injuries were confined, by the Acts, to one or to a few, the *Principles*, on which they were made, extended to all. If common Rights, common Interests, common Dangers and common Sufferings are Principles of Union, what could be more natural than the Union of the Colonies?

"Delegates authorized by the several Provinces from Nova Scotia to Georgia to represent them and act in their Behalf, met in GENERAL CONGRESS. It has been objected, that this Measure was unknown to the Constitution; that the Congress was, of Consequence, an illegal Body; and that its Proceedings could not, in any Manner, be recognized by the Government of Britain. . . . To Those, who offer this Objection, . . . we beg Leave, in our Turn, to propose, that they would explain the Principles of the Constitution, which warranted the *Assembly of the Barons at* RUNNINGMEDE, when MAGNA CHARTA was signed, the *Convention-Parliament* that recalled Charles II, and the *Convention of Lords and Commons* that placed King William on the Throne. When they shall have done this, we shall perhaps, be able to apply their Principles to prove the Necessity and Propriety of a Congress."

Turning to another phase of the situation he declares:

"We wish for Peace — we wish for Safety: But we will not, to obtain either or both of

[1] *Vide* p. 5 *supra*.

them, part with our Liberty. The sacred Gift descended to us from our Ancestors: We cannot dispose of it: We are bound by the strongest Ties to transmit it, as we have received it, pure and inviolate to our Posterity. We have taken up Arms in the best of Causes. We have adhered to the virtuous Principles of our Ancestors, who expressly stipulated, in their Favour, *and in ours*, a Right to resist every Attempt upon their Liberties. . . . Our Troops are animated with the Love of Freedom. They have fought and bled and conquered in the Discharge of their Duty as good Citizens as well as brave Soldiers. Regardless of the Inclemency of the Seasons, and of the Length and Fatigue of the March, they go, with Cheerfulness, wherever the Cause of Liberty and their Country require their Service. . . . The Experience and Discipline of our Troops will daily increase. Their patriotism will receive no Diminution: The longer those, who have forced us into this war, oblige us to continue it, the more formidable we shall become.

"The Strength and Resources of *America* are not confined to Operations *by Land*. She can exert herself likewise *by Sea*. Her Sailors are hardy and brave: She has all the materials for Ship-building: Her artificers can work them into Form. . . .

"Possessed of so many Advantages; favoured with the Prospect of so many more; Threatened with the Destruction of our constitutional Rights; cruelly and illiberally attacked, because we will not subscribe to our own Slavery; ought we to be animated with Vigour, or to sink into Despondency? When the Forms of our Governments are, by those entrusted with the Direction of them, perverted from their original Design; ought we to submit to this Perversion? Ought we to sacrifice the *Forms*, when the Sacrifice becomes necessary for preserving the *Spirit* of our Constitution? Or ought we to neglect and neglecting, to lose the Spirit by a superstitious Veneration for the Forms? We regard those Forms, and wish to preserve them as long as we can consistently with higher Objects: But much more do we regard essential Liberty, which, at all Events, we are determined not to lose, but with our Lives. . . We deem it an Honour to 'have raised Troops, and collected a naval Force'; and, *cloathed with the sacred Authority of the People, from* WHOM *all* LEGITIMATE AUTHORITY *proceeds*, 'to have exercised legislative, executive, and judicial Powers.'" . . .

Finally he declares:

"It is in the Power of your Enemies to render Independency or Slavery your and our Alternative. Should we — will you, in such an Event, hesitate a moment about the Choice? Let those, who drive us to it, answer to their King and to their Country for the Consequences. We are *desirous* to continue Subjects: But we are determined to continue Freemen. We shall deem ourselves bound to renounce; and, we hope, you will follow our Example in renouncing the *former* Character whenever it shall become incompatible with the *latter*. . . . That the Colonies may continue connected, as they have been, with Britain, is our second Wish: Our first is — THAT AMERICA MAY BE FREE."

Such are a few excerpts from Wilson's great appeal. An amusing feature of certain portions of this address, and in that respect it is also a masterpiece, is Wilson's effort "to lead the public mind into the idea of Independence" and yet not to over step the instructions of the Pennsylvania Assembly, cited p. 7, *supra*, and for which he seems to have had an official respect, although no doubt a personal contempt, for John Adams records that on May 10, 1776, (June 10)[1] after referring to the maxim that "All government originates from the people," he said:

"We are the servants of the people, sent here to act under delegated authority. If we exceed it, voluntarily, we deserve neither excuse nor justification. Some have been put under restraints by their constituents; they cannot vote without transgressing this line."[2]

But we are anticipating. Among other committees to which Wilson was appointed in 1776 were the following, and of some of which he was the chairman: to report concerning vessels exporting produce of the Colonies and importing ammunition (Feb. 26); on memorial from merchants at Montreal respecting Indian trade (March 4); on letters of marque and reprisal (March 19);

[1] Jefferson has the date correctly, June 10; *vide* p. 1086, Vol. VI. Ford Reprint of Journals of Continental Congress.

[2] *Ibid.*, p. 1075.

to superintend printing of the Journal of Congress (March 21); on letter from General Washington (Apr. 3); respecting Governor Tryon's conduct (Apr. 11); *in re* Indian affairs (Apr. 30); on communication from General Lee (May 20); "to confer with General Washington, Major General Gates, and Brigadier General Mifflin, upon the most speedy and effectual means for supporting the American cause in Canada" (May 23); to confer with the same Generals "and concert a plan of military operations for the ensuing campaign" (May 25); to consider what is proper to be done with persons giving intelligence to the enemy or supplying them with provisions (June 5).

June 13, 1776, the Board of War and Ordinance, composed of five members, was established and Wilson was elected by ballot a member of it. On June 14th, an important report drafted by Wilson concerning sundry communications from General Washington and General Schuyler was presented and favorably acted upon. On June 24th, Congress resolved that a committee composed of a member from each Colony be appointed to inquire into the causes of miscarriages in Canada, and Wilson was named from Pennsylvania. Then came the Declaration of Independence. It is impossible in this brief sketch further to detail Wilson's services in that matter.[1] Following the Declaration, Wilson in 1776 appears as a member of many other committees, among them: to settle a cartel for exchange of prisoners (July 9); to circumvent a conspiracy to liberate prisoners in Philadelphia (July 11); on memorial from Connecticut (July 25); to devise a plan for encouraging the Hessians and other foreigners employed by the King of Great Britain to "quit that iniquitous service" (Aug. 9); on plan of foreign treaties (Aug. 27). On August 1, the young nation, then less than thirty days old, received its first instruction in Nationalism from James Wilson. The problem was under debate in Congress, whether in determining questions each colony should have but one vote or the voting be according to population or in proportion to wealth. Thomas Jefferson, in his holographic notes on the debate, records that Wilson said:

"Taxation should be in proportion to wealth, but representation should accord with the number of free men; that government is a collection or result of the wills of all. . . . It has been said that Congress is a representation of States, not of individuals. I say that *the objects of its care are all the individuals of the states*. It is strange that annexing the name of 'State' to ten thousand men should give them an equal right with forty thousand. This must be the effect of magic, not of reason. *As to those matters which are referred to Congress, we are not so many States, — we are one* large state; we lay aside our individuality when we come here. The Germanic body is a burlesque on government and their practice on any point is a sufficient authority and proof that it is wrong. The greatest imperfection in the constitution of the Belgic Confederacy is their voting by provinces. The interest of the whole is constantly sacrificed to that of the small states. The history of the war in the reign of Queen Anne sufficiently proves this. It is asked: Shall nine colonies put it into the power of four to govern them as they please? I invert the question and ask: Shall two millions of people put it in the power of one million to govern them as they please? It is pretended too that the smaller colonies will be in danger from the greater. Speak in honest language and say the minority will be in danger from the majority, and is there an assembly on earth where this danger may not be equally pretended? The truth is that our proceedings will then be consentaneous with the interests of the majority, and so they ought to be. The probability is much greater that the larger states will disagree than that they will combine."

On September 24, Congress adopted instructions for a treaty with the King of France, which instructions were drafted by Wilson and contained the most minute directions on various points, such as: "Press this hard, but destroy not the treaty for it," etc., etc. Other committees: concerning

[1] *Vide* pp. 6–9.

negroes taken by vessels of war (Oct. 14); to devise ways and means for supplying the treasury with funds (Oct. 14); concerning raising of eight battalions of troops in Maryland (Oct. 23); to recover despatches stolen from General Washington (Oct. 29); "to prepare effectual plan for suppressing internal enemies of America and preventing communication of intelligence to our other enemies" (Oct. 31); concerning the raising of troops in the State of Massachusetts Bay (Nov. 9); chairman of a committee of five "with full power to devise and execute measures for effectually reënforcing General Washington and obstructing the progress of General Howe's army" (Nov. 23); to prepare a translation into the German language of Great Britain's treaty with the Court of Hesse and to pursue means the most effectual for communicating to the Hessians the said treaty (Nov. 27); on communications from General Washington and other Generals (Dec. 20); "to take into consideration the state of the army" (Dec. 26); "to prepare a circular letter to the several United States, explaining the reasons which induced Congress to enlarge the powers of General Washington, and requesting them to cooperate with him and give him all the aid in their power" (Dec. 28).

Wilson also served on numerous committees hearing admiralty appeals. Jefferson records in his notes that in the latter part of July when the proportion or quota of money which each State should furnish to the common treasury was under consideration, an amendment had been proposed that two slaves should be counted as one freeman, whereupon Wilson said:

"Slaves occupy the places of freemen and eat their food. Dismiss your slaves and freemen will take their places. *It is our duty to lay every discouragement on the importation of slaves:* but this amendment would give the *jus trium liberorum* to him who would import slaves."

The year 1777 opened with no relaxation of Wilson's activities; no man was even approaching him in the amount or value of work done. His versatility was only equaled by his application and attention to detail. Reports from his pen were being laid before Congress in rapid succession; he was not only attending to duties there, but he was often away, hurrying from point to point; now negotiating in the then far West with the Indians whose friendship was so essential to the cause of American independence, now conferring in camp with the Revolutionary generals on ways and means the most effective to bring the war to a successful conclusion; yet committee work continued to be thrust upon him. On January 30, 1777, Congress, finding it inconvenient to appoint a committee each time one of the many and rapidly increasing admiralty appeals was to be heard, determined upon a standing committee of five members "to hear and determine" *all* appeals from "the courts of admiralty in the respective states," and directed that the several appeals, when lodged with the secretary of Congress, "be by him delivered to them *for their final determination.*" Wilson was elected the chairman of this committee, which was afterwards known as "the Committee of Appeals," and thus became the presiding officer of the first supreme Federal Court of Appeals having a semblance of permanency, and from which ultimately developed the Supreme Court of the United States. On May 8, 1777, the committee in the *interim* having been enlarged, Congress, declaring that "the standing committee for hearing and determining appeals is too numerous," resolved that "the said committee be discharged and that a new committee of five be appointed, they, or any three of them, to hear and determine upon appeals brought to Congress." Of this new Court of Appeals, James Wilson was also elected the presiding officer.

Other committee work continued to be thrust upon Wilson, although he was also one of five members of the Board of War, as well as on other important standing committees. A few of the new committees to which he was appointed during 1777 are as

follows: on letter from the president of the North Carolina Convention and the memorial from it (Feb. 4); on communication from the Governor of Connecticut *in re* the four New England states (Feb. 5); on conferences with General Gates and General Green (March 21); as to sundry Pennsylvania matters (March 26); on steps for opposing the enemy's attempt to penetrate through New Jersey (Apr. 9); on ways and means to aid the recruiting service and prevent abuses therein (Apr. 12); "on rewards for destroying the enemy's ships of war" (Apr. 14); on "suppressing the spirit of Toryism" in Massachusetts (Apr. 17); on "ways and means for speedily reënforcing General Washington's army" (Apr. 23); "to prepare an address to the inhabitants of the thirteen United States on the present situation of public affairs" (Apr. 30) — this was a committee of three of which Wilson was chairman, as he was of numerous other committees; Wilson, a committee of one, on the memorial of the Commissary General (May 22); to confer with the Pennsylvania authorities concerning complaints from the Indians (May 23); on miscellaneous matters (June 28); to take into consideration the state of Georgia (July 25); to examine certain correspondence of the committee on secret correspondence (Aug. 1); to consider the state of affairs in the Northern Department (Aug. 2); on memorial from John Jay and Gouverneur Morris (Aug. 8); on communication from General Washington and the memorial of the general officers, Wilson chairman (Aug. 11); to define the powers of the Inspector General of ordnance and military manufacturies, Wilson chairman (Aug. 11).

During August, an earnest effort was made by and on behalf of the former Proprietory Governor of Pennsylvania, "John Penn, Esq.," as he is referred to in the Journal of Congress, to prevent his removal to Virginia, as directed by Congress, and he made a personal appeal by letter to be admitted to parole, and this Wilson successfully opposed. Other committee appointments were: to take into consideration the state of the Western frontiers and the Northern Department (Aug. 16); to consider the state of South Carolina and Georgia (Aug. 21); on communication from the Governor of Connecticut (Sept. 8).

Wilson's last act during September, 1777, so far as recorded in the Journal of Congress, was to record his vote on September 11, in favor of a resolution, which Congress adopted, to import twenty thousand Bibles from Holland, Scotland, and elsewhere, into the different states of the Union.

Three days later, September 14, 1777, the relentless arm of an unpatriotic party machine, reaching out from Pennsylvania, deprived the young nation of the services of its ablest champion in Congress, striking down James Wilson in the full vigor of his valiant fight for American liberty, independence, and nationality. It was a blow aimed at the growing prestige of the young Pennsylvanian, who, in addition to his labors in Congress, had voiced an irreconcilable opposition to the miserable makeshift of a Constitution, without counterchecks or balances, which had been adopted by Pennsylvania in 1776, and in the framing of which Wilson had had no part. It was a blow which was intended to destroy one whose growing popularity and influence meant the eventual overthrow of those in Pennsylvania who otherwise considered themselves sufficiently entrenched in power under the Constitution of '76; but it was a blow which struck the nation — a blow from which, perhaps, it could never have recovered had not Wilson, before his removal, succeeded in leading Congress into bestowing almost dictatorial powers upon Washington. With Wilson gone from Congress and the reorganization of the Board of War shortly afterwards, lack of harmony soon developed between the civil authorities and the military, and the friction continued until July 31, 1781, when James Wilson was appealed to by Congress to go to Washington's headquarters with Robert Morris, then the Superintendent of Finance, and Richard Peters, of the Board of

War, "with a view to bringing the military into a better understanding with the civil administration."

The faction in control of the Pennsylvania Assembly which superseded Wilson was the same which had drafted the instructions to him and the other Pennsylvania delegates in Congress in November, 1775, directing opposition to independence. The effort to knife Wilson had long been in contemplation. His friend, Colonel Thomas Smith, afterwards a Pennsylvania member of Congress and subsequently a Justice of the Supreme Court of Pennsylvania, writing concerning Wilson to a mutual friend, General Arthur St. Clair, on August 3, 1776, said:

"He has enemies — created, I sincerely believe, by his superior talent. Their malice has hitherto been impotent, but they are such industrious, undermining, detracting rascals, that I hardly think they will rest until they have got him out, and a ready tool in his place."

Six months later, on January 31, 1777, Wilson's client and close friend, Robert Morris, the "Financier of the Revolution," wrote him:

"I am told our Assembly do not intend you shall be in the new list of delegates. . . . I well know that the honesty, merit, and ability which you possess in so eminent a degree, would not be sufficient pleas against the previous determination of a strong party, for that, I am told, is the case. However, you will enjoy your family and friends at home, if you are deprived of the opportunity of continuing those services to your country, which she *so much needs*, and which, if I mistake not, she *will feel the want of until better men, in better times, shall call you forth again.*"

The party in power did act, and on February 5th elected new delegates superseding Wilson and other signers of the Declaration of Independence, including George Clymer, Benjamin Rush, George Ross, and John Morton. On February 19th, Wilson wrote his friend, General St. Clair, who, like himself, had come from Scotland and between whom there was a close bond of sympathy:

"You have probably heard that I am removed from the delegation of Pennsylvania. I retire without disgust, and with the conscious reflection of having done my duty to the public and to the state which I represented. . . . I am still hurried as much as ever. . . . I shall have more leisure by and by."

Wilson had written St. Clair in July, shortly before the attempt was made to keep "John Penn, Esq.," and his Tory Chief Justice from banishment:

"As to the politics of Pennsylvania, they are not in the situation I could wish. If a regular system was formed between General Howe and the friends of our Constitution, [the Pennsylvania Constitution of 1776], his motions could not have been better timed."

And Washington declared:

"The disaffection in Pennsylvania . . . is much beyond anything you have conceived, and the depression of the people of this state [New Jersey] render a strong support necessary to prevent a systematical submission."

The force of public opinion among the people of Pennsylvania, however, was such that two of those who had been elected declined to serve, and on February 22d, Wilson, with George Clymer, was again returned to Congress. The then dominant party in Pennsylvania bided its time, and seven months later, on September 14, 1777, as stated above, superseded Wilson in Congress, and for more than five years the nation was without his services there. This act, the more the situation becomes known, will serve to deepen the stain which Wilson's removal placed upon those responsible for it, and its consequences, measured by what the nation lost, it is not possible even to estimate. Dr. Benjamin Rush, who served in Congress with Wilson, records of him:

"He was a profound and accurate scholar. He spoke often in Congress, and his eloquence was of the most commanding kind. He reasoned, declaimed, and persuaded, according to the circumstances, with equal effect. His mind, while he spoke, was one blaze of light. Not a word ever fell from his lips out of time or out of place, nor could a word be taken from or added to his speeches without injuring them. He rendered great and essential services to his country in every stage of the Revolution."

Alexander Graydon says of him in his Memoirs:

"He never failed to throw the strongest light on his subjects, and seemed rather to flash than elicit conviction syllogistically. He produced greater orations than any other man I have ever heard."

Wilson could not have been blind to the value of his services, and must have been deeply chagrined at the thwarting of his activities in Congress. He removed to Annapolis, Maryland, where he devoted himself to practice, but yielding to the importunities of friends, he returned after a year and took up his permanent residence in Philadelphia.

He at once threw himself with the vigor and impetuosity of youth into active practice, at the same time rendering valiant service wherever possible to the cause of republican liberty in state and nation. William Rawle, the elder, a leader of "the old Bar," who had declined a proffer of the attorney-generalship of the United States at the hands of Washington, and whose great grandson, former President of the American Bar Association, Francis Rawle, had so prominent a part in arranging the 1906 Wilson Memorial services, in a brief memoir of "the elder Bar" delivered before the Bar of Philadelphia in 1824, said:

"Few of those now present can recollect Wilson in the splendor of his talents and the fullness of his practice. Classically educated, ... his subsequent success in the narrow circle of country courts encouraged him to embark in the storm which after the departure of the British troops agitated the forum of Philadelphia. The adherents to the royal cause were the necessary subjects of prosecution, and *popular prejudice seemed to bar the avenues of justice.* But Wilson and Lewis and George Ross [a signer, with Wilson, of the Declaration of Independence] never shrunk from such contests, and if their efforts frequently failed, it was not from want of pains or fear of danger."

He had helped to organize the Republican Society, which was pledged to unyielding opposition to the Pennsylvania constitution of '76, indeed to such an extent that its members, among whom were the ablest and most patriotic of Pennsylvanians, refused to accept any state office under that constitution, as that would compel them to take an oath to support its vagaries. Alexander Graydon, in his Memoirs, records that it was understood to have been principally the work of George Bryan, the political leader of the party in power, "in conjunction with James Cannon," who was professor of mathematics in the College of Philadelphia, and Graydon adds, "it was severely reprobated by those who thought checks and balances necessary to a legitimate distribution of the powers of government." This man Cannon, who had helped to draft the instructions against independence to the Pennsylvania delegates in Congress in '75 and '76, so far lost his own balance as to declare in a public meeting that "all learning as an artificial restraint on the human understanding he had done with;" and he advised "our sovereign lords, the people, to choose no *lawyers* or other professional characters called educated or learned; but to select men uneducated, with unsophisticated understandings;" and he declared that he "should be glad to forget the trumpery which had occupied so much of his life." Such were some of the men who had removed Wilson from Congress and whom he was now engaging in the bitterest political struggle Pennsylvania has known from that day to the present, which is placing it on a very high plane of bitterness. Yet these men were not Tories, although their narrow vision often led them, in their antagonism to Wilson and his party, to acts which injured the cause of the United States more than any Tory had the power to do. In the announcement of the Republican Society published in March, 1779, Wilson declared:

"While we oppose tyranny from a foreign power, we should think ourselves lost to every sense of duty and of shame were we tamely to acquiesce in a system of government which in our opinion will introduce the same monster so destructive of humanity

among ourselves. Such a system we conceive the constitution framed by the late convention to be."

The relentless fight was waged not only during the Revolution, but until Wilson triumphantly achieved Pennsylvania's endorsement of the United States Constitution in 1787 over the venomous opposition of the Bryan-Cannon adherents, and with his own hand wrote a new constitution for Pennsylvania, which was adopted by the people in 1790. In 1779 the Bryan faction realized the growing strength of Wilson's opposition and determined to break his influence, if possible. He had speedily built up a large and lucrative practice. The leading business men and merchants of Philadelphia were his clients, among them Robert Morris. The emission of bills of credit by Congress had inflated the currency, and the price of food stuffs rose; the public mind was inflamed against Morris and other merchants, and an attempt was made, through a committee appointed at a town meeting, to regulate the prices at which flour and other commodities should be sold. Morris and other merchants refused to sell on terms dictated to them, and some of the flour was used to supply the French fleet. This was early in October, 1779, and Wilson was at that time Advocate-General for France, as well as counsel for Morris. Those opposed to him had little difficulty in working up a popular sentiment against him, particularly as he had but recently been of counsel for Roberts and Carlisle accused of treason, and had obtained the acquittal of a number of persons tried for that crime. Could any mob ever be made to understand that a man might be an ardent patriot and at the same time discharge his duty as a lawyer to a client unjustly charged with an unpopular crime? On the night of October 3, 1779, signs were posted throughout Philadelphia, threatening Robert Morris, Wilson, and others. The following afternoon a mob assembled, armed with muskets and revolvers, and after marching for several blocks through the city, headed towards Wilson's residence, at the southwest corner of Third and Walnut streets. An eyewitness records that General Thomas Mifflin went to the leader in the march, and it is said warned him that if they attacked Wilson's house they would be fired upon, and "one of the men in the ranks struck or pushed him [Mifflin] with his musket." In the meantime a large group of Wilson's friends assembled at his residence to protect him, including Robert Morris and George Clymer, both signers of the Declaration of Independence, General William Thompson, General Thomas Mifflin, Major Francis Nichols, Captain James Campbell, John Lawrence, Samuel C. Morris, and a score or more of others. Their only ammunition consisted of some cartridges with which Clymer and Nichols had filled their pockets at the arsenal at Carpenter's Hall. And it is a fact worthy of note that in Wilson's house at this time there was a majority of those who eight years later represented Pennsylvania in the United States Constitutional Convention. Shortly before the arrival of the mob, an eyewitness who had no part in the contest, records that he talked with Wilson and that he said that he "had good information he was intended to be taken up and that he was determined to defend himself." The mob finally attacked the house, and a fusilade of shots resulted. Captain Campbell, of Wilson's old county, Cumberland, and who had been married but a week, was killed in the house, and General Mifflin was wounded by a bayonet thrust. One or two of the mob were also killed and many wounded. A disinterested eyewitness, in a personal letter, wrote that "although the whole of the mob was preparing to fire, I think a third single shot was fired before any return of fire was made from Mr. Wilson's house." Finally, led by Major Lenox, a part of the First City Troop, which had been held in rendezvous for the emergency, galloped up and charged the mob, dispersing it after the front door had been battered in. Had it not been for this rescue,

as a modern Pennsylvania historian [Stone] so truly declares, "the soil of Philadelphia would have been stained with the blood of three signers of the Declaration of Independence." It was this same organization, still containing the best blood of Philadelphia, which served as a guard of honor to Wilson's remains at the time of their recent re-interment in Philadelphia, and which since Washington's day guards the person of the President of the United States when visiting Philadelphia. The controlling faction in Pennsylvania promptly issued, on October 6, 1779, a proclamation, declaring *inter alia:*

"The undue countenance and encouragement which has been shown to persons disaffected to the liberty and independence of America by some whose rank and character in other respects gave weight to their conduct, has been the principal cause of the present commotion. . . . We . . . require all those who marched down from the Common in hostile array to the house of James Wilson, Esq., and also *all those who had previously assembled in the said house with arms or otherwise* immediately to surrender themselves to . . . some justice of the peace, *who is directed to commit them to prison*, there to remain until examination can be had."

In response to this extraordinary proclamation, Wilson, who had been defending his life in his own house — his castle — and the other men with him, boldly appeared before their enemies in the Supreme Executive Council, which had issued the proclamation, —and were held in bail for trial in such modest sums as £10,000 for Wilson, £20,000 for his brother-in-law, £10,000 for Richard Peters, later a member of the Board of War, and afterwards the distinguished United States judge, etc., etc. Some embarrassment was caused when Colonel Gressel, of the Continental Army, appeared, but the Council avoided it by declaring that "he had used his influence to prevent bloodshed," and allowed him to go without bail, with the request that he attend later on "as evidence." These farcical proceedings were finally ended by an act of amnesty to all concerned, passed March 13, 1780, by the same body which a few months before had remonstrated concerning Washington's military plans. The curtain, however, was not rung down until the president of the Supreme Executive Council had secured an appropriation of £360 to replace a sword hanger which he had lost at the time of the riot, for it seems that he had appeared on the scene.

So ended this criminal effort permanently "to remove" James Wilson from the scene of his worldly activities. "But," as is recorded in Sanderson's "Lives of the Signers of the Declaration of Independence," "like the mammoth of the lakes, he opposed a dauntless front to the storm and shook off the shafts that were hurled for his destruction."

During the *interim* of five years when Wilson was not in Congress, he performed an inestimable service to the cause of American independence by maintaining the closest relations with America's great ally, France. The minister plenipotentiary of Louis XVI, M. Gerard, on September 15, 1779, formally notified Congress that he had constituted James Wilson Advocate-General of the French nation, "in order that he may be charged with all the causes and matters relative to navigation and commerce." The commission issued to Wilson on June 5, 1779, the appointment, having been made on that date, recites:

"The daily discussions which arise in the different parts of United America, relative to commerce and navigation, and the establishment of fixed regulations on those subjects, forming an object of great labor and importance, which can only be confided to a person versed in the laws, and internal administration of America, as well as in the rights of man, and the general usages of commerce; and the experience and talents, of which Mr. James Wilson has afforded so many brilliant proofs, making him worthy of this nomination, we hereby appoint and constitute him, subject to the good pleasure of the King, and until his decision be known, Advocate-General of the French nation, in the thirteen United States."

This commission was duly confirmed by the King of France on February 18, 1781, "in consideration of the zeal and attach-

ment which he had on various occasions shown towards the subjects of his Majesty." The arduous duties of the office demanded close attention, and much study and research were necessary. "I fancy myself," said Wilson, "in the situation of a planter who undertakes to settle and cultivate a farm in the woods where there has not been one tree cut down nor a single improvement made." By the treaty between the American government and France, which Wilson had played so important a part in initiating, commercial relations and a consular system were to be established, and it devolved upon Wilson early in 1780 to draft the agreement on behalf of France. In doing so, he outlined the jurisdiction and procedure of courts in international commercial causes, as well as an elaborate consular system, which later became the basis for that of the United States. Wilson's preparations for these duties were referred to in a letter to John Holker, then the Counsel-General for France, in which Wilson said:

"A close study of the laws of England and of this country for upwards of thirteen years, and an extensive practice during the greatest part of that period, entitle me to say that I am not altogether unacquainted with them. I have given attention to the laws of nations. Since I have been honored with the nomination to be Advocate-General, I have directed my studies to the laws and ordinances of France; but I am very deficient in the knowledge of them. Nothing but intense application, for a considerable time, can make me so much master of them as to do justice to the office, or to derive reputation from it to myself. As the trade of France with the United States shall increase, the number of processes, in which the kingdom will be interested, and of cases, in which law opinions must be given, will increase in proportion. To give a safe opinion upon any particular point, however simple or detached it may appear, requires a general knowledge of the laws from which it ought to be deduced."

Some difficulty subsequently arose concerning Wilson's compensation, and he wrote M. Gerard declining a proposition which had been submitted, saying:

"It would in other respects reduce me to a degree of dependence to which I will not submit. You know my sentiment from the beginning was that my salary and my commission should be dependent only on the King."

Finally, after a long correspondence, the Duke de Luzerne informed Wilson, in April 1782, that it was not the intention of the King to attach an annual salary to the office of Advocate-General, although this was a condition of the agreement originally made with the French minister. Instantly Wilson's spirit of patriotism was aroused, and, although notifying the French minister that he would not have accepted the office except upon the terms that a salary be annexed, he added:

"But, sir, I am a citizen of the United States, and feel what I owe to France. While the King is making such generous and such expensive efforts in behalf of my country, every service of which my situation and circumstances will admit is due to him. With the greatest cheerfulness, therefore, I will, during the war, give my best service and assistance, in the line of my profession and practice, concerning such matters as the ministers and consuls of France will do me the honor of laying before me."

"Finally," as Wilson's biographer, in Sanderson's "Lives of the Signers," with biting sarcasm remarks, when writing in 1824, "after several years of labor, Mr. Wilson received from his most Christian Majesty, in November, 1783, the princely remuneration of — ten thousand livres;" yet Wilson had the conscious satisfaction of knowing, which to a man of his patriotism and character was worth more than dollars and cents, that he had fulfilled a mission which largely helped to maintain throughout the Revolution the close bond of friendship between the United States and France, so essential to the former; for without France's cordial friendship those "enemies from within," the Tory party, might have triumphed, even though the British could not by force of arms.

(To be continued.)

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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, and anecdotes.

A CORRECTION

An important manuscript, by Mr. Brooks Adams, published in our January number, has attracted so much attention in the press that we feel it necessary to take this opportunity to correct an error which we made in the paragraph about Mr. Adams which we printed in another part of that number under the title "Our Contributors." Owing to a confusion of Professor Henry B. Adams of the University of Michigan with Professor Brooks Adams of the Law School of Boston University, both of whom are interested in the economic and legal questions arising out of rate regulation, Mr. Adams was described as a lecturer of the Law School of the University of Michigan and one of the advisers of the Interstate Commerce Commission. This last statement was particularly embarrasing to Mr. Adams since his only connection with the Interstate Commerce Commission was his appearance before it as counsel for the city of Spokane in an important case shortly after publication of this unfortunate paragraph.

JUDICIAL SUPREMACY

In the Commonwealth of Australia are arising questions under the new constitution which bear a striking resemblance to those decided in the early history of our own Supreme Court, and indeed our own decisions are being constantly cited as authorities in these cases. Thus in a recent decision of the Privy Council Lord Halsbury declined to follow the decision of Chief Justice Marshall in McCulloch *v.* Maryland on the ground that no state of the Australian commonwealth has the power of independent legislation possessed by the states of the American union, and no tribunal exists like the Supreme Court in America which could declare an act passed by a colonial legislature and assented to by the Crown void as being against the constitution. Hence it was held that the state of Victoria had a right to impose an income tax on the official salary of an officer of the Commonwealth. Thus we are again reminded of the unique position in the history of jurisprudence which is occupied by the Supreme Court of the United States; the power to declare acts of Congress unconstitutional has no counterpart in the history of other countries. From time to time we read in our legal periodicals contentions that this assumption of power by our Court was really unwarranted by the constitution, and replies showing that it was certainly in the contemplation of members of the constitutional convention, but whatever the merits of the controversy this power of the Courts has been hitherto accorded by the American people the respect due to the judicial ermine. Had the framers of our constitution comtemplated, however, that by the adoption of the 14th amendment the assumption of this power by the Court would force upon it the ultimate determination of the economic policy of the republic in questions about which great masses of our countrymen will bitterly differ, they must have hesitated before subjecting our judicial system to the tremendous strain which the political aspects of these questions are bound to bring upon the body which decides them.

PSYCHOLOGY AND THE LAW

Judge Brewer once made the text of an address before a religious gathering, explaining the reasons for his belief in immortality, the conviction forced upon him by years of experience on the bench that absolute justice is an impossibility in this world. We are ob liged to carve roughly in framing our skeleton of facts to which the law must be applied, but this is a necessity if work is to be accomplished. The real reason for the dif-

ficulty of ascertaining the exact truth is the constant necessity of passing judgment upon a subject of which the man on the street has but the most superficial knowledge, and one which its specialists must admit as yet has few rules clearly defined and those almost impossible of accurate application. As Mr. Adams stated in his article in our January number, our Courts are constantly trying to decide upon an individual's state of mind. Psychology, therefore, has much to suggest to the lawyer. Whether we can safely apply in our trials the principles that are being evolved in this new science is another question. At times, however, cases arise in the decision of which this learning may be of vital importance.

In the January number of the *Times Magazine* Prof. Hugo Munsterberg calls this forceably to our attention in an article on " Untrue Confessions," suggested by the remarkable story of a conviction for murder in Chicago last summer upon a confession which most people now believe to have been made by a temporarily unbalanced mind. The striking feature of the article, however, is the unexpected clearness with which the author works out his contention that the weakminded defendant subjected to a sudden mental shock while undergoing rigid police examination became temporarily unbalanced and subject to influence of suggestion which produced the somewhat incoherent confession upon which he was convicted, but which he afterwards repudiated. That such confessions are not unknown in our criminal reports is shown by a contribution by John F. Geeting, the editor of American Criminal Reports, to a recent pamphlet entitled " Making of Men " published by the Central Howard Association; and the story of the Boorn Murder case was related not long since in our columns. Although many of these, as Mr. Munsterberg shows, are to be explained upon different grounds, the fact remains that the line between sanity and insanity can be but uncertainly described, and even in the proper field of rationality there are variations of mental states which seriously affect the credibility of testimony. The problem of the lawyer is how far these variations can be effectively distinguished without reducing our courts of justice to laboratories for dabbling in the occult.

AMERICAN BAR ASSOCIATION

The Executive Committee of the American Bar Association announces that the next annual meeting will be held at Portland, Maine, on Monday, Tuesday, and Wednesday, August 26, 27, and 28, 1907. The reason assigned for selecting the first days of the week is that the International Law Association is considering holding its meeting in America this year and the suggestion has been made to that body to hold its meeting at Portland on the last three days of the same week.

AN ENGLISH VIEW

The *London Law Times* considers it significant that there is more public effort in America than in England to declare and uphold a standard of professional ethics, more readiness among leaders of the profession to exercise active influence for good over the whole body, and more apparent interest in the profession as a profession. Perhaps a study at closer range of the rank and file of the American Bar might lead him to doubt the universality of the interest of our lawyers in ethics that might interfere with their income, but it is fortunate indeed that there are so many of our lawyers to whom these questions are of vital interest and who are willing to sacrifice much valuable time to advance the cause. To these this commendation from the Bar of the mother country should be a great gratification.

OUR CONTEMPORARIES.

The opening of the new year brings changes in the management of two of our contemporaries. Mr. Charles E. Grinnell of Boston, who was formerly an editor of the *American Law Review*, has resumed that position and we are glad to welcome so able an editor again to the field of legal periodical literature, in confidence that the *Review* will continue the same high standard of excellence which it has maintained in the past.

The Corporation Legal Manual Company announce that it has purchased the *American Lawyer*, which in future will be published in connection with the *Corporation Legal Manual* and the *Manual Corporation Law List Quarterly*. Mr. Chapin will remain editor-in-chief of the *American Lawyer* and will have associated with him, Mr. John S. Parker, Mr. Edward Q. Keasbey and Mr. J. C. Clayton.

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

Among the recent legal articles those of the widest general interest are perhaps Herbert Pope's "The Legal Aspect of Monopoly" in the *Harvard Law Review*, and Wm. Trickett's *American Law Review* paper on "The Non-Federal Law As Administered in the Federal Courts." George P. Costigan, Jr.'s, two articles on Quasi-contracts, one in the *Harvard* and the other in the *Columbia Law Review*, are able discussions of narrower scope, as are also Frederick Dwight's suggestions, as to "Capital and Capital Stock," and Albert M. Kales' comments on Professor Gray's second edition of his "Rule Against Perpetuities." Like the last named, Joseph W. Bingham's "Suggestions Concerning the Law of Fixtures" covers so many points as to be incapable of adequate treatment in a department of this nature, but deserves a close reading by those who are interested in those special subjects.

ADMINISTRATIVE LAW. "American Administrative Tribunals," by Harold M. Bowman, *Political Science Quarterly* (V. xxi, p. 609).

ADVERTISING. "The Law Concerning Advertising," by "A. D. D.," *Scottish Law Review* (V. xxiii, p. 1).

ARBITRATION. "United Nations of the World," by George C. Gregory, *Virginia Law Register* (V. xii, p. 595).

BIOGRAPHY. "James Valentine Campbell," by C. A. Kent, in the January *Michigan Law Review* (V. v, p. 161), is the first of a series of papers to be published in that magazine on four distinguished justices of the Supreme Court of Michigan — the others being Christiancy, Cooley, and Graves. Mr. Kent knew Judge Campbell well and has given an appreciative but discriminating sketch of his friend, who sat for thirty-two successive years in the highest court of the state. How far he is from conventional adulation the following division of judges into two classes and his inclusion of Judge Campbell as often among those having the first described tendency shows. The extract is also of general interest apart from its special application:

"There are two important and distinct judicial tendencies, both of which may appear at different times in the same judge, but one or the other of which make the prevailing tendency of his mind and largely contributes to his judicial character.

"The first leads the judge to ascertain from his sense of justice, or any other powerful conviction, operating, perhaps, unconsciously on his mind, the result at which he wishes to arrive and, having determined this, then to make in his opinion the best argument he can to sustain this result. This is the method in which many opinions are obtained and defended. Our interests or our prejudices lead us to adopt certain views, and we then defend them, according to the measure of our abilities. The contrarieties of opinion among able lawyers are largely produced by their retainers. The desire to decide each case by itself, according to the feeling of the judge, leads to the forgetfulness of general principles and to distinctions between the cases so subtle that they are no guide to the inquirer.

"The second method by which judges reach their decision, is by inquiring what legal principles are applicable to the case at hand. These principles should be arrived at by a consideration of the statutes or precedents, or where no rule can be found in either of these then by the development of a rule which will be a wise and just one for future cases as well as for that at bar. No doubt a deep sense of justice should pervade the mind of the judge who is looking for a legal rule, but it is the justice of a rule not applicable to the case at bar alone, but to all other like cases, a rule which shall make the law as certain as is possible.

"It is very likely that judges, who are influenced by the first tendency, will decide

their cases to the general satisfaction as much or more than those of the second tendency, but it is certain that they will not thereby contribute much to the building up of the law as a system, or to their own lasting fame. The law is a system of principles applicable each to a great many cases or it is as uncertain as the verdict of juries, no one of which is any precedent for a succeeding jury. All the judges who are long remembered depend for their rememberance on the legal principles which they have stated in such language as to be a guide to the future."

BIOGRAPHY. "Hamilton Fish, Secretary of State," by Alfred Spring. November-December *American Law Review* (V. xl, p. 801).

BIOGRAPHY (Lincoln). An interesting addition to the anecdotes of Lincoln's legal life is made by Duncan T. McIntyre, entitled "Lincoln and the Matson Slave Case," in the January *Illinois Law Review* (V. i, p. 386).

BIOGRAPHY (Victorian Chancellors). In volume one of "The Victorian Chancellors" (Little, Brown & Co., 1906, 2 vols. @ $4.00) J. B. Atlay, Esq., begins a set of biographical sketches of the occupants of the Woolsack during Queen Victoria's long reign. This first volume deals with Lords Lyndhurst, Brougham, Cottenham, and Truro, and thus covers the early Victorian period. As the author points out, Lord Brougham never held the Great Seal at the hands of Victoria, but his career was so interwoven with the history of the first years of her reign that to omit him would be to emasculate the recital of that history.

The work is so well done, with so proper an appreciation of proportion, literary charm, and human interest, that it cannot fail to attract both the laity and the profession, the American as well as the Englishman. The glimpses of history, the anecdotes of great men's chaff, and the vivid descriptions of political crises combine to give the work all the relish of historical fiction without marring its fidelity to truth.

The sketch of John Singleton Copley, Baron Lyndhurst, and thrice Lord Chancellor of England is particularly welcome, since it holds to a happy mean between the spiteful attitude of Lord Campbell and the rather too laudatory work of Sir Theodore Martin in their respective biographies of Lord Lyndhurst. The wealth of material provided by a life begun in the Province of Massachusetts Bay, May 21, 1772, and extending to October 12, 1863 is judiciously handled and in such a way as but to properly emphasize the dramatic epochs of that eventful career. Mr. Atlay seems to get under the skin, as it were, and to depict the actual character of his subject as lawyer, politician, statesman, and member of the judiciary. He is particularly happy in his treatment of Lord Lyndhurst's attitude on Catholic Emancipation and Parliamentary Reform and of the immortal charges of political profligacy that followed Copley from the time of his first entrance into Parliament until his death — in singular contrast with the usual English custom which makes it "bad form" to go behind a man's public utterances.

In Henry Peter Brougham, first Baron Brougham and Vaux, we find a subject of whom the most able biographer might well despair. His life was one long chain of theatrical incidents; his personality was so striking, so dominant, as to provoke almost limitless discussion among his contemporaries, irreconcilable opinions and statements as to his every motive, act, and characteristic. And of all the interpretations that of Brougham himself is least reliable. Despite these difficulties the author has produced a well rounded, well balanced, keenly analytic and intensely interesting sketch of this strange person, and one that has all the earmarks of equable, impartial treatment. The chapters devoted to Queen Caroline and the Bill of Pains and Penalties give a graphic picture of an almost unprecedented trial and of the leaders of the bar who appeared for the prosecution and defense.

With Lords Cottenham and Truro the situation was reversed and the paucity of authentic material gave Mr. Atlay an even more difficult task, one however that he has satisfactorily performed. With all fairness to their industry and professional acumen he shows that they really owed their highest honors to political exigencies rather than to preëminent fitness.

The four lives, as a whole, unite in showing

the rewards which law and politics combined hold out to the indefatigably industrious, thus adding the spur of hope and encouragement to the other charms of an unusual biographical work.

BIOGRAPHY (Wallis). "Severn Teackle Wallis," by Bernard C. Steiner, in the January *Sewanee Review*, is an interesting account of a famous lawyer of Baltimore.

CONSTITUTIONAL LAW. "Invalidity of Interstate Railway Transportation Contracts of Common Carriers," by M. C. Freerks, *Central Law Journal* (V. lxiv, p. 29).

CONSTITUTIONAL LAW. "Relation Between the General Government and the States," by Thomas J. Johnston, *Law Notes* (V. x, p. 186).

CONSTITUTIONAL LAW. "The National Constitution," by Joseph C. Clayton, *American Lawyer* (V. xiv, p. 544).

CONSTITUTIONAL LAW (Treaties). In the *North American Review*, December 21 (vol. clxxxiii, p. 1239), is an article entitled "The United States can Enforce Its Law." This is written to prove that within their proper sphere, treaties and legislation of the United States are necessarily supreme, and that from the necessity of the case, the executive department has power to enforce this supremacy just as the judicial department has power to declare it. Decisions early and recent of the Supreme Court are cited in support of this, and the question is asked why our government has hesitated to declare its power in the case of the San Francisco schools. While, owing to lack of remedial legislation, it may be impossible to punish infractions of treaties as in the case of the New Orleans riots, it is certainly possible to prevent continuous violation by a quasi public board even if the latter owes its authority to the state.

CONSTITUTIONAL LAW (see Interstate Commerce, Public Policy, Jurisprudence).

CONTRACTS. "Rescission of Executed Contracts of Sale for Breach of Warranty," by George A. Lee, *Law Notes* (V. x, p. 188).

CORPORATION (Capital and Stock). "There are certainly few legal expressions more familiar than 'capital,' 'stock,' and 'capital stock,' says Frederick Dwight, in the January *Yale Law Journal* (V. xvi, p. 161). "And yet when one examines the statutes and decisions in which they are employed, he finds the most extraordinary confusion and vagueness of thought. Possibly it would be more fair to the courts to say that legislatures have been at sea in the use of the terms, and judges, in endeavouring to clarify the situation, have only increased the tangle." "Both 'stock' and 'capital' seem to have been originally economic rather than legal in their significance. . . . With the development of corporations, both of these words, while retaining the economic, acquired gradually distinct and technical meanings. Stock thus came to mean the undivided interest which a shareholder had in the net assets of a company, while capital became the permanent fund with which the business of the corporation was conducted and which in general arose from the original sales of its 'stock.'"

"The further division of 'stock' corporations, however, into 'monied' and 'business,' that is, banking and mercantile, produced a still narrower specialization of the word 'capital.' It is evident that whatever funds were originally subscribed might be greatly augmented in value by judicious management and investment, or reduced to the vanishing point by misfortune or bad judgment. But by reason of the peculiar functions of banks, subscribers to the 'stock' were obliged to pay the corporations the nominal amount of such subscriptions in cash. The aggregate fund thus received became a fixed, permanent 'entity' to be invested apart from other resources, not increasing in its nominal value and not permitted to fall below without imposing an obligation upon the stockholders to make such deficiency good. This is the present 'capital' in the technical sense of the word.

"Loose use of the words has caused confusion, especially in taxation questions.

"It would be a very simple matter to prevent this uncertainty. As a matter of fact 'stock' and 'capital stock' are now synonymous, referring exclusively to the shares held by the stockholders, the only possible distinction being that the former is usually used distributively (as 'the stock owned by Jones') and the latter collectively to represent the sum of total shares outstanding. . . . 'Capital'

should be confined strictly to the permanent fund of a monied corporation. As was noted above, business corporations have not 'a capital' that they are obliged to maintain. . . . It is unnecessary and confusing to employ 'capital' in connection with them. The idea that it may mean such property as is necessary for the conduct of their business is in actual experience so vague as to be quite worthless. If legislatures wish to tax whatever property they possess, why not say so, instead of describing it as 'capital' or 'capital stock?' And if, nevertheless, they employ these terms inaccurately, while their intention appears from the context, why should not the courts simply declare the fact and say frankly that the wrong words were used, instead of stretching them to cover various unrelated conceptions and so perpetuate an extraordinary confusion?"

CRIMINAL LAW. In the January *Atlantic* (V. cxix, p. 44), Edward Alsworth Ross analyzes a type which he calls "The Criminaloid." By this he means a violator of our laws who for some reason society hesitates to regard as criminal. This is usually due to the fact that his offense is new and causes no perceptible injury to the community in which he moves. The burden falls on the future or on the nation at large or on some other social class. He is, moreover, careful to observe the conventional moralities and to be conspicuous for local public spirit and patriotism. "The key to the criminaloid is not evil impulse but moral insensibility. He understands sympathy and antipathy as springs of conduct but justice strikes him as hardly human. The law is a club to rescue your friends from and to smite your enemies with but it has no claim of its own." He flourishes until the growth of morality overtakes the growth of opportunities to prey.

CRIMINAL LAW. "The Early History of the Crime of Murder," by Nelson E. Johnson, *The Brief* (V. vi, p. 269).

CRIMINAL LAW. "Disturbing the Peace," by Fred. Kelsey, *Central Law Journal* (V. lxiii, p. 467).

CRIMINAL LAW (Privilege Against Self-Incrimination). "The Privilege of Silence and the Immunity Statutes," by Franklin Beecher, *American Law Review* (V. xl, p. 869), is an exposition with many citations of the present condition of the law on the subject treated. The same article is printed in the *Central Law Journal* (V. lxiv, p. 3).

CRIMINAL LAW. "The Grand Jury," by George J. Edwards, Jr. The George T. Bisel Company, Philadelphia, 1906.

A scholarly treatment of the history, development, and functions of the grand jury. A great deal of information is to be had from this small book, for the author has annotated it with copious and valuable citations.

GOVERNMENT. Under the title "The Brunswick Succession," Gordon E. Sherman, in the January *Yale Law Journal* (V. xvi, p. 176), makes some observations on the differences between the union of our states and that of those forming the German Empire.

HISTORY. "The Profession in the Political History of the United States," is the annual address before the graduating class of the Yale Law School, delivered by Victor H. Metcalf, Secretary of Commerce and Labor. January *Yale Law Journal* (V. xvi, p. 182).

HISTORY. "The Code Napoleon — How It was Made and Its Place in the World's Jurisprudence," in the November-December *American Law Review* (V. xl, p. 833), is the address of U. M. Rose before the Bar Associations of Arkansas and Texas, July 10, 1906.

HISTORY. "The Colonial Bar and the American Revolution," by William F. Gurley, *The Brief* (V. vi, p. 289).

HISTORY. In the January *Illinois Law Review* (V. i, p. 363), John Maxcy Zane relates in an interesting manner the history of a once famous case reported in the Plea Rolls of the year 1226, under the title of "A Mediaeval Cause Celebre."

HISTORY. "James Wilson — Patriot," by Lucien Hugh Alexander, *North American Review* (V. clxxxiii, No. 8).

HISTORY (Alabama Arbitration). In the January *Harper's*, Frederic Trevor Hill describes the second of his "Decisive Battles of the Law," in the story of the treaty and tribunal by which were settled the Alabama Claims. Though of diplomatic rather than

legal interest, as the Johnson Impeachment was chiefly of political interest, the narrative will interest lawyers and serve to emphasize the breadth of our professional field.

INNKEEPERS. "The Law of Innkeepers and Hotels, including other public houses, theatres, sleeping cars," by Joseph Henry Beale, Jr., Bussey Professor of Law in Harvard University, pp. xviii, 621, 8 vo. William J. Nagel, Boston, 1906.

Case law is growing so rapidly that without the aid of treatises, it is impossible for the practitioner to feel sure that he has secured all or nearly all of the authority on his particular point. He is in fact dependent for his authorities on the law writer. Since specialization has invaded the law as it has other professions, the lawyer needs, still more, books in his particular field. This need is recognized by the encyclopædia makers; and their judgment is confirmed by the extensive use of the encyclopædias. But we need something more extensive than encyclopædic articles. We need text books, instead of articles.

Professor Beale, too, has recognized this need in offering to the profession a book on the law of innkeepers. Years ago the law on this subject would have been included, as it was by Story, in a treatise on bailments, yet it cannot be said that the innkeeper is distinctly or essentially a bailee. The law of innkeepers' rights and liabilities depends in its last analyses, as Professor Beale points out, on the fact that the innkeeper is engaged in public service. Professor Beale's contributions to the law of public service are many and important, and by his book, showing that law in one of its narrow applications, he adds one more.

The main titles into which the book is divided are: I. The Public Calling of the Innkeeper; II. The Public Duty of the Innkeeper; III. The Undertaking of the Innkeeper; the Beginning of Responsibility; the Extent of Responsibility; the End of Responsibility; IV. Compensation and Lieu; and V. Remedies against Innkeepers. In addition to this, Protessor Beale considers other public houses, such as the boarding house, the restaurant, the theater; he also devotes four chapters to sleeping cars, and adds two chapters concerning statutes affecting innkeepers.

In a brief but interesting and convincing outline Professor Beale traces the history of the inn in early times and the beginnings of the law of inns. He also defines carefully and at length at the outset, what an inn is, and he distinguishes it from other houses of entertainment, which do not profess a public calling, and hence do not fall within the law of innkeepers.

The text devoted to the primary subject of innkeepers covers two hundred and one pages; that to boarding houses, restaurants, and theaters about seventy pages; and that to sleeping cars, about thirty-five; from which it will be seen that about one-third of the text is given to the kindred and analogous subjects, and not strictly to the law of innkeepers. However, the author, both on his back titles and title page sufficiently indicates this.

A very full collection of statutes of the several states dealing with inns and innkeepers is made in an appendix of some two hundred and thirty pages. About fifteen hundred cases are cited in footnotes to the text. The index is adequate.

Professor Beale has given an interesting and suggestive book, worked out on a consistent theory, and one which cannot fail to be helpful both to practitioners and students.

S. H. E. F.

INTERNATIONAL LAW. "The International Law and Diplomacy of the Russo-Japanese War," by Amos S. Hershey, the MacMillan Company, New York, 1906. Price $3.00 net.

This interesting work of Mr. Hershey's is an expansion and revision of the series of articles which he originally published in this magazine during the progress of the war, and, therefore, needs no further introduction to our readers.

INTERNATIONAL LAW. The third session of the International Conference of American States, held at Rio de Janeiro in July, and attended by representatives of twenty-one countries, resolved formally "to recommend to the governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts; and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin."

In "The International Conference at Rio," in the *American Law Review's* November-December number (V. xl, p. 896), Hannis Taylor says:

"The gravest and most practical question which the next Hague Conference will have before it is that involved in the making of such an agreement between all civilized States as will compel the submission to compulsory arbitration of all such conflicts as have an exclusively pecuniary origin, not involving either the independence or honor of a State, such as would be the subject of an ordinary law suit between individuals. After the first conference had completed its labors there was great rejoicing throughout the world over the fact that an arbitral tribunal had been established, even if its creators had refused to clothe it with compulsory jurisdiction. Comfort was drawn from the fact that a beginning had been made, and the hope has ever since been indulged that, in due time, the awakened conscience of the civilized nations will find a way through which compulsory jurisdiction may be built up, bit by bit, as a kind of evolution. There are certain well defined classes of pecuniary claims, not involving either the independence or honor of nations, which all publicists admit should be submitted to the judgment of a permanently organized international court. Everything depends upon the making of a beginning through a treaty to be executed by all civilized nations, in which it shall be provided that all such claims must, through a fixed and automatic process, pass to a permanent arbitral court, just as cases now pass in this country from the local federal courts in the several states to the Supreme Court of the United States. There was a time in the history of that court when even its first chief justice regarded it as a failure, because of what he considered a lack of jurisdiction. . . . Jay's outcry of despair was a bugle call to Marshall whose accession was a turning-point not only in the history of the court, but in the history of the Constitution itself. 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. So the time is ripe now for the advent of some great jurist or group of jurists clear-visioned enough to sweep the entire horizon of possible international power, and bold enough so to organize it as to bring the civilized States of the world under the authority of a tribuna armed with, at least, a limited compulsory jurisdiction. If only such a beginning can be made the rest may be safely confided to the future and to the enlightened conscience of mankind."

INTERSTATE COMMERCE. "The Federal Rate Bill, Immunity Act, and Negligence Law of 1906," annotated by F. N. Judson, T. H. Flood Company, Chicago, 1906.

This is a valuable edition of important new legislation, giving the benefit of the commentaries of a specialist both in the theoretical and practical side of the law of interstate commerce.

JUDGMENTS. "Res Judicata in Execution," by R. Srinwasa, *Allahabad Law Journal* (V. iii, p. 309).

JURISPRUDENCE. "A Consideration of a German View of Americans as Law Builders," by Hon. Fred. Brasted, *Oklahoma Law Journal* (V. v, p. 190).

JURISPRUDENCE. "Evolution of the Law by Judicial Decision," by Robert G. Street, *American Lawyer* (V. xiv, p. 554).

JURISPRUDENCE (Federal Common Law). The "Non-Federal Law Administered in Federal Courts," by William Trickett, in the *American Law Review* for November-December (V. xl, p. 819), is an interesting discussion of the refusal of the United States courts to be bound by a state court's declaration of the common law of the state, although the "Act of Sept. 24th, 1789, directed that the laws of the several states, except where the Constitution, treaties, or *statutes* of the United States otherwise require, or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Mr. Trickett thinks the federal courts wrong in their theory that in repudiating the state common law they are only declaring it more correctly than do the state courts, for he believes decisions are just as much law as are statutes; that the courts actually make the law, at least for practical purposes. A deci-

sion wrong on principle is, like a statute wrong on principle, nevertheless law for him and remains law until overruled, exactly as the statute remains law until repealed. He finds the federal courts inconsistent in saying they will accept the state decisions in certain matters, notably "settled" rules as to land.

"Why select from the vast mass of titles, and rights, rights and titles to things having a permanent locality, to land? Are we to understand that a state's common law concerning the sale, devise, inheritance of land, is to be respected, and that concerning the sale or bequest of cotton, or wheat, or a horse, or a piano, not? Is a state common law concerning persons, the status of children and married women, to be held not 'law' in the congressional sense?"

Similar comment is made on the other cases where state rules are recognized.

"If the courts of a state had shown a purpose to enforce a given principle merely because they supposed it, mistakenly, to be the principle adopted in England, or in a majority of the common law jurisdictions, and a federal court sitting in it, should believe that the state court had propounded it under this mistake, there might be a justification for its rejection of the erroneous inference. The state court would really have adopted two propositions, (*a*) that which is law in England upon this point shall be law in this state, (*b*) this is the law in England. The federal court would not be without warrant for its position that the first proposition was the one that was really enacted into the law by the court, and might then, discovering the error in the second proposition, rectify it. But it is on no such ground that it has assumed the right to repudiate the law as declared by the state courts."

The article, however, accepts the fact that this practice is a settled one and makes this interesting prophecy.

"The constitutional lawyer who surveys the Constitution and the decisions of the court discovers a vast as yet unused power in Congress and the federal courts whose existence is not generally suspected. The ratio of the litigation that is drawn to the federal courts to the entire mass of litigation is steadily increasing and is susceptible of indefinite augmentation. Over all this litigation Congress has unchallengeable power. It may prescribe the rules of procedure, the rules of evidence, and the rules which determine the rights and duties of litigants. It can, if it chooses, build up a real estate law, an inheritance law, a law of contracts, a law of torts. It has chosen thus far in common law matters for the most part to adopt state legislation. But, in some cases, it has overridden state legislation. There can be no doubt that it may, if it will, override it altogether. In equity proceedings the law of the state is more fully ignored.

"Congress, thus far, has only very partially invaded the sphere of the state law. In thus refraining, it has given scope for the initiative of the federal courts. They are building up a body of law to be administered within the states, which is a real federal common law, and which is capable of indefinite expansion at the cost of the peculiar law of the respective states. Thus far they have repudiated important elements of the states' law of torts, of contracts, of evidence. There is no power capable of imposing limits on the growth of this indirect legislation, save their own 'comity and good sense.' This process which will prove to be secular, is constant and silent and is but a part of a vast and resistless movement towards the reduction of the importance of the States and the greater coarctation of their powers. The reduced importance of the States, however, will not, we may hope, be wholly without compensation."

LAW MERCHANT. "The 'Law Merchant' of A. D., 1906," by W. N. Ponton, *Canadian Law Times* (V. xxvi, p. 783).

LEGAL ETHICS. "The Lawyers' Methods of Advertising," by Mitchell D. Follansbee, *The Brief* (V. vi, p. 276).

LIMITATIONS. "When is an Action Begun so as to Stop the Running of the Statute of Limitations?" by H. Claude Pobst, *Virginia Law Register* (V. xii, p. 675).

MONOPOLIES. "The Legal Aspect of Monopoly," by Herbert Pope, in the January *Harvard Law Review* (V. xx, p. 167), considers these questions:

"Does the law object to size, control of the market in itself, or only to particular methods

of accomplishing size, or is size not taken into account at all?"

His conclusion is:

"The line is drawn between combinations formed for the purpose of securing a monopoly by means of the union of existing competing interests, and monopoly which is the result of the growth or development of a single business, whether carried on by an individual or a corporation. If, in the case of every business enterprise, conspicuous success in the competitive struggle were to result only in illegal monopoly, the value of the competitive system would be impaired.

"It is clear, however, that some monopolies must be tolerated unless all roads leading to monopoly are closed. If that cannot be done without interfering with the ordinary methods of competition, then the only course left is, not to prohibit altogether size which gives control of the market, but to restrict the uses which may be made of size and limit the competitive power of size to perpetuate itself regardless of the interests of the general public. The success of a competitor, where competition is still active, is the gain of the purchasing or consuming public. But success which is so secure that the public may be disregarded must be controlled. The competitive system is maintained, not merely for the benefit of the successful competitor, but to serve the welfare of the whole community. The public is interested, not in the success of any one competitor, but in the continuous and effective operation of free competition, active and potential. When such restraining influences are no longer effective, so that the interests of the successful competitor and those of the public no longer correspond, the public interests must be protected in some other way. It may then become necessary by means of legislation to control the power and regulate the conduct of all large corporations, no matter what their past history."

MONOPOLIES (see **Public Policy**).

MUNICIPAL CORPORATIONS. "The Power of Municipal Corporations to make Special Assessments for Local Improvements," by Edson B. Valentine, *Albany Law Journal* (V. lxviii, p. 325).

NEGOTIABLE INSTRUMENTS. "The Uniform Negotiable Instruments Law," by John C. Richberg, *Illinois Law Review* (V. i, p. 305).

NUISANCE. A Treatise on the Law Governing Nuisances with Particular Reference to its Application to Modern Conditions and Covering the Entire Law Relating to Public and Private Nuisances, including Statutory and Municipal Powers and Remedies, Legal and Equitable, by Joseph A. Joyce and Howard C. Joyce, Albany, N. Y. Matthew Bender & Company, 1906.

This is a subject to which very few text books have been exclusively devoted, none having appeared within the last fourteen years in America. The law of nuisances in a special sense develops with the progress of industry and invention and with the resulting changes in modes of living and social conditions. It consists fundamentally in the application to each particular case of what is reasonable as between conflicting interests; and new social relations present novel situations, while changing standards and habits of thought make the test of reasonableness very elastic. Therefore a volume which brings up to date the authorities on the subject, as does Joyce on Nuisances, is timely and should be of value to the profession.

The merit of the present work consists not in analysis and exposition but in the detail and fullness with which the decisions are compiled. The text in great part is merely a methodical and orderly statement of the decisions, with little criticism or comment. Thus it is stated broadly, section 83, on the authority of Commonwealth *v.* Howe, 13 Gray, 26, that a statute declaring that a building for the illegal sale of intoxicants is a common nuisance, which may be treated as such, is constitutional; and on the authority of Lawton *v.* Steele, 152 U. S., 183, that the legislature may declare that nets set in certain waters are nuisances and may provide for their summary destruction; but there is no discussion of the interesting constitutional questions raised by those cases.

The "underlying principle which governs the doctrine of nuisances and the remedy" is stated as follows: (section 25) "Every person

is entitled in some degree at least to the enjoyment of certain private rights whether they are personal or property rights or both; and also to the enjoyment of certain public rights, and when such rights clearly exist or are vested there ought not to be an unlawful or unreasonable violation or infringement thereof which will work injury or damage to the person or persons in whom they exist or are vested either individually, as a private citizen, or collectively."

The application of these principles in the more familiar classes of cases is shown in detail by chapters on trade or business; smoke, fumes, gases, and noisome smells; noises, jars, and vibrations; animals and animal enclosures; nuisances affecting highways; and waters.

Several chapters are devoted to the subject of remedies, and the distinction in this respect between public and private nuisances is well brought out. H. F. L.

PRACTICE. "The Recommendations of the Illinois Practice Commission," by Robert McMurdy, *Illinois Law Review* (V. i, p. 299).

PRACTICE. "Affidavits on Attachment," by Raymond D. Thurber, *Bench and Bar* (V. vii, p. 92).

PRACTICE. "The Duty of the Bench to the Bar," in the November-December *American Law Review* (V. xl, p. 855), is an unsigned article in address form, found among the editorial papers of the late Judge Seymour D. Thompson, and which there is some reason to think was his own work. It is not pretentious, but has many practical ideas.

PROPERTY. 'Some Questions in the Law of Fraudulent Alienations," Anon., *Madras Law Journal* (V. xvi, p. 383).

PROPERTY (Fixtures). "Some Suggestions Concerning the Law of Fixtures" are made in the January *Columbia Law Review* (V. vii, p. 1) by Joseph W. Bingham. The article treats of too many of the multifarious phases of the subject to be summarized adequately here, but it is commended to all interested in that branch of the law as an intelligent and clarifying discussion.

PROPERTY (Rule Against Perpetuities). In the January *Harvard Law Review* (V. xx, p. 192), Albert M. Kales discusses "Several Problems of Gray's Rule Against Perpetuities, Second Edition," taking issue with the distinguished author in several matters. The subjects treated are: Vested and contingent remainders; vested and contingent interests after terms for years; statement of the rule against perpetuities; whether the rule applies to contingent remainders; vested gifts to a class and the rule; postponed enjoyment clauses void apart from the rule.

PROPERTY. Albert Martin Kales continues in the January *Illinois Law Review* (V. i, p. 374) his suggestions as to reforms in the law of future interests needed in Illinois.

PUBLIC POLICY. "The Economic Advisability of Inaugurating a National Department of Health," by J. Pease Norton, *Albany Law Journal* (V. lxviii, p. 338).

PUBLIC POLICY (Commerce Regulation). An article by Judge Alfred Hand of the Supreme Court of Pennsylvania on "Titles to Coal Lands in Pennsylvania and Incidental Monopolies Connected Therewith," in the January *Yale Law Journal* (V. xvi, p. 167), discusses among others a question of national interest, namely, the monopoly in the coal trade secured by the Pennsylvania railroads in connection with the evil of discrimination in freight rates. Judge Hand thinks very cautious consideration should be given the suggestion "that no common carrier shall be allowed to carry as freight its own goods and products, and this to take the form of legislation by the national government, reaching to the past as well as the future." It is proposed to do this through the power of the United States to "regulate commerce" and deprive railroads of all vested rights to carry their own products outside of the state of their incorporation. Under the Dartmouth College case, the author thinks this result can be reached if at all only after a legal struggle as famous as that case. It does not seem to him worth while to take this step.

"The simple fact that some corporations have a right to carry their own product to market, which has become vested, is not the evil — if it be an evil — that society is aiming at. The evil to-day is graft, discrimination, rebates to hide discrimination. The investigation already made shows it did not hide dis-

crimination, and the law can correct that, without violating or altering the Constitution, under one of the most sacred principles, the inviolability of contracts by state or national legislation."

PUBLIC POLICY (Lynching). In "The Court *v.* The Mob," in the *American Law Review* (V. xl, p. 864), Edwin Maxey declares that lynching, despite "the specious plea that it is for the purpose of furthering the cause of justice," is in truth "resorted to for the purpose of gratifying a desire for revenge — a remnant of savagery." With equal keenness he says:

"The mob excuses itself, and a great many well-meaning people are wont to excuse it, on the ground that "hanging was too good for him," that "the brute deserved all the punishment he got," etc., etc. Grant all this and the main consideration has not been touched. We have not merely the claims of the criminal to consider, but those of the community as well, and viewed from the standpoint of the community, every consideration of law, morality, and expediency demands that the criminal shall be disposed of in a way least brutalizing to its members and least subversive to its peace and good order. The view which considers merely the criminal is altogether too narrow."

QUASI-CONTRACTS (Change of Position). The January *Harvard Law Review* has a quasi-contract article by George P. Costigan, Jr. "Change of Position as a Defense in Quasi-Contracts — The Relation of Implied Warranty and Agency to Quasi-Contracts" (V. xx, p. 205). The action for money had and received to recover money paid by mistake of a material fact is the one which the author considers; the words "change of position" are used "simply in the ordinary sense of such a change in the situation of the defendant in consequence of the mistake in payment as will entail financial loss to him if he has to make repayment. That change may consist in the loss of a legal right on the very claim or instrument upon which the payment is made, or in the giving up of property, or in delay in getting at the person really liable, or in the payment of money to third persons. Such a change of position may mean a total or only a partial loss, and, if the latter, can be of course only pro tanto a defense."

The author's summing up is as follows: "This particular field has been somewhat neglected, so that exposition rather than argument is needed. Our exposition has disclosed that except in a few jurisdictions change of position caused by a payment made under mistake of fact, for which mistake the defendant is not responsible, is a complete defense to an action to recover the money, unless by express contract or by a contract implied in fact the defendant has put it out of his power to make use of the defense.

"It should be added that except in the few jurisdictions which allow a plaintiff to throw the loss upon an equally innocent defendant by taking from such defendant that title to the money which the plaintiff himself conferred upon the defendant, it is impossible to assert positively that the results reached by the courts are erroneous. It being conceded, as under our common law system it must be, that the general equitable doctrine that where the equities are equal the legal title must prevail has no application where by actual contract, that is, by express contract or by contract implied in fact, the parties agree that it shall not apply; the cases which find such an implied actual contract to exist rest upon an assumed general business understanding which is extremely difficult, if not impossible, to disprove. For that reason it is believed that they are now invulnerable to attack except through legislation. But vigorous protest may be effective, and therefore must still be raised, against those cases where equitable principle as such has been violated by the courts."

QUASI-CONTRACTS. "The Doctrine of Boston Ice Company *v.* Potter," by George P. Costigan, Jr., in the January *Columbia Law Review* (Vol. vii, p. 32), is a careful examination with copious citations of a Massachusetts case, decided in 1877, which the author believes to have been correctly decided on wrong grounds. It was an action for the value of ice furnished by the plaintiff as assignee of an express contract, if the contract was assignable, but as the assignee sued in his own name, which then he had no right to do, no recovery could be had on the express contract. The

question therefore was simply whether there was a quasi-contractual obligation to pay the value.

The facts found were that the defendant in 1873 was supplied with ice by the plaintiff, but, on account of some dissatisfaction, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish ice; that sometime before April, 1874, the Citizens' Ice Company sold its business to the plaintiff with the privilege of supplying its customers, that the plaintiff did not notify defendant of this change of business but supplied the ice called for by the assigned contract from April 1, 1874, to April 1, 1875; that during all that time "the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company;" and that "the defendant received no notice from the plaintiff until after the ice had been delivered." Upon these facts the court held that the plaintiff could not recover anything in the action brought, adding, "We are not called upon to determine what other remedy the plaintiff has."

The decision has been taken to mean that since the defendant had been dissatisfied with the plaintiff under the earlier arrangement he might have refused to deal with it as assignee, had he learned of the facts in time.

Mr. Costigan's discussion is very minute. He sums up:

"1. If the court's notion that the express contract was not assignable could by any possibility be correct, the decision in Boston Ice Company *v.* Potter would be erroneous because the plaintiff, reasonably believing itself entitled to act as assignee, was not an officious intermeddler, and, having no remedy on the express contract, was entitled to recover in quasi-contract.

"2. If, however, the court was wrong in thinking the contract not assignable to plaintiff, and that it *was* wrong we have already seen, the decision in the Boston Ice Company case was perfectly sound because the plaintiff, having already an adequate remedy on the express contract in its assignor's name, had no excuse for asking that a quasi-contractual obligation be imposed upon the defendant.

"It is submitted that in Boston Ice Company *v.* Potter the contract was assignable to plaintiff; that it actually was assigned to plaintiff; that plaintiff had an adequate remedy on the express contract in its assignor's name; that plaintiff's remedy on the express contract precluded any quasi-contractual obligation; and that because at that time in Massachusetts the assignee of a contract could not sue in his own name on the express contract the case was rightly decided."

STATUTES (United States). "June 22, 1874, President Grant put his signature to a great quarto volume which we know as the United States Revised Statutes. This has since been amended, and many additions have been made to the general laws of the United States which have not been incorporated in the Revised Statutes. These are scattered through the Statutes at large, mingled with many temporary provisions. To convert this chaos into order" Congress has created a commission to revise and codify "all the laws of the United States of a permanent and general character." This commission has recommended a Penal Code and a Judiciary Act, both of which are now before Congress. Everett P. Wheeler in "The Revision of the Laws of the United States" (January *Michigan Law Review*, V. v, p. 176) calls attention to the importance of these bills and of some amendments that have been suggested.

In admiralty and equity causes the Revision provides for a bill of exceptions to the Appellate Court, instead of the present practice which transmits the full record. A committee of the Admiralty Bar of New York seeks an amendment retaining the present practice.

"Experience shows that the ability of the appellate tribunal in admiralty and equity appeals to dispose of the whole cause upon the merits is of great public advantage. It obviates the necessity of a new trial, it disposes of the case finally upon the merits, and removes from the consideration of the Appellate Court a hundred technical points which in common law cases lead to discussion of whether or not there has been reversible error in the court below, and eliminate in many cases the consideration upon the merits, to which every litigant should be entitled."

A more far-reaching amendment in the same line suggested by members of the Bar is the English system brought specially to the public attention by Judge Amidon in his address on

"The Quest for Error and the Doing of Justice," that has been noted in these columns, and recommended by President Roosevelt in his annual message as follows:

"No judgment shall be set aside or new trial granted in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless, in the opinion of the court to which the application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

"This amendment is similar to a provision which has for more than twenty years been in force in the English Supreme Court of Judicature. It has worked well there, has greatly diminished the number of new trials, has enabled the Appellate Court to dispose of the causes before it upon the merits, and in this way to do justice more promptly and fully than is possible under a more technical system."

Other possible improvements in the revision are noted by Mr. Wheeler, who concludes by urging the profession in general to give the matter the attention its importance deserves.

SURETYSHIP. "Contracts of Indemnity," by T. F. Martin, *Commonwealth Law Review* (V. iv, p. 13).

TELEGRAPH COMPANIES. A treatise on the law of Telephone and Telegraph Companies, by S. Walter Jones, Vernon Law Book Company, Kansas City, 1906. Price $6.00.

The author states that this is the first work in which the liabilities of both telephone and telegraph companies have been comparatively analyzed, though there have been earlier works on the law of telegraph companies alone. While the differences in the two subjects are not profound in principle they become important in application, and it is well that the entire law relating to the transmission of intelligence by electricity should be thus collated. The work is elaborate and cites many cases, though not all the decisions on the subject, for we noted the absence of several important Massachusetts cases. The text, however, is in general accurate and the style is clear. The book will be desired by all lawyers who specialize in this subject.

TORTS. "Unsoundness of Mind in Relation to Torts," by H. Dean Bamford, *Commonwealth Law Review* (V. iv, p. 3).

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.)

CONTEMPT. (Punishment.) **Ky.** — The amount for which a person in contempt of court may be fined is considered in French *v.* Commonwealth, 97 S. W. 427. A jury had found defendant, a party to an action, guilty of criminal contempt, arising from his having corruptly, and with intent to obstruct the administration of justice, procured, by bribes and threats, witnesses for the adverse party, who had been summoned to testify in the action, to leave the state pending the action, and had fined him $5,000. This fine, it was contended, was excessive, and violated section 17 of the Bill of Rights, declaring that excessive fines shall not be imposed. However, the court did not consider the fine excessive in view of the testimony before it. "If, as asserted by counsel," the court says, "the fine is the largest ever imposed by a jury in this state for a contempt, doubtless it is because no other jury has ever had to deal with so aggravated a case of its class." The contention that the fine was excessive within the Bill of Rights, the court disposes of by saying: "We have in this state no statute defining contempt. There is a statute limiting the power of the court as to the infliction of punishment for contempt, but, if in the opinion of the court the contempt is one demanding greater punishment than lies in its power to inflict, it may have a jury to hear the truth of the matter, and leave it to them to inflict such punishment as they may deem commensurate with the offense. As in any other case of trial by jury, their verdict will not be disturbed unless flagrantly against the evidence, or in the result of passion or prejudice."

CONTRACTS. (Portraits — Right of Privacy.) **Wis.** — The right of an artist who has been given a commission to paint a portrait to paint a duplicate on his own accord was questioned in the recent case of Klug *v.* Sheriffs, 109 N. W. Rep., 656. The court reviews at length the authorities regarding the right of privacy, but comes to the conclusion that the case at bar turns not upon the right of privacy but upon contract relations. Plaintiff had been commissioned to paint a portrait of defendant's deceased wife. This he did, and then painted a second portrait without being requested to do so. By doing this, the court held that plaintiff had violated the implied contract to use the photographs furnished by defendant only for the purpose for which they were furnished, so that defendant, though he received the second portait and refused to return it to the artist, was not liable for its value.

This case applies to peculiar facts, the prevailing doctrine that a plaintiff shall not recover on quasi-contract principles against a protesting defendant where the plaintiff is shown to have violated deliberately the express contract in reference to the transaction. That majority view receives its ordinary application where a plaintiff has wilfully abandoned the express contract after part performance and yet seeks to recover on a quantum meruit. The cases refusing such recovery are collected in 15 Am. & Engl. Ency. of Law, 2d ed. 1087 and in the supplement to that work, Vol. 3, pp. 520-1. Malbon v. Birney, 11 Wisc. 107, denied plaintiff relief in such a case and shows that Klug v. Sheriffs is in accord with the court's previous attitude; for to deny a recovery in Malbon v. Birney where all that the plaintiff actually sues for was done in compliance with the contract and to allow a recovery in Klug v. Sheriffs where all that the plaintiff actually sues for was done in breach of the contract would be absurd.

But Klug v. Sheriffs seems indefensible as a quasi-contract decision. It is believed that Britton v. Turner, 6 N. H. 481, and its respectable following (the cases are collected in 15 Am. & Engl. Ency. of Law, 2d ed. 1089 and in the supplement to that work, Vol. 3, p. 521) are more in accord with eternal justice than the majority cases above cited, and that even in the extreme state of facts disclosed by Klug v. Sheriffs the plaintiff should recover. It should be remembered that in Klug v. Sheriffs the court put to one side the claim of a right of privacy as such and dealt with the case as if plaintiff had simply violated a provision implied in fact in the express contract. Upon that theory it would seem as if the defendant ought in conscience to pay to plaintiff the value of his enrichment at the expense

of plaintiff. That does not mean, however, that the defendant must pay as much for the second picture as for the first. The true measure of recovery is difficult to figure out, but it can in no event be more than the value of the picture to the defendant nor more than an amount which will compensate plaintiff for its loss. The lack of a market value complicates the problem. On the measure of damages adopted where a railroad had to pay for a family portrait, see Green v. Boston & Lowell R. R., 128 Mass. 221, 226. Those were not quasi-contract cases, however. In Klug v. Sheriffs the recovery would naturally be very small because the defendant, having already one picture did not care much for the second, and since the defendant cared so little for the second picture that he offered to destroy it, it might well be that recovery could not exceed the value of the paint and canvas as such. But surely if a plaintiff who sues in tort for the destruction of a picture painted and exhibited by plaintiff, which picture was a gross libel of defendant's sister, can recover the value of the paint and canvas (Du Bost v. Beresford, 2 Camp. 511), that much recovery at least should be awarded in a quasi-contract action where the plaintiff has painted a perfectly proper picture with the hope of pleasing the defendant so much that he will buy it and the defendant, instead of cutting up the picture appropriates and keeps it. A majority of the courts would agree with the Wisconsin court, however, in refusing any recovery. It should be noted that in Klug v. Sheriffs one judge, Mr. Justice Dodge, dissented.

The case has been discussed above as one in quasi-contracts. The majority opinion suggests that it was presented to the court as one of contract implied in fact, and the court got around the point by holding that the plaintiff never had title to the picture and so had nothing to sell to the defendant. That view seems to be wholly erroneous. Plaintiff certainly owned the canvas and paint and the two combined into a picture by his own labor. On the other hand, that no actual contract by defendant to purchase the picture was made out seems equally clear; his acts did not belie his words. The question then was essentially one of quasi-contract. GEO. P. COSTIGAN, JR.

CRIMINAL LAW. (Practice.) N. Y. Sup. Ct. — People *ex rel.* Jerome, District Attorney *v.* Court of General Sessions of the Peace, 98 N. Y. S., 557, involves the right of the people on relation of the district attorney to a writ of prohibition against the Court of General Sessions to prevent it from taking proceedings on a motion for a new trial on other grounds than newly discovered evidence, made after conviction of a misdemeanor. The special term of the Supreme Court (98 N. Y. S. 66) held that, inasmuch as the statute provided that, except when made on newly discovered evidence, a motion for new trial must be made before judgment and that as it must be presumed that the court below would construe the statute correctly the relator is not entitled to the writ, but on appeal the appellate division of the Supreme Court (98 N. Y. S. 557) held that as the motion for new trial was not made on the ground allowed by the statute the relator was entitled to the writ. The questions raised by the motion for new trial the court held could be considered on an appeal from the judgment of conviction in the court below.

DOMICILE. (Residents on Property of United States.) Tenn. Many of the veterans of the Civil War are in their old age taken care of in homes provided for them by the federal government. Being thus wards of the federal government, the question quite often arises as to whether or not the old soldiers who fought for the preservation of the Union may exercise the right of voters in the states in which the homes are located. A recent case dealing with this question is that of State *ex rel.* Lyle *v.* Willett, 97 S. W. Rep., 299. The state of Tennessee had granted its consent to the acquisition by the National Home for Disabled Volunteer Soldiers of certain lands for the establishment of a branch of such home, but in doing so the state had provided that the act granting this consent should not be construed to deny to inmates who were qualified voters of the state the right to vote. On authority of Sinks *v.* Reese, 19 Ohio St. 306, 2 Am. Rep. 397, and Ft. Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264, the court held that the land on which the soldiers' home was located was within the exclusive jurisdiction of the federal government. The home being within the exclusive jurisdiction of the federal government, the residents thereof were consequently non-residents of the state of Tennessee, and since the constitution of the state requires voters to be residents of the state and county wherein they offer to vote, the inmates of the home could not be regarded as qualified voters. A proviso in the act giving the state's consent to the acquirement of the property for the home, by which it was sought to reserve the right to vote to inmates who were qualified voters of the state, the court holds to be invalid. A contention that the home was a corporation and that a conveyance of the land to it was not a conveyance to the United States, the court regards as being without force. The members of the board of managers of the home are merely officers of the United States, subject to its control in every respect. They are together in their organized capacity merely the hand of the government in effectu-

ating the purposes for which they were appointed. The real and only party in interest in making the purchase was the government of the United States.

EMINENT DOMAIN. (Taking City Property for Street.) N. Y. — The right of a city to compensation for property of the city taken for the purposes of a street was questioned in *In re* Van Cortlandt Avenue, 78 Northeastern Reporter, 952. Land had been acquired by the city in fee simple for the purposes of its water supply and paid for from the proceeds of bonds, which were a general charge against the city. Afterwards a part of this property was desired for street purposes, and the question arose as to whether or not the city was entitled to compensation the same as other property owners whose land is taken for streets. In determining this question, the court calls attention to the fact that persons owning property abutting upon land owned by a municipality do not have easements in or over the municipal property simply because the property is owned by a municipality and not by an individual; that real property acquired by a municipality for general corporate purposes and not for street or other special purposes is held pursuant to the deeds of conveyance the same as individuals hold real property, and that the abutting owners on the lands in question prior to the condemnation proceedings did not have any right of access over the same or right to protect the free circulation of light and air to their property. So far as the city was concerned, it could undoubtedly have devoted the land to street purposes, but as the city owned the land in fee, it could have erected thereon a public building, maintained a public park, or, if the property was not required for the purposes of the water supply, it could have been sold, and the proceeds of the sale applied to the general purposes of the corporation and to the advantage of the general taxpayer. When the property was dedicated to the use of the public as a street, this was inconsistent with the absolute fee. By such dedication, the general taxpayer suffers a damage and the abutting owner acquires an advantage. The city is therefore entitled to compensation.

EQUITY. (Contracts in Restraint of Trade.) U. S. C. C., E. D. N. Y. — The rights of a manufacturer of a proprietary medicine, by virtue of contracts made with wholesale dealers binding them to sell the medicine only at a certain price and only to retail dealers, who also had contracts with the manufacturer fixing the price at which the medicine should be sold to consumers, are involved in Wells & Richardson Co. *v.* Abraham, 146 Federal Reporter 190. Complainants are the manufacturers of Paine's Celery Compound and defendants are the owners of a large department store in New York. Complainants brought action to restrain defendants from selling the compound at a price less than that stipulated in the agreement which complainants had made with the wholesale dealers to whom they sold the medicine. Defendants had no contract with complainants and purchased the medicine from other parties. Before selling the medicine they removed the cartoons and labels and other printed matter usually attached to or wrapped around the bottles containing the medicine. This the court considered as evidence of connivance with persons under contract with complainants and as showing that the medicine was purchased from persons interdicted by contract from selling it. The court calls attention to numerous cases in which similar contracts had been upheld and holds that complainants are entitled to the relief demanded. The court makes it clear that the case must be carefully distinguished from cases where the purchase had been made from persons who had a right to sell to the purchaser, such as Keeler *v.* Standard Folding Bed Co., 157 U. S. 660, 15 Sup. Ct. 738, 39 L. Ed. 848, and from cases where the facts did not show a contract, as, for instance, Bobbs-Merrill Co. *v.* Straus (C. C.), 139 Fed. 155.

EQUITY. (Interpleader.) Mo. App. — A case of peculiar interest is Lavelle *v.* Belliu, 97 S. W. 200, involving, as it does, the right of a bailee of found property to interplead in an action for the possession of such property. On review of the authorities the court finds that both by English statute and by the course of practice of the English courts of equity, the finder of personal property is entitled to interplead in an action for the possession of such property. No cases are found in the Missouri courts where the question has arisen, but the court is persuaded that unless plaintiff is allowed to interplead he will be without sufficient protection from demands of the different claimants, and that he will be harrassed by more than one law suit, and subject to the risk of paying lawyers' fees and costs, for which there would be no remuneration, and as it is a familiar and well established principle that equity will grant relief where the party has no adequate remedy at law, the court believes that the proceedings in the case at bar can be upheld on that ground, and that, therefore, a bailee of property found was entitled to interplead in an action between the finder and others for the possession of such property.

EQUITY (Specific Performance — Injunction.) Ia. — In H. W. Gossard Co. *v.* Crosby, 109 N. W. 483, plaintiff had engaged defendant to sell corsets for it and to give lectures pertaining to physical culture, and brought suit for an injunction to restrain her from working for a rival company. In

the petition it was alleged that the services were unique, requiring a cultured saleswoman of strong individuality and good address and ability as a lecturer, which requirements defendant was alleged to meet in an exceptional degree, and on the basis of this an injunction was sought. But the court notes that it was not shown that exceptional talent was required to understand the corset, nor was it shown why any other woman of intelligence and good address could not perform the service required. By way of introduction to the consideration of the main question, the court states that an injunction in favor of an employer against an employee, forbidding the latter to engage in the service of another, is in the nature of a decree for specific performance; and that the remedy for a violation of a contract to perform personal services or labor is universally recognized as being at law the damages there recoverably constituting the full measure of relief to which the employer is entitled. In the early English case of Kemble *v.* Kean, 6 Sim. 333, an injunction was denied when sought for the purpose of preventing an actor from entering the services of another theatrical manager, he having engaged to play at plaintiff's theater and expressly bound himself not to play at any other theater in the same city during a stated period. A later case (Lumley *v.* Wagner, 1 *De Gex* M. & G. 604) is generally regarded as overruling Kemble *v.* Kean, and in Montague *v.* Flockton, L. R. 16 Eq. 189, the court, professing to follow the Lumley case, extended the rule to uphold an injunction where the contract contained no express negative stipulation. But this case, the court notes, appears to have been overruled by later decisions (Whitman *v.* Hardman, 2 Ch. Div. 416) which distinctly refuse to approve the idea that an injunction is allowable in the absence of an express negative covenant to which the writ may give effect. The doctrine of the latter case the court regards as the one prevailing in England at this time. The court observes that there are cases in this country where the negative covenant of an employee has been enforced by an injunction, and that in some of them the courts have indulged in the suggestion, *obiter*, that the writ will lie to enforce an implied negative of this character. But these dicta have not had general acceptance, and so far as the courts of last resort in this country have had occasion to speak in cases involving the question, they have never been known to extend the rule to contracts containing no express negative covenant. As an exception to the general American doctrine, the court cites the case of Duff *v.* Russell, 133 N. Y. 678, 31 N. E. 622, but even in that case the court considers that the contract contained something more than an implied contract not to enter the services of another during the period covered by the defendant's engagement. Further discussing the authorities, the court comes to the conclusion that equity will not undertake to decree specific performance of contracts for personal services; that in the absence of express negative covenant equity will not aid the enforcement of such contract by injunction, and that even where there is an express negative covenant, injunction will not be granted save in exceptional cases, where by reason of the peculiar and extraordinary character of the promised services a violation of the agreement will cause injury to the other party, for which an action at law will not afford an adequate remedy. Coming to these conclusions, the court naturally held that in the case at bar plaintiff was not entitled to an injunction.

EVIDENCE. (Phonograph.) Mich. — An exceedingly novel question was raised in Boyne City G. & A. R. Co. *v.* Anderson, 109 N. W. Rep. 429, which was a condemnation proceeding for damages for laying tracks on a city street opposite respondent's property. The trial court permitted a phonograph to be operated in the presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to respondent's property, proper proofs having been made to justify the introduction of the instrument as substantially accurate and trustworthy reproducer of the sounds actually made. This action of the trial court the Supreme Court supports. The court notes that communication by means of the telephone have been held admissible in evidence, and states that the ground for receiving the testimony of a phonograph would seem to be stronger than that of communications by telephone, since in the case of the phonograph there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves.

This appears to be the first instance in which an American Supreme Court has ruled upon the admissibility of testimony given by the medium of a phonograph. But it is not the first instance of the admission of such testimony. Before the date of the above decision (Nov. 14, 1906), by nearly a year, i.e., on Dec. 7, 1905, and probably before the trial in the above case, this had been done by Judge Wait of the Superior Court of Suffolk County, Massachusetts, in the trial of Loring v. Boston Elevated Company, the issue and the purpose of the evidence there being precisely the same as in the Michigan case. In the Boston case, Mr. Morse for the plaintiff stated that he had known of at least one prior instance in England (Boston Daily Transcript, Dec. 7, 1905). Of the propriety of the evidence, with the safeguard above stated, there can be no doubt. J. H. W.

INFANTS. (Criminal Responsibility.) **Ga.** — In Anthony *v.* State, 55 S. E. 479, the court reaffirms the doctrine announced in Vinson *v.* State, 52 S. E. 79, 124 Ga. 19, that a minor who has arrived at the age of criminal responsibility may be convicted under the Act of 1903 of the fraudulent practices made penal by that act, although a contract for services made by him may not be civilly enforceable. Furthermore, the court in this case holds that though proof that a minor left the service of his employer in obedience to parental authority will suffice to rebut all presumptions of fraudulent intent, yet the bare fact that the minor told his employer that he yielded to the command of a stranger to go to work for him can afford the minor no excuse in the absence of a satisfactory showing that he did so under fear of duress, rather than voluntarily and with the purpose of defrauding his employer in accordance with a previously formed intent.

MUNICIPAL CORPORATIONS. (Taxation.) **Col.** — In City and County of Denver *v.* Hallett, 83 Pacific Reporter 1066, was questioned the power of a city to build an auditorium and to issue bonds for such purpose. The constitution of Colorado grants home rule to Denver and provides that the people thereof shall always have the exclusive power of making, altering, revising, or amending their charter, thereby bestowing upon the people of such city every power possessed by the state legislature. It was contended by counsel for a taxpayer who brought suit to restrain the issuance of bonds for an auditorium and conceded by the court that the constitution did not expressly grant the power to build an auditorium, that such power was not incident to nor implied in the powers granted and that an auditorium was not indispensable to the objects and purposes of the municipality as declared by the article of the constitution granting home rule to the city, but the court held that under the constitution the city had every power possessed by the legislature. Therefore, the main question was whether or not the legislature could authorize the city to purchase a site for and build an auditorium. The court notes that for many years Denver has had the power under her charter to appropriate funds for the entertainment of visitors and for the expenses of funerals, to take an enumeration of the inhabitants, to foster and encourage manufactories, to lay out and ornament grounds for a cemetery and sell lots therein, and to support or own a public library. None of these powers, the court maintains, can be regarded as indispensable to a municipality, but municipalities are permitted to exercise them because they tend to the advancement, the culture, the convenience, and the general welfare of the public. The court, therefore, is of the opinion that the authority thus exercised by the city can be extended to include the power to erect an auditorium. To fortify its position the court cites numerous cases from other jurisdictions wherein the powers of municipal corporations have been greatly extended. Thus the court cites People *v.* Kelly, 76 N. Y. 475, upholding a statute authorizing the cities of New York and Brooklyn to build a bridge over the East River; Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24, sustaining an act authorizing the city of Cincinnati to construct a railroad between that city and Chattanooga; State *v.* Cornell, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513, 68 Am. St. Rep. 629, sustaining the validity of a law authorizing counties to participate in interstate expositions, to issue bonds for such purposes and to erect and maintain suitable buildings therefor; Sun Printing Co. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, affirming the power of the legislature to invest the city of New York with authority to build a railroad within the limits of the city and issue bonds to meet the indebtedness. In addition the court notes that the city of Brooklyn has power to establish and maintain public baths (Poillon *v.* Brooklyn, 101 N. Y. 132, 4 N. E. 191); that in Massachusetts towns have power to raise money by taxation for celebrations (Hill *v.* Easthampton, 140 Mass. 381, 4 N. E. 811), and may appropriate money for public concerts by a band (Hubbard *v.* Taunton, 140 Mass. 467, 5 N. E. 157); that a memorial hall to be used and maintained as a memorial to the soldiers and sailors of the War of the Rebellion may properly be deemed a public purpose (Kingman *v.* Brockton (Mass.) 26 N. E. 998, 11 L. R. A. 123); that the officers of a school district in Vermont may build a hall in connection with a schoolhouse to accommodate the schools and inhabitants of the district for the purpose of examinations and exhibitions Greenbanks *v.* Boutwell, 43 Vt. 207); that a Vermont town may build a town hall, though the upper part thereof is known as the "Opera Hall," and incidentally used for theatrical purposes (Bates *v.* Bassett, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166); that in Tennessee the city of Knoxville has been empowered to appropriate money in aid of a college located without the city limits (East Tennessee University *v.* Knoxville, 6 Baxt. (Tenn.) 166); and that the city of Philadelphia has power to entertain distinguished visitors at public expense (Tatham *v.* Philadelphia, 11 Phila. (Pa.) 276). If the powers above enumerated could be exercised by municipalities, towns, and counties, the court argues that there is no apparent reason why the taxpayers of Denver may not under a constitu-

tional provision, limiting the power to assess and collect taxes for the purpose of such corporation, by vote order the erection of an auditorium for public purposes even though it be incidentally used for conventions and national associations.

PROPERTY. (Taxation.) Cal. — The right to assess the poles and wires of a telegraph company for the construction of an irrigation ditch was involved in Western Union Telegraph Co. *v.* Modesto Irrigation Co., 87 Pac. 190. The telegraph company had erected its poles and wires on the land of a railroad company under a contract by which such poles and wires were reserved to the telegraph company as personal property. As the poles and wires could be easily removed, and were in no sense essential to the support of that to which they were attached, the court held that they could properly be considered as personal property. Therefore they were not assessable for the revenue purposes of the irrigation district. Furthermore, Cal. Pol. Code (§§ 3617, 3663), in defining real estate for taxable purposes as land including the improvements, expressly excepts telegraph lines, and makes them assessable as personalty. These provisions the court regarded as prevailing. Hence the poles and wires of the telegraph company were not under the statutes assessable for the purposes of the irrigation district.

PROPERTY. (Tax Deed — Sufficiency of Description.) Wash. — Generally, courts construe tax deeds strictly against grantees, but in Ontario Land Company *v.* Yordy, 87 Pac. Rep. 257, the court appears to exercise a good deal of liberality for the purpose of upholding a conveyance by a tax deed. An owner of land, in platting the same as an addition to a city, numbered the blocks consecutively except that where blocks 352 and 372 would ordinarily have appeared a rectangular tract was shown, marked "reserved." Subsequently, this reserved tract was listed for taxation described as blocks 352 and 372 in the designated addition. A tax deed was issued, describing the property as blocks 352 and 372. Subsequently, the one who had made the original plat platted this rectangular tract as another addition to the city, and subdivided it into blocks, numbering them from 1 to 4 inclusive. The court, however, upholds the tax deed as a sufficient conveyance of the tract. The original owner had paid no taxes on the reserved tract for years and had made no inquiry as to such taxes. The tract was located where blocks 352 and 372 should have been if the regular order of numbering had been carried out.

PROPERTY. (Vendor and Purchaser — Defective Title — Effect of Condemnation Proceedings.) Wash. — Usually, it is agreed in contracts for the conveyance of real estate that if the title is not good or cannot be made good within a sufficient time, the purchaser shall have the right to rescind the contract. A contract of this nature was involved in Miller *v.* Calvin. Philips & Co., 87 Pac. Rep. 264, and the question therein was whether or not the pendency of condemnation proceedings by a railroad for the acquirement of a right of way constituted such a defect in the title as to entitle the purchaser to a refund of his earnest money. In disposing of this question in favor of the purchaser, the court states its reasons as follows: "Can it be said with any degree of reason that, after the commencement of the condemnation proceedings, and the filing of the *lis pendens* by the railroad company, a good title without defect could have been given by the appellant? It may be that a conveyance any time before the condemnation proceedings culminated in vesting the title in the railroad company would convey to the grantee the right to receive the damages allowed for the taking; but the value of the damages for the taking was not the subject of the contract — was not what the respondent expected to buy, or the appellant intended to sell. Under such contract it has been universally decided that the grantee is entitled to a marketable title — to an indubitable title — and that he cannot be compelled to buy a lawsuit, or a title that will involve him in litigation, but that he has a right to a title which will enable him to hold possession of his land in peace and security."

PUBLIC SERVICE CORPORATION. (Negligence.) Fla. — Mugge *v.* Tampa Waterworks Company, 42 So., 81, is a carefully considered case, involving a question as to which there is great conflict of authority, the question being as to the liability of a water company to a citizen for loss of property by fire on account of an insufficiency of water, arising from the negligence of the company. Defendant waterworks company entered into a contract with the city of Tampa, whereby the company enjoyed extensive franchises, such as the right to use the streets with its mains and hydrants, and to have special taxes levied on the property of the citizens, to be paid to the company for its supply of water for public use in the extinguishment of fires Plaintiff's building having caught on fire, and the fire department having promptly responded to the alarm, the water mains on account of defendant's negligence were found without appreciable pressure and failed to yield any appreciable flow of water, whereby the building was destroyed, and plaintiff sued the water company. The first case cited by the court is Nickerson *v.* Bridgeport Hydraulic Company, 46 Conn. 24, 33 Am. Rep. 1, the same being the first

American case bearing on the question, where it was held that where a water company, organized for the purpose of supplying the inhabitants of a city with water, contracted to supply the city hydrants with water and by the company's neglect the fire department was unable to extinguish a fire, the water company was not liable. The next case cited is Davis *v.* Clinton Waterworks Company, 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185, wherein the court in speaking of the contract said, "It is sufficient to state that the parties thereto were the city and the defendant, and that plaintiff in this case in no sense was a party to the contract." The opinion then points out that the court in Davis *v.* Waterworks treated the water company as an agent or officer employed by the city, and not as a business enterprise operated for the profit of the water company. As in line with the two cases cited, the court cites a large number of authorities, among them: Wainwright *v.* Queens County Water Co., 78 Hun. 146, 28 N. Y. Supp 987; Nichol *v.* Huntington Water Co, 53 W. Va. 348, 44 S. E. 290; Foster *v.* Lookout Water Co., 3 Lea (Tenn.) 42; Fowler *v.* Athens City Waterworks Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; Wilkinson *v.* Light, Heat & Water Co, 78 Miss. 389, 28 South 877; House *v.* Houston Waterworks Co., 88 Tex 233, 31 S. W. 179, 28 L. R. A. 532; Ferris *v.* Carson Water Co., 16 Nev. 44, 40 Am. Rep 485; Bush *v.* Artesian Hot & Cold Water Co., 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161; Ukiah City *v.* Ukiah Water & Imp. Co., 142 Cal. 173, 75 Pac. 773, 64 L. R. A 231, 100 Am. St Rep 107; Fitch *v.* Seymour Water Co, 139 Ind 214, 37 N. E 982, 47 Am St. Rep. 258; Britton *v.* Green Bay & Ft. H. Waterworks Co., 81 Wis. 48, 51 N. W. 84, 29 Am St. Rep. 856; Howsmon *v.* Trenton Water Co., 119 Mo. 304, 24 S W. 784, 23 L. R. A. 146, 41 Am St. Rep. 654. The opinion then states that the terms and conditions of the various contracts involved in the cases are not always alike, but that "the doctrine of a want of privity of contract between a property owner and the water company runs through them all."

Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R A. 77, 25 Am. St. Rep. 536; Duncan *v.* Owensboro Water Co., 15 S. W. 523, 12 Ky. Law Rep. 824; Graves County Water Co *v.* Ligon, 112 Ky. 775, 66 S. W. 725, are cited as repudiating the doctrine that a water company is not liable under such circumstances, and after reviewing further authorities, the opinion states: "It is impossible to reconcile the conflicting views of the courts and law writers upon the question at bar. . . . We are of opinion that the defendant enjoying, as it does, extensive franchises and privileges under its contract, such as the exclusive right to furnish water to the city . . . the right to have special taxes levied on the property of the citizen for its benefit . . . has assumed the public duty of furnishing water for extinguishing fires, according to the terms of its contract, and that for negligence in the discharge of this duty . . . it is liable for the damages suffered in an action of tort." The decision appears to be bounded upon Gorrell *v.* Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. S. Rep. 598, and Fisher *v.* Greensboro Water Supply Co., 128 N. C. 375, 38 S. E. 912, and Guardian Trust & Deposit Co. *v.* Greensboro Water Supply Co. (C. C.) 115 Fed. 184, and Guardian Trust Co. *v.* Fisher, 200 U. S. 57, 26 Sup. Ct. 186.

This decision is undoubtedly contrary to the almost overwhelming weight of authority, but undoubtedly too reaches a most desirable result. The cases on this subject are fully considered in this decision, and the court did not for a moment lose sight of the fact that its determination is contrary to the decisions in nearly every jurisdiction that has considered a similar state of facts. It is supported only by the few cases cited by it from Kentucky and North Carolina, and by the one U. S. Supreme Court case (Guardian Trust Co. v. Fisher, 200 U. S. 57), but it is to be noted that in the last named authority three of the judges dissented.

The decisions generally hold that the individual citizen whose property is destroyed by fire through the water company's neglect to fulfill its contract obligations with the municipality and maintain an adequate pressure in the fire hydrants, cannot sue the water company on contract because he was not a party or privy to the contract. Harvard Law Review, Vol. 15, page 784; Wainwright v. Queens County Water Co. 78 Hun. (N.Y.) 146; 28 N.Y. S. 987. Nor can he sue in tort because an action in tort cannot be predicated upon a mere failure to perform a contract with a third party. Fowler v. Water Works Co., (1889) 83 Georgia 219; 9 S. E. 673. And it has also been held that furnishing of water for fire protection is a governmental duty or power, resting with the municipality and that the water company in undertaking that work acts merely as agent of the municipality and so cannot be sued for inadequate performance any more than the municipality itself could be. Nichol v. Water Co. (1903) 53 West Va. 348; 44 S. E. 290. Nor can the city itself sue the water company for the damage thus coming to the property of the individual citizen because its interest in the property is too remote. Ferris v. Carson Water Co., 16 Nevada 45. Thus under the prevailing view a water company

may contract to furnish water for fire protection, may lay mains through the public streets, have a complete monopoly upon that most profitable privilege, and yet it can nevertheless wholly neglect to furnish water in any adequate amounts or at any adequate pressure for purposes of fire protection, and yet there is no person on earth that can compel it by legal action to pay for the damage which resulted from its neglect. It is entirely unsatisfactory to call this a mere non-feasance or a mere failure to perform a contract, for it is not the case where the water company never began supplying water under its contract, but is rather the case of undertaking a work and then carrying it out in a negligent manner. As the court well said in Olmsted v. Morris Aqueduct Co., 46 N. J. L. 459, "It is well known that when a company undertakes to supply a town with water the ordinary methods to obtain water to extinguish fires are abandoned by the people, and under the circumstances it would be gross negligence in the company to permit the supply of water to be intermitted or diminished to any considerable extent, and thus endanger the property within the town." That is the real situation in these cases. And if it can be shown as a fact that the fire could have been surely extinguished with a stream of the usual volume and pressure for fire purposes, then the water company that agreed to furnish it and has actually begun the work of doing so should pay the damages resulting from the negligent manner in which it maintained that supply and allowed the quantity or pressure to be reduced below the proper standard. (See note by Judge Freeman to Britton v. Green Bay, etc., W. W. Co., 29 Am. St. Rep. 863, suggesting the need of legislation in view of the decisions of the great majority of courts in these cases.)

The principal case is well supported by the opinion of Mr. Justice Brewer in the case cited from the United States Supreme Court, and we believe it is sound in reason and just in result. F. T. C.

Where the greatest latitude is allowed a person who is not a party to a contract to sue upon it as a beneficiary, there is still the fundamental condition that the plaintiff must be a direct beneficiary as distinguished from one who is merely collaterally or incidentally benefited. (Per Baker, J., in Crandall v. Payne, 154 Ill. 627, 39 N. E. 601.) The test of who is a direct beneficiary and who is not is this: Is the promised performance to be executed directly to the third party? If it be the payment of the promisee's debt, as in Lawrence v. Fox (20 N. Y. 268), is the money to be handed over to the third party directly? If not, then the third party is not a beneficiary and cannot sue upon any theory. Thus, if the promise is to put money into the promisee's hands, with which he is to pay his debts, the creditor cannot sue (Burton v. Larkin, 36 Kan. 246, 13 P. 398; Thomas v. Prather, 65 Ark. 27, 44 S. W. 218); or if the promise is to pay the promisee $1,000, conditioned, however, to be void if the promisor pays the promisee's debt to a third party, the creditor cannot sue. (Turk v. Ridge, 41 N. Y. 201; Simson v. Brown, 68 N. Y. 355.) Similarly, if a railway company contract with levee commissioners to so build an embankment on its right of way as to establish a dam which would keep the water off of the land of property owners in the district, and to complete the work by a certain time, it will not be liable in contract to the property owners of the levee district who are damaged by the failure to complete the work within the time specified. (Rodhouse v. C. & A. Ry. Co., 219 Ill. 596. 76 N. E. 836.)

The same principle is fundamental in the law of torts. The law creates a mandate to act or refrain from acting (the breach of which is a tort), not in favor of everyone who may be damaged as the natural and probable consequence of the breach of such mandate, but only in favor of some single individual or limited class of individuals to whom the performance directly and physically runs, or who are the immediate recipients of the benefits of refraining from acting. Thus if the negligence of A caused the death of B while both were driving upon the highway, A's wife and children, who were dependent upon him, would have, apart from statute, no cause of action for damages. There was a mandate to use due care toward A alone. All others, no matter how obvious, or how great financially, their interest may be in the performance of that duty, are merely incidentally or collaterally benefited by its performance. Similarly, a railway company which contracted with levee commissioners to so build an embankment on its right of way that it would operate as a dam to keep the water off of the land of property owners in the district, and to complete the work by a certain time, was declared not to be liable in tort to a property owner damaged by the failure to perform its contract within the time specified. (Rodhouse v. C. & A. Ry. Co., 219 Ill. 596. 76 N. E. 836.) Obviously, the application of the general principle founded upon this distinction is not affected by the fact that the mandate to use due care in the doing or refraining from doing certain acts with reference to B, is upon a public service corporation in the furnishing of the public service in which it is engaged. In the case put where A's negligence caused the death of B, it would have made no difference that A was a public service corporation and B a passenger.

The public policy in favor of this general principle, applicable alike to any contractual or other

liability is so obvious that it hardly needs extended comment. Any departure from it would make every sort of human activity, whether founded upon contract or tort, highly speculative in character. The amount of liability which might be incurred for the failure to perform any obligation would remain always uncertain and too frequently incalculable. An infinity of suits must not infrequently ensue upon the breach of an obligation and the danger of false claims be enormously increased. Individuals would be forced on every occasion to have relations with persons toward whom they would not voluntarily assume them.

The application of the general principle announced is decisive in the principal case. If the performance by the water company in furnishing water for fire protection purposes (whether regarded as pursuant to its contract or pursuant to a mandate raised by law, apart from the contract, because it is a public service corporation engaged in furnishing a public service) runs directly and physically to the inhabitant, then the water company may possibly be liable in contract. It certainly would be liable in tort. On the other hand, if the performance of the water company runs directly and physically to the municipality alone, then the inhabitant is only incidentally or collaterally benefited and there can by no possibility be a recovery either in contract or in tort. It is submitted that the latter view is the only possible one under the facts of the principal case. The water company has not been negligent in failing to give water service directly to the individual inhabitants, including the plaintiff. On the contrary, the water company was dealing directly and entirely with the municipal corporation. The municipality undertook to give fire protection. Pursuant to this design it organized a fire department. To make that fire department effective it needed hose, fire engines, hose carts, and water delivered at hydrants. All these items stand on the same footing precisely. All of them are actually used by the city itself in the course of running its fire department. All of them are necessary to make the protection given by the fire department effective. The water is no more important than the hose. Even in contracting with the water company that it furnish the water at a high pressure so that the necessity of purchasing steam fire engines is avoided, the municipality is simply arranging for a necessary element to make its fire department effective. The water company under such a contract no more renders service direct to the inhabitants than does the corporation which makes a business of selling fire hose, fire alarms, and fire engines. In short, while the water company is a public service corporation which might in fact enter the public calling of furnishing water for fire protection to the inhabitants directly, for use by the inhabitants in person, yet it has not in fact done so when it merely undertakes to furnish the municipal corporation with water or fire pressure as a part of the equipment of the municipal fire department.

Twenty-three cases arising in twenty jurisdictions and involving the same point as the principal case, have resolved the problem of liability in favor of the defendant. (Liability of water companies for fire losses, "Michigan Law Review," May, 1905.) In only one was the decision in any way confined to the question of liability in contract. (Howsmon v. Trenton Water Co., 119 Mo. 304. 24 S. W. 784.) In all the others any action, whether in tort or in contract, was denied. In all but two the pleading was under a code, and it made no difference what the form of the action was, whether contract or tort, and in all of them the plaintiff failed because he had no cause of action upon any theory. In some cases the court considered both the theory of contract and of tort. (Fowler v. Athens City Water Works, 83 Ga. 219, 9 S. E. 673 (1889); House v. Houston Water Works Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; Britton v. Green Bay Water Works, 81 Wis. 48, 51 N. W. 84 (1902); Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982 (1894); Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Nichol v. Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903).) In some the court was indifferent to terminology. (Wainwright v. Queens Co. Water Co., 78 Hun. 146, 28 N. Y. Supp. 987 (N. Y. Supreme Ct. 1894); Beck v. Kittanning Water Co., 11 Atl. 300 (Pa. 1887); Stone v. Unionton Water Co., 4 Pa. Dist. Repts. 431 (1895); Foster v. Lookout Water Co., 3 Lea 42 (Tenn., 1879); Wilkinson v. Light, Heat & Water Co., 78 Miss. 389, 28 So. 877 (1900); Bush v. Artesian Hot & Cold Water Co., 4 Idaho 618, 43 Pac. 69 (1895); Mott v. Cherryvale Water Co., 48 Kan. 12, 28 Pac. 989 (1892); Town of Ukiah City v. Ukiah Water & Imp. Co., 75 Pac. 773 (Cal. 1904).) In others still the court assumed that if there was any cause of action it must be in contract. (Ferris v. Carson Water Co., 16 Nev. 44 (1881); Davis v. Clinton Water Works Co., 54 Ia. 59 (1880); Becker v. Keokuk Water Works, 79 Ia. 419; Blunk v. Dennison Water Supply Co., 73 N. E. 210 (Ohio, 1905).) In the two jurisdictions which had a common law system of pleading the action was on the case in tort for damages. In both a demurrer to the declaration was sustained, the court considering whether any action lay either in contract or tort. (Nickerson v. Bridgeport Hydraulic Co., 46 Conn., 24 (1878); Nichol v. Huntington Water Co., 53 West Va. 348, 44 S. E. 290 (1903).) A recent case in Louisiana (Allen & Curry Mfg. Co. v. Shreveport Water Works Co., 113

La. 1091, 37 So. 980) has reversed its former decision (Planters' Oil Mill v. Monroe Water Works, 52 La. Ann. 1243, 27 So. 684) holding the water company liable. Kentucky, the original jurisdiction holding the water company liable in contract, seems to have become a trifle apologetic about its position. (Graves County Water Co., v. Ligon, 66 S. W. 725, 726 (Ky.).)

By far the most usual line of reasoning upon which the water company is held not liable on any theory, is that the plaintiff is not in any proper sense the beneficiary of the obligation on the part of the water company to the municipality. This is most succinctly put in Allen & Curry Mfg. Co. v. Shreveport Water Works Co., 113 La. 1091, 37 So. Rep. 980. (See also Britton v. Green Bay Water Works, 81 Wis. 48, 56, 51 N. E. 84; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24, 29; House v. Houston Water Works Co., 88 Tex. 233, 239, 31 S. W. 179; Howsmon v. Trenton Water Co., 119 Mo. 304, 314, 24 S. W. 784; Blunk v. Dennison Water Supply Co., 73 N. E. 210, 211 (Ohio).) See further to the same effect, but not so succinctly, Wainwright v. Queens County Water Co., 78 Hun. 146, 28 N. Y. Supp. 987; Ferris v. Carson Water Co., 16 Nev. 44, 47; Nichol v. Huntington Water Co., 53 West Va., 348, 44 S. E. 290; Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982; Wilkinson v. Light, Heat & Water Co., 78 Miss. 389, 28 So. 877. In the Texas case (House v. Houston Water Works Co., 88 Tex. 233, 31 S. W. 179) the court distinguished between the right of the sendee of a telegram to sue the telegraph company in tort for negligence, and the non-liability in tort of the water company to the inhabitants in case of loss by fire on the ground that in the former case the telegraph company is serving directly the person to whom the message is sent.

Guardian Trust Company v. Fisher, 200 U. S. 57, does not in fact hold in the slightest degree that an action of tort lies against the water company. There, judgments had been obtained in the state courts of North Carolina against the water company for loss by fire. In foreclosure proceedings against the water company in the United States court these judgments were proved up as claims. The question of liability was absolutely closed. The only question was whether the judgments were in tort or contract. If they were in the former, then they took priority over the bonds. The North Carolina court had already held the judgments to be in tort. The United States Circuit Court held the same way, and in the United States Supreme Court this was affirmed. No question of the propriety of the judgments was up. The only question was, what was their character. The Supreme Court, while denied all right to consider the validity or propriety of the judgments, were asked to say upon what legal theory they rested. They evidently regarded the tort theory as more possible than contract. Then they stated the most plausible ground of tort liability which they could invent. By this means the character of the judgments only, and not their propriety, was fixed. Obviously there is nothing in such a decision which lends the slightest countenance to the holding on the merits of the question that a judgment in tort is a proper one.

The difficulty in the class of cases of which the principal is one, is the opportunity which is afforded to a court, swayed by sentiment and sympathy, of making a special rule for a particular case contrary to a general rule of the greatest fundamental importance, and by way of infringement upon the peculiar province of the legislature.

A. M. KALES.

TAXATION. (Transfer Tax — Corporate Stock — Corporation Incorporated in Two States.) **N. Y.** — The extent to which stock of a corporation incorporated in both New York and Massachusetts, belonging to a non-resident, may be taxed under a law imposing a tax on the transfer by will of any personal property within the state where decedent was a non-resident of the state at the time of his death, is determined in *In re* Cooley's Estate, 78 N. E. 939. The corporation had property in New York, as well as in Massachusetts. The court was of the opinion that for the purposes of the transfer tax the stock held by a non-resident should be taxed by regarding the New York corporation as owning the property situate in New York, and the Massachusetts corporation as owning that situate in Massachusetts, and each as owning a share of any property situate outside of either state or moving to and fro between the two states. By adopting this rule the court regarded itself as avoiding any difficulty arising from double taxation. The case was distinguished from others in which the tax had been imposed to the full extent of the property owned by the corporation, on the ground that in such cases it did not appear that the corporation owned property situate without the state. See, for instance, Matter of Bronson, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632, and Matter of Palmer, 183 N. Y. 238, 76 N. E. 16.

TORTS. (Libel — Picture.) **Wis.** — In Wandt *v.* Hearst's Chicago *American*, 109 Northwestern Reporter, 70, a newspaper publisher is held liable in damages to the original of a picture published in connection with a libelous article concerning another person. The fact that the original of the picture published might not have been damaged

in the estimation of those well acquainted with her the court did not consider as a defense to the action but merely as mitigation of the damages.

This problem is one that is bound to come before the courts oftener in these days of pictorial journalism. But the opinion in the above case does not discuss the different considerations with sufficient thoroughness to make it of permanent value as a precedent in other courts. The only recorded litigation of the same kind hitherto known to us is a suit by Detective Porteous against the Cosmopolitan Magazine, in New York, December, 1885, but we never saw any disposition of it in the Court of Appeals. J. H. W.

TRUSTS. (Cy-prés.) N. Y. (Sup. Ct.) — A case involving the distribution of a trust fund, which perhaps derives the greatest interest from the fact that it involves the proper distribution of the remains of the funds collected for the sufferers from the Slocum disaster, is that of Loch *v.* Mayer, 100 N. Y. Supp. 837, decided by the Special Term of the New York Supreme Court. The case is, however, also of legal interest in that it involves the application of the *cy-prés* doctrine. As will be recalled, a large fund was collected for the sufferers from the Slocum disaster. Of this fund only about one-fourth was expended for the relief of sufferers, leaving in the hands of the relief committee nearly three-fourths of the amount collected — over $9,000. The trustees brought this action for instructions as to the disposition of the money remaining in their possession. St. Mark's Lutheran Church intervened as a claimant to the fund. As will be recalled, the disaster happened to an excursion arranged by said church.

All doubt on the question has been removed by Laws N. Y. 1901, p. 751, c. 291, wherein it is provided that the Supreme Court shall have control over gifts in all cases provided for by section 1 of the Act, and that when it appears that circumstances shall have so changed since the execution of the instrument containing a gift or grant to religious, charitable or benevolent purposes, as to render a literal compliance with the terms of the instrument impracticable, the court may direct that such gifts shall be administered in such manner as will most effectively accomplish the purpose of such instrument, but that no such order shall be made and enacted within twenty-five years after the execution of such instrument, or without the consent of the donor or grantor, if living. In view of this enactment it was held that the trustees should continue to administer the fund, for the relief of individual sufferers from the Slocum disaster needing financial assistance, and that moneys not so expended should be added to the fund and kept until the expiration of twenty-five years, when the application for instructions as to the disposition of the fund might be renewed.

THE LIGHTER SIDE

He Dodged. — It is said of a noted Virginia judge that in a pinch he always came out ahead. An incident of his childhood might go to prove this.

"Well, Benny," said his father, when the lad had been going to school about a month, "what did you learn to-day?"

"About the mouse, father."

"Spell mouse," his father asked.

After a little pause Benny answered, "Father, I don't believe it was a mouse after all; it was a rat." — *Lippincott's.*

Title Deed. — A subscriber of Madison, South Dakota, sends in the following curious deed:

I, J. Henry Shaw, the grantor herein,
Who lives at Beardstown, Cass County, within,
For seven hundred dollars, to me paid to-day,
To Charles E. Wyman do sell and convey
Lot two (2) in block forty (40), said county and town,
Where Illinois River flows placidly down,
And warrant the title forever and aye,
Waiving homestead and mansion, to both a good-bye,
And pledging this deed is valid in law,
I add here my signature, J. Henry Shaw.

(Seal) Dated July 25, 1881.

I, Sylvester Emmons, who live at Beardstown,
A justice of peace of fame and renown,
Of the County of Cass and Illinois state,
Do certify here that on this same date,
One J. Henry Shaw to me did make known
That the deed above and name were his own;
And he stated he sealed and delivered the same
Voluntarily, freely, and never would claim
His homestead therein; but left all alone,
Turned his face to the street and his back to his home.

S. Emmons, J. P.

(Seal) Dated August 1, 1881.

The poetic deed preserves all legal points, and is regarded by the members of the Bar as a masterpiece.

J. Henry Shaw was born in Boston in 1825, and settled in Illinois in 1835, and was prominently identified with the early history of Cass County, Illinois, and was a prominent attorney-at-law, meeting at the Bar such men as Lincoln, Douglas, War-Governor Yates and others. He died in 1882. His education so far as schools were concerned was limited to three weeks in a country school in 1837, where he learned the elements of reading and writing.

Judge Brewer's Bailiff Story. — While on his way recently to Burlington, Vt., to visit relatives, Judge Brewer related the following incident:

"An amusing thing took place in Washington in connection with the Supreme Court this last winter. There was a young man in the court room who was talking out loud, making a little confusion, and one of the old colored bailiffs that we have there went in and led him out and said: 'Young man, you want to come out and be still. That is the Supreme Court of the United States in there! If they get after you, nobody in the world could help you! Nobody could help you — except the Almighty — and the chances are He won't interfere!'" — *Boston Herald.*

Woman's Discernment. — "What a murderous looking individual the prisoner is!" whispered an old lady in a crowded court room. "I'd be afraid to get near him."

"Sh!" warned her husband. "That ain't the prisoner. He ain't been brought in yet."

"It ain't! Who is it, then?"

"It's the judge." — *Lippincott's.*

Carlisle and the Supreme Court. — A good story is told of John G. Carlisle. Mr. Carlisle was once approached by a well-known member of the New York Bar, a man of most patronizing manner.

"I see, Carlisle," he observed loftily, "that the Supreme Court has overruled you in the case of Mullins *v.* Jenkinson. But," he added, in his grand way, "you, Carlisle, need feel no concern about your reputation."

Carlisle chuckled. "Quite so," he agreed. "I am only concerned for the reputation of the Supreme Court." — *Harper's Weekly.*

According to His Folly. — The present chief justice of Ontario, Sir William Meredith, was for many years engaged in the practice of criminal law, and afterwards became a notable figure in provincial politics, as leader of "Her

Majesty's Loyal Opposition" in the Ontario Parliament. He is a man of fine presence, with a leonine mass of white hair. One night he was speaking in Toronto at a turbulent meeting held toward the close of a hot campaign, when he was sharply interrupted by a strident voice from the top gallery:

"Aw, Willum, go an' get your hair cut!"

Instantly Meredith threw back his magnificent head, and, fixing the offender with the stern eye of the practiced examiner, exclaimed:

"My friend, if my memory serves me, I once had something to do with getting *your* hair cut."

There were no more interruptions. — *Lippincott's.*

Saved His Opponent.— "Sam" Tompson, the Boston lawyer, back in the seventies had a case in the civil court, and during the trial the attorney on the other side, in a heated argument, called him a liar, in words more forcible than elegant. Now "Sam" was hard of hearing, and his alert assistant promptly informed him that his opponent had just called him a blankety-blanked liar.

"Sam" at once faced him, and, in his peculiar drawl, said, "I can take you out on the street and find a hundred who will say the same thing."

He then proceeded with his argument so quickly, the court, if so inclined, had no chance to administer a rebuke, or perhaps a fine for contempt, to his opponent. — *Boston Herald.*

The Quality of Mercy. — In the court of common pleas of the city of Aurora, Ill., along toward the close of the war, a darky preacher was indicted for the larcency of a pig belonging to an Irishman.

The accused not having a lawyer, the judge appointed two Democrats, among the ablest at the Bar. It was amusing to the audience in attendance to see them consulting during the trial with their client who of course sat with them. They set up an elaborate defense; a better one it was thought than they would if their client had been white instead of black. But the jury was satisfied the pig had been feloniously taken and carried away as it was found at the darky's, with footprints leading from the Irishman's pen. Before passing sentence the judge asked the accused if he had anything to say, etc., to which he replied that he had always been taught in the South that it was better to tell the truth than to lie, and better to beg than steal; but he said he had asked for aid, and unable to get it, he had helped himself to the pig in order to save his family from starvation. His appeal for clemency was so touching that the judge suspended his fine and thereupon a bailiff passed around a hat to pay for the pig, and there being more than the Irishman was entitled to, the balance was given the darky, and they left the court room together.

"A Logical Deduction." — A decision lately rendered by a justice of the peace in this district illustrates beautifully the wisdom of selecting as a judge a person who has never wasted his valuable time in burning the midnight oil while pursuing his studies of elementary law, and I might say of logic.

Plaintiff, a saloon keeper who conducted what is commonly known as a wine-room in connection with his saloon, sued a young man, a minor, on account, for beer and whisky furnished him therein from time to time. The defendant pleaded "infancy," but admitted the purchases. The judge, to the great surprise of defendant's counsel and, I might also add, the plaintiff's counsel also, rendered the following opinion:

"The defendant admits the contract and relies only on a plea of infancy. The law is well settled that an infant may contract for necessaries. All medical authorities agree that whisky is a medicine and that beer is food, and medicine and food are necessaries. Therefore, the defendant's plea in this case is bad. Let judgment go for the plaintiff."

1. THE DISINTERMENT AT EDINGTON
2. BODY LYING IN STATE
3. CITY TROOP AWAITING BODY
4. PROCESSION LED BY CHIEF JUSTICE FULLER
5. BANNERS OF THE SONS OF THE REVOLUTION
6. THE BURIAL

The Green Bag

VOL. XIX. No. 3 BOSTON MARCH, 1907

JAMES WILSON — NATION BUILDER[1]

BY LUCIEN HUGH ALEXANDER

PART III

DEVOTION to private practice and service as Advocate General for France by no means occupied all of Wilson's energies during the years immediately following his retirement from Congress in 1777. In 1773 he had been elected Professor of English Literature in the College of Philadelphia, afterwards the University of Pennsylvania, and he held this chair until 1779, when he became a trustee of the University. As such he continued to serve during the remainder of his life, with such associates as Benjamin Franklin, Governor Thomas Mifflin, Bishop White, and Francis Hopkinson. During a period of ten years he fought vigorously in the forum of the law for the legal rights of the institution, for in 1779 an attempt was made by the party in power in Pennsylvania to confiscate its estates and to amend and alter the charter. Wilson was eventually successful, and secured the adoption of an act in 1789, branding the attempt to rob the University of her rights and privileges as "repugnant to justice, a violation of the Constitution of this Commonwealth and dangerous in its precedent to all incorporated bodies." This victory, due entirely to Wilson's superior reasoning powers, was won on the same line of argument which nearly a third of a century later enabled Webster to win the Dartmouth College case.

Commencing in 1779 Wilson maintained an active correspondence, often in cipher, with the American Commissioners to France, and, among his other activities, devoted himself to a study of finance. He was in search of a remedy for the instability of the currency which had resulted from the emission by Congress of millions in paper money, with which to pay the troops and carry on the war. He became convinced that a national bank was a necessity, and a manuscript copy of a plan for such a bank, dated January 25th, 1780, is among the *Wilsonia* in the archives of the Historical Society of Pennsylvania, as also extensive notes and "Observations on Finance." Among these papers is a "plan for establishing the Bank of the United States," dated May 26th, 1781, also various papers concerning the Bank of North America, and a draft of a "Petition for a Second Bank." Again we find notes "on the case of the two banks," as well as others entitled "Considerations on the Bank," and "Case of the bank and remarks concerning banks and banking," also on "Progression of Society and improvement in the United States and Pennsylvania, particularly with reference to public credit and bank credit," etc.

He was closely associated with Robert Morris in organizing the Bank of North America, of which he was appointed a Director by Congress on December 31, 1781, during the period he was not a delegate. He became counsel for the bank, as he already was for Morris. Ever after in his speeches, when questions of finance were under discussion, he was an earnest advocate of a sound currency and against the repudiation of the obligations of state or nation. Indeed, he became an authority in

[1] Continued from the February Number.

finance, as he was on so many other subjects, and as soon as he was returned to Congress, January, 1783, proposed the plan of general taxation, which was adopted February 12, 1783. His brilliant and unanswerable argument on the power of the Congress under the Articles of Confederation to incorporate the Bank of North America is referred to, and quoted from at some length by the writer, in *The North American Review* at pp. 986–987 of Vol. 183 (Nov., 1906), and will not be repeated here. No student of Wilson or of the many problems resulting from the claims of state rights doctrinaires can afford not to read the argument[1] in full.

James DeWitt Andrews of the New York and Chicago Bars, and editor of the last edition of Wilson's works,[2] says this argument "stands as a constitutional exposition second to no constitutional argument or opinion delivered before or since. Indeed it not only embraced every ground or argument which Marshall was called upon to treat, but it assumed and defined precisely the position which was necessarily taken in the Legal Tender decisions."

It should be added that Hamilton's great report to Washington — Hamilton's chief claim to fame — of February 23, 1791, on finance, was founded on this argument by Wilson, and it is possible that the historian of the future will be able to trace an even closer connection on the part of Wilson with that powerful document. However this may be, all that can now be said is that a manuscript copy of Hamilton's report, forty-six pages in length, is among the Wilson papers in the Historical Society of Pennsylvania.

During this time Wilson's party in Pennsylvania was gradually but surely overcoming that of George Bryan and the other adherents to the Pennsylvania constitution of 1776. On May 23, 1782, Wilson was unanimously elected by the Supreme Executive Council, Brigadier-General of the militia. Although not in Congress, he was maintaining an active interest in national affairs and exerting every energy on behalf of the colonies in the bitter conflict with the mother country. How active we may judge from the fact that it was to him General Arthur St. Clair wrote from "Headquarters, October 19, 1781," congratulating *him* (Wilson) on the surrender of Cornwallis at Yorktown. Said St. Clair:

"I was lucky enough to get up in time to take my command, which is no less than the whole American troops, and to have been in the trenches during the operations. *I most heartily congratulate you* upon this event which cannot fail to have the most beneficial consequence, and reflect great lustre upon our arms."

In 1781 Pennsylvania sought Wilson's services as counsel in the contest with Connecticut over the latter's claims to the lands of the "Wyoming settlement," and a commission was issued to him under the Great Seal of the state. The case was won in December, 1782, before an arbitration court, appointed by Congress, sitting at Trenton, as a result of Wilson's skillful handling. Wilson's brief is still preserved. In 1784 an attempt was made by Connecticut to re-open the contest and the then President of Pennsylvania's Supreme Executive Council, John Dickinson, writing the Pennsylvania delegates in Congress, referred to Wilson's "professional knowledge and laborious preparation for the late trial," at the same time asserting that the attempts of Connecticut to re-open the case "are very extraordinary and are to be opposed with the most persevering vigilance." The matter dragging, Wilson then in Congress, having taken his seat January 2, 1783, reported to President Dickinson, on February 26, 1785:

"The controversy respecting the settlements at Wyoming depends before Congress in a very disadvantageous state of suspense. I think that both the interests and the honor of Pennsylvania require that a speedy and explicit decision be had upon

[1] See Wilson's Works (Andrews' Edition), Vol. 1, pp. 549–577.

[2] Callaghan & Co., Chicago, 1896.

the complaints and representations which have been made against her."

Finally, Wilson was able to report a complete victory for Pennsylvania. We also find him informing President Dickinson in 1785 that "in some conversation I have had with Governor Clinton [of New York], the actual running and marking a line between Pennsylvania and New York has appeared to us to be a measure of much importance to both states and which in the present juncture may be easily accomplished," — and it was, as a result of Wilson's initiative.

He was also called upon to assist the Attorney General of Pennsylvania in several other cases of importance. One of them, Commonwealth *versus* Matlack, indicated that political conditions had decidedly changed in Pennsylvania, for Matlack had been a member of and the Secretary of the Supreme Executive Council at the time of the issuance of the proclamation in the matter of the attack on Wilson's house in 1777, which disturbance is known in Pennsylvania history as the "Fort Wilson Riot."[1] On June 2, 1784, the Supreme Executive Council adopted a resolution that Wilson be requested to assist the Attorney General in the de Longchamps case and it appearing that he had not acted, another resolution to the same effect was adopted on June 25, 1784, and this double effort to secure his aid proved successful. James Wilson's far-seeing mind, however, was not confined to intellectual activities alone, for on October 31, 1783, he submitted a proposal to the Assembly of Pennsylvania to build "a bridge over the river Delaware at the Falls of Trenton," which was favorably received.

In 1784 he was not a delegate to the Congress, but in that year he published his celebrated address to the citizens of Philadelphia. He was again returned to Congress in April, 1785, also in November, 1785, and was continued by successive re-elections until the adoption of the United States Constitution. Space will not permit of an examination of Wilson's many and invaluable services in Congress during the trying years following the treaty of peace with Great Britain, during which time the lack of cohesive force in the Articles of Confederation became so evident and the flame of nationality burned so low. But Wilson, realizing the necessity for one great nation on the western shores of the Atlantic, never lost the faith and courage that was within him. When Robert Morris, angered by the attacks made upon him, resigned as Superintendent of Finance, it was Wilson who pleaded with him and succeeded in getting him to remain in charge of this branch of the public service, then, as now, so vital to the public welfare.

The Articles of Confederation had been agreed to by Congress and ratified by the states *after* Wilson's removal in 1777,[1] and they lacked that power to make a nation which was characteristic of every national document which received Wilson's touch. We may well imagine, from all we know of Wilson, that had he shaped the Articles of Confederation into final form, they would not have possessed the inherent weaknesses they did. Finally, the Constitutional Convention was decided upon, and the year 1787 found James Wilson a delegate from Pennsylvania, and fully equipped by learning, experience, temperament, and personal influence for the great work that lay before him and the other creative intellects of the time — the making of the Constitution of the United States, to the end that republican government might be firmly established in America, and a sure foundation built for the mighty nation then slumbering *in embryo*. No man in America had greater forensic powers than Wilson, save perhaps Patrick Henry, who, imbued with local and bereft of national pride, had declined to serve as a Virginia delegate to the Constitutional Convention. Combined with Wilson's powers of oratory, there was

[1] *Vide* pp. 106–107 *supra*.

[1] *Vide* p. 104 *supra*.

organized knowledge based not only upon deep philosophic study and profound historical research, but upon vast practical experience in the affairs of government.

No one can read Madison's, King's, or Yates' minutes of the Convention, without being impressed by the fact that Wilson's intellect, to a greater extent than that of any other man's, dominated the proceedings of the Convention. The great principles of republican government, which were finally crystallized into form in the Constitution, he held constantly as beacon lights before the members of the Convention. He was on his feet more frequently than any other delegate, excepting one, speaking, in all, one hundred and sixty-eight times, yet the contemporaneous records of the proceedings show that he never rose for the mere sake of talking, but only when it was necessary to give direction to the trend of thought. When views were being expressed consonant with his theories of government, and there seemed no doubt but that the Convention was in accord therewith, he would sit a silent spectator, intently watching, but always on guard against a departure from correct principles, and ever ready to battle for them at the slightest intimation of a variance therefrom. In the great battles of the Convention, he was ever in the forefront, contending with all the powers at his disposal for the nation's life. Space will not permit of more than a cursory glance at his services in the Convention.[1] In the index to *The Documentary History of the Constitution of the United States*, as recently published by the government, seven and a half columns of fine print are taken up in merely indicating the topics he discussed. However, a brief summary of his work in the Convention will not be out of place:

He desired the executive, legislative, and judicial departments to be independent of each other. He wished to guard the general government against the encroachments of the states, yet he desired the preservation of the state governments, and stood like a rock against all those who would have abolished them, declaring on June 19, according to the minutes of Chief Justice Robert Yates of New York:

"I am (to borrow a sea phrase) for taking a new departure, and wish to consider in what direction we sail, and what may be the end of the voyage. I am for a national government, though the idea of federal is, in my view, the same. With me it is not a desirable object to annihilate the state governments, and here I differ from the honorable gentleman from New York [Hamilton]. In all extensive empires a subdivision of power is necessary. Persia, Turkey, and Rome under its emperors, are examples in point. These, although despots, found it necessary. A general government, over a great extent of territory, must in a few years make subordinate jurisdictions. Alfred the Great, that wise legislator, made this gradation and the last division, on his plan, amounted only to ten territories."

He contrasted the Virginia and New Jersey outline plans for the Constitution, and brought light out of the darkness. He argued that the separation from Great Britain did not make the Colonies independent of each other, yet he did not think the individuality of the states incompatible with a general government. He proposed that the executive should consist of but one person, and advocated the election of the President through electors elected by the people, as an alternative to having him selected by Congress. To the latter plan he was unalterably opposed, declaring that he "would agree to almost any length of time for the service of the President, in order to get rid of the dependence which must result" from an election by Congress, and he presented the plan of an electoral college as a compromise. He objected to an executive council, but urged a council to consist of the President and the Supreme Court, with a veto power over the acts of the legislative branch, coupled

[1] Those interested are referred to McLaughlin's able analysis, entitled "James Wilson and the the Constitution," *Polit. Sc. Qr.*. March, 1897.

with the proviso that a two-thirds vote in the Congress might pass an act over the veto of either the President or Court, and a three-fourths vote where both were opposed. It was his preference that the President should be elected by the direct vote of the people. He advocated a provision for the impeachment of the President, but opposed his removal by Congress on application of the states, for it was a fixed principle with him that the national government derived its powers and authority solely from the people of the nation, and not from the states, — these he considered to be merely the artificial creations of the people for the purposes of government, — the units into which the nation must necessarily be divided for purposes of internal police and local self-government:

"The judiciary ought to have an opportunity of remonstrating against projected encroachments on the people, as well as on themselves. It has been said that the judges, as expositors of the law, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the judges did not go far enough; laws may be unjust, may be unwise, may be dangerous, may be destructive and yet may not be so unconstitutional as to justify judges in refusing to give them effect. Let them have a share in the revisionary power and they will have an opportunity of taking notice of those characters of a law and of counteracting by the weight of their opinions the improper views of the legislature."

He thought the power of the President to pardon should exist before conviction. He urged the election of senators directly by the people, and proposed to divide the Union into senatorial districts; he advocated six years as the senatorial term; opposed the equal vote of the states in the Senate, and thought the number of senators should be in ratio to the population; he objected to state executives filling vacancies in the Senate, and disapproved of the Senate being united with the President in the power of appointment, as well as to its being separately convened. He urged the election of representatives by the people, and advocated proportionate representation of the states in Congress; he pointed out that voting by states was submitted to originally by the Continental Congress "under a conviction of its impropriety, inequality, and injustice." He advocated the same proporton of representation in both houses, and thought annual elections of representatives desirable. He opposed payment of senators and representatives by the states, declaring that "the members of the national government should be left as independent as possible of the state governments in all respects." He was against the constitution fixing the amount of compensation, asserting that "circumstances would change and call for a change of amount." He suggested the number of freemen and three-fifths of the slaves as the ratio of representation, but considered the admission of slaves into the ratio a matter of compromise. According to Madison he argued thus, as to slaves:

"Are they admitted as citizens — then why are they not admitted on an equality with white citizens; are they admitted as property — then why is not other property admitted into the computation? These were difficulties, however, which he thought must be over-ruled by the necessity of compromise."

And in the Pennsylvania Ratifying Convention he argued:

"After the year 1808, the Congress will have power to prohibit such importation [*i.e.* of slaves] notwithstanding the disposition of any State to the contrary. I consider this as laying a foundation for banishing slavery out of this Country; and though the period is more distant than I could wish, . . . it is with much satisfaction I view this power in the general Government, whereby they may lay an interdiction on this reproachable trade. . . . It was all that could be obtained. I am sorry it was no more; but from this I think there is reason to hope that yet a few years, and it will be prohibited altogether."

He was of opinion that a quorum in Congress should not be less than a majority

of the whole. He urged that the journal of Congress should be published; and it may be pertinent while on this point to remark that as a member of the Continental Congress he had been opposed to secret sessions, asserting that the people of the Union had a right to know what their deputies were doing. He desired a provision in the Constitution, declaring that the contracts of the Confederation would be fulfilled, and advocated a guarantee to the states of republican institutions, and of protection from foreign and domestic violence. He objected to a prohibition against taxing exports. His professional pride caused him to regard a provision in the Constitution forbidding *ex post facto* laws as wholly unnecessary; he declared that "the insertion of such a thing, will bring reflections on the Constitution and proclaim that we are ignorant of the first principles of legislation or are constituting a government that will be so." He strongly opposed a proposition to allow states to appoint to national offices. He doubted if the writ of *habeas corpus* should ever be suspended, and desired an absolute prohibition on the states relative to paper money, and a guarantee against laws interfering with the obligation of contracts.

He urged that the territorial rights of the United States and of the individual states should be left by the Constitution *in statu quo*, asserting that he "knew nothing that would cause greater or juster alarm then the doctrine that a political society is to be torn asunder without its own consent." He demanded a provision that Congress should have power to declare the effect which judgments obtained in one state should have in another, and asserted that without such power, each state would be in the same position as independent nations are. He urged that the House of Representatives should be united with the Senate in making treaties, declaring that "as treaties are to have the operation of laws, they ought to have the sanction of the laws also." He objected to a two-thirds vote in the Senate on treaties, because it would put it "into the power of a minority to control the will of a majority," and showed that, in case of an existing war, "if two-thirds was necessary to make peace the minority may perpetuate war against the sense of the majority."

He opposed the appointment of Judges by Congress and proposed that the appointments should be made by the President. He urged a national judiciary and argued that the admiralty jurisdiction should be given to the national government exclusively, "as it related to cases not within the jurisdiction of particular states." He desired the Judges to remain in office during good behavior and opposed a provision permitting their removal by the President on application of the Senate and House of Representatives, declaring that "the Judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two branches of our government." He thought unanimity among the states unnecessary in order to put the new Constitution into operation. Madison records that Wilson took occasion early in the convention to lead it "by a train of observations to the idea of not suffering a disposition in the plurality of states to confederate anew on better principles, to be defeated by the inconsiderate or selfish opposition of a few states." He hoped the provision for ratifying would be put on such a footing as to admit of such a partial union, with a door open for the accession of the rest. He desired the new Constitution to be ratified by a majority vote of the people and of the states. According to Wilson's theories, future amendments should be adoptable by a majority vote of the people, but, on it being moved that no amendments should be binding until consented to by all the states, he proposed that two-thirds only should be necessary, and being defeated in this immediately advocated three-fourths as the next best thing attainable and secured it.

After the great principles and much of the mechanism of the new government had

been tentatively agreed upon, a committee of five "on detail" was elected *by ballot* to draft the Constitution, and Wilson was chosen on this committee, and by some he is reputed to have been its chairman. Among the most treasured possessions of the Historical Society of Pennsylvania is a draft for the Constitution in Wilson's handwriting.

It is not practicable in the limits of this sketch to follow Wilson through the varying phases and the shifting scenes of the Constitutional Convention, and we can better and in more condensed form catch a glimpse of his theories of government by quoting, even if but briefly, his own words as expressed after the Consitituton was a completed whole. Fortunately, Wilson's principal speeches in the Pennsylvania Convention, called to consider the question of ratifying the Constitution, were recorded stenographically, and are accessible in *Elliot's Debates*, and Stone and McMaster's invaluable work, *Pennsylvania and the Federal Constitution*. These speeches by Wilson, and one by Chief Justice Thomas McKean, who was also a delegate to the ratifying convention, were considered of such intrinsic value that they were published in London in 1792, in a book of one hundred and fifty pages, all but fifteen being devoted to Wilson's arguments, *sub nomine* "COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *in which are unfolded the principles of free government and the superior advantages of republicanism demonstrated.*"

Wilson's views are luminous — more luminous, it is not too much to say, than those of any man who has written or spoken since his day; and it is not strange that it is so, for he was at the fountain source of our nation, and had a broader, deeper, and more comprehensive grasp of the principles upon which our governmental institutions are founded than any of his compatriots. For not even Madison, Rufus King, Hamilton or Randolph were possessed of as profound a knowledge of theories and conditions as was Wilson — none of them had been trained in such institutions as St. Andrews, Glasgow, and Edinburgh, or had had such master minds as had Wilson to direct their educations; and none had had more practical experience in the affairs of government than this marvelous man, then at forty-five, in the full vigor of his prime.

It was from the "Commentaries" that that discriminating constitutional historian, James Bryce, the present British Ambassador to America, gained his insight into Wilson's theories of government, causing him, in his great masterpiece, *The American Commonwealth*, to declare Wilson to be "in the front rank of the political thinkers of his age" and "one of the luminaries of the time to whom subsequent generations of Americans have failed to do full justice." Bryce, however, does not stand alone among historians in paying high tribute to Wilson; Bancroft, Hildreth, Fisk, Cooley, McLaughlin, Hart and a host of others all proclaim his greatness. Former President of the American Bar Association, Simeon E. Baldwin, now President of the American Historical Association, says of him:

"*He was the real founder of what is distinctive in our American jurisprudence*, and his arguments for the reasonableness and practicability of international arbitration were a century ahead of his time."

John Marshall Harlan, Senior Justice of the Supreme Court of the United States, declares that Wilson's "labors in the cause of justice and constitutional liberty were not surpassed in value to the country by those of anyone who served the public during the same period of our history."

The late United States Judge, Henry W. Blodgett, stated that he "had it direct from Stephen A. Douglass that the statutes of the First Congress were written by Judge Wilson, and that they were so clear that no contest had ever arisen on account of any ambiguity of their language."

Judson Harmon, Attorney General of the United States in Grover Cleveland's Cabinet, asserts that "no man of his time better

deserves grateful remembrance than James Wilson."

Alton B. Parker, the last candidate of the Democracy for the presidency refers to him as "the man who laid the corner-stone of constitutional interpretation in this country upon deep and solid foundations," and adds:

"As the result of his labors and those of John Marshall and Joseph Story and their associates and successors, there has been perfected a system of jurisprudence, which is the most original, as it promises to be the most imposing monument of our national ideas and institutions."

Justice of the Supreme Court of the United States, William H. Moody, when the Nation's Attorney General, declared that Wilson, "exercised an influence in the convention which equaled, if it did not surpass, that of any other man," and that:

"He sought a government with sufficient power to perform the duties of a nation, and in constructing it was controlled by a few great principles clearly understood and tenaciously pursued. Recognizing that the ultimate sovereignty rested with the people of the United States, he desired a government whose powers should proceed directly from them and operate directly upon them; a government which in truth should be *of* the people, *by* the people, and *for* the people. . . . He was a believer in democracy and in nationalism, — the first man, I believe, in all our history who united the two opinions. . . . He appreciated the proper relations of the two governments, state and national, each entrusted with its own supreme powers, to each other and to the people who created both, and how, through the judiciary, the limits upon their powers, imposed by the Constitution could be made effective. He left the deep impress of his design upon the work of the convention. When it was done he had mastered its great outlines and was ready to expound and defend them. With the keen vision of a seer, he discerned that the structure of the Government was destined for the ages, for vast territories and uncounted millions."

With these ringing words of patriotism, Justice of the Supreme Court of the United States, Edward D. White, of Louisiana, closed his tribute at the Wilson Memorial and Interment services:

"As I stand here, a participant in these ceremonies commemorative of the placing of all that remains of James Wilson to rest in the bosom of his adopted mother, this great commonwealth of Pennsylvania, my mind turns not to extol his virtues but rather lifts itself up to that Wise and All-Merciful Ruler who holds in the hollow of His hands the destinies of peoples and nations, with the supplication that these ceremonies may enkindle in all our hearts a keener purpose to preserve and perpetuate the government which our fathers gave us. Not a government of a great and stolid bureaucracy; not a government of infirmity in national power; not a government destructive of the rights of the states; not a government of the sordid few to the detriment of the many, or of the many to the destruction of those inalienable rights of life, liberty, and property upon which our civilization depends. Not any or all of these, but the government of the Constitution, a government of liberty protected by law, which affords the substantial hope that civil liberty may not pass away from the face of the earth."

And now, for more than one hundred years, that civil liberty for which Wilson strove and struggled, has not only been perpetuated on the American Continent, but has been extending over the world in precisely the way Wilson foreshadowed at the close of one of his masterful arguments for the Constitution in the Pennsylvania Ratifying Convention, — that of December 11, 1787:

"By adopting this system, we shall probably lay a foundation for erecting temples of liberty, in every part of the earth. It has been thought by many, that on the success of the struggle America has made for freedom, will depend the exertions of the brave and enlightened of other nations. — The advantages resulting from this system will not be confined to the United States; it will draw from Europe many worthy characters, who pant for the enjoyment of freedom. It will induce princes, in order to preserve their subjects, to restore to them a portion of that liberty of which they have for many ages been deprived. It will be subservient to the great designs of Providence, with regard to this globe; the multiplication of mankind, their improvement in knowledge, and their advancement in happiness."

James DeWitt Andrews, chairman of the American Bar Association's Committee on Classification of the Law, sums up Wilson's creative work under three heads:

"I. *Contributions to Jurisprudence Proper:* He stated the true theory of jurisprudence, and enunicated the American conception of Law and Right. He showed the necessity for a system of legal education, and presented an outline or juristic encyclopædia.

"II. *Contributions to International Law:* His conceptions of the Law of Nature and of the Law of Nations are just and modern; his divisions of the subject correct and scientific. His views on the exercise of Remonstrance now obtain, as do his views on Intervention, on Mediation and on Arbitration.

"III. *Contributions to Constitutional Law:* He published to the world the principles of the Declaration twenty-three months prior to July 4, 1776, and asserted the unconstitutionality of acts of Parliament over the American Colonies. He affirmed that the Colonies, by their union, formed a nation, and was the first to expound the doctrine of inherent national power. He maintained that a charter is a contract, and also that a legislative grant constitutes a contract. He expressly upheld the doctrine of national expansion. He declared the right of the federal government to incorporate national banks and asserted its power to make paper money a legal tender.

"Wilson thus anticipated the most important measures of the Government and the most important decisions of the National Supreme Court."

But the end is not yet. That profound student of our history, John Bach McMaster, declares:

"I believe Wilson to be the most learned lawyer of his time. As a statesman, he was ahead of his generation in foresight. *Many of the great principles of government advocated by him, we, as a nation, are only beginning to apply.*"

We should never forget that every great decision by John Marshall was foreshadowed by James Wilson, the nation-builder. Fifteen years before Marshall wrote the opinion in Marbury *versus* Madison declaring a law repugnant to the Constitution to be void, and thirty years before his equally potent decision in McCullough *versus* Maryland, Wilson had clearly enunciated the doctrine. On December 1, 1787, in one of his speeches in defense of the Constitution, he declared:

"Under this constitution, the legislature may be restrained and kept within its prescribed bounds by the interposition of the judicial department. This I hope, Sir, to explain clearly and satisfactorily. I had occasion on a former day to state that the power of the constitution was paramount to the power of the legislature acting under that constituton. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass in the usual *mode* notwithstanding that transgression; but when it comes to be discussed before the judges, when they consider its principles, and find it to be incompatible with the superior powers of the constitution, *it is their duty to pronounce it void;* and judges independent, and not obliged to look to every session for a continuance of their salaries, will behave with intrepidity and refuse to the act the sanction of judicial authority." [1]

Did space permit, it would be profitable to quote at length Wilson's profound elucidation of the principles of republican government, but to do so would require many scores of pages. He was determined that the American people should have a Constitution which would be a true transcript of their national life and place them before the world a nation, and not a mere confederacy of jarring states. He stood against the idea of sovereignty in the states and declared that the sovereignty was solely in the people. The *real* battle must have been fought in that little "Committee of Detail," composed of five members, which drafted the Constitution into concrete form. The changing of a few words here and there would have altered the fundamental principles upon which our nation now exists. He had his convictions, he saw the situation as it existed, and with prophetic vision he also saw the future, — he knew what the Constitution ought to be,

[1] "Commentaries on the Constitution" (English Edition), p. 12.

he made up his mind what it must be and — made the thing happen, crushing opposition with irresistible force.

He was the antithesis of such patriots as Patrick Henry, who were controlled by local interests and narrow considerations of policy, and who lacked Wilson's broad and comprehensive grasp of fundamental principles. Patrick Henry, in his powerful oration against the adoption of the Constitution in the Virginia Ratifying Convention, with his analytical mind went to the heart of the issue, yet his words show the same misconception of first principles which control so many in our day. He asked:

"What right had they to say, *We, the people?* My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of *We, the people*, instead of *We, the states? States* are the characteristics and the soul of *a confederation*. If the *states* be not the agents of the compact, it must be one *great, consolidated, national government of all the states*. . . .

"The fate of America may depend upon this question. Have they said, *We, the states?* Have they made a proposal of a compact between *states?* If they *had*, this would be a confederation; it is, otherwise, most clearly a *consolidated government*. The whole question turns, sir, on that *poor little thing*, the expression, *We, the people*, instead of *the states* of America." [1]

How different were Wilson's views, as expressed in the Pennsylvania Ratifying Convention.

"I view the states as made *for* the People as well as *by* them, and not the People as made for the states; the People, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another; and by this means preserve them all; this, I say, is the inherent and unalienable right of the people."

Then, after quoting from the Declaration of Independence as an authority, he declared:

"State sovereignty, as it is called, is far from being able to support its weight. Nothing less than the authority of the people could either support it or give it efficacy. . . . My position is, sir, that in this country the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments; but that the fee-simple continues, resides, and remains with the body of the people."

Wilson has also left with us these golden words of wisdom and of warning, containing an even more trenchant statement of his doctrine:

"The people of the United States must be considered attentively in two very different views — as forming one nation, great and united; and as forming, at the same time, a number of separate states, to that nation subordinate, but independent as to their own interior government. This very important distinction must be continually before our eyes. *If it be properly observed, everything will appear regular and proportioned: if it be neglected, endless confusion and intricacy will unavoidably ensue.*"

Wilson, as a result of his battle for the people, was attacked with all the virulence of political bitterness. He was called an "aristocrat," "The Caledonian," "Jimmy," "Jamie," and, with Thomas McKean, Chief Justice of Pennsylvania, was burned in effigy at Carlisle, Pennsylvania, with this inscription "*James de Caledonia*" fastened to his coat. But at last, triumphing over every obstacle, he was successful in securing from the convention, mainly as a result of his own abilities, the immortal Constitution; securing, practically entirely by his own efforts, its ratification in Pennsylvania; and securing, very largely as a result of his arguments scattered broadcast throughout the states, its adoption as the fundamental law of the land in 1788. *Thus did James Wilson achieve his second great mission in America.*

(To be concluded)

PHILADELPHIA, PA., February, 1907.

[1] Wirt's "Life of Henry," pp. 267–271.

MONOPOLY AND THE LAW

By Frank B. Kellogg

As government has developed from the chaos of absolute individual freedom, the formation of rules of government, and the selection of those rules and principles, forming the body of the laws most efficient to the higher development of man, his social and industrial condition, have been gradually going on. Governments are not made, nor are the principles of law, on which they are based, discovered or written in a day; they are the result of those same evolutionary processes going on among men; they are the expression of their wishes, desires, and needs, taking concrete form, developing into customs, and from customs into general rules of action, and finally often into written laws.

The problems which are to-day principally agitating the public mind are not new. They arise in different forms, and some of them under conditions entirely unknown to the centuries which have gone before. But the principles are the same. Corruption in politics and administration, which tend to destroy the integrity of the state; the control of public facilities, and the regulation of monopolies, in order that the avenues of employment, industry, enterprise, and commerce may be kept open, are not new to the world, and have been solved in their various aspects as they have arisen from time to time. The evils of monopoly have in the past, and are to-day agitating the public mind in many countries and in many phases. It was one of the principal causes of that great cataclysm called the "French Revolution," in which disappeared forever, in France, arbitrary government, feudalism, monopolies, and oppressive taxation. Monopoly of land, the exclusion of the people from participation in ownership, and from the right, as proprietors, to pursue agriculture for a livelihood, is to-day one of the most fruitful causes of Russian agitation, which threatens a revolution of portentous import. It has always been the case that, where either under the guise of law, or by corporate or individual aggrandizement, the people have been excluded from any employment or commercial enterprise; from the right to own and cultivate land, and equally to participate in business enterprises, they have abolished such conditions either by revolution or by law. We are confronted with that proposition to-day. Under conditions of great prosperity, individual and aggregate wealth, in the form of corporations, has reached such colossal proportions that they threaten to undermine the power of the state, and to close the avenues of enterprise to the people generally. Many phases of this control and regulation have been agitated. Laws have been passed, enforced, and many devices have been declared unlawful. But there yet remains the most vital question, whether corporations or individuals, by unlimited acquisition of wealth and power, may control one or all of the industries of the country, and thereby exclude the people from an equal participation in such enterprises. To my mind, the power of the Congress and of the state is ample, under the constitution as it exists, to meet this question and prevent this monopoly. The question is: Can we, under our constitution, so regulate and control property that a single person, or a single corporation, may not monopolize, or attempt to monopolize, the commerce of the country, by the purchase and acquisition of properties engaged in such commerce? As originally understood among English-speaking people, monopoly was a grant from the Crown of the exclusive right to engage in any particular trade or commerce. During the reign of Queen Elizabeth, these monopolies became so enormous and oppressive as to alarm the people. One of these grants

coming before the courts was held to be unlawful, in the great Case of Monopolies, decided about the close of her reign. It was there said:

"Monopoly tends to the impoverishment of diverse artificers and others who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will, of necessity, be constrained to live in idleness and beggary. Every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life."

This decision of the court proved the death-knell of monopolies, and shortly after, Parliament, by act, abolished them. But the evils of monopoly, and the principles invoked by the courts of England in declaring them void, and the grounds on which Parliament prohibited them, apply with equal force in modern times, and to the enactments of Congress prohibiting them within the United States. When the Congress, by the constitution, was given the power to regulate commerce with foreign nations, among the several states and with the Indian tribes, it was given plenary power to deal with this question. It is not simply confined to the power to regulate, but it extends to all the incidents of regulation, and it necessarily includes the power to enact such legislation, and enforce such laws, for the protection of citizens, as will make this regulation effective. No state action, or corporate action under state authority, can be invoked to stay the hand of the Federal government in the enforcement of its enactments. And the same is true, so far as the powers of the states are concerned, within the province of its intrastate matters. This was well settled by the great opinion of Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheaton, 1, in which he placed an enlarged construction upon this provision. We care not whether the monopoly is attempted by individuals, corporations, or combinations, — the instrumentality is immaterial. When Congress declared that no person should monopolize or attempt to monopolize commerce, and included corporations within the definition of "persons," it was a broad and sweeping provision, which applied to individuals, corporations, and to all manner of monopolies. I say, therefore, that combinations between separate and distinct individuals or corporations, to suppress competition in commerce and trade and to monopolize trade, is not the only thing prohibited or the only form of restraint and monopoly against which the law may be invoked. It cannot be material whether the means by which commerce is attempted to be monopolized is by purchase of all the available supply; by the control or acquisition of competing industries; by unfair methods of competition; by vast aggregations of capital sufficient to crush feebler efforts, or by what means. The suppression of competition through these means is as unlawful as the suppression of competition by agreement between independent persons or corporations engaged in the same business. If at common law a grant of monopoly to a single person or corporation was void because it destroyed freedom of trade, discouraged labor and industry which should be free to all the subjects of the realm, why is it not void for the same reasons when accomplished by a single individual or corporation by other methods? If it is against the policy of the law to grant perpetual monopoly in any commerce, which would deprive the people of the right to engage in that industry, how is it less against the policy of the law for a single corporation or individual to gain control of all the commerce in a particular article, through purchase or acquisition of competing properties, or through any other means or device? We are not invoking a new principle against an old device, but an old principle against a new device. Principles are everlasting. Devices change. In our opinion, it is against the terms and the spirit of the Sherman Act for any man or set of men, through the form of corporate

action, to acquire dominant and controlling power over any commerce, with intent to monopolize that commerce, whether this be done through the form of purchase of competing properties, or in any other form. It is no answer to say that, by limiting the right of purchase and acquisition of businesses and wealth, we are limiting the freedom of contract and the inherent right to acquire wealth, in violation of the fundamental law of the land. The constitution is often invoked to cover oppressive action and illegal methods, but the courts have answered these arguments in many cases. Freedom of contract, the individual freedom of the citizen to acquire property, and invoke the protection of the law in defense of his ownership, of course cannot be too highly valued, or protected with too scrupulous care; but individual aggrandizement, or the combination of wealth, or corporate acquisition, may go to that extent where the individual rights and freedom of the citizen may be endangered. It is of the highest importance, in the preservation of society, and in the development and elevation of the race, that the right to earn a livelihood, to engage in any commerce, employment, or labor, be kept free and untrammeled. And when any aggregation of labor or capital reaches that point where any man is denied the free right to engage in enterprise, it is illegal before the law, and contrary to the instincts and the training of free men. It is not sufficient that the citizen be given merely an opportunity to earn a livelihood; the avenues of commerce, trade, and enterprise should be kept open. The man who has constantly before him the prospect of always being an employee, in a subordinate position; who can never rise above it; who has no prospect of being a proprietor, cannot enter the field of competition in industry, in discovery, in commerce, is not in a position to develop those faculties of independence and enterprise, which mark the highest type of man. It is ambition in empire, or in industry, which marks human progress; and upon the happiness, the prosperity, the development and elevation of the individual depends the stability of the state. These propositions may be said not to be open to discussion, for the reason that the Congress has declared for freedom of trade against all restraints and monopolies; but the effectiveness of laws depends upon their interpretation and execution. The people have expressed their will, and Congress has exhausted its power, by declaring that all monopolies in restraint of trade shall be void. It is, as it has always been, for the courts to construe this language and to enforce this law. And upon the lawyers and the courts rests the responsibility of making effective these declarations of principles made by the legislative bodies. I do not deny that new legislation is from time to time necessary as new conditions arise, but I do claim that the legislation now upon the statute books, amply authorized by the constitution, is sufficient, if properly interpreted and enforced by the courts, to remedy the evils of monopoly and restraint upon trade. These considerations are important when we come to apply the law to the various devices by which monopolies and restraints upon trade are attempted. This is the province of the courts, and they have shown themselves equal to the task. You ask, "What is the duty of the lawyer?" His duty is in the halls of the legislatures, in his private life, in his professional career, to carry out the policy and the principles of these laws; and not to seek means of avoiding them. There is an impression that a lucrative branch of professional business is organizing trusts, combinations, and schemes for evading the law. To some extent this may be true, but I venture to say that the schemes for the evasion of the law have had their origin in the greed and cupidity of man more often than in the mind of the lawyer. I have no patience with the blatent demagogue who is running up and down the land vociferating against all wealth and corporations, without discrimination, or un-

derstanding the principles about which he is talking. But I do believe, for the conservative, conscientious lawyer and citizen, there is a work to do in limiting the power of individual and corporate wealth. Man has ever been abusive of power, and he can no more be trusted with unlimited power, when it takes the form of wealth or corporate power, than when it takes the form of government. Free government has ever been a struggle between unlimited power and unlimited license; and there is a middle ground along which people may travel; where the right of the many is superior to that of the few, and where a limit is placed upon power, to the end that all may enjoy greater freedom of action.

Whether large aggregations of wealth, corporate or individual, tend to the permanent benefit of the race; whether they add happiness, individual prosperity and good to the whole community, is undoubtedly a question about which political economists will differ. But, however this may be, one thing is certain, — and about this there can be no dispute, — it is necessary that corporations shall be subservient to the law; for, when the time comes that they are greater than the law, they are greater than the government. Competition has ever been recognized as the right of every English-speaking people. Competitive forces have not only developed our country, but our manhood, and my judgment is, that aggregations of wealth, either individual, in corporate form, or otherwise, may become so large as to endanger the right of the people to engage in all employments with equal opportunities, and unless they are curbed by the laws now in force, more drastic means will be found.

We recognize that large aggregations of capital are necessary to certain industries, especially that of transportation. No individual has, or should have, wealth sufficient to build and operate the great railways which have become a necessity in our complex, modern civilization; and it is with no hostility to such legitimate enterprise that we have passed laws, and are enforcing them, regulating railway corporations. This is one of the great achievements of the day. The time was when transportation was largely a matter of convenience for the people in traveling from place to place. Much of the products of the country was exchanged in the village markets; was used in the immediate vicinity of production, and transportation was not such a vital factor as it is to-day. But the time has come when everything which the farmer raises, the merchant sells, the manufacturer makes, and substantially every article we use, bears a tax or charge for transportation. The village artisan has disappeared, and all that we buy or sell is transported upon the railway. The construction of great lines of railway is beyond the power of the few, but is carried out through corporations, which can be managed by few but owned by many. It therefore becomes necessary and vital to the life and prosperity of the people that this public tax for transportation should be regulated by law. I do not agree with the remarks of the distinguished President of the American Bar Association when he said:

"The recent session of Congress pushed the legislative power granted by the commerce clause of the constitution a long distance beyond any point reached before in that direction. Whether it went beyond the granted power, and by addition and enlargement asserted an authority not warranted by the instrument, is another question."

I believe that the enactments of Congress, regulating the rates for transportation, are grounded on constitutional principles thoroughly established by the decisions of the Federal courts; that they are also in harmony with the progressive policy of the times. It is not for the best interests of the country to injure the railways. The millions upon millions of money invested in them are the savings of the people. The

railroads are not owned by a few millionaires, but they are owned by a vast number of people scattered throughout the breadth of the land, in every state. The earnings of the railroads paying dividends upon their securities are the basis of income of a large percentage of the people, and form the basis of a large amount of our national wealth. But, on the other hand, the charges for transportation attach to every business, every enterprise, and every industry, and are the very life blood of our commercial prosperity. Discriminations tend to build up monopolies, and deny to individuals the equal right of competition. The business of today is done upon such a narrow margin of profit that an advantage in freight rates may wipe out a business, destroy a community, build a monopoly or a city. Is it, therefore, unreasonable that the regulation of that which has become a public charge should be in the hands of the law? Administered wisely, and safeguarded by the courts, as it will be, it will prove a protection to the business of the country, and will not injure railroad property.

But undoubtedly the enforcement of its provisions will create much divided sentiment; will bring up new questions for solution by the courts, important and far reaching in their effect, and will demand of the lawyers and the judges of this country the highest order of ability, courage, and good judgment, as well as conservatism.

The power to fix a schedule of rates is a legislative and administrative power, and may be delegated by the Congress to a Commission. The power to decide whether rates so fixed deprive a railroad company of reasonable earnings, so as to take property without due process of law, is a judicial power and cannot be taken away from the courts. It seems to me much confusion has arisen in the discussions on this subject by not keeping clearly in mind the demarcation between the powers of these two branches of the government. Congress has power to pass a law fixing rates to be charged by a railway company in the future, which is no more than laying down a rule of action for future guidance. The court has power to declare that law unconstitutional if the rates are so low as to deny the railroad reasonable earnings, and amounts to taking private property without due process of law.

I have no doubt that it is not within the power of Congress to delegate to the courts the power to fix schedules of rates, or to fix a rate for future use. This is an administrative power, that cannot be conferred upon the courts. Neither is it practicable. One of the great objects which was sought to be accomplished by the separation of the functions of government into three distinct branches was to prevent one from making the law and construing it. The primary intention was that there should be a judicial branch, which should stand between the people and oppressive and unconstitutional legislation. It may be said that, as the court is the ultimate judge of what is a reasonable rate, and as this power cannot be taken away from the court, it is idle to vest this power in separate tribunals or branches of the government; that it would tend to simplify the matter to confer it on the court. The argument is fallacious. It might as well be said the court should promulgate rules of action in all human affairs, because the court could decide in advance whether the law is valid or not and what the law should be. We believe that the interests of the country are best subserved by adhering to the line of the division of the powers laid down by the constitution, and to the principle that rules of action for future conduct, whether they involve personal liberty or the rights of property, should be promulgated by the legislative branches of the government; that the courts established under the constitution are a sufficient guaranty against oppression and confiscation or other unconstitutional legislative action.

But it will be claimed by the ultra-radical that whatever rate is fixed by the Commission should not, and cannot, be reviewed

by the courts. This neither should be, nor is, true. Under the wise conservatism of our form of government, the court is and must be the ultimate arbiter of the validity of all legislative and executive action, where they affect property and personal rights. There must be a rock on which men may stand, and to which they may pin their hopes, which is not affected by the storms of passion or the mutations of politics.

But it is not necessary to the protection of property rights that this conservative judicial power should be carried to the extent of frustrating reasonable legislation in the interests of proper regulation of transportation. The courts should be alive to the spirit of this movement, and give the law a broad and liberal construction to effectuate the objects of Congress in passing it. Suppose it does require us to tread unknown paths; it is not the first time we have blazed the way. Whenever great questions have confronted the courts, they have shown themselves equal to the emergency, and should do so again. They should keep abreast with the most advanced thought of the time. Do not misunderstand me. I do not think courts should bend to every breeze and yield to public clamor, but we should not be unmindful of a legitimate and healthy public sentiment which has found its ultimate expression in legislative action. If we are, we show ourselves blind to the signs of the times and will block the wheels of progress. Representative government is but the expression, through constituted authority, of the public will, and while no greater service can be rendered to a people by the courts than resisting encroachment upon their fundamental constitutional rights, yet we should be equally bold to support new ideas, advance new methods, and establish new precedents, when necessary to the public good. It is possible that in times of public agitation and excitement, the Commission may go beyond that reasonable regulation which Congress contemplated when granting the power to fix rates, and may take from railroad companies, and therefore from the stockholders a reasonable income upon the investment. To obviate this, it is, of course, the duty of the legislative department of the government to make the Commission as free from interference by the legislative and executive branches of the government as possible, so that they cannot be made mere instruments of political will in the exigencies of campaigns. But this is not a question for the courts. It is the duty of the courts to carry out and enforce the orders and regulations of the Commission, unless they invade property rights. Railroad property and all property invested in such public utilities can only be worth what it will earn to its shareholders. It is as much taking private property to deny the stockholder any part of a reasonable earning, as it is to deny him any earnings whatever. It is, therefore, a judicial question when the Commission has fixed a rate or schedule of rates for railroads to charge, whether those rates give to the stockholders a reasonable return upon their capital. This question becomes much more difficult, to be sure, when Commissions only fix a part of the rates charged by railway companies, or when state Commissions fix the rates for intra-state business, and the Interstate Commerce Commission fixes the rate for interstate business. But it only adds to the difficulty, and requires the more care, judgment and experience by the courts and lawyers. Undoubtedly the conflict between state and federal authority will become one of surpassing importance, but we believe that wherever the federal authority attaches, the power is exclusive, that it does not stop at state lines, and that it may go to any extent to effectuate the objects of Congress in establishing the regulation. We mean to any extent within the bounds of the Federal Constitution, because the Congress can no more take and destroy private property than can the state. The commerce of the country has become of such

enormous proportions, local and interstate so intermingled, that it may become impossible to separate it on state lines, to distinguish between earnings purely within the state and those earnings which are interstate, or to properly separate the expenses of the service in each case. If that time comes, we believe the Congress will be justified in regulating all of the commerce upon the lines of transportation engaged in interstate commerce. This is, perhaps, an advanced doctrine, and may to some extent shock the sensibilities of those who have strong views upon the reserved rights of the state. But it is a serious question whether the immense commerce of this country can be controlled and regulated effectively except through single federal power. Divided authority, except where the subjects over which that authority is exercised are entirely distinct and separate so that there can be no clash, is always dangerous and ineffective. Let us consider this a moment. Taking into consideration that state and interstate commerce are carried on together by the same facilities, in the same trains and cars, by the same employees; that no division is made at state lines; that the density of traffic varies in different localities; that there is no possible way of accurately arriving at the expense of doing each class of business; that general expenses cannot be apportioned; that all apportionment is necessarily a mere estimate, — is it unreasonable to say that there is no accurate way of arriving at what would be a reasonable rate of income for carrying the separate classes of traffic, or dividing upon state lines the commerce of the country? If it be true that the rules suggested by the courts are to be finally established as the basis of reasonable earnings, to-wit, a fair income upon the capital invested in the transportation, we are immediately confronted with a most difficult proposition. It is impossible to determine what proportion of capital is invested in interstate business. Shall the Interstate Commerce Commission allow a fair income upon the entire capital, taking into consideration alone the earnings from interstate business and excluding the income from state traffic, or shall the state Commissions allow a reasonable income upon the same theory, taking into consideration alone state traffic? This might result in allowing the railway company double earnings, or it might result in one commission allowing no profit whatever, and requiring the railway company to obtain its income from the other class of traffic. I suggest, with these questions before us, whether it is not in the power of the federal authority to take exclusive control of all the regulation of rates upon lines engaged in interstate commerce.

When it comes to the control of corporations and individuals in interstate commerce under the Sherman Act, the courts do not stop because some of the corporations or individuals may also be engaged in intra-state commerce. In other words it has been decided that because a part of the business done by a combination of separate corporations in restraint of trade is intra-state, this in no way affects the power of Congress over the combination, if it is also engaged in interstate commerce; and such combinations have been restrained and entirely dissolved, although the effect has been to stop that part of the commerce within the control of the states. May it not therefore be the ultimate result of this question, that where the instrumentality, the railway, is engaged in interstate commerce, the power of Congress attaches and it may regulate all of its business? I am not speaking of those lines of railway exclusively within the states and not engaged in any respect in interstate commerce.

I do not suggest these questions with a view to encouraging the interposition of technical questions, in order to render the administration of this law ineffective, but, on the contrary, I believe it is the duty of the courts, while keeping in view

those fundamental principles for the protection of property, to make the regulation strong and effective and I believe the courts will so solve these propositions as to effectuate this end, because otherwise we may be followed by the calamity of public ownership. Whatever we may think of the theories of some prominent men to-day on that question, divided ownership between the state and federal government, with conflicting rights of control, to my mind is impossible. Whether there can be divided control of instrumentalities engaged in both classes of commerce when we ultimately come to settle the question of reasonableness of transportation rates, may yet be open to discussion. But divided ownership of instrumentalities engaged in both classes of traffic would raise questions of conflict entirely destroying the effectiveness of the remedy. Imagine a railway situated exclusively within a state and incorporated under its laws, engaged in both classes of traffic, owned by the state and partially controlled by the federal government. If public ownership must come, and I earnestly hope it will not, it should be a federal ownership. But it is not the object of government to engage in business and occupations which should be freely open to all the people, and it is not for the interests of the people to increase the army of purely dependent government employees. Public service should not be despised; it should reflect honor upon those so employed, and while compensation should be, as far as possible, commensurate with the duties performed, the primary object of the service should be for the good of the state. Laying aside the tremendous influence in politics and the degenerating effect upon the public service which a great army of employees engaged in operating the railroads of the country, would exercise, it is against the interests of the country from a purely economic and educational standpoint. Great nations do not grow from dependent and subservient people. It is against the spirit of the age; it is contrary to the teachings of our institutions and the examples of human progress. Government in legislation and administration should be free from selfish and sordid motives. It can only be so when the citizen has at heart just laws of government and high ideals as to their execution. The larger the number of electors engaged in public service in a purely business capacity, the greater the selfishness and the less effective the administration. But this is undoubtedly a question of political economy. The proposition that confronts the lawyer, and especially the judges, is how to effectuate in harmony with constitutional methods and the advanced ideas of the age, the regulation of rates of transportation which are necessary to the commercial equality and prosperity of the people, and take away the cause of the agitation for public ownership. If we fail in this, we shall lower the standard of our profession. But we shall not fail.

There are other questions which to-day are agitating the public mind, and receiving wide attention, which, perhaps, do not interest the lawyer more than those engaged in other vocations, except that his training and his opportunities peculiarly fit him to take an active part in these reforms. I refer more particularly to corruption in public life and political methods, and to that seemingly lax morality exhibited by many in great commercial and financial enterprises. The exposure of these methods and the agitation of these questions do not indicate a more corrupt condition than in other times, but they are rather a hopeful indication of an awakened sentiment to higher ideals in business and public service, and they are the most hopeful signs of the times. I can but allude to some phases of these questions in passing. I believe that we should by law prohibit corporations from making political subscriptions, and that we should all take an interest in enforcing the laws as they now stand, against the use of money directly or indirectly, to influence official

action in the administration of government, legislative or otherwise. Morally it is no worse for corporate money to purchase votes, influence elections or legislation, than for individual money to do so. The corporation is but an aggregation of individuals, but in practical life the effect is worse because of the facility with which great aggregations of wealth in corporate management may be handled to corrupt political action. The danger to the public in this is not simply that great monopolies may grow up, that avenues of commerce may be closed, that enormous wealth may illegitimately come to the owners, but the greatest danger lies in threatening the integrity of the state. The elimination of this power can only come through strict enforcement of the laws and the education of the American people to a higher standard of political and private action. We may, however, have to take one step further in legislation, and that is, to limit the aggregation of wealth under corporate management.

Speaking of Theodore Roosevelt as a man and not as President (because I would not bring into this discussion the slightest reference to partisan politics) he has done more to elevate the standard of manhood, to inculcate higher principles of political action, and higher ideals of business morality, than any man who has lived within my recollection, and it is the duty of every citizen, and especially the members of our profession, in our humble way, to emulate his course. It is also our duty to take a deep interest in these questions, because the danger to state is not imaginary. We have before us the history of other great republics which have arisen to splended heights, added a few pages to history, crumbled to decay, and disappeared, because they were honeycombed with corruption. Governments but epitomize the moral standard of its people. Great wealth tends to luxury, luxury to idleness and vice, and vice to degeneration of the human race. We are a wonderfully prosperous and wealthy people. If we would maintain the high standard of manhood we must with courage eliminate from the people the corroding and decaying effects of vice, of immoral conduct, in private life, in public life, and in the business and commercial transactions of the people.

St. Paul, Minn., January, 1907.

THE IMPRISONMENT OF CRIMINAL CORPORATIONS

By Donald R. Richberg

In discussing "The Control of Corporations" in the December number of The Green Bag, Mr. Frederick N. Judson took issue with an article on "Imprisonment of Corporations" published previously by the present writer. Mr. Judson's article presented so well the original logical theory of corporate control that it would seem proper in historical sequence to follow that article with one which will endeavor to show that the development of the law through a perhaps illogical sequence of decisions has now reached the point where it is necessary, for effective action against erring corporations, to carry onward the present legal theories. To go backward into the realm of what might have been can only increase the uncertainty and inefficiency of the present judicial control of corporations. Mr. Judson's positions may be fairly stated as follows:

First: Increased penalties do not diminish offenses;

Second: Innocent parties would suffer disaster in the imprisonment of corporations;

Third: The public at large would suffer in its interest;

Fourth: Preventive remedies are more effective than punitive remedies;

Fifth: Individual responsibility should be increased.

As to the first point, historically, it may be true that "a dreadful list of penalties, instead of diminishing, increased the number of offenders." It might well be argued that the barbarism of an epoch in which hanging was the penalty of petty larceny would, simultaneously, without casual connection, be an era of great crime. It might well be argued that as humanitarian principles increased and the penalties were diminished, crime would also decrease, again without causal connection between the penalty and the crime. In the consideration of the present subject, however, such arguments are hardly applicable. In dealing with the punishment of a corporation we need not reckon with the emotions and psychological responses of human beings. We are at present face to face with a business problem pure and simple. If a corporation can make three million dollars a year by granting rebates or entering into unlawful agreements, and if the chances are that the legal expenses and penalties incident thereto will not exceed one million dollars it is obvious that in our present state of business morals that corporation will not hesitate to break the law. If, on the other hand, the penalty for such illegality is the deprivation of the corporation's income for a period of one year or more the chances of obedience to the laws by that corporation are remarkably increased. It should also be noted, as a further example of the business appeal to be made by the imposition of such a penalty, that it could no longer be made an object for the unfortunate corporation-employee to take the risk of committing crimes that his employer might gain. If the penalty for corporate wrongdoing were punishment of the corporation the punishment would ipso facto fall upon the true logical wrongdoer. This leads, naturally, to the second point above stated.

The only innocent parties in the present writer's view who could suffer by the imprisonment of a corporation would be those parties who have been led by false representation to invest their money in an illegal concern. Inasmuch as this variety of innocent parties is protected in no other domain of the law the natural query is, why should an exception be made in favor of the stockholders of corporations? If one invests property in a concern operating a lottery, or any other gambling device prohibited by law, such property is quite liable to confiscation

and small pity is granted to the investors.[1] Following the same analogy — why should persons investing in a corporation acting in defiance of law be protected when their investments are providing the means whereby illegal transactions are carried into effect? Stripped of all emotional considerations the responsibility for corporate wrongdoing should be traced back as follows: Employes commit unlawful acts. They do this under orders which indirectly or directly have their source in the Board of Directors. The Board of Directors are elected by the stockholders. It is a fitting example of the popular mystery attached to a corporation's actions that this plain responsibility of stockholders receives so little general consideration. Strip away the technicalities of corporate organization, and corporate crimes are committed in this manner — a number of men unite to carry on a criminal enterprise; they employ certain of their number or outside parties to act for them; these parties in turn employ others who do the physical acts prohibited by law. Can there be any plainer responsibility than that which is attached to the law-breakers who have conceived and provided the means for the committment of crimes? Have they any right to demand protection for money which they have used in defiance of law?

If, from a sympathetic point of view, those stockholders who buy purely for investment. who know nothing of the management of the company, are to be termed "innocent parties," is it possible for intelligent lawyers to assert that they are legally innocent parties? Even the sympathetic appeal of innocence is in a large measure false. In the present state of general enlightenment as to great business combinations the average man knows perfectly well the character of a corporation whose stock he is purchasing. If he does not know this, it is obviously his legal duty to obtain such knowledge. It can hardly be claimed, however, that a man who invests to-day in any one of our notorious law-breaking corporations is ignorant of the fact that he is providing the means and assisting in employing men to break the laws of his state and nation. Such "innocent" parties as stockholders in illegal enterprises may appeal for public sympathy in the newspapers, magazines or briefs of counsel, but in any court of real justice their claims can have but little standing.[1]

An endeavor has been made in numerous writings in reference to stockholders' responsibility, to draw a distinction between a corporation which incidentally commits criminal offenses and a corporation organized for crime. Obviously few corporations would come under the latter category unless the somewhat radical view is taken that any business enterprise which expects a return of over 20 per cent on the capital

[1] Bishop, Criminal Law, Sixth Edition, Vol. 1, Sec. 819 et seq. "When a thing which is the subject of property passes into a situation antagonistic to the law, its owner may lose his ownership in it, whether personally guilty of crime or not, because the thing has offended."

[1] To the defense that many persons would be injured by the punishment of a guilty corporation an effective reply was made in the case of Spokes *v.* Banbury Board of Health, L. R. 1 Eq. 42, by Wood, V. C.: "I was told that the large and important town of Birmingham would be stifled and smothered and perhaps subjected to pestilence if the Board were not allowed to discharge the whole of their sewage into the river in which a private gentleman, the plaintiff, had certain rights of fishing, as well as of sending his cows to drink, and other benefits of that kind. But it appeared to me quite plain from the Act of Parliament that they had no right to discharge their sewage into the river; and I did not in the least regard the circumstance of their acting for 100,000 people any more than I should have regarded the circumstance of their acting for one. I think the principle of law must be so. What difference can it possibly make as to the commission of an illegal act, whether a man acts on behalf of thousands or on behalf of himself only? The act is illegal and being illegal the party injured has a right to be protected. It does not signify whether the injury is inflicted by many or by one."

invested necessarily contemplates the evasion and breaking of the laws. Yet this distinction between a corporation committing crime incidentally and as a business is one having no analogy in the criminal law as applied to natural persons. If John Smith, after a long and virtuous career, forges a check for a thousand dollars and is convicted he is designated a criminal. If John Smith, entering the service of a bank with the intention of earning an honest living, is tempted by pressing needs of an invalid wife or an indigent race-horse and grants himself rebates on his receipts at the teller's window, he becomes a criminal in the eyes of the law. The surety company and trusting uncle who have innocently signed his bond risking their money in the security of his honesty are liable to the extent of his defalcation. To urge that a wrongdoing corporation is not criminal because it only commits crimes sporadically is, first, pitifully without foundation of authority in the domain of the criminal law; second, plainly untrue as a practical fact, since the crimes of corporations against which legislation has been enacted are those wherein a course of law-breaking has been and is a settled policy of the corporation, and one which month after month and year after year has steadily piled up illegal gains for the enterprise.

The question, however, raised by the advocacy of imprisonment for corporations is not whether the stockholders shall forfeit absolutely their investment. The assets of the corporation would be held for the term of imprisonment by the State, and on the expiration of the sentence they would of course revert to their original owners as a discharged convict is returned to his family. Neither would the interests of the stockholders suffer to that extent which would be caused by a total cessation of the activities of the corporation. Mr. Judson's assumption that an industry would be paralyzed during the period of imprisonment is not properly founded on the writer's original article wherein the statement was made — "for the period of punishment . . . not a bond should bear interest, not a share of stock pay a dividend . . . not a wheel of machinery should be turned *except in the service of and for the benefit of the State.*" The suggestion in the above-quoted sentence is plainly made that an intelligent governor would not paralyze an industry during the period of imprisonment, but would, on the contrary, gladly devote its legitimate profits to the service of the State, meanwhile giving employment to the innocent employees and saving so much of the wealth of the community from needless rust and decay.

With this portion of the theory of imprisonment correctly understood little further answer is required to Mr. Judson's third point that the public at large would suffer in its interest. In the first place the interest of the public at large in the ordinary corporation is entirely an historical and theoretical one, except in so far as the State has inherent control over its artificial creation. Certainly this control cannot be confined within smaller limits than that exercised over natural persons. In the workings of the average private corporation the State obviously has no further interest than in the workings of any private individual engaged in large enterprises. This lack of any real interest of the State in private corporations is now practically admitted in all courts, the old fiction of public interest being generally removed as a useless and dangerous appendix. The interest of the State in quasi public corporations can be quite exactly compared to the interest of the State in quasi public officers. Men operating public franchises can be held to certain strict responsibilities, and the same should certainly be true of corporations. Would any one advocate that the president of a great railroad, or even its entire directorate, if caught in deliberate criminality, should be punished only with a fine because of the severe harm which might ensue to the general public should

their valuable persons be confined within a common jail? If a great corporation becomes bankrupt the argument that the public interest will suffer by the appointment of a Receiver is not likely to prevent such action by the Federal Court. The imprisonment of a corporation by putting its affairs in control of government officials is not radically different from the process of Receivership. If a Receivership is the best aid which the law can give to the creditors of a bankrupt, is it a very far stretch of analogies to believe that imprisonment of a criminal corporation amounting to complete governmental control, temporarily, would be the best aid and protection in the power of the government to be granted to law-abiding citizens? How the public at large could suffer by the substitution of governmental control of enterprises for private criminal control is not easy of comprehension.

The fourth point urged by Mr. Judson is that preventive remedies are more effective than punitive remedies. There is no necessity of taking issue with this proposition which is fairly axiomatic. Two facts should, however, be borne in mind. First, that the preventive remedy suggested — that of injunction — has been in existence for many decades and our present system of wide monopolistic control of practically every important industry bears eloquent witness to the efficacy of this remedy. It may well be that a wider use of this preventive weapon and increased activity and honesty of officers of government will accomplish much toward the solution of present day problems. Second, however, as long as it is necessary to have punitive laws by the thousands on the statute books to hold fear before the eyes of the private individual it will also be necessary to have punitive laws to restrain the pernicious activities of artificial persons. In fact it may well be argued on the lines suggested in replying to Mr. Judson's first point that punitive remedies will be of far greater effect in dealing with artificial persons than they can be when reckoning with the emotions of human beings. Increase the risk and danger of unlawful enterprises and necessarily the amount of capital offered for investment in such lines must decrease proportionately. Nowhere is there a better opportunity to make a true application of the semi-false statement that there is no sentiment in business than in dealing with the present situation. "Fear," as a weapon against human beings, may simply inspire greater courage and daring. Fear, applied to an artificial person, to a business proposition, shows its results in a decreased market value, an attack on the most vulnerable spot in the corporation's anatomy.

Irrespective, however, of academic considerations as to whether preventive remedies are more effective than punitive, it is a fair proposition of law that since we must have in our midst, for the facility of business, artificial persons granted many of the rights of natural persons and also many rights not enjoyed by natural persons, the penalties attached to criminal acts of human beings should be extended just as far as is logically possible to cover the criminal acts of these artificial persons.[1] If the arguments of corporations had been heeded during the development of modern law, we would find to-day that the States, in granting corporate charters, would be creating Frankensteins menacing practically all of our much prized constitutional protections. Private individuals would have continually to deal with beings possessing boundless rights, unrestrained activities and amenable to no process of law, undeterred in illegal trans-

[1] Purdy's Beach on Private Corporations, Chap. on Crimes and Criminal Prosecutions, Sec. 1015: "The whole course of authorities shows that an action for a wrong will lie against a corporation, where the act complained of is done within the scope of its incorporation and is one which would constitute an actionable wrong, if done by an individual."

actions by any fear of punishment.[1] Step by step, however, the courts have torn down the artificial protections reared about these artificial persons. Their appearance in court, for a long time stubbornly fought, has been determined legally enforceable. One by one crimes have been added to the list of misdeeds legally committable and legally punishable. The gravest difficulty now confronting the government in its efforts to enforce obedience to the laws is found not in lack of ability to punish, but apparent lack of ability to punish effectively, the convicted wrongdoers. Logically, the next step forward would be to apply to corporations that last resource of the injured State against the persistent law-breaker — the absolute restraint for a period of time of his pernicious activities, and the confinement of his illdoing person within limits of absolute control.

Corporation law has been developed to its present state by two great causes:

First: The desire of guilty individuals to shift the burden of blame from themselves to artificial persons.

Second: The desire of the courts to place the responsibility of wrongdoing upon the person who, though the artificial, was in fact the actual wrongdoer.

The fifth point raised by Mr. Judson, therefore, is entirely opposed by the trend of modern decisions.[2] While it may logically seem highly advisable to single out and punish the actual human beings who have been the chess-men in a corporation's criminal game, there are two good reasons for opposing such procedure. First, the power which has moved knights and pawns is left unpunished and unrestrained. Second, as a practical fact, it is extremely difficult to ascertain who the actual wrongdoer is. In most cases, even if he be singled out, he will be found to have been an uninformed agent made, by the necessities of earning his livelihood, a mere mechanical tool in the hands of the real criminals who cannot be reached, whose orders cannot be traced, whose responsibility cannot be proved and who can only be properly attacked, restrained and punished through direct punishment of the corporation.[1] The corporation is much more flesh and blood of the wrongdoer than is the helpless unpaid employee, whom the law could attack as directly responsible. The very case cited by Mr. Judson of contempt of courts wherein he claims the individual should be held responsible, is the case in which the courts in recent days have gone farthest in upholding the distinct individuality of the corporation and declaring it has a legal entity capable of violating the orders of court and liable as an artificial person

[1] Thompson, Com. on Corporations, Vol. 5, Sec. 6285. "There is no reason why a corporation should be included in the word 'person' for the purpose of jurisdiction and be excluded from it for the purpose of being exempted from liability to penal actions for the commission of wrong for which the statute law makes individuals so liable. On the contrary such an interpretation gives to an aggregated body of wrongdoers an immunity from punishment which individuals do not enjoy."

[2] Purdy's Beach on Private Corporations, Chap. on Crimes and Criminal Prosecutions, Sec. 1016: "The former view that a corporation because it has no physical body, could commit no criminal act, and having no soul, could not be a subject for punishment, is now obsolete. Under the modern rule, the policy of the law and the practice of the courts, is to hold corporations as far as practicable to the same civil liability as natural persons, for wrongful acts, and whether or not committed within the scope of its granted powers. A corporation may be indicted, or punished for any act done or omitted, in violation of law. It may be indicted for committing a felony or a misdemeanor punishable by a fine or a forfeiture. . . . There seems to be no reasonable objection to laws which make corporations criminally liable for the misconduct of their officers and agents in the discharge of their duties."

[1] Bishop, Criminal Law, Vol. 1, Sec. 424 "Though a corporation is indictable for a particular wrong, still the individual member and officers who participate in it may be also for the same act. But they are not so liable in all cases in which the corporation is."

for such contempt.[1] More than forty years ago Judge Hogeboom rendered an opinion dealing in no uncertain terms with this very question in which he said:[2] "It is no answer to say that the act of the corporation is manifested and carried into effect by individuals, and that those persons are always liable to the process of the law, and may be punished, and therefore an injured party has always the means of redress. It is a poor compliment to the law to say that, while the principal is the real offender, though you cannot reach him you can reach his agent, his instrument. Besides, the agent may be entirely irresponsible or comparatively innocent."[3]

It may, therefore, be fairly urged that in his final conclusion that injunction is the effective remedy for corporation evils and that violation of injunction should be punished by contempt procedure against the individual corporate officials, Mr. Judson is going backward into the law which has been discarded as unjust and ineffective and is opposing the trend of modern judicial opinion which is firmly set in the direction of making the corporation, as a legal entity, directly responsible for its acts.[1] Mr. Judson points out also that the Rate Bill of 1906 restores the penalty of imprisonment repealed in 1903. The fact that it was necessary to restore this imprisonment is most significant in the present consideration, since this gives additional strength to the proposition that a fine imposed on either individual or corporation is an utterly ineffective form of punishment, since in modern business such penalties for illegal action are not in the least deterrent but are simply charged up as necessary expenses in the piling up of illegal profits. Imprisonment is the only effective penalty for individual wrongdoing, and it is surely a logical conclusion that in the development of the law wherein corporations are to be made responsible as legal entities for their misdeeds the only effective penalty against natural persons should also be enforced against the artificial persons known as corporations.[2]

With all due respect, therefore, for the learning exhibited by Mr. Judson and for the plausibility of his reasoning, the writer would take issue most earnestly with his premises and his conclusion. The objections to Mr. Judson's five points above stated may be summed up as follows:

First: Increased penalties for commercial wrongdoing will inevitably decrease commercial offenses.

Second: There are no legally innocent parties and few of moral innocence who would suffer disaster in the imprisonment of corporations.

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[1] Old View and Modern View of Corporate Contempts. Am. & Eng. Ency. — 2nd Ed. Vol. 7, p. 847.; Thompson Com. on Corporations, Vol. V., Sec. 6449.

[2] People *v.* Albany & Vermont R. R. Co.; 12 Abbott Pr. 171.

[3] Lord Denman, prior to that opinion, had spoken likewise in Railroad *v.* Great N. & Eng., 9 Q. B., 315. "There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is the corporation, acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings."

In Franklin Union *v.* People, 220 Ill. 335, the Supreme Court of Illinois held, in referring to the contention that the corporation could not be punished for contempt: "That doctrine now seems to have been exploded, as all the modern text writers and adjudicated cases, so far as we have been able to discover, where the question has been fairly presented for consideration or decision, hold that a corporation may be punished for a contempt of court."

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[1] Old View and Modern View of Corporate Crimes; Am. & Eng. Ency., 2d Ed., Vol. 7, p. 842.

[2] Bishop, in his Criminal Law, 7th Ed., Sec. 423, goes even beyond the imprisonment analogy and suggests the death penalty for corporations where individuals would be hung. "And though a corporation cannot be hung there is no reason why it may not be fined or suffer the loss of its franchise for the same act which would subject an individual to the gallows."

Third: In so far as the public at large has any interest in corporations that interest will gain by the substitution of governmental for criminal control.

Fourth: Preventive remedies should be used as far as possible against corporations, but where they fail of effect the same punishment should be meted out to artificial as to natural persons.

Fifth: Increase of individual responsibility is opposed to the trend of constructive corporation law, is difficult of accomplishment, ineffective in results and often highly unjust as the punishment of "entirely irresponsible or comparatively innocent parties."

Within the limits of this article it is impossible to undertake an historical and deductive argument justifying the imprisonment penalty for corporations as the next logical step in the development of corporate criminal law. It may, however, have been the writer's good fortune, in endeavoring to controvert Mr. Judson's view of the law, to have inferentially justified to a certain extent the theory of imprisonment of corporations. It should be stated in conclusion that this is a constructive and not a destructive proposition. Corporations are a necessity in modern business. They are part and parcel of a splendid and tremendous commercial development. They should not be hampered in their activities. They should not be restrained in their operations to any greater extent than individuals. If, however, they are granted, as they have been to the present time, powers greater than those of individuals and held to infinitely less responsibility, popular outcry and condemnation are inevitable. In the effort to correct abuses publicly inveighed against, great harm is likely to result to the good as well as to the evil powers of business organizations. If, however, corporations are placed with the greatest possible exactitude on the same plane of responsibility as are individuals, subject to the same legal restraints and the same punishments, while still possessing greater powers, their activities will not arouse the popular condemnation under which they are at present laboring. Demagogism will lose one of its most effective weapons when the responsibilities of both classes of persons, natural and artificial, are made the same.

CHICAGO, ILL., February, 1907.

LITTLE JOURNEYS TO THE LEGAL PROFESSION

THE IMPORTANCE OF MENTAL ATTITUDE

By Stanley E. Bowdle

MENTAL ATTITUDE is a great matter. Mary Baker Eddy says that it is everything. Elbert Hubbard — that book binder to the leisure class who freshens up old ideas with slang, and "does" them into an occasional beautiful volume "at the Roycroft Shop which is in East Aurora" — says that mental attitude is nearly everything. Doctor Dowie and Madam Tingley, indeed all the impresarios of the great cults, say that mental attitude is genius, power, success, and as essential to a Saint Saëns concerto as to a well-digested meal.

Now surely all these high appraisals will sustain for mental attitude the general average statement that it is a number one concern and well worth considering for an evening or two.

Heretofore we have shown that dining, reputable and conspicuous dining, occupies a leading place as an impression maker for the young lawyer. And we have touched up Clothes and the Green Bag as next in prominence, though no law professor has taken time to say one word about these things. Mental attitude now completes a triumvirate of aids to legal life untouched by legal pens, and into this virgin land I now propose to timidly blaze a way for some legal genius with a gang plow.

I am not now speaking of mental attitude as affecting health or nervous power. Its effect upon fees and relations with clients is my subject — so let's at it.

The lawyer's static mental condition is of no importance — what he thinks in the undisclosed recesses of his soul matters not, (though it might be shocking to his client). It is his dynamic mental state that counts — the state manifested in his conversation with his client. My theme, then, might more properly be called Legal Conversation, and its fee-getting and client-keeping power.

My observation is, that to the lawyer there is nothing so valuable, so potent in his dealing with clients, as a conversational attitude of contempt for judges and courts. At once the untutored legal yearling interrupts with a ponderous "why?" Well, such an attitude taken with a client whose case is pending, convinces him in advance of your prowess, and dauntlessness, your ability to bear his cause through fiery perils, even "As Æneas through the flames of Troy the old Anchises bore." And you shortly find that your client believes in you, that your make-believe opinion of yourself has become his opinion. You have moved him from the miasmatic fogs of doubt, and he now lives in an atmosphere of victory. He sniffs the battle from afar, sees himself upon the heights, under the protecting ægis of your intrepid genius, and anon, in the calm, he counts the swag of victory, apprehensive of nothing but your bill. Yea, the results are even more: He thereafter entereth your office deferentially; he speaketh quietly, and with no assurance; he ventureth no opinions on his own account, and troubleth you no more with the haphazard opinions of friendly lawyers who hand him their un-feed views at club and church; he tarrieth not long in your office, seeing that you are a man of visible importance; and he boweth himself out as he would from the chambers of a Supreme Court Justice. You are to him a Jeremiah Mason, a Rufus Choate, an undiscovered Webster — for the case has not been tried. His deferential visits are oases in your businessless Saharah, and you are radiant in the contemplation of yourself, fearing only the disillusioning day of trial.

This attitude always decorously observed by the best lawyers (for the habit formed in youth clings to them through life, and

long after there is any necessity for it) expresses itself on this wise: "Mr. Bellicose, our case unfortunately must be tried before Judge Way Up, an arrogant political accident. However, I have reversed him several times in the Supreme Court, and he has considerable respect for me." Or in this fashion: "Judge Baloon, I regret to say, is not dirigible. He is a man of unbending prejudices. His decisions are about as clear as a time table to a woman. But my experience is that when the essential X-rays of a proposition are liberated from the encumbering data, and are set to vibrating, they generally penetrate the opaque headpiece of Judge Baloon." These identical observations, vigorously announced, produce, as I can solemnly attest, the most profound results. Nothing short of the day of trial will efface them. They may be taken by the young lawyers as models and moulded to fit the local situation.

Should the case in hand be one fraught with grave danger, there is another remark that will act as a saline injection to your depressed client. You may say: "My great fear in this case is due to the fact that Judge Blunderbuss is likely to try it. He could not comprehend the law were it hypodermically administered. It takes a grape and shrapnel preface to an argument to wake him up, and then your proposition must be made as clear as Mother Goose Melodies." At such a juncture this observation is most diplomatic. It steadies your client's knees, prepares him for a shock, and, best of all, affords you a kind of stage door exit from responsibility, when the foreman of the jury solemnly declares, "We the jury on the issues joined, find for the defendant" (your adversary).

But this remark, like all studied remarks, needs a little stage setting to give it strength. I, therefore, suggest to the young lawyer that a valise be kept in his office, with his books, and green bag, and silk hat, and other stage properties. A valise at times is an impressive thing, if thoughtfully brought upon the scene. It causes your client to think about you most decorously. It straightway occurreth to him that you have just returned from Washington where you may have argued the case of your neighbor Mr. Bucket Shopper, whose Fourteenth Amendment privileges were lately so menaced; or he cogitateth immediately that you have just returned from New York, where no one goes save on big business. And should his face show that he cerebrateth not at all about you, you can help him by saying "I have just returned from New York, or Washington, or Chicago." This is the oldest place of legal stage property in the world. The vigorous use of centuries has left no trace upon it. The lawyers of the little Persian Satrapies used to say, "Ah, Mr. Nabob, glad to see you, I have just returned from Bagdad," whereupon Mr. Nabob looketh big-eyed and wonderously. This remark, then, is as historical as it is proper. A client, nervous about your prowess, is simply put in a trance by its timely use. It is a balm, a healing lotion, a sovereign soporific to that I-fear-you-ought-have-associate-counsel feeling that sometimes distresses clients and gives cold feet to their counsel whose calibre is being taken.

Getting a law practice is a great drama, sometimes comic, sometimes tragic, few cases and many sloughs of despond. The office is your stage, you the actor, and there are no crowded houses: but the one man audience is watching you. So be sure you have the spittoon hidden, your unpaid bills in a drawer, law books lying about suggestively open, valise handy, a ready tongue speaking contemptously of Courts, a proud conversational swing, a readiness to speak of "grave constitutional questions" (but always speak slowly at this point); and, lo, shortly you will reach your office in a Limousine Car from whose sumptuous cushions you will be privileged to give your friends the soulless stare of modern life.

CINCINNATI, OHIO, February, 1906.

METHODS OF ASCERTAINING COST OF CARRIAGE

By John B. Daish

THE purpose of this paper is to consider the several methods which have been used by tribunals to ascertain the cost of transporting freight — that cost being the cost to the carrier.

It is assumed, first of all, that charges for transportation should bear some relation to the cost of transportation. What this relation shall be, and whether or not cost shall exceed charges or vice versa, we shall not now attempt to concern ourselves with; we simply assume the fact that some relation should exist between these figures when ascertained.

It may be argued that, from a legal point of view, the cost of transporting goods having been once obtained, we are scarcely wiser than before. The Supreme Court of the United States has held that as a matter of law, it is improper, in considering the reasonableness of a rate, to make a comparison of the intra-state rates of two states, and it is likewise improper, as a matter of law, to compare the intra-state rates of one state with the rates applying on interstate traffic originating in, destined to, or passing through the state which we have under consideration. However this may be as a matter of law, certain it is, that as a matter of business, no stronger argument can be adduced than to show by mathematical process that the rates of one state are greater or less than those of another, or that the local state rates are very much more than the interstate rates for traffic which, in its transit, enters the state one may be considering.[1]

We shall further assume that there has been determined and crystalized into currency, what we mean by the term "fair valuation" of the carrier's property. We are supposed to have agreed to consider some figure which may not be entirely dependent upon any one, but in fact an inference, if you please, from all of the following items: the cost of construction, the cost of reproduction, the valuation as a going concern, the valuation of the services of the entrepreneur; in short, we have placed in figures the "fair valuation" of the carriers property in accordance with the rules of law, the demands of justice, and the requirements of good business.[1]

One other assumption, and that is that the carrier has given us upon oath such testimony as we shall have called for.

It should be remembered in considering this matter that cases involving the cost of traffic to the carrier may take either one or two forms, namely, of the schedule as a whole, or of a particular commodity. If we consider the schedule as a whole, we must perforce conclude that we have simply arrived at the beginning when we get our final figures, for we shall then be compelled to determine what relation each of the eight thousand articles in the classification shall bear to this average cost. If, on the contrary, we consider the cost of transporting a particular article, we shall then be under the necessity of determining what relation should subsist between the charges to be made for transporting this particular article

[1] Smyth *v.* Ames (169 U. S. 466).

[1] The "fair valuation" of the carrier's property must be taken into consideration in determining the reasonableness of its rates and charges. The elements which must be taken into consideration to ascertain the "fair valuation" have been named by the Supreme Court, but no definite mathematical rule by which to crystalize the "fair valuation" into currency has as yet been expressed. The elements are to be found in Smyth *v.* Ames (169 U. S. 466, 546). Upon the general subject concerning the necessity for considering the "fair valuation" of property as an element of reasonable charges, see Lindsley: "Rate Regulation of Gas and Electric Lighting "

and the cost of its transportation, and, if we are to aim at completeness, the relation between the cost of transporting this article and others or the relative charge to be made for them.

Cases requiring the ascertainment of the cost of transporting freight per unit arise in one of two ways; either a statute or an order of a railroad commission has prescribed a schedule of rates or a preliminary investigation to ascertain the cost precedes the making of such a schedule.

One of the earliest cases in which it was attempted to ascertain the cost of transportation was the case of Smyth *v.* Ames.[1] In that case the legislature of Nebraska had prescribed a schedule of rates applicable to the state tonnage moved upon all the carriers operating within that commonwealth. The facts before the courts were as follows: By expert testimony it was said that the legislature-made rates reduced the charges upon freight traffic 29½ per cent; it was in evidence from expert witnesses that the cost of moving the purely intrastate traffic was from 10 to 25 per cent more than the cost of moving the interstate traffic, the court assumed that 10 per cent increase was a reasonable one; figures were introduced showing operating expenses and receipts, number of passengers carried, the tons of freight, and the mileage over which freight was transported.

With such evidence at hand, after separating the passenger traffic from the freight traffic, the court used the following method. Dividing the cost of freight operation by the receipts from freight operation, a result was produced of 66.24. These figures (66.24) were said to show the percentage which the operating expenses bore to the receipts upon all the traffic carried by the railroad, and hence represented the cost of carrying. As the evidence showing that the cost of doing the intra-state freight business exceeded the cost of doing all the business 10 per cent, this last figure was added to the quotient heretofore obtained, making a total of 76.24. The legislature-made rates would reduce (according to the testimony) the receipts 29½ per cent. That is to say, for each $100 of receipts, if it be assumed that the quantity of tonnage will not change (and the court made such assumption) the carrier would receive $70.50. Thus, under the legislature-made rates (and it being assumed that there would be no increase in tonnage) the carrier would expend in operating expenses $76.24 and receive in return $70.50. Of course, upon such a basis the court held the legislature-made rates of Nebraska unconstitutional, for the proposed rates would not be remunerative.

The fallacy of the mathematics of this case can be seen from two points, even if we concede that there will be no increase or decrease in the yearly tonnage by reason of the change of rates or commercial conditions.

1. The percentage which the operating expenses bear to the receipts does not mean anything; it simply shows the relation between the two items; they both might be relatively high or low, or one or the other may be entirely disproportionate to fairness or good management or justice.

2. Again, a careful consideration of the exhibits in the case shows the prospective effect of the proposed reduction of rates upon several carriers. If this change of rates produces a reduction for one carrier, it is fair to conclude that it must produce a reduction for another. And so, if it produce a reduction for one carrier in a single year, it must produce a reduction for that carrier every year. Such, however, is not found to be the case. For example, the Fremont Company was shown, had this reduction of rates been applied in 1891, to have gained, while seven other roads would have lost; and, in 1892, the Fremont Company would have lost with five other companies, and the Union Pacific (which had been a loser the year before) would

[1] 169 U. S. 466.

become a gainer; further, the Fremont Company in 1893 shifts to the other side of the line, becoming a gainer and holding the Union Pacific with it, while five other companies still remain losers.[1]

Thus, it clearly appears that there must be some error in the mathematical method of this case.

The Supreme Court had occasion to consider the cost of transportation in the so-called South Dakota Case.[2] In that case a schedule of rates had been prescribed by the railroad commission of South Dakota. Here the Circuit Court assumed that for succeeding years the tonnage carried by the railroads would remain substantially the same, and it undertook to separate the passenger and freight business, and found from the testimony that the gross receipts from passenger business, had the legislature-made rates been in effect, would be reduced 15 per cent, and a reduction in freight charges would have diminished the gross receipts from that source by 17 per cent. It was also found that the cost of doing the business, as expressed in the term operating expenses, would be practically the same. The court below found the value of the particular carrier's[3] property in South Dakota to be $10,000,000,[1] but it was held that it was not fair to consider that sum as employed in doing the local business, for the same property was employed in doing the interstate business. The court below also found that the true way to determine the value of the property which is employed in the local business was to divide the total valuation of $10,000,000 according to the proportion that existed between the amount of gross receipts from the interstate and from the local business, both of which amounts were accurately stated.[2] Upon this basis of division it was found that the value of the property employed in local business in a particular year[3] was $1,900,000; dividing this amount by the gross receipts from local business, it was ascertained that these receipts represented 16.03 per cent of the valuation. The court then proceeded upon the supposition that the commission's schedule of rates had been enforced during the year it had been considering. Taking the supposed reduced earnings, it found that the valuation of the carrier's road engaged in the local business would have been $1,600,000, and upon such basis that the gross receipts from local business (under revised schedules) would have amounted to 16.02 per cent of the valuation of the property. As a matter of law, it was held that the variation of percentage was not sufficient to justify a declaration that the reduced rates prescribed by the commission were unreasonable; in short, the court below was of the opinion that the earning capacity of the road was so slightly reduced that it could not be affirmed that the new rates were unreasonable.

Commenting upon this method the Supreme Court of the United States suggests

[1] The statistics cover three years, 1891, 1892, and 1893. The companies were the Burlington, St. Paul, Fremont, Union Pacific, Omaha, St. Joseph, Kansas City. In 1891, had the earnings under the law been reduced, according to the expert testimony (29½ per cent) the several companies would have lost from 5.74 per cent to 59.76 per cent, except the Fremont Company, which would have gained 10.63 per cent. In 1892, the several companies would have lost from 3.73 per cent to 32.62 per cent, except the Union Pacific Company, which would have gained 4.06 per cent (the year before this company would have lost 8.44 per cent). In 1893, the several companies would have lost from 1.55 per cent to 33.64 per cent, except the Fremont Company and the Omaha Company, the former gaining 6.84 per cent and the latter 1.99 per cent. The table in full is to be found in 169 U. S. 535.

[2] C. M. & St. P. R. R. *v.* Tompkins (176 U. S. 171).

[3] C. M. & St. P. R. R.

[1] This fact was found by the court below, notwithstanding evidence to the effect that it was bonded for over $19,000,000.

[2] The receipts from local and interstate business were ascertained from the testimony of the carrier.

[3] The court considered the effect of the statute for four years.

that there must be some fallacy in it, for the reason that while the new schedule would reduce the actual receipts on freight business 17 per cent, the earning capacity was diminished only one-tenth of one per cent. "Such a result," says the court, "indicates that there is something wrong in the process by which the conclusion is reached." To show the fallacy of this method and attempt to ascertain the cost of transportation, the court took round numbers. "Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts from both interstate and local business were $1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving $500,000, the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers, $8,333,000, and to that engaged in earning local receipts, $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns 6 per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And, turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business — 6 per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as that employed in local business, in which the rates are reduced. Again, in another way, the error of the court's computation is manifested. The testimony discloses that the operating expenses of the entire system during each of the four years were over 60 per cent of the gross receipts. If the cost of doing local business in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent of the gross receipts. Reduce the gross receipts 15 per cent, and the reduction by the defendant's rates was 15 per cent on passenger and 17 per cent on freight business, it would leave only 25 per cent of the gross receipts, as what might be called net earnings, to be applied to the payment of interest on bonds and dividends on stock. But the testimony shows that the cost of doing local business is much greater than that of doing through business. If it should be 85 per cent of the gross receipts (and there was testimony tending to show that it was as much if not more) then a reduction of 15 per cent in the gross receipts would leave the property earning nothing more than expenses of operation. These computations show that the method which the court pursued was erroneous, and that without a finding as to the cost of doing the local business it is impossible to determine whether the reduced rates prescribed by defendants were unreasonable or not.[1]

In a recent case[2] before the Kentucky Railroad Commission, an attempt was made to arrive at an approximation of the

[1] The decree of the trial court dismissing a bill to restrain the enforcement of a schedule of maximum rates was reversed, but the court in its opinion recommended that the testimony should be referred to some competent master, general or special, to make finding of facts.

[2] The Commonwealth of Kentucky *v.* the Louisville and Nashville Railroad Company, *et al.*, before the Railroad Commission of Kentucky, 1906.

cost to a carrier for doing the freight service in that state during the year 1905 upon a ton mile basis. It was in evidence from the carrier what amount of the money was properly chargeable to the intra-state freight traffic. This was separated by the carrier into two parts, one chargeable to haulage or transportation and the other to services other than haulage or transportation, such as terminal charges. It was decided that the total of the amount chargeable for haulage is fairly apportionable between intra- and interstate freight upon the basis of total ton miles. The charges for services other than haulage or transportation was said to be fairly apportionable between each of the two classes of freight based upon the number of tons. The carrier having given figures as to the average length of haul of interstate and intra-state freight, the amount chargeable to charges other than for haulage was divided by the number of tons (inter-plus intra-state) and this was found to give an average charge per ton for station loading and unloading, advertising, damage, and, in fact, all services except haulage of 16.25 cents per ton. This amount was then divided by the average haul of the state traffic and produced a result of .1659 cent. In order to secure a comparison between the inter- and intra-state traffic the average charge per ton was divided by the average haul of interstate freight, producing a result of .1092 cent. That is to say, by reason of the difference between the number of tons of state traffic and the number of tons of interstate traffic hauled by the carrier, and the variation in the length of haul between these two kinds of traffic, there is chargeable for expenses other than haulage .1659 cent on the local traffic and .1092 cent on the interstate traffic.[1]

The Commission then proceeded to ascertain the cost per ton mile for haulage. This was accomplished by dividing the operating expenses for the state traffic by the number of ton miles of state traffic, which produced a haulage charge per ton mile of .3884 cent. To this amount chargeable for haulage (.3884 cent) was added the cost for charges other than haulage (.1659 cent) producing the fair estimated cost of all service for state traffic per ton mile, .5543 cent. By the same method the interstate cost for haulage was found to be .4976 cent per ton mile. That is to say, the cost of haulage was estimated to be the same upon state traffic as upon interstate traffic, while the cost for stations and other services except haulage, is more upon intra- than upon interstate traffic.[1]

At this point the Kentucky Railroad Commission approached the serious question of the value of the physical property within the state and the amount of money which ought to be earned upon it. The Commission having been furnished by the carrier the physical value of the property and having ascertained the rate of interest which securities of this kind are accustomed to produce, the quotations on stocks and bonds being considered, it remained to ascertain how the fair valuation should be divided so that one portion of it should produce adequate revenue from state freight and another portion produce revenue from interstate freight. The first proposition is to separate this valuation into freight and passenger business. While the Kentucky Commission assumes that this separation must be made, it does not seem to have done so. Having determined the proper total amount to be earned by the carrier, from both inter- and intra-state business, it attempts to ascertain what shall be used as a basis for dividing this fund equitably as between the two kinds of traffic. "Certainly neither gross earnings nor net earnings can be a satis-

[1] The expenses for terminal charges, damage, advertising, etc., were therefore 51 per cent more on intra-state traffic than on interstate traffic.

[1] The total cost upon the ton mile basis on intra-state traffic as found in this case is 11.4 per cent more than on interstate traffic.

factory basis of apportionment of these charges for this purpose, particularly where the purpose of apportionment is to determine the propriety of the rates from which gross earnings and net earnings result. In this case the earnings result from the rates in question. This annual charge for valuation is in a sense part of the carrier's cost, and to attempt to justify the apportionment of costs by the earnings resulting from rates, and then to justify the rates by the apportionment of costs based on the earnings resulting from the rates, would clearly be reasoning in a circle. Nor can any suitable basis for apportionment of this annual charge on account of valuation be derived from transportation statistics relating to passengers and freight, for the obvious reason that there is no common transportation unit, except the train-mile or car-mile, and the use of the train-mile or car-mile would give no help in apportioning between state freight and interstate freight, because no trains are devoted solely to either class of freight, nor is any considerable number of cars assigned exclusively to either class of freight.

"Plainly, then, we have left only the operating expenses as a basis of apportionment."

Having determined that the operating expenses are the only available basis for apportionment, and being in possession of the operating expenses for both state and interstate traffic and of the amount of money which would be needed to pay interest, it ascertained that the interest fund was 43.95 per cent of the cost of operation. It then took the operating expenses chargeable against state freight which it multiplied by 43.95 to ascertain how much money should be derived from the state business in order to contribute to the interest fund; that contribution was found to be $542,744. This sum was added to the state operating expenses and was held to represent the fair amount which the carrier should receive from state traffic because it included the two elements of actual cost of operation and a surplus with which to pay interest.

Commenting upon its own method the Commission said:

"The Commission does not, of course, undertake to say that the computations, the results of which are hereinbefore set forth, are mathematically accurate, for it is universally conceded that any exact statement of the cost to a carrier for performing its freight service as compared with its passenger service, or for performing a part of the freight service as compared with the remainder, can not be made. The Commisson has merely done the best it could with the figures and facts before it, but it has endeavored in all its computations to make the most liberal allowance for actual valuation. Yet, with all this, we have a result showing charges by this carrier for intrastate traffic, within the state of Kentucky, which are more than $774,000, in excess of just and reasonable rates" [1]

From the adjudicated court cases it seems reasonably certain that the method used by the Supreme Court in Smyth *v.* Ames is inaccurate, for the relation which operating expenses bear to gross receipts does not and can never show the cost of transporting the commodities. The method used by the Circuit Court of the United States for the District of South Dakota could not stand the tests applied by the Supreme Court of the United States, which tests, it will be recalled, were different from the method formally used by that tribunal. The method used by the Kentucky Railroad Commission is clearly more elaborate if not more correct,

[1] For the Louisville and Nashville Railroad and some other carriers, the Commission prescribed a schedule of rates based upon these findings. The schedule covers seventeen classes and distances from ten miles and less to four hundred and fifty miles (by five mile steps to one hundred miles, and by ten mile steps to two hundred and fifty miles, and by twenty-five mile steps to four hundred and fifty miles).

than those to which reference has been made by the Supreme Court.

While the method of the Kentucky Railroad Commission is most elaborate, yet to determine with mathematical accuracy the cost of traffic, a definite method has not as yet been devised. The difficulty is twofold. First, on the one line of road, with a single equipment, two kinds of traffic are carried. How is the capital to be separated for the purpose of producing revenue upon these two kinds of traffic. Again, the method used by the Kentucky Commission considers the whole schedule of rates, rates in gross, and secures its results in figures per ton per mile. In short, in the same focus it takes a broad survey of all kinds of commodities in the two kinds of traffic, and microscopically looks at the smallest possible unit of measurement. The shipment of a box of books is augmented to per ton per mile; a shipment of a carload or trainload of vegetables is reduced to the same unit. While this unit may be used in mathematics, it can be confidentially asserted that it rarely, if ever, enters the head of a traffic manager making rates; ordinarily he does not consider the cost of traffic, for he does not know it.

The difficulties in this matter seem to be the unwarranted assumptions, within which there might be such a variation as to cause rates (single or as a schedule) to be unreasonably low on the one hand or extortionate on the other. The assumption that the future quantity of traffic will remain the same,[1] the assumption that the average haul of both inter- and intra-state traffic will not be materially different, the assumption that operating expenses for a particular year are reasonable, the assumption what shall constitute fair valuation of the carrier's property, the amount of tonnage it will transport, the fair rate of return, the arbitrary rule that all parts of the road cost the same to operate per unit,[1] the equally arbitrary rule that the rate of return ought to be the same for all roads and branches of roads, that the unit of per ton mile is a safe and equitable one, that any unit ought to apply to the eight thousand articles in numerous classes, that terminal expenses are the same for all classes of commodities, that the haul on interstate traffic costs the same as on local traffic, and finally, but by no means unimportant, that the carrier shall give us correct figures. These assumptions heretofore made may and may not be true. Until proven correct, we cannot hope to ascertain to a mathematical certainty the cost of transportation to the carrier by any of the methods considered or one hereafter to be devised.

WASHINGTON, D.C., February, 1907.

[1] It was said by Mr. Justice Brewer in Chicago Grand Trunk Railway Company *v.* Wellman (143 U. S. 339), "Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible — indeed, does not all experience suggest the probability — that a reduction in rates will increase the amount of business, and, therefore, the earnings?"

These suggestive queries were quoted and approved by Mr. Justice Shiras in St. L. & S. F. Ry. Co. *v.* Gill (156 U. S. 648).

[1] It is curious to note that a former president of the Louisville and Nashville Railroad analyzed the cost of carrying freight on the main line and on each of the different branches. Mr. Albert Fink summed up as follows: "A careful investigation shows that, under ordinary conditions under which transportation service is generally performed, the cost per ton mile in some instances may not exceed one-seventh of a cent and in others will be as high as seventy-three cents per ton mile on the same road." That is to say, the cost may vary from one to five hundred. It is said that the receipts of the Paris and Lyons Company from Paris to Marseilles, about one-eighth of the entire trackage, produces one-half the net earnings of the company.

SQUIRE ATTOM'S DECISIONS

UNDER THE TWELVE OR FOURTEEN MAXIMS OF EQUITY

AS SPECIALLY EDITED BY HERBERT J. ADAMS

MAXIM V

HE WHO SEEKS EQUITY MUST DO EQUITY

EDITOR'S NOTE: The application by courts of the above maxim would seem to be but an enforcement of the Golden Rule, and simply turning it around would produce a very apt and simple paraphase: He must do equity who seeks equity.

During the extension of the shorthand notes of the subjoined case, the special editor was reminded of the story of a very economical woman. Her frugality centered in bargains. Like most females endowed with the gift, limited means narrowed and hampered her splendid capacity, as does a bottle prematurely surrounding a growing cucumber. At the department stores, if the lady was attracted by some article that she had not seen advertised as a bargain, the salesman would reassure her by asking if she had not noticed it given out as one of their best bargains at the price. Unhampered, a million dollars a day would have been but pin money to her. It was not often, however, that she could not restrain her economy and save a nickel to get home on. One day, towards evening, she found herself in an amazing situation. She probably had not been feeling as well as usual, for after exhausting her list she found herself the happy possessor of a quarter. She wished then that instead of having made a long list, she had simply ordered the whole emporium, bargain signs and all. Then a new sign caught her eye: "Reduction in Fares; Six Rides for a Quarter; Special Arrangements with Street Car Company." Her perplexity was relieved, and she rushed for the "Transportation Department." It was not until she alighted from the home bound car after riding only six of the twenty-seven blocks she had to go, during which she examined her purse, that she recalled having ordered the last salesman to have everything delivered. That "everything" included the transportation; and "Hank," with a hard day's work done, due for his supper in fifteen minutes.

EASYMAN *v.* WILLING

Matter Brought Here for Final Determination after Failure to Settle Same out of Court

EQUITY OF THE CASE

While it is allowed by law for one party to a dispute to hand out to the other party a summons in suit, yet *held*, that in equity such act will not be construed to have been done in contemplation of friendly relations thereafter, and the court need not wait on a preponderance of the evidence to hold that such citation is not equivalent in friendly design to an invitation to a smoker.

Where the plaintiff is not seeking any equity upon which may be predicated doings by him in that line, but only seeks a legal cinch, *held*, that the court will anticipate some future seeking, either in this world or in the world to come, and apply the conclusion of the maxim, *must do equity*, regardless, in so far as the case presents possibilities.

STATEMENT OF THE CASE

Suit to recover judgment for $40.00 for various odd jobs on and about defendant's premises during the six months last past. Defendant claims to have paid plaintiff's wife the sum of $9.00, claiming credit on account. Defendant further claims that prior to suit, and conditioned upon the return to him by the plaintiff of a certain article of value and usefulness loaned him, he made tender of the balance. He claims plaintiff refuses to return the property. Mrs. Stacy, witness for plaintiff, and neighbor of both parties, substantiated by the admissions of plaintiff's wife, the $9.00 claim. Mrs. Easyman had told that her

she received the $9.00 in small amounts, because her husband would not give her money for shopping and club dues. Plaintiff testified without objection that the money probably went for female suffrage enterprises and upon a mistaken notion as to bargains; that he had unearthed a great fake in the matter of bargains; that there was always some reason that the bargain hunter had not time to bother with why the bargain price was really a mighty good price. He said the stock of goods in the attic of his house would never be of any use to him, for he was not cut out for a merchant; and he was afraid to carry insurance on his premises because he might get negligent sometime when he had occasion to go aloft. As to refusing to return the rubber claimed by defendant, witness said it was loaned to him for so long as he desired to use it; that he had looked for it in vain, and could not now find it, and that it wasn't worth over $10.00 anyhow. He also said that Mrs. Stacy was a quarrelsome meddler. Mrs. Stacy, recalled, stated that the only quarrel she knew of between the parties or witnesses was the present suit; and on cross-examination as to her relations with neighbors the court refused to expunge her evidence, the part especially objected to being, that one day as she had to pass a neighboring saloon, plaintiff wanted to fight someone there who had put him out. "Poor man! he was evidently too drunk to know what he was about, and was bent on quarreling with someone."

MURPH MURPHYSON,
Attorney for Plaintiff.
L. L. D. PURDY,
Attorney for Defendant.

OPINION BY ATTOM, J. P.

I. Plaintiff vainly cites the case of Administratrix of Crimp *v.* Icemann, Tp. 94, R. 44 E. 6th P. M. In this case the wife of intestate, on the day before his death, collected a part of his bill for work performed for an undertaker. The court refused to allow defendant credit for the amount. The reason for this holding was partially that the undertaker had knowledge that she intended taking advantage of a bargain in crepe that afternoon, a bargain that she had somewhere gotten wind of. It is not shown that she gloated to her dying husband over this example of her economical virtues; but as this same undertaker buried him, the court evidently rightly concluded that there was something dark besides black oak in the wood pile.

II. The accumulations in the attic under the plaintiff's roof should have made a corresponding impression upon the conglomerate in the garret under his hat. He should be thankful that after his failure to provide a little leeway in the matter of occasional small change against his wife's economical exploits, she yet found a place to get a little honest money, so that she would not be watched with an embarrassing closeness while in the stores, or followed home by a policeman.

III. The phrase, "equity to a settlement," spoken of in the books treating of the maxim involved herein is full of meaning, and describes the position a court of equity will take in certain cases pertaining to the wife's estate. Where a husband, in such court, asks the control and disposition of the wherewith of the moneyed partner of his joys and sorrows, he will, while coming into the knowledge of a good maxim, be required to secure a settlement for her benefit. While it is said the phrase quoted is full of meaning, it is thought that courts nowadays do not practically have time to hark back to the ancient books such cases are found in. And it happens to mean little in this case, for the wife herein seems to have surrounded to some extent upon her own motion even her husband's personal avails without his having to be stopped by equity with a maxim.

IV. Under the maxim, equity will not enforce specific performance of a contract misdescribing property sold thereunder, unless compensation is made equal to the damage caused by the erroneous description. He who seeks equity must do equity. But there is no misdescription here. The rubber has not been misdescribed. It has not even

been described. Plaintiff and defendant both touch on the matter softly; and as to whether the rubber is hard or soft, it is only intimated that it is hard to find; and we only know that we do not know what it will be like when found. Hence, on such an issue both parties would lose with costs. It has been admitted that the rubber was loaned, and it has an admitted value of $10.00.

V. In the absence of citations on the point, it is left a case of doubt in the mind of the court, whether it is equitable to insist that the husband should have the sole right to draw his wages. With a married man wages almost universally represent the living, or expense, money of the family. Where the husband is a spendthrift, what a weekly, monthly, and yearly hardship it is upon the wife and children that no one but he may dispose of the earnings; and under many exemption laws he can laugh at legitimate debts for necessaries that harrass them because unpaid by him. Doubtless there are many cases where a prudent wife — not a bargain speculator — could make a better home with half the wages at her command, than will the spendthrift or drunken husband with the whole.

VI. It is the opinion of the court that there was no prejudice suffered by plaintiff with respect to the evidence of the witness, Mrs. Stacy. Her animadversions on plaintiff's exit from a saloon were surely not material. And a self-respecting court never likes to take the chance of being the butt of the last word of some irrepressible female witness. Even when driven to the extreme of meting out to the offender punishment for contempt of court, there is really nothing, we have found, to prevent aggravation afterward of the embarrassment sought to be avoided.

VII. One last guess at the subject of the bailment in this case — for a discovery of its nature seems almost necessary to a proper decision. The court grasps at it, and it bounds away, invisible — surely a thing to tire. Who would wish to stand in this court's hosiery, and risk to walk wet shod, though cushion heeled, the slough of despond, with tear tubes welling, in apparently vain attempt to circumscribe the thing that, if it were a pair, maybe would make the return trip dry? Who would join a band, suspending research here, to trace the rubber back to Indiana. No objection being offered, the court will erase from its mind the yearning for knowledge, remain content with ignorance and simply — rubber.

VIII. The case will be continued thirty days to give the plaintiff time to find the article claimed by defendant. The costs, at the same old prices — no special rates — payable instanter by foregone conclusion, will be against the plaintiff in view of defendant's offer to pay the amount claimed less $9.00. Judgment will be entered for the amount tendered if the plaintiff does equity in the premises, otherwise $10.00 less.

Situation somewhat reversed.

MAXIM VI

HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS

EDITOR'S NOTE: — The special editor might have understood the above maxim, had it not been for his carefully studying it while extending the notes of the subjoined case. There is nothing said about rain water and soap in connection with "mits," "digits," "hooks," or the distal segments otherwise known as manus. There is nothing by which he can sense it.

There are the hands of a clock; and there is a maxim that reckons it well for the litigant to watch them, and keep the alarm wound up. Then there are hired hands; yet, though a party to suit chances to bring along a clean lawyer, it is thought it would be risky unless he is not afraid to take

off his own gloves. In somewhat of a dilemma, the editor visited the Equitable Assurance Company, and an investigating committee there was found, apparently doing the most business. Those of the company inquired of claimed that they had always had all the equity they wanted, so never had had to pay any attention to their hands or feet.

There are exceptions as to the tastes of cows — my cow, for instance. The opinion herein has commendably followed the beaten path of natural history. Though point lace and dish rags may be necessary to the subsistence of some specimens, not anything and everything is considered edible to the family bovine. Our cow, of whose milk we have been selling a teacupful a day, would turn from a bale of fresh hay to eat a hair mattress. A mop, a kite, are her delight. But she is going. She got in and consumed quite a number of white laundered pieces hanging on some bushes; and we lost the milk customer on account of blueing in the milk. But we have found another customer — a customer for her. We have sold her to a paper mill.

Dodd *v.* Dodson

Originally brought in the same court in which tried

Equity of the Case

Where a division fence is designedly placed by complainant beyond his line, *held*, that in suit by him to recover contribution to the cost of the fence, the maxim, He who Comes into Equity must Come with Clean Hands, will be applied strictly; and it will be the duty of the court to pierce the veil of mere fence-building soil for the real thing.

Where, by reason of such placing, complainant's cow comes onto the adjoining owner's land, and is there captured for cause and taken beyond the fence, *held*, that complainant, by his own misdoings, has cut himself off from benefit of equity or clergy, as against any lien on the cow arising from her wanderings. It is not conversion or larceny, and the fence will not be deemed a "fence" for stolen goods, though the cow be never so safe as behind it.

Statement of the Case

Complainant claims of defendant $90.00, being claim of $40.00 for the material for a line fence contracted for by defendant, and $50.00 to cover the value of a cow alleged to have been wrongfully taken out of his lot by his antagonist herein. There is a counterclaim of $65.00 for the loss of a lace fichu claimed by defendant to have been destroyed by the cow in question while trespassing. The fence was not produced in court, the defendant admitting its existence, and that he had agreed to pay for the material if complainant would erect it. But he alleges, and fairly substantiates, that complainant designedly placed the fence some foot and a half away from his own premises. There was entire agreement as to the style of the fence, and there is nothing in the evidence tending to show that complainant placed it so far away because it was obnoxious to him. The material had been delivered close to complainant's house, and there is evidence tending to show that his physical energy is not of the willing kind. The court took the ground that had the placing been accidental the fence would have been a good deal nearer the material as it lay. The evidence offered by complainant that in winter defendant's boy never shoveled their front walk any farther than where the fence was placed, was given some consideration; but true monuments of survey, long hidden to both parties, but known to the complainant before the contract, being identified by defendant, but not produced, the boy's stopping place was of course incompetent. It appears that complainant's cow and defendant's boy were running loose at the same time in their respective yards; that the cow was discovered by the defendant's wife tapping her clothesline; that a moment of anguish followed, for before she could utter, the cow's nose was close to the pins, and a costly piece of lace was dangling somewhere in the cow's throat; that a handy noose was thrown over her horns by the boy, and she was led along the fence around into new quarters. Complainant swore, however, that the boy, from the effects of a "Wild West" show, had been practicing for a week on his harmless cow with a lasso, and had caught her at

every conceivable disadvantage, even catching her, as he believed, by the cud, for she had lost it; and he believed she had a right to get another off the boy's folks. Judgment for defendant.

"GRITTY" GRIMES,
Attorney for Plaintiff.
O. N. E. WRIGHT,
Attorney for Defendant.

OPINION BY ATTOM, J. P.

I. The case at Bar would be easy to dispose of were it not that there is a contest involved. It would be comparatively simple if there were not questions of equity as well as law to decide. And infinitely different from the present situation would it be, had there been default for want of appearance. Opportunity for disposal on such ground having irretrievably passed, and the parties being apparently willing to abide the costs, this squabble will be taken up in as orderly a way as possible, and the court will, to save time, overlook the remark of the plaintiff as he left the court room this noon, to wit: "Double Dod-gast the case, anyhow!!"

II. There has been no objection made by defendant to the form of the action. It is one of money demands. It may have been the complainant's motive — not bringing replevin — to avoid the equitable jurisdiction of this court. Equity is still here, and so is the constable. That arm of the court overheard a remark of the complainant given *sotto voce* after he had been sworn: "The pasture has been bad, the winter is coming on, and I am glad to get her off my hands." Now if he had the grime of fence building off his hands, all would be well. Yet the cow is off his hands only to this extent: the cow was caught by the lasso while she was chewing the $65.00 rag. She was head, neck, and forefeet beyond the border line; and she remained partly beyond the line until the impounding in defendant's yard was complete, by leading her down along the fence and around to the other side. It was an impounding and not a conversion. The cow has no more been converted than the plaintiff himself.

III. To have equity successfully asserted against a party is viewed the same in this court, so far as the condition of such party's hands is concerned, as where, from such condition, a party seeks it in vain. Had complainant not been at wilful fault in locating the fence, this case might have been one simply of conversion, and a lien for damages and a winter's feed for a cudless cow might not now be staring the complainant in the face. The cow is his. There is no question about that (see conflicting cases). And the situation is not affected by the probability that she will, metaphorically speaking, eat herself up at his expense, unless he recants with sufficient penance.

IV. There are charges and countercharges of negligence. Negligence will be adverted to in a later number of the opinion — also here. Complainant charges carelessness in hanging the lace too near the line. He means the division line. Defendant says his wife did not know it was cow bait. He, in turn, charges complainant with not feeding his cow. While the court is willing to receive complainant's statement that he did feed her, but that it took her, up to the lassoing practice, a long time to chew it, yet we care to dwell neither upon her in his yard as a picture of contentment, nor upon her in defendant's yard as a mere bone of contention.

V. Happily there is no question in this case involving the ultimate location of the fence on the proper line. If the parties still desire to carry on the dispute after this case is disposed of, they may proceed with it through the winter and beyond grass cutting time all next summer. They seem to have two division lines now to fight it out on, and it may take two summers. So far as the equity of this court is concerned, any applicable to this involved matter will be exhausted in the present case. If the fence viewers have none, then the court does not know where these neighbors will find it.

Attention will be now given to number six, which is very important.

VI. The court's temptation in aggravated cases to give expression to unprecedented views, has to be constantly strangled in view of more satisfactory cost adjustments. This *à propos* the test of the age of a minor, given in *Kids Chum*, No. —, Vol. — (circulation guaranteed), to the effect that one cannot determine the age of a youth by the thickness of the dirt on his hands. This case is later than the familiar one illustrating the maxim under view. There (O. *v.* B. 3 Rabbit, 503) a minor, by claiming to be of age, procured stock (not a live stock case) from trustees having the duty to hold it for him till his majority. After attaining such age, upon suit brought by him to compel the trustees to forget that in his infancy they had paid some of the stock over, and to pay a like amount again, the court applied the maxim. They held that although in law the baby had been incapable of accepting the stock, taking it in the underhanded way he did, showed such a condition of the hands that the court could not wait for him to clean them, even if he could have done so. In view of the untarnished equities t'other side the fence, the muddy work the complainant was drawn into doing in performing his part of the contract, has rendered him not altogether presentable to a court of equity; and the claim that defendant saw him stake out the line will not avail. (See further.)

VII. It seems there had been no division fence for many years. There came a time when a fence seemed desirable. The kind selected — a low picket — would have been all right to substitute for one there at time of contract. But with respect to any fence at all at this late day, the court cannot but believe that the desire for a fence was really grounded in causes that could not be so well satisfied as with a high board one, and one in which the contract specifications and drawings call for the calking of all cracks, and adequate reinforcement of all knotholes, both sides, lest they too fall out, affording eyelets for curiosity, loopholes for enmity, and portholes for gunnery. Though no affair of the court, we throw out the hint with view to future fence arrangements — a hint that the court would throw out anywhere, on the street even, and without costs.

VIII. With the complainant's knowledge, if not encouragement, there must have developed on his side the lot line a rampant taste for open work; and the cow took to the lace in his neighbor's yard from the promptings of a family trait. Defendant's reputation is saved by evidence that the lace is an heirloom, and not in use, but that his wife gets it out to clean once or twice every hundred years.

IX. The equities, the fence, the cow, and the lace, are all with the defendant. Complainant has some right to the fence, but it is not equitable, and its location is probably not suited to his convenience. Defendant will have judgment for his counterclaim, and complainant is left to his remedy as to the cow. In addition to this liberty the latter also has the costs — to pay, and the constable is not far distant.

Maxim Affirmed.

DAVENPORT, IA., February, 1907.

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, and anecdotes.

THE EXECUTIVE AND THE JUDICIARY.

The attention of the profession should be called to the bill introduced by Representative DeArmond, which we are informed would authorize the President to remove judges of the lower Federal courts, when in his judgment the public welfare requires it. As we have not seen the full text of this bill we hesitate to criticise its purpose, but if the above is a correct interpretation it should call forth speedy disapproval from the profession. However much we may regret the cumbersomeness of the process of impeachment it seems a greater danger to place the judiciary completely in control of the executive. We must consider, not merely the possibilities under present political conditions but those which may well arise in other generations. Even the lowest Federal courts are positions of dignity and importance, and should hardly be treated in a way that might be proper for a country trial justice. This is but another phase of the impatience at disagreeable decisions of the judiciary which is fashionable in other centers than Washington. In contrast may be commended the tactful deprecation of desire to overstep the constitutional separation of powers in the address of the Chief Justice of the Superior Court of Massachusetts before a committee of the Legislature, in advocacy of much needed changes in the methods of selecting our jurors.

THE THAW TRIAL.

As we go to press the world is watching a New York jury facing the problem of the unwritten law, concerning which Judge Kernan wrote so impressively in our October number. There is little of technical interest in the Thaw trial, though the attorney of other jurisdictions will wonder why it was that so much unusual testimony slipped by the district attorney. Those of our readers interested in the question of "emotional insanity" should read an article in an earlier number of the magazine by Frank B. Livingston (V. vii, p. 368) entitled "Moral Insanity as a Defence to Crimes," where the decisions are collected. The issues of fact in the case, however, are presented in a somewhat unusual form, and it must be admitted with unusual skill by the defense, and the questions of relevancy of testimony doubtless will prove precedents. The real importance of the case, however, lies less in its legal than in its social interest. The fact that so many will be inclined to credit acquittal to the influence of enormous wealth will add another stone to the structure of discontent. Though the manner of presentation of evidence of insanity will make it difficult to determine the extent of the influence upon the New York jury of the covert plea of justification, nevertheless an acquittal unfortunately will accentuate popular misunderstanding on this important subject.

JUDICIAL DISCRETION.

The utterances of Mr. Justice Gaynor of New York are always striking, and in his brief contribution to the January *Bench and Bar* (V. viii, p. 15), entitled "How to Stop Perjury in Our Courts," he calls to our attention matters of great importance. While commending the movement to make solicitation of personal injury suits a penal offense, he insists that the chief responsibility for perjury in these cases is due to the failure of trial judges to avail themselves of their right to commit perjurers on the spot. The reluctance of judges to take a firm stand in this matter and indeed their tendency not to avail themselves of their undoubted right to discuss the evidence of witnesses in their charge to the jury he says is due to the "proneness of appellate judges in recent years to meddle with and adversely criticise trial judges in matters entrusted to the discretion of the latter

for the orderly and safe administration of justice.' There are many who lament the delays and uncertainty of trial litigation as compared with that in English courts, and critics have usually attributed this to the inferior caliber of our trial judges. The trial bench now suggests another point of view which appellate judges would do well to heed.

A WISE REFORM

New York has recently adopted a rule designed to expedite the collection of claims to which there is no real defense and to prevent dilatory pleas. The rule is similar to that of the English courts which has been discussed in our pages frequently, and somewhat like that for a long time in force but with little effect in Massachusetts. One provision of the New York rule, however, suggests a means whereby in the hands of a really efficient judge it may greatly aid the expeditious hearing of these cases. This is the portion of the rule that gives the court authority in its discretion in deciding upon the motion to place the case on the special calendar, to require stipulations as to facts not really controverted, require consent to the examination of a party or witnesses before trial, the production of books, papers, or documents, or the giving of security to pay any judgment in favor of the plaintiff.

LEGAL STYLE

In a recent number of the *London Law Times* is a brief contribution on the influence of law books, calling attention to the profound influence that some of our classic treatises have exerted upon famous lawyers of later times by reason in large measure of their literary quality. Blackstone's "Commentaries," Bentham's "The Rationale of Judicial Evidence," and Smith's "Leading Cases" are cited as conspicuous examples of legal treatises of this sort. It was the impression produced by reading a two volume copy of Blackstone's "Commentaries" which Abraham Lincoln, the country storekeeper, found among the effects bought of an emigrant, that crystalized all the results of Lincoln's omnivorous reading into a coherent unity and determined his career. The merits of style in our text books are unfortunately seldom considered by publishers or reviewers, and indeed amid the mass of ill-digested compilations which is being constantly thrust upon us we are justly grateful if a book is reasonably clear and accurate, and can forgive crudities of style and arrangement. It is pleasant, however, in this connection to note that in a recent editorial in a London newspaper American law books were held up as an example of effective English in contradiction of the assertions made in discussions in the current English press that the English of America is inferior in standard to that of old England.

CLIENTS' ACCOUNTS

An interesting question which is now under discussion in England is the calling of a meeting of the Council of the Law Society to consider the advisability of appointing a committee to inquire into the subject of the custody of clients' moneys. The subjects to be considered are:

1. The methods in which the solicitor should keep the accounts of himself and his clients.
2. The keeping and auditing of trust accounts.
3. The conduct of professional business.
4. The formation of a guarantee fund.

"The cases of defalcation which occur from time to time," says the *Law Times*, "show that these are matters which demand the earnest attention of the profession." In England the specialization of the work of the solicitor makes regulation of the sort of legal work here under consideration an easier matter perhaps than in our country where the work of the attorney and the solicitor are performed by one person. We are not, however, without our regular reminders of the importance of the consideration of this same question by our own Bar associations. Few professional or business men have the temptations to dishonesty that are spread before the attorney, and it is believed that many cases of misapplication of a client's funds are due to the consequences of what was originally merely careless mingling of personal and agency accounts. If any definite regulation is found expedient by the English societies it would be well for our own to give them careful consideration.

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

Huge corporations, both the so-called "trusts" and the railroads, receive an unusual amount of attention in the recent legal magazines, and several of the articles on the subject are of exceptional merit. The related subject of interstate commerce, both from an historical and a legal viewpoint, gets treatment commensurate with its vast importance to the nation. General readers will find much to interest them along those lines, and are also specially recommended to Dean Bigelow's striking address on the conception of law. Readers interested in special lines will find many papers valuable for their purposes listed under the appropriate titles.

BAILMENTS (Contract Against Liability for Negligence). In the February *Harvard Law Review* (V. xx, p. 297), Hugh Evander Willis writes on the actual and the ideal state of the law on "The Right of Bailees to Contract Against Liability for Negligence." His conclusion is:

"We have admitted that if it were a purely private matter between the shipper or passenger and carrier, as the New York courts maintain, absolute freedom of contract would be the best rule. Granting the public interest, it may be urged in favor of freedom of contract to relax and modify the strict rule of responsibility that it would enable carriers to reduce their rates of compensation (surely a public benefit), and if this did not lead to the introduction of new evils, against which it is the policy of the law to guard, it is of course an end to be sought. But the danger of leading in other serious evils is very great, well-nigh inevitable. The condition of our carrier service is bad enough under existing conditions; a relaxation of liability which would tend to make it more careless, more unobliging, more dangerous, would be intolerable. Again, it may be claimed, a common carrier ought not to be made an insurer without the rights of an insurer; that the only resemblance his business bears to the insurance business is his liability; and that it seems especially harsh and unjustifiable to hold the common carrier liable for the frauds perpetrated on the consignor by third parties. The answer to this objection is that, if it is necessary to protect the interests of the public, the public, without other reason, has a right to impose even such a liability as a condition to the exercise of the carrier's franchise.

"In view of all these considerations and of the methods by which at the present time common carriers must carry on their business, it seems to me it is against public policy to allow a common carrier to contract away his liability for negligence either in the carriage of goods or of passengers; but that public policy would not prohibit such contracts, clearly, in the case of the simple bailments not affected with a public interest, nor even in the case of innkeepers and other bailees affected with a public interest. The cases and legislation supporting these propositions have the better reasoning. However, in the instance of common carriers, it must be admitted, as should be expected, the tendency of the law seems to be slowly the other way, towards the allowance of special contracts. Express messengers and persons riding on free passes may now make such contracts, a great many courts allow still further latitude, and in the further progress of the law the doctrine may encroach into the territory of passengers for hire and the territory of goods and live stock. But it does not seem as though the time were yet ripe for such changes, and haste in this direction should be made slowly. Before the clamor of private convenience is listened to it should be certainly and definitely decided that the interests of the public are safeguarded. The effect of letting the bars of public policy down and the freedom of contract in, where that policy has been tried, has not proven an unquestioned and

indisputable success. The legislation in England registers the protest of the English people against the interpretations of the courts. Dissatisfaction is felt in New York. It is not alone the fact that common carriers are pursuing a public employment that should prevent their making contracts limiting their liability for negligence — there are other public employments perfectly compatible with absolute limitations of such liability — it is more because of the magnitude of the business, its monopolistic character, and the conditions and dangers surrounding its management."

BIOGRAPHY. "James A. Reid, Dean of the Faculty of Procurators in Glasgow," Anon., *Scottish Law Review* (V. 23, p. 37).

CARRIERS. "A Treatise on the Law of Carriers as administered in the Courts of the United States, Canada and England," by Robert Hutchinson, Third Edition, by J. Scott Matthews and William F. Dickinson of the Chicago Bar, 8 vo. Vols. III, pages ccc xxi, 2350, Chicago, Callaghan & Co., 1906. Hutchinson on Carriers has long been recognized as the standard American treatise on this subject. Unfortunately, Mr. Hutchinson died even before the first edition was actually given to the public. All the work since then, consequently, has had to be done by other hands. The second edition, published fifteen years ago, was edited by Professor Mechem, and that edition maintained and added to the already high reputation of the work. In the years since this second edition many other works on carriers have been published, but though many of them have been of some value none approached Hutchinson. A new edition of this work is, therefore, very welcome to the profession.

The particular changes made in this edition are set forth in detail in the editors' note, and it would serve no useful purpose to recapitulate them here. Suffice it to say the editors have maintained, without change, the chapter and sub-chapter divisions of the previous edition. The changes have been in the insertion of additional sections within the chapters and the expansion or rearrangement of other sections. An examination of some of the sections added by the editors of this edition shows that they have modeled their work on Mr. Hutchinson's. They have given in those sections a statement of principles and not merely a statement of the findings in particular cases. Although the second edition was in one volume, and this in three, the text has not been expanded in the same proportion. The thickness of the paper used and a slight change in the setting of the type account for part, and a very much larger index and increased table of cases account for a still greater part. It should be noted, however, that whereas in the second edition there were 818 sections, there are in this edition 1446. The number of cases in the second edition was approximately 5,000; in this edition they are double that number. The editors have used good discrimination in the cases which they have added, but they seem to have included all new cases of importance. The editors have perhaps wisely excluded all street railway cases.

The makeup of this work is excellent. The references in the table of contents, in the table of cases cited, and in the index, are to sections, thus avoiding confusion by uniformity. At the beginning of the first volume, there is a table of contents of all three volumes, and in each of the other two volumes there is a table of contents for the particular volume. Considering the size of the work, this will make the volumes more readily usable. There is, furthermore, a detailed table of the contents at the beginning of each chapter. The index in the third volume is one of the most elaborate, if not the most elaborate, which the reviewer has seen, covering as it does six hundred pages. It is fair to say that by the use of this index any topic in the law of carriers treated in this work can be found. Only one criticism of the index may be made, and that is that the sub-headings are not arranged alphabetically, nor do they begin with the significant word. This makes it necessary to read through all of the sub-headings in order to find the particular one that the user wishes. Taken all in all this work is one of the most valuable that has recently been published, and no practitioner can well afford to be without it if his practice brings to him questions in the law of carriers. S. H. E. F.

CONSTITUTIONAL LAW. "Federal Employers' Liability Act Unconstitutional," by Walter Evans, Judge, *Law Notes* (V. x, p. 208).

CONSTITUTIONAL LAW. "The National Constitution," by Joseph Culbertson Clayton, *American Lawyer* (V. xv, p. 19).

CONSTITUTIONAL LAW. "The Amendment of State Constitutions," by James Wilford Garner, *American Political Science Review* (V. i, p. 248).

CONSTITUTIONAL LAW (Citizenship of Corporation). "A Legal Fiction with Its Wings Clipped," by Simeon E. Baldwin, in the January-February *American Law Review* (V. xli, p. 38), is a discussion of the fiction by which the United States Supreme Court decided a corporation to be a citizen of the state to which it owed its existence, not because it was "an artificial person of its creation, having no right to exercise its franchise elsewhere; not because its managing officers were exercising its franchises there; not because all its shareholders were in fact citizens of the state; but because the court had concluded to make the false assumption that they were, and to hear no proof to the contrary. . . .

"This fiction took definite, and, as it was supposed, final shape in 1862, at the hand of Chief Justice Taney, in the Ohio & Mississippi Railroad case. But as time went on, and corporations of an interstate character and composition became numerous and powerful, new difficulties became apparent in working under it. The Supreme Court, in 1896, apologetically described its creation as a step which 'went to the very verge of judicial power.' Nine years later, in Doctor *v.* Harrington, they marked the limits of the verge, but in such a way as practically to overrule many of their earlier decisions.

"New Jersey shareholders in a New York corporation brought, by reason of their interest as such, a bill in equity against another New York corporation, to which they made the former corporation a defendant, on an apparently good cause of action in the Circuit Court. The cause was dismissed because of the conclusive presumption that all the shareholders of each company were citizens of New York. . . . On an appeal to the Supreme Court this decree was reversed. The reason, said the brief opinion by Justice McKenna, for adopting the presumption, was to establish the citizenship of the corporation for the purpose of jurisdiction in the Federal Courts. 'This, then, was its purpose, and to stretch it beyond this is to stretch it to wrong. It is one thing to give to a corporation a status and another thing to take from a citizen the right given him by the Constitution of the United States.'"

A new generation of judges had twisted an old theory into new shape, thinks Judge Baldwin. "The real error of the Supreme Court . . . lay in Marshall's rejecting the first claim set up in the Deveaux case. A corporation should have been held, by virtue of its own personality, to be a citizen of the state which created it, within the meaning of Article III of the Constitution, notwithstanding it could not be deemed a citizen within the meaning of Article IV. The purposes of the two provisions were obviously so different, that the word *citizen* might fairly be taken to have in each a different sense.

"To treat an artificial person thus as a citizen might have been itself indeed the assertion of a legal fiction, but it would have been a fiction far simpler and more manageable than one created by a legal presumption of a state of facts which, in nine cases out of ten, everybody knew did not and in the nature of things could not exist."

CONSTITUTIONAL LAW (Commerce Clause). Judge Walter C. Noyes' article on "The Development of the Commerce Clause of the Federal Constitution," in the February *Yale Law Journal* (V. xvi, p. 253), is an illuminating historical paper. He sees in the commerce clause and its increasing importance the most striking illustration of the principle of constitutional evolution through interpretation. "The series of decisions marking that development mark, also," he says, "American commercial progress, and furnish the most enduring monuments of the greatness of the tribunal which rendered them."

After tracing the development he prophesies that "the end is not yet. The tendency in this country toward a centralization of power is increasing. The field of the national government is constantly widening. The nation is dealing more and more with problems formerly thought to belong exclusively to the states. A unity is growing out of a union. And the primary source of all this nationalizing power is the commerce clause of the Constitution."

CONSTITUTIONAL LAW (History). In the February *American Political Science Review* (V. i, p. 200) appears one of a series of studies of our state constitutions entitled "General Tendencies in State Constitutions," by James Quayle Dealey, which begins as follows:

"Throughout classical and medieval philosophizing runs a theory of a paramount or fundamental law, permanent in kind, because fixed in nature. This theory in its modern form, after voicing itself for a time in the Cromwellian period, came to the front in the American Revolution and found its proper expression in the written constitution. In our Federal system, owing to the rigidity of the national Constitution, the development of that document must be traced in the varying decisions of the Supreme Court of the United States. In the Commonwealths a more flexible system of amendment prevails, and for that reason changes in what the states consider to be their fundamental law, may be traced more easily in the constitutions themselves, subject as they are to frequent revision and amendment.

"In the Revolutionary period these constitutions were few in number, small in size, and contained a mere framework of governmental organization, now they are filled with details, so petty in many instances as hardly worthy even to be dignified as statutory.

"In conclusion, attention may well be called to the practical disappearance from our constitutions of some old-time provisions. Among these may be mentioned the annual election, and the annual session, the governor's council, and unequal representation of the people in law-making bodies, the life tenure of judges, and the advisory capacity of the Supreme Court. Religious restrictions on office-holding, and the property qualification for suffrage, with very slight exceptions, have gone; the town system of New England is dying in that section and does not exist outside of it. The real local units of administration now are, (1) the rural county with its numerous subdivisions, and (2) the incorporated city, both of which are gaining power throughout the United States.

"If general tendencies in the making of constitutions may be condensed into a sentence, we may say that governmental powers are centering in the electorate, which voices itself through the ballot and the convention."

CONSTITUTIONAL LAW (Income Tax). "The Income Tax and the Constitution," by Edward B. Whitney, *Harvard Law Review* (V. xx, p. 280).

CONSTITUTIONAL LAW. (Judicial Power). With an article entitled "Judicial Dispensation from Congressional Statutes," in the *American Law Review* (V. lxi, p. 65). William Trickett re-enforces his former argument that the power of the United States Supreme Court to declare statutes unconstitutional was "a great usurpation," and entirely unintended by the framers of the Constitution. William M. Meigs has vigorously attacked this position in an article noted in the December GREEN BAG, and the present paper is an equally sharp reply, concluding with the statement "that, if the courts possess the power to declare acts of Congress void, they owe it, not to the intention of the makers of the Constitution, but to what Chief Justice Gibson has termed 'necessity' which seems to be another name for their own desire."

CORPORATIONS. "The Abuse of the Corporation Charter," by Don. E. Mowry, *Central Law Journal* (V. lxiv, p. 49).

CORPORATIONS (Stock). "It is quite apparent that there are some features of our corporate system which require re-adjustment, if not abandonment," says Frederick Dwight in the February *Yale Law Journal* (V. xvi, p. 247), in an article on "The Par Value of Stock." The practice of requiring a "par" or face value for every share of stock seems to him unnecessary and now in many cases harmful.

"Of course, if, as is the case with 'monied' corporations, the entire capital had to be paid by the stock subscribers in cash, and thereafter maintained intact as a permanent and undiminished fund above all debts, there would be some justification for establishing a par value. But as stock may now be issued for money, labor performed, or property, and, in the absence of fraud, no question may be raised as to the actual value of the labor or property by which the payment is made, the gateway has been opened for the most astounding inflation. . . . The par value, consequently, has become little more than an attempt to create the semblance of value by the activity of the printing press. . . . That

it has become the merest fiction is also evident from the fact that courts have disregarded it when recognition would have been inequitable. . . .

"One hesitates in this era of unrestrained language to express unduly harsh judgments, but it seems as though the chief attraction of the habit of creating apparently definite values were the unusual opportunities it affords to mislead."

Mr. Edward M. Shepard has suggested that the law should not require for shares any money denomination, that is to say, any par value. Mr Dwight says:

"This seems to be eminently sound. But why should we not go a step further and prohibit corporations from giving any apparent value to their shares instead of merely permitting them to refrain from so doing? Let every company, for instance, set forth in its charter, instead of the arbitrary 'capitalization,' a statement of all property it has received or will receive and the number of shares it is proposed to issue. Each one would then represent, without any obscurity, a proportionate interest only in the net assets of the corporation.

"It is always difficult to prophesy with accuracy what practical effect will be produced by new methods. But it seems reasonable to suppose that the change suggested, apart from conforming to the simple truth and preventing much misconception, would have some positive and beneficial results. Thus it would at least tend to lessen the absenteeism that is so conspicuous now in corporate management. What does the average stockholder know about his company? . . . If it were brought home to him that his interest was an indeterminate one, obviously dependent upon the varying fortunes of the corporation, he would be far more apt to follow its operations in detail and request periodical statements. And this would probably result in a publicity that is not vouchsafed, but which is certainly one of the most legitimate of present day demands. . . . It would be quite as easy to pay dividends at so many dollars a share as upon a percentage basis. And if it seem necessary or desirable to continue the division into classes of preferred and common stock, the preference of the former in the distribution of assets could be placed at any reasonable figure."

CORPORATIONS (see **Foreign Corporation Constitution Law, Railroads and Trust Regulation**).

DAMAGES. "Measure of Damages," Anon., *Oklahoma Law Journal* (V. v, p. 225).

DAMAGES. "Mental Anguish Doctrine in Telegraph Cases," by George A. Lee, *Central Law Journal* (V. lxiv, p. 108).

DIGESTS (**Massachusetts**). "A new Massachusetts Digest." Lawyers should not part with their old Massachusetts Digest until they have assured themselves that the one recently published will supply its place. The three volumes of the digest published in 1881 included 127 volumes of reports. The next 34 volumes were contained in a fourth volume and 16 volumes more in a supplemental fifth volume of the digest, and the addition of the 12 volumes ending with volume 189 of the reports would not have made this fifth volume equal in size to the fourth, if the same proportion had been preserved. In consolidating these two supplemental volumes with the three original volumes, it might have been expected that some condensation would have been possible. But the makers of the new digest have managed to inflate this material into eight large volumes. The index of cases alone fills 829 pages, while that of the old digest and supplements, with a proportionate addition of 38 pages for the 12 additional volumes of reports, would occupy 480 pages. Yet the new index gives, under the defendants' names, only a reference to the plaintiff's name, instead of giving also, as the old one does, a reference to both the reports and the digest, which are to be found in the new index only under the plaintiff's name, where a second search must be made.

The arrangement of the new digest is entirely different from that of the old, but the preface states that the old digest has been carefully studied and the material freely used, though this is not apparent in the result that has been produced. It is satisfactory to notice that cases on the construction of wills have been placed under the title of "Wills," where they belong, instead of under the quaint heading of "Devise and Legacy," where no one

nowadays would think of looking for them. The titles of "Assumpsit" and "Trover" are however retained, though assumpsit and trover were abolished in 1851, and cases on conversion of chattels are indexed under the title of "Trover and Conversion," while "Conversion" is devoted to a few cases on equitable conversion. Under the title "Calls" there is only the cross-reference, "In deeds, see Boundaries, §11," under which heading there are a number of cases about boundaries, but nothing relating to "calls" or even indicating what they are, but possibly that is a name by which boundaries are designated in the region where this digest was made. "Ground-rents" is a title under which it is inconceivable that anyone should look for anything, but it occupies a whole page with three short notes, the longest of which consists of ten lines. The first of them consists of this remarkable statement, "A lease for 1000 years conveys the fee," which is supposed to have been decided in Ipswich Grammar School *v.* Andrews, 8 Met. 584. It is hardly necessary to say that no such point was decided (it was not even raised), but on the contrary it was decided that the plaintiffs had a good title to the reversion expectant on the termination of a term of 1000 years. The case is correctly stated in the old digest. An equally misleading note will be found under Wills, col. 15,184, §45, as to Thayer *v.* Wellington, 9 Allen 283, viz., "An instrument to which a will refers must be executed with the same formalities as the will itself." The note of Wood *v.* Willis, 110 Mass. 454, under Bond, "Nature and essentials in general" (col. 1728), states only that a bond was made containing certain provisions, but does not indicate any point involved or decided. The title "Highways" while it includes some public ways that are not highways, does not include streets in "incorporated cities," which are. The arrangement of all ways, public and private, under the familiar title of "Ways" was much more convenient. The useful collection of cases under "Words" has disappeared, and under that heading there are only a number of cross-references to other headings without any references to cases, and it does not contain the same or anything like the number of words or phrases contained in the old digest.

The cases in Pickering, Metcalf, Cushing, Gray, and Allen, are referred to as if those reports formed part of a series of Massachusetts reports numbered consecutively from the beginning, and the regular citation by the name and volume of the reporter is only given in parenthesis; thus, the ninth volume of Cushing is referred to as 63 Mass. (9 Cush.). The printing of the names of the cases in the same type as the text, instead of in italics as usual, is an inconvenience and makes it less easy to distinguish the case from the rest of the page. The type is smaller and less distinct than that of the old digest, but the use of leads makes the same number of lines fill more space. The columns are broken up by numerous subdivisions and headings and references to the Century Digest, and the titles are generally preceded by descriptions of their contents in large type and often occupying considerable space; thus, the title Bills and Notes is preceded by 10 pages of explanation and description and cross-references, Evidence by 21 pages, Wills by 13 pages. This adds very much to the size of the book, but the short and condensed indications under the principal headings in the old digest were better and more useful.

As the new digest comprises only 12 volumes of reports beyond those contained in the five volumes of the old digest and its supplements, it is likely that the latter may still be useful even to those who invest in the new work. The original digest in three volumes will probably be found a more accurate, and possibly a more convenient, book of reference to the first 127 volumes of reports. The two supplements are not so good as the original digest, but it is hard to say that the new digest is better. Is it too much to hope that some Massachusetts lawyers may take in hand the preparation of a new and convenient digest of the volumes following the 127th volume of reports? In five years the new digest will be more behind than the old digest and supplements are now. If they should begin now, taking the last volume first and working backwards, at the same time keeping up with the new volumes as they come out, we might have a good digest ready in about five years. It should not follow too closely the old digest, for in that the notes of cases were too long and consisted too much of hard statements of

details in which the principle of the decision was not always clearly apparent, and there is room for improvement in the titles and arrangement. But diffuseness and trifling sub-divisions and classifications, and all attempt at making a big and pretentious book should be avoided. A good digest of the volumes 128-208 ought to be contained in two moderate sized volumes.

DOMESTIC RELATIONS. "Limitation Applicable to Suits for Restitution of Conjugal Rights," by Durga Charan Bannerjee, *Bombay Law Reporter* (V. ix, p. 19).

DOMESTIC RELATIONS. "Adoption by Hindu Widows," by Sir Edward Candy, *Bombay Law Reporter* (V. ix, p. 1).

EMPLOYERS' LIABILITY (Federal Law). Report of the committee appointed at the Conference of Counsel for Railroad Companies on the questions arising under the Act of Congress known as the Employers' Liability Act.

The publisher of this pamphlet is not named, but it is signed by the members of the committee headed by Henry L. Stone of Louisville, Ky., General Counsel for the Louisville and Nashville R. R. Co. It should be consulted in preparing any case under the new act.

EMPLOYERS' LIABILITY (see Constitutional Law).

EVIDENCE. "Privileged Communications between Attorney and Client," by W. C. Rodgers, *Central Law Journal* (V. lxiv, p. 66).

EVIDENCE. "Admissibility, in a Criminal Trial, of the Former Testimony of a Witness, Since Dead," by Walter R. Staples, *Virginia Law Register* (V. xii, p. 755).

FOREIGN CORPORATIONS (State Control). The difficulties and uncertainties in dealing with foreign corporations under our dual system of government are the theme of "The Interstate Commerce Clause and State Control of Foreign Corporations," by Frank E. Robson, in the February *Michigan Law Review* (V. v, p. 250).

"Without undertaking to compare the statutes of the different states, it is enough to say that it is more difficult for the manufacturer and merchant doing an interstate business to keep himself advised of the details of the laws relating to foreign corporations than it was for the trader of the early days to keep track of the value of colonial currency, or the merchant of more recent times to know the value of 'wildcat bank' bills. This conflict in the statutes and in the decisions of the courts construing them has had a harmful effect in many ways. Credits have been restricted and sometimes wholly withheld from fear of meeting a defense of some violation of the local statutes upon an attempt to enforce contracts or payment for goods sold and delivered. A variety of ingenious methods of evading the statutes with more or less success has been evolved. I believe that manufacturers and merchants engaged in interstate commerce, as a whole, would gladly comply with the laws of the different states if they were certain as to what would be required of them, if there was at least a tolerable uniformity in the requirements, and if these statutes were free from discrimination in favor of domestic corporations.

"What is the remedy? Something can be done probably by continued and constant agitation for the enactment of uniform laws by the several states. Our 'Negotiable Instruments' law is a notable instance of what can be accomplished by persistent effort."

Mr. Robson thinks much can be done by Congress. Commissioner Garfield has recently favored the requirement of a Federal license to engage in interstate commerce. "The scheme suggested certainly contains many meritorious features, and on the other hand is surrounded by many practical and legal difficulties, which must be met in its actual development. But whether the scheme of a Federal license for corporations engaged in interstate commerce is workable or not, it would seem that valid laws could be enacted along the principles presented by the Railroad Act of 1866 and the so-called Wilson Act of 1890 which would afford protection to the corporations engaged in interstate commerce, and at the same time relieve them from the burdens now imposed by the conflicting acts of the many states and territories. The Railroad Act of 1866 is affirmative and progressive in its nature, abolishing state lines, as it were, and permitting and promoting the formation of continuous lines of transportation. The Wilson Act is negative in its character, by determining the point at which a

transaction shall cease to be interstate commerce and become the internal commerce of the state; both acts preserve the rights of the states, and at the same time dispose of the unseemly conflict theretofore existing. Under such a statute the right of a corporation to make contracts out of the state creating it — its interstate commercial transactions — could be preserved, and at the same time a uniform system of requirements could be provided under which citizens of the several states might be informed of the financial responsibility and legal character of the foreign corporations with whom they deal, and due service of process might be had within the bounds of each state. Such regulations would of necessity restrict the powers now exercised by the states, but at the same time corporations now engaged in interstate commerce would within certain limits be subjected to state laws. Necessarily such regulations could not directly interfere with the internal commerce of the states."

HISTORY (The Supreme Court). In the February *Yale Law Journal*, George P. Costigan, Jr., writes of the history, functions, and methods of The Supreme Court of the United States (V. xvi, p. 259).

INTERNATIONAL LAW. "The Third International Conference of American States," by Paul S. Reinsh, *American Political Science Review* (V. i, p. 187).

INTERNATIONAL LAW (Japanese Treaty). Simeon E. Baldwin writes in the February *Columbia Law Review* (V. vii, p. 85) on "Schooling Rights under Our Treaty with Japan."

"The underlying question, it will be observed, is not, as things stand, whether the United States can by treaty virtually compel a State to educate resident foreigners. It is whether, if a State confers the privilege of full education on all residents, and allows every American child to go to such one of the public schools as is at the most convenient distance from his place of residence, it can deny the same identical privilege to a Japanese child. The treaty is aimed against discrimination, and discrimination exists if any right 'whatever' relating to residence is, either by the United States or by any State, given to an American and denied to a Japanese."

The main argument against this view unfavorable to California is that, by Article II, the treaty is not in any way to "affect the laws, ordinances, and regulations with regard to police and public security" of the United States or any of them. Mr. Baldwin considers it debatable whether this reservation of the police power does not authorize California to do precisely what it has done.

INTERNATIONAL LAW (Congo Free State). The present agitation over the Congo Region renders timely the article by Hannis Taylor, in the *American Law Review* (V. xli, p. 102), on "The Congo Free State." He gives the history of its origin, and declares that "in view of the current reports as to conditions in the Congo State, it would seem to be within the province of the United States Government, as of any other power signatory to the Brussels Act, to suggest to the other signatories the importance of instituting an inquiry to determine (1) whether the government of the Congo State, by its permission of a revival and continuance of conditions rivaling the worst 'crimes and devastations' of the slave trade, is not in violation of the spirit and the letter of its engagements under the act of Brussels, and (2) whether the system of monopolization of territory and products maintained and enforced by the Congo Government is not itself directly and fatally hostile to a just discharge of the engagements contracted by the Congo Government in the act of Brussels, and thus fatal to the purpose of the powers as represented in that act.

"It is well known that the agitation in England for some action by the government under its treaty obligations looking to reforms in the Congo has been as great, if not greater than in the United States, but England has apparently been loath to act, while there was a prospect that Belgium will annex the Free State.

The matter of annexation is now before the Parliament at Brussels, and in the result of the debate there may be a solution of the entire difficulty. It seems that Great Britain, with whom this government is earnestly co-operating, will be satisfied if the government of Belgium takes over control of the Congo, a result most likely to be reached.

INTERNATIONAL LAW (Law of Occupation). The discovery and settlement of America owing to the absence of any international rules in regard to new territory caused friction which lasted many centuries. Under the title, "Spheres of Influence and Protectorates," Hannis Taylor tells, in the *American Law Review* (V. xli, p. 92), on what basis these disputes were settled, and how the experience thus gained has been made use of by the world:

"The one new and hopeful expedient in the interest of peace which the partition of Africa has added to the law of occupation is embodied in the device recently agreed upon in various forms by Great Britain, Germany, France, Italy, Portugal and other nations for the prevention of future conflicts as to boundaries. With the history of such conflicts in America to guide them, a systematic effort has been made by many powers to prevent their recurrence in Africa through international treaties of delimitation which define in advance the 'sphere of influence' through which the growing settlements of any given State may extend. From the sphere thus defined the dominant State has the right to exclude other European States through their own consent, thus leaving the field clear for the free development of its chartered companies and protectorates. The power thus conferred over a given area is an excluding power and not one of entire and direct control over the affairs of the sphere, either internal or external. . . . The nations colonizing on the coasts of Africa, which have thus reduced to a minimum the chances of conflicts as to boundaries, when the growing populations within their respective spheres shall eventually touch each other, have of course no power to bind those States that have not made themselves parties to such stipulations. And yet the new rule thus established by all who have actually participated in the partition of Africa possesses a growing moral force which will no doubt develop it there, as the Monroe Doctrine has been developed here, into a positive canon of international law."

INTERNATIONAL LAW (see Public Policy).

INTERSTATE COMMERCE (see Foreign Corporations).

JURISPRUDENCE (The Conception of Law). At the opening of the Boston University Law School last fall, Dean Melville E. Bigelow addressed the students on the topic, "The Scientific Conception of Law." The address is printed in the *American Law Review* (V. xli, p. 27), with some additions, under the title "Economic Forces and Municipal Law." The thesis is as follows:

"The conception of law which the faculty of this law school hold rejects the idea that there are certain ultimate principles of law which govern universally and for all time; the faculty oppose the doctrine both of abstract principles and of the law as a system of precedents in the books governing of their own force alone, *propriore vigore*, or pointing the way for governing, all questions that may now or hereafter arise —in other words—the past governs the present.

"We, of course, admit that the law is in one sense a system of reasoned jurisprudence; to deny that would be to fly in the face of plain facts; but we hold that to stop with that statement, whether on the footing of the analytical or of the strict historical school, is misleading in the extreme. It is only within a limited area of the law, as we understand the subject, that the reasoning of the judges, failing precedents, in other words precedent or reasoning founded upon precedent, governs the decisions of the courts. We hold that the past merely governed itself; that the present alone governs the present.

"As we see it, the law is continuous only in time. In point of substance it is broken up into periods of the ascendency of certain social, economic forces. These periods, acting upon judges and legislatures, are the main factors which make our law; accordingly the law of one period may be essentially different from what it was, or what it may be, under another period — I say "essentially different," and not merely as new phases of old doctrine calling for new decisions may arise. The law, in accordance with this view, is the resultant of conflicting social or political forces, less of course the hindrance of that natural or at least general conservatism of courts and legislatures which, following the line of least resistance, clings to the past. In other words, the law is the actual product of the dominant energy as far as that energy gains ascendency.

While other forces, such as public opinion, seek to influence, the dominant energy seeks to become, and as it attains its purpose does become, the will of the State.

"In this view of the matter, the past does not govern the present, the books do not contain, either in development or in germ, all the law. To understand the law, past or present, the decisions of the courts and the acts of the legislature must be read in the light of accompanying social history. This we call a scientific school of legal thought."

The illustrations of the inadequacy of the "theory of development," pure and simple, are all striking; space permits us to give but one, chosen because it treats of a subject of great present interest that in various forms is the subject of several articles reviewed in this number of THE GREEN BAG.

"Let us put ourselves at the crisis of our own national birth, when it was proclaimed that all men are born equal. This was the preaching of the economists of England from Bentham on, and prevailing here as well as there brought in the era of equality, along the line of which all our decisions and statutes proceeded to run. But putting ourselves there we shall note another idea proclaimed by the same set of men, with if possible still greater emphasis, to wit, freedom of contract, along which line also our decisions and statutes proceeded to run. With what result? Let the controversy of last winter and spring in Congress, and the controversy still going on throughout the country, give answer. Freedom of contract proved the worst kind of delusion; it ran to gigantic monopoly and threatens to-day, whether for good or ill I am not concerned as a teacher of law to say, the whole fabric of equality. Was freedom of contract a development of unfree contract, which the economists tore down? The economists made a great mistake in their dogma of freedom of contract, a mistake which has precipitated another conflict, at the crisis of which we now stand, trembling at the possibilities even while we notice the new economists discarding the old error and trying to save the day."

JURISPRUDENCE (Roman and Civil Law). The *American Law Review* has a valuable short article by William Wirt Howe on "The Study of Roman and Civil Law" (V. xli, p. 47), outlining a course of reading for those who wish to learn some of the fundamentals of the civil law and gain some idea of its modern application.

JURISPRUDENCE (Mohammedan). In the February *Columbia Law Review* (V. vii, p. 101) appears the first part of "A Historical Sketch of Mohammedan Jurisprudence," by Abdur Rahim. This installment sketches the customary law and usages among the Arabs at the time of the promulgation of Islam, which the writer thinks have not received the attention that the importance of their bearing on the study of Mohammedan jurisprudence entitles them to. It will be followed by "a succinct review of such of the principles of Mohammedan law as were established during the lifetime of the Prophet — called the 'legislative' period of Islam — by the Qur'án and by his precepts (Hadíth). These form the main foundation and primary sources of the Mohammedan jurisprudence, and upon them the superstructures of the four Sunni schools have been constructed.

"The second period extends from the date of the Prophet's death to the foundation of different schools of jurisprudence, and would cover, roughly speaking, the time of the Companions of the Prophet (Sahábah) and their successors (Tábi-ún). In the history of Mohammedan law it was an age of collection and interpretation and partly supplementing the Qur'ánic and traditionic laws by means of *ijma'* (concensus of opinion).

"The third period is that of the science of jurisprudence properly so called, commencing from the establishment of the four Sunni schools until the completion of their work. A short historical account of the last two periods will be given in order to trace the chief elements in the growth and development of Mohammedan jurisprudence. This will enable the reader to keep in view the principal ideas in the Mohammedan science of law, and make it easier for him to follow the processes of theorization elaborated by the leading jurisconsults.'

The article is to be commended to all interested in the subject as a well written one with many interesting details. It is possible to give only the following instance of an Arab custom of compurgation:

"If a member of one tribe killed a member of another tribe, no distinction being made whether it was willful or otherwise, the heirs or chief of the tribe of the deceased were entitled to demand that the offender might be given up to them to suffer death. But the matter might be compounded by payment of a fine or compensation amounting to a hundred camels. If the two tribes happened to be at amity with each other, and the person accused denied the charge, then on a number of men belonging to his tribe pledging their oaths to his innocence the matter would be dropped."

LABOR LITIGATION. "When, if at all, does the law impose liability for preventing the formation, or causing the termination, of business relations, in cases where no breach of contract is involved, and where the methods used do not include defamation, fraud, or force, or reasonable apprehension of force? What constitutes actionable interference with the right to form or maintain business relations?"

Under the title "Crucial Issues in Labor Litigation," Professor Jeremiah Smith considers some of the points arising under the above question in the February *Harvard Law Review* (V. xx, p. 253). The article, which is to be continued, is the first of a series to be contributed to that review this spring by members of the faculty of the Harvard Law School in tribute to the memory of Professor Langdell. Like all of Professor Smith's work, it is characterized by exact definition and subdivision. Adequate treatment of the many points taken up is impossible within the space allowed this department, and the best service that it can do its readers is to assure them that this is an article of the highest value in its special and very important line.

LANDLORD AND TENANT. "Some Observations on the Duration of Oil and Natural Gas Leases," by Sumner Kenner, *Central Law Journal* (V. lxiv, p. 89).

LEGAL ETHICS. "The American Lawyer — As He Was — As He Is — As He Can Be," by John R. Dos Passos, Banks Law Publishing Company, New York, 1907. This is a striking criticism of the profession of to-day by one who knows. He emphasizes the change in social position held by the lawyer arising from the economic changes that have followed the Civil War. He also shows that these changes are not confined to law but will also be found in the press, the stage, and in literature. The author considers the failure to teach legal ethics as a defect in our present system of legal education. He then proceeds to define the duties of the lawyer in his various functions, and suggests specific remedies for the defects he criticises. The reader is unlikely to approve of all the remedies suggested, but they deserve our serious consideration.

LEGAL ETHICS. The address of Henry Wade Rogers, on "Legal Ethics," delivered before the graduating class of the Albany Law School last year is printed in the *Yale Law Journal* for February (V. xvi, p. 225). Dean Rogers regrets that a code of legal ethics has never been formulated by the American Bar Association. He says:

"A code of medical ethics was adopted a number of years ago by the medical profession in the United States, acting through its national organization. I shall not venture to explain why the lawyers of the United States have failed to act in a matter of this importance. It is not to the credit of the legal profession that it has been in this respect so much behind the medical profession. Action has, however, recently been taken by a few of the states. A code of legal ethics was adopted in 1898 by the Bar Association of Colorado. And in 1903 the Kentucky State Bar Association did likewise. It is possible that similar action may have been taken in other states. I wish it might be done in all the states and by the American Bar Association as well. I am sure that such action would prove helpful to the profession throughout the country. I cannot yield assent to the proposition that it is better that rules of conduct should not be reduced to exact detail lest the spirit be cramped in the letter. The men of light and leading who do not stand in need of any written code will not permit themselves to be cramped by the letter of it, and those whose conscience is less sensitive and whose ideas of professional honor are not so clear and strong as they might be are likely to find themselves considerably helped by it. Law has in every community an educative force. And a code of legal ethics

approved by the Bar Association of the country could not but exert a wholesome influence upon the American Bar."

PRACTICE. "Theory of the Case," by W. T. Hughes, *Central Law Journal* (V. lxiv, p. 128).

PRACTICE. "Contempt of Law by Debtors," by W. H. Trueman, *Canadian Law Times* (V. xxvii, p. 1).

PUBLIC POLICY. "The Monroe Doctrine: Its Statics," by John F. Simmons, in the February *Michigan Law Review* (V. v, p. 236), summarizes its history to the present time, and in a most positive way declares it to be now an accepted rule of international law.

"When it was promulgated in 1824 it was purely a doctrine, adopted by the executive of the United States alone, and promulgated to the country and the world through a message of the chief executive, a doctrine intended to state a principle to guide the action of this country in the circumstances then surrounding this continent. It became a policy, a step higher in importance, when the legislative joined the executive branch of the government in recognizing, by sending commissioners thereto, the purpose of the Panama Congress. That the United States never actually acted in that Congress and that that Congress took no action involving the Doctrine except to adopt it as one of the matters to be considered, is of no importance. Thus having become the policy of the government, it so remained and remains unless and until some equally decisive governmental action repeals the policy. A policy adhered to and practiced by this government and recognized by all civilized governments, rises still further in the scale of importance, becomes an integral part of international law when it becomes a rule of conduct accepted as binding by all civilized states.

"The Hague Convention, held in 1899, included every civilized nation on earth. That convention resulted in the establishment by a treaty, in which the whole world joined, of a tribunal for the settlement of international disputes by arbitration. This treaty was signed by the United States with the proviso that nothing contained therein should 'be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions.'

"The Senate of the United States ratified this treaty thus signed.

"What was the legal effect of this?

"First: The Senate by ratifying it, thereby gave a legislative endorsement to our 'traditional attitude toward purely American questions.' That 'attitude' is and has been the Monroe Doctrine.

"Here is another legislative acknowledgment of the Doctrine, which again takes it out of the category of purely executive political policies.

"Second: The whole civilized world accepted this signature with the proviso; for the signing of a treaty is, in law, if not in fact, a single act, an act occurring at one time, in which no signature precedes another. As a matter of fact, before our emissaries or those of any other nation put pen to paper, it was fully understood that the United States would sign only with the reservation which now precedes its signature.

"Therefore the whole world had notice of our insistence upon the Monroe Doctrine and after that notice they accepted the signature. Thereby they recognized the Doctrine and thus again is it raised into the level of international law by the common consent of mankind. This time the consent is not implied. It is express and in writing. Can there be stronger recognition imagined?"

Not only is the Monroe Doctrine an accepted one; in Mr. Simmons' view it is one most necessary for the welfare of the Americans.

"Colonization here on the part of European monarchs is not an idle dream. The vast unused portions of the southern part of this continent offer great attractions to the land hunger of those peoples whose confines in Europe are yearly becoming more narrow. If the United States were less strong, or if the severity of the Monroe Doctrine were to be relaxed for one hour, the 'Philistines are upon us' would be the cry raised from many a fair stretch of pampas in South America, and then just as in 1823 there would be danger for us, constant and threatening always. With a military or naval base on this side of the globe, the limitations of the Hague Convention would be weak indeed to restrain those European

lands which are increasingly jealous of the mighty republic of the North. Jealousy sleeps and dreams, but it never dies."

PUBLIC POLICY. "Municipal Control of Public Utilities," by Oscar Lewis Pond, Columbia University Press, 1906.

RAILROADS. Interstate Commerce Acts Indexed and Digested by Charles S. Hamlin, Boston, Little, Brown & Co., 1907. This volume includes the text of the Carrier's Liability Act, the Safety Appliance Act, the Act Requiring Reports of Accidents, the Arbitration Act and the Sherman Anti-Trust Act and other Acts of Congress, and indices for each.

RAILWAY REGULATION. "Long-haul Legislation and Law-writing, Being Reflections upon a New Work on Railroad Rate Legislation," is the title which Charles E. Grinnell gives to his review in the *American Law Review* (V. xli, p. 1) of Beale & Wyman's recent book on Railroad Rate Regulation. Mr. Grinnell is very appreciative of the work as a whole, but he is far from joining the authors when they say: "It can be predicted with confidence that there will be further advance along these lines until a complete system for fixing rates by governmental authority in place of the rates set aside will be established by legislation."

Mr. Grinnell says:

"But more than one side can play at the game of prophecy even in predicting the ups, downs, and sideway developments of law, constitutional, statutory, and common. The business most important to our country is the business which is succeeding. This is as important to the poor as to the rich. Successful men are as honest as unsuccessful men, taken as classes.

"It is more important that the railroads of the country should be profitable to their stockholders and their bondholders and other creditors and their tenants and their landlords and their officers and other employees, than that all their customers who ship goods and all their passengers should succeed in getting perfect equality in terms. The most of those shippers, customers, and passengers know and believe this substantially, and practice according to it in their own private business, public as well as private; but they fight for what they can get, not with the temporarily disinterested motives of an author while writing before dealing with a publisher, but permanently with their own private interests controlling their declarations concerning public calling.

"Not pure theory nor absolute justice to any one person is the practicable solution of questions how the government shall treat the private grantees of a public franchise. Elements come into the reckoning which require compromise, logical or illogical though it be. The political problem is wisely indicated by Judge Noyes, who, when discussing how to deal with unjust rates, says, 'The feeling of impotency upon the part of the shipper is a real evil. It is not vitally important whether in fact unjust charges be many or few. It is important that the shipper should have an opportunity of presenting the justice of the charge complained of in an expeditious way to a disinterested tribunal. The existence of a remedy might do more to allay popular apprehension than any possible resort to it.'

"The last sentence is a wiser suggestion as to political and legislative probabilities than the prediction that we are face to face with the alternative of the minute regulation by government or the public ownership of railroads."

TORTS (see Labor Litigation).

TRUST REGULATION. "The Standard Oil Anti-Trust Complaint," by Richard W. Hale, in the *American Law Review* (V. xli, p. 51), is a detailed examination of the case of the United States of America against the Standard Oil Company of New Jersey, John D. Rockefeller and many other individuals and corporations, brought in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. The note of control, not destruction, of trusts is struck in his conclusion:

"The grievance, the cry of monopoly, the complaint that because the company is big, and although its acts are lawful, yet it is so big that it is illegal and criminal, is based upon a fallacy. It is as hopeless to-day to compete against the circumstances that oil can be better refined or beef better prepared for the market in a great factory or by a great concern than over a chemist's stove or in a retail butcher shop as it ever was for Mrs. Partington to try to mop up the Atlantic. Such bigness is not criminal, it is an economic fact. Such a strik

ing circumstance as that the sugar trust with ten factories can save a quarter of a cent on the price of sugar at times when the demand is slack by running nine factories full blast and shutting down one, while its independent competitor must run one factory at 90 per cent efficiency is a sufficient refutation of any complaint that bigness is necessarily bad. In the long run the people of the United States want the economy which results from skill and from spreading the benefits of organization as wide as the largest concern can spread them. Their country is big, big things are done in it, and they will learn in the end to prevent the evils which attend unrestrained bigness without fighting organization itself or seeking to dismember combinations like that described in this complaint."

TRUST REGULATION (Suggestions). Walter C. Noyes writes in the February *Columbia Law Review* on "Possible Federal Trust Legislation" (V. vii, p. 93). "Federal control of trusts," he says, "would, undoubtedly, accord with the sentiment of the people." The Sherman Act under the federal power to regulate commerce among the states fails to reach the producing trusts it was aimed at. Judge Noyes suggests that "Congress might enact legislation prohibiting corporations of such character that they are unlawful combinations under the laws of any state from shipping goods into that state. This is not only upon the principle that the corporation as an instrument of interstate commerce is subject to federal regulation, but upon the underlying principle that Congress may, under the commerce clause, remedy the evils caused by the operation of that clause. . . .

"Before the adoption of the Constitution a state manifestly had power to entirely exclude foreign corporations. . . . There was a strange loss of power in transmission if Congress under the grant of power over interstate commerce cannot now in conjunction with state laws grant as effective relief. . . .

"But while the power of Congress to enact such legislation seems to exist, a conservative regard for the business interests of the country might prevent it from adopting such radical measures. The laws of the different states with respect to trusts vary so widely that the interests of the nation as a whole might not permit interstate trade to be made subject to such varying conditions. The remedy might be worse than the disease.

"The adoption of a uniform anti-trust statute in all the states would solve the difficulty. A federal enactment that a trust corporation of the nature described in such uniform statute should not engage in interstate commerce would not be radical. But uniform laws regarding even uncontroverted matters are of slow growth. A uniform statute relating to trusts would be a practical impossibility.

"Another way in which Congress might exercise its power over trusts employed as instruments of commerce would be through a broad declaration of a national policy coupled with appropriate legislation. Thus this rule of public policy regarding the trusts may be formulated from the decisions of the courts of the whole country.

"*Any trust or combination, the object of which is, or the necessary or natural consequence of the operation of which will be, the practical control of the market for a useful commodity, is against public policy and unlawful.*

"The rule furnishes a conservative standard. It is a test of illegality rather than of legality. Trusts not contravening the rule would probably be held invalid in many states. Trusts contravening it would, it is believed, be held unlawful in every state, unless it be New Jersey. Congress might, upon the principles we have considered, declare this rule of public policy the national rule of public policy, and prohibit trust corporations that violate it from engaging in interstate commerce.

"Upon the same principles Congress, instead of enacting a comprehensive statute, might adopt more restricted measures. Thus it might deny the right to engage in interstate commerce to foreign trusts discriminating in the price of their products or giving rebates or special privileges for the purpose of destroying local competition.

"As auxiliary to a broad statute defining a national rule of public policy, or to statutes of limited application based upon the same principles, Congress might require all corporations engaged in interstate commerce to make public statements of their financial condition."

WITNESSES. "Prepossession and Bias of Opinion Witnesses to Handwriting," by Charles C. Moore, *Law Notes* (V. x, p. 205).

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. (Admission.) N. C. — Another case affirming the power of the legislative branch of the government to establish qualifications and regulate the admission of attorneys, is that of *In re* Applicants for License, 55 S. E. Rep. 635. The court in this case reviews numerous authorities on the proposition, and holds that a statute prescribing the qualifications for admission to the Bar does not violate the constitutional provision that the legislative, executive, and supreme judicial powers of the government shall be kept separate and distinct, and the further provision that the general assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it. The court calls attention to the fact that the only decision which squarely declares that a statute regulating the admission of attorneys is unconstitutional is the case of *In re* Day, 181 Illinois 72, 54 N. E. Rep. 646, and remarks that the force of this decision is much weakened by the dissent of two judges. In this connection it is interesting to note that the court holds that under the North Carolina statute regulating the admission of attorneys which requires applicants to file a certificate of good moral character signed by two attorneys practicing in the court, one who complies with the formal prerequisites and shows himself to have a competent knowledge of the law is entitled to admission without an investigation by the court of his general moral character.

ATTORNEYS. (Right to solicit Business.) Tenn. — The practice of so-called ambulance chasers in soliciting business is roundly condemned in the recent case of Ingersoll *v.* Coal Creek Coal Co., 98 S. W. Rep. 178. In this case attorneys who had through their representatives solicited and secured a number of personal injury claims against a corporation, sought to collect their fees from the corporation which had made settlement with the claimants. But, as the cases had been procured by the attorneys by the personal solicitation of their representative, the court held that they were without redress against the corporation, though the contract of employment of the attorneys was free from fraud or misrepresentation. Such acts constitute an impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties. The court denounces the practice of so-called ambulance chasers and says that it cannot agree to the propositions that in these latter days a spirit of commercialism has lowered the standard of the legal profession; that the practice of law has become a "business" instead of a "profession," and that it is now allowable to resort to the practice and devices of business men to bring in business by personal solicitation, under such facts as shown in the case at Bar.

AUTOMOBILES. (Care required of Chauffeur.) Mo. — The increasing use of automobiles makes it important to determine the care to be exercised by chauffeurs while driving on streets and highways. A recent case wherein such rule is stated admirably is that of McFern *v.* Gardner, 97 S. W. Rep. 972, wherein the court says: "The automobile is a modern invention, propelled by steam, electricity, or gasoline, and attains a very high rate of speed. It is of great weight, made very strong, and, in a collision with an ordinary vehicle, is capable of smashing it without serious damage to the machine itself, and while it has equal rights on the road with the ordinary vehicle, it is a sort of menace to the traveling public, and, on account of the danger to others incident to its operation upon public highways, the chauffeur in charge is bound to exercise care commensurate with the risk of injury to other vehicles and pedestrians on the road, and this risk of injury, it seems to us, is as great if not greater than is the risk of injury to vehicles and pedestrians traveling on and across streets upon which street cars are operated by electric power, and we can see no reason why the chauffeur in charge of an automobile traveling on a public highway in a populous city should not be held on the same degree of care in respect to pedestrians and other vehicles upon the street as is a motorman in charge of a street car running on a public street. In view of this position the court holds that it is the duty of a chauffeur driving an automobile on a public highway in a populous city to keep vigilant watch

ahead for vehicles and pedestrians and on the first appearance of danger to take proper steps to avert it." Rapp *v.* Transit Co., 190 Mo., *loc. cit.* 161, 88 S. W. 865, and cases cited: Sluder *v.* Transit Co., 189 Mo., *loc. cit.* 136, 88 S. W. 648; Riska *v.* Railroad, 180 Mo. 169, 79 S. W. 445; Sepetowski *v.* Transit Co., 102 Mo. App., *loc. cit.* 119, 76 S. W. 693.

CONSTITUTIONAL LAW. (Commerce.) U. S. Sup. Ct. — A state railroad commission's regulation requiring a railway company to stop its interstate mail trains at a specified county seat where proper and adequate railway passenger facilities are otherwise afforded at that station is an unconstitutional interference with interstate commerce, according to Mississippi Railroad Commission *v.* Illinois Central Railroad Co., 27 Sup. Ct. Rep. 90. The court says, the matter of the validity of statutes directing railroad companies to stop certain of their trains at stations named has been before it several times and the result of the cases is: That a statute of Illinois, which required the Illinois Central Railroad to stop its fast mail train from Chicago to New Orleans at Cairo, in the state of Illinois, which was a county seat, was unconstitutional if the company had made adequate accommodation by other trains for interstate passengers to and from Cairo. That a statute which required every railroad corporation to stop all regular passenger trains running wholly within the state at its stations at all county seats was a reasonable exercise of the police power of the state, where the statute did not apply to railroad trains entering the state from any other state, or transcontinental trains of any railroad. A statute relating to railroad companies which provided that a company should cause three of its trains each way, if so many were run daily, Sundays excepted, to stop at a station containing over three thousand inhabitants, was valid in the absence of legislation by Congress on the subject; and also a state statute which required all regular passenger trains to stop at county seats was invalid when applied to an interstate train, intended only for through passengers from St. Louis to New York, when it appeared that the railroad company furnished sufficient trains to accommodate all the local through business in the state, and where such trains stopped at county seats. These principles have been decided in Illinois C. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 Sup. Ct. Rep. 1096; Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. Rep. 465; Cleveland C. C. & St. L. R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. Rep. 722.

There was need for the above case to explain if not to reconcile the cases which had preceded it and which are referred to therein. Having it we are able to determine quite clearly the question as to how far the state may go in compelling railroads to accommodate its local needs without interfering with the prerogative of Congress. It now seems clear that where the railroad is entirely within the state the Supreme Court of the Nation will seldom interfere with the discretion of the State Legislatures and will sustain laws which have any appearance of reasonableness. It will, for instance, sustain a state statute which requires all regular passenger trains running wholly within the state to stop at all the county seats they pass and will not inquire into the fact as to whether such county seats have, without the stopping of all such passenger trains, adequate accommodation. Gladsen v. State of Minnesota, 166 U. S. 427, 17 S. Ct. 627. Where, however, interstate commerce is concerned, and especially where the carriage of the United States mails is affected, the United States Supreme Court does not seem to be willing to bow to the discretion of the local legislature, of the local railroad commissions, or even of the local courts. In such cases the Supreme Court recognizes the fact that the people of the state through which the road passes have the right to demand that the railroad shall reasonably subserve their local interests, and can therefore insist that even in the case of interstate lines enough trains shall stop at any particular point to reasonably accommodate its needs. In such cases they hold that the regulations providing for such reasonable accommodations are at the most merely an incidental interference with interstate commerce. Lake Shore & Michigan Southern Railroad Co. v. State of Ohio, 19 Sup. Ct. Rep. 465. In no case, however, will the Supreme Court concede the right, where interstate commerce or the carriage of the mails is concerned, to require all trains to stop at any place no matter how large, where the needs of such place are otherwise reasonably complied with; nor, indeed, will they generally sustain statutes at all which require mail trains to stop at places designated by the local authorities. If such places are not properly served, the remedy, the Supreme Court suggests, is for the state authorities to compel the company to run more trains, rather than to interfere with their interstate traffic by stopping those which are required to make a fast schedule between distant points. Andrew A. Bruce.

CONSTITUTIONAL LAW. (Commerce, Trade Unions.) **U. S. D. C. for W. D. of Ky.** — In several states, laws have been enacted by which employers have been prohibited from discriminating against members of trade unions seeking employ-

ment because of such membership. In 1898, Congress passed an act by which it was made a criminal offense for common carriers engaged in interstate commerce to require any employee to agree as a condition of his employment not to become or remain a member of any labor organization or to threaten his removal or otherwise discriminate against him because of such membership or to attempt or conspire to prevent any employee who has been discharged or has quit from obtaining employment. The validity of this provision was questioned in the case of United States *v.* Scott, 148 Fed. Rep. 431. This provision the court says relates not to the safety of the employees while actually discharging duties pertaining to interstate commerce, but to their being members of labor unions, and in the matter of making and enforcing contracts for hiring them, forbids discrimination against them on that ground. The essential purpose of the enactment was not to "regulate commercial intercourse among the states" but was to prevent generally discrimination against what is called union labor in one state alone, as well as in more than one state. This being true, the court holds that the unconstitutionality of the enactment is settled. Whatever the states might do in such matters there through their own legislatures, the constitution of the United States does not confer upon Congress by any express language, nor by any fair implication from any language used, the power when servants are employed to prevent discrimination against union labor, either in one state alone, or in several states, even if the hirer at the time does happen to be engaged in interstate traffic. Viewed from a narrowed standpoint, the court holds the enactment unconstitutional on authority of Trade Mark Cases, 100 United States 82. The enactment in question includes not only those who work upon interstate commerce but those who work upon local and state traffic. This the court holds to be sufficient to bring the law within the rule laid down in the Trade Mark Cases, *supra*.

Even if the act were within the delegated domain of Congress it would hardly be sustained. Similar acts certainly have been uniformly refused the sanction of the state courts when passed by the state legislatures. Although the labor union is no longer under the ban of the law, and its trade-marks and trade-labels are recognized, the courts, nevertheless, refuse to concede the right to the Legislatures to enter into industrial conflict and to directly aid organized labor in its conflict with capital. Nor do they believe that "the liberty" guaranteed by the constitution is accorded by a statute which seeks to punish the motive which induces either party to terminate or to refuse to enter into the contract of employment. State v. Julow, 31 S. W. 781; State v. Krutzberg, 90 N. W. 1098; Mathews v. People, 202 Ill. 389.

Andrew A. Bruce.

CONTRACTS. (**Illegality — Monopoly.**) **U. S. C. C. A. 7th Cir.** — The effect of an illegal combination in restraint of trade on a contract for the sale of merchandise by the combination comes up for decision in the case of the Chicago Wall Paper Mills *v.* General Paper Company, 147 Fed. Rep. 491. In this case it appears that a corporation was organized in Wisconsin for the purpose of acting as the exclusive sales agent of the paper and paper products of certain manufacturing corporations located in Wisconsin and Michigan and engaged in the paper industry. The board of directors of this corporation consisted of representatives of the various paper mills, so that for trade purposes there was a practical amalgamation of the producing companies. By this arrangement the sales corporation was put in control of 90 per cent of the paper and paper products manufactured west of the Alleghany Mountains. The validity of the contract made by this sales corporation was attacked in the case at bar, but as the paper was purchased in the ordinary course of business, the court held that the purchaser was a stranger to the alleged unlawful combination, and that therefore the contract of sale was not rendered illegal by the fact that the selling corporation was a trust or monopoly organized in violation of law, either federal or state. In support of this position is cited, Hopkins *v.* United States, 171 U. S. 578, 19 Sup. Ct. 40; Anderson *v.* United States, 171 U. S. 604, 19 Sup. Ct. 40; Dennehy *v.* McNulta, 86 Fed. 825; Star Brewery Co. *v.* United Breweries, 121 Fed. 713; Harrison *v.* Glucose Co., 116 Fed. 304.

CONTRACTS. (**Marriage — Ill-health as Defense.**) **Wash.** — Whether or not a man is justified in breaking a promise of marriage by the fact that the woman is suffering with pulmonary tuberculosis is exhaustively discussed in Grover *v.* Zook, 87 Pac. Rep. 638, and the court comes to the conclusion that in view of laws enacted for the purpose of preventing the spread of pulmonary tuberculosis and on grounds of public policy a man is justified in breaking a promise of marriage under such conditions, even though he knew that the woman had the disease at the time of the engagement. A large number of authorities are cited by the court in support of its position.

CORPORATIONS. (**Minority Stockholders — Monopolies.**) **Ill.** — The right of a corporation either directly or indirectly to obtain control of a competing corporation by a purchase of the majority stock in the latter corporation and thus to prevent competition, is denied in the recent

case of Dunbar *v.* American Telephone & Telegraph Company, 79 N. E. Rep. 423. In this case the court laid down several propositions which are of interest. It is held that the company cannot purchase the majority of the capital stock of another company in its own name for the purpose of controlling the latter and thereby prevent the competition between itself and the latter company. Furthermore, the court says that it cannot be seriously contended that a purchase by the company in the name of others as agents or trustees will relieve the transaction of its illegality. In support of the latter proposition, the court cites Northern Securities Co. *v.* United States, 193 U. S. 197, 24 Sup. Ct. 436. Furthermore, the court holds that it was not material that the corporations whose control was sought were not the only corporations engaged in the same line of business as the purchasing corporation. Though a complete monopoly or a complete restraint of competition would not necessarily result if such were the case, the tendency, nevertheless, would be in that direction, which the court regards as sufficient to condemn the transaction as unlawful. People *v.* Chicago Gas Trust Co., 130 Ill. 288, 22 N. E. 798; More *v.* Bennett, 140 Ill. 69, 29 N. E. 888. As to the right to test the validity of the purchasing company, the court holds that in this case this could be done by minority stockholders. The purchase was made in excess of the authority of the purchasing company under its charter, and was therefore null and void; hence, the minority stockholders of the purchased corporation had the right to relief in equity to restrain the purchasing company from voting the stock which it illegally held. Stebbins *v.* Perry County, 167 Ill. 567, 47 N. E. 1048. Aside from the question that the purchase was *ultra vires* and thus a nullity, the court was of the opinion that in the case at bar complainants were entitled to equitable relief, inasmuch as it appeared that the purchase of a controlling interest in the other corporation was made to stifle competition in trade and create a monopoly, and for the purpose of enabling it to secure and maintain unreasonable and excessive rates and charges. This end was to be accomplished by selecting and maintaining a board of directors of the purchased corporation which would act in the real interests of and subservient to the purchaser. Ultimately, this would operate to injure and finally destroy the purchased corporation. Such conduct on the part of the purchaser, the court held, was fraudulent as against the stockholders of the purchase corporations. On the plainest principles of equity, the minority stockholders were therefore entitled to relief. Menier *v.* Hooper Telegraph Works, L. R. 9 Ch. 350. And on principle: Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320, 30 N. E. 667; Wheeler *v.* Pullman Iron & Steel Co., 143 Ill. 197, 32 N. E. 420; Gamble *v.* Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, and Fougeray *v.* Cord, 51 N. J. Eq. 185, 24 Atl. 499 are in point. Further authorities cited are: Memphis, etc. R. Co. *v.* Woods, 88 Ala. 630, 7 South. 108; Milbank *v.* New York, Lake Erie & Western R. Co., 64 How. Prac. 20; Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350.

CORPORATIONS. (**Powers.**) **Mass.** — The right of the Onset Bay Grove Association, whose incorporators were Spiritualists, to use its property as a summer resort and to provide for holding of camp meetings there, was decided in favor of the association in Nye *v.* Whittemore, 79 N. E. Rep. 253. The act incorporating the association stated that its purpose was to hold personal and real property where a wharf, hotel, or other public buildings might be erected and building lots sold or leased for the erection of private residences under regulations prescribed by the corporation, and provided that buildings erected on the premises should, for the purpose of taxation, be considered real estate. The corporation when formed, purchased a tract of land on a bay and proceeded to lay out parks, streets, building lots, and to construct a wharf and erect cottages and an auditorium and temple for the holding of camp meetings. The master in the court below was of the opinion that the provision for taxation of the booths and the grounds of the association indicated that the legislature in incorporating the association had in mind and proceeded upon the theory that the corporation was to carry on camp meetings, and this view is sustained by the appellate court.

CORPORATIONS. (**Ultra Vires — Religious Societies.**) **Iowa.** — The right of the Amana Society, a religious communistic association incorporated as a religious association, to engage in agricultural pursuits and in business and manufacturing enterprises was questioned in State *v.* Amana Society, 109 N. W. Rep. 894. The articles and constitution of the society make it manifest that the corporation was organized to aid in effectuating certain ideals in religious life, especially those relating to communistic ownership of property. The state in seeking the dissolution of the society insisted that such ownership and management of property for the maintenance of the community could not be other than purely secular, and therefore inappropriate to religious purposes. The court notes that in many instances members of religious associations have held property in common, as for instance the Moravians, the Shakers, the Oneida Community, and more recently the Zionists, and portions of the Holy

Writ are quoted to show that the first Christians held property in common. The attorney-general in maintaining that the society's ownership and management of property was not for religious purposes, contended that religion pertains to the spiritual belief and welfare of man as distinguished from his physical wants and necessities; that it relates to the ethics of life and to the hope and belief in immortality; that secular business and pursuits upon the other hand are those pertaining to the material and physical wants of man, and are clearly distinguished from things spiritual or holy. The court concedes that theoretically the distinctions pointed out may be correct, and then points out that practical religion may not be so completely separated from the affairs of this life. Furthermore, it was argued that the organization and maintenance of the society was obnoxious to sound public policy: but the court while it concedes that the status of the individual members of the society is not in accordance with the prevailing American ideals cites numerous decisions in support of the doctrine that such an association and its trusteeship of property is not against public policy. Such decisions are in part: Schriber *v.* Rapp, 5 Watts 351; Gass *v.* Wilhite, 2 Dana 170; Waite *v.* Merrill, 2 Greenl. 102. Secular pursuits, such as those conducted by the society in question, the court says are not ordinarily to be regarded as incidental to the power of religious corporations for the very good reason that ordinarily they bear no necessary relation to the creed it is organized to promote. But, where the ownership of property and the management of business enterprises are in pursuance thereof and in comformity with an essential article of religious faith, these cannot be held, in the absence of any evidence of injurious results, to be in excess of the powers conferred by the law upon corporations. Under the blessings of free government every citizen should be permitted to pursue that mode of life which is dictated by his own conscience, and if this also be exacted by an essential dogma or doctrine of his religion, a corporation organized to enable him to meet the requirement of his faith is a religious corporation and as such may own property and may carry on enterprises appropriate to its creation.

COUNTY OFFICERS. (Per Diem Compensation.) **N. D.** — As in many states, county and township officers often receive no stated salary, but are allowed a *per diem* compensation for their services, it quite frequently becomes important to determine what constitutes a day's work for which compensation would be allowed. A recent case in which this question is discussed is that of State *v.* Richardson, 109 N. W. Rep. 1026. In this case it appeared that by law the county commissioners were to be allowed a stated sum per day for the time they were necessarily employed in the duties of their office, and mileage for the distance actually traveled in attending the meetings of the board and when engaged in their official duties. The commissioners had been accustomed to charge the county for overtime when they were out on their official duties at night, and had charged and collected *per diem* and mileage for one day coming to commissioners' meetings, and *per diem* and mileage for one day going from such meetings. As a result of this practice it was alleged that one commissioner had collected for not less than thirty-six days' services in one month. This custom, the court held, could not be upheld under the law by which the commissioners were allowed *per diem* compensation, as there was no provision that less than twenty-four hours should constitute a day's work. Unless the contrary is provided by the statute, a day extends over the twenty-four hours from one midnight to the next midnight, and a commissioner cannot charge and collect for two days' official services performed within the twenty-four hours from midnight to midnight. Robinson *v.* Dunn, 77 Cal. 473, 19 Pac. 878; Smith *v.* County Commissioners, 10 Colo. 17, 13 Pac. 917.

CRIMINAL LAW. (Larceny.) **Wis.** — The necessity of showing trespass in a prosecution for larceny is prominently brought out in Topolewski *v.* State, 109 N. W. Rep. 1037. In this case, accused had conceived a plan to obtain by criminal means and through the aid of another, some of the products of a packing company, but the plan was abandoned, the confederate having disclosed it to the packing company. Subsequently, however, a meeting was arranged between the confederate and accused, the packing company having requested the confederate to bring it about, and at such interview accused proposed to his confederate that the latter should procure some packages of meat to be placed on the packing company's loading platform, and that accused should drive to the platform and remove the packages. This proposition the confederate reported to the packing company, which caused the meat to be placed on the loading platform, and notified the persons in charge of the platform to let the meat go as it was for a man who would call for it. When the accused arrived and loaded the meat he was not interfered with by the one in charge of the loading platform. Under these facts the court held that accused was not guilty of larceny, as the element of trespass was wanting, and in support of its position cites Rex *v.* Eggington, 2 P. & P. 508, and Williams *v.* State, 55 Ga. 391. In the latter case it was held that the owner of property may make everything ready and easy for the larceny thereof by one purposing to steal the same, and

then remain passive and allow the would-be criminal to perpetrate the larceny as to every essential part of such offense, without sacrificing the element of trespass or non-consent; but if one, ostensibly acting as an accomplice, but really for the owner of the property for the purpose of entrapping the would-be criminal, does acts amounting to the constituents of the crime of larceny, although the accused concurred in and supposed he prompted the act, he is not guilty of larceny.

Where an owner stands by and permits the taking, for the purpose of detecting and punishing the thief, the taking is none the less larceny. Rex v. Eggington, 2 Leach C. C. 913; State v. Adams, 115 N. C. 775, 20 S. E. 722. This is true even if the owner takes steps to facilitate the taking. Rex v. Williams, 1 Car. & K. 195; Connor v. State, 24 Tex. App. 245, 6 S. W. 138. The fact that a detective employed by the owner acts with the thief does not prevent the taking from being theft. Reg. v. Gill, 1 Dears. C. C. 289; Johnson v. State, 3 Tex. App. 590; People v. Mills, 178 N. Y. 274, 70 N. E. 786; State v. Hayes, 105 Mo. 76, 16 S. W. 514. On the other hand, if the solicitation to take comes originally from the owner the taking is by consent and therefore not larceny. Connor v. People, 18 Col. 373, 33 P. 459; Love v. People, 160 Ill. 501, 43 N. E. 710; McAdams v. State, 8 Lea 456. And if the pretended accomplice takes the goods himself and the defendant afterwards receives them there is no larceny. Reg. v. Lawrance, 4 Cox C. C. 440; Williams v. State, 55 Ga. 391; People v. McCord, 76 Mich. 200, 42 N. W. 1106. The recent decision falls within the latter class. The pretended accomplice caused the goods to be placed at the place where delivery was made and caused the servant who had charge of the delivery of goods to permit the defendant to take them.

J. H. B.

One of the points raised by this case is a delicate and interesting one. The general principle is, as the court points out, clear, viz., that to constitute a larceny there must be a taking without the consent of the one having possession, and if this consent is given, either expressly or impliedly, there is no larceny. A common form of case is where A, either directly or by an agent, solicits B to steal property in A's possession. This has been repeatedly held to be no larceny for the reason that both common sense and public policy forbid that a man should in the same breath solicit another to take his property and deny that he consented thereto. Connor v. P., 18 Col. 373, 33 Pac. 159; S. v. Waghalter, 177 Mo. 676, 76 S. W. 1028; P. v. Collins, 53 Cal. 185; Love v. P., 160 Ill. 501, 43 N. E. 710. And if the taking is solicited by the owner or his agent it would seem immaterial that the exact method thereof or modifications of the proposed scheme emanated from the taker, so long as the original impulse may fairly be said to be traceable to the owner. Such were apparently the facts in the present case and the decision may have been and it would seem was, in part, rested on the ground that the defendant had abandoned his original criminal intent and that the moving impulse for the crime that actually was committed was due to the company. The court says (109 N. W. 1040), " the owner of the property . . . did not suggest the plan for committing the offense of larceny, which was finally adopted, but the evidence shows conclusively that by the consent or direction of the packing company, through words or otherwise, he (its agent) suggested the commission of such an offense and invited from the accused plans to that end."

The case, however, also raises and considers a more doubtful question, namely, supposing the proposed theft to originate entirely with the defendant whether the acts of the company amounted to a consent to the taking so as to make it not larceny. These acts were two: first, the fact that the company's agent agreed that the meat should be put on a platform which was the only place to which the defendant had access, which was done; second, the fact that the employee in charge of the platform was instructed by the company that the defendant should be allowed to take it. These acts did indeed go far to make the way easy for the defendant, but if it was for a crime that he originated it is hard to see the difference between this and instructing the watchman not to resist or not putting up a bar across a door, or pretending to be drunk in order to afford the thief greater opportunity, in none of which cases has the taking been held to be not felonious. Rex v. Eggington, 2 East P. C. 666; S. v. Anone, 2 N. & McC. 27; S. v. Stickney, 53 Kan. 308, 36 Pac. 714; P. v. Hanselman, 76 Cal. 460, 18 Pac. 425; McAdams v. S. 76 Tenn. 456. The court, however, would apparently be inclined to hold that the acts in the case before it might in themselves be sufficient to raise a sufficient consent to the taking to make it not larcenous (109 N. W. 1039). This would seem open to serious question. There is of course no consent in fact, and the public policy which underlies the line of cases already discussed and which is referred to in Love v. P. (supra), quoted by the court with approbation, has no application where the original impulse for the crime originates with the defendant. H. A. B.

DEFINITION. (Flat.) N. J. — In our day of large and over-crowded cities it may be interesting to know what a flat or a flat-house is, and

what distinguishes an apartment house from a flat. In the case of Lignot *v.* Jaekle, 65 Atl. Rep. 221, the court defines a flat or flat-house as any building consisting of more than one story in which building there are one or more suites of rooms on each floor equipped for separate housekeeping purposes. A house containing two or more such flats is a "flat-house." An apartment house is either a building otherwise termed a flat or flat-house, or it is a building divided into separate suites of rooms intended for residence but commonly without facilities for cooking. In this case it was contended that the amount of rent paid would determine whether a house was a flat-house or an apartment house. Conceding this, the court holds that thirty-five to forty dollars a month rent will not convert what is otherwise a flat into an apartment.

GIFTS. (Presumptions.) N. Y. — In Platt *v.* Elias, 79 N. E. Rep. 1, the court holds that the presumption of undue influence in the case of a gift by a man to a woman with whom he has a meretricious connection is only a presumption of fact, which merely warrants deducing the exercise of undue influence from the fact that the sexual relations between the parties were improper, and does not absolutely demand that such an inference shall be drawn from the fact. In support of this proposition, the court cites Dean *v.* Negley, 41 Pennsylvania 312, 18 American Decisions 620.

INSURANCE. (Statute prohibiting Forfeiture.) U. S. Sup. Ct. — In Northwestern National Life Insurance Co. *v.* Riggs, 27 Sup. Ct. Rep. 126, it is held that a state statute cutting off any defense by a life insurance company, domestic or foreign, based on false and fraudulent statements in the application unless the matter misrepresented actually contributed to the death of the insured, is held to be constitutional as it is applicable alike to all life insurance companies doing business in the state and does not deprive a foreign company of its liberty or property without due process of law; the liberty referred to in the fourteenth amendment being the liberty of a natural, not an artificial person.

This case adds the sanction of the Supreme Court of the nation to the doctrine that the business of life insurance is "a business affected with a public interest" to much the same extent as the savings bank, and that on this account the states may regulate the conduct of insurance companies even after the grant of a charter which has reserved no right of regulation. In this view of the case it is immaterial whether the business is carried on by a corporation, a partnership, or even a single individual.

Andrew A. Bruce.

INSURANCE. (Warranty — Defense.) Vt. — Scofield's Adm'x *v.* Metropolitan Life Ins. Co., 64 Atl. Rep. 1107, is an illustration of the length to which insurance companies often go in order to show breaches of warranties in insurance policies. In this case it appeared that a brother of insured had received a letter from him mailed in Colorado. In consequence thereof counsel for the insurance company contended that the trial court should allow them to argue to the jury that California and Colorado were resorts for consumptives, and in their briefs on appeal contended that the court should take judicial notice of the fact that Colorado was a place to which consump tives resort. The mere fact that a letter had been received from insured, mailed in Colorado, the court held, did not have any tendency to prove that the insured resided in Colorado, nor did it have any tendency to prove that he had consumption. The letter might have been mailed by insured while passing through Colorado, as well as it might have been mailed by him while residing there. Besides, the court would hesitate to hold that even if the evidence did in fact have a tendency to prove that insured had gone to Colorado to reside temporarily or permanently, that such fact was evidence of the fact that he then had consumption. In other words, it may be said that the case holds that mere removal to the above-named state does not raise the presumption that the person moving there is suffering from pulmonary troubles.

MUNICIPAL CORPORATIONS. (Use of Street by Building Contractor — Effect Thereof.) Wis. — A rather novel point comes up for consideration in Compty *v.* C. H. Starke Dredge & Dock Company, 109 N. W. Rep. 650. Plaintiff, an infant, was injured by a splinter from a pile being driven by defendant, a building contractor. At the time of the injury, plaintiff was sitting on building materials placed by defendant in the street in front of the lot on which the building was in course of construction and where the pile was being driven. Defendant insisted that it was only liable for gross negligence, as, in the exercise of defendant's lawful right to place in the street building materials inconsistent with occupation thereof for travel, it had temporarily ceased to be subject to such latter use, that therefore persons on that part of the street occupied by defendant's building materials were trespassers. The court, however, maintains that the exercise of the right of a lot owner to incumber an adjoining street with building materials, does not transpose the street into private property. It is merely, the court says, one of the lawful uses of the space as a public street, and is in deference to the rights of

others to make all lawful use thereof. In support thereof is cited Raymond *v.* Keseberg, 84 Wis. 302, 54 N. W. 612; Van O'Linda *v.* Lothrop, 21 Pick. 292. Continuing, the court says: "The presence of a vehicle in the street, while entirely lawful, is not exclusive of the right of another to be there, nor does such lawfulness absolve the owner from the duty of due care toward the other. Why should lawfulness of building materials have any greater effect? We cannot at all agree with the proposition that, because defendant had placed some materials within the limits of Jefferson Street, all others using the street were trespassers, nor that defendant was absolved from the general duty of ordinary care toward them."

NAVIGABLE WATERS. (What constitutes Navigability.) Va. — In Hot Springs Lumber & Mfg. Co. *v.* Revercomb, 55 S. E. Rep. 580, the court takes up the question as to how large a stream must be in order to be navigable. It is held that a stream is a navigable or floatable one if, by the increased precipitation at seasons, recurring periodically with reasonable certainty, the flow of water will be sufficient to be substantially useful to the public for transportation. As a stream can only be said to be a navigable or floatable one when it is capable of being used in its natural state, it was contended that the stream in question was not floatable or navigable as it had not sufficient water in it when in its natural or normal condition, but that in order that the stream could be used for floating logs or for navigation, it was necessary for the volume of water to be increased by melted snows or rains. The court, however, takes the position that the condition of a stream when its volume of water is increased by melted snows or rains is as natural as when it is diminished by drought, and hence such a stream must be regarded as a floatable or navigable one. In support of this conclusion, the court cites numerous cases among which we may mention: Brown *v.* Chadbourne, 50 Am. Dec. 641; Thunder Bay Booming Co. *v.* Speechley, 18 Am. Rep. 190; Gaston *v.* Mace, 10 S. E. 65.

The navigability of a stream is rather a question of fact than of law. As to what constitutes a navigable stream, the principal case is in accord with the great preponderance of state decision. An occasional navigability brought about by unusual freshets is not enough. But on the other hand a navigability due to stages of high water recurring with sufficient regularity to be reasonably anticipated is sufficient to impart the character of navigability, though for long periods of low water it may be suspended. See the note to Gaston v. Mace, 5 L. R. A. 392.

The federal courts, however, in declaring what constitutes navigable waters of the United States, have not gone so far. And the consequence of thus attaching the character of navigability to every insignificant stream that may occasionally float a log is serious; for such a stream at once becomes subject to the admiralty jurisdiction and to the federal statutes forbidding the obstruction of such streams. The jurisdiction of Congress over them at once becomes supreme, and supersedes state legislation.

Hence in the leading case of Leovy v. U. S. 177 U. S. 621, 20 S. Ct. 797 (not cited in the principal case), the Supreme Court, moved by these considerations, held that mere capacity to pass over a stream in a boat is not sufficient to constitute it a navigable water of the United States, but that the term has reference to commerce of a substantial and permanent character to be conducted thereon. And it sustained the right of Louisiana under the police power to dam a small bayou or crevasse used only by fishermen. See also Hughes, Admy., p. 11.

Artificial as well as natural water-ways are navigable waters of the United States. In Boyer exp. 109 U. S. 629, admiralty jurisdiction was upheld over an artificial canal entirely within the limits of Illinois, and the court took judicial notice of the fact that the canal was 96 miles long, 60 feet wide, and 6 feet deep. R. M. H.

PHYSICIANS AND SURGEONS. (Authority to Practice.) R. I. — State *v.* Hefferman, 65 Atl. Rep. 284, is a prosecution for practicing medicine without authority. It appeared that defendant had advertised that he had opened offices at a certain number, for the practice of Dermatology and Physical Education in the cure of every and all manner of diseases on the inside or outside of the human body; that he was also authorized by law to teach the science of healing; that he had cured certain diseases; that consultation and advice was free, the only charge being for "Electro-Magnetic Nerve Food" and work done. Witnesses testified that they or their friends had consulted defendant, been examined by him, had been given treatments by being rubbed with the nerve food, and had paid for the treatments and medicines. Defendant admitted that he had no certificate of medical education, but showed a certificate of incorporation to himself and certain persons for the purpose of teaching and promoting Dermatology and Education, aiding and caring for the sick, and admitted that he had sold a so-called nerve food and had applied it to patients. This evidence, the court held, showed that defendant had practiced medicine in violation of law.

PROPERTY. (Dower.) Ia. — A contention was made in Pierce *v.* O'Neil, 109 N. W. Rep. 1082, that the right to dower was not barred by

a sale in strict accordance with the terms of a trust deed in which the wife of the grantor had not joined. The crucial point was, whether or not such a sale would be considered a judicial sale; if it was a judicial sale, the dower rights of the grantor's wife would be barred. The court held that the sale was a judicial one under a statutory provision that trust deeds may be foreclosed in accordance with their terms. In support of this decision the court cites Sturdevant *v.* Norris, 30 Iowa 65, and Stidger *v.* Evans, 64 Iowa 91, 19 N. W. 850. In the first case it was held that a foreclosure of a mortgage by notice in accordance with its provisions and without proceedings in court was in fact a judicial sale, although such mode of foreclosure was not strictly within the ordinary definition of a judicial sale. In the second case it was held that a sale by an assignee to whom property had been conveyed by a general assignment for the benefit of creditors under a statute providing for such an assignment, was a sale within the rule announced in the Sturdevant case.

STATUTES. (Repeal — Elkins Law.) U. S. D. C. N. D. Ill. — In a prosecution for violation of the Elkins Law in which a point of law of vital importance to further prosecutions by the government is determined, is the recent case of United States *v.* Standard Oil Company, 148 Fed. Rep. 719. Inasmuch as the new rate law expressly repeals all laws in conflict with its provisions with the proviso that the new law shall not affect cases now pending in the courts of the United States, defendant sought to escape prosecution for penalties incurred under the Elkins Law, prosecuted under indictments found subsequent to the enactment and approval of the New Rate Law. Under the statute providing that the repeal of any statute shall not have the effect to release any penalty, forfeiture, or liability incurred under such statute, unless the repealing act so expressly provide, the court held that the repeal of the parts of the Elkins Law conflicting with the New Rate Law did not extinguish penalties previously incurred under the Elkins Law. It was contended that this law was an unwarranted interference with the authority of succeeding Congresses by limiting the effect to be given to the statute, but the court held that the law was only the substitution of a new rule of construction to be observed by the courts with respect to laws to be thereafter enacted, and which could be abrogated by any subsequent Congress, but was to be followed until so abrogated. It was further contended that inasmuch as the saving clause of the New Rate Law specifically authorizing the prosecutions of "causes now pending," Congress must be presumed to have thereby expressed its intention that prosecutions could not subsequently be commenced and prosecuted for penalties incurred under the old law, but the court ruled against the contention of defendant on this point and quoted with approval the rule laid down by Judge Grosscup in the case of Lang *v.* United States, 133 Federal 201, 66 Circuit Court of Appeals 255, and expressed its disapproval of the ruling to the contrary in State *v.* Showers, 34 Kansas 269, 86 Pacific 474.

TELEGRAPH COMPANIES. (Forgery of Telegram by Agent — Liability of Company.) Mo. Ct. of App. — In Usher *v.* Western Union Telegraph Co., 98 S. W. Rep. 84, the court distinguishes between the liability of a telegraph company for the transmission of a forged or fraudulent telegram filed with it by a stranger and liability for the transmission of a forged or fraudulent telegram forged by its own agent. The court admits that at first view the two obligations look to be so near akin as to be substantially alike. But in the first case the obligation upon the company is that its agent will be careful and prudent, the business considered, in guarding against imposition in sending forged telegrams. In the second case there is an absolute assurance that the agent himself has not forged the telegram, the agent acting within the apparent scope of his authority.

TORTS. (Boycott.) Md. — In the case of Klingel's Pharmacy *v.* Sharp & Dohme, 64 Atl. Rep. 1029, an association of retail druggists in a city and wholesale druggists had formed a combination to maintain a maximum schedule of prices, and in pursuance of this plan had refused to sell to a retailer who had refused to join the combination, and coerced and intimidated vendors of like commodities by means of threats to blacklist and boycott such vendors if they sold to the retailer in question. As a result such vendors had been deterred from selling goods to the retailer, and he brought suit to recover for damages to his business. A combination to exact and maintain maximum schedules of prices for drugs and druggists' supplies the court holds to be a criminal conspiracy at law, and punishable as such, and it is not necessary that a total suppression of the trade in the commodities should be accomplished in order to render the combination invalid. Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 244, 20 Sup. Ct. 96. See also Morris Run Coal Co. *v.* Bartley Coal Co., 68 Pa. 173, 8 Am. Rep. 159, and People *v.* North River Sugar Refining Co., 3 N. Y. Supp. 401. It was conceded on authority of Bohn Mfg. Co. *v.* Northwestern

Lumbermen's Ass'n, 54 Minn. 223, 55 N. W. 119, that defendants had a perfect legal right to refuse to sell to plaintiff any drugs and druggists' supplies owned by them, and that it would have been wholly immaterial whether the refusal was the result of whim, caprice, prejudice, or malice, if the bare refusal to sell had been the head and front of their offending. But, says the court, the refusal to sell was not the exercise of a legal right if that refusal was a mere step in the development and enforcement of a scheme to forestall the market in restraint of trade, or to drive the plaintiff into becoming a member of an organization which would control the prices he could charge for his wares and which would thereby deprive him of the liberty to contract for the sale of his goods according to his own judgment of their value. Whilst an act which is in itself lawful can never become unlawful because it may be done by several persons instead of only one, yet the same act may be unlawful when it is a means of accomplishing an unlawful act. In other words, the court holds that the motive with which an act is done governs as to whether such act is lawful or not, and by way of illustration mentions that while the receiving of stolen goods is not in itself unlawful, yet where such goods are received with knowledge that they have been stolen, the act becomes a criminal offense. In support of this position the court cites Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011 In this case the court also defined the word "boycott," saying: "A boycott means the confederation, generally secret, by many persons whose intent is to injure another by preventing all persons from doing business with him, through fear of incurring the displeasure, persecution, and vengeance of the conspirators."

See "Crucial Issues in Labor Litigation," by Jeremiah Smith in the February *Harvard Law Review*.

TORTS. (Trade Unions). N. J. — A case dealing with an interesting phase of the rights and powers of labor or trade unions is that of Brennan *v.* United Hatters of North America, 65 Atl. Rep. 165. A trade union claimed the right, under its constitution and by-laws, to procure the dismissal of a member from his employment on his suspension from the union. The court questions whether any member of a union can make an agreement with such union that on his proper conviction on charges submitted and tried in accordance with the union's rules he shall lose his place of employment and his opportunity of gaining other employment within the union's district. As bearing on this question the court cites: Curran *v.* Galen, 152 N. Y. 33, 46 N. E. 297; Jacobs *v.* Cohen, 183 N. Y. 207, 76 N. E. 5; Protective Ass'n *v.* Cumming, 170 N. Y. 315, 63 N. E. 369; Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, and Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603. The court maintains that the Bill of Rights confers on every man the right to engage in such lawful business or occupation as he may choose, free from hindrance or obstructions by his fellowmen, save such as may result from the exercise of equal or superior rights on their part. The right of one seeking employment to have every opportunity to gain employment and to retain a position, once it is gained, is as precious in the eye of the law as the right of the employer. Actions, like the one at Bar, which was brought by the suspended member of the union to recover damages from the union for interference with his employment, the court holds are essentially analogous to the familiar actions for enticing away servants. In view of this, such cases cannot be considered exactly as novelties.

WAYS. (Travelers.) Vt. — In Howrigan *v.* Bakersfield, 64 Atl. Rep. 1130, the liability of a town for injuries to a horse on a highway bridge turned on the question whether or not the horse walking along the highway alone could be considered as a traveler. This the court says depended on the question as to whether or not the owner of the horse was guilty of contributory negligence. If the horse escaped onto the highway without the owner's fault or negligence, then he was not at large in a legal sense of the term, and was while following its natural instincts to return home, a traveler on the highway. The word "traveling" the court says has no very precise or technical meaning when it is used without any limitation. Its primary meaning is passing from place to place. If horses or cattle are forced or frightened from an inclosure over a lawful fence onto a highway, the owner or keeper being without fault, they cannot be said to be at large or astray, but their owners are entitled to have them protected as travelers. In support of its decision the court cites: Holden *v.* Shattuck. 34 Ct. 336; Coles *v.* Burns, 21 Hun 246; Commonwealth *ex rel.* Wilson *v.* Fourteen Hogs, 10 Serg. & R. 393; Goener *v.* Woll, 26 Minn. 154, 2 N. W. 163; Kinder *v.* Gillespie, 63 Ill. 88; Montgomery *v.* Breed, 34 Wis. 649.

THE LIGHTER SIDE

Quandary. — It was an old Virginia judge, who, when the lawyers had summed up for plaintiff and defendant, respectfully charged the jury: "Gentlemen of the jury, if you believe what the lawyers for the plaintiff have told you, you must find for the plaintiff. If you believe what you have heard from the lawyers for the defendant, you must find for the defendant. But if you are like I am, and don't believe a dam word either have told you, I don't know what the hell you will do."

Domestic Damages. — In a western town, H. was defending a physician in a suit brought by a negro who wanted damages, his wife having died shortly after an operation.

When it came his turn to cross-examine the plaintiff, he asked, "Mr. Wilson, how old was your wife when she died?"

"About forty-five, sir."

"Been in feeble health a long time, had she not, Mr. Wilson, and cost you a great deal for medicine and help?"

"Yes, sir."

"You have married again, have you not?"

"Yes, sir."

"How old is your present wife?"

"About thirty-five, sir."

"Is she stout and healthy, Mr. Wilson?"

"Yes, sir."

"Then, Mr. Wilson, will you please state to this jury how you are damaged in this case?" Mr. Wilson could make no answer. The good and true men thought he had made rather a good thing by his bereavement.

Drawing the Line. — A well-known judge on a Virginia circuit was reminded very forcibly, the other day, of his increasing baldness.

One of his rural friends, looking at him rather hard, drawled, "It won't be so very long, jedge, fo' you'll hev to tie a string round your head to tell how fer up to wash yer face."

Justice by Day. — This is from the pen of Du Query, an eminent Irish barrister, of the generation of John P. Curran.

Judge Dey (Day) was holding court in Dublin, and on account of the business moving slowly and the calendar congested, proposed holding night sessions. No sooner had the proposition gone forth than Du Query penciled the following, and passed it up to the Bench:

"Try men by night, my Lord forbear,
Think what the wicked world will say.
Methinks I hear the rogues declare
That justice is not done by Dey."

No Defense. — When Mr. W. Orison Underwood of Boston was new at the Bar he tried to collect a promissory note in the local Municipal Court. It seemed to be a plain case and he was confident of success. Much to his chagrin, however, the judge found for the defendant. With characteristic persistence he appealed to the Superior Court, that jurisdiction of delayed justice. Hoping to expedite a hearing he contemplated filing an affidavit of no defense and moving for a speedy trial, but was somewhat embarrassed by that finding of the judge below. At last he sought that haven of distressed young barristers, the clerk's office, and approaching the venerable clerk Willard, asked if he thought it would be proper to file an affidavit of no defense in the face of a judgment for the defendant in the Municipal Court of the city of Boston. "I should think that was the best reason for such an affidavit," replied the clerk of the higher jurisdiction.

Self-Restraint. — The case of Neuschafer *v.* Wurst Enk was one in the Gloucester Circuit for services rendered decedent by his daughter. The plaintiff's attorney was having considerable difficulty in drawing from his client a statement of her services to decedent. Defendant's counsel was pleased, and the trial judge, as usual, bored. Suddenly her counsel asked her with some show of anger why she did not respond more fully and clearly to his questions, to which she replied with sweet innocence, "Why, Mr. ——, you told me not to say any more than I could possibly avoid on the witness stand."

Curtain.

F. W. Maitland

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FREDERIC WILLIAM MAITLAND

By Gaillard Thomas Lapsley

Ille magnus magnum de magno dixit, ego parvus parvum de magno dicebo, the artless Latin of the Cluniac monk cannot conceal or disfigure the true feeling that moved his words which may yet serve to express the veneration which men of all ages pay to one who is a master among them. And it is indeed a master that we have lost in the person of Frederic William Maitland. No one who read his work could doubt that, still less those who knew him, or had ever so little a glimpse of the ideals by which he measured his work, his deep and true modesty, his delicate and generous consideration for others. It is not only the learned world of law, history, and political philosophy that is bereaved by his death, it is not only the university which he loved and served well — it is rather every man who cares for learning and truth, for honest, tireless work and high-minded gentle living.

The story of Maitland's life, in so far as it was made up of events, is soon told, but it will be long before one can penetrate even a little way into the movement of his strong and subtle thought. He was born in London in 1850, in Guilford street, as many Americans, for whom London chiefly means the Record Office and the parts about the Museum, will like to know. But although the accident of birth made him a Londoner he was in fact of Gloucester stock, and he passed a good part of his youth in that county where he later inherited a property. He was the grandson of that S. R. Maitland who was the first in England to put mediæval studies in their true light and to tell the world that it is not enough to qualify the Dark Ages as unimportant because your own foolish heart is darkened with ignorance of them. Maitland was sent to Eton where, it seems, he left little memory either of brilliance or deficiency. Certain it is that he was an oppidan and not on the foundation. He was not a good classic, not good enough that is to obtain a scholarship at Trinity College, Cambridge, where he came in due course. Indeed he has been known to say in later life that he had only just enough Latin to work with the documents that came under his notice. Those who have studied his work most closely will best know what scant justice he did himself in this matter. At Cambridge he addressed himself to the study of philosophy and came into relation with the late Henry Sidgwick, whose teaching was the deepest and most abiding influence in his life. His first considerable publication, it will be remembered, was dedicated to Sidgwick, and he always spoke of him with reverence and gratitude. In 1873 Maitland took the Moral Science Tripos and shared the distinction of heading the first class with a scholar almost as well known in America as he is in England, the Rev. Dr. William Cunningham. Maitland now turned to one phase of the study which was destined to absorb in one way or another his whole life, and in 1873 obtained one of the Whewell scholarships for international law. Meanwhile he was preparing himself for what is no doubt the severest struggle in English academic life, the competition for a fellowship. His real interest was in philosophy, and it was his desire to remain at the university and devote himself to philosophical studies. As it happened there was but a single fellowship available,

for Trinity at that time offered a fellowship in moral science for open competition every three years, and owing to the rule of superannuation no one could compete for this more than once. Chance had brought together four such candidates as are rarely found in an university competition. Maitland, the Rev. Dr. Cunningham, Professor James Ward, and the late Bishop of Southampton (the Hon. A. T. Lyttleton). They were all destined to attain high distinction, and three of them were to remain in the university and eventually to secure the prize which at the moment could be allotted to only one. Sidgwick was the examiner and he has related the searchings of heart with which he tried to discern amid so much excellence the marks of superiority that might guide his choice. The lot fell upon Ward, and Maitland went on his appointed way, which was the study of the law at Lincoln's Inn. He was called to the Bar in due course, and practiced in London until 1884.

During these years in London his professional engagements did not, it would seem, absorb all of his time and energy. As a practicing barrister indeed he had no success, and his work consisted chiefly in "deviling" for other people. He achieved, however, a thorough mastery of the practice of the courts and the intricacies of conveyancing. The practical knowledge of the law which he obtained is, indeed, abundantly proved by his subsequent teaching and the substantial services which, as counsel, he was able to render his college upon his return to Cambridge. But before the close of the period he was already asking himself questions about the history and growth of the common law. His attention was first drawn to this subject by another Trinity man, seven years his senior in academic standing, Sir Frederick Pollock, "from whom," he wrote in 1887, "I first learnt to find an interest in the history of law." The result of the interest so inspired is before the world to-day. It is no exaggeration to say that it amounts to the creation of the history of English law. The material, indeed, existed in abundance, but it was scattered and uncriticized, and the existing commentaries from Lyttleton to Reeves afforded but meager help. The whole work of research and criticism had to be performed before the synthesis could be made, and that work Maitland did, almost single-handed, between the years 1884 and 1895. The first-fruits of these labors was the volume of Gloucester Pleas, a selection of cases heard in 1221 before the justices itinerant in the county where Maitland was himself a free-holder, and might in other ages have been bound to suit and service at the shire-court.

Meanwhile a new career was preparing for him. Sidgwick had, it seems, from the first recognized the qualities of his pupil and desired to obtain his services for the University. In 1884, partly by his own generosity and partly by his influence in the University, Sidgwick secured the foundation of a Readership in English Law which was offered to Maitland, as indeed it had been created for him. He seems to have come into residence in the autumn of 1884 — he certainly began to lecture early in 1885.

From this time until his death there are but few events of general interest to record. His life is to be traced in his teaching and writing. In 1887, on the death of Birckbeck, the Downing professor of the Laws of England, Maitland was elected to that office, thereby becoming a member of the youngest of the Cambridge colleges. He went into residence in the pleasant house in Downing, where so many Americans in search of help or inspiration have been welcomed by him. As his work proceeded, without haste and without rest, recognition came abundantly from every quarter. The Universities of Oxford, Glasgow, and Cracow conferred their doctorates upon him; the Royal Academies of Prussia and Bavaria elected him corresponding member; the

societies where he had received his education and his training were proud to associate his name with their history; and he became a Bencher of Lincoln's Inn (an honor very rarely conferred upon one who had not taken silk) and an Honorary Fellow of Trinity College. The death of Lord Acton in 1902 left the Regius Professorship of Modern History vacant, and this post, as is now generally known, was offered to Maitland. He refused on the ground that the state of his health disqualified him for the work.

But his activity was by no means confined to the business of teaching and study. His connection with the Selden Society, both in its organization and the subsequent direction of its work, contributed perhaps more than any other factor to the distinguished success of that body. Its honorable history and the great services which it has rendered to the advancement of sound learning are largely due to Maitland's wise counsels and unflagging energy. Every work it published was passed by him in manuscript or proof and sometimes both. Then his college and the university made demands upon him which he never refused. He did his share — and it was a large one — of administrative work and college business, for which his professional knowledge peculiarly qualified him. In university politics he was an ardent liberal. He took an active part in the two liberal — not to say radical — movements which in late years have most deeply agitated the academic world. That the proposals to grant degrees to women and to abolish compulsory Greek were both lost was not due to any want of effort on Maitland's part. His speeches in the course of these discussions are still vividly remembered when much good speaking and clever writing are forgotten. He clothed his clear, strong thinking with a sarcasm that did not hurt, because it was never personal, and a wit and gayety to which even his strongest opponents could not refuse the tribute of honest laughter.

In addition to his ordinary lecturing he was always ready to help students or scholars who applied to him. No question was too rudimentary, no explanation too troublesome for him; with high courtesy and infinite consideration he opened his great store of learning to those who came to him. The demands upon his time and patience must have been heavy, but there are many on both sides of the Atlantic who can gratefully testify that his pains were not wasted. As early as 1892 he organized classes for instruction in the use of mediæval charters, which presently developed into practical and systematic teaching of paleography and diplomatics. Probably there were few men in England, certainly there was no one in Cambridge, so well qualified as Maitland to do this work. He had seen and read an enormous number of documents, and the fruit of his experience was laid before his pupils in the long mornings that he devoted to their training. Perhaps the best evidence of the success of his efforts in this direction is to be found in the high excellence of the work of one who was no doubt his most distinguished pupil, that deeply lamented scholar, Mary Bateson.

It is hard to realize that all this was the work of a man never physically vigorous and in later years positively broken in health. From 1898 onward he was never wholly free from illness. The damp, dark air of Cambridge oppressed him physically — indeed he used to say that he was a human hygrometer and could register to a fraction the humidity of the atmosphere on any given day. It became necessary for him to seek relief in a change of climate, and from 1899 onward he used to go abroad at the end of Michaelmas Term returning in time for the Easter Term. This enforced absence troubled his conscience in regard to his professorial work, and he presently began to lecture in the long vacation, for in Cambridge a considerable part of the university is in residence during July and August. The winter sojourns, generally in

Madeira or the Grand Canary, which were at first simply exile from his work, became more tolerable after he had begun to edit the Year Books for the Selden Society. He was able to carry on this work effectively far from the archives by having the manuscripts from which he was working photographed. And for the last few years also he was happy in the association of his pupil and colleague, J. G. Turner, who joined him for at least part of each winter. But it was at best an expedient. His malady made steady progress and nobody who had seen him in the later years was surprised when the news came that he had made his last voyage. The wonder was rather that we had had him so long — that the brave spirit and the high devotion to duty had sustained him through a struggle so severe and so protracted.

Maitland's work as teacher and writer will be, for those who undertake to register the movement of thought in the nineteenth century, a fact of the first order of importance. It would be premature to attempt now to put it in its right relations, but those who know how profoundly it has effected historical and legal studies and how extensively its influence has been felt, may well ask for some survey, however brief and incomplete, of its scope and character. Referring to the future study of early English history, Maitland wrote in 1897, "by slow degrees the thoughts of our forefathers, their common thoughts about common things, will have become thinkable once more; there are discoveries to be made, but also there are habits to be formed;" and these words, I think, give the clue to the course, otherwise so difficult to account for, of his own development. Here was a man by temperament and education a philosopher, by training a lawyer, dealing with the law from a purely historical point of view as it would seem. "The history of institutions," he wrote, *à propos* of Stubbs' great work, "is the history of public law." That was a view that a generation ago would scarcely have commanded the assent of many lawyers, or historians either. Well, I think that it may be said without paradox that Maitland treated the law historically rather than philosophically, precisely because he was himself a philosopher. It should be remembered in what state he found English legal history. There was the meritorious Reeves and Finlay's disastrous attempt to improve upon Reeves. There was Blackstone, to be sure, but even a generation ago men were shy of Blackstone's history. Then Coke had attempted to rear a structure of theory upon an historical basis — most of us will remember Maitland's own judgment of that attempt, "the disorderly mass of crabbed pedantry which Coke poured forth as 'institutes' of English law." Then, and I think that this is a factor of prime importance, there were Sir Henry Maine's brilliant but inaccurate generalizations about the early history of law. In one word it was apparent that no philosophizing about legal history could be of any permanent value until that history had been put upon a sound historical basis. Precisely that work, meanwhile, had been going on in Germany since von Savigny and the Grimms had begun their labors, and Pertz had decreed that a whole section of the Monumenta should be consecrated to Leges. In France and even in Italy a like work, though on a smaller scale perhaps, was under way. With these familiar facts in mind, it will be easier to understand the drift of Maitland's work from the time of his return to Cambridge.

His first lectures, delivered in the Lent Term of 1885, were on tort and contract, but in the autumn of that year he began to teach the law of real property and to lecture on the rise and progress of the laws of England. In 1887 his course on real property was specialized on the period 1830–1885, an early instance of the application of his well-known method of working backward from the known to the unknown. In the same year he was lecturing on the civil govern-

ment, using part of Stephen's Commentaries as his text-book. It may be said here, for the benefit of those familiar with the methods of the American Law School where the case system is held in honor and the text-book frowned upon, that the conditions in Cambridge are very different. The fact that the Law Tripos has to serve the double purpose of education and professional training, and that it leads to an academic degree and not license to practice, makes the case system, in the judgment of those who have the best right to an opinion, impracticable. At any rate most of Maitland's teaching, with some exceptions which will be duly noted, was by lecturing and the use of a text-book. The year 1887 is marked by two important events in Maitland's career. One of them, the foundation of the Selden Society, needs no comment for lawyers, either in America or England. But the other may detain us a moment. This was the publication of the now famous document known as Bracton's Note Book, the first considerable piece of scholarly work with which Maitland's name is associated. Readers of the *History of English Law* know to what an extent that book centers about Bracton's great treatise. Those who have examined the critical apparatus of Bracton's Note Book and the volume on Bracton and Azo in the Selden Society, know further how profoundly Maitland had penetrated Bracton's thinking by acquainting himself with the sources of the great jurist's knowledge. This important piece of work had occupied Maitland for three years. The manuscript in the British Museum had been brought under Professor Vinogradoff's notice in 1884. In the summer of that year he announced the discovery in the *Athenæum*, and at the same time engaged Maitland's interest in the task of editing the document. A phrase in the preface has its significance. "Perhaps," wrote Maitland, "I was not the man for the work, but I have liked it well." He had taken a long step backward, into the thirteenth century in fact, and he found himself in a congenial atmosphere. This year, too, saw the publication of the first volume put forward by the Selden Society, *Select Pleas of the Crown*, edited by Maitland. His work continued to grow more historical in character. In 1888 he was lecturing on constitutional history and parliament, beside teaching a class in advanced real property. At the same time he brought out another volume of records for the Selden Society, the *Select Pleas in Manorial Courts*, the introduction to which put the history of the manorial courts in a new light. Here was one lawyer at least who was not content to accept without verification the traditions of institutional history, which had satisfied generations of his professional brothers. And when he came to verify the tradition it was found to rest upon an insufficient basis of fact, and so, in the history of the manor, room has to be found for the halmote before the leet and the courts baron and customary are introduced.

In 1889 he was lecturing on constitutional law and history, and expounding cases on the law of contract. He had announced a course on the history of the English manor, but it was not given until the next year. Meanwhile he was busy editing the precedents of pleading in manorial courts which the Selden Society published in 1890 under the title of *The Court Baron*. In the same year he was teaching the law of real property, using Challis as a text-book, and giving, for the last time as it turned out, his lectures on constitutional law and history. Five new courses of great significance were given in 1891, the history of English law in the thirteenth century and English land law in and before 1086. Meanwhile he had edited for the Pipe Roll Society the earliest curia regis roll (1194) together with two eyre rolls for 1194 and 1195 respectively. These appeared in 1891 under the title *Three Rolls of the King's Court*. Already, it will be seen, he was rapidly assembling the elements out of which the great *History of English Law* was to be composed. In 1892

his lectures on the history of English law had been extended so as to include the twelfth as well as the thirteenth century, and concentrated chiefly upon tenure. He was working backward from Bracton to Glanvill. He added further a course of lectures on the origin of feudalism in England, the substance of which is no doubt preserved in his *Domesday Book and Beyond*, and began that instruction in paleography to which allusion has already been made. On the legal side he gave a course of lectures on equity with special reference to trusts, which seems, to judge from its frequent repetition in later years, to have been a favorite of his. In 1893 the lectures on the history of English law had been still further subdivided and defined. In one term it was status and jurisdiction, in another land laws, and in another a general sketch of English legal history. The great book was fast taking form and shape. The instruction in equity and paleography continued and the year is further marked by two publications, the *Records of the Parliament at Westminster in 1305*, a model of editorial care and skill with an invaluable introduction, treating of the relation of the council, the courts, and the parliament, and parliamentary procedure, and a brilliant introduction to Mr. Whittaker's edition of the *Mirror of Justices* for the Selden Society. In 1894 Maitland must have been largely occupied in passing the *History of English Law* through the press. Certainly he gave no new lectures, although he did produce, for the Selden Society, that volume on Bracton and Azo which may be regarded as having definitely settled the vexed question of Bracton's debt to the Roman Law, in the sense that the substance of Bracton's book is English. The year 1895 is in some sort the turning point in Maitland's intellectual career. The great historical work was done. Painfully and laboriously he had hewn and prepared the materials and trained others to do the same. But he had never neglected those studies and interests which qualified him so preëminently to plan and construct the great edifice which will long stand as a monument to his genius. The *History of English Law* in its form and its substance exemplifies nearly all of Maitland's distinguishing qualities. It is the work of a philosopher and a jurist familiar with the thinking and learning of continental schools; but it is the work too of a critic subtle and erudite, of the documents upon which is based all knowledge of the subject; and finally it is the work of a man of letters, an artist of no mean order. We are just beginning to measure the effect which this book has produced upon the method and the substance of historical teaching. What its effect may have been upon the teaching of law I cannot tell. But its great lesson of the vital connection of law and history can scarcely fail in the long run to stamp itself upon lawyers as it has done and is still doing upon historians.

This closes the first period of Maitland's intellectual activity. A second period between 1895 and 1903 is transitional in character. There was much historical work remaining to do, for the whole abundant harvest of those earlier years of study and research could not be garnered even into a grange so commodius as the two stately volumes of the *History of English Law*. Accordingly two more volumes were to come. Whether he would have continued his historical studies when these were completed cannot be known. But his health failed, and from the closing year of the century he worked as a man who knows that his time is short, and sees the magnitude of the task remaining to be done. When he took the Year-Books in hand, his whole interest was concentrated upon the work of editing them, and in later years he would turn almost fretfully from questions connected with his earlier historical work.

The preparation for the *History of English Law* had involved what he himself has described as an incursion into a region

that was unfamiliar to him, that of ecclesiastical jurisprudence. The first-fruits of these studies consisted in a course of lectures on the elementary history of canon law, delivered in the Michaelmas Term of 1895. These are not to be confused with his special study of the canon law in the church of England of which I shall speak presently. I am informed by a friend, who had the great advantage of hearing these lectures, that they treated the whole of the growth and formation of the *Corpus Juris Canonici*, and that they were elementary only in so far as they were addressed to a class — small, alas! — of beginners. In 1896 Maitland was lecturing on equity and the English village community, and the next year he published *Domesday Book and Beyond*, a work which for historical students is as important as the *History of English Law*. Indeed, it grew out of, and supplements that book. Its publication marks a long step forward in the discussion of the question of the origins and foundations of society, which has been so bitterly disputed since the middle of the last century. If all the theories which Maitland advanced in it have not been able to endure the fire of criticism, they have none the less served a valuable purpose. In 1898 Maitland lectured on equity, and repeated under the title of agrarian Cambridge the substance of his lectures delivered the year before on the Ford foundation at Oxford. These he published under the title *Township and Borough*, and they form an important contribution to a subject both philosophical and legal, which always exercised an irresistible fascination over him — the growth of the corporation. During the years that remained to him he returned to this again and again, both in teaching and writing. In this same year, 1898, he published a volume, small in bulk but great in power, entitled *Canon Law in the Church of England*. In this he taught, indeed I may say he established, the proposition that down to the breach with Rome the English church was as much bound by the law of the universal church as any other branch of that organization. Apparently an obvious truth, but in reality less simple than it appears. The theory of the matter that then held the field had been advanced by Stubbs in 1883 in the Report of the Commission on Ecclesiastical Courts and afterward expounded in his Oxford lectures. Roughly stated it was to the effect that the English church was only bound by so much of the canon law as had been accepted and ratified in English councils, and that Lyndwood's *Provinciale* was a sort of special corpus of English canon law. This view Maitland traversed directly, and if you have regard only to the theory of the canonists, he was no doubt right; at any rate his case was a strong one. The implications of either position are of course very far reaching; but an unlucky high churchman, whose zeal exceeded his learning, found to his cost that Maitland was not unable to defend himself. He jestingly described his opponents in this dispute as representing the Anglican church as wholly Protestant before the Reformation and wholly Catholic ever since. But it is likely that, as far as the purely legal question goes, the last word has not been said, and cannot be, until we know more than we do at present of what went on in the courts christian.

In 1899 his health broke down completely, and there was little of teaching or writing. But he employed his enforced leisure in translating part of one of the books that had most influenced his thinking. The chapter of Gierke's *Genossenschaftsrecht*, which in 1900 appeared in English under the title, *Political Theories of the Middle Ages*, is a very substantial contribution to political philosophy as well as to law. Maitland's part in this work was by no means confined to that of translator, for he added a brilliant essay dealing with the origin and theory of the corporation and its relation to the state. His views on this subject are well known, less so perhaps is his jesting remark that

his epitaph must be, "*Hic jacet persona ficta.*" To these studies are doubtless owing the course of lectures on the theory of the corporation which, announced under a more restricted title in 1899, but not then given, were actually delivered in 1900. In 1901 he was appointed Rede Lecturer, and his little discourse, which he afterwards printed with an elaborate apparatus of notes and references under the title of *English Law and the Renaissance*, fills a considerable gap in the history of English civilization as well as English law. In this work he dealt with and settled the delicate question of why England escaped the reception of the Roman law which overwhelmed her continental neighbors. It is pleasant to remember that he made this solid bit of work the means of expressing his appreciation of American legal learning by dedicating it to the late Professor Thayer. Meanwhile he was repeating the courses of lectures which he had already given, and it is a significant fact that, with the exception of the Introduction to the *History of English Law*, the subjects are no longer historical in character. He was dealing with equity, contract, and real property, and in the last term of all gave what seems to have been a new course on future estates and perpetuities. His work of research, meanwhile, was focussed upon the Year-Books. He desired passionately to secure a proper critical edition of these so important monuments of English legal history. Upon the promotion of this end he deliberately concentrated all his energy and interest. As early as 1900 he said to me that he would never again do anything but Year-Books, and it was only the higher demand of *pietas* that led him to turn aside into the field of letters and write the life of Leslie Stephen. He used to say laughingly that he thought the edition of the Year-Books could be accommodated to the limits of some two hundred volumes. Although he did not live to see more than a small part of his ideal realized — the publication of the Year-Book, 1–4, Edward II — it must have been a satisfaction to him to know how much he had done to make the work of future editors accurate and efficient. In his three volumes he had set the pattern for the critical treatment of the documents. He had discussed and, as most people will think, had settled the question of the authority of the reports and their relation to the Plea-Rolls. Finally he had removed the long-standing reproach of English legal studies by putting, for the first time, its proper language, the Anglo-French, upon a sound grammatical basis. This subject he dealt with scientifically, and his treatise might well pass for the work of a highly trained philological specialist.

I have said nothing of Maitland's abundant and valuable contributions to periodical literature. Some of them have been collected and the rest will no doubt be brought together in good time. Nor have I mentioned his excursion into sixteenth century ecclesiastical history upon which I shall touch in another connection. I have tried only to trace the main outline of the work to which he devoted his life.

This is neither the time nor the place to attempt an analysis or an appreciation of Maitland's genius. Still, one may be allowed to detach and emphasize one or two significant characteristics. Perhaps the most striking trait was the unfeigned, the passionate interest which he brought to his studies. His desire to know was not due solely, I think, to his capacity, great as it was, to interpret and relate knowledge; he loved the thing for itself as well. Ten years ago he put to a beginner in historical research, who had come to him for help, the appalling question, "Where would you draw the line between history and archæology or antiquarianism?" His own jesting answer came quickly to the relief of the embarrassment which he had occasioned — "For my own part I regard anything in which I am interested as history." It is no small part of his distinction that he was able to seize upon and develop the historical value of the

subjects in which he was interested. It was out of the abundance of this interest that he wrote of a certain piece of minute and intricate textual criticism that its perusal "made the best detective story of Boisgobé or Gaborieau seem stale, flat, and probable." Everyone knows how lightly he bore his great learning and what gayety his inexhaustible wit infused into the most unpromising subjects. His success here must be ascribed to causes that lie deeper than the possession of a style formed upon the best models, or a turn for making happy phrases. He had a fine sense of proportion and value, and he was a great teacher. He kept always before himself the object of making his thought clear and precise, in so far as it was susceptible of precision. It is significant that, much as he admired Gibbon, he considered that for purposes of historical exposition, his style was vicious.

He was the last of men to shun criticism of himself, and in this respect disloyalty to him would consist only in the suggestion that he never erred. The truth is that although his courtesy never failed him, he was in one important respect deficient in sympathy. No one, I think, can fail to be sensible of this in his attitude toward the mediæval Church, an institution with which he had to deal in so many relations. He was by inclination and conviction strongly anti-clerical, and he never quite succeeded in suppressing this bias. He was chosen, as likely to be quite impartial, to treat, in the Cambridge Modern History, the delicate question of the Reformation Settlement. Impartial he certainly was, but it was an impartiality that regarded all parties to the conflict with contemptuous patience. For once his trifling was out of place, his wit degenerated into frivolity. Sometimes he was inclined to press too hard the theories which he formed or adopted. *Domesday Book and Beyond* offers examples of this. He tried to find a way out of the dilemma of maintaining primitive freedom without admitting primitive communism in the sense of corporate life and action. Perhaps the dilemma would not have existed for an intelligence less subtle, less constantly nourished by legal and philosophical studies, but to him it was certainly very real. Still the solution which he offered, the introduction of the ideas of automatism and reality, is not really a solution at all since it speaks to the question of development rather than that of origin. It explains the process by which later conditions were reached, but it leaves in obscurity the conditions out of which they grew. Then, in the same work, he made great use of the theory elaborated by Meitzen in regard to the expression of racial characteristics in the method of settlement — the contrast between the Teutonic nucleated village and the Celtic hamlet. But this has scarcely survived the fire of criticism with which it has been riddled both on the continent and in England. On the other hand his abundant use of Gierke's theories has met with better fortune.

Still, when future criticism shall have done its utmost, there will remain for all time the figure of a great scholar and a noble man who loved learning because he loved truth, and sought it eagerly wherever it might be found. His work goes on, for generations that knew him not will gather instruction and inspiration from his books. But only those who knew him can measure the greatness of his loss. His friends and contemporaries have in many quarters registered their sense of bereavement, and those many younger men whom he taught and counselled, will ever remember him with reverence as well as gratitude. If they felt for him the love which he so inevitably called forth, their consolation must lie in the memory of an association with an august master whom they will ever deem worthy of all honor.

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THE WILL OF AN ENGLISH GENTLEMAN OF MODERATE FORTUNE

By Albert Martin Kales

THE form of will for a typical combination of circumstances is no longer a matter of individual choice. It has become the subject of an evolutionary choice.

Law has been roughly characterized as the expression of the persistent will of those who govern. Certainly the Common or Non-Legislative Law derives its great force from the fact that it is the result of an evolutionary process. It is not the subject of one mind or one time. It is never ready made. The rule which sprang into life a century ago had its origin in influences which began a century or more before that. The rule which appears as something new to-day reaches back into the past for its reason and its inspiration. The rules which exist and have existed as the fundamentals of our law derive force and sanctity from the fact that they are the product of many times and many great minds. They represent very largely only that which has survived the scrutiny of generations of trained masters. Sometimes a rule survives too long, but in the day of its strength it has, like the rules of moral and religious codes of conduct, the elements which command admiration and obedience.

The typical testator is a little apt to forget that the best testamentary disposition for him to make has been settled, like the rules of law, by generations of experience and experiment on the part of trained specialists. The results of this experience and experiment, as well as the evolution which it has produced, are to be found in the form books of the English conveyancers of every generation since the reign of Charles the Second. He, perhaps, does not realize that the plan prescribed for him in the 7th volume of the last edition of Bythewood or in the 4th volume of a recent edition of Davidson's Precedents is the crowning effort of an evolution which dates back to the latter part of the seventeenth century.

In fact the founder of that school of conveyancers which has produced the form that I am about to speak of in detail was no other than Sir Orlando Bridgeman, afterwards Lord Keeper of the Great Seal from 1667 to 1672. He is called the father of modern conveyancing. "A collection of his precedents made by his clerk, Thomas Page Johnson,[1] is fortunately preserved. Mr. Johnson states in his address to the reader that these precedents were framed and advised by the late Lord Keeper Bridgeman during the time of his practice, when the unhappy circumstances wherein the kingdom stood, afforded no other means of safety to persons of his loyalty and constancy than a strict retirement from all public affairs, and he continues, that, 'betaking himself to a sedentary kind of life in his chamber, he became the great oracle not only of his fellow-sufferers, but of the whole nation in matters of law, his very enemies not thinking their estates secure without his advice.'"[2] So great, indeed, was his reputation that in 1683 Lord Chancellor Nottingham, in sustaining the validity of certain provisions of the Duke of Norfolk's family settlement, called attention to the fact that it was drawn by Sir Orlando Bridgeman — impliedly intimating that this indicated a strong probability that what had been done would stand.[3] Since the time of Bridgeman there have been a succession of conveyancers, conveyancing counsel, and chancellors who have added to, or pointed the way for, or insisted upon improvements in the form of

[1] Bridgeman, Sir O., Precedents, (Eng.) 1682–1725.

[2] History of Settlements of Real Estate, 1 Jurid. Soc. Pap. 45, 54.

[3] Duke of Norfolk's Case, 3 Ch. Cas. 1.

family settlements. To the American lawyer the names of Fearne, Preston, Butler, Smith, Hayes, Davidson, Bythewood, and Jarmen, and such Chancellors as Lord Hardwick, Lord Eldon, and Lord St. Leonards, are familiar.

We are to consider then what this evolutionary process has settled as the best course for a typical testator to take. This typical testator I have called an "English gentleman of moderate fortune." This is what the more old-fashioned form books call him when they write his prescription. He is to be distinguished from the nobility or great landed proprietors. Their estates were limited in what is known as a "strict settlement" — a form adopted to a system of inheritance according to the rule of *primogeniture*. Of it Sir Frederick Pollock says, in a little book on the Land Laws,[1] written, I ought to emphasize, for the intelligent laymen: "There is nothing, perhaps, in the institution of modern Europe which comes so near to an *imperiun in imperio* as the settlement of a great English estate. The settler is a kind of absolute law giver for two generations; his will suspends for that time the operation of the Common Law of the land, and substitutes for it an elaborate constitution of his own making." It is not of this that I shall attempt a description; nor yet is it of the provisions of the will of that opposite type — the tradesman of wealth whose fortune has been made in and exists at the time of his death almost wholly in a prosperous business which must be carried on for a time at least after his death for the benefit of his family. The typical testator of whom I speak is one who has, either from being descended from younger sons or daughters of nobility ceased to belong to that class, or whose ancestors having made a fortune in trade, has ceased to be a tradesman. He is a man of leisure, or he may have an occupation. Formerly it was a profession, as the army, the law, the church, or politics. To-day the field of activity has broadened so that it may be almost anything. In any event he is a man of moderate fortune. He has at least a country house. So characteristic is this that some of the form books describe him as a "Country Gentleman." Perhaps he has also a town house. The capital of his estate consists of land and personal property in suitable proportions. A proper proportion of the real estate is productive, and the personal estate is invested suitably in consols, mortgages, bonds of railway corporations — perhaps some stocks, etc. Formerly the stocks of the great trading companies like the East India Company were favorite forms of investment. Our typical testator is forty years of age. He is neither a bachelor nor a widower. Both are abnormal variations at this age. Furthermore, there is no question of race suicide. He is the father of three young children — two boys and a girl. He has a fair prospect of more of each kind.

I have selected this typical English testator because in many ways he approximates a constantly increasing class of typical testators in this country. In fact, here, the very rich being cut off from anything like a "strict settlement" may with some modifications properly resort to the form which I am about to introduce you to, while those who have a fortune "in trade" now usually hold it in the shape of stock in a corporation which may be handled by trustees apart from the business itself. In fact, I was in some doubt for a time whether to entitle this paper "The will of an Englishman of moderate fortune" or "The will of an American gentleman."

The general outline of the will under these circumstances has long since been settled. After the gift of specific legacies, the wife shall have an interest in the whole of the residue for her life or until she marries again, and after her death or re-marriage, the whole property shall be divided equally among the children of the marriage. Nothing could be more direct and simple than this, and yet the infinite care and attention to detail with

[1] Page 112.

which the English conveyancers have, since the time of Charles the Second, worked out this typical form of will makes it to-day a wonder to behold.

Suppose, then, I attempt to introduce you to this perfection of detail.

The first care of the draughtsman is to allow the testator, — as a great concession I assure you, — to bequeath as he pleases a few specific chattels — a watch to one, a picture to another, a library to a third. There is only one restriction upon the testator here. He must make his gifts absolute. He must not attempt any gifts of chattels to one for life and then to another. Such gifts are valid, but extremely annoying to both parties interested, and unwise from other points of view.

If the testator has any poor female relative or relatives whom he wishes to provide for he may then charge upon his estate or direct the purchase of a small annuity for their benefit.

At this point the personal choice or preference of the testator largely, if not entirely, ceases.

The conveyancer will next provide, as a matter of course, for the gift of household effects to the widow.

Here some difficulties in the use of language must be faced. It is of course impracticable to put into the will an inventory of all the household effects which are to go to the widow, for they might all wear out and be replaced by the time of the testator's death. General descriptive language must be employed. The articles must be described with reference to their existence at a certain locality, or without reference to locality. The former is a very usual method and the one adopted in the will of the late Marshall Field. In either case, however, difficulties arise. If the clause be drafted so as to leave all the residue of the testator's effects which shall be in and about a certain dwelling at the time of his death, he may include much more than he intends — viz., money or securities for money, bonds, stocks, and other personal property of that nature in a private safe upon the premises. It is well, therefore, after a general gift of "all my wines, consumable stores, household furniture, household linen, plate, china, books, and other effects which shall be in and about my house at ," to except "money, securities for money, stocks, evidences of indebtedness, and documents of title." In the will of the late Marshall Field this same object was effected by the following enumeration: "Furnishings and equipments of every kind, including furniture, paintings, library, bric-a-brac, horses, carriages, and all other personal property which may be used in connection with said residence at the date of my death." If the testator does not restrict the gift to articles at a given locality, he must still use some general word such as "effects." The difficulty here may be that there will be included too much — viz., the whole personal estate of money, stocks, bonds, notes, etc. The general words must, therefore, be selected with the greatest care. Time and experience have suggested in the usual case the following:

"All my household furniture, pictures of every description, plate, plated articles, linen, china, glass, musical instruments, books, watches, jewelry and trinkets, horses and carriages and the equipage and furniture belonging thereto, cows, poultry, and other live stock, plants in pots, gardening and husbandry implements, domestic animals, fuel, housekeeping provisions and other consumable stores, and all other household effects not hereinbefore bequeathed, which shall belong to me at the time of my death. And I declare that the last mentioned bequest shall comprise all effects, though not strictly household, which are applicable to personal or domestic use, ornament, occupation or diversion and are not hereinbefore specifically bequeathed."

The usual practice of English conveyancers is clearly to make the gift of effects to the wife an absolute one. It must not be a gift to her for life. Such a gift was valid enough but the practical inconveniences of it were too great. In the first place, the

subject matter of the gift is to a very considerable extent perishable and wearing out, so that the one ultimately entitled cannot in the usual course expect to enjoy it. This gives rise to the requirement that effects of a certain character must be sold, the proceeds invested, and the income only used by the widow during her life. Difficult and troublesome questions arise as to what articles must be treated in this way. Finally, there is always present the opportunity of friction between the life tenant and those entitled afterwards. If the testator insisted upon the widow having a life estate only in these chattels, it was customary to bequeath all such as were of a permanent character and not likely to wear out or disappear in the using to trustees to permit the widow to use them during her life or widowhood.[1] It is a matter of remark, therefore, that in the will of the late Marshall Field the gift of household effects to the widow includes all sorts of effects, both those likely to be consumed in the using and those of a permanent character, and creates in the widow an interest for life, without the intervention of trustees.

The final and principal concern of the draughtsman is the disposal of the residuary estate. This, of course, includes the bulk of the testator's property, real and personal.

The first step is to devise all the rest and residue of the estate, real and personal, to trustees who are named, and to expressly provide what powers they shall have. Here experience has constantly added provisions which enable those administering the estate to proceed with the least possible inconvenience. The trustees represent the estate to the outside world. Whatever acts the holder of such a property must ordinarily execute in its profitable administration the trustee must be given express power to perform. There must be power to lease, to sell, to exchange, to mortgage, to pay off encumberances, and to make a voluntary partition of lands which the testator may hold in common with others. In their relation to the trust estate the trustees must be given directions as to the investments to be allowed. The English conveyancers had this all very precisely worked out. There were three different clauses. From these the draughtsman took his choice according to the exigencies of the situation. There was a clause for "Restricted Range," one for "Fair Range," and a third which gave a "Comprehensive Range." There then must be a power to vary investments to buy land and sell the same again. It was wise, also, to confer power upon the trustees to apply the proceeds of any sale of real estate to pay off encumbrances upon the property sold or any other property in the trust estate. Powers to partition the trust premises among the beneficiaries at the time of distribution and to allow the widow to reside in a particular residence of the testator during the time when she was entitled to the income from all or any part of the trust estate by the terms thereof, without paying rent, were appropriate and advisable.

All of these powers are properly common to English and American wills. There was, however, an almost invariable accompaniment of the English will which has been usually dropped in this country. The English draughtsman always started his gift to trustees with an explicit direction that they were to at once convert all the residue into money and invest the same. This, of course, from a practical point of view, was most inexpedient, for, as the most ordinary experience indicates, no estate can be at once converted into money without great loss. We find the English draughtsman, apparently, at once stultifying himself by inserting a proviso that the trustee may postpone conversion so long as such postponement may be advantageous in their opinion to the estate. What then is the object of the clause which directs an immediate conversion of the trust estate? It is this: It has

[1] Davidson's Precedents (1880) Vol. 4, p. 67.

the effect of at once giving the whole estate the character of personalty so far as the beneficiaries are concerned. This was advisable because the rules of law regarding the descent of property, and some regarding the construction of wills, were different in the case of realty and personalty. Thus, if under any of the subsequent provisions a child of the testator should become entitled and should die before the trust terminated, the descent of the real estate would be to his eldest son or the eldest brother, while personalty would go to all his children, or to all his brothers and sisters equally. This latter was always the result desired. It was provided for very neatly, for the whole will by a direction contained in only a half-dozen words, and never, under any circumstances intended or allowed to occur, that the whole residuary estate be immediately converted into money.

It is settled that the income from the trust estate shall be paid over to the widow from the testator's death.

It is, of course, expected that she will support, maintain, and educate the children out of her income so long as they remain minors, yet the conveyancer, who left nothing to chance, gave the children a legal right to such support, maintenance, and education, by charging the widow's income with the expense of such as she in her discretion might deem it proper they should have.

The principal question, however, which arises in regard to the trust for the widow is: How long shall the income be paid over to her? Shall it be during the remainder of her life, or merely during her widowhood, *i.e.*, so long as she remains unmarried? For many generations the English conveyancers seem to have had but one opinion about this — that the widow's interest should terminate with her second marriage. It is believed that in the hands of a dispassionate and unsentimental adviser, no other answer is possible. There can be only two results of continuing the whole income to the wife after her second marriage. Either she will have more than she properly needs or the income will make up the deficiency in her second husband's income. In either event there is a distinct injustice in continuing to deprive the children who are ultimately to take. It is believed that the somewhat usual American practice of giving the income to the wife so long as she lives results in the testator's sacrificing his children to avoid the appearance of spite against his widow for marrying again.

The English form books usually provide for a special power in the widow to appoint such part or all of the residuary estate among her children as she shall see fit. In drafting such a clause some care is required. The draughtsman must make it clear that the widow may appoint to one or more exclusively of the others, otherwise an appointment of the whole interest which leaves not any one will be wholly void. The power must be to appoint not only to children but to more remote issue, and in such manner and form as the widow shall deem best.

An abuse of the power by the widow, which apparently was not unknown in practice, gave rise to a further clause. A widow with several young and delicate children, who was not satisfied with the income merely, and who desired to obtain some of the capital of the estate might resort to this expedient. She might appoint absolutely to a child who was practically certain not to live to his majority. If, then, the child died under age the widow would inherit a portion at least of the child's interest and might call upon the trustees to pay it over to her. To circumvent this, the following rather innocent looking proviso was added to the clause creating power:

"But I expressly declare that no child or children or other issue of mine shall take or acquire any descendible or transmissible estate or interest, through or by virtue of any such appointment as aforesaid, until such appointee or appointees respectively

shall have attained the age or respective ages of twenty-one years or shall marry."

The existence in the will of a power in the widow made necessary, at a later stage of the will, what is known as a "hotch pot clause." According to the usual course, the widow appointed something to the daughters when they married, or to the sons when they reached twenty-one or twenty-five. It not unfrequently happened, therefore, that out of a family, say of four, the first three had received appointments at the death of the widow. Let us suppose that these appointments had amounted to £4000 apiece and that at the death of the widow there is a balance of £12000 in the estate. This latter sum must be divided among all the four children so that the three who have already recieved appointments will have altogether £7000 apiece, while the youngest child must be satisfied with only £3000. This is neither what the testator intended nor as the widow planned. It was an accident merely that the youngest did not receive an equal share by appointment with all the others. In that case the balance would have been equally divided and all would have shared equally. The hotch pot clause was designed, under the exigencies described, to effect this result as nearly as possible. It, therefore, provided that no one who took by appointment should (in the absence of an express direction in the appointment to the contrary) share in the unappointed part without bringing his appointed share into the general fund, — that is, into *hotch pot* — to be distributed as in default of appointment.

As to the expediency in general of giving the widow this power of appointment, opinions may differ. It's use may be most salutary. It enables the widow to attain control over the children. She may alter the disposition according as events turn out. If the daughters marry well their shares may be reduced. If a son is wild and stays wild and unregenerate his portion may be cut down to a life estate, with clauses which will save the estate from the sons creditors and provide for his wife and children. On the other hand, if the testator's children are fairly normal individuals, but the widow is inclined to follow her own judgment and unused to relying upon the advice of a well tried family solicitor, or proves flighty or partial, or lives to a great age and falls under the influence of some single child who lives with her when all the others have moved away, great disturbance in the family may result from the existence of the power. Suspicions, bitternesses, and strife may be engendered between brothers and sisters, and if by any chance the power be actually exercised otherwise than to make an equal division, the whole estate is likely to be thrown into the courts by the disappointed ones, to the loss and misfortune of everybody. The American tendency has been, I think, to omit the power unless there is some very likely reason for it. When it appears it will not infrequently be found to have been carelessly inserted. As a consequence the existence of the power in American wills seems often to turn out badly.

The only remaining beneficial interest to be inserted is the gift in default of appointment to the children of the testator after the termination of the widow's interest.

The testator is apt to think of only a simple direct gift to his children. The moment, however, that he is reminded that his family is a young and growing one, it will occur to him that the trust must not terminate for each child till he or she comes of age. Perhaps a moment's further reflection causes him to desire that it shall not end for the different shares except as the children reach twenty-five. A few questions will develop that should any of the children die under twenty-five, their children, if any, are to take the parent's share. If such deceased children of the testator die before reaching twenty-five without children then the other children are to divide

the share of the deceased child. Our problem, then, is to effect these desires. Here perhaps the nicest point of all in technique arises.

Scientific modern conveyancing recognizes that the testator's objects may be accomplished in just two ways. These must be kept absolutely distinct and separate. You must keep to the one and let the other absolutely alone. Alas for the will where this is not done, or where it is difficult to tell which mode has been adopted!

The first possible method is to make a direct gift to all the children to take effect immediately upon the death or re-marriage of the widow. That will give each child what is known as a vested interest. Each will have a share at once upon the testator's death, subject to the provision for the widow. Then there will be a clause simply postponing the termination of the trust and the payment over of the principal of each share till the beneficiary of that share reaches twenty-five. If the will stopped here each child would have full power to alienate after it came of age by deed or will, and upon his or her death intestate at any time the share would descend to his or her next of kin. If, then, any child of the testator dies under twenty-five leaving children there is no reason why the child's rights of property and alienation should be interfered with, for he will in the natural course alienate to his children by will, or the share will descend to them. The deceased child's portion may, therefore, be left to descend or to pass by will. No further provision is necessary to take care of the contingency of the testator's child dying under twenty-five leaving issue. On the other hand, if a child of the testator dies without leaving issue, it is proper, consistently with the general scheme, that the share of the child so dying be not subject to his will or to descent from him, but that it surely go over to the other brothers and sisters. This required a special provision known as a clause of "accruer." Originally this was very simply worded. It declared that "in case any of my said children shall die without leaving issue surviving, then the share hereinbefore given to the child so dying shall go to and accrue to my other children in equal shares as tenants in common." In 1735 this case, however, arose.[1] One of the testator's three children died without leaving issue. The share of that child then accrued to the other two. Then one of the remaining two died without leaving issue. His original share accrued to the survivor. But the question arose what should become of the one-sixth which had already accrued to the second deceased child from the first. That, it appeared, was not covered by the clause of accruer in the form just indicated. This one-sixth, therefore, passed to the deceased child's next of kin which included his father. Ever since that time the clause of accruer, drawn by a competent draughtsman, contains the additional clause: "Including any further share or shares accruing to him under this present clause;" so that the whole reads:

"In case any of my said children shall die without leaving issue surviving them the share hereinbefore given to the child so dying, *including any further share or shares accruing under this present clause* shall go and accrue to my other children."

The second plan for the gift to the testator's children is to describe the class who are to take and to make it, as far as possible, contingent upon each member of the class reaching the age of twenty-five — the time of distribution. According to this plan the devise will read:

"To such child or children of mine as shall survive me and attain the age of twenty-five, and the child or children of any any child or children of mine who shall be dead at my death or shall die under the age of twenty-five."

If the clause stopped here it would allow each of the ten children of a deceased child

[1] Rudge *v.* Barker, Cas. Temp. Talb. 124, 5 Gray's Cases on Property, 249.

of the testator to share equally with each of the testator's own children. This, of course, is not at all desired, or proper, so the following is added:

"Provided that the child or children collectively of any child of mine dead at my death or dying under the age of twenty-five shall take only such share as his, her, or their parent would have taken, if such parent had lived to take a vested interest."

Both these plans — that of a vested gift with a clause of accruer and that of a contingent gift — accomplish precisely the same result, but by quite a different series of clauses. Imagine, then, the hopeless confusion which will result if there is uncertainty as to which one has been adopted, or if the clauses belonging to one plan have been mixed with clauses belonging to the other. Yet this is apt to happen, and has happened constantly. In fact, I suppose there has been no more fruitful source of litigation regarding the construction of wills than just that sort of difficulty.

There can no longer be said to be any doubt about which plan the English conveyancers prefer. During the last seventy-five years the evolution of opinion has been entirely in one direction. In the second edition of Bythewood and Jarmen, published in 1833, one finds much prominence given to the first plan where the children took vested interests and there was a clause of accruer. I am inclined to think that this was the first choice of the conveyancers at that time. Subsequent experience, however, has condemned it as the more clumsy method of effecting the desired results. In the last edition of Bythewood's Conveyancing (dated 1889) it is almost entirely dropped and the learned editor declares[1] that "the more usual and better course is to suspend the vesting till" the period of distribution arrives, *i.e.*, in our case when the legatees reach twenty-five.

Of course, with the discarding of the first plan of leaving vested interests in the children, its development has somewhat ceased, while the more acceptable plan of giving contingent interests we find more and more carefully worked out. You will observe that while the gift to the children of the testator was made contingent on their reaching twenty-five, the gift to the child of any deceased child of the testator is made to it absolutely without requiring it to attain any particular age. The reason for this is that a gift to the child of any deceased child of the testator on such grandchild reaching the age of twenty-five would be in violation of the Rule against Perpetuities and so void. That rule requires that the gift to the grandchildren must be so limited that it is sure to take effect within twenty-one years after the death of the widow and children of the testator. If, therefore, the grandchildren — *i.e.*, children of a deceased child of the testator — were not allowed to take till they reached twenty-five that might be more than twenty-one years after the death of the widow and all the testator's children. It would then be void. Nevertheless, the general plan requires that all gifts be postponed, if possible, till the legatee reaches twenty-five. The ingenuity of the more recent conveyancers has devised a clause which does the work so simply and effectively that you are surprised into an indescribable admiration for it. It is this:

"*Provided always:* That if any grandchild or grandchildren of mine should attain the age of twenty-one years before the expiration of twenty-one years from the time of the death of the survivor of my children and more remote issue (if any) living at the time of my death, then the vesting of the share of each such grandchild shall be postponed to the expiration of such time of twenty-one years, or until the attainment by such respective grandchild to the age of twenty-five years, which shall first happen."

Then, in order that there may be no possible gap in the limitations to the issue of the testator, it is provided also,

[1] Page 891, vol. 7.

"that if any grandchild of mine entitled or who may become entitled to a share of the trust estate under the foregoing limitation shall die without having attained a vested interest in a share of the trust estate, leaving issue surviving him or her, then and in such case the share or shares hereinbefore limited to such grandchild shall be held in trust for the absolute use and benefit of his or her child or children living at the death of such grandchild and the child or children then living of any such child or children then dead, and if more than one in equal shares *per stirpes.*"

Finally, the testator concludes,

"In case I should have no child or more remote issue who under the trusts hereinbefore contained shall live to acquire a vested interest in my said residuary estate, then it is my will that the whole of said residuary estate shall after the death or re-marriage of my said widow be transferred to" —

Well, to whom? The draughtsman doesn't care. What, then, does the testator desire? Shall it be to a favorite charity, or to those who would be his next of kin had he died at that time, or shall it be half to one and half to the other as in the case of the will of the late founder of the Newberry Library of Chicago?

Whichever plan be adopted — the one where the gift is vested or the one where it is contingent — the provision for the children and other issue is very incomplete. As none are to take till they reach twenty-five (except in case of great-grandchildren) what is to happen between the termination of the widow's interest and that time? Obviously the income upon the vested or expectant share of each child or grandchild is to be used for its maintenance and education. This is accomplished by providing generally that during the time that the income of all or any part of the trust estate shall not be payable to any person for life or otherwise under the trusts created and in respect to which the time shall not have come for a final distribution according to the terms of the trusts,

"the said trustees shall apply the whole, or such part of it as to them or him shall seem best, of the income thereof for or towards the maintenance and education of such person or persons under the age prescribed for the payment of the principal of or the vesting of a share or interest in the trust estate until he or she or they shall become entitled to the transfer of the principal of or acquire a vested interest therein under any of the trusts, powers, and provisions hereinbefore contained; and the trustees may themselves so pay or apply the income or any part thereof or may pay the same to the parent or guardian or guardians of such person or persons who have not attained the age prescribed for the payment of the principal of or the vesting of a share or interest in the trust estate for the purposes aforesaid, without seeing to the application thereof."

Suppose then that the trustees cannot spend all the income of the vested or expectant share upon some one or more of the children or grandchildren, what shall be done with the balance? If the share is vested then the income would at least be accumulated and paid over when the time for distribution arrives. On the other hand, if the gift be contingent, the trustees would, if nothing more were said, be obliged to add the unexpended portion to the whole estate, so that it would ultimately be divided equally among all who took. That would be saving from Peter to pay Paul. The following clause should, therefore, be added where the interests are contingent:

"And so much of any of the income arising from the presumptive or expectant share of each such child, grandchild, or other issue, respectively, under the trusts hereinbefore contained, as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof shall be added to the principal of the share whence the sum shall have arisen; with power nevertheless in the said trustees, if they shall deem it expedient so to do to apply such accumulated fund or any part of the same in and for the maintenance and education of the child or children from whose presumptive or expectant share or shares, respectively, the same may have arisen, during any sub-

sequent period while the trusts herein contained shall continue to exist in regard to the share of any child for whose benefit it is desired to apply the accumulation aforesaid."

Whether the interests are vested or contingent, it may happen in certain exigencies that some one or more children may require more than the income from their vested or expectant share, — as in the case of extraordinary illness, or in taking advantage of educational opportunities involving unusual expense. To be able to meet this contingency the trustees should be given power with the consent of the wife during the time she is entitled to the income,

"to apply any part of the principal of the vested,[1] presumptive, or expectant share of any child, grandchild, or other issue, under the trusts hereinbefore contained, towards the maintenance and education of such child, grandchild, or other issue, in such manner as the said trustees shall deem proper."

This power may, of course, and frequently does, go farther and allow the trustees to make advancements to sons to enable them to purchase the shares of a business, a commission in the army, or a living in the church, or any purpose in the discretion of the trustees.

The balance of the will contains some routine clauses, declaring that the gift to the wife shall be in lieu of all interest which the law allows her, providing a method of supplying the place of a trustee who dies or becomes incapable or refuses to act, and naming executors.

This, then, as Davidson, in his Precedents, says, is an outline "of a will of the simplest and most ordinary description." It is nothing but a gift to the widow for life or during widowhood, and then to the children. It is what testators do or are planning for every day. Almost anything, however, is more easily conceivable than that the layman who sits down to draft such a testament should ever begin to perceive the perfection of form and detail to which an instrument on these simple lines can be brought.

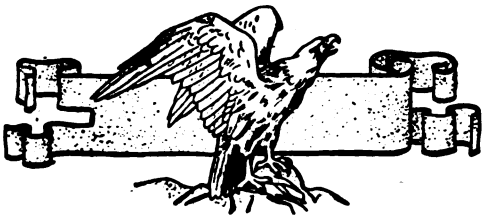
One wonders why there was any demand for all this perfection of detail. It was doubtless expensive, and yet any conveyancer might safely admit that in no case could all the provisions be operative, and that in a considerable proportion of cases a very substantial number of the clauses would never have any effect at all. Unless his family is rather larger than usual, or he has married rather late, the testator may fairly expect to live till his children have all reached twenty-five. Those children, if any, who die under twenty-five, will probably not have been married or have had children which are left surviving. The testator's wife, if not dead before him, will very likely die a few years after him. At that time, therefore, there must be an immediate distribution of the whole estate to adults. It will be in a proportion of cases only that the family history will be such as to call for the application of many of the provisions inserted. Why, then, not take a chance and have a will expressing the bare essentials of a gift to the wife and then to the children with a simple trusteeship and power of sale in the trustees?

All that can be said is that the education, tradition, and temper of the English gentleman of even moderate fortune must have forbidden the taking of any chances. He must have had a profound respect for that which is exactly correct. It must have been that he would rather have what the traditions of his kind dictated than what he might personally want. His demands no doubt have created — certainly they have

[1] The word "vested" was necessary where the wife took for her life because then after her second marriage, she was not able to relinquish her life interest to a child over twenty-five having a vested interest, who required an advancement. If the gift be to the widow during her widowhood only, the word vested may properly be omitted. (See Davidson's Precedents, Vol. 3, p. 44. note 10, (ed. of 1880).)

been met — by a professional class who have thought for him, preserved the traditions of his class, and perhaps his family, from generation to generation, and whose ideal is perfection and care of detail. Generations of dealing between the two has developed a condition where the one furnishes that which is dictated by the experiments and mistakes of the past, and the other submits its own wishes to the dictates of the former. Both, in their way, worship at the shrine of evolutionary perfection. The result is that the testator obtains not what he thinks he wants, nor what his solicitor thinks is best for him, but what generations of a trained, experienced, and skillful professional class have discovered is best. With a will drawn according to the ideal which has been thus wrought out, the question of testamentary disposition may in most cases safely be dismissed by the testator from his mind during the remainder of his life.

CHICAGO, ILL., March, 1907.



THE NEW CENTRAL CRIMINAL COURTS

By Godfrey Pinkerton

THIS large pile of buildings, which occupies the site of the Old Newgate Prison, has been complete for some little time awaiting its formal opening by King Edward on February 27th.

The old Sessions House (still standing and in use) had become inadequate for its purpose, while the prison with its arrangements based on the criminal law of the eighteenth century, although modified and improved, was no longer in accordance with modern ideas. In the year 1900 therefore the Corporation of the City of London invited a limited number of architects to prepare designs, in competition, for new buildings. The winning design was that of Mr. E. W. Mountford and the work has been carried out by him. Although a necessity, the destruction of the old prison was greatly to be deplored from an architectural point of view. Completed about 1782 from the designs of George Dance, the younger one of the first four architect members of the Royal Academy of Arts at its foundation in 1768, it had for long been recognized as a supreme example of a building, which, by the skillful ordering of few and simple parts, clearly and forcibly expressed the purpose for which it was built, and at the same time satisfied every requirement of good architecture. The disappearance of such buildings, all too rare, is a loss to any city. The illustration is of the main façade, 300 feet long, in the

OLD NEWGATE PRISON, OLD BAILEY, LONDON

center of which was the gaoler's house. The prison derived its name from one of the old city gates which stood near it, made in the reign of King Henry I or Stephen, about the beginning of the twelfth century, and called the New Gate. Before this there was only one entrance in the western wall of the city, namely the Lud Gate. Newgate became a prison for criminals as early as the time of King John (A.D. 1199) if not before, and there is extant a mandate of the third year of Henry III to the sheriffs of London ordering them to repair the gaol of Newgate. All through the centuries down to the time of the building whose loss we have been regretting the prison was a grim place. Dirt, bad water, overcrowding and want of air produced the disease called gaol fever, of which prisoners died wholesale. As late as about 1750, two judges, the Lord Mayor, several of the jury and others to the number of sixty died of gaol fever. It was in consequence of this and the danger caused to the neighborhood that the city commissioned George Dance to provide a new and more sanitary prison. It was almost completed when the London riots of 1780 broke out and the building was stormed by an infuriated mob, who burned everything combustible inside and so seriously damaged the structure that an extra expenditure of £30,000 was required to reinstate it.

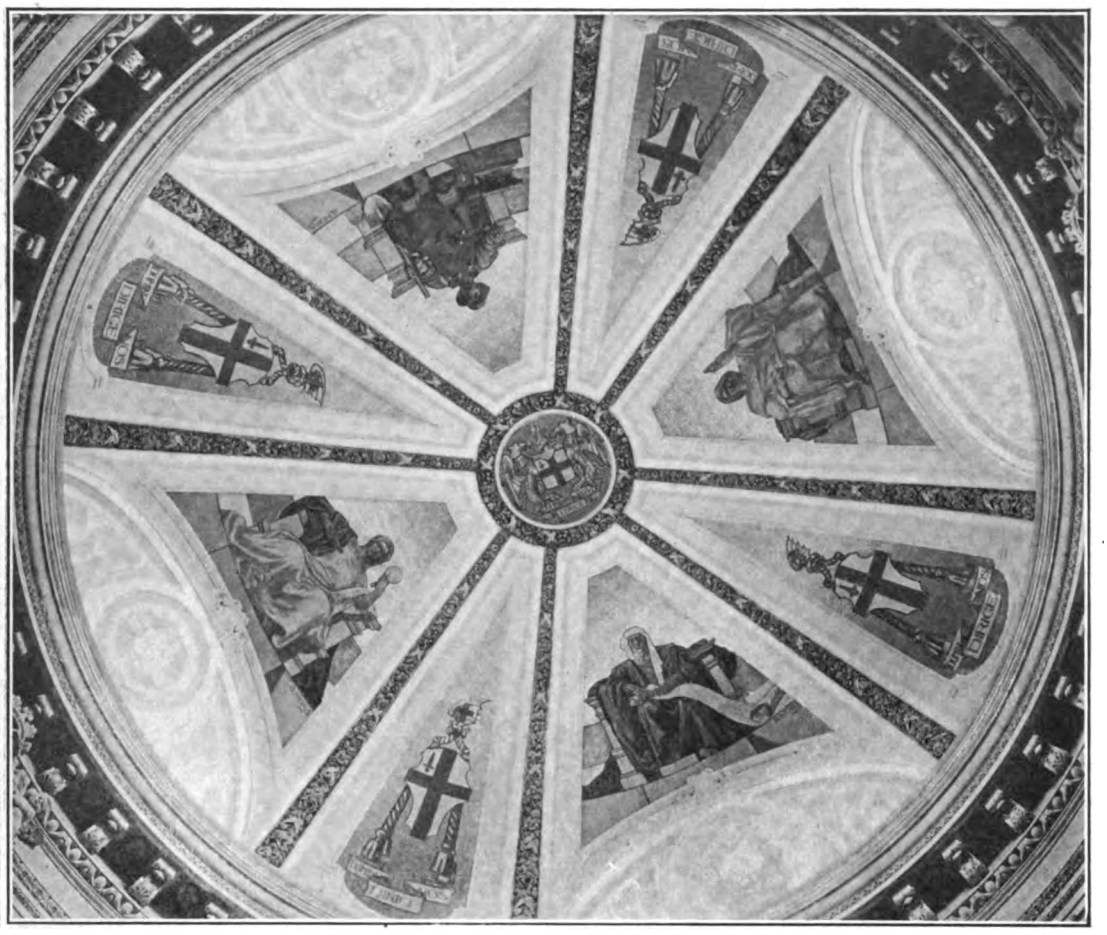
STAIRCASE LEADING TO GREAT HALL

A prison forms no part of the new structure which is wholly given up to the administration of the law, and the prisoners convicted in its courts will serve their sentences elsewhere. There is, however, a large block of cells four stories in height in which persons awaiting or during their trial will be detained. These cells are completely cut off from any other part of the building,

the only means of intercommunication being the stairs leading up into the docks of each court.

The general view of the exterior will show the style and character of the new building. The façades are of Portland stone; the cupola is covered with copper and crowned

arches into two aisles. The principal staircase, facing the entrance, leads up from here to the great hall on the first floor. This is the chief feature of the interior, and much thought and labor have been bestowed on its decorations, which are unusually elaborate for a building of its kind in England.



DECORATIONS OF THE DOME

by a figure of Justice in gilded bronze, modeled by Mr. Pomeroy, the sculptor.

The principal entrance, over which is a sculptured group of three figures, is closed by heavy gates of hammered iron, through which is entered the lower hall, extending the full length of the building. This has a wide central area, and on either side the remaining space is divided by columns and

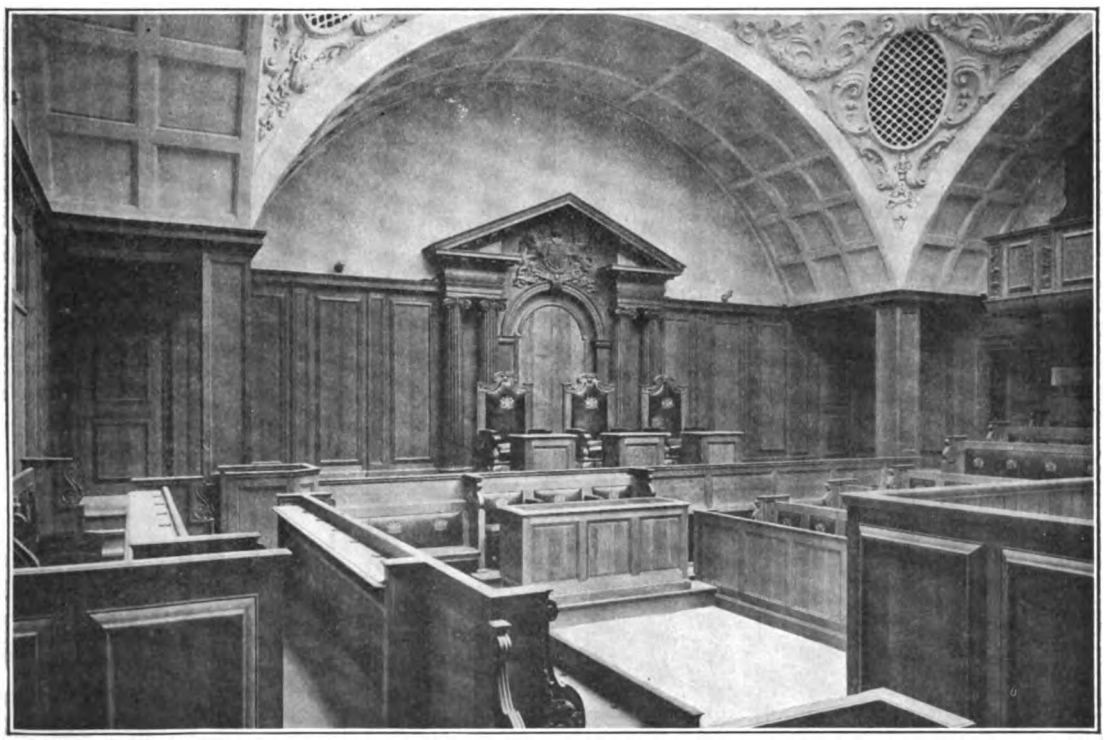
Its use is for the meeting and consultation between counsel, solicitors and their clients, and other people having business in the courts with which it communicates. Over the center part is the dome, panelled out into four sections and decorated with figure subjects in mosaic, from designs by Mr. Gerald Moira, symbolical of Truth, Wisdom, Knowledge, and Labor. Below the cornice

VIEW OF PART OF THE GREAT HALL—FIRST FLOOR

which runs round the springing of the dome, are four great arches, the spaces between which are filled with bas-reliefs by Mr. Pomeroy, symbolizing Justice, Prudence, Mercy, and Charity.

On either side of the dome the hall is

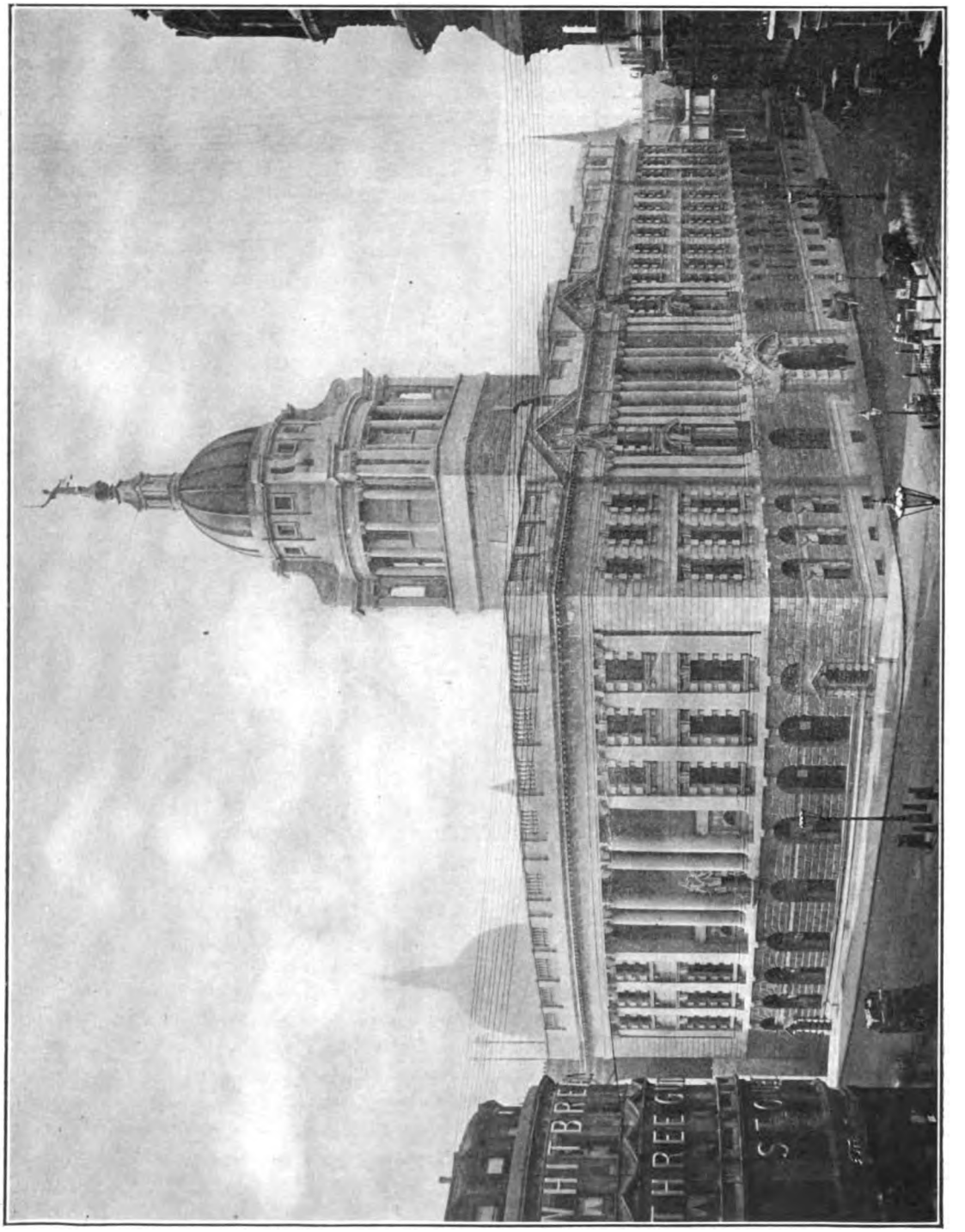
vaulted at a lower level, and three of the large turrets, shown in our view, have been filled with decorative paintings by Mr. Moira, representing Moses and King Alfred as great lawgivers and Homage to Justice. On the other side is a painting by Sir W. Richmond of a decorative landscape with a group of nude figures intended to represent the Golden Age, when, we suppose, there was, or will be, no need of criminal law. The walls below are veneered with Pavonazza marble, with borders of Cippolino. The floor is also of marble, of simple design and large in scale. At each end of the great hall are two courts approached by corridors. The fittings of these courts are of oak, solid and simple in design, but with enough of architectural form to give them dignity. All the numerous rooms in connection with the courts are also fitted up in oak. The Lord Mayor and the judges have a separate stair and corridor giving access to their private rooms which adjoin the courts.



INTERIOR VIEW OF A COURT
(Looking Towards the Judge's Bench)

The accommodation for witnesses is ample, including a large general room on the ground floor for witnesses to wait in, and rooms on the court level for those required in cases being heard. We give an interior view of one of the courts.

London, Eng., February, 1907.



THE NEW CENTRAL CRIMINAL COURTS—LONDON

THE OPENING OF THE CENTRAL CRIMINAL COURT

By Percy A. Atherton

AS the chief Criminal Court of England, the Old Bailey possessed a long and a remarkable history, but Wednesday the twenty-seventh of February it passed forever, giving way to the new building of the Central Criminal Court recently erected on the site of Newgate Prison.

The opening of this new Court House was made of especial significance by the presence of the King and Queen. The learned Blackstone says in his Commentaries, "The Sovereign is considered in domestic affairs as the fountain of justice and general conservator of the peace of the Kingdom." It was, therefore, peculiarly fitting that this new home of a court, so far reaching in its influence, should be opened by the Sovereign in person, in the presence of the high officers of Church and State, and that the Sovereign should thus publicly dedicate it to the administration of Justice and the preservation of the King's Peace.

The ceremony was to take place at twelve noon, but long before that time the streets through which the royal procession was to pass were crowded with people eager to witness the entry of the King into the city. From Temple Bar down through Ludgate Circus and up to Old Bailey, the Strand was gayly decorated and freshly strewn with sand. Shortly before twelve the royal procession, escorted by the Horse Guards White, drew up at Temple Bar. Here the Lord Mayor bearing the Pearl Sword, accompanied by the Sheriffs and the Remembrancer, awaited the King's arrival. As the royal coach drew up, the Lord Mayor advanced and tendered the Pearl Sword to the King, who smilingly returned it. The Lord Mayor and the sheriffs then entered their coaches and preceded their Majesties to the new building. An interesting touch was given by the guard of honor of one hundred rank and file, with the King's color and band, from the Honorable Artillery Company, the parent organization of the Boston Ancient and Honorable Artillery Company. Crowded about the entrance to the new building was a dense mass of people that recalled one's Dickens, and made one dream of the Gordon rioters and of Barnaby Rudge.

On arriving at the new building the Lord Mayor, carrying the Pearl Sword, received the King and Queen upon the steps. The proceedings within the building were short but of great dignity, and conducted with an impressiveness and with a stateliness of ceremonial fitting to a court of justice. The ceremony itself was of two parts, the first in the lower hall on the ground floor. Here near an end of the hall a low dais had been erected for the King and Queen. Upon it rested two Gothic chairs, and over it swung a canopy in gold and crimson; behind the chairs on white tapestry hung the Royal Arms. To the right of the King were grouped members of the Common Council in robes of blue; to the left distinguished guests of the Corporation; facing the dais were ladies and gentlemen, guests of the city. A bit of color was given by four trumpeters from the 2d Life Guards, who later blew a blast when the King declared the building opened. The scene in the lower hall, when the King and Queen entered and took their places upon the dais, was of rare brilliancy and color; the uniforms of the officers, the robes of the Archbishop of Canterbury and the Bishop of London, the scarlet gowns of the City Aldermen, all set off by the white walls and marble pillars, combined to make a scene long to be remembered.

As the King and Queen entered, they were preceded by the Lord Mayor bearing the Pearl Sword upright. Not the least inter-

esting figure about the dais was the Lord Chief Justice of England wearing his scarlet and ermine robes and chain of gold. After the King and Queen were seated, a short address was read by the Recorder, expressing the loyalty and devotion of the city of London, and pointing out the age and importance of the court. The King then read in reply an address indicating the ideals to be maintained in the new building. Its closing sentences indicate the high purpose for which the building was planned.

"This noble edifice, will, I am sure, amply fulfill its high purpose by giving convenience and dignity to the administration of justice in the interests, not only of the inhabitants of its immediate district, but of the vast urban population that has accumulated in the adjacent counties. The old buildings which were replaced were, however, of high historical interest, for they witnessed during the century of their existence a change in the administration of criminal justice far greater than has taken place in any preceding century. The barbarous penal code, which was deemed necessary one hundred years ago, has gradually been replaced in the progress towards a higher civilization, by laws breathing a more humane spirit and aiming at a nobler purpose. It is well that crime should be punished, but it is better that criminals should be reformed. Under the present laws the mercy shown to first offenders is, I am well assured, often the means of reshaping their lives; and many persons, especially children and young offenders, who, under the old system might have become hardened criminals, are now saved from a life of crime and converted into useful citizens. Still more remains to be accomplished in the direction of reclaiming those who have fallen into crime, and I look with confidence to those who will administer justice in this building to have continual regard to the hope of reform in the criminal, and to maintain and strengthen in their new home those noble traditions which have gathered round the high position they occupy. I am well assured that the independence and learning of the judges, supported by the integrity and ability of the other members of the profession of the law, will prove in the future as they have in the past, the safeguard of order, right conduct, and true humanity."

At the conclusion of the King's address the Lord Mayor advanced and asked the King's acceptance of a gold key to the building; then, after a prayer by the Archbishop of Canterbury, the King declared the building open, and the trumpeters sounded a royal salute. After the presentation to the King of certain distinguished personages, the Common Sergeant was summoned by the Lord Chamberlain to receive the honor of knighthood, — a very picturesque ceremony. As Mr. Bosanquet advanced he knelt before the King, who, taking a sword from one of the members of his suite, touched him lightly on each shoulder.

The Lord Chamberlain then announced, "Mr. Charles Williams to receive the honor of knighthood," but no one responded; and after a slight and rather embarrassing pause it was discovered that a mistake had been made, and that Mr. Charles W. Mathews, the leader of the Old Bailey Bar, had been intended for the honor. The procession, however, immediately formed and left the hall; later, after returning from the ceremony in the upper court room, the knighthood was duly conferred upon Mr. Mathews.

From the lower hall the King and Queen ascended to the principal court, where were gathered judges, barristers, and solicitors, the judges in their full judicial costume of scarlet and ermine, and the barristers in their gowns and wigs. As the King and Queen entered the court room they were received by the Lord Chief Justice, who, in the absence of the Lord Chancellor, delivered a short address of welcome. The King and Queen then rose, bowed to the judges and the Bar, and escorted by the Lord Chief Justice and the Lord Mayor left the build-

ing. Curiously enough, though the court room was all too small to hold the members of the Bar who desired to be present, the prisoners' dock remained quite deserted, no one, apparently, cared to be the first to occupy it.

Outside the building the royal procession was again formed, and the return to Buckingham Palace made by way of the crowded Strand.

The Central Criminal Court exercises a wide jurisdiction, covering the city of London, the whole of the counties of London and Middlesex, and a considerable portion of the counties of Essex, Surrey, and Kent, in all a population of well over six million people. The present magnificent building will tend to make justice more speedy and in that respect more just. As was well said by the Lord Chief Justice in his address to the King: "The chief characteristic to which I venture to call your attention is the frequency of its sessions, to which in a large measure the satisfactory performance of its duties is due. No less than twelve times a year by statute its sessions are held, the result being that no accused person need remain untried for a period of more than a few weeks."

In brevity, in dignity, and in stateliness it would be hard to imagine a better opening for so great a court.

BOSTON, MASS., March, 1907.

SHOULD FEMALE MURDERERS BE HANGED?

By Maynard Shipley

A LITTLE over a year ago the whole country was aroused over the hanging of Mrs. Mary Rogers, of Vermont, the second woman to be executed for murder in that state. More recently, sentence of death has been passed upon a female fiend in Missouri, and Governor Folk has been besieged with letters from an excited public demanding that her sentence be commuted to what is popularly known as "life imprisonment." Twice has the day of Mrs. Myers' execution been set, and twice has a stay of execution been granted, on one pretext or another. Only a month or two since, to quote another instance, a husband-poisoner in California received the law's supreme sentence, and protests are now being made everywhere against the hanging of a woman, though this was the penalty decreed by a jury which had the right to choose, as an alternative penalty, life imprisonment.[1] The recent State Convention of the W.C.T.U. adopted a resolution asking Governor Pardee to use his best offices for the abolishment of capital punishment, which is obviously a move to prevent the hanging of Mrs. Le Doux. While it is not at all likely that the legislatures of California will abolish the death penalty at this time, it is almost certain that public sentiment in that state will prevent the execution of Mrs. Le Doux, convicted of the cold-blooded murder of her husband.

The question naturally arises, "Whence comes this prejudice in favor of women murderers?" One finds no trace of sentiment in favor of female offenders among the ancients. We know that executions of women were of relatively frequent occurrence among the Assyrians and Egyptians. Women guilty of murder or adultery were ruthlessly exterminated under the Hebraic codes. Under the regal laws of Rome the death penalty was inflicted upon women for merely tasting of wine. Pliny speaks of a certain Roman lady who was starved to death by her family for leaving open a purse in which the keys of the wine cellar were kept. In Greece women offenders were executed by poisoning, or were hurled mercilessly from a high rock. The punishment of either sex for theft of grain was hanging, the culprit being regarded as an expiatory offering to Ceres. In Rome, as late as the second century B.C., unchastity on the part of a sacred virgin of Vesta was punished by burial alive, while her paramour was scourged to death. Incest was punished by precipitation from the Tarpeian Rock. As for female slaves, they had no rights before the law in either Greece or Rome, and might be tortured or killed at the pleasure of the master. Anglo-Saxon law was particularly severe in the punishment of female delinquents. A female slave was burned at the stake even for simple theft, the executioners being mostly women, eighty of whom were required to contribute one log each to feed the flames. The free woman who was convicted of theft fared little better, her punishment consisting of drowning, or of being hurled from a cliff. Under English law, women were publicly hanged, often whipped through the streets, just as were male offenders. The penalty for high or petty treason, which included the murder of master or husband, was death at the stake. As late as 1784, one Mary Bayley was put to the flames for the murder of her husband, and it was not until the thirteenth year of the reign of George III, that this inhuman penalty was abolished. The only favor shown women guilty of capital crimes in England up to that time was the hangman's

[1] There are eleven states in the Union in which the jury fixes punishment of death or imprisonment for life.

privilege of choking the woman to death before igniting the wood. Among the Scandinavians and Teutons, grave criminality on the part of women seems to have been of rare occurrence, but no mercy was shown the adulteress or the murderess. In India, husband-poisoning became so frequent a practice that it was thought necessary to formulate a law that no widow should survive her husband, hence the custom of burning the wife on the funeral pyre of her spouse. It is, perhaps, superfluous to add that Asiatic codes in general have never shown any favor to female assassins.

It is apparent that the prejudice against the execution of women guilty of murder is a comparatively modern sentiment, and, it may be said, is even now, with one exception, strongly exhibited only in the United States and in the Latin countries of Europe and South America. That the prejudice against the hanging of female murderers is most strongly felt among peoples of Latin origin, is probably due, in part, to the fact that it was among the Romanic races that originated the sentimental adoration of women as a sex, a sentimentality which had its origin in events closely identified with the spirit which gave rise to adoration of the Virgin Mary. Thus we find that in most of the Latin countries where the death penalty is still applied at all, it is tacitly understood that sentences of death pronounced upon women will be commuted to imprisonment for not more than twenty years. In the South American republics the fiction of "life imprisonment" is no longer maintained. In Italy, San Marino, Portugal, and Roumania, neither men nor women are subject to the death penalty. Of Latin nations in Europe, France and Spain only have retained the death penalty for women. In both countries the capital crimes are: treason, murder, setting fire to an inhabited edifice, and infanticide. As a matter of fact, however, the execution of a woman in either of these countries is of very rare occurrence; for instance, of the 1,376 women brought to trial for infanticide in France during the decade 1891–1900, not one received sentence of death. During the same period nearly one hundred women were tried for homicide by poisoning, and of those convicted two only were sentenced to the guillotine, and it is well understood that neither of these sentences will ever be carried into effect. The fact that the salary of "Monsieur Paris" (the public hangman) was erased by the budget committee, in taking up the estimates for 1907, points to the early abolition of capital punishment in France for both sexes.

In Spain the death penalty has been gradually dying out since 1867. In 1895, of the culprits sentenced to death, 93 per cent were finally pardoned, that is, their sentences were commuted to penal servitude. Although the law of Spain prescribes the death penalty even for infanticide, the unwritten code is that the *garrote* shall never be brought into requisition in the case of infanticide when committed to hide the mother's shame. Of the thirty-two women sentenced to death for infanticide in 1900, not one has been executed. Even in aggravated cases of premeditated murder, sentences of death passed upon women are almost always commuted to a term of imprisonment, only twenty-two sentences of death passed upon females having been carried out since 1867. Capital sentences are executed in Spain "behind prison walls," according to the code; but the *garrote* is raised so high upon a platform within the prison yard that the performance can be viewed by spectators outside.

In the Latin-American republics, with a few exceptions, the death penalty has either been abolished by statute or is never applied, excepting under martial law. The criminal code of Argentina provides the death penalty for treason and murder in the first degree, but the execution of a woman is prohibited both by law and by public sentiment. In Mexico the death penalty, wherever legalized, applies to both men and

women, but the former are seldom and the latter never executed. In five of the twenty-seven states of Mexico, and in one of the three territories, the penalty of death is legally abolished. Even where the death penalty is nominally in operation, it is very seldom applied. Of two hundred and forty-six applications for Executive clemency in the Federal District, during the twenty-one years, 1881–1902, only twenty-one were refused. The penal code of Guatemala provides the death penalty for five offenses without regard to the sex of the condemned, but no woman has ever been legally executed in the republic, and only one male criminal within fifty years.

One might almost conclude that the death penalty for women is at the present time an essentially Protestant institution, so seldom is it applied in Catholic countries. In Teutonic but Catholic Austria, no offender belonging to the sex of the Virgin is ever regarded as a criminal, no matter how diabolical the nature of the offense committed. Female murderers are always sent to Neudorf, a convent only a few miles from Vienna.

While most of the Catholic clergy are strongly in favor of the death penalty, at least as applied to male murderers, it is nevertheless precisely in Catholic countries that the repugnance to the judicial killing of criminals is strongest. The United States being neither a Latin nor a Catholic country, the question naturally arises, "Why should a purely physical or sexual difference between male and female murderers be set up as a barrier to the administration of justice?" Again: "Why should a female who has proved herself to be devoid of all the moral attributes that normally pertain to 'the gentle sex,' be regarded as outside the provisions of the penal code?" The same argument that is brought forward against the hanging of a woman is applicable also to male criminals.

If the people who cry out against the hanging of female murderers are willing to concede that the deliberate killing of any and all unarmed and properly guarded human beings is out of harmony with the spirit of modern civilization, and inconsistent with our present knowledge of the causes and cure of criminality, then their protests are justifiable. If, on the contrary, they believe in the justice and necessity of capital punishment for male murderers, whether incorrigible or not, it is clear that their protests against the hanging of female murderers are based upon sentimental, rather than upon humane, practical, or scientific grounds, and may, therefore, consistently be ignored by the chief executive, or the board of pardons, of any state.

RENO, NEVADA, March, 1907.

THE GROWTH OF MINING LAW

By R. L. McWilliams

MINES have always occupied a peculiar position in the laws of all countries. This has been due primarily to the peculiar interest with which governments from the earliest times have looked upon the precious metals. The value of those metals both to the people for the purposes of commerce and to the government for its maintenance and defense, early brought about certain restrictions connected with the ownership and operation of all mineral deposits. The control of them was included in the regalia or royal rights, which the king had by virtue of his prerogative.[1] Athens was almost alone in holding that the State had an absolute property in all mines.

Under the theory obtaining in other countries, the king could merely grant the right of working mines to certain persons with proper supervision, reserving the right to a certain percentage of their products.

It was decided in Spain as early as 1343 that mines were so vested in the king that they did not pass in his grant of land though not expressly excepted. The grantee might work the mines but was obliged to turn over two-thirds of the product to the king. Upon the separation of Mexico from Spain the former country retained the same principle. That fact was subsequently the cause of considerable controversy when the rights of the miners in California came up for settlement.

In England the rights of the crown extended only to the precious metals. Blackstone gives as the reason therefor, that those metals were essential for purposes of coinage.[2] We find the reasons for the general rule stated more fully in argument in the early case of The Queen *v.* The Earl of Northumberland, decided in 1568.[1] It was there said that this right belonged to the king, in the first place, because of "the excellency of the thing, for of all things within this realm which the soil produces or yields, gold and silver is the most excellent, and of all persons in the realm the king is, in the eyes of the law, the most excellent." The second reason lay "in the necessity of the thing," as it was one of the principal duties of the king to defend his subjects, and he could not do so without a plentiful supply of treasure, "and therefore inasmuch as God has created mines within this realm as a natural provision of treasure for the defense of this realm, it is reasonable that he who has the government and care of the people whom he cannot defend without treasure, should have the wherewith to defend them." As a final reason was given, the convenience to the subjects in the way of mutual commerce and traffic.

In a later case[2] it was decided that if lead, tin, copper, or iron mines had gold or silver mixed in the ore, though of less value than the other metals, that the king could not hold jointly with the subject, and consequently took the whole. There was, however, a strong dissent, and the popular opinion was so strongly opposed to the rule that it was subsequently repealed. According to the new statute passed in its stead, the king was allowed in such cases to take the proceeds, but only upon the payment therefor within thirty days at certain specified rates.[3] This did not, however, apply to the tin mines in the counties of Devon and Cornwall.

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[1] Rogers on Mines, ch. 4.
[2] Bl. Com. I. 294.

[1] Plowden, 310.
[2] Plowden, 336.
[3] I Wm. & M., ch. 30; 5 Wm. & M. ch. 6.

Upon the foundation of our government the English principle that the king was the original proprietor of all lands was adopted. But as the original thirteen colonies derived their titles through grants from the crown, they remained largely independent of the federal government. Most of the Royal Charters to the colonies included express grants of all mines discovered, reserving to the crown, however, one-fifth of all gold and silver found.[1] In Massachusetts one-fifth of all precious stones discovered was also reserved.

No reservation of any minerals was made in the New York Charter. That state has from the first asserted an absolute sovereignty over all gold and silver mines within its borders. The discoverers of such mines are allowed to work them for but twenty-one years.[2] The same provision applies to mines of other metals found in lands of persons not citizens of the United States, and also to such mines on lands of citizens of the United States in case the ore contains less than two-thirds in value of copper, tin, iron, or lead.

The Continental Congress passed a law in 1785 based on the English rule, reserving to the general government one-third of all gold, silver, lead, and copper mines.[3] In 1807 the President was authorized by Congress to lease lead mines for a period not to exceed three years. The constitutionality of this act was questioned, but it was upheld by the Supreme Court.[4] The ground of the decision was that as the Constitution gave Congress the power to dispose of the public lands, that power included the right to lease as well as to sell. It was also held in a later case[5] that to mine without having secured such permission constituted trespass.

[1] Shoemaker *v.* United States, 147 U. S. 282.
[2] I Rev. St. 281, sec. I, 4.
[3] Am. State Papers, pt. I, 13, 14.
[4] U. S. *v.* Gratiot, 14 Pet. 526.
[5] U. S. *v.* Gear, 3 How. 120.

In 1841 a Pre-emption Act was passed granting to certain states a large quantity of land, but expressly reserving all lands on which were situated any known salines or mines.[1] By this act the reserved mineral lands of Iowa, Wisconsin, Illinois, and Arkansas were also thrown open, with the exception of the lead mines. In 1846 this law was relaxed, and all lead and copper mines in the Northwest were thrown open to settlers.

About this time the question arose as to what title was taken to mining lands by a grant from an Indian tribe. In the case of Chouteau *v.* Moloney[2] the claim was made that as the Fox Indians had granted the right to work certain mines, which grant was later confirmed by the Spanish governor and the fee declared to be in the grantee under the provisions of the treaty of 1803, the United States must respect the title of the plaintiff. The Supreme Court held, however, that as the Indians had not intended to grant the land itself, the confirmation by the Spanish government was irregular, and that the plaintiff possessed only an interest in the mines as such. The court also made the more important statement, though only a dictum, that the Indian tribes never had any right to interfere in any manner with possessions belonging to Spain, — that their rights extended only to occupancy.

In 1850, upon the admission of California to the Union, it was expressly provided that the people of that state should never interfere with the public lands within its boundaries. Notwithstanding this provision, the Supreme Court of California decided a few years afterwards[3] that the United States held in trust for the future state, among other things, all gold and silver mines which passed by the cession, and that upon the admission of California the ownership of

[1] 5 St. at L. 453.
[2] 16 How. 203.
[3] Hicks *v.* Bell, 3 Cal. 219.

them vested in her. But in the case of Moore *v.* Smaw, decided in 1861, this principle was expressly overruled.[1] The court admitted that the United States held certain rights of sovereignty over the territory which was later embraced within the limits of California, only in trust for the future state, and that such rights at once vested in the new state upon her admission into the Union. But as the court proceeded to point out, "the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of the state than that of any other property which is the subject of barter and sale."

When gold was discovered in California in 1849, there was immediately an immense immigration into that region. Though the land there was unsurveyed and not open to settlement, the miners immediately proceeded to stake out claims and search for the precious metal. Their numbers were soon so large that measures had to be taken to preserve order. The miners accordingly proceeded to draw up an informal code of rules. These rules varied in the different mining districts, but on the whole were very similar. As Justice Field has concisely stated,[2] "They all recognized discovery followed by appropriation as the foundation of the possessor's title, and development by working as the condition of its retention; and they were so framed as to secure to all comers within practicable limits, absolute equality of rights and privileges in working the mines."

Attempts were made from time to time to show that mining on government lands was carried on under an implied license. But the government consistently refused to bind itself by such an admission, and always held when the question arose that no such license had been given. But that fact made no practical difference, as mining was carried on under ordinary circumstances, with no hindrance on the part of the government.

It was not until 1866 that the government took any formal action in the matter. In that year a law was passed whereby the general policy of the government, as it had hitherto existed, was entirely changed.[1] Mr. Justice Field has thus summarized the act; "In the first section it was declared that the mineral lands of the United States were free and open to occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law, and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it is provided for acquiring the title of the United States to claims in veins or lodes of quartz-bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government."[2]

In 1872 a complete revision of the law was made which, with minor changes made subsequently, remains the law of to-day.[3] The principal changes made pertained to the size of the claims that might be located. Under the statute of 1866 the discoverer was allowed to take four hundred feet along the lode, two hundred feet being allowed each associate. Not more than three thousand feet might be taken by any association of persons. By the act of 1872 mining claims of certain specified minerals, "whether located by one or more persons, may equal but shall not exceed one thou-

[1] 17 Cal. 199.
[2] Jennison *v.* Kirk, 98 U. S. 453.

[1] 14 St. at L. 251.
[2] Jennison *v.* Kirk, 98 U. S. 458.
[3] U. S. Rev. St. 2318 to 2352.

sand five hundred feet in length along the vein or lode." The width allowed was changed from two hundred feet to "not more than three hundred feet on each side of the middle of the vein at the surface."

Most of the western states have adopted mining codes regulating the location and working of mines on points not covered by the federal statutes. In California, Utah, and Alaska, the old district mining regulations, modified by statute, have been retained.

SPOKANE, WASH., March, 1907.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest

THE SCIENCE OF TESTIMONY

In the March *Times Magazine* (V. i, p. 425) Professor Hugo Munsterberg publishes the second of his series of studies of testimony from the point of view of the psychologist. He says that while we bring in experts to test with great care the reliability of certain forms of sworn evidence we entirely neglect what is the most important part of all trials, the scientific values of oral testimony. We are too confident, he believes, in the reliability of memory, and attributes this to the solemnity we attach to an oath, which causes us to put a wrong valuation upon sworn testimony. He then proceeds to illustrate many ways in which memory fails. Not only is observation defective, but there are different types of memory which are capable of classification. Some people observe and remember accurately things they see; others things they hear. Others he describes as of the motor type; that is, they "feel intention of movement, as of speaking, or writing, or acting, whenever they reconstruct a past experience." "The courts will have to learn sooner or later that the individual differences of men can be tested to-day by the methods of experimental psychology far beyond anything which common sense and social experience suggest." He further explains that the subject of which he treats does not belong in the domain of the physician, but is merely the variations of normal mental life. Still another factor which he says more than anything else devastates memory and plays havoc with our best intentions and recollections is the power of suggestion.

The idea certainly deserves our serious consideration that in cases of conflicting testimony on questions of fact we shall come some day to employ the expert psychologist to make simple tests in court of the real capacity of the memory of the witness. Every lawyer knows that the most dangerous element in evidence is not willful perjury, but unconscious variation or inaccuracy, and the careful lawyer devotes much time in preparation to the cross-examination of his own witnesses for the purpose of satisfying himself as to the accuracy of their memory. If some tangible, scientific method could be used to test these mental qualities of witnesses the value of oral testimony would be immensely enhanced, and a large part of the popular distrust of the accuracy of judicial decisions might be avoided.

THE PHYSICAL QUALIFICATIONS

In a recent address before the students of the Law School of Northwestern University on legal tactics, Frank J. Loesch, president of the Chicago Bar Association, gave his hearers many wise suggestions as to the qualifications essential to success at the Bar. In addition to the moral and intellectual qualities usually emphasized, the following words will strike a responsive chord in the heart of many an over-worked attorney. "You may just as well make up your mind at the beginning that unless you have sound physical health you cannot endure the strain of a law practice. Whether that strain comes as a trial lawyer or whether it comes in the sometimes more exacting work of the office or of preparation for the trial, at any rate the strain that is put upon you time and again requires steady nerves and sound physical condition. If you have not got that and you cannot get it, seek some other employment, for your career will be full of bitterness and disappointment."

Have you noticed how many of your eminently successful rivals are men of powerful physique? It is not merely the advantage of impressive figure that gives the former athlete an advantage in jury trials. It is his physical endurance that enables him to cross-examine day after day. A very successful trial lawyer in Boston recently stated that after a winter of constant practice his work

became so irksome that he envied the laborers on the highway whom he passed in the morning as he went to his office, and another has said that if he could earn his living in any other way he would never go inside the court again. The anxieties of the business man are many, but after all success with him to a large extent is the establishment of wise routine and the selection of subordinates to whom details can be entrusted. But the lawyer's work is constantly changing and the part that can be turned over to subordinates is often but a fragment of his responsibility. Above all else, the consciousness that upon his efforts are depending the fortunes and often the happiness of others imposes upon him a strain of which a man devoted to the pursuit of his own fortunes knows nothing.

UNWRITABLE LAW

Another month has passed and still the Thaw case drags on, though the district attorney fervently thanks God that the end is in sight. In spite of diminished public interest the verdict will be awaited in much suspense. In the meantime, however, a Virginia jury true to southern traditions has in the Strothers case promptly acquitted two brothers of the murder of a brother-in-law because of alleged domestic infidelity, and the judge who solemnly charged the jury that there was no unwritten law which justified acquittal is said to have praised them for their neglect of his instructions and declared "It is an established precedent in the state of Virginia that no man tried for defending the sanctity of his home should be found guilty!"

TORTS OF MUNICIPAL OFFICERS

A political situation in Boston suggests an interesting legal problem. The Grand Jury, after an exhaustive investigation of the performance of certain contracts with the city of Boston for the construction of the Fenway drainage system, concerning which there has been much public criticism, reported no bill against one of the leading contractors. The District Attorney, however, confirming the opinion of the special attorney, who previously investigated the case for the city of Boston, announced that although it was evident that the contractor had made an improper profit of twenty-six thousand dollars, nothing of a criminal nature could be proved because of the peculiarly lax contract under which he worked. This contract had been approved and executed on the part of the city by the Superintendent of Streets, who was designated by the Mayor for that purpose. The Superintendent was a politician and unfamiliar with the kind of work called for by the contract. A very slight investigation, however, would have informed the Superintendent of Streets that the prices fixed for certain services were absurdly in excess of the market rate. The District Attorney, therefore, concludes that the Superintendent of Streets was negligent in the performance of his duty. With this it seems the matter must end so far as the courts are concerned, and as the Superintendent of Streets is now out of office the public must simply content itself with seeing that he remains in retirement.

But is there sufficient reason why a municipal administrative officer specially designated by the Mayor to let contracts for an extraordinary public improvement should be personally exempt from the consequences of his neglect of official duties, even if he be not guilty of willful misconduct? If such officer is financially responsible, why should he not be held liable by the city in part for negligence, just as any careless employee in a private establishment would be held responsible for the consequences of his failure to exercise the care of an ordinarily prudent business man?

There is disclosed by this transaction an opportunity for municipal graft too insidious to be ignored, and it is submitted that the danger that honest and capable men would be deterred from accepting office under such circumstances is unreal. We seldom get them now. If the old decisions that such administrative officers are not agents of the municipal corporation apply to such a case as this, it would seem that legislation is needed to make the responsibilities of the agent of a municipal corporation conform to those of other agents.

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

The San Francisco schools and Japan stand out prominently in the legal literature of the past month. Several of the leading articles discuss at length questions of constitutional and international law and interpretation of treaties suggested by Japan's protest, especially the very important and unsettled matter of the extent of the treaty-making power of our federal government. The student of comparative jurisprudence will find much to interest in the article on the Japanese family in *The Law Quarterly Review* from the pen of Munroe Smith, with its introductory sketch of the legal history of the island kingdom of the Pacific. The other articles of the month noted below offer a wide range of choice for the seeker of legal reading.

AUTOMOBILES. "The Regulation of Motor Cars at Home and Abroad," by Edward Manson, *Journal of the Society of Comparative Legislation* (No. 16, p. 333).

BANKRUPTCY. "Conflict of Laws Within the Empire: Bankruptcy and Company Winding-up," by Harrison Moore, *Journal of Society of Comparative Legislation* (No. 16, p. 384).

BIOGRAPHY. "Thomas McIntyre Cooley," by Jerome C. Knowlton. March *Michigan Law Review* (V. v, p. 309).

BIOGRAPHY. "Lord Chancellor Erskine," by J. A. Lovat-Fraser, in *Juridical Review* (V. xviii, p. 357).

CONFLICT OF LAWS (see Equity).

CONSTITUTIONAL LAW. "The State Tax on Illinois Central Gross Receipts and the Commerce Power of Congress," by Henry B. Schofield, February *Illinois Law Review* (V. i, p. 440).

CONSTITUTIONAL LAW. Frederick J. Stimson in the *North American Review* (V. clxxxiv, p. 508), briefly discusses "The Constitution and Popular Liberty," and calls attention to the fact that our government is not only a democracy, but it is a "republic." "It is the function of a democratic government to enforce the will of the majority, but it is the function of a constitutional government also to protect the minority, even the individual, against the majority, against even the executive or a legislature transcending its admitted powers." The author believes we are inclined to forget the importance of these restraints, and should hesitate to assume that any of them has grown obsolete.

CONSTITUTIONAL LAW. Chief Justice Walter Clark of North Carolina, in the February *Arena* (V. xxxvii, p. 141), takes a very different attitude from Mr. Stimpson in an article entitled "Constitutional Changes Demanded to Bulwark Democratic Government." He advocates calling a constitutional convention to make the following amendments:

1. Election of senators, judges, and postmasters by the people.
2. The electoral vote of each state to be divided pro rata, according to popular vote therein for each candidate.
3. Term of President six years and ineligible for reëlection.
4. Repeal or modification of the fourteenth amendment.
5. Each Congress to expire at the election of its successor.

He insists that the Constitution is not democratic and was made under reactionary influences; that conditions of society have so changed that it is impossible that a constitution should be fully adapted both to conditions now and to conditions then. He even goes so far as to say that "an instrument so framed, adopted with such difficulty, and ratified after such efforts and by such narrow margins, could not have been a fair and full expression of the consent of the governed."

CONSTITUTIONAL LAW. "Some Observations on State Laws and Municipal Ordinances in Contravention of Common Rights, Interfering with Individual Liberty, and Attempting to Regulate Personal Association and Employment," by Eugene McQuillin, *Central Law Journal* (V. lxiv, p. 209).

CONSTITUTIONAL LAW (Criminal Law). "Is One Acquitted of a Crime by Reason of Insanity Deprived of his Liberty without Due Process if Ordered Committed without further Proceedings?" by W. F. Meier, *Law Notes* (V. x, p. 12).

CONSTITUTIONAL LAW (The Treaty-Making Power). The San Francisco school incident is causing much discussion of the extent of the treaty-making power of the United States, as yet unsettled by judicial decision. Three of the recent legal magazines have leading articles on the subject.

In the February *American Law Register* William Draper Lewis answers affirmatively the question, "Can the United States by Treaty Confer on Japanese Residents In California the Right to Attend the Public Schools?" "In the Constitution itself we find nothing to restrain the President from negotiating, and two thirds of the Senate from ratifying such a treaty. It is not opposed to the fundamental characteristics of free republican government; it does not interfere with the liberty of the citizens of the United States; and finally, there is nothing in the nature of our federal state from which we may imply any limitation on the treaty-making power not found in the words of the Constitution."

"The Treaty-making Power and the Reserved Sovereignty of the States," by Arthur K. Kuhn in the March *Columbia Law Review* (V. vii, p. 172), adopts practically the view which led Mr. Lewis to his answer to his narrower question. He says: "From the very nature of our government, the treaty-making power must reside centrally or nowhere. If there be a limitation upon the power of the President and Senate to enter into a particular treaty, the power of the entire nation has been by so much cut down.

"For all practical purposes of negotiation with a foreign nation, there is no residue of such power left anywhere. Adopting the reasoning of Mr. Butler, now reporter of the Supreme Court of the United States, we may say that as to those subjects over which it was neither proper nor practical for a state to exercise sovereignty, but which required national action for the joint or equal benefit of every state, it was impossible for any state separately, or all the states collectively, either to delegate or reserve elements of sovereignty which none of them possessed.

"Whatever may have been the intention of the framers of the Constitution in respect of the reserved powers of the states within the category of national or state law, it could never have been (and the debates in the Convention so prove) to limit the central government in the exercise of its international power as a sovereign to protect and benefit the citizens of *all* of the states in foreign countries, and for that purpose, to assure reciprocal rights to aliens in all the states."

"The Japanese School Incident at San Francisco from the Point of View of International and Constitutional Law," by Theodore P. Ion, in the March *Michigan Law Review* (V. v, p. 326), agrees with those writers who "are of the opinion that a treaty, contrary to the Federal Constitution and encroaching upon the fundamental rights of states which have not been delegated to the federal government cannot be valid." In the immediate matter of the San Francisco school incident, Mr. Ion thinks the objection of the Japanese government to the segregation of Japanese pupils is untenable.

CONSTITUTIONAL LAW (Eng.). The general assumption that the coming session of the English Parliament will witness a struggle between the two houses arising out of the recent virtual rejection by the Lords of the Education Bill, renders timely the historical analysis by G. Glover Alexander of "The Constitutional Position of the House of Lords" in the *Law Magazine and Review* (V. xxxii, p. 129).

CONSTITUTIONAL LAW (Eng.). "The Jurisdiction of the Privy Council," by Sir Frederick Pollock, *Journal of the Society of Comparative Legislation* (No. 16, p. 330).

CONSTITUTIONAL LAW (Statutes). "The Ambulatory Rule — as Viewed from the

Maxim, Verba Fortius Accipiuntur Contra Proferentem," by W. T. Hughes, *Central Law Journal* (V. lxiv, p. 167).

CONTEMPT. "Contempt of Court by Debtors," by W. H. Trueman, *Canadian Law Times* (V. xxvii, p. 1).

CONTRACTS. "The Law of Contracts," by C. B. Labatt, *Canada Law Journal* (V. xliii, p. 121).

CONTRACTS (Conditions). A careful article on "Conditions in Contracts," by George P. Costigan, Jr., appears in the March *Columbia Law Review* (V. vii, p. 151). The author does not attempt "to cover the whole field of conditions, but seeks to furnish clear definitions and then to state in the form of rules the doctrines of the cases."

CORPORATIONS. "Company Law in Ontario," by Thomas Mulvey, *Canada Law Journal* (V. xliii, p. 81).

CORPORATIONS. "Secretarial Work and Practice," by Alfred Nixon and George H. Richardson. Also "Company Law," by Thomas Price. Longmans, Green & Co., London, 1906. A convenient compendium of English corporation practice similar to recent publications in this country noted in these columns.

CRIMINAL LAW. "Insanity as a Defense in Homicide Cases in New York," by Wm. Lawrence Clark, *Bench and Bar* (V. viii, p. 50).

CRIMINAL LAW. "Outlines of Criminal Law," by Courtney Stanhope Kenny, LL.D. Revised and adapted for American scholars by James H. Webb, New York, The Macmillan Co., 1907.

This is an excellent elementary book on criminal law by a competent scholar and teacher, improved for the use of American students, by the additions and annotations of Mr. Webb of the Yale Law School. Besides the substance of the law, the author has added a brief statement of the principles of English criminal procedure, and the editor has retained as much of this portion as can be of use to an American student. Both author and editor have wisely refrained, on the one hand, from an attempt at exhaustive citation of authorities, which would have been confusing; and on the other hand from reducing the law to a series of definitions and rules which must leave the reader quite ignorant of the real spirit and meaning of the law.

The book is intended for the reader rather than for the practitioner. The student who learns from an elementary text-book, and the general reader who wishes to get such knowledge of the criminal law as will be a desirable part of a broad education will find here the results of Mr. Kenny's sound historical scholarship and gift of clear exposition, supplemented by Mr. Webb's sufficient additions. The greater portion of the criminal law is simple and well adapted to this sort of treatment. It is of course impossible to solve in so short a discussion the puzzling questions which arise, for instance, in many cases of larceny and of attempt. All that need be said of the work, so far as those subjects are concerned, is that the topics are made as clear as possible in the space devoted to them. On the other hand, the general principles of the subject are developed with clearness and accuracy, though concisely. In fine, to one who wishes to get a general "outline" of the law of crimes, without the puzzling effects of light and shade, and free from detail, this book may be warmly commended. J. H. B.

CRIMINAL LAW (French). "Extenuating Circumstances in French Law," by Herbert E. Boyle, is concluded in the January *Juridical Review* (V. xviii, p. 341).

CRIMINAL LAW (Bribery). One of the great evils of modern commerce is the corruption of agents to secure the business of their employers. Contracts to pay secret commissions have long been unenforceable as contrary to public policy. In Great Britain since January 1st, the giving or taking, or offering to give or take, any consideration in such affairs, without the knowledge of the principal, is made criminal and punishable by imprisonment for not more than two years or fine not exceeding £500, or both. In the January *Juridical Review*, G. W. Wilton writes about "The Prevention of Corruption Act, 1906," giving its terms and discussing the cases likely to arise under it (V. xviii, p. 370).

"It may be surmised that the Statute of 1906 will not put an end to 'tips' of the

petty kind. They are disagreeable exactions. Everyone except plutocrats and the 'tipped' would willingly see them disappear. The railway guard and the hotel porter and the hotel chambermaid may be saved from prosecution because their employers know of the practice. It is for them to denounce and prohibit it. The continuance of 'tipping' in such cases is not to be understood as recommended. The 'tipper' and the 'tipped' must take their risk of trial under the Act. The butler and the cook are not in so seemingly favorable a position as the guard or the porter. The butcher, the baker, and the grocer, or other tradesman, will give to the butler and to the cook, and the butler and the cook will take any discounts, presents, or gratuities each at their own peril. A careful perusal of the Statute may satisfy all such servants and all such tradesmen inclined to deal in this nefarious way that the blessing will be for those who neither give nor take bribes in any shape or form."

DIVORCE. "Marriage and Divorce in France," by J. C. Adam, *Madras Law Times* (V. i, p. 281).

DIVORCE. "An Argument for Uniform Divorce Laws" by Dr. Felix Adler, March *Woman's Home Companion*, p. 10. A conservative discussion of a grave social problem by the leader of the Society for Ethical Culture.

DIVORCE. Proceedings of the National Congress on Uniform Divorce Laws. Harrisburg Publishing Company, Harrisburg, Pa., 1907.

EDUCATION. Floyd R. Mechem's paper on "The Opportunities and Responsibilities of American Law Schools," read at last August's meeting of their association is printed in the March *Michigan Law Review* (V. v, p. 344).

EQUITY. "Delay as Defense to Specific Performance," by Sarat Chandra Chandhri, *Allahabad Law Journal* (V. iv, p. 55).

EQUITY (Control over Foreign Property). Joseph H. Beale, Jr., in the March *Harvard Law Review* discusses "Equitable Interests in Foreign Property," both real and personal. As to real property, he summarizes as follows:

"An equitable interest in land can be created only by the law of the situs; if that law creates an interest, the courts of all other states must recognize and enforce it; while, if the law of the situs does not create the equitable interest, no foreign court can assume the existence of such an interest. But since equity acts in *personam* it has power to act whenever it has jurisdiction over the person of a defendant; and if a defendant is shown to be in default for a breach of obligation, it may, in some cases at least, decree a conveyance of land by way of reparation for the injury, although there was no prior interest in the land created by the law of the situs. The limitations of this power must now be examined.

"First, there must be a real obligation growing out of the transaction of the parties. If there is no equitable interest in the land, and there is no independent legal obligation in the owner to deal with the land for the benefit of a *cestui que trust*, the court of equity of another state cannot create and enforce such an obligation merely because it has power over the owner and regards the transaction as one which should have given rise to a trust. . . .

"The second limitation . . . is this: that the obligation violated must have run from the defendant to the plaintiff. If land in a common law state subject to an equitable claim is sold to a purchaser with notice, he is bound to respect the equity. But this is because he takes the land subject to the other's equitable right; and if by the law of the situs there is no equitable right in the land, the purchaser cannot be subject to a claim on the part of the asserted beneficiary, even though he would be held a trustee if the land were in the state of forum. . . .

"The third limitation . . . is based on the lack of jurisdiction of a court of equity to order the doing of an act on foreign soil. The decree of the court cannot directly affect the foreign land; if it is to be effective, it must be through a conveyance of the land by the defendant. In countries governed by the common law land may be conveyed by a deed made anywhere; and a court of equity may therefore make an effective decree by ordering the defendant to give a deed of foreign land. But in countries governed by the civil law a

conveyance of land or of any interest in land is usually ineffective unless it is registered in the country of the situs. A court of equity cannot decree such registry; and therefore it cannot through its jurisdiction over the owner of land in such a country exercise any control over the title to the land. . . .

"The principles regulating trusts of movables are more complex but more restricted. No case has been found, and probably none exists or is likely to be decided, where a court has attempted to find grounds for ordering a conveyance of foreign movables, not the proceeds of foreign land, on the ground merely of fraud or breach of contract. We have to consider only cases of express trust. . . .

"As to a trust of movables created by will, there is no doubt that its validity must be tested in the first instance by the law of the testator's domicile. If valid by that law, it will be recognized and enforced everywhere. . . .

"The validity of trusts created in a settlement *inter vivos* is not so clear a question. Older writers on the conflict of laws, alleging a maxim *mobilia sequuntur personam*, laid it down that the law of movables was the law of the domicile of the owner. But this fictitious doctrine has been practically abandoned in modern times so far as tangible movables are concerned, and the rule which is in consonance with reason has been accepted; that the validity of a transfer of chattels depends on their situs at the time of transfer. In accordance with this doctrine it seems to be held that validity of a trust in tangible movables depends on the law of their situs at the time the trust settlement was made."

The paper concludes with a discussion of what law governs the administration of a trust.

EVIDENCE (Similar Acts). "Perhaps the most difficult branch of the law of evidence is that which comprises the exceptions to the rule excluding proof of similar acts from the evidence which may be adduced against an accused person," says Ernest E. Williams, in the January *Law Quarterly Review* (V. xxiii, p. 28), in an article on "Evidence to Show Intent." A most difficult case in the court for Crown Cases Reserved, Rex *v.* Bond, required decision on the admissibility of a prior act or acts of a similar nature to show the intent with which a prisoner committed the act charged. The charge was abortion on a girl, whom the prisoner, who was a doctor, had seduced. The defense was that the instruments were used for a lawful purpose, to cure a disease from which the girl was alleged to be suffering. There was offered by the prosecution the evidence of another girl who testified that nine months before the prisoner, who had seduced her also, had used similar instruments on her to produce an abortion. The court decided five to two that the evidence was admissible.

The author traces the intrusion of exceptions to prove intent or guilty knowledge upon the rule of inadmissibility of proof of similar acts and approves the movement in that direction.

"Opposition to this development, however, still exists. The judgments in R. *v.* Bond were not unanimous; lawyers commenting on it have declared emphatically that it is wrong. But are not these lawyers resting on the tradition of an old, rigorous, insular rule, rather than reasoning out the needs of justice? Even allowing that the rule in its old integrity (or in the rigidity it was at one time supposed to have) was in consonance with the judicial procedure of an earlier day, is it not well to remember, as Lord Coleridge said in Blake *v.* Albion Life Assurance Co., that the law of evidence has in other respects been widened, demanding a corresponding extension of the rule excluding evidence of similar acts? And since Lord Coleridge delivered that judgment there has been a still further extension in criminal procedure by the act permitting a prisoner access to the witness box. Former disabilities, as Mr. Justice Darling said in R. *v.* Bond, 'no longer exist, and, provided he have due notice, an accused person may fairly be confronted with evidence relevant to the issue now that he may give his own testimony, although it would have been hard to admit it when the witness box was forbidden to him.' Certainly, as the same learned judge contends, it is not 'admissible to strive for increase in the technicality of our rules of evidence so as to narrow yet more the approaches to the source of justice.'"

FICTION. "A Suspended Sentence," by C. T. Revere, March *McClure's* (V. xxviii, p. 535).

FICTION. "The Law Goes Aglimmering," by Frances Nelson, March *National Magazine* (V. xxv, p. 455).

FICTION. "The Farce of Police Court Justice in New York," by Franklin Matthews, February *Broadway Magazine* (V. xvii, p. 511).

HISTORY. "Maryland During the English Civil Wars," by Bernard C. Steiner, Johns Hopkins Press, Baltimore, 1907.

HISTORY. Frederick Trevor Hill writes the third of his "Decisive Battles of the Law," in the March *Harper's* (V. cxiv, p. 557) describing the Hayes-Tilden contest. This series might more properly be described as "Decisive Battles of the Lawyers," since the subjects are rather political than legal. In the former aspect, however, this great constitutional compromise is also of importance, and the author's description is both entertaining and instructive.

HISTORY. In *Putnam's Monthly* for March (V. i, p. 746), Ion Pedlicaris describes "An Experience in Bow Street." This is an amusing account from the layman's point of view of the annoyances to which an entirely innocent party may be subjected by litigation, into which he is accidentally drawn.

INTERNATIONAL LAW (Arbitration Awards). "The weaving of the network of international agreements for the reference of disputes to arbitration has made so rapid a progress that the problems of international arbitration have ceased to be connected with the acceptance of the principle of agreements to arbitrate, and have entered the region of the practical application of arbitration clauses."

"The Enforcement of International Arbitral Awards," by "Aula Gentium," in the February *Law Magazine and Review* (V. xxxii, p. 155), suggests that "the analogies for the determination of the methods by which international arbitral awards are to be brought into existence and enforced, must be derived from the system of individual arbitration, and not from the system of distributive justice administered by national courts. . . .

"The difficulty of enforcing private awards was of necessity felt from the earliest times. In so far as the enforcement of awards in England (before comparatively recent legislation), the system may be taken to have been derived from the Code of Justinian. Before dealing with that præ-statutory system we may point out that the modern system is merely the almost automatic transmutation of a duly constituted award into a rule of court with all the authority of a judgment declared by the court. In other words, the court of justice reaches down and takes up an award, and gives to it the sanction of its own machinery of enforcement. Now that is a much later stage than international arbitration has yet approached. . . .

"Apart from the clothing of a private award with the robe of state recognition, there were three sanctions which were not uncommonly inspired by the very terms of the submission. . . .

"Now the first remedy was that which was provided by the Roman law, that is to say, the penalty. In order to be effective without recourse to the courts, the penalty must be a gage, because an action to recover a penalty must in itself suppose the sovereign executive." . . . The gage must be such as upon the declaration of the award automatically remains with the possessor, or at any rate which needs no further step in order to secure its possession by the successful litigant state. The possession of the gage by a third party, or its control by the arbitration court itself; these with proper safeguards would be sufficient to avoid the friction. The gage in some instances would be territory, in some instances would be money, or its equivalent; in some instances it might be an edict pronounced by the sovereign power of the litigant state, or a treaty declared by the litigant states, and in either case made subject to and needing only the authority of the arbitration court to make it effective.

The next method which appears to have been adopted for the purpose of enforcing awards, was that of guarantee. There are international relations where, either from the relative superiority of a state (we have instanced the United States of North America in relation to the independent states of South America), or from the exceptional obligations

between states, the performance by a state litigant of any obligation to be imposed on that state by an international award may be the subject of a guarantee, and such guarantee may be either national or international.

Another sanction which might be added to this armory of international arbitration, is the general suspension of diplomatic relations with a state, after its persistent refusal to obey the award of an international tribunal. Perhaps the nearest analogy to this would be found in the proceedings which in the Middle Ages might often be found to have been taken by the constituent members of a commercial confederation, like that of the Hanseatic Towns, in instances where there had been a refusal or neglect to comply with the rules of the league. The "unhansing" of a litigant state would not in any way imply anything in the nature of an act of war, that is to say, it would in no way affect the safety or condition of the citizens of or the inhabitants in that state, whilst it would have the effect of, for the time being, excluding that state from the circle of international comity."

INTERNATIONAL LAW. "Some Legal Aspects of the Submarine Cable and Wireless Telegraphy in War," by Charles L. Nordon in the *Law Magazine and Review* (V. xxxii, p. 166) discusses the problem yet unsettled in international law. As to cables, Mr. Nordon thinks the "proper solution of the question no doubt lies in a judicious combination of the three principles of (1) Restriction of use without actual destruction: (2) Compensation where destruction becomes absolutely necessary: and (3) Reëstablishment after destruction. If belligerents are placed under liabilities of this character they are not likely to act without sufficient justification, and in all cases neutrals would appear to be protected so far as they can reasonably expect in the unsettled times of war."

As to the still less settled question of wireless telegraphy, the author thinks the proposition submitted by Sir Edward Fry should be adopted by the nation, viz: "That the sender of wireless telegraphic messages must send them at his own risk, and that any person may lawfully receive and interpret the same, provided that he does so at a place where he may lawfully be."

INTERNATIONAL LAW (A Hague Court Decision). "The Muscat Dhows," by J. Westlake, discussing a decision of the Hague Court of Arbitration in a cause between Great Britain and France, in relation to the right of European powers to grant their protection to persons not their subjects. *Law Quarterly Review* (V. xxiii, p. 83).

INTERNATIONAL LAW. "The International Law Association at Berlin," by Thomas Baty, *Journal of Society of Comparative Legislation* (No. 16, p. 371).

JURISPRUDENCE. "Responsibility in Law," by Rankine Wilson, in the *Law Magazine and Review* (V. xxxii, p. 185), is an installment of an article begun in Vol. xxxi. It discusses the conditions of responsibility in the acts of a human being in a normal state of mind and in various states of abnormality, the former in all branches of the law, the latter in contract and tort, crime being left for separate treatment.

JURISPRUDENCE (Mohammedan). The second installment of "A Historical Sketch of Mohammedan Jurisprudence," by Abdur Rahin, in the March *Columbia Law Review* (V. vii, p. 186), deals with the legislative period which began "After the Prophet's exile to Medina, when the community of his followers grew sufficiently large to require rules and regulations for the guidance of their conduct. The Prophet was the messenger of God and to him he revealed in His own words His wishes and commands through the medium of the angel Gabriel. The collection of these revelations is called the Qur'án, but its text which existed from eternity was communicated from time to time in pieces called Ayahs, or verses. The verses that lay down rules of law were mostly revealed when cases actually arose requiring decision according to the principles of Islam. Sometimes God in His wisdom repealed some previous injunctions and laid down others in their stead. Sanctions or rewards were attached to the violation or observance of God's ordinances and in many cases they were both spiritual and legal.

"With the Prophet's death, which occurred in June, 632 A.D., the eleventh year of the Hijrah, a new era commenced. . . . There

was no longer an accredited messenger through whom God could promulgate His wishes and commands for the guidance of the Muslims. The Divine Book and the precepts and precedents of the Prophet were closed, though they were still accessible for reference and instruction. If a text of the Qur'an or pronouncement of the Prophet covered a point, there was no difficulty; or, if the Prophet had decided a similar case, the decision was no doubt a binding precedent to follow. But not merely fresh facts but entirely new circumstances arose, for which no provision had been made, especially as the affairs of the community became more complex with the growth of the empire. In the absence of authority the Companions had to guide themselves by the light of their reason, having in regard those usages ('urf) of the community which had not been condemned by the Prophet. Those who were associated with the Prophet as his companions and often shared his counsels must have known, as if by instinct, the policy of Islamic law, and whether a particular rule or decision was in harmony with its principles. It is presumed therefore that an agreement among the Sahábah in a particular view, vouched for its soundness and such agreement (ijmá') has been treated as an independent source of law next only to the Qur'án and the Hadíth. The first and the most momentous problem that the community had to solve on the Prophet's death was that of finding a successor to him as the head of the Mohammedan commonwealth. Over this question the Mohammedan world has since then divided itself into two hostile factions, the Shí'ahs who assert that the Imamate or Caliphate should have continued in the family of the Prophet, and the rest of the Mohammedan bodies who support the right of the community (Jamá'ah) to elect the chief."

JURISPRUDENCE (Japan). Japan's rapid rise to a position of influence in world affairs naturally calls the attention of students of jurisprudence to its laws. In the *Law Quarterly Review* for January, Munroe Smith writes at length on "The Japanese Code and the Family" (V. xxiii, p. 44). In clearing the ground for his special subject he gives the following summary of Japan's legal history:

"The great periods recognized by Japanese legal historians are: (1) the period of indigenous civilization, which terminated with the reception of Chinese ideas and institutions in the seventh century of our era; (2) the period in which Chinese culture remained dominant, which closed with the year 1868; and (3) the present period of occidental influence. A subdivision of the second period is made at the close of the twelfth century, when the feudal system was fairly established. Until the third period law was not clearly differentiated from social ethics; until 1868, indeed, there was no word in the Japanese language that expressed the idea of a legal right, a fact which indicates that social relations were viewed exclusively from the side of duty. Moreover, the so-called laws of the emperors and of the feudal princes were not addressed to the people; they were kept secret from the people. They were instructions addressed to subordinate officials. Those which touched upon what we should regard as legal relations contained, of course, what we should call legal rules: i.e. they set forth the principles according to which justice was to be administered in controverted cases. In the second part of the second period, from the close of the twelfth century until the latter part of the nineteenth century, the feudal principalities were independent in legislation and in adjudication, and the development of law and custom was, as in the European middle ages, particularistic. In 1867 Japan had as many divergent laws and customs as existed in France or in Germany a century earlier. The written laws of some three hundred principalities were modified by local customs of even more restricted validity, and across the territorial laws and customs there ran, as in continental Europe down to the French Revolution, well-defined class distinctions.

"Since the re-establishment of the imperial supremacy in 1868 a common national law has been established. This result has been attained not by the gradual development of a settled practice in central courts of last resort, as in imperial Rome and in Norman England, but by the more rapid process of legislation, as in modern continental Europe. The Japanese imperial legislation of the closing decades of the nineteenth century, culminating in the

civil code of 1898, has effected at the same time a sweeping reception of West European law. Hozumi characterizes it as a reception of Roman law: Japanese civil law, he says, has 'passed from the Chinese family to the Roman family of law.'"

The author's discussion of the Japanese family is elaborate and careful and is commended to students of social relation and comparative jurisprudence.

JURISPRUDENCE (Roman Law). "Marriage in Roman Law," by Emile Stocquart, translated by Andrew T. Bierkan, March *Yale Law Journal* (V. xvi, p. 303).

JURISPRUDENCE. "The Fate of the Roman-Dutch Law in the British Colonies," by Arthur Cohen, *Journal of the Society of Comparative Legislation* (No. 16, p. 356).

JUVENILE COURTS. "Children's Courts," by Thomas Rawling Bridgwater, *Journal of Society of Comparative Legislation* (No. 16, p. 375).

LABOR LITIGATION. "The Evolution of the Law of Trades Unions," by John H. Romanes, *Scottish Law Review* (V. xxiii, p. 73).

LABOR LITIGATION. The second installment of "Crucial Issues in Labor Litigation," by Jeremiah Smith, in the March *Harvard Law Review* (V. xx, p. 345) treats the *prima facie* liability of defendants who are members of a combination, and the question of justification, especially the right of competition and its limits. The article is to be continued.

LEGISLATION. "Year Book of Legislation, 1905, and Digest of Governor's Messages, 1906," edited by Arthur H. Whitten, New York State Education Department, Albany, 1906.

LIBEL (Defenses). "The Defense of 'Fair Comment' in Actions for Defamation," by Francis R. Y. Radcliffe, in the January *Law Quarterly Review* (V. xxiii, p. 97), takes the position that "'fair comment' is only a form of 'qualified privilege' and that proof of actual malice will do away with the protection which would otherwise prevail." There is doubt, however, under the English authorities whether malice does make the otherwise "fair comment" actionable and the hope is expressed that a recent decision will be taken to the Lords so as to get a review of the whole subject.

LIMITATIONS. "Limitation Applicable to Suits for Restitution of Conjugal Rights," by Durga Charan Bannerjee, *Bombay Law Reporter* (V. ix, p. 19).

MONOPOLIES. "The Prevention of Trusts and Monopolies," by R. M. Benjamin, *Central Law Journal* (V. lxiv, p. 147).

PRACTICE. "The Proposed Special Jury Act." An attempt to eliminate the remarkable delays in procuring a jury to try cases which have attracted much public attention in Chicago is discussed by Howard O. Sprogle, Philip Stein, and William S. Forrest in the February *Illinois Law Review* (V. i, p. 446). This act is based on one recently adopted in New York and may well be of interest in other large cities.

PRACTICE. An address on Legal Tactics, entitled "The Acquisition and Retention of a Clientage," by Frank J. Loesch in the February *Illinois Law Review* (V. i, p. 455), deserves the attention of every young man starting in practice. It is the most sane and suggestive bit of advice that we have recently seen.

PRACTICE (Law's Delay). In the February *Illinois Law Review* the delay in the trial of the cases both criminal and civil, arising out of the burning of the Iroquois Theatre is severely criticized by Frederick C. Woodward and Frank O. Smith, and the defendant's position is justified by George A. Follansbee in articles entitled, "The Iroquois Theatre Cases" (V. i, p. 429). The statistics presented will be interesting to those in other jurisdictions who are striving to remedy the delay in litigation.

PRACTICE (Egypt). "The Judicial System of Egypt," by James H. Scott, the *Juridical Review* (V. xviii, p. 386).

PRACTICE (Scotland). "Practice and Procedure in the Court of Session," by James A. Clyde, *Juridical Review* (V. xviii, p. 319).

POLICE POWER. "The Compensation for Property Destroyed to Stop the Spread of a Conflagration," by Henry C. Hall and John

H. Wigmore in the March *Illinois Law Review* (V. i, p. 501), discusses the following inquiries:

1. Is there a cause of action against the destroyer for the trespass?

2. If not is there a claim for indemnity against an insurer under the contract of insurance?

3. If not is there a quasi-contractural claim against the municipality for contribution?

4. If not does or should a statute bestow such an action?

5. Would such a statute be constitutional?

The authors answer to the first question in the negative and contend that an ordinary fire policy does cover such a loss, but that it is usually eliminated by special exceptions. The authors believe that there is a claim against the municipality for contribution on analogies from other departments of the law such as general average, war claims, sanitary measures, and eminent domain. The few decisions, however, leave the question in doubt and the authors believe that a statute should provide such a remedy. There can be no doubt that such a statute would be constitutional. A valuable digest of decisions is also published.

POLICE POWER. "Foreign Law and the Control of Advertisements in Public Places," by W. J. Barnard Byles, *Journal of the Society of Comparative Legislation* (No. 16, p. 323).

PROPERTY (Boundaries). "Streets as Boundaries in Pennsylvania," by Boyd L. Spahr, *American Law Register* (V. lv, p. 91).

PROPERTY (England). "The 'Mortgage Charge' of the Land Transfer Acts," by James Edward Hogg, *Law Quarterly Review* (V. xxiii, p. 68).

PROPERTY (New York). "Concerning Certain Peculiarities in the Real Estate Laws and Proceedings of the State of New York," by Pierre W. Wildey, March *Yale Law Journal* (V. xvi, p. 328).

PROPERTY. "Notes on Easement of Light in England and Elsewhere," by H. A. DeColyar, *Journal of Society of Comparative Legislation* (No. 16, p. 298).

PUBLIC LAW (Liability of the State in Tort). W. Harrison Moore in the January *Law Quarterly Review* (V. xxiii, p. 12) writes on "Liability for Acts of Public Servants," using as a text, the recent case of Bainbridge *v.* The Postmaster-General [1906], 1 K. B. 178. The author says this case "calls attention to some defects of the law of England in the relation of the citizen to the state. In that case, the state is carrying on a business — the receiving, forwarding, and delivering of messages by telegraph for reward — which in some countries, e.g., the United States, is carried on as a private undertaking for the benefit of shareholders, and which was so carried on in England until a very recent date. The business is undertaken by an incorporated public department, which has been by statute made the successor of the companies whose undertakings were acquired by the state. The servants of the state in the course of the management of the undertaking, commit acts which in the case of those companies to which the department succeeded would make the employer liable for tort; but it is held that the immunity of the Crown covers the case, and the person injured is without a remedy against the state or the department. Probably this result could not have been reached in any other country in Western Europe, and as Professor Maitland suggested a few years ago, there are features in our constitutional law which may well give pause to the jurist who, freely classing France or Germany as Rechtsstaat, is considering whether England is entitled to a place in the same category. . . .

"In English law we are still engaged in the task of fitting to the state and the government the prerogatives and immunities of the monarch, and of reaching the state through the person of the king. But the great federal systems within the empire disclose a complexity of relations which cannot find a sufficient expression in the old-established formulas of our constitutional law. The mere fact that Canada and Australia have 'rigid' constitutions, calls forth there the idea of 'public law' with a vividness unknown in England. Already we are driven, notwithstanding the unity of the Crown, to recognize the separate personalities of state and commonwealth. It is becoming apparent also that in the course of the inevitable conflicts between the commonwealth and the states as political entities, and particularly from the

growth of socialistic schemes for the extension of the sphere of operations by one or other government, it will be necessary to consider how far each government is a juristic person, subject to the laws of the other. . . .

"In the United States the present question, like most other questions of public law, has received more attention than with us. The state, whether as a political abstraction or a juristic person, is clearly perceived as something behind and apart from the government; its personality is not obscured by or confused with anything corresponding with the Crown; the Governor is a mere executive officer. It is easy, therefore, to impute representation of the state to all who are exercising governmental power for the whole community. The result is that the immunities of the state attend the public body in the performance of all duties which do not peculiarly concern the interest of the inhabitants of a particular locality or the administration of property; the governmental functions of even a municipal corporation are regarded as powers entrusted by delegation from the state and exercised on its behalf. (See Goodnow, Municipal Home Rule, p. 140, Municipal Problems, pp. 59 and 60; Comparative Administrative law, i. 173 *et seq.*) Although this result has been reached by a careful regard to English as well as American authorities (e.g. see Hill *v.* Boston (1877) 122 Mass. 344) it is at first startling to an English lawyer, and it may be doubted whether any English court would accept the principle in the form in which it is commonly stated by American writers. Still, by a different road, we may reach the conclusion not very different from the American. The English doctrine that public authorities are not in general liable for nonfeasance but are for misfeasance, expresses darkly and unscientifically a great part of the American rule that purely governmental powers are not sources of civil liability; that the American courts have been driven to more explicit enunciations of the principle than our own, may in part be imputed to be hardihood of American suitors and a more experimental spirit in litigation. Further, recent cases in British courts warn us against the crude application of the principles of employer and employed to the relations of public authorities their officers."

PUBLIC POLICY. "Municipal Control of Public Utilities," by Oscar Lewis Pond, Columbia University Press, New York, 1906.

SALES (Remedies of Seller). In "The Right of a Seller of Goods to Recover the Price," in the March *Harvard Law Review* (V. xx, p. 363) Professor Samuel Williston gives an exhaustive discussion of the rights of the seller when the property in the goods has not passed to the buyer, because he wrongfully refuses to pay. The English common law did not permit recovery of the price in such cases; a large number of our states do permit it. Professor Williston on the whole approves the American rule as reaching a just result.

SAN FRANCISCO SCHOOL INCIDENT (see Constitutional Law).

TAXATION. "Internal Taxation in the Philippines," by John S. Hord, Johns Hopkins Press, Baltimore, 1907.

TAXATION (England). "The Incidence of Estate Duty in Regard to Personalty," by W. Strachan, *Law Quarterly Review* (V. xxiii, p. 88).

TELEGRAPH. "Mental Anguish Doctrine in Telegraph Cases," by Geo. A. Lee, *Central Law Journal* (V. lxiv, p. 108).

TORTS (see Libel, Public Law).

WITNESSES. "Privileged Communication Between Attorney and Client," by W. C. Rodgers, *Central Law Journal* (V. lxiv, p. 66).

WORKMEN'S COMPENSATION. "The New English Compensation Act in a Nutshell," *Tit-Bits* (V. li, N. 1324).

WORKMEN'S COMPENSATION. "Is Workmen's Compensation Practicable?" by Arthur B. Reeve, *Outlook* (V. lxxxv, p. 508) a brief article insisting upon the ultimate necessity of such legislation from an economic standpoint. It contains some interesting statistics.

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.)

CARRIERS. (Persons Riding Gratuitously.) **Ind.** — Indiana Traction & Terminal Company *v.* Klentschy, 79 N. E. Rep. 908, is another decision on the broad question as to who are passengers. Plaintiff, a member of a ladies' society, was attending a convention in defendant's city. With other members of the convention she was invited to ride on defendant's cars, and during the progress of the ride a collision occurred between two of the cars by which the plaintiff was injured. It was contended that though the cars were operated by regular employees of the company, that by the acceptance of the cars they became the servants of the convention and hence the company would not be liable for their negligence. It was also contended that inasmuch as the members of the convention were riding gratuitously, they did not become passengers so as to impose liability upon defendant company. The court in holding that the company was liable for the injuries sustained, said: "A passenger who is carried gratuitously by a common carrier is as much a passenger as if he were paying full fare, and the mere fact that he is carried gratuitously will not of itself deprive him of his right of action if injured by the negligence of the carrier." Citing Russell *v.* Pittsburg Ry. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214, 2 Hutchinson on Carriers (3d Ed.) §§ 1021, 1022, 5 Am. & Eng. Ency. Law (2d Ed.) 507, 6 Sack. 544.

CONFLICT OF LAWS. (Master and Servant.) **Ill.** — In Christiansen *v.* Graver Tank Works, 79 N. E. Rep. 97, it appeared that the contract of employment was made in Indiana to be performed in that state, and an action to recover for injuries received while in the master's employ was brought in Illinois. It was contended that the action having been brought in Illinois, the law of that state controlled the right of recovery. The court in ruling adversely to this contention, maintained that the contract of employment was made in Indiana to be performed in that state and was made with reference to the law of that state, and concluded that while the action was transitory and might be brought in Illinois, if service could be had on defendant, there was no doubt but that the law of the state of Indiana controlled in determining whether the plaintiff was entitled to recover, citing Herrick *v.* Minneapolis & St. Louis R. Co., 31 Minn. 11, 16 N. W. 414, 47 Am. Rep. 771; Leonard *v.* Columbia Steam & Nav. Co. 84 N. Y. 48, 38 Am. Rep. 491; Dennick *v.* Central R. Co. of N. J., 103 U. S. 26, 20 L. Ed. 439. The most interesting part of the court's discussion arises on the question of the admission in evidence of the statutes and report of decisions in the state of Indiana. The defendant, while relying on the statutes of Indiana, as defense to the action, failed to plead them, contrary to the general rule that a foreign law must always be pleaded. The court, in referring to this rule, stated that it had its exceptions and that it was not applicable to the case in hand. It appeared that the plea of not guilty was filed, and the court stated that under such plea the defendant was properly permitted to introduce in proof, as part of its defense, the law of the state of Indiana so far as it was material to show there was no liability resting on defendant to respond for the injury, which plaintiff had sustained. City of Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271 was quoted to the effect that in an action on the case, the defendant is permitted, under the general issue, to give in evidence a release, a former recovery, a satisfaction, or any other matter *ex post facto*, which shows that the cause of action has been discharged or that in equity and conscience the plaintiff ought not to recover. Thomson-Houston El. Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. State Rep. 536 was cited as holding that the laws of another state as to pleading and proof stand on the same footing as to any other facts, and are not required to be pleaded when they are matters of evidence. The court's conclusion was that the defendant was properly permitted under its plea of not guilty to properly introduce in proof, as part of its defense, the law of the state of Indiana, so far as it was material to show that there was no liability on its part.

CONSTITUTIONAL LAW. (Corporations.) U. S. Sup. Ct. — The validity of a Connecticut statute relative to condemnation of the stock of minority holders in certain instances came up for consideration in the case of Offield *v.* New York, New Haven and Hartford Railroad Company, 27 S. C. Rep. 72. The statute provides that in case any railroad company, acting under authority of the laws of the state, shall have acquired more than three-fourths of the capital stock of any other railroad corporation and cannot agree with the holders of outstanding stock for the purchase of the same, it may cause such stock to be appraised, and that on such appraisal the stockholder shall thereupon cease to have any interest therein and shall surrender his certificates to the corporation applying for the appraisal. The defendant in error, as lessee of the New Haven and Derby Railroad Co., had acquired all the shares of stock of that road except the two owned by plaintiff in error, and for the purpose of improvement of the road brought proceedings under the statute for the acquisition of plaintiff in error's stock. It was contended that the proceedings and statute were in violation of the constitutional provision against deprivation of property without due process of law and that relating to the impairment of rights of contract; but the court, citing the case of Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718, upheld the validity of the law.

CONSTITUTIONAL LAW. (Criminal Law.) Tex. — The Constitution of Texas, guaranteeing every person accused of crime a speedy public trial was invoked to defeat the "law's delay" in Waldron *v.* State, 98 S. W. Rep. 848. Acts 28th Leg. p. 221, c. 136 prescribing the penalty for seduction, provides that if the parties marry before the accused pleads to the indictment, the prosecution shall be suspended, but not dismissed, and shall be continued on the docket of the court from term to term for two years, and in case of any misconduct on the part of the defendant that would be ground for divorce, the prosecution shall be revived. The court, in discussing the validity of the statute, states that the defendant was relieved by it of the offense of which he was guilty by his subsequent marriage, but conditions subsequent were left hanging over him which might be equivalent to grounds of divorce. It was conceded that the legislature may define the offense of seduction and denounce the punishment therefor, but that the proposition that the legislature may authorize the continuance of an indictment or the suspension thereof for two years, was antagonistic to the bill of rights and unsound; that it could not be seriously contended that the legislature had power to punish a man for seduction simply because he might treat his wife in such manner as might justify her in bringing a suit for divorce. It concludes that the provisions suspending the prosecution for two years was violative of Const. Art. 1, § 10 guaranteeing every person accused of crime a speedy public trial.

CONSTITUTIONAL LAW. (Discrimination Classification.) Wis. — In State *v.* Evans, 110 N. W. Rep. 241, the question arose as to the constitutionality of the Wisconsin statutes regulating the practice of pharmacy, the important elements of which provide that any person who shall dispense drugs in any city, etc., having five hundred or more inhabitants, unless he be a registered pharmacist, shall forfeit a certain sum, and that any person who shall dispense drugs in any town, etc., having less than five hundred inhabitants, unless he be a registered pharmacist, or registered assistant pharmacist, shall forfeit, etc. The validity of these laws as attacked principally on the ground that they classified localities, allowing some to be served in the business of pharmacy by assistant pharmacists, who as a class, presumptively have less of competence than is demanded of registered pharmacists by whom the larger communities are required to be served. It was argued that the classification was false inasmuch as the health and life of every individual and that of the public is as important in the little hamlet as in the great city, and that any protection against incompetent dispensers of drugs is as much due the one as the other. The court in upholding the validity of the law cited as examples of such classification the laws requiring a certain age to vote, difference in police protection and protection against fire, pure water and the construction of sewers, and in speaking of the cogency and propriety of such regulations said: "Those subjects rest with the legislature and only when the court in the exercise of the utmost deference toward that other branch of the government is compelled to say that no one in the exercise of human reason could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation can it deny it validity."

CONSTITUTIONAL LAW. (Employers' Liability Act.) U. S. C. C. for Tenn. — In Howard *v.* Illinois Central Railroad Company, 148 Fed. Rep. 997, the court holds that the liability of a common carrier to its employer for personal injuries is not commerce, and the regulation of such liability with respect to carriers engaged in interstate commerce, is not within the power of Congress under the Interstate Commerce clause of

the Constitution. The decision turns on the constitutionality of Act, June 11, 1906, 34 St. 232, c. 3073, which makes common carriers liable to any employee for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defect due to its negligence in its cars, road bed, or works. It was contended that the relation between common carriers and their employees, more or less affected interstate commerce and for that reason it was within the power of Congress to regulate it. In answer to this contention Williams *v.* Fears, 197 U. S. 278, 21 Sup. Ct. 131, 45 L. Ed. 186 was quoted in the language of Chief Justice Fuller, to the effect, that if the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states and would exclude state control over many contracts purely domestic in their nature. It was urged in argument that the Safety Appliance Act (Act, March 2, 1893, c. 196, 27 St. 531), U. S. Comp. St. 1901, p. 3174, and the act in question were the same in character, and it was insisted that if the former was within the power of Congress to enact, it must have been within its power to enact the latter. The court found a well-defined distinction between these two acts. That distinction was clearly pointed out by showing that the carrier's liability under the Safety Appliance Act was in the nature of a penalty because of the carrier's violating the rules of the government prescribed by Congress for the conduct of its business and because as a result of such violation the employee was injured. In the act in question Congress did not undertake to prescribe a rule or regulation for the conduct of the business of a common carrier for the infraction of which any penalty was imposed, but the act only declared that the carrier should be liable for all damages to its employees, the result of negligence of its officers or agents. The court concludes that the power of Congress to define the liability of common carriers, engaged in interstate commerce to their employees, and to create rights of action in favor of employees, and to define the method of procedure, can only be exercised when Congress in the first instance has prescribed rules of conduct governing common carriers, and it is only for the breach of these rules that Congress has power to prescribe civil liability.

CONSTITUTIONAL LAW. (Initiative Legislation.) **Cal.** — A recent case of great interest and touching on a great question is found in *In re* Pfahler, 88 Pac. Rep. 270, which called in question the validity of an "initiative" provision of the Los Angeles City Charter. Though the case presents too many phases of interest to permit of delving deeply, it will not be amiss to skim it. The main contention of course was the validity of the provision under the Federal Constitution, which guarantees a republican form of government. The court in upholding the provision of the charter based its decision mainly on the grounds that if the constitutional provision did refer to states it did not refer to local affairs in that state. It was also urged that the provisions interfered with and suspended the exercise of the police power, and other state constitutional provisions, all of which were considered as not affecting the validity of the law. There was, however, a dissenting opinion in the case based on the ground that the "initiative" provision in the charter did offend the constitutional provision providing for a republican form of government, and that such constitutional provision did apply to local government in the state, and arguing that the guaranty necessarily imposes a duty on the part of the states themselves to provide such a government, and hence every act done by a state inconsistent with and violative of the theory of the republican form of government is invalid.

CONSTITUTIONAL LAW. (Trading Stamps.) **Colo.** — Another case on the much discussed question of trading stamps and one already passed upon by several able courts is found in City and County of Denver *v.* Frueauff, 88 Pac. Rep. 389, where the validity of an ordinance was called in question forbidding any gift enterprise designed to include the giving of any trading stamps or other device which shall entitle the purchaser of property to receive from any person or corporation other than the vendor any property other than that actually sold. The trading stamp contract was the ordinary one for the giving of stamps to purchasers of goods as a medium of advertising. The constitutional provision which it was contended that this contract offended provided, "the general assembly shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state. The court cites and bases its decision that the ordinance in question was not a valid exercise of police power and that such giving of trading stamps was not a gift enterprise on two cases; that of Young *v.* Commonwealth, 45 S. E. 327, and State *v.* Dalton, 22 R. I. 77. The cases of Lansburgh *v.* District of Columbia, 11 App. D. C. 512 and Humes *v.* City of Fort Smith, 93 Fed. 857, are discusssed and held not to justify the

court in following them, as they were directly opposed to the conclusions reached in all the cases in which the business of trading stamp companies has been under investigation.

CONTRACTS. (Of Marriage.) Cal. — In Bailey *v.* Brown, 88 Pac. Rep. 518, an ingenious contract of marriage was entered into, presumably to avoid any disagreeable interference by the mother-in-law with the conjugal bliss of the wedded pair. The question arises on an issue of variance between the plaintiff's allegation and the proof. Plaintiff alleged that defendant promised to marry her on her request at any time and the proof was that the marriage was not to occur until her mother's death. There was an essential difference between the allegation and the proof. The court cited Owen *v.* Meade, 104 Cal. 179, 37 Pac. Rep. 923; Shenandoah M. Co. *v.* Morgan, 106 Cal. 409, 417, 39 Pac. Rep. 802, and Davis *v.* Pacific Tel. Co., 127 Cal. 317, 321, 59, Pac. Rep. 698, and held that the defendant was entitled to a nonsuit on the ground of variance. Judge McLaughlin, in a concurring opinion, stated that the evidence clearly demonstrated that the plaintiff could not recover, even if a complaint contained the most elaborate averments in consonance with the proof. He asked the question, "How could a contract to marry exist when the promisor might never be under an obligation to marry the promisee, and *vice versa*" and continues, "If this good mother should live to a very ripe old age, as mothers sometimes do, no human could tell what might happen. Either of the parties might be waiting for the other, harp in hand, beyond this vale of tears, or both might pine away and die before this promise of future connubial bliss could ripen into a cause of action enforceable in earthly courts. Then, too, age creeps on all apace, and, if the contingency which could make this promise quick with life as a legal obligation, performable presently, was delayed through many weary years, waning desire and ripened judgment might prompt the parties to acknowledge the wisdom of that rule of public policy which forbids long-continued restraint upon marriage, and frowns upon a contract tantamount to an indefinite postponement thereof. And, if the roseate dreams of youth survived the blasting frosts of age, decrepitude, mental or physical incapacity, infirmities due to weight of years might be urged as defenses not now available to this defendant."

HUSBAND AND WIFE. (Enticing away wife.) Mass. — Interesting from a legal standpoint is the recent case of Mutter *v.* Knibbs, 79 N. E. Rep. 762, which was an action by a husband against his wife's father for enticing away and keeping from him his wife. The case practically turned on the distinction between the rights of the father or parents of a wife and a stranger to induce the wife to leave her husband. The court in discussing this distinction said in part: "There is a material difference between the acts of a parent and those of a mere intermeddler. Even in the latter case a defendant may disprove any intent on his part in advising the wife to cause a separation and may show that his advice was honestly given. But the rights and the corresponding duties of a parent are much greater than those of a stranger; and much stronger evidence is required to maintain an action against him. It is proper for him to give to his daughter such advice and to bring such motives of persuasion of inducement to bear upon her as he fairly and honestly considers to be called for by her best interests; and he is not liable to her husband in damages for her desertion, resulting therefrom, unless he has been actuated by malice or ill-will towards the plaintiff and not by a proper parental regard for the welfare and happiness of his child. In such an action the material question is the intent with which the parent acted rather than the wisdom or even the justice of the course which he took."

INSURANCE. (Accident Insurance — Exceptions in policy.) Wis. — A somewhat peculiar state of facts is found in Weidner *v.* Standard Life & Accident Insurance Company of Detroit, Michigan, 110 N. W. Rep. 246, which was an action on an accident policy limiting the loss to one-tenth of the amount otherwise payable, in event of death due to injuries intentionally inflicted upon insured by any other person, except assaults committed for the sole purpose of robbery. Insured was riding in a wagon with other persons and as they approached a toll gate they met two men, one of whom asked for a ride and exhibited a ticket. One of the persons in the wagon returned the ticket as the driver did not desire to give them a ride, whereupon the other man took from the wagon a pair of rubber boots belonging to insured and started off with them. Insured then demanded his boots and the man having possession of them struck him, knocking him down, and then beat insured in the face with the boots, inflicting injuries from which he afterwards died. The lower court granted a nonsuit on the ground that the evidence showed that a dispute and a controversy had arisen between the parties upon the road and that the sole purpose of that assault was not robbery. The appellate court in reversing this holding decided that such facts presented a question of fact to be passed upon by the jury and cited

Sherman *v.* State, 4 Ohio Cir. Ct. Rep. 531; Turner *v.* State, 1 Ohio State 422; Hill *v.* State, 42 Neb. 505, 60 N. W. 916; People *v.* Glynn, 54 Hun 332, 7 N. Y. S. 555; McDaniel *v.* State, 16 Miss. 402, 47 Am. Dec. 93, as defining what constituted robbery and cited other cases to show that forfeitures are abhorred in the law and especially in insurance cases.

MONOPOLIES. (**Contracts in restraint of Trade.**) **U. S. C. C. for Ohio.** — In Continental Wall Paper Company *v.* Lewis Voight & Sons Company, 148 Fed. Rep. 939, the action was to recover a balance due on account of wall paper sold and delivered to defendants. The defense turned mainly on the contention that defendants were compelled to become parties to an illegal combination, and that the contract on which the suit depended for the price and terms of the sale constituted one of the agreements, which went to make up the illegal combination represented by the plaintiff company. It appeared that plaintiff corporation was formed to control the output of 98 per cent of the wall paper mills in the United States. The combination was composed of manufacturers and wholesalers of wall paper throughout the country. Under the contract between plaintiff corporation and the manufacturers, plaintiff was the nominal seller of all the paper manufactured by the combine, though it was actually purchased from various jobbers of mills within the combination. Defendants, wholesalers of wall paper, were compelled to enter the combination, and agree to purchase and sell wall paper in accordance with the monopolistic terms of the contract, and purchased paper from various members of the combine for which plaintiff brought the action. The court stated in its discussion of the question involved that the vital issue was the bearing of the fact that the plaintiff was but the corporate hand of an illegal combination under the Anti-trust Law of 1890, on the liability of the defendants for the price of wall paper brought from the illegal combine. After quoting from the contract, to the effect that the vendor was to have the right to select the jobbers through whom the goods manufactured by it were to be distributed, and to designate the amount of its goods such jobbers should buy, the court continued, "Thus the declaration in this case is on an account which shows purchases by the defendants from many different members of the combination and the amount bought from each. But the plaintiff sues for the aggregate balance due on the several purchases. This action, it seeks to maintain, not on any averment of its assignment by the several vendors to it, but as on an account with it, and not the vendors. These and other considerations lead us to the conclusion that the several agreements referred to between the parties constitute one contract, and that the general purpose of the design and the undoubted result was to establish an illegal combination of manufacturers and wholesale dealers in restraint of trade," and that since plaintiff was bound to rely on the combination contract to show its capacity to sue, the illegality thereof constituted a defense to the action.

PROPERTY. (**Ejectment — Telephone Wire.**) **N. Y. C. of A.** — In the case of Butler *v.* Frontier Telephone Company, 79 N. E. Rep. 716, the court passes on the question as to whether ejectment will lie to compel the removal of a telephone wire stretched across private property but not in any place resting thereon. After stating generally things necessary to support the action of ejectment, the court says: "The serious question is whether he [plaintiff] was deprived of possession to the extent necessary to authorize ejectment." It was unable to find that the precise question had ever been passed upon and said that some of the courts had held that the action would lie in cases of projecting cornices and eaves: (Murphy *v.* Bolgar, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; McCourt *v.* Eckstein, 22 Wis. 153, 94 Am. Dec. 594; Stedman *v.* Smith, 92 Eng. C. L. 1.) while other courts had come to an opposite conclusion. (Nowalk, H. & L. Co. *v.* Vernon, 75 Conn. 662, 55 Atl. 168, 96 Am. St. Rep. 246; Rasch *v.* Noth, 99 Wis. 285, 74 N. W. 820, 40 L. R. A. 577, 67 Am. St. Rep. 858.) Proceeding upon the well settled theory of law that the ownership of land extends upward to an indefinite extent and that the extent of obstruction is only one of degree, it was held that the action would be sustained and judgment was thereupon rendered for plaintiff.

PUBLIC SERVICE COMPANIES. (**Refusal to Serve.**) **N. Y.** — In Benson *v.* American Illuminating Co., 102 N. Y. S. 206, it is held that where, after an electric company has wired an office for light, the customer makes defective connections with other wires causing danger of fires and refuses to remedy it, the company may shut off the current without liability to the customer therefor. The plaintiff, who was a dentist by profession, sued for damages occasioned by the defendant company in refusing to furnish electricity for a certain period. It appeared that defendant company had installed its wires for the use of plaintiff. Plaintiff attached additional wires for the further use of the current and was informed by the defendant that the wiring he had done himself was defective and dangerous.

He was warned to discontinue the use of them, and having failed to do so, the defendant shut off the current from his wires. The court, in discussing the liability of the defendant company for damages in refusing to furnish plaintiff electricity as agreed, stated that the company was clearly within its rights when it refused to allow its electricity to run through such defective wires to avoid any possible liability of fire or danger to any person on its part, and that whatever damages the plaintiff suffered by being deprived of his light was due to his own fault and not to the fault of the company.

PUBLIC SERVICE COMPANIES. (**Unfair Competition.**) **Utah.** — A novel and original cause of action arises in Rocky Mountain Bell Telephone Company *v.* Utah Independent Telephone Company, 88 Pac. Rep. 26. The parties are rival telephone companies, and the action is a suit for injunction to restrain the defendant company from adopting and using the number 888 for its telephone call for its trouble department. The gravamen of the complaint was founded on the fact that defendant company adopted such numerals for its trouble call after the plaintiff had adopted and used such number for many years for the same purpose, alleging that the adoption of such number was fraudulent and done for the purpose of obtaining knowledge and information and then using it to induce the patrons of plaintiff to subscribe for and use the telephones of defendant, to plaintiff's injury and damage. It was not directly alleged that the defendant made the numbers in imitation of those used by the plaintiff, or that there was any deceit or misrepresentation practiced in their use, except as stated. The court lays down the proposition that if defendant had a legal right to adopt and use such number in connection with its trouble department, then the motive it had in view in so doing was wholly immaterial from a legal standpoint, and that any incidental injury or annoyance from that source would not be of any legal significance, if they were the result of a legal right. In this connection, the court cites as presenting analogous cases, Phelps *v.* Nowlen, 72 N. Y. 39, 28 Amer. Reps. 93; Clinton *v.* Myers, 46 N. Y. 511, 520, 7, Amer. Reps. 373; Hague *v.* Wheeler, Pa., 27 Atl. 714, 22 L. R. A. 141, 37 Amer. St. Reps. 736. It was pointed out that all that defendant could learn was whose telephone was defective, and that could only be so when a patron of the plaintiff company made a mistake by carelessly using the telephone of defendant instead of that of plaintiff. The court propounds the question, can the defendant be enjoined from conducting its business in its own way simply because it has so organized it that careless people may use its telephone for a certain purpose not for pay, instead of that of plaintiff, who is a competitor of the defendant in the same business? It continues "surely, it cannot seriously be contended that defendant organized its system and is conducting it in that way for the sole purpose of benefitting itself from chance occurrences such as those above mentioned. But suppose it is true that defendant does learn of trouble in respect to plaintiff's telephone by the means alleged, it could not profit from this, unless it can convince the subscriber using the plaintiff's telephone that defendant's system is the better one, and is better calculated to serve his purpose in that it is less liable to cause trouble. This, if competition is permissible in the telephone business, would seem to be legitimate competition," and concludes that it did not appear that defendant had practiced any deceit or fraud, but had simply and openly announced to all that its trouble department was connected with telephones which were the same number used by plaintiff for the same purpose. It was pointed out that no claim was made that the number 888 either alone or as used in connection with the telephones connected with plaintiff's trouble department was, or constituted a trade-mark.

RELIGIOUS SOCIETIES. (**Selection of Trustee.**) **U. S. Cir. Ct. N. D. Ill.** — One of the most interesting recent decisions on questions of both law and fact is that of Holmes *v.* Dowie, 148 Fed. Rep. 634, involving the affairs of the religious organization founded by Dowie at Zion City, Illinois. A vast amount of property had been accumulated by Dowie from sales of land and voluntary contributions of his followers all over the world. The property all stood in his name, although he had at various times stated that it was held in trust for the "Christian Catholic Apostolic Church to go down in generations to do good in that line." He had acted as sole head of the church and business interests connected therewith; but, his health having failed, he had gone to Mexico, leaving the affairs of Zion City in charge of one Voliva, to whom he had executed a power of attorney giving full control over the property. While Dowie was thus away, Voliva and others proceeded to suspend him from the position of general overseer and Voliva assumed authority himself. Dowie hastened back to regain his leadership, and brought an action against Voliva and those who had helped place him in authority, alleging that the property covered by the power of attorney belonged to himself personally; that the conveyances made by Voliva to one of his associates were a fraud on Dowie's

rights, and praying for a decree ordering conveyances to himself. The answer and cross-bill of defendants alleged the trust character of the property and prayed for a decree establishing that fact. Then other complications arose. Certain persons claiming to be creditors of Dowie filed a petition in the United States District Court, alleging Dowie to be bankrupt. The parties to the Dowie action for recovery of the property, which had been brought in the Illinois State Court, entered into a stipulation transferring that action to the United States District Court to be determined in connection with bankruptcy matter. Questions of jurisdiction arising, the whole controversy was, by further stipulation, transferred to the Circuit Court. That court came to the conclusion that the property should be decreed to be in trust and therefore not subject to bankruptcy proceedings against Dowie personally. A receiver was appointed to care for the business interests involved and then the court took up the question of the leadership of the society. In passing on this question, it said, "It is a general rule that a court will recognize the action of a religious society in this respect and this court does not assume to usurp the power of selection in the pending cause. Inasmuch, however, as the organization has no regulation providing how this should be done, it seems fair that the majority rule should prevail." An election was, therefore, ordered to be held under charge of officers appointed by the court for that purpose; all male and female members of the church over twenty-one years of age being granted the right to vote.

SPECIFIC PERFORMANCE. (Contracts of Adoption.) Iowa. — In Chehak *v.* Battles, 110 N. W. Rep. 330, is an interesting discussion as to what contracts of adoption will be specifically enforced where they involve the property rights of the party adopting. The contract in question provided generally that in consideration of the giving over of the child the party adopting would bring her up as would natural parents and that such child would have all the rights of inheritance by law. On the death of the party adopting it turned out that the contract was not acknowledged, and hence, under the statute, was not a valid instrument of adoption. Suit however, was brought to specifically perform the contract in respect to the property rights involved, on the ground that the giving over of the child was a part performance of the contract within the statute of frauds, and that the consideration was ample. The court in disposing of the question of the consideration of such contracts quoted from Godine *v.* Kidd, 19 N. Y. S. 335, and said further, in respect to the clause of the contract of adoption providing for the inheritance of the child, that it did not purport to declare that her status would be such as to entitle her to inherit, but merely that, as a consideration on the part of the party adopting, she should acquire a portion of their property to be determined definitely at their death. The following cases in which contracts of adoption were involved in equity were cited and discussed; Shearer *v.* Weaver, 56 Iowa 578, 9 N. W. 907; Vanduyne *v.* Vreeland, 12 N. J. Eq. 142; Winne *v.* Winne, 59 N. E. 842, 82 Am. St. Rep. 647; Kofka *v.* Rosicky, 59 N. W. 788; 25 L. R. A. 207, 43 Am. St. Rep. 685; Sharkey *v.* McDermott, 4 S. W. 107, 60 Am. Rep. 270; Wright *v.* Wright, 58 N. W. 54, 23 L. R. A. 196; Sutton *v.* Hayden, 62 Mo. 101; Grantham *v.* Gossett, 182 Mo. 651, 81 S. W. 895.

The court upholds the contention that such contract is not within the statute of frauds, since the surrender of the child is a part performance; also that it is not testamentary in its nature so as to be affected by the statute relating to the execution of wills, and upholds the petition for specific performance.

STATUTES. (Validity.) Wash. — In State *v.* Superior Court, 88 Pac. Rep. 207, the Supreme Court of Washington passes on the validity of a statute of that state relating to the deportation of insane persons. Affidavits had been filed before the judge of the Superior Court of King County alleging that a couple of persons confined in the jail on the charge of murder were then insane and asking appointment of a commission to pass on the question of sanity. Such commission sustained the allegations in the affidavits referred to and reported to the court that the prisoners were insane. The court was about to enter an order in accordance with the findings of the commission and to direct the deportation of the prisoners to the state of Oregon when the prosecuting attorney applied to the Supreme Court for a writ of prohibition alleging that the proceedings had were invalid. The Supreme Court held the proceedings relating to the determination of the question of sanity regular and authorized by law but, although the question on the validity of the statute authorizing the deportation was not raised by the record, it said that "being a question of public importance which might disturb the friendly relations of the sister state, the majority of this court believe that it should be carefully considered." It said that notwithstanding the court might direct the sheriff to deport the prisoners to their home in an adjoining state, the officer's powers would cease immediately on his crossing the state boundary and

to that extent the decree would be incapable of complete enforcement. It cited Overseers of the Poor *v.* Overseers of the Poor, 1 Vt. 464, relating to the removal of paupers, and Overseers *v.* Overseers, 87 Pa. 294; Overseers *v.* Overseers, 9 Atl. 457, 22 Cyc. 1217; State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357, and held the statute invalid as being incapable of judicial enforcement.

TELEGRAPHS AND TELEPHONES. (Agency.) Ind. — In Western Union Telegraph Company *v.* Sanders, 79 N. E. Rep., 406, it is held that the penalty for failure to transmit a telegram is recoverable, though the message was delivered orally to and taken down in writing by the company's agent outside its office, where it appeared that he filed a message in the office.

It was contended by the company that the statute under which the action to recover the penalty was brought, contemplated the filing of messages in the office, and that a verbal communication could not bind the company, unless by recognized custom held out to the world that whenever any of its employees, whether at the post of duty or elsewhere, accepted a message, it would undertake under penalty to transmit the same; that the legislature in creating the penalty had in mind the receiving of dispatches, either written or printed, and that whatever the agent did or omitted to do with reference to writing down the message orally given him, he did as agent of the sender. The court, in its discussion of the question of the agency of the company's employees, referred to the well-known cases of first impression in the state of Texas, Western Union Tel. Co. *v.* Edsall, 63 Tex. 668; Same *v.* Foster, 64 Tex. 220, 53 Am. Rep. 754; Gulf, etc., R. R. Co. *v.* Geer, 5 Tex. Civ. App. 349, 24 S. W. 86, holding that an operator, in writing a message for the sender, becomes the agent of the sender. The court admitted that the statute seemed to contemplate the filing of dispatches at the company's office, or with an agent while on duty, but concluded that, if it was conceded that the operator was the agent of the sender in writing the message, and until the message was actually in the office of the company, yet when it was filed in the company's office by its agent, and in the line of his duty, he ceased to be the agent of the sender and became the agent of the company.

THE LIGHTER SIDE

Humor of Cross-Examination. — Of the famous Daniel O'Connell many interesting stories are told illustrating his resourcefulness when engaged in the cross-examination of a witness. *The Sunday Magazine* repeats these two, one in which he was successful in his attempt to entrap the witness, and another in which he was himself worsted.

Once he was defending a prisoner indicted for murder. The principal witness against the defendant swore that the prisoner's hat had been found near the place of the murder. The hat was then produced in court, and the witness swore positively that it was the same one that was found, and that it belonged to the prisoner.

"By virtue of your oath, are you positive that this is the same hat?"

"Yes."

"Did you examine it carefully before you swore that it was the prisoner's?"

"Yes."

"Now, let me see," said O'Connell, as he took up the hat and began carefully to examine the inside of it. He paused with a curious expression on his face, and then spelled aloud, 'J-a-m-e-s.' Now, do you mean to say that that name was in the hat when you found it?" he asked, turning to the witness.

"I do."

"Did you see it there?"

"I did."

"And this is the same hat?"

"Yes."

"Now, my lord," said the lawyer, turning to the judge, "there's an end to this case. There is no name whatever within this hat."

The prisoner was instantly acquitted.

An amusing incident is told of a victory over O'Connell by a witness whom he was cross-examining. The witness was for the Crown, and the case was a riot committed by a crowd of beggars. O'Connell was at that time well known, and it was after he had received his sobriquet of "the Big Beggarman."

The witness finished, and O'Connell began the cross-examination. "Now tell the court just how many beggars there were," he said.

"Indeed, I did not stop to count them, but there was a great tribe of them, your Honor."

"A whole tribe of them, eh? Will you tell us to what tribe they belonged?"

"Indeed, your Honor, that is more than I can do, for I never heard, but I think it must have been to the tribe of Dan."

"You may go down, sir!" said O'Connell in a rage, amid the laughter of the court.

Sherry Won His Case. — Some years ago there arose in Lynn an important law case bearing upon the right of a labor union employing a "banner boy" to patrol at the front of Patrick Sherry's shoe factory on Munroe street.

Upon the banner was printed a "warning" to workmen to keep away from the Sherry factory, as a strike was in progress. Mr. Sherry reasoned that the work of the "banner boy" was an invasion of his rights, therefore the boy was arrested.

The case was appealed to the Superior Court. The Hon. John R. Baldwin was counsel for the labor union. Judge Aldrich was hearing the case. Mr. Baldwin sought to make a ludicrous point of the very diminutive "banner boy," and said to the court:

"Your Honor, look upon the culprit!"

The judge promptly responded: "I am looking. What of it?"

Mr. Baldwin was so suddenly taken aback at the sharp response of the judge that it was some little time before he recovered his usual composure. Mr. Sherry won his case. — *Boston Herald.*

Life Sentence. — She (*thinking of her trousseau*): This getting married is certainly a trial.

He: Well, it isn't half so bad as working out the sentence. — *Philadelphia Record.*

Joyful. — "Maud says she loves to see other people made happy."

"Now I understand why she goes to every trial for divorce in town."

Sententious. — "Bridget," said the noted judge's wife to her new cook, "my husband is a great man. He has sentenced some of the most noted criminals of our day."

"Faith, an' long afore I come here I heard he was quite sententious."

Handsomely. — "Brigg's ward is the most beautiful girl and he has cheated her out of fifty thousand dollars, but he doesn't consider it a crime."

"What does he call it?"

"He calls it 'doing the handsome thing.'"

Truly Feminine. — A pretty girl went to a famous New York lawyer last month and asked him to conduct a breach of promise case for her.

"What evidence have you?" asked the noted jurist.

"Evidence in plenty," replied the broken-hearted one. Then she burst into tears and added: "In the first place he always called on me in a business suit and — and — and in the second he has married another girl!"

Lapsed. — Peter Newell tells a story of a little Southern boy who sat reading while his colored mammy was doing the mending. The child looked up and asked:

"Mammy what does 'lapse of justice' mean?"

"For de Lawd, honey, I su't'nly doan' know. All de justices what visits your pa am so fat dey aint got no laps."

In Bankruptcy. — An Irish lawyer who is always full of original sayings hung around the referee in bankruptcy and asked who did most of the business in that court. The referee replied that L. seemed to have the most business. The lawyer said, "Well I always thought that L. had a lot of poor clients, but never knew before that he had all the dead beats in town."

The Law's Delay. — The aforesaid lawyer was seen sitting quietly on the doorsteps of the court house one day, absorbed in thought, and a lawyer came along and asked what the trouble was now. The wit replied, "I am waiting for clients. The judge has sent all my clients to the pen for six months and I have nothing more to do till they get out."

Judge Hubbard. — The late Judge Hubbard, for more than fifty years a prominent member of the Iowa Bar, was noted for his many sarcastic sayings and retorts in court. He had on the stand one John Wear, an old banker, all afternoon on a hot June day, when the judge left the room for a few minutes, much to the satisfaction of the witness who got out a red handkerchief with which he wiped his brow. Hubbard, who had not gotten out of the witness what he thought, said in a most sarcastic vein. "It makes you sweat, John, to tell the truth, don't it?"

A doctor who was rather pompous asked to be excused so that he could look after his patients. Judge Hubbard replied to the full court room. "You should give your patients a chance to get well, and I'll keep you here for that purpose." He hated a man who was too technical, and used to relate of one S. that "he is so technical that he will fall over a crowbar to hunt for a needle, and not see the crowbar mind you." He was an enemy of a certain person who always gave him more or less trouble. One day the judge came into an office asking if he could tell him anything about the life tables. "No," replied the person. "Well," said the judge, "I just want to know how long I'll have to endure that fool of a man who lives across the way, that's all," and away he went down street.

He got left in a political campaign and one day having heard of a shoemaker who had voted against him, whom he had befriended, the judge replied, "Say Jack, you won't need to buy any more bristles for you can just put your hand back of your neck and pull one out, for you are nothing but hog anyway."

Judge Rothrock. — The late Judge Rothrock had a fine sense of humor and often enlightened court and juries in his own inimitable way. He sat on the Bench when one G. W. Wilson came into court with a cart full of books. The judge asked what all this was for, and Wilson replied that it was to show up a receivership. "Well, well," said the judge, "don't you think this failure is entirely due to too much bookkeeping?"

When he was on the Supreme Bench he examined a number of young men for admission to the Bar. Among the number there was a young man who knew the code very well but had no knowledge of legal principles. He said to him, "Young man you are in bad fix, for the legislature may in a night do away with all the law you know." At another time he was trying a suit in which there were about a half dozen lawyers who quarreled

over the admission of evidence and about positions and what not. The judge sat quietly by and finally he put the question to one of the lawyers. "What am I sitting here for anyway?" The lawyer quick as a flash replied, "You have got me now judge, I don't know except for manner's sake."

Indignity. — One G. used to go on a drunk once in a while and would when in that condition go to a hotel or home and remain till the spree was over and would perhaps not indulge again for many weeks. He once got on one of his "periodics," when he went into a livery barn and hid in the hay mow. At night one of the men found him, and thinking he was an ordinary tramp tried to pull him up. It was impossible to get the man to move, as he was covered up with hay and straw and evidently felt he was resting on a bed of ease. The stable keeper, thinking he had some tramp to deal with, knew one remedy which had worked many times in the past; he turned on the water and gave the sleeper a good dose of cold river water directed at the sleeper's chest and neck. In an instant the sleeper, over six feet tall and well dressed, rushed up at his would be assailant, grabbing him by the throat, saying, "I was a gentleman, I have always been a gentleman, I came in here a gentleman, and now I go out of here the worst looking tramp you ever saw." As he went down street, pulling chaff from his neck and throat, with hay and straw sticking to him like cockle burr to a cow's tail, he shook his fist at the terrified stable keeper saying as he went along, "I'll sue you for befouling my person, I was a gentleman till I struck your place, I shall never come back here again, except with the sheriff to cause your arrest, you ignorant lout you, who don't know better than to sprinkle a gentleman in such fashion." B. L. Wick.

An Ad. — Another lawyer's advertisement has come to join our collection. "O. J. Felton, farmer's attorney. At home on Brookdale Farm. Practice in all courts. Litigated cases not sought for. New Phone 2 on 390." *Cedar Rapids Evening Gazette.*

Evidence. — "The evidence shows, Mrs. Mulcohey, that you threw a stone at Policeman Casey."

"It shows more than that, yer Honor, it shows that Oi hit him." — *Minneapolis Tribune.*

Mayor and a Mule. — Mayor Dunne issued a pardon for a mule. The action was taken on the assurance of State Senator E. J. Rainey that the prisoner at the city pound had never before offended and would be good in the future. The mule is the property of Gerald Broderick, fifteen years old, who appeared in the mayor's office armed with a letter from the senator. He peered over the high railing and caught the attention of Abe Merinbaum, bridewell pardon clerk.

"I want a pardon," said the boy.

"Who for?" asked Merinbaum.

"You have locked up my mule," answered the youngster with a catch in his voice.

Merinbaum read the senator's letter, consulted with the mayor, visited the deputy comptroller, and a pardon was arranged. — *Chicago Daily News.*

Generosity. — One S. was known in his day and generation as one of the most brilliant lawyers of Iowa, but he would get drunk. One morning he came into the Supreme Court room of the state in that condition, and while the court was in session many motions and orders came up before the regular business of the day began. When about all the detail of the business was disposed of, the chief justice asked if there was anything else that could be disposed at that session. Mr. S. walked up in front of the speaker's desk and called out "What has been done with no——," a case in which he was interested. The chief justice said that the case had not as yet been decided. Then Mr. S. replied, "This is the only case I have, my client needs the money, and I need my fees. Now if you will decide this case right away I'll give you five dollars." The chief justice called for order and was very much enraged. S. did not realize what he had said, so to fix it up replied as follows, "Excuse me, judge, I did not mean five dollars for all of you, I meant five dollars apiece." There was a smile on the faces of the members of the Bar, while a friend led the offending attorney out of the court room to sober up. — B. L. W.

A DETAIL FROM THE TRUMBULL PAINTING OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE (JAMES WILSON IS THE CENTRAL FIGURE).

The Green Bag

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JAMES WILSON — NATION BUILDER [1]

By Lucien Hugh Alexander

PART IV

BY the time the United States Constitution was ratified in 1788, James Wilson had triumphed over his political enemies and had become the leader of the dominant party in Pennsylvania, then the most important state in the Union; yet his rule was a sway of reason, resulting from universal recognition of his abilities as a leader of men and moulder of public opinion. William Findley, one of his most aggressive opponents in the Pennsylvania ratifying convention of 1787, wrote that Wilson was "considered as the most able politician in the state." His commanding influence is strikingly illustrated by the words of the leader of the opposition to the ratification of the United States Constitution, who finding the Pennsylvania convention, as the result of Wilson's arguments, determined to ratify it, moved that the objections of the minority, including a series of articles in the nature of amendments, be spread on the records. Wilson, opposing, demanded that the motion be reduced to writing, whereupon the leader of the opposition replied:

"Indeed, sir, I know so well that if the honorable member from the city (Mr. Wilson) says the articles shall not, they will not be admitted, that I am not disposed to take the useless trouble of reducing my motion to writing, and, therefore, I withdraw it."

When the Constitution was finally ratified by the number of states necessary to put it into operation, a great celebration was held in Philadelphia, July 4, 1788, which included a procession of a character never equalled since, with floats representative of the various vocations and trades of the people, and upon one of which sat the Judges of the Supreme Court of Pennsylvania. This float, as described by Francis Hopkinson, was in the form of a large eagle, drawn by six horses, and upon it was the Constitution framed and fixed on a staff, crowned with the cap of liberty, the words THE PEOPLE in gold letters being on the staff immediately under the Constitution. In the procession each of the thirteen states was represented by a distinguished citizen, and James Wilson personified Pennsylvania. He was selected to deliver the oration [1] at Independence Hall, and it is said 20,000 people assembled to hear him. The oration was effervescent with the spirit of the time and the exultation resulting from the victory of the Constitution and faith and hope in the future. With the vision of the seer, he foreshadowed the development of America:

"The commencement of our government has been eminently glorious; let our progress in every excellence be proportionably great. It will — it must be so. What an enraptured prospect opens on the United States! . . . . Lowing herds adorn our valleys; bleating flocks spread over our hills; verdant meadows, enameled pastures, yellow harvests, bending orchards, rise in rapid succession from east to west. . . . Commerce next advances in all her splendid and embellished forms. The rivers and lakes and seas are crowded with ships. Their

[1] Continued from the March number.

[1] For same in full see Wilson's Works (Bird Wilson edition, 1804) vol. III, pp. 299–311.

shores are covered with cities. The cities are filled with inhabitants. . . . Peace walks serene and unalarmed over all the unmolested regions — while liberty, virtue, and religion go hand in hand, harmoniously protecting, enlivening, and exalting all! Happy country! May thy happiness be perpetual!"

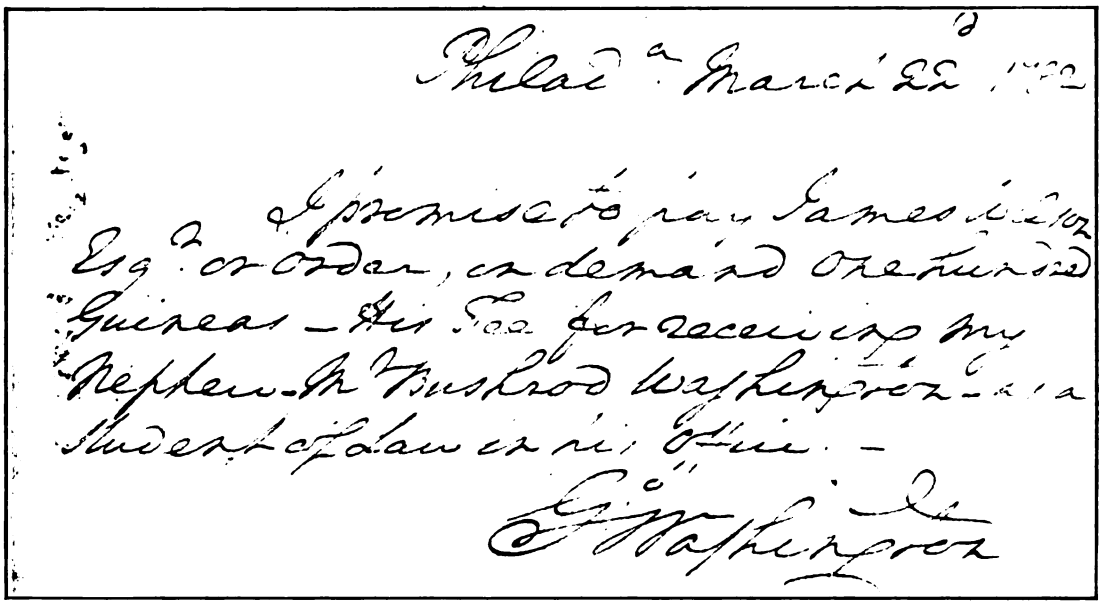
After tracing the rise and fall of governmental institutions from the days of antiquity, he exhorted the citizens of the young nation to frugality, temperance, and the highest civic duty, and painted in a powerful word picture the fall of Rome as a warning to the infant republic. "A progressive state," he asserted, "is necessary to the happiness and perfection of man." He abjured the people to protect the ballot and conscientiously to discharge their electoral duty, declaring:

"Of what immense consequence is it then that this primal duty should be faithfully and skillfully discharged! . . . You will forgive me, I am sure, for endeavoring to impress upon your minds, in the strongest manner, the importance of this great duty. It is the first concoction in politics. . . . Let no one say, that he is but a single citizen, and that his ticket will be but one in the box. That one ticket may turn the election. In battle every soldier should consider the public safety as depending on his single arm; at an election every citizen should consider the public happiness as depending on his single vote."

It is not strange that it was to a man of such mental grasp and moral caliber that George Washington, who had learned to know and understand Wilson during the early years of the Continental Congress, should have insisted in 1782 that his nephew Bushrod Washington should go for instruction in the law. Long years after, in 1822, Bushrod Washington, then a Justice of the Supreme Court of the United States, wrote that his father had sent him to Philadelphia in the winter of 1781–82 with a view to the study of the law, and that General Washington, happening to be in the city, undertook to superintend the necessary arrangements for his establishment; and he adds that although James Wilson "required from his students a much higher fee than was usually paid to the other gentlemen of the law, the General unhesitatingly overruled the intention I expressed to him of entering some other office on account of that difference, by arguments strongly indicating the high opinion he entertained of" James Wilson, and in the same communication Mr. Justice Washington spoke of Wilson as "a sincere friend of the General." George Washington gave his personal note to Wilson for one hundred guineas "for receiving my [his] nephew Mr. Bushrod Washington as a student of law in his office." This document is of such historic interest that a *facsimile* reproduction, with Wilson's receipt endorsed, is here inserted through the courtesy of Hon. Hampton L. Carson, former Attorney General of Pennsylvania, in whose historical collection it now is.

On August 7, 1790, the trustees of the College of Philadelphia, afterwards the University of Pennsylvania, as the result of the suggestion of Charles Smith, Esq., son of the Provost, and formerly a student in James Wilson's law office, appointed a committee of three, of which Wilson was one, to consider the propriety of establishing a law professorship, and one week later they submitted an outline plan, prepared by Wilson, for a course of law lectures. It is still preserved among the Wilson papers in the Historical Society of Pennsylvania. It is so clear and so applicable to present day conditions that we here reproduce the essential portions:

"The object of a system of law lectures in this country should be to explain the Constitution of the United States, its parts, its powers, and distribution, and the operation of those powers; to ascertain the merits of that Constitution by comparing it with the constitutions of other states, with the general principles of government, and with the rights of man; to point out the spirit, the design, and the probable effects of the



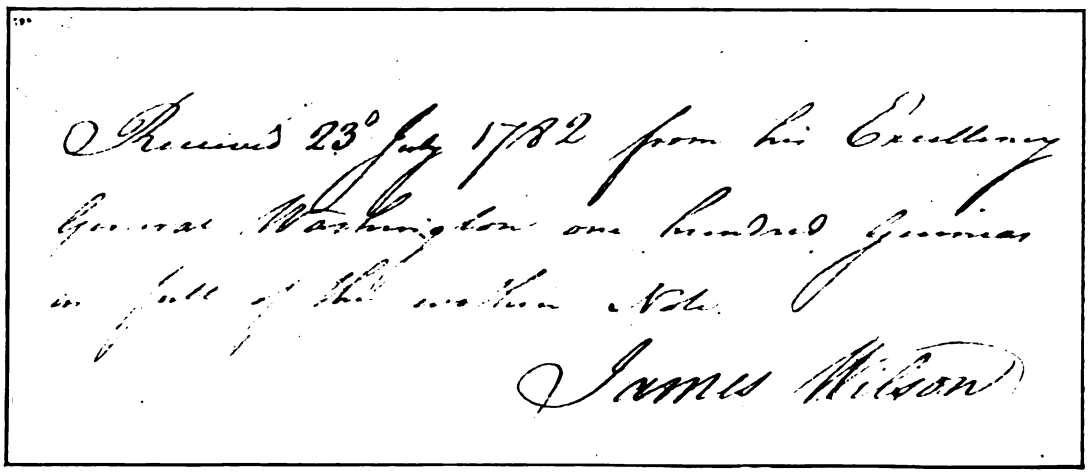
GEORGE WASHINGTON'S NOTE

laws and treaties of the United States; to mark particularly and distinctly the rules and decisions of the federal courts in matters both of law and practice.

"To examine legally, critically, and historically the constitutions and laws of the several states in the Union; to compare those constitutions and laws with one another, and with the general rules of law and government; to investigate the nature, the properties, and the extent of that connection which subsists between the federal government and the several states, and, of consequence, between each of the states and all the others.

"To illustrate the genius, the elements, the origin, and the rules of the common law, in its theory and in its practice; to trace as far as possible that law to its fountains, to the laws and customs of the Normans, the Saxons, the Britons, the ancient Germans, the Romans, and perhaps in some instances the Grecians.

"Under this head it is to be observed,



JAMES WILSON'S RECEIPT

that the common law, in its true extent, includes the law of nations, the civil law, the maritime law, the law-merchant, and the law, too, of each particular country, in all cases in which those laws are peculiarly applicable. All the foregoing subjects of discussion should be contrasted with the practice and institutions of other countries. They should be fortified by reasons, by examples, and by authorities; and they should be weighed and appreciated by the precepts of natural and revealed law."

To this man, James Wilson, jurisprudence was a synthetic science, and not a mere group of isolated subjects to be taught independently and without a comprehensive presentation of the interdependent and reciprocal relations of its various branches; to him it was also a philosophic ethical science, based on reason and justice, the various subdivisions of which he believed must necessarily be studied as a correlated whole for a proper comprehension of the particular parts.

The proposed law course was established to consist of twenty-four lectures per annum, the fees to be paid by each pupil not to exceed ten guineas, and James Wilson on the 17th of August, 1790, was unanimously elected by the trustees by ballot to the chair created, and thus became the first professor of law in America. The initial lecture was delivered on the 15th of December, 1790, in the presence of President Washington and many distinguished guests, including his cabinet, members of Congress, the judges of the national and state courts, and the executives, as well as legislative bodies, of both Pennsylvania and Philadelphia. At the conclusion of the lecture, the degree of LL.D. was conferred upon him. Many ladies were present, among them Mrs. Washington and Mrs. Alexander Hamilton, and Wilson alluding to the ladies, facetiously remarked that he had never before addressed such "a *fair* audience." Invitations had been issued by Mr. Justice Wilson — for he was then senior Justice of the Supreme Court of the United States — to the President and his Cabinet, the members of Congress, etc., etc., and the *Pennsylvania Colonial Records* show that the Supreme Executive Council of Pennsylvania formally resolved to attend in a body. The lectures are included in *Wilson's Works*, a second edition of which was published in 1896[1] by James DeWitt Andrews, LL.D., who so truly says in his introductory note:

"Would you trace the history of popular governments, you will find the whole outline traced by the master hand of Wilson in these lectures, prepared especially to instruct the American student as to the difference between the institutions which had before existed and the political system of law and government which exists in the United States. . . . In one respect Wilson's Works are remarkable. It is in this: each fundamental principle is in every instance traced to its source, whether it shall be a principle enunciated by Socrates, Aristotle, Cicero, Gaius, Puffendorf, Locke, Grotius or Hobbes, Descartes or Hume, Vattel or Domat, who may have written upon some proposition or problem of the law or government."

There is no clearer or more satisfactory exposition anywhere of the basic principles of our system of jurisprudence and government than Wilson enunciated in these lectures and in the luminous arguments concerning the Constitution, which have fortunately been preserved to posterity, and which as the years go on, and Wilson's real worth becomes fully appreciated, are destined to be held in the highest esteem.

Wilson's earliest biographer, Robert Waln, Jr., writing of him in Sanderson's *Lives of the Signers*, a quarter of a century after his death, described him as "about six feet in height, erect, or rather, if the expression may be allowed, stooping backward." He also says:

"His person was dignified and respectable; and his manner a little constrained, but not ungraceful. His features could not be called handsome, although they were far from disagreeable; and they sometimes bore the appearance of sternness, owing to his extreme nearness of sight."

[1] Wilson's Works, Callaghan and Co., Chicago.

Apropos of this last remark, his friend Thomas Smith, a member of the Continental Congress, in a letter speaks of his looking through his spectacles,[1] "like a surveyor through a compass," adding jokingly, for the letter was addressed to Wilson, "with a good-natured smile upon your countenance, so that all the house might see what excellent and white teeth you have." The disinterment of Wilson's remains, at which the writer was present, disclosed that the last intimation had substantial foundation in fact; that the occlusion of the upper and lower dentures was remarkably perfect; and that the lower jaw, while well proportioned and not objectionably obtruding, was unusually long and massive, with the chin very broad and square, all betokening that strength and determination of character which, in Wilson, were such dominant traits. The remnants of the coffin showed the inside measurement to have been six feet one inch in length. His wealth of hair still retained the bright auburn hue of the typical Scot, and was bound in a cue, after the manner of his time, though in life it was no doubt often well powdered, if we may judge from the snow whiteness of the hair in the miniature,[2] painted from life and reproduced as the frontispiece of the January issue.

The portrait of Wilson by Trumbull in his *The Congress Voting Independence*, now in the possession of Yale University, and in which Wilson's is one of the five full length figures, shows a man of great power and personal vigor, with determination stamped on every line of face and figure. This painting, so superbly engraved nearly a century ago by Durand, and extensively distributed, is far superior to the *replicas*, one in Hartford and the other in the Capitol at Washington, in both of which the portraiture is most defective.

[1] They were very large with wide, heavy frames and are now in the possession of Mr. Israel W. Morris, of Philadelphia.

[2] Now in possession of the Montgomery family of Philadelphia.

William Rawle, the elder, in an address delivered in 1824, declared that Wilson's views on the great questions of the day "were luminous and comprehensive," and that "his knowledge and information always appeared adequate to the highest subject, and justly administered to the particular aspect in which it was presented." He also said:

"His person and manner were dignified; his voice powerful, though not melodious; his cadences judiciously, though somewhat artificially regulated. His discourse was generally of a reasonable length; he did not affect conciseness nor minuteness; he struck at the great feature of the case, and neither wearied his hearers by a verbose prolongation, nor disappointed them by an abrupt conclusion. But his manner was rather imposing than persuasive, his habitual effort seemed to be to subdue without conciliating, and the impression left was more like that of submission to a stern than a humane conqueror."

On the other hand, Dr. Benjamin Rush, who served with him in the Continental Congress and who knew him intimately, declared that "he reasoned, declaimed, and persuaded, according to circumstances, with equal effect;" that "his mind, while he spoke, was one blaze of light;" and that "his eloquence was of the most commanding kind." Francis Hopkinson bore similar testimony in a letter to Jefferson, declaring that "the powers of Demosthenes and Cicero seem to be united in this able orator." Still another contemporary, Alexander Graydon, in his celebrated *Memoirs*, recorded that "he never failed to throw the strongest light on his subjects, and seemed to flash rather than elicit conviction syllogistically," and that "he produced greater orations than any other man I have ever heard"; and his great contemporary, Robert R. Livingston, of New York, wrote to Jefferson that his oratory in the Pennsylvania ratifying convention "combined information, logic, and eloquence with resistless effect." "His voice," records Waln, "was powerful," and "its cadence perfectly modulated."

With all his great abilities and marvelous talents, he had sublime confidence and faith in humanity and in mankind's ability to work out its mission on earth; and like so many men of massive mind, he was possessed of a simplicity of demeanor, indeed to such an extent as to afford "frequent cause of good-humored merriment to his friends," as noted in the sketch of his life in Sanderson's *Lives of the Signers*. Waln also remarked that "Wilson was more a man of books, than of the world."

In his writings and speeches he illustrates or quotes from Plato, Aristotle and Homer, from Cato, Cicero, Cæsar, Brutus and Caligula, as well from Bolingbroke, Bacon, the Bishop of Tours, Bishop Taylor and Berkeley, Bishop of Cloyne, and a host of others, among them, Dr. Robertson, Pope, Addison and Milton. Barbeyrack, Gogeut, Kaims and Puffendorf, Adam Smith, Blackstone, Coke, Yelverton, Justinian, Hadrian, Alfred the Great, Frederick the Great, Solon and Lycurgus, Marcus Antonius, Hodreau, Des Cartes, Beccaria, Heineccius, Hobbes, Locke, Hume, Sully, Lælia, Carew, Baron de Wolfius, Vattel, Domat, Necar, Fortesque, Burlamaqui and so on almost *ad infinitum*.

The celebrated traveler, the Marquis de Chastellux, Major General in the French army, when on his travels in America, 1780–82, was deeply impressed by his wide reading, recording in his notes[1] that Wilson, "a celebrated lawyer," "has in his library all our best authors on public law and jurisprudence; the works of President Montesquieu and of the Chancellor d'Aquessau, hold the first rank among them, and he makes them his daily study."

Waln in his biographic outline of Wilson's life records:

"In private life he was friendly, interesting, and hospitable; amiable and benevolent in his deportment; of strict truth and integrity; and affectionate and indulgent as a husband and father. In a word, his domestic character and conduct were such as, uniformly, to secure the reverence and affection of his family and friends."

Sometime after the "Fort Wilson Riot" in 1779, Wilson moved to Chestnut Street between Fourth and Fifth, later resided at 274 Market Street, and on the 14th of April, 1788, took possession of the house at the Southwest corner of 7th and Market Streets, Philadelphia, in which the Declaration of Independence was written.

On the 14th of April, 1786, he was called upon to mourn the death of his wife, whom he buried in Christ Churchyard, and to whose memory he erected a tablet, describing her as "loved, honored, and lamented by her husband," and by whose leaden casket his own remains were tenderly laid at his reburial on November 22d, 1906. After the lapse of seven years, he in 1793 married Hannah,[1] daughter of Ellis Gray, a merchant of Boston.

There were six children by the first marriage, and by the second a son, who died in infancy. There are no descendants of Judge Wilson now living. One son by the first marriage, Bird Wilson, became a Pennsylvania Judge, in 1802, in a judicial circuit embracing the counties surrounding Philadelphia, and seventeen years afterwards he resigned from the bench to enter Holy Orders.

There are many indications throughout James Wilson's writings that he had strong religious convictions, and it is said that when he resided in Cumberland County, Pennsylvania, he was a trustee of the Presbyterian church there. Soon after coming to America, he published, between 1767 and 1769, with the Rev. William White, afterwards the distinguished first Episcopalian bishop in America, a number of essays entitled *The Visitant*. He was also on terms of close intimacy with the Rev. Dr. William Smith, first Provost of the University of Pennsylvania. He was an active

[1] *Chastellux's Travels* (English translation, London, 1787) Vol. I. p. 224.

[1] Judge Wilson's letter of proposal to Miss Gray is now in the autograph collection of Mr. Simon Gratz, of Philadelphia.

member of the American Philosophical Society, and on July 7, 1789, was elected an honorary member of the Pennsylvania Society of the Cincinnati. He was an associate of Benjamin Franklin, serving with him in many organizations and on numerous committees, and when Franklin was unable to speak in the United States Constitutional Convention, it was to Wilson he sent his manuscript with the request that he would read his views. It was also to Wilson that that brilliant politician and leader of men, Alexander Hamilton, turned for help in the effort to elect George Washington President of the United States, sending him on January 25, 1789, this letter,[1] which has not as yet found a place in any of the many editions of Hamilton's writings:

"A degree of anxiety about a matter of importance to the new government induces me to trouble you with this letter. I mean the election of the President. We all feel of how much moment it is that Washington should be the man; and I aver I cannot think there is material room to doubt that this will be the unanimous sense. But as a failure in this object would be attended with the worst consequences, I cannot help concluding that even possibilities should be guarded against.

"Everybody is aware of that defect in the constitution which renders it possible that the man intended for Vice-President may in fact turn up President. Everybody sees that the unanimity in Adams as Vice-President and a few votes insidiously withheld from Washington might substitute the former to the latter. And everybody must perceive that there is something to fear from the machinations of Anti-federal malignity. What in this situation is wise? By my accounts from the North, I have every reason to believe that Adams will run there universally. I learn that he is equally espoused in Jersey, Pennsylvania, and Delaware and that Maryland is not disinclined to him. I hear of no persons thought of to the South, but Rutledge in South Carolina and Clinton in Virginia. As the accounts of the appointments of electors will satisfy the partisans of those Gentlemen in each of those states, that they will have no coadjutors elsewhere, it seems not improbable that they will relinquish the attempt in favor of their intended candidates. Here then is a chance of unanimity in Adams. Nothing is so apt to beget it as the opinion that the current sets irresistibly towards him. Men are fond of going with the stream. Suppose personal caprice or hostility to the new system should occasion half a dozen votes only to be withheld from Washington — what may not happen? Grant there is little danger. If any, ought it to be run?

"The votes from New Hampshire to Delaware inclusively, and exclusive of New York, are 41, south of Delaware, 32. Here, supposing equal unanimity on each side in a different candidate, the chance is that there will be Eight votes to spare from Adams, leaving him still a majority. Take the probability of unanimity in the North in Adams and of division in the South between different candidates, and the chances are almost infinite in his favor. Hence I conclude it will be prudent to throw away a few votes, say 7 or 8, giving these to persons not otherwise thought of. Under this impression I have proposed to friends in Connecticut to throw away two, to others in Jersey to throw away an equal number, and I submit it to you whether it will not be well to lose three or four in Pennsylvania. Your advices from the South will serve you as the best guide; but for God's sake let not our zeal for a secondary object defeat or endanger a first. I admit that in several important views, and particularly to avoid disgust to a man who would be a formidable head to Antifoederalists — it is much to be desired that Adams may have the plurality of suffrage for Vice-President; but if risk is to be run on one side or on the other can we hesitate where it ought to be preferred?

"If there appears to you to be any danger, will it not be well for you to write to Maryland to qualify matters there?

"Yrs sincerely and affec'ly
"A. Hamilton."

In January, 1789, Wilson was elected at the head of the Pennsylvania electoral ticket, and the deliberations of the first electoral college resulted in George Washington triumphing over Adams and being

[1] In the possession of Mr. Israel W. Morris, of Philadelphia, executor of Wilson's last surviving descendant, a granddaughter, Miss Emily Hollingsworth.

elected first President of the United States. It has been said that James Wilson was Washington's first choice for Chief Justice, but that political reasons resulted in the appointment of John Jay, with James Wilson merely as an Associate Justice.

In making the appointment, President Washington wrote him on Sept. 30, 1789:

"I experience peculiar pleasure in giving you notice of your appointment to the office of an Associate Judge in the Supreme Court of the United States.

"Considering the Judicial System as the chief Pillar upon which our national Government must rest, I have thought it my duty to nominate for the high office, in that department, such men as I conceived would give dignity and lustre to our national character — and I flatter myself that the love which you have to our country, and a desire to promote general happiness, will lead you to a ready acceptance of the enclosed commission. . . ."

The commission is dated the 29th of September, and now hangs in the Law School of the University of Pennsylvania. Wilson took the oath of office on October 5, 1789, and at once entered upon that career which in the course of a few years afforded him the opportunity to write the all potent decision in the case of Chisholm *v.* Georgia, upon which, as has been so truly said, "rests the governmental fabric of the United States."

Wilson believed "Justice to be the great interest of man on earth," that the ministers of the law were the conservators of the liberties of the people; that they should have that same respect for Constitutional restraints which he asserted it to be their duty to demand from and impose upon both the Executive and Legislative departments of the government. Judicial decisions controlled by considerations of policy were to him utterly abhorrent. With these scathing words of denunciation, he warned against them:

"Among all the terrible instruments of arbitrary power, decisions of Courts, whetted and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds."

To Wilson there was no No-man's land between the limits of national and state jurisdictions — no vacancies or interferences. He had a broader and more comprehensive grasp of the Constitution than had any man of his time, and certainly none have excelled him since, not even Marshall who was bound and restricted by the limits of the issues before him for adjudication, and who left behind him no great treatise on the Constitution as did Wilson. It is not strange that Wilson should have foreshadowed all of Marshall's great opinions and should have clearly enunciated the most far-reaching constitutional principle John Marshall ever wrote into a decision, and this Wilson did in 1791 in these plain and simple words in his law lecture on the legislative powers of Congress:[1]

"The powers of Congress are, indeed, enumerated; but it was intended that those powers, thus enumerated, should be effectual, and not nugatory. In conformity to this consistent mode of thinking and acting, Congress has power to make all laws, which shall be necessary and proper for carrying into execution every power vested by the Constitution in the government of the United States, or in any of its officers or departments."

Did John Marshall know of Wilson's writings? Did his great colleague, Joseph Story, know? Theoretically it is inconceivable that they did not; but any who are curious enough to look will find Mr. Justice Story's *autograph* copy of *Wilson's Works* (edition, 1804) in the Library of Congress — *in the Congress branch*, under the Supreme Court room in the Capitol.

Wilson, when a Justice of the Supreme Court, acted with courage and fortitude at the time of the insurrection in Pennsylvania, known as the Whiskey Rebellion. Congress had passed an excise law on March 3, 1791. The senators from Pennsylvania

[1] *Wilson's Works*, 1804 ed. Vol. II, p. 181; 1906 ed. Vol. II, p. 59.

were instructed by the Legislature to oppose the law as one "established on principle subversive of peace, liberty, and the rights of citizens." The agents of the National Government sent to collect the excise tax were maltreated and driven away, and United States marshals attempting the service of writs were tarred and feathered. Even Albert Gallatin, afterwards Secretary of the Treasury under Jefferson, was a leader in the opposition to the collection of the tax, serving as secretary of a mass meeting of seven thousand armed insurgents on August 1, 1794. The situation had become most critical, Washington subsequently declaring that many persons in the western parts of Pennsylvania "have at length been hardy enough to perpetuate acts which I am advised amount to treason, being overt acts of levying war against the United States." The Governor of Pennsylvania, General Thomas Mifflin, declined to take the initiative in calling upon the National Government for assistance. Wilson, however, was equal to the emergency, and unflinchingly met the issue on the 4th of August, 1794, by a brief and formal communication to President Washington notifying him:

"In the counties of Washington and Allegheny in Pennsylvania, laws of the United States are opposed and execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshall of that district."

There he stopped, — he made no recommendation. His statement was all sufficient. Washington promptly acted, and on August 7th, by his proclamation, called upon the insurgents to disperse and retire peaceably to their homes. The warning being unheeded, Washington issued a requisition on the governors of Pennsylvania, Virginia, Maryland, and New Jersey, for fifteen thousand militia and in person accompanied the troops as far as Carlisle. The insurrection was suppressed merely by the show of federal force at the scene of the disturbances. Had Wilson temporized with the situation and lacked the courage to certify the facts to Washington, it is probable the insurrection would have gained such headway as seriously to affect the ability of the national government to suppress it without bloodshed and resultant bitter feeling and resentment towards the Federal authorities.

The climax, however, in Wilson's career came in 1793, when he wrote the all potent and powerful opinion in the case of Chisholm *v.* Georgia,[1] declaring the United States to be a nation, the court standing with him three to two. Speaking of the decision in that case, Judge Cooley, in his lectures on constitutional law, says:

"Justice Wilson, the ablest and most learned of the associates, took the national view and was supported by two others. . . . The Union could scarcely have had a valuable existence had it been judicially determined that the powers of sovereignty were exclusively in the States or in the people of the States severally."

Another able writer, in an article[2] characterizing Wilson as "The Pioneer of American Jurisprudence," declares:

"On the foundation of this decision rests the governmental fabric of the United States. . . . Wilson set to himself the task of answering the question, 'Do the people of the United States form a nation?' This question is illustrated by copious classical, historical, and juridical references, presented with the vivacity of an earnest debater, the answer constituting a thesis in which the broad observations of a scholar, the close analysis of a jurist, and the profound researches of a philosopher are happily united."

Still another,[3] referring to this great decision and Wilson's invaluable services to our nationality as exemplified therein, asserts:

[1] 2 Dallas, 419.

[2] Professor J. O. Pierce in *The Dial*, Vol. XX, p. 236.

[3] *The Nation*, Vol. LXII, p. 494 (1896).

"The sovereignty of the Union had been recognized, the idea of the state as a subordinate political agency had been formulated — views to be wholly lost sight of, and to be vindicated two generations later by force of arms in a conflict which ended in their complete triumph. One of the earliest heralds of the true constitutional meaning and scope of that great conflict seems to have been Wilson."

The doctrine was thus authoritatively enunciated by the highest tribunal in the land, by a majority vote of one, that we are a nation, and not a mere confederacy of sovereign states. *James Wilson's third great mission in America had been accomplished.*

There is yet a *fourth* — it is yet to be achieved, but it will not be until the spirit of the Constitution as Wilson conceived it and gave it birth, shall pervade the nation; not until there shall be removed, by an application of his doctrine, that "endless confusion and intricacy" with reference to national and state powers, which now exist, and which Wilson predicted would "unavoidably ensue" if the fundamental principles, upon which our dual form of government was established, were not properly observed. That this day will come none can doubt who have faith in the future of the American nation. When it does, Wilson will for the first time rise to his true proportions in the hearts and affections of the American people. He has left with us these weighty words of wisdom and of warning:

"I consider the people of the United States, as forming one great community; and I consider the people of the different states, as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number, and magnitude of their objects.

"*Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed.*" [1]

[1] McMaster & Stone's *Pennsylvania and the Federal Constitution*, p. 316.

At another time he wrote in a holographic letter to George Washington:

"The most intricate and the most delicate questions in our national jurisprudence will arise in running the line between the authority of the National Government and that of the several States. . . . It is probable . . . that neither *vacancies* nor *interferences* will be found, between the *limits* of the two jurisdictions. For it is material to observe, that both jurisdictions *together* compose or ought to compose only *one* uniform and comprehensive system of government and laws." [1]

Elsewhere he asserted:

"Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled." [2]

The thought, which was crystallized into the General Welfare Clause of the Constitution, he expressed thus:

"The states should resign to the national government that part, and that part only, of their political liberty, which, placed in that government, will produce more good to the whole, than if it had remained in the several states." [3]

Still again he declared:

"Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends *in its operation or effects* beyond the bounds of a particular state, should be considered as belonging to the government of the United States." [4]

Such is the Wilson Doctrine.

On August 21,[5] 1798, James Wilson, at the age of fifty-six, died a broken-hearted man, in Edenton, North Carolina, at the home of his friend and colleague on the Bench of the Supreme Court of the United

[1] December 31, 1791 *Washington Manuscripts*, Library of Congress.

[2] *Wilson's Works* (Andrews' ed.) Vol. I, p. 558.

[3] *Wilson's Works* (Andrews' ed.) Vol. I, p. 539.

[4] *Wilson's Works* (Andrews' ed.) Vol. I, p. 538.

[5] Not August 28 as most historians incorrectly have it.

States, Mr. Justice Iredell. He had exchanged circuits with the latter to escape the importunities of avaricious creditors pressing claims, — debts, which Wilson himself said "were originally none of mine."

He had lost his fortune through the failure of many of the same enterprises which wrecked Robert Morris, the financier of the Revolution, and sent that great patriot to a debtors' prison, imprisonment for debt not yet having been abolished in Pennsylvania. The evident fact is that Wilson had such faith in the future development of America, and so keen a desire to hasten it that he put his money, as did many of the great statesmen of the time, into wild land,[1] buying more than he could carry, and all his available assets were swept away.

That Wilson was prompted to make these investments mainly as the result of an earnest desire to help the development of his country, rather than from purely mercenary motives, none can doubt who examine his papers, study his views, and grasp the trend of his mind. Of property he declared:

"Property is not an end, but a means. How miserable, and how contemptible is that man who inverts the order of nature and makes his property, not a means, but an end."

Referring to the future of America, concerning agriculture, he asserted:

"Our strength will be exerted in the cultivation of all the arts of peace. Of these the first is agriculture. . . . On agriculture, therefore, the wealth of nations is founded. Whether we consult the observations that reason will suggest, or attend to the information that history will give, we shall, in each case, be satisfied of the influence of government, good or bad, upon the state of agriculture."

Again he said:

"The wise and virtuous Numa was the patron of agriculture. He distributed the Romans into *pagi* or villages, and over each placed a superintendent to prevail with them, by every motive, to improve the practice of husbandry."

Still again:

"Let us attend a moment to the situation of this country; it is a maxim of every government, and it ought to be a maxim with us, that the increase of numbers increases the dignity, the security, and the respectability of all governments; it is the first command given by the Deity to man, increase and multiply; this applies with peculiar force to this country, the smaller part of whose territory is yet inhabited. We are representatives, Sir, not merely of the present age, but of future times; not merely of the territory along the sea coast, but of regions immensely extended westward. We should fill, as fast as possible, this extensive country, with men who shall live happy, free, and secure. To accomplish this great end ought to be the leading view of all our patriots and statesmen."

With Wilson holding such views as these, we can understand why, as early as 1785, he endeavored to interest financiers in The Netherlands in the development of the vast, unpopulated regions of the United States; and why he himself came to acquire large interests in land companies, and endeavored to promote colonization on a most extensive scale. The men of his time did not have his far-reaching vision, and it is doubtful if they altogether understood his motives. Among the *Wilsonia* in the Historical Society of Pennsylvania, is a holographic manuscript, thirty-five legal pages in length, containing "notes on cultivation of unused land in the United States" and a "Prospectus of an Association for the Promotion of Immigration from Europe." But James Wilson was too far in advance of his time, and through the treachery of supposed friends and through circumstances

[1] An anonymous attack upon the memories of James Wilson and Patrick Henry, extensively printed some months ago, deserves no further notice than this comment. It was traced to its source, and authorities for the assertions demanded, and such as were finally furnished, after repeated demands, not only completely vindicated Patrick Henry, but failed in any way even to implicate James Wilson.

over which he had no ultimate control, many of his plans failed of fruition during his lifetime, and he "fell in the traces" overburdened, laboring for the country he loved and for the advancement of the great principles of civil liberty to which he had devoted his marvelous talents and the best portions of his time, energies, and life.

Such are the landmarks of James Wilson's wondrous career of activity, and they also mark great crisal points in the early history of the American people.

As the years go on, his name will be associated more and more with that of Washington, as it often was during their lifetime. Jefferson relates in his *Ana* that in 1793, at a cabinet meeting, General Knox, the Secretary of War, introduced a cartoon recently printed, entitled "The Funeral of George W—— and James W——, King and Judge," in which the President was represented as placed on a guillotine, and Jefferson records this interesting sidelight on Washington:

"The President was much inflamed; and got into one of those passions when he cannot command himself; ran on much on the personal abuse which had been bestowed on him; defied any man on earth to produce one single act of his since he had been in the government which was not done on the purest motives; [declared] that he had never repented but once on having slipped the moment of resigning his office — and that was every moment since; that by God he had rather be in his grave than in his present situation; that he had rather be on his farm than to be made Emperor of the World; and yet that they were charging him with wanting to be a King."

Wilson was a truer Democrat than Jefferson and a better Federalist than Hamilton, for he founded his entire theory of government on the people, absolutely and irrevocably, and while ardently advocating the upbuilding of the nation, stood like a rock against the abolition of the states, all of which represents not inconsistency but a broad, comprehensive grasp of fundamental principles. His faith in the people was real and sincere, — in his last analysis they were the sole and only hope in a republic. He asserted that under such a government:

"There is a remedy, therefore, for every distemper of government, if the people are not wanting to themselves. *For the people wanting to themselves there is no remedy.*"

Our nation is yet in its infancy, and it is probable that a hundred, three hundred, or five hundred years hence, when the perspective of time shall have adjusted the proportions, two great figures will loom from the Revolutionary period, the one, Wilson's, whose brain conceived and created the nation; the other, Washington's, who wielded the physical forces that made it. While doubtless the affections of Americans will always be centered in Washington as "the father of his country," the world at large will be apt to place one above the other, and as to which will receive the laurel wreath of highest fame will probably depend upon whether at that distant day a man who wielded the physical forces will be deemed equal to the man who swayed the intellectual forces of his time. But however this may be, James Wilson's fame is secure as the greatest intellectual power dominating the nation at its birth, and his services to our people, his doctrines and governmental theories are destined, in the oncoming years, more and more to receive popular recognition; for we live in an age of research, and they cannot escape the attention they deserve. "*Melius est petere fontes, quam sectari rivulos;*" it is better to seek the fountains than to follow the rivulets.

PHILADELPHIA, PA., April, 1907.

THE JUSTIFICATION OF FAIR COMPETITION

By Bruce Wyman

I

IN any consideration of industrial problems we are confronted by the long established condition of free competition and the still unquestionable desire for its continued maintenance. Even in these present days of elimination of competition by combination, the public policy for free competition is asserted often as vehemently as ever. For the most of men still believe, and the most of judges with them, that by the natural processes of free competition, men find their highest development. Of course, there are opposed to an absolutely free competition in fact the natural barriers which necessarily accompany an industrial organization. To such social limitations men may submit themselves however unwillingly, but in modern times legal restriction to individual advancement would not be endured in ordinary businesses. The final justification of the inevitable losses which free competition unfortunately involves is to be found in this well founded opinion that fundamental limitations upon free competition are not only wholly impractical but wholly incompatible with individual liberty.

II

That this is all a matter of current opinion may be established by showing that other views were formerly expressed quite as confidently by the courts of law. In the mediæval system as we see it in our earliest law reports, restriction of competition was the prevalent doctrine. It was conceived that it was better both for producer and consumer to have a special position in the economic order assigned to every man. Each man had a right to his place in the established order according to his rank with its corresponding duty. So long as this condition of affairs gave satisfaction to the most of men, it received the support of the most of courts.

These special rights in special businesses met one at every turn in mediæval trade and business. Almost all the crafts and manufactures were parcelled out by special franchises to various guilds and fraternities, each of which had exclusive right in its own field. So local trading and distant commerce was in the hands of the guilds merchant and trading companies each with an extensive monopoly by its original constitution. The same arrangements ordered activities within the manor. The course of husbandry and the rotation of the crops were regulated by an established system. The incidental services like those of baker, miller, farrier and butcher, were provided for by exclusive franchises. Markets and fairs were established for the sale of products and protected so that none might barter his goods elsewhere during those periods. And of course hunting and fishing was preserved and reserved.

Times change, however, and the laws with them; when the doctrines of the renaissance became current men were no longer content with the older restrictions which so hampered the advancement of the individual. So far as one case can evidence it, the turning point in our law was the Schoolmasters' Case in 1410 (Y. B. 11 Hen. IV. 47. 21). The masters of a grammar school of Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40 d. a quarter from each child, now they only got 12 d. to their damage. The counsel for plaintiffs contended that this interference shown and this damage proved made a good action on the case; he cited many instances of exclusive rights including the claim of the

masters of Paul's that there should be no other masters in all London except themselves. But Justice Hill said: There was no ground to maintain this action; since the plaintiffs had no estate but a ministry for the time; and though another equally competent with the plaintiffs came to teach the children, this was a virtuous and charitable thing, and an ease to the people, for which he could not be punished by the law.

This was not accepted as good law without a struggle. Thirty-five years later in the case of the Prior of Nedeport (Y. B. 22 Hen. VI. 14 b) we have a long and heated argument between counsel and court over a writ claiming damages for the injury done to the business of the mill of the prior by the establishment of a mill by another party without authority. Finally Justice Newton disposed of the argument for the plaintiff by putting supposititious cases. He concluded with this: Let us suppose that there is a freeholder in a certain vill who is making large profits by using his lands for pasturing cattle, and then another turns his arable land into pastures, thereby getting from the inhabitants the agisting of many beasts, will there be a remedy for the first landowner? Clearly not; for it is lawful for an owner to make the best profit he can from his land.

Not only did these cases establish for the future beyond all doubt that competition was to be free unless an exclusive franchise had been granted in explicit terms, but they declared with the high hope of new enthusiasm that free competition was altogether beneficial. After some centuries of experience such indiscriminate praise, it may be, would not be given the competitive system. It has been learned that the competitive régime along with its good results brings deplorable injustices even to meritorious individuals. But there are few persons notwithstanding this, who would assert that any practicable method of ordering affairs would produce better results.

III

And indeed this is so fundamental in modern opinion that the issue is hardly to be found in litigation in modern books. As a usual thing it is only incidentally that the question comes up, as in Allen *v.* Flood (1898 A. C. 1), where Lord James of Hereford supposes this case: An architect seeks to be employed to the exclusion of his rivals. He says: "My plans are the best, and following them will produce the best house at the least cost. Therefore, employ me and not A. or B." Can this rival sue? His Lordship says not, clearly: " Before discussing the question it is necessary that some definition of the words 'interfered with' in their legal sense should be given. Every man's business is liable to be 'interfered with' by the action of another, and yet no action lies for such interference. Competition represents 'interference,' and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly 'interfere with' it. If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow."

Again, in Vegelahn *v.* Guntner (167 Mass. 92), Mr. Justice Holmes propounds by way of illustration the case of rival shopkeepers, a new man endeavoring to drive the old man out of business. The town, he supposes, is too small to support more than one, and the new man succeeds in ruining his rival within a short time. Yet it is the necessary decision that no legal wrong is done: "The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them. I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority

that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in battle of trade."[1]

IV

It is not altogether impossible to find cases where the decision turns upon the fact that what is complained of is nothing more than mere competition; for a judge will sometimes find it a convenient method of disposing of a case to reduce it thus to simplest terms. In Snowden *v.* Noah (Hopkins Ch. 351), for example, an injunction asked by the purchaser of a newspaper property to prevent the former editor who had set up a new journal from getting away his subscribers was refused, Chancellor Hopkins saying: "The business of printing and publishing newspapers, being equally free to all, the loss to one newspaper establishment, which may follow from the competition of any rival establishment, is merely a consequence of the freedom of this competition, and gives no claim to legal redress."

In a recent case of this same sort, Ricker & Sons *v.* Portland and Rumford Falls Railroad (90 Me. 395), an elaborate bill in equity was held by the court to set out nothing more substantial than that the business of stage proprietors was injured by the opening of a railway station nearer, and therefore dismissed the bill; Mr. Justice Strout saying: "The fact that complainants for a series of years had run a stage line from Danville Junction to their hotels, affords no legal right to exclude another stage line over the same route; much less from another station upon another railroad to the same destination, so long as the new line is not represented in some way as that of the complainants, and by this means a fraud is perpetrated upon the traveler, or the complainants."[1]

V

Another way in which the question comes up is when a person who has been damaged by the construction of the works for a competing business claims that he is one of the persons who should have compensation, reparation having been provided for in some general way. Thus in Hopkins *v.* Great Northern Railway (L. R. 2 Q. B. D. 224), plaintiff as the proprietor of a ferry sued the defendant railway company under the Railway Clauses Act for damage caused to his business by the construction of the railway bridge across the river, which diverted travel from his ferry. Lord Justice Mellish held that the plaintiffs were not entitled to anything: "If owners of ferries are held entitled to compensation, they will certainly form a singular exception to all other persons who were the owners of highways, or had a legal interest in the profits to be derived from the use of highways before railways were invented. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways, and who have suffered loss from the diversion of traffic from those highways to railways; proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls, have all suffered great losses from the diversion of traffic to railways and have received no compensation. No doubt their rights have not been infringed, though their property has been affected."

There are several cases also where the grantees of a franchise have brought suit against those who are damaging their in-

[1] See the language of Lord Holt in Keeble *v.* Hickeringill, 11 East, 574 n, 575, and Chief Justice Shaw in Com. *v.* Hunt, 4 Met. 111, 134.

[1] The cases of this same sort are very numerous; see for good examples: Parsons *v.* Gillespie, 1898 A. C. 239; Globe Wernicke Co. *v.* Fred Macey Co., 119 Fed. 696; Van Camp *v.* Cruikshank, 90 Fed. 759; Ayer *v.* Rushton, 7 Daly, 9.

terests by conducting a competing business in which the courts upon the strictest construction of the franchise have held that this particular kind of competition was not in violation of the franchise, and therefore have dismissed the suit since nothing but mere competition remained as the basis of the complaint. Such were substantially the facts in Illinois and Michigan Canal *v.* Chicago and Rock Island Railroad (14 Ill. 314) where a canal company complained of the interference with its business by the construction of a railroad paralleling it. In discussing the case, Mr. Justice Caton said: "Who shall anticipate the new methods of intercommunication which the ingenuity of this wonderful age may devise, or the improvements which may be made in the old? Who can set bounds to the wants in this respect which new developments may suggest? And shall we imply and intend, even with the aid of the most liberal rule of construction that the legislature designed to surrender the right to allow the people to avail themselves of improved modes of communication or commerce?"[1]

VI

It would seem that the right to cut prices whatever damage may result to competitors is a fundamental privilege in competition. In the very important case of the Mogul Steamship Company *v.* McGregor (L. R. 23 Q. B. D. 598), one of the matters of which the plaintiff steamship owners complained was that the defendant steamship companies sent additional ships to Hankow and smashed freights in order to ruin the plaintiffs or drive them from the field. In holding that this constituted no legal wrong Lord Justice Bowen said: "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. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a 'fair freight'? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.' To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute."

Undoubtedly the excellent opinion just quoted represents the law everywhere; all that there is against it is an interesting dictum in Averrill *v.* Southern Railway (75 Fed. Rep. 736), where the receiver of a railway filed a bill asking the aid of the court in protecting the property against a rate war inaugurated by the Southern Railway. A cut of 35 per cent had been made with notice that if this was met a further cut of 80 per cent would be made in the rates. It was alleged that its ultimate object in this was to annihilate competition by the destruction of its competitors. How deplorable this seemed, in a public service, to Mr. Justice Simonton, may be seen from his extreme language: "The destructive results of a rate war waged between two great systems of railroads are recognized and deprecated by men of the greatest ability who

[1] These principles are well set forth in the following cases: Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Parrott *v.* Lawrence, 2 Dillon, 332; Saginaw Gas Co. *v.* Saginaw, 28 Fed. seq.; Omaha Ry. *v.* Omaha Ry., 30 Fed. 388. Petition of Mt. Washington Rd., 35 N. H. 134; Tuckahoe Canal *v.* Railroad, 11 Leigh 73.

have considered the subject. They impair and destroy the usefulness of the railroads themselves, and their ability to serve the public with certainty, efficiency, and safety. The business interests of the community which move the crops and bring supplies to the consumer require that rates be stable. Every precaution has been taken by state legislatures and by the congress to keep them just and reasonable, — just and reasonable for the public and for the carriers. A few favored points and a few persons may for a short time receive temporary advantage. But the result of such a war is the destruction of values, the disturbance and injury of all business interest, the demoralization and confusion of rates, and great public and private loss."[1]

VII

The attempt in every modern case of this sort is therefore to show something more than mere competition, to show in the particular case there are special circumstances which bring the case outside the ordinary course of competition. A striking instance of this is the recent case of Passaic Print Works *v.* Ely & Walker Dry Goods Company (105 Fed. 163). The plaintiffs were the manufacturers of various brands of calicoes which sold usually at fixed prices, and they complained of a circular sent out by defendants offering these prints at cut prices upon the ground that it injured their trade; for no jobber of theirs could sell "Central Park Shirtings" at 3½ cents per yard, the list price, while the defendants were offering the same goods at 2⅞ cents. The majority of the court — Mr. Justice Thayer writing the opinion — decided against the complainants; the gist of his opinion being this: "The owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale."[1]

The same principle that the proprietor of a business has a right to fix the price at which his own goods shall be sold whatever damage he may cause a competitor thereby is seen in Walsh *v.* Dwight (40 App. Div. 8 N. Y. 513). It appeared in that case that the plaintiffs who were manufacturers of saleratus, were hampered in marketing their product by the terms which the defendants made in selling their Cow Brand Saleratus, a well advertised article. It seemed that the defendants made agreements with many jobbers, as the result of which the jobbers would not handle other brands of saleratus which sold at a lower price. The court held that this policy would constitute no legal injury, however much competitors might be damaged; Mr. Justice Ingraham saying: "There is nothing to prevent an individual from selling any property that he has at any price which he can get for it. Nor is there any reason why an individual should not agree that he will not sell property which he owns at the time of making the agreement, or which he thereafter acquires, at less than at a fixed price; and certainly a contract of this kind is not one which exposes the parties to it to any penalty, or subjects them to an action for damages by

[1] It is needless to point out that to cut rates for particular customers is unfair competition in public service, since illegal discrimination is thereby employed. See Mobile *v.* Bienville Water Supply Co., 130 Ala. 379, and compare Messenger *v.* Pennsylvania, 37 N. J. L. 531.

[1] It may be that the justification of competition may not prevail if the object in underselling is solely to injure a person as was admitted by the demurrer in the case quoted above. Professor Ames regards such wanton damage as altogether indefensible; in 18 *Harvard Law Review*, 420, note 2, he refers to all the dicta there are on both sides of this question. But Professor Smith in 20 *Harvard Law Review*, 454, considers it unadvisable to open this question to investigation.

those whose business such a contract has interfered with."[1]

VIII

Mere competition is, therefore, always permitted without question unless some unfair method is employed. What constitutes unfair competition opens up too large a subject for consideration here. It is enough to point out that the border line must be overstepped unquestionably before the competition will be held unfair. One of two cases will illustrate further the extent to which competition will be allowed to go before the court will interfere. Perhaps the most interesting is White *v.* Mellin (1895 A. C. 154). The respondent was the proprietor of Mellin's Food; the appellant was the proprietor of Vance's Food. Respondent had brought the original action against the appellant for the circulation of the following advertisement: "Notice — The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered." The keen business insight of Lord Hershell was well displayed in his opinion in this case when he brushed aside all the distinctions of counsel with: "Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure — whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough."

In a later case the English courts again took the position that they would permit competition to go on without interference unless something was done so outrageous as to be clearly wrong. In Hubbuck *v.* Wilkinson (1899, 1 A. B. 86), it appeared that the plaintiffs and defendants were competitors in the paint business, and that defendants had advertised that as the result of certain paint covering experiments conducted by them, their paint proved superior in every respect. The plaintiffs in their complaint alleged that the reports were untrue, but the divisional court summarily dismissed the complaint, which the Court of Appeal held proper, guarding itself however in this wise: "It is not necessary to consider how the case would have stood, if the defendants had not been rival traders simply puffing their own goods and comparing theirs with those of the plaintiffs. If the defendants had made untrue statements concerning the plaintiffs' goods beyond saying that they were inferior to, or, at all events, not better than, those of the defendants, or if the defendants were not rivals in trade and had no lawful excuse for what they said, it would not have been right summarily to strike out the statement of claim as showing no reasonable cause of action. But the circular complained of is such as plainly to constitute no cause of action even if all the allegations in that statement of claims are true."[1]

IX

According to the better opinion at the present time as expressed in the writings of the many authorities who have turned their attention of late to the prob-

[1] Two other cases similar to the two quoted in this section are well worth reading. Ajello *v.* Worseley (1898), 1 Ch. 274; and West Virginia Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611.

[1] Deciding similar issues in the same way are: Evans *v.* Harlow, 5 Q. B. 624; Younge *v.* Macrae, 3 B. & S. 634; Jenner *v.* A'Beckett, 7 Q. B. D. 11; Tobias *v.* Harland, 4 Wend. 637. But see Western Manure Co. *v.* Hawes Manure Co., L. R. 9 Exch. 218; Harris *v.* Rosenberger, 145 Fed. 449.

lem of the place of competition in the law, fair competition is considered as a matter of justification upon grounds of policy. The accepted theory is that every man engaged in business has a right *prima facie* to have his custom undisturbed; in this view a person who diverts trade from him commits a tort *prima facie*. But if this trade is invaded in the course of fair competition there is a recognized justification, while there is no valid excuse in the case of unfair competition. The comparison of two cases may bring this out more clearly.

In Graham *v.* St. Charles Street Railway (47 La. Ann. 214) defendant's foreman posted a notice to the effect that he would discharge employees who should continue to deal with the plaintiff grocer. The court held that such unjustifiable interference with the grocer's business constituted an actionable wrong, Chief Justice Nichols saying: "In so doing the defendant would not only control their own will, action, and conduct, but forcibly control and change from pure motives of malice the choice and will of others through fear of non-employment or discharge. This will and power of choice, both the plaintiff and the parties themselves are entitled to have left free, and not coerced in order to simply work the former damage and injury."

On the other hand, in Robinson *v.* Texas Pine Land Association (40 S. W. Rep. 843), where the defendant gave notice that it would discharge employees who did not trade at its store but dealt with the plaintiff, the court held that there was no actionable wrong. As Chief Justice James said: "If the defendant could so control its employees as to prevent their dealing with plaintiff, or so control their wages as to divert them from the channels of the plaintiffs' business in favor of his own, we know no rule making it actionable. Had the defendant no proper interest of his own to subserve in so doing, but had acted wantonly in causing loss to plaintiff, the rule would have been different. The fact that defendant's purpose by the act was to break plaintiff up in business would not give the cause of action, for that is the natural result of successful competition."

It is submitted that both of these cases are good law, but it would be impossible to reconcile them without the theory here defended; however, this general theory is now so well accepted that it no longer requires an elaborate defense. Indeed, every one of the now innumerable suits for unfair competition is really based upon this theory, for in last analysis the plaintiff in all of these cases recovers for injury done to his business right by some interference by the defendant which he cannot justify as fair competition. The right of every man in any business to adequate protection of his probable expectancy is therefore well established; but equally well recognized is the necessary justification of any damage caused a business rival in the regular course of fair competition.[1]

It is therefore because of an underlying public policy that lawful competition will

[1] One is quite justified by modern authority in basing everything upon the fundamental theory that intentional interference with business rights is *prima facie* a clear tort, so that unless plain justification be sufficiently shown, action lies. See, among many others, the following cases: Chipley *v.* Atkinson, 23 Fla. 206; Hollenbeck *v.* Ristine, 114 Iowa, 358; London Guaranty Co. *v.* Horn, 206 Ill. 493; Ertz *v.* Produce Exchange, 79 Minn. 140. These principles are most elaborately worked out in the long series of able opinions in Massachusetts culminating at the present writing with Pickett *v.* Walsh, 78 N. E. 753. And it is stated with the utmost accuracy in the New Jersey decisions, particularly in Jersey City Co. *v.* Cassidy, 63 N J. Eq. 769.

This general theory is strongly opposed in recent times by the majority opinions in Allen *v.* Flood, 1898 A. C. 1, and in National Assn. *v.* Cummings, 170 N. Y 315. Payne *v.* Railroad, 3 Lea. 507, and Raycroft *v.* Taynter, 68 Vt. 219, seem to be based upon this opposite theory. But Guethler *v.* Altman, 26 Ind. App. 587 and Heywood *v.* Tillson, 75 Me. 225, usually cited to the same effect, are plainly distinguishable at least, as there was certainly sufficient justification for the interference shown in the facts of those cases.

always justify interference with the business of another. The theory is that free competition is for the best interests of society; for it is believed that the law does its best for all when it gives to every man an equal chance. Enough has been quoted to show how inveterate the belief has become that free competition is for the best interests of society. The state acting through the courts is permitting the struggle for advancement to go on with the fewest possible rules because the most of us believe that this is for the best for all of us. It is not a perfect way of ordering our world, far from it. No economist can fail to see that the competitive system has not only its costly mistakes, but its inevitable wastes. Moreover, there is in some lines of production and distribution a danger that if the law permits competition to go to every length, the survival of the fittest only may unduly reduce the number of the competitors so that in the end much of the benefit of competition may be lost. These are ugly facts, and yet trained observers of sober judgment are few who will not join with the mass of men in supporting the competitive system against every substitute which may be urged. For the most of us still believe that the advances in the arts and the march of commerce in modern times have been due to the prevalence of competition. More than this, we believe that never in the history of mankind has the exceptional man had such opportunity, nor the average man such return for his industry as in modern times under the competitive system. And as we have seen, so long as this is public opinion, the public policy for free competition will remain.

CAMBRIDGE, MASS., April, 1907.

It will have been noticed that the discussion of fair competition in this article has been confined as far as possible to cases of individual competition. Cases of competition by combinations seem to the writer to involve additional considerations and these cases he has treated elsewhere, particularly in 17 GREEN BAG 21, 210. It should be pointed out that most of the cases cited there are consistent with the general theory stated here. It is generally recognized in all of these cases that any interference by joint defendants with the business right of a plaintiff constitutes a tort *prima facie*. According to the weight of authority certain forms of combined action are held unfair methods even in usual competition, while the minority cases justify such concerted action in most cases which would be fair competition by individuals.

JUDICIAL MANNERS

By Ira Jewell Williams

THE present fashion of almost unlimited criticism of the conduct of public men, being founded for the most part in political partisanship or jealousy, sensational newspaper methods, or the exaggerated if honest belief in the virtue of the "literature of exposure," has not yet extended to the Bench. There have been occasional exceptions, as when a judge of the court of last resort, by reversing his former vote, on a question of the gravest public interest, declared unconstitutional the attempt to levy an income tax. Of this decision, Chief Justice Walter Clark, of North Carolina, said:

"Under an untrue assumption of authority given by thirty-nine dead men, one man nullified the action of Congress and the President and the will of seventy-five millions of living people, and in the thirteen years since has taxed the property and labor of the country, by his sole vote, $1,300,000,000, which Congress, in compliance with the public will and relying on previous decisions of the Court, had decreed should be paid out of the excessive incomes of the rich."

Recent examples may be found in the Senate debates of the Railroad Rate Bill and the picturesque explosions of Senator Tillman, that exponent of cornfield law, equally versatile with pitchfork or muck-rake. But as a rule, notwithstanding the "fierce light which beats upon the Bench," its sayings and doings have been treated with a civility at times approaching servility. The many books and treatises upon legal ethics have been devoted exclusively to the formulation of correct rules of conduct *for the Bar*. The Bench, in its relation to the Bar and to the public, has been almost immune from suggestion. The divinity which hedges about a king has resulted in the tacit acceptance of the maxim, "The king can do no wrong." True, public discontent has at times flamed out upon what was believed to be a vicious principle, as in the protest, in large part mistaken, against "government by injunction": and the power of the judges has in some states been wisely shorn, by stripping them of the rights to punish for "constructive contempts," and by making the jury the judges of the law as well as the fact in cases of libel. But in the main the remark holds good that the conduct of a judge upon the Bench has fewer safeguards than that of any other public official. And perhaps it is the lack of such careful sane discussion that has led some judges to exercise their "discretion" in an arbitrary manner, and to conduct the business of their courts in a method quite foreign to a "place where justice is judicially administered." For, as the great Chief Justice Marshall was careful to point out, "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the law."[1]

Jealousy of one's prerogatives, it may be remarked in passing, is a human failing, be it in bootblack or poet; and the Bench has not escaped its touch. An effort to make the courts go to the suitors instead of *vice versa*, was deemed derogatory to the dignity of the judiciary, held unconstitutional, and humorously denounced as an attempt to establish a "peripatetic court of common pleas to deliver the law at the doors of suitors."[2] A similar piece of legislation, requiring an appellate court to sit in some twelve or more different cities in a state, for the convenience of counsel, was foiled before it ran the gauntlet of the judges, by one irrepressible legislator who jumped to his feet

[1] Osborn *v.* Bank, 22 V. 5, 738.

[2] Phila. *v.* Pepper, 17 Phila. 371.

and shouted, "Mr. President, I move that a horse and wagon be purchased for the court, and that it dispense justice from its tail-board!" The absurd proposal was voted down amid shouts of laughter.

The founders of the Republic in their wisdom separated the legislative, executive, and judicial functions, formulating a government of "checks and balances" based upon permanent, organic law — the Constitution. While the duty to support and defend that instrument rests alike upon the conscience of legislator, executive, and judge, in practice, following the irresistible logic of Chief Justice Marshall, upon the courts alone has fallen the burden of upholding the fundamental law, against the attempted encroachments of unconstitutional legislative or executive action. Thus the courts have decided themselves to be clothed with the unique power of declaring illegal a statute duly enacted by the chosen representatives of the people, or an administrative function beyond the power of the executive official assuming it. The Congress makes the laws; the President's duty is to enforce them within the limits of the power delegated by the people; and the judiciary may say whether this power has been transcended. "The President and the Congress are all very well in their way," said President Roosevelt, at a dinner given to Mr. Justice Brown, "they can say what they think they think, but it rests with the Supreme Court to decide what they have really thought." Assuming his "good behavior," that is, freedom from actual corruption or criminal misconduct, the judge's decision is final and without appeal except to the whole people, who may by a two-thirds majority alter the basic rule. These extraordinary powers, thus reposed, have been exercised, almost without exception, in a fitting manner. It is not my purpose to discuss the plan of government (which has made us to-day one of the most conservative nations in the world) further than to say that it has magnified the importance and prestige of the Bench, and increased the stress upon the judicial temper. Just as some men cannot stand success, so many men cannot stand power. Certain types are especially warped by the exercise of intellectual despotism, and in no way, perhaps, is this more strikingly exemplified than in the manners of the court room.

In every Roman triumph the laureled general, with his vermeil-tinctured face, is said to have had a familiar at his side incessantly whispering in his ear, "Remember thou art a man." Be this our "Memento mori" to those judges, happily few in number, who forget the humanities.

The kindergarten method of the "awful example," ascribed to early temperance lecturers, is adopted in the following instances of injudicious if not unjudicial conduct.

A distinguished engineer was on trial in a large city for a misdemeanor in having preferred a powerful contractor. The case was a "political" one. After the trial had lasted several days the mother of one of the jurors died. The trial judge was notified, in order that the bereaved son might be permitted to pay his final tribute of respect and love. The judge withheld the news. The juror learned, after the charge of the court had relieved the jury of any real function, that his mother was dead and buried. His protests were useless. His outraged feelings were powerless against the absolute privilege of the judicial office. The judge was reported as saying that the juror must bear his sufferings like a soldier, for the common weal. The conclusion would follow if the analogy were true. But there was no real necessity for the sacrifice. No statute or rule of court forbids the separation of the jury in a trial for misdemeanor. However, if it had been feared that the separation of the jury might have given rise to a suspicion that one of the jurors had been improperly approached, and newspaper and other criticism might have resulted, then, doubtless, the other jurors would, if requested, have willingly gone with

their fellow juror and have attended the funeral in a body, or the single juror might have been accompanied by court officers or the judge himself. No great principle of public policy would have prevented, because the coincidence is rare of a parent's death while a juror is actually serving.

A second example: An accident case is being tried before a civil court. A physician is subpœnaed as a witness. He is in attendance upon a patient who is dangerously ill. He fails to respond to the summons from the court, sending word that he is at the bedside of a patient. When he reaches court, he is severely reprimanded by the judge, who is reported as laying down the principle that the mandate of the court must be obeyed, even as against the most imperative call of one's professional duty.

The defense calls witness after witness, each one of whom breaks down under the skillful cross-examination of plaintiff's counsel. Finally the judge says, "Well, have you any more of those up-country liars?" There is a verdict for the plaintiff, but of course it must be set aside by the court *in banc* because of the gross indiscretion of the trial judge. The case is tried again, and the jury finds that the "up-country liars" were telling the truth. It will be long before they forget the judge who put such an aspersion upon them.

An election case is pending, and a member of the ward committee is called to the stand. The court asks him how many names are on the assessor's list in his division. He is unable to remember the exact number, whereupon the judge exclaims, "You're not fit to be a member of the ward committee, or you're lying!"

Counsel for the plaintiff, after the defendant's evidence is all in, asks for binding instructions on the ground that defendant has not made out a case. The motion is granted; but the judge calling the plaintiff to the bar of the court, rebukes him, saying sharply, "If you had acted with ordinary care, as a prudent man should have done, there would have been no loss to anyone, and this suit would not have been necessary!"

A young and nervous advocate protests courteously, but in unfortunate phrase, against what he believes a premature entry of judgment against his client. "But under these authorities, your honor, you *cannot* enter judgment against a garnishee until the notes outstanding have been impounded." "Oh! can't I enter judgment?" said the judge, lifting up his pen, "I'll show you." And he did.

Often the judicial rebuke is both justified and merited. A judge objects to counsel for a rule reading at great length from numerous authorities. Counsel insists. When he sits down the court says, "Mr. Blank, *your rule was discharged just one hour ago.*" Counsel for the appellee in the Supreme Court foolishly insists upon his client's "constitutional right to be heard" although the court plainly show, by saying that they do not care to hear from the appellee, that they propose to affirm the judgment. At the close of his unnecessary argument, the chief justice bitingly remarks, "Notwithstanding your argument, Mr. Smith, we are *still* of the opinion that your opponent has no case." A woman lawyer, granted special extension of time, argues for more than a day in favor of the right of women to exercise the elective franchise. As she takes her seat, the chief justice says, "Notwithstanding the able and *exhausting* argument on behalf of the appellant, we believe the judgment must be affirmed." Surely allowance can be made for such reproof as this. Not even for the dignity of the office would we ask that the Bench endure everything.

"Your honors, there has been stupidity in this case, and it's not on this side of the bar." But the Bench, on this occasion, had the last word, "Mr. Blank, we feel that there has been discourtesy in this case, and it's not on *this* side of the bar!"

Wits there have been who have had their fling at the failings of the judicial office.

"A judge should be a gentleman; and if

he know a little law, so much the better."

Of one Common Pleas Bench it was remarked, "Judge A. is a lawyer; Judge B. is a gentleman; Judge C. is neither a lawyer nor a gentleman."

At a banquet to the Supreme Court, a distinguished and well-loved member of the Bar, many years ago, closed his response to a toast:

"With the per curs,
And the Mercurs
To ——— with the Supreme Court."

His taste was deplorable, but perhaps his conscience was somewhat clearer than that of a newly elected justice who is reported to have said in consultation:

"I know the appellant; he's a ——— of ———; I am in favor of affirming the judgment!"

Of necessity the usual attitude of the Bar toward the Bench is expressed in the phrase, *suaviter in modo*. But sometimes a bold spirit is found independent enough to brave and rebuke contemptible acts upon the Bench. On these occasions, as when the prophets of old, in the might of their spiritual power, rebuked the wicked kings, God and one have made a majority.

Counsel, thinking from a pause in the remarks from the Bench that the court has finished what he has to say, attempts to reply. "Mr. Blank," shouts the judge, "I want you to learn to keep your mouth shut when the court is talking." A few moments later the judge, regretting his vicious violence, calls counsel up to the side bar, and tries to make it straight with him. "No, your honor," answers the attorney, raising his voice so that everyone in the room can hear, "your insult was a public one, and I shall accept no apology except a public apology!"

While a witness is being examined the trial judge calls to him a friend with whom he holds a whispered conversation for several minutes. Returning to his judicial duties, he wheels suddenly around in his chair and says, "That's not evidence." "If your honor," thunders the cross-questioner, "had been listening to what went before, instead of talking to Mr. Blank, your honor would see at once that that *is* evidence." And his honor, after having the stenographer's notes read to him, is manly enough to admit that it *is* evidence and to allow the question.

Only an old and tried war horse could venture such a rebuke. Younger men are helpless. Two young attorneys are trying a copyright case involving very close and complex questions of law and fact; the presiding judge, impatient of delays, says, "*You both seem to be afraid to try the case.*" The counsel for the defendant is finally victorious by wresting his defense from the unwilling lips of the plaintiff himself; but his client will never consult him again, and it is impossible to say how much damage will result to his reputation.

"Oh, the times! Oh, the customs!" Thus many a green and hopeful advocate, bruised by the first arrows from Olympus. The books say the law is an honorable profession; some of the judges seem to entertain an opposite opinion, at least as to its neophytes. A sensitive young man is often made to endure torments from the Bench. Sometimes it's good for him. Occasionally, perhaps, it is merited. Oftener, however, the punishment is inflicted for no purpose retributive or corrective, but represents merely the wanton use of power; analogous to kicking a man when he's down, or hitting a man who cannot strike back. It is a human weakness to try one's wits on an obvious butt. The humor of the Bench finds ready and appreciative hearers. Needs must when the judex jokes. The power once exercised grows sweeter with use. Occasionally a brilliant judge acts as if he regards the proceedings before him as provided solely for his intellectual entertainment. He enjoys it all hugely. No judge should be lacking in humor, but God forbid that he should regard each case chiefly as joke or an opportunity for one.

Then there is the grouchy judge, who growls most of the time like a bear just hibernated, or snarls at each demand upon his intellectual powers. Such a judge makes the law of slight regard to the public, and his court a chamber of horrors to the young lawyer. With him must be regretfully classed the judge who, though usually of manly manners, has occasional lapses into irritation: who throws papers from the Bench, and dashes down briefs declaring, "There's nothing in the case." With these, too, belong the judge whose opaque brain kindles with anger because he cannot understand the point, and who, blaming his own density upon counsel, flares out at the innocent occasion of his wrath.

"If your honor please," says the attorney, "under the circumstances I must respectfully protest against a juror being withdrawn, and the case continued, because . . ." "I don't care how much you protest," politely responds the judge, "*I* propose to continue the case."

Of course, the fault, as we have seen, is not always, or even generally, with the judge. There are more boobies at the Bar than boors upon the Bench. "Law," said the delightful Advocate Pleydell in Guy Mannering, "'s like laudanum; it's much more easy to use it as a quack does than to learn to apply it like a physician." Great is the judicial suffering from incompetence and lack of intelligence in attorneys. The temptation to sarcasm is almost irresistible. Yet, many judges are able to successfully resist it.

Of a greatly beloved judge, recently deceased, it was justly said that he "scorned to test his wit against an incompetent attorney struggling with the difficulties of his case."

"Law is not one of the exact sciences," meditated the late Judge Black, "and in judicial proceedings as in other uncertain affairs of this changing world, no man can tell what a day or an hour may bring forth."[1]

[1] Cleveland etc. R.R.Co. *v.* Erie, 27 Pa. 384 (1856)

It is true that the accuracy of its decrees are not demonstrable as a problem in mathematics; its ear is not always attuned to the "absolute pitch" of the music of the spheres. Yet justice and judgment proceed from the bosom of the Almighty Himself, and the judge for a little while exercises in part this power. Too often it is justice not tempered with mercy. "Mercy," remarks Mitchell, C. J., in Scouten's App., 186 Pa. 279 (1898), "is not the prerogative of this court." But it was expressly conceded to be a prerogative of the court of first instance.

It is trite to say that no power has ever been held for long by any man or body of men without being abused. That the judicial power is no exception was to have been expected. Shakespeare wrote in the same breath of

> "the insolence of office, the law's delays."

Not that we can justify Job in his sweeping condemnation:

> "The earth is given unto the hand of the wicked, he *covereth the faces of the judges thereof*,"

but surely judicial fallibility should be recognized, and the Bench, instead of sitting in splendid isolation, should expect and welcome fair criticism of their official acts.

The aphorism, "An honest man is the noblest work of God," is the survival of a primitive standard of ethics. Mere honesty is not only not enough, it should be and is so common on the Bench and elsewhere as to be taken for granted. But how much higher an ideal is the just, conscientious, faithful, courteous gentleman, discharging as best he can the onerous duties of declaring righteousness and enforcing judgment. All the inborn kindliness of disposition, all the advantages of careful training, all the dictates of that superb self-conquest of the strong, embodied in "noblesse oblige," all these go to the making of the ideal judge. As a man, strong, self-reliant and courageous; as a citizen, pure and above reproach; as a judge, helpful, tactful, and considerate: behold, the upright lawgiver!

PHILADELPHIA, April, 1907.

THE CONSTITUTIONALITY OF THE BEVERIDGE CHILD LABOR BILL

By Edwin Maxey

THE bill introduced in the Senate by Mr. Beveridge for the purpose of regulating child labor is a most interesting project of legislation in more ways than one. Not only is it an evidence of the growing influence of labor in politics, but it raises the whole question of the extent of police power possessed by the General Government. It may be safely said that there is no other question which is to-day of more vital interest in the field of American jurisprudence, and none more perplexing.

The bill provides that "no carrier of interstate commerce shall transport or accept for transportation the products of any factory or mine in which children under fourteen years of age are employed or permitted to work, which products are offered to said interstate carriers by the firm, person, or corporation operating said factory or mine, or any officer, or agent, or servant thereof, for transportation into any other state or territory than the one in which said factory or mine is located."

Owners of factories and mines are required to file every six months an affidavit, the form of which shall be prescribed by the Department of Commerce and Labor, but which shall in substance state that said factory or mine employs no child under fourteen years of age. A penalty of ten thousand dollars or imprisonment for six months or both is provided in case any interstate carrier fails to require such affidavit, and double that penalty for each violation of the act by the owner of mine or factory.

As, therefore, the bill proposes to regulate child labor through an exercise of the powers of the Federal Government, derived from the interstate commerce clause, it is necessary that we examine carefully the extent of powers conferred by that clause, in order to determine whether or not the Constitution confers any such powers upon the Federal Government as are necessary to the enforcement of the provisions of this bill.

As against the states, the Federal Government no doubt possesses the exclusive power to regulate interstate commerce. This was decided in Gibbons *v.* Ogden, 9 Wheaton, 1, and that decision has never been reversed. The regulation provided by the bill is, therefore, no infringement upon the rights of the states, unless, instead of being a regulation of interstate commerce, it is a police regulation under the guise of regulating commerce. If it is a police regulation, its constitutionality is open to dispute.

If this can be sustained as a regulation of commerce, it becomes very difficult to see what limit there is to the power of the Federal Government to control the productive processes heretofore controlled under the police power of the states. If the Federal Government has the power to forbid interstate carriers to accept goods produced by child labor, would not the same power warrant the exclusion of goods produced in factories or mines in which men are permitted to work more than eight hours per day? Would not the same power enable it to forbid interstate carriers to accept goods from concerns employing foreigners, or Mormons, or union laborers, or non-union laborers? In short, if this is a legitimate exercise of the power of Congress over commerce, the extent of control which Congress may exercise over production becomes almost entirely a question of expediency, not of law. A large part of the police power now exercised by the states will have disappeared and a considerable portion of what

remains will be held by them as tenants at will.

That this is not a regulation of commerce would seem to appear from the fact that it is not commerce, but manufacture and mining, that is regulated. The processes upon which the regulation operates have ended before commerce begins. If there is any distinction at all between production and distribution, and it has always been considered that there is, the power to regulate the latter does not necessarily include the power to regulate the former. It is thus a new doctrine which teaches that because Congress has power to regulate commerce it has power to regulate manufacturing and mining which are parts of production.

One would not be surprised if, under its power to regulate commerce, the Federal Government should claim the right to prohibit interstate carriers from employing children under fourteen years of age. While this would in reality be a police regulation, it would on the face of it be a regulation of commerce. But this is a very different proposition from making the regulation apply to a process which has ended before commerce begins, and calling it a regulation of commerce rather than of manufacture or mining. The Supreme Court of the United States in the case of Gibbons *v.* Ogden, defined commerce as "intercourse." And in the case of the County of Mobile *v.* Kimball, 102 U. S. 691, it supplemented the above general definition with one much more explicit: "Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and transportation of persons and property, as well as the purchase, sale, and exchange of commodities." And in the case of Kidd *v.* Pearson, 128 U. S. 1, it was said that "Manufacture is transportation — the fashioning of raw material into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. Any movement towards the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the advantages of a large part of the localities in it, if not of every one of them. A situation more puzzling to the state governments, and more provocative of conflicts between the General Government and the states, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine."

And in United States *v.* E. C. Knight Co., 156 U. S. 1, the court said: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. Commerce succeeds to manufacture and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed."

It is therefore clear that unless the Supreme Court changes its view as to what constitutes commerce, it would not hold the act we are considering to be a regulation of commerce. May it be sustained as a legitimate exercise of the police power of the Federal Government?

We often hear it stated that the Federal Government possesses no police power; that it possesses simply delegated powers and that there is no delegation of police powers. True, no police power, *eo nomine*, was conferred upon the Federal Government by the framers of the Constitution. The phrase, police power, was not used until forty years after the Constitutional Convention, it being first used by Chief Justice

Marshall in his opinion in the case of Brown *v.* Maryland, 1827.

But whether in theory the Federal Government possesses any police power, the fact is that it exercises police powers. The exclusion of lottery tickets from interstate commerce by prohibiting interstate carriers from carrying them, cannot be considered a regulation for the purpose of securing the safety of commerce, but is clearly for the purpose of protecting the public morals. As was said by the court: "What clause of the Constitution can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals?" (Champion *v.* Ames, 188 U. S. 357.) But legislation by the Government for the purpose of protecting the public morals is unquestionably an exercise of the police power.

The recent Pure Food Bill passed by Congress is in the interest of public health and not for the purpose of rendering commerce less dangerous. Though it may theoretically serve the latter purpose, its real purpose is well understood to be the former, and a law must be judged by its real purpose, not by its remote or incidental effects. This principle has been recognized by the Supreme Court in Minnesota *v.* Barber, 136 U. S. 313; New York *v.* Miles, 11 Peters, 103, Passenger Cases, 7 Howard, 283; Yick Wo *v.* Hopkins, 118 U. S. 356. That governmental action for the protection of the public health is an exercise of the police power is too clear to admit of doubt.

The Employers' Liability Act which is a regulation for promoting public safety is also an exercise of the police power by the Federal Government. Like the Pure Food Law, its constitutionality has not yet been passed upon by the Supreme Court, but until then the presumption is in favor of their constitutionality.

As to the fact of the exercise of police power by the Federal Government we find the following in Freund's very able work on the Police Power: "It is impossible to deny that the Federal Government exercises a considerable police power of its own. This police power rests chiefly upon the constitutional power to regulate commerce among the states and with foreign nations, but not exclusively so. It must now be regarded as firmly established that the power over commerce, while primarily intended to be exercised in behalf of economic interests, may be used for the protection of safety, order, and morals." (Police Power, p. 63.)

Relative to the right of the General Government to exercise police powers, Judge Cooley says in his "Constitutional Limitations," p. 723: "Congress may establish police regulations, as well as the states, confining their operation to the subjects over which it is given control by the Constitution."

In view of the position taken by the Supreme Court in the Lottery Case, it would not be surprising if it would sustain as constitutional a regulation by the General Government for the purpose of protecting the public health and promoting the public intelligence. This exact question has not yet been presented to that court for decision, so that it is impossible to say at present what its decision would be. Considered in connection with other questions closely allied to it, the question presented by this proposed legislation becomes one of intense interest, whether we consider it from the standpoint of its legality or of its expediency.

LINCOLN, NEBRASKA, April, 1907.

ENGLISH AND AMERICAN MURDER TRIALS

By Lee M. Friedman

WHILE the Thaw trial has been dragging out its weary length from week to week our English cousins have also been absorbed in an equally sensational murder trial. On January 24, 1907, William Whiteley, the "Universal Provider," head of the great "Whiteley's" of London, was shot and killed in his establishment by an unknown man, who immediately attempted suicide. Foiled in his attempt at self-destruction the murderer was arrested. For some little time his identity was a mystery. On his person was found a paper addressed "To all to whom it may concern," announcing that, "William Whiteley is my father. He has brought upon himself and me a double fatality by reason of his refusal of a request perfectly reasonable," and signed by the initials "R. I. P."

On March 22d, or within sixty days of the murder, the prisoner was put on his trial in the New Bailey in London, before a jury of his peers on a charge of willful murder. During the time that had elapsed the interest not only of all England, but of all Europe and America had been aroused by the sensational development of the case. The identity of the prisoner had soon been established as Horace G. Rayner, aged 27, clerk, living in London in great poverty. Rayner claimed to be the illegitimate son of the murdered man and one Louisa Turner, a former shop girl, who had lived "under the protection" of Mr. Whiteley for some years. The suggestion of the prisoner's insanity only furnished an added item of doubt and interest to the public. On the whole perhaps not so sensational as the Thaw case, but yet in many incidents quite parallel. The deliberate and dramatic shooting in a conspicuous place of a well known man of great wealth and considerable public position, the laying bare of the secret scandals of his life, the story of the life of shame of his victim, and the debatable questions of the prisoner's sanity had all the same elements of interest for the English public as appealed to the morbid tastes of America in the Thaw case.

The Lord Chief Justice, Lord Alverstone, opened the trial by calling upon the prisoner to plead to the indictment. The prisoner pleaded not guilty. A jury was promptly drawn and without loss of time, Mr. R. D. Muir who prosecuted on behalf of the crown, made his opening. In a plain matter of fact statement without sensationalism, he outlined the case of the government. He said:[1]

The case which the prosecution would seek to make out against the prisoner was that on January 24 he started out on a journey which ended in his taking the life of Mr. William Whiteley, in circumstances which showed that he had a criminal motive and had prepared for the crime which he intended to commit with great care and deliberation. The prisoner was born in April, 1879. His mother was at that time a single woman, Miss Emily Turner. She was living with a man named George Rayner, and the child was registered by her in the name of Rayner, she, so far as that registration was concerned, represented herself as a wife, when, in fact, she was a single woman. Emily Turner had a sister named Louisa. On November 15, 1882, Louisa Turner entered the service of Mr. William Whiteley in Westbourne-grove. That was the earliest date at which any member of the Turner family came into contact with Mr. Whiteley. In January, 1883, Louisa Turner went to live at a house

[1] The summary of this opening statement as well as that of Mr. Elliott, are adopted from the London *Times* of March 25, 1907.

in Grenville-road, Kilburn, which was taken for her by Mr. Whiteley, and she lived under the protection of Mr. Whiteley for some considerable time after that. In 1883 or 1884 Mr. Whiteley and Louisa Turner together visited Mr. George Rayner and Emily Turner at Hove. As far as was known that was the first time the prisoner's mother ever saw Mr. Whiteley. At that time the prisoner was four or five years old. On a date which was not quite certain, when the prisoner was about five years old, his mother took him to Mr. Whiteley's shop in Westbourne-grove. Mr. Whiteley saw him, and Louisa Turner told Mr. Whiteley who he was — namely, her sister's son. In 1885 a child was born to Mr. Whiteley and Louisa Turner, whom Mr. Muir called Cecil Whiteley for the purpose of this case. In May, 1888, some differences or quarrel arose between Mr. Whiteley and Louisa Turner, the details of which were irrelevant to this case, and they ceased to live together. The differences were settled, and Louisa Turner was given an allowance by Mr. Whiteley and lived apart from him thereafter. The prisoner was brought up and educated by his father, Mr. George Rayner, and passed always by the name in which his birth was registered, Horace George Rayner. The prisoner's mother and Mr. George Rayner eventually quarreled, and later on Emily Turner married. She died on January 13, 1898. The prisoner from time to time, between 1897 and 1900, was in communication with his aunt Louisa Turner, seeing her from time to time and visiting her at her house. On one occasion, the date of which was not clearly fixed, in 1898 or 1900, the prisoner saw Cecil Whiteley. The prisoner asked his aunt Louisa who Cecil Whiteley was, and she told him. How much she told him was not material; but the prisoner then learned of the existence of that person, and the fact that the prisoner knew of it was in the view of the prosecution of considerable importance regarding the motives which the prisoner had when he committed the crime alleged against him. In November, 1901, the prisoner married, and he had some children. He seemed always to have been very poor. In September, 1905, as indicative of the prisoner's state of poverty, his wife and children and his wife's sister were living at the house of a Mr. Browning in Highgate-road in apartments, the rent of which was only 5s. 6d. a week. In March, 1906, the prisoner joined his wife, and they continued living there down to September, 1906, when Mr. Browning and his family removed to Tottenham. The prisoner, his wife and children, and his wife's sister removed to Tottenham also, and they there had apartments. They had furniture on the hire system, on which some instalments were paid. Mr. Browning's account of the prisoner was that he seemed to have no occupation, and that he was from time to time away from the house where his family were living for considerable periods. Towards the end of 1906 they were obviously in very great poverty, the prisoner and his wife pawning all the available things they had, and on the 18th or 19th of November they left Tottenham. Later on the prisoner called upon Mr. Browning, and told him he had not a brass farthing and that he had no employment and could not get any. At that time the prisoner appeared very downhearted. Subsequently he seemed to have gone to lodge at Howton-house, Hammersmith. In January of the present year he went to stay at an hotel in Red Lion-street kept by Mr. Gerhard. The prisoner had stayed there in 1906, when he gave the name of Horace Payne, and said he had just come from Russia. On January 23, at about 5 o'clock in the afternoon, the prisoner or some other person went to the shop of Messrs. Cogswell and Harrison, gunmakers, in the Strand, and purchased fifty cartridges for a revolver of the particular make called a Colt's "Police Revolver." They were a kind of cartridge seldom sold, the bullets being flat-nosed. That evening

he told Mr. Gerhard that he wanted to be called at 8 o'clock the following morning as he had an appointment to keep. On the morning of January 24 he had breakfast and left the hotel at half-past 9 o'clock. He appeared to have gone by "Tube" to the Lancaster-gate station, where he deposited an envelope in which he had put a number of documents, which if found upon him would have served to establish his identity. About noon he called at Mr. Whiteley's private house in Porchester-terrace and asked to see Mr. Whiteley. The butler told him that he must call at his office. At half-past twelve he went to Westbourne-grove and asked to see Mr. Whiteley, saying that he came from Sir George Lewis. He was shown into Mr. Whiteley's private office. Some time afterwards Mr. Whiteley came out and said to one of his employés, "Jules, go for a policeman." The prisoner emerged from the office and pushed Mr. Whiteley, saying, "Are you going to give in?" Mr. Whiteley waved him off and said, "No." The prisoner exclaimed, "Take this," or "Then you are a dead man, Mr. Whiteley." Then raising a revolver within twelve or fifteen inches of Mr. Whiteley's face the prisoner fired two shots, and Mr. Whiteley fell dead. The prisoner then turned the revolver on himself and fired a shot at his own forehead, the result being to destroy his right eye and injure the base of his nose. The wound, however, was not sufficient even to make him unconscious. Dr. French and a policeman were sent for. Dr. French found that Mr. Whiteley was dead. The prisoner said to the doctor, "I am conscious. I am alive. Don't worry about me." At St. Mary's Hospital, the prisoner said, "I am conscious; I am Cecil Whiteley. I have killed my father, Mr. Whiteley. Give me something to make me sleep away, there's a good boy." He appeared calm and rational.

Witness after witness was called, the examination and the cross-examination were to the point, short and direct. No dramatic tilts between counsel for the prisoner and the public prosecutor, no exchanges of wit or badinage, no long arguments over the admission and exclusion of testimony. Everything went along with dignity and speed so that by the noon recess the government testimony was all submitted. One cannot help contrasting the examination and cross-examination of Louisa Turner with that of Evelyn Thaw. In the hands of the two English barristers the woman's story became matter of fact, and commonplace. She was not used by the one side or the other as an instrument to move the emotions of the jury or to play to the gallery. Moderation, good sense, and, above all, good taste, characterize both the English barristers who had this disagreeable duty to perform.

Upon the coming in after luncheon Mr. George Elliott opened the case for the defense. His opening was concise and dignified. "While it was no part of his case," he said, "to prove or even to allege that the prisoner was in fact the son of Mr. Whiteley, he was there to tell them on his behalf and to show, as far as the evidence could show it, that he was a man who rightly or wrongly did believe that he was the son of Mr. Whiteley, and that that belief preyed upon his mind, and when sunk in poverty it came home to him as a fact so vital to his life's future that his whole soul went out to it with a view to decide it. He would show how the conviction gradually crept into the prisoner's mind that he was no longer the son of George Rayner, but was the illegitimate son of a wealthy father, Mr. Whiteley. It mattered not whether he was right or wrong in that belief, whether he had reasonable grounds for his belief, or whether in fact he was not the son of Mr. Whiteley. Not only had George Rayner repudiated the paternity of Emily Turner's first child, but he had repudiated the paternity of the prisoner also. That the prisoner was impecunious was true, but his impecunious

state was not due to extravagance. He had been in excellent employment. He had been in the service of an hotel company, and was at one time private secretary to Sir Henry Burdett. He went to Russia with excellent introductions to the British Ambassador. Unfortunately, the prisoner became unemployed, and at the time of this story he was in a destitute condition. So far from that being in any way against him, it explained his subsequent conduct. He had fits of depression, and seemed to feel his position acutely. All this gradually operated upon a mind never of a powerful equilibrium, and on a body enfeebled by the drinking tendencies of his mother, grandmother, and great-grandmother. He was not going to suggest that he was insane in the legal sense of the word at the time he went to Mr. Whiteley's, but he did contend that this was a case of a man of a degenerate mind whose mental heritage was tainted by at least two generations of alcoholism. While in many matters of life he was shrewd, clever, and even accomplished, yet he was just in that condition of mind as to which, quite apart from mental experts, they knew from their own experience that there were men and women who at some crisis of their history had *mental explosions*, and in a moment were guilty of acts of impulsive insanity which had never manifested themselves before, and which, once the explosion had taken place, never occurred again. It was promised that witnesses were to be called on the subject of impulsive insanity, and that the prisoner would testify as to what took place in the interview with Mr. Whiteley. The prisoner, in his destitute condition, having come to the conclusion that there was a mystery about his birth, and that Mr. Whiteley could satisfy him about it, paid the visit to Westbourne-grove, and took the revolver with him, thinking that if his request for information and monetary assistance failed, he could take his own life — possibly in Mr. Whiteley's presence. He had had but little to eat that day, and had taken some drink. He had never intended to hurt Mr. Whiteley, and he remembered nothing more than pulling the trigger. Seeing Mr. Whiteley on the floor, he turned the pistol on himself."

The first witness was the prisoner's wife. She told her story in a few words. Other witnesses were then called, and finally the prisoner himself testified at considerable length but was not cross-examined. Medical testimony was then given, to the effect that persons who had been perfectly rational for years had then been guilty of acts of mental instability, and subsequently recovered their normal sanity. The prisoner's ancestry, his drinking, his want of regular food, his distress of mind from poverty and anxiety would diminish his self-control, and in those circumstances he would be more susceptible to the influence of an insane impulse at any crisis. Instead of the "brain storms" of the Thaw case we are introduced to a new form of insanity designated as "mental explosions."

On the close of this evidence Mr. Muir requested the Court to rule that there was no evidence to go to the jury that the prisoner was insane. The Lord Chief Justice promptly so ruled. Thereupon Mr. Elliott summed up the case for the defense to the jury. Mr. Muir briefly replied on the part of the crown. The brevity and business-like directness of these arguments is striking. Accustomed to such jury address it is no surprise to hear that the English Bar has characterized the fervid rhetoric of both Delmas and Jerome as "flapdoodle," and express surprise that it should be supposed to be effective with any jury.

Lord Alverston charged the jury also very briefly, and within nine minutes they returned a verdict of guilty. Immediately his lordship sentenced the prisoner to death. The trial had been completed within a single day in less than seven hours. Within a month of the verdict, according to the English practice, Rayner will be hanged, unless pardoned or granted a new trial.

Contrast this prompt, certain, and yet fair administration of justice, not only with the Thaw case but with any of our recent sensational murder trials. The delays, uncertainty and doubts surrounding the Tucker, the Patrick, the Caleb Powers, the Mary Rogers, the Nan Patterson, or the Molineaux trials are all fresh in mind. On the other hand if one is to venture a criticism on the English procedure, it is that they sacrifice too much to the despatch of business. It is almost as if the case was prejudged, and the verdict a foregone conclusion, and that all of the Court officials, barrister for the defendant, as well as prosecutor for the crown, and his lordship the judge, were solicitous that all due forms of law might be observed in the trial rather than that any and every possibility in favor of the prisoner should be carefully considered and weighed before the final determination of his fate.

With some misgivings an explanation of the contrast is ventured. The sentiment of the English public is for the infliction of the death penalty for willful murder. The people stand back of the court and jury that imposes that extreme penalty of the law in a case of proven murder. With us the sentiment of the public is divided. In parts of the country human life is still held so cheaply that murder under the proper extenuating circumstances justified itself to the community, and they balk at so severe a penalty for what they regard as little more than a misdemeanor. In other localities there is a real doubt of the efficacy or justice of the infliction of the death penalty for any cause. Much of this may be due to mere sentimentality. Nevertheless, much of the American methods in murder trials of obstruction, delays, and benefits of reasonable, or, as some say, of "unreasonable" doubts, are directly traceable to the repugnance of the public to a death sentence. The trial judges shirk responsibility. The juries dodge their duty. Probably no American judge would undertake to rule in a capital case on an issue of insanity that he regarded the evidence as insufficient, and take that question away from the jury. Nor would you find an American jury in a contested murder trial who would be willing to bring in a verdict of guilty within nine minutes, no matter how clear the evidence, where they know their verdict means death to the prisoner. Our sensational press exploits the sympathy of the community for the man that is down — for the prisoner in the dock. It preys upon the sentiment of the people in opposition to the death penalty. Every great murder trial is a campaign of the yellow press on that subject. A court and jury naturally reflects the sentiment of the community, and we have doubt, delay, hesitation and uncertainty in our murder trials instead of the prompt, sure, and orderly administration of justice of the English courts. To remedy the evil we must have a penalty that in the minds of the people at large fits the crime and which public sentiment demands shall be enforced.[1]

BOSTON, MASS., April, 1907.

[1] While this article was in press it has been reported that a new trial was to be granted to Rayner. We have not been able to verify this report.

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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, facetiæ, and anecdotes.

THE DISAGREEMENT

The absurdity of the rule that requires unanimity of jurors is the conspicuous lesson of the trial of Thaw. Because our saving Saxon sense has taught us to work an illogical system by tacitly ignoring its requirements, cannot justify its indefinite continuance. No other tribunal is required or expected to arrive always at unanimous decisions, however trained to the work of analysis, and yet we ask twelve plain men, faced with facts which have caused a difference of opinion sufficient to result in litigation, to see those facts alike. The truth is that jurors are not unanimous, and in the nature of things they cannot be. A few strong minds dominate, and all at length come to regard the definition of duties given them by the court as something the court does not really expect. And when now and then a conscientious man of independent mind gets on the panel, counsel and court despair. Is it not time to insist that principles conform to practice?

AS ENGLAND SEES IT

The *Law Journal* has this to say of New York criminal practice.

"To an English lawyer the Thaw trial reads like a travesty or abuse of the common-law procedure. The judge seems unable to restrain the conflicting energies of the numerous lawyers on each side who exercise a claim to equality characteristically democratic in raising distinct and conflicting pleas. A hypothetical question of 15,000 words is allowed to be fired at a medical witness, and arguments are raised as to the 'unwritten law,' which is supposed to entitle a man to slay anyone who at any time has inflicted a wrong on one of his female relatives, while vexed questions of brain-storm and other new-fangled forms of mental unsoundness are dragged in at intervals, till the whole proceeding seems like a mock trial prepared for the entertainment of the curious in mental abnormities rather than a judicial investigation into a question of fact. Comparison of the two systems indicates that the English system, with its modern improvements, coupled with the effective control of the presiding judge, affords the better means of vindicating public justice in a manner becoming the dignity of the offended law. And when it is remembered that a verdict in the American trial may be followed by appeals *ad saecula saeculorum*, it becomes evident that law reforms are urgently needed across the Atlantic in the interests of Law, which, in the end, are always the interests of the sovereign people. *Salus populi suprema lex.*"

LEGAL SHAKESPEARE

An interesting suggestion as to the author of the Shakespearian plays has recently been made by Dr. Appleton Morgan, after reading Spedding's "Life of Bacon."

"There was in London a certain young barrister, a son of the late Lord Chancellor, Sir Nicholas Bacon — recently then deceased, leaving a widow, Lady Ann Bacon, and one other son, named Anthony Bacon. This young barrister's name was Francis Bacon. A briefless barrister; he lacked for revenue (for 'lease of quick revenue,' as he himself epigrammatically expressed it). Of the privileged class — a kinsman of dozens of Queen Elizabeth's courtiers — forced to live, without revenue, exactly as if he possessed revenue and to spare! He used his pen, not only as a resource for bread, but to press himself into recognition in his profession. He composed letters for others in their emergencies, even

volunteering to meet their emergencies and submitting letters and pleas to fit their circumstances. There were no newspapers, magazines, nor periodical literature of any sort — courtiers were not so frequently in emergencies as to support a letter-writer. But there was the choice of writing for a theater or for a patron — the former paid cash, the latter allowed him to dine in the servants' hall. At any rate, Master Francis Bacon, for many long years, lived somehow between wind and water — keeping up appearances, receiving from his mother plenty of good advice wherewith to forefend — if he could — the wolf from his door. But, in the year 1593 (to be exact, as Mr. Spedding, who, two hundred years later, wrote the life of this young man, Francis Bacon, by name, enables us to be) on the seventeenth of April, 1593, this young Mr. Francis Bacon found himself in pressing need of something more tangible than good advice to pay his debts with. He implored his mother, the Lady Ann Bacon, to consent to the sale of a parcel of land belonging to the estate of her late husband, Sir Nicholas, in which the Lady Ann had her dower and which could not be sold without her consent, so that Francis could realize his share therein in money. Lady Ann Bacon refused. Thereupon Francis applied to his elder brother, Anthony, to labor with his mother — represent to her his extremities and induce her to consent to the sale. Anthony did, and prevailed. Lady Ann consented, and the sale was made and Francis was relieved. But again, on the twenty-fourth day of September, 1598 (I am following Mr. Spedding again) Francis was once more in debt, and this time his creditor — a Jew money-lender named Sympson — had him arrested and thrown into a spunging house. He who helps once, helps twice! and Francis again applied to his brother Anthony to rescue him from the Jew. And once again Anthony raised the money and released his younger brother. 'Antonio' — Anthony Bacon; 'Bassanio' — Francis Bacon, — 'Shylock' Sympson; — the year, 1593 — the play written and 'divers times acted' until, its acting value being diminished, it is printed in broadside (as we say technically 'in Quarto') in the year 1600.

"Is not the coincidence a curious one? Was not an impecunious Bacon as well as an impecunious Bassanio looking for a 'lady richly left?' We need hardly the assurance of biography — which is, however, at hand — to guess that much."

It must not be inferred, however, that Mr. Francis Bacon was an entirely Briefless Barrister. My friend Hon. Charles E. Phelps, Judge of the Supreme Bench of Baltimore, discovered that, in Slade's Case (4 Rep. 91), Francis Bacon was of counsel, and associated with him as attorney on the same side was a lawyer named John Halstaff. Says Judge Phelps ("Falstaff and Equity." Boston. Houghton, Mifflin & Co., 1901, p. 130, *note*): "The case was pending from 1596 to 1602. When the author of the first part of Henry the Fourth found himself obliged in 1597 to find some other name to substitute for the offensive 'Sir John Oldcastle,' and to find it in a hurry, did he get the suggestion of Sir John Falstaff from the name of John Halstaff?"

CORPULENT TEXTS

It is time that the profession registered a decisive protest against the excessive size to which the modern law book is being expanded. The accumulation of decisions compels a sufficient increase of pages without the obvious attempt by large type, wide margins, and heavy paper, to expand a two volume work into a three volume edition. The authors contend that the customary price per volume does not provide a sufficient remuneration for the time required in the preparation of a modern work, but is their work worth more than buyers undeceived by devices are willing to pay? Shelf space alone is a consideration not to be neglected in these days of high rent.

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

Constitutional law, labor questions, and the ever-present discussion of the imperfect procedure of the law, receive much attention in the legal articles reviewed this month. The growing tendency to give what would formerly have been considered strictly judicial functions to the executive, is ascribed by Roscoe Pound to the impatience of our practical people with the law's delays and technicalities; and Hannis Taylor blames the same defects in the criminal law for the prevalence of lynching. In the department of constitutional law a timely article by S. S. Gregory discusses the constitutionality of national regulation of the liability of interstate carriers for accidents to employers. Jeremiah Smith concludes his valuable series of articles on labor litigation, and Frank W. Grinnell has written an interesting analysis of the value of a labor union's contract with an employer who agrees to the "closed shop." Edward H. Warren's examination of *de facto* corporations, and Samuel B. Clarke's analysis of the Armstrong committee's legislation on insurance, are of much interest in their special fields.

BILLS AND NOTES. "Fictitious or Non-Existing Payee," by J. D. Falconbridge, *Canada Law Journal* (V. xliii, p. 225).

BILLS AND NOTES. "Some Suggestions on the Proposal to Enact the 'Uniform Negotiable Instruments Law'" in Illinois, by Julian W. Mack, *Illinois Law Review* (V. i, p. 592).

BIOGRAPHY. "Benjamin Franklin Graves," by Hoyt Post in the April *Michigan Law Review* (V. v, p. 409). Concluding the series of biographical sketches of four noted Michigan Supreme Court judges.

BIOGRAPHY. "Sir Walter Scott as an Advocate," by R. A. B. *Scottish Law Review* (V. xxiii, p. 109).

CONSPIRACY. "The Results Flowing from the Extinction of the Civil Action for Conspiracy," by Robert L. McWilliams, *Central Law Journal* (V. lxiv, p. 266).

CONSPIRACY. "Conspiracy as a Crime and as a Tort," by Francis M. Burdick, in the April *Columbia Law Review* (V. vii, p. 229), examines many cases. The positions taken are that as conspiracy is a crime "apart from any criminal act which the conspirators have in view when forming the confederation, it . . . does not merge in any crime perpetrated by the conspirators while carrying out their agreed scheme;" and that anyone damaged by a conspiracy should have an action in tort of which the distinctive feature "is the conspiracy, rather than the species of harm inflicted."

CONSTITUTIONAL LAW (Acquisition and Control of Territory). An historical examination of the theories and decisions relating to "Acquisition and Government of National Domain," by David K. Watson, appears in the March-April *American Law Review* (V. xli, p. 239). The author's summing up of the result of the decisions on the controverted question of the control over acquired territory is as follows:

"Foreign territory acquired by the United States is subject to three classifications: First, territory which is incorporated into the United States. This is subject to the provisions of the Constitution, and its people are entitled to its benefits, including the Bill of Rights, commonly known as the first ten amendments. Second, territory which is not incorporated into the United States, but which may be regarded as outlying territory. This is subject to be governed by Congress under the powers granted in the Constitution applicable to such territory, not necessarily including all the provisions of the Bill of Rights, but subject to such limitations upon Congressional

action as inhere in the 'prohibitions' of the Constitution. Third, the United States has full power to hold annexed territory, until its inhabitants are qualified to become citizens thereof, and Congress may determine how long that period shall continue."

CONSTITUTIONAL LAW (The Commerce Clause). Under the title "The Commerce Clause of the Federal Constitution and Two Recent Cases Dealing with It," S. S. Gregory has a suggestive discussion in the April *Michigan Law Review* (V. v, p. 419) of the cases of Howard *v.* Illinois Central Railroad Co. and Brooks *v.* Southern Pacific Co., in which Judges McCall and Evans respectively decided that the recent act of Congress regulating the liability for injury to employees of common carriers engaged in interstate commerce was unconstitutional. The question is now before the Supreme Court. Mr. Gregory thinks the cases have been wrongly decided in the lower court, that such regulation is fairly within the scope of the commerce clause. He says that the power to regulate interstate commerce is as broad as the power to regulate foreign commerce and that Congress has without question imposed such liability on ocean carriers engaged in foreign commerce.

"It is no solution of this question to say, as does Judge McCall in his opinion, not merely once but repeatedly, that the liability of a common carrier to its employees for injuries is not interstate commerce. Neither are railways, bridges, or ships commerce, interstate or otherwise; yet their construction, location, and use may be regulated and controlled by Congress when employed in connection with interstate commerce. In view of the plenary and sovereign nature of the power of Congress in this regard, it is hardly too much to say that every person derives his right to engage in interstate commerce under national authority; that he may exercise this right only upon the conditions which Congress sees fit to prescribe in respect thereof; that in this respect this right is as wholly derived from national authority as are the charter rights of a corporation from the sovereign from which they emanate; with foreign and interstate commerce the States have absolutely nothing to do. In that restricted field where their legislative enactments have been permitted to stand, although somewhat related to interstate commerce, this has been not because of any inherent vitality in such legislation considered by itself, but because from the silence or failure of Congress to occupy this field the courts have raised the presumption that it was the national legislative will that the State should be, *sub modo*, permitted to act in it. It would appear, therefore, to be at least a moderate statement that, in respect of interstate commerce and all its incidents, the Congress has the same power of police, which is possessed by legislatures of the several States in respect of matters within the sovereignty of each State."

And the statute, Mr. Gregory thinks, is clearly within the police power.

The objection that the act may in a measure affect commerce carried on entirely within a state, does not seem to him of any controlling significance in the light of the fact that it has been found no objection at all to the exercise of the power in respect of maritime transportation and having regard to several decisions referred to.

"It remains to notice briefly the suggestion made by Judge Evans that as the act in question would be in terms applicable in the case of injury to employees employed in the shops of a railway company and its general office, whose duties were in no way related to interstate commerce or to transportation of articles of interstate commerce, therefore the statute is invalid. It must be said that this is the most plausible objection that has been urged against its validity and possibly it ought to be regarded as conclusive against it; yet I am not altogether persuaded on this point. If it be true, as I have already suggested, that the right to engage in interstate commerce at all is derived wholly from the Nation, then it is not at all impossible that Congress has power to prescribe the terms and conditions upon which anyone shall engage either in interstate commerce or in the transportation of articles of interstate commerce. Possibly the suggestion made by Mr. Garfield, that every corporation engaged in such commerce be required to take out a license from the federal government, will be found to rest, for its practicability and validity, upon this idea. It is certainly a question of profound and far-reaching impor-

tance and one not to be lightly decided against the power of the National Government. It seems to me it is worthy of more elaborate treatment and fuller discussion than is devoted to it in the opinion to which I have referred."

CONSTITUTIONAL LAW (Executive's Power over Legislature). James D. Barnett has the first part of an article on "The Executive Control of the Legislature," in the March-April *American Law Review* (V. xli, p. 215). "The methods of the executive control of the legislature in the United States consist, for the most part, of the recommendation of legislation, the approval and veto of legislative measures, the call and limitation of special sessions of the legislature, changing the place of the legislative sessions, the adjournment of the legislature, and the issue of writs of election to fill vacancies in the legislature." The first two are considered in this number, the discussion being wholly from the legal point of view with copious citation and discussion of cases. The article will be concluded in the May-June number.

CONSTITUTIONAL LAW (Michigan). "Some Suggested Changes in the Constitution of Michigan," by John A. Fairlie, April *Michigan Law Review* (V. v, p. 439).

CONSTITUTIONAL LAW (see Japanese Compromise).

CONTRACTS. "Some Option-Contract Quandaries in Illinois Law," by George Packard, *Illinois Law Review* (V. i, p. 571).

CONTRACTS (Labor Union and Employer). A suggestive article for all interested in labor questions is Frank W. Grinnell's in the March-April *American Law Review*, entitled "An Analysis of the Legal Value of a Labor Union Contract" (V. xli, p. 197). The writer deals "with the contractual relations of a labor union and an employer from the inside, especially in the light of certain recent decisions in New York and Massachusetts. Because of its simplicity for the purposes of discussion, the form of contract recently considered by the Massachusetts court in the case of Berry *v.* Donovan, 188 Mass. 353," is used.

The principal points covered by this contract are:

1st. The use of the union stamp label on goods as an advertisement . . . 2d. The retention and employment of union men only. This is the "closed shop" clause. 3d. The cessation of strikes and lockouts and the reference to arbitration of all questions of wages and conditions of labor which cannot be mutually agreed upon. This is the so-called "arbitration" clause. The first of these three points is merely incidental to the second and third.

The author's analysis leads him to the following conclusion as to the "closed shop" clause.

"1st. The principles of liberty demand that the 'closed shop' agreement be held illegal as to the non-union man who is forced out of his job, as in Curran *v.* Galen, Berry *v.* Donovan, Martell *v.* White, and Boutwell *v.* Marr.

"2d. That the same principles demand that the 'closed shop' clause be held illegal in the sense of being unenforceable against the employer, as in the decision of the Appellate Division in Jacobs *v.* Cohen.

"3d. That the same principles demand that the employer shall not be prevented by a court from carrying out such a clause if he sees fit, as in Mills *v.* U. S. Printing Co. of Ohio."

By the "arbitration clause," it is mutually agreed that the union will not cause or sanction any strike, and that the employer will not lock out his employees while this agreement is in force. All questions of wages or conditions of labor, which cannot be mutually agreed upon, shall be submitted to the State Board of Arbitration. The decision of this Board of Arbitration shall be final and binding upon the employer, the union, and the employees. The union agrees to assist the employer in procuring competent workers to fill the places of any employees who refuse to abide by the above, or who may withdraw or be expelled from the union.

This sounds very fair but Mr. Grinnell puts the following case "suggested by actual experience."

"A shoe manufacturer, in order to stop a strike in his factory, decides to try the experiment of the 'closed shop' and the 'union label,' and signs a contract in the form above quoted for three years, the contract being also signed by the general president of the union and by the officers of the local union, and the

strike is ended. Every man in the factory at that time either joins the union or leaves the shop. At the end of a year the local union proposes a new wage scale which if adopted would cause such an increase in wages that the shoes would be made at a loss; the manufacturer refuses and enters into negotiations with a committee of the local union to try to adjust the prices by mutual agreement. We will assume that there are about one hundred different operations in making the shoes, and each one had to be gone over, so that these negotiations take several months. Meanwhile part of the work in the factory, the 'lasting,' is being done at a 'day' price, as before the negotiations began. We will assume also that any ordinarily competent 'laster' can 'last' at least six dozen pair of shoes per day, and a good 'laster' can last seven dozen, and we will assume that these lasters have been working at that rate. After the negotiations for the new price list begin, every laster in the factory drops to four dozen pair per day. The manufacturer appeals to the general president who tries to interfere but is unable to control the action of the lasters. The business suffers accordingly by failure in production, inability to fill orders, etc. The hope of forcing negotiations and getting a higher piece price by making the manufacturer fear a loss of business is, of course, the motive of the 'lasters'' conduct. This interruption of business continues throughout the negotiations, which finally results in a 'price list' which is signed by the committee of the union and by the manufacturer and posted in the factory. Yet the employees are not satisfied with the work of their committee; they spend their time complaining about it instead of making shoes, the factory is completely demoralized, and the result is that the manufacturer closes the factory and goes out of business after pocketing a very considerable loss."

In such a case Mr. Grinnell says the contract, on account of the difficulty of proving the legal relation of cause and effect between the breach of the arbitration clause and any substantial damage, "does not give an employer any *legal* protection against abuse, and upon the facts assumed in the case stated would be of no legal value to him unless he could get sufficient evidence, in addition to those facts, to prove a combination or conspiracy between the union and its members to control the labor market and oppress him unfairly.

"Such evidence would ordinarily be very hard to get, and if he could get it his claim would be, not an action of contract but of tort for conspiracy on the theory applied in the cases of Curran *v.* Galen, Berry *v.* Donovan and Martell *v.* White, already cited in the first part of this article. In such an action the union contract might be valuable, *in connection with the other evidence*, to show the way in which the employer was tied down before he was stamped on, but, other than that, it is difficult to see how the contract is of any legal value whatever.

"The lesson for the employer from this discussion is that it is wise not to enter into an agreement which leaves him helpless in the hands of his enemies and without redress."

CORPORATIONS. The *Harvard Law Review* for April has in its series of articles dedicated to the late Professor Langdell, a monograph by Edward H. Warren, entitled "Collateral Attack on Incorporation. A. *De Facto* Corporations" (V. xx, p. 456). The scope of the article cannot be better given than by his opening paragraphs:

"A, B, and C wished to engage in the business of retailing ice. By statute it was provided that if any three persons did specified acts, they acquired the privilege of engaging, as a corporation, in any designated business. A, B, and C, intending in good faith to avail themselves of the provisions of this statute, did all the acts required except one. By inadvertence, no statement of the amount of capital to be employed was made in the certificate of incorporation. Believing that they had received the franchise of the state to act as an artificial person, they assumed, as such person, to engage in the designated business for a number of months. They employed D, and he, while delivering ice and solely by reason of his own negligence, injured E. The alleged corporation has become insolvent, and E seeks to establish that A, B, and C are personally responsible for the tort to him.

"'But,' say A, B, and C, 'although we were not a *de jure* corporation, clearly we were a *de facto* corporation. It is for the state to

grant the franchise to be a corporation, and is it not, therefore, for the state alone to complain if persons usurp that franchise? Is it not well settled that, except as against the state, a *de facto* corporation is just as good as a *de jure* corporation? Has it not been written that the existence of a corporation shall not be attacked collaterally?' It will be the attempt of this article to meet these questions."

Professor Warren, after citing and discussing a large number of cases, sums up his conclusions as follows:

"1. When the existence of a corporation is only collaterally in issue, proof of facts sufficient to satisfy the requirements of the *de facto* doctrine is sufficient to make a *prima facie* case.

"2. If a corporation is in existence, but there is a ground upon which the state might have its existence forfeited, no one but the state can take advantage of this cause of forfeiture.

"3. Most failures to conform strictly to statutory provisions regarding the formation and regulation of corporations are not fatal to the formation of a *de jure* corporation. But failure to perform an act, the performance of which the legislature has intended to be a condition precedent to incorporation, is necessarily fatal.

"4. There are considerations of public policy so urgent as to justify the courts in holding that a *de facto* corporation may be a conduit of title.

"5. The *de facto* doctrine has a very important scope in cases where contracts have been made on a corporate basis.

"6. If associates who have not the corporate privilege assume to exercise it, there is no established doctrine that all but the state must submit. It is not proper to apply to such a case the doctrine that the existence of a corporation cannot be attacked collaterally.

"7. The *de facto* doctrine should be applied with caution when it is invoked for the benefit of the associates themselves against persons who have not dealt with them as a corporation. It is anomalous to permit the usurper of a right to require a stranger to submit to the assertion of such right.

"8. It is anomalous to bridge a legal gap, even for the benefit of a person who has made an expenditure in good faith.

"9. There may be no objection to applying the doctrine for the benefit of the associates themselves against strangers, if the associates are asserting a right which is in them either as natural persons or as a corporation.

"10. The doctrine should never be applied for the benefit of the associates themselves to the prejudice of an innocent stranger."

CRIMINAL LAW. "The Law of Homicide," Francis Wharton. Third Edition by Frank H. Bowlby. Rochester, 1907 (pp. 156, 1120). Wharton on Homicide is noteworthy, first of all, as a very large book on a comparatively narrow subject. The second edition, published in 1875, formed a thick octavo volume, and the present third edition is fifty per cent larger than the second. Yet this great bulk does not indicate that the subject is treated with the fullness of a monograph. The actual amount of case law on the subject of homicide seems to bear out the assertion that life is very cheaply held in this country. The table of cases alone, in this edition, occupies one hundred twenty-five pages of very closely printed names in double column. There are probably at least eight thousand cases cited.

The matter contained in the second edition, as Dr. Wharton left it, has been entirely changed in arrangement and largely modified in statement by the editor of this volume. In some respects these changes are much for the better. The least satisfactory part of Dr. Wharton's books was the arrangement and analysis of his subjects, and the editor of this edition has gained in clearness of treatment by the re-arrangement. On the other hand, the new matter is much less philosophical in tone and authoritative in form of statement than Dr. Wharton's work. In fact, the editor's contributions are in the form of statements of new cases rather than of discussions of principle. The cases are stated very well, but in some sections apparently contradictory decisions are cited with no attempt to reconcile their differences and with no indication as to which represents the better doctrine.

On the whole, however, the work of the

editor has been very carefully done. The difficult portions of the subject have been adequately covered by the discussion, and the book may be recommended as of the utmost value for lawyers who have occasion to investigate the subject covered.

The general principles of criminal law, as applicable to prosecution for homicide, are first stated: these include questions of causation, responsibility, and parties. The nature of murder and manslaughter and the differences between the two offenses are then considered; next, questions of justification. After these general investigations the editor deals with various cases of homicide, and finally examines the rules which regulate the precedure in prosecutions for homicide. There is an adequate index, and the table of contents forms a useful analysis of the whole subject.

If all Dr. Wharton's books, of which the Lawyer's Coöperative Publishing Co. is now bringing out new editions, are as well edited as this one, the profession will have cause to be thankful to that corporation for its enterprise in re-issuing the series. — J. H. B.

CRIMINAL LAW. "The Thaw Case," by Wm. L. Clark, *Canadian Law Review* (V. vi, p. 100).

DIGESTS. "Cream of the Law." Volumes I and II (1905 and 1906) and No. 1 of Volume III. Edited by Emerson E. Ballard, Cream of the Law Company. Crawfordsville, Indiana.

This legal quarterly presents to the profession in compact form a great number of recent and interesting cases, the professed aim of the publisher being to keep the subscriber constantly informed of those decisions forming part of the growth of the law. The style of the work is unique. There is, properly speaking, no text. Neither is the work a collection of cases printed in full. Under appropriate headings the decision in each case treated is briefly stated, and there follows a quotation from the opinion of the court, varying in length with the importance of the respective cases. Sometimes there is simply a quotation of the cases referred to by the court, and occasionally an allied case is stated by the editor. The work is comprehensive rather than exhaustive. The whole field of the law is covered, but cases which are simply reiterations of established and familiar principles are not included. An important feature is the cumulative index published with each number. It embraces all the numbers of *Cream of the Law* issued for the year, and refers to notes in other collections of cases and to articles in the leading law journals. The numbers make interesting reading because of the fact that only new matter is presented, and we believe that the indexes will prove to be of value.

DIVORCE. "Uniform Law Relating to Annulment of Marriage and Divorce," by Walter George Smith, *Central Law Journal* (V. lxiv, p. 229).

EMPLOYERS' LIABILITY. "The Doctrine of Common Employment in England and Canada," by J. P. Macgregor, *Canadian Law Review* (V. vi, p. 110).

EQUITY PROCEDURE. "The Law and Practice of Interpleader in the High Court and County Courts, with Forms," by S. P. J. Merlin, Butterworth & Co., London, Eng. This little book is a manual for English practitioners, which will hardly be of assistance to practitioners in this country.

ETHICS. "The Bench and Bar in their Relation to the People and the Corporations," by J. Aspinwall Hodge, *Albany Law Journal* (V. lxix, p. 54).

FRAUD (Statute of Frauds). "A Treatise on the Law of Frauds and the Statute of Frauds," by John W. Smith. The Bobbs-Merrill Company, Indianapolis, 1907. The first part of this book is a treatise upon fraud in general, including deceit, fraud in fiduciary relations, equitable remedies for fraud, and fraudulent conveyances. The second part of the book relates to the Statute of Frauds, and includes, in addition to a consideration of the general law on this subject, a collection of the statutes of England and the different states, together with summaries of the decisions under those statutes, arranged by states. Though the first part of the book is not exhaustive, it is a satisfactory and correct summary of the law, illustrated by recent decisions, and was found useful by the reviewer in his prac-

tice. The arrangement of the cases under the Statute of Frauds, however, is to be regretted. The lawyer will hardly find the collection of cases in his own state more satisfactory than his own digest, except from the fact that recent decisions are included, and the time required to locate analogous decisions in other jurisdictions would seem to be prohibitive. The differences in the statutes in the different states seem hardly great enough to warrant the classification determined upon.

INSURANCE DIVIDENDS (Armstrong Committee Legislation). Samuel B. Clarke, in the March-April *American Law Review* discusses "Defects of the Armstrong Committee's Legislation Relating to the Dividends of Mutual Life Insurance Policy Holders" (V. xli, p. 161). Mr. Clarke is far from satisfied with the legislation, though he commends heartily the committee's work in ferreting out abuses.

The committee has done well, Mr. Clarke thinks, in not attempting to establish by statute the manner of distribution of surplus, leaving it to be divided equitably, that is, by the courts. The dividends of policy holders should be determined, Mr. Clarke urges, by the amount of sacrifice made by them. The differences in sacrifice are in the payment of money: "A has made a single payment of $100; B has paid $100 annually for the past fifty years; C has made one payment of $10,000; D has paid $10,000 annually for twenty years; E has paid one lump sum, $250,000; and so on, and so on. It is the plainest equity that these differences ought to be taken into account, and unless there are other germane considerations not yet adverted to, they ought to furnish the rule or principle of distribution. By this standard the share of the divisible surplus, which each policy holder is entitled to, is to be determined by the ratio between the total amount which he has paid to the company since he became a member of it and the total amount which all the policy holders who are to participate in the distribution have paid since they severally became members of it. The general expression of the proportion for each individual policy holder, whom we may call A, would be; — as the total amount paid by A to the company since he became a member of it is to the total amount paid to the company by all the participating policy holders since they severally became members, so is A's share of the divisible surplus to the divisible surplus. To illustrate arithmetically: — If the total premiums paid by all the participating policy holders are $100,000,000, and if the total paid by A is $100, and if the fund to be divided is $2,000,000, the proportion stands thus, — $100: $100,000,000 = A's share: $2,000,000. Solving this proportion we find that A's share amounts to $2. If, instead of paying $100 once, A has paid that amount annually for the past fifty years, making $5,000 in all, the proportion stands thus, — $5,000: $100,000,000 = A's share: $2,000,000. Solving this we find A's share to amount to $100. We know, mathematically, that in every proportion the ratio between the second and fourth proportionals is equal to the ratio between the first and third proportionals. This enables us to establish a *dividend rate* capable of quick and easy application as a percentage of the total amount of premiums which each participating policy holder has paid to the company. Thus, in the last example, the dividend rate is the ratio 2,000,000: 100,000,000, or two per cent. A's share is equal to and may, correctly, be measured as two per cent of the total of the premiums ($5,000) which he has paid."

Minor corrections are to be made, but the principle is not affected. The actuary's idea that surplus comes from the earnings of three imaginary funds, the death loss, premium reserve, and loading funds and that the dividend should depend on what the premium has contributed to each, is ridiculed as artificial and untrue.

Mr. Clarke's specific criticisms of the Armstrong legislation are four in number: First, the requirement that on the 31st of December each year companies shall ascertain the *surplus earned during that year.* What should be found is the *surplus, if any, existing at a particular time.* The limitation obliges a company to make its investigation from its books of accounts, a method much more liable to error than the natural one of inventorying present property and obligations. A company does not have to report the surplus existing, but only the profits and losses of the business of the year and their sources.

An error in the books which may have originated years ago will fail to be detected.

The second criticism is of the division for dividend purposes of policies into existing deferred dividend policies and all other policies, for any division is sure to embarrass the court in determining an equitable distribution.

"Third: The statute, after imposing the duty on the company to ascertain and apportion surplus *as soon after the thirty-first day of December as may be practicable*, does not require that any information whatever regarding the dividend principle or principles followed by the company in making the apportionment or as to the methods of arriving at dividend rates and calculating dividends, shall be given by the company to the superintendent of insurance or to policy holders until after the expiration of fourteen months from the 31st day of December of the year in question. . . . Fourteen months! During those fourteen months what will have happened? The dividends will have been declared and become payable, and many of the policy holders will, severally, have taken theirs in cash, others will have used theirs in reduction of premiums, and others still will have allowed theirs to be retained by the company as the purchase price of additional paid-up insurance, to which they severally are entitled. In other words, the company will have lost the legal title to the divisible fund and that fund will have been scattered all over the world, wherever policy holders may be domiciled."

No special powers are given to the court to correct any errors then discovered fourteen months late, and the ordinary processes of law will afford no remedy at all, except in cases of actual fraud.

"Fourth: Each of the standard forms of policies prescribed by Sec. 101, of the statute, . . . after January 1, 1907, contains the following provisions — 'This policy shall each year participate in the surplus of the company, *as provided by the laws of the state of New York now in force*.' The laws existing either at the date of the statute or at the date of the delivery of policy contracts will thus become a part of the obligation of the contracts. It follows that the legislature will have no constitutional authority to change the law of apportionment so as to affect any of the contracts that may be made on the standard forms. Than this, it is not possible to conceive of a more artistic and efficient method of perpetuating the evils which the Armstrong committee exposed."

The company should not be allowed to take any steps in apportioning and distributing surplus for sixty days after announcing its amount, and provisions should be made for policy holders to appeal to the courts in case of error and for the courts to have full charge of the surplus and its distribution in such cases.

INTERNATIONAL LAW. "The Legal Status of the Panama Canal Zone," by Charles R. Williams, *American Lawyer* (V. xv, p. 125).

INTERNATIONAL LAW. "The Exemption of Private Property at Sea from Capture in Time of War," by Sir Wm. R. Kennedy of the Queen's Bench Division, read at the Berlin Conference of the International Law Association, is reprinted in the April *Yale Law Journal* (V. xvi, p. 381).

JURISPRUDENCE (Evidence). "The Philosophy of Proof, in its Relation to the English Law of Judicial Evidence," by J. R. Gulson, London, Routledge; N. Y., Dutton, 1905, pp. xv, 496. The author has here attempted a task very praiseworthy, and one unusual and much needed in these days of book-making, for the daily needs of the practitioner, namely, to develop and apply a strictly scientific theory and system of evidence. The first part of this work is devoted to "a study of natural evidence," and "the general principles of inference in its relation to evidence." The second part purports to "exhibit the bearing of the natural principles of proof upon the positive rules of the English judicial system," and "to point out how far the practice, on the one hand, and the abstract doctrines and maxims of the law, on the other, are in harmony or at variance with natural science."

The chapter headings of Part I read as follows: Evidence in General; A Fact; An Expression of a Fact; the Connection Between the Two; Facts Positive and Negative; Facts Physical and Psychological; Events and States;

Facts Principal and Evidentiary, Compound and Component, an Inference; a Coincidence; Bentham's Definition of Evidence; Divisions of Evidence; Evidence Immediate and Transmitted, and the Comparative Force of These; Facts and Communications; Evidence Direct and Circumstantial, and the Comparative Force of These; Negative Evidence; Bentham's Divisions of Evidence; Evidence Preappointed and Casual; Evidence Real and Personal; Evidence Original and Derivative. Of this Part I, let us say frankly that we can make little of it. The reason for this is not easy to state; for the style is lucid, if diffuse, and the author is well equipped both in professional and in general reading, and writes from a judicial and balanced mind. Perhaps the real reason for the failure of this Part I to make upon us the impression of having achieved anything is that there can be, after all, no system of "natural evidence," apart from some specific body of legal rules, on the one hand, and from the canons of logic, on the other hand; hence the elaborate distinctions and definitions of this Part I may be predeterminately vain. Among the particular points, furthermore, which we definitely decline to believe is that there are "three sciences, Evidence, Induction, and Logic" (p. 16). Most of all, we decline to believe that "the methods of circumstantial evidence are purely deductive" (pp. 106, 238); for this belief relegates all the difficulties of evidence to our arid old friend, Barbara Celarent, and gives no real help in the practical solution of those problems. Any one who will read Professor Alfred Sidgewick's book on "Fallacies: A View of Practical Logic," will appreciate that the inductive form of an inference (or some equivalent of it) is the only serviceable form for any purpose but that of mental exercise. The deductive form is useful, perhaps, for testing a counsel's argument, but not for testing a rule of evidence.

In Part II, however, we find more profitable reading. The author passes in review the chief rules of evidence; and his keen analysis exposes the fallacies of many common phrases and misguided shibboleths of the law. One need not accept the author's system of "natural evidence" in order to agree with him in most of his criticisms upon the commonplaces of our treatises and our judicial traditions. For example, he effectively explodes (pp. 270, 338, 341, 349, 362) the ancient fallacy of treating "Documents" or "Writings" as a single subject of evidential rules — a fallacy found in the classification of almost every treatise since Gilbert. Documents, he points out, have entirely different aspects "accordingly as on the one hand the act of the writer forms the very substance of the issue, or as, on the other hand, it amounts to a mere statement of the fact which we are seeking to ascertain;" and the practical applications of this to official documents are pointed out by him in detail. Again (p. 279) he corrects Bentham's fallacious use of the term "real evidence." This, he demonstrates, "is neither peculiarly the evidence of things, nor necessarily the proof of any particular kind of fact; it is the evidence furnished by the perceptive faculties of the tribunal applied to the fact itself, and whether the fact in question be the contents of a document, or the features of any material object, the proof of it is then and then only 'real' when the fact is itself manifested to the senses of the tribunal." A recent writer's use of the term "autoptic proference" for this process has led to some uplifting of eyebrows; but what critics should rather notice is that Bentham's "real evidence" not only was a useless distinction, but has also been since misunderstood and applied in a different sense; and Mr. Gulson's analysis goes to show that the term is no longer fit for scientific discussion. Again Mr. Gulson neatly demonstrates (p. 334) the fallacy in principle of the rule in The Queen's Case (showing a witness's contradictory writing to him before questioning him); this should the more speedily induce us to abolish that anomaly. Mr. Gulson also (pp. 389-391) does manful service in attacking the fallacies of the term "parol evidence," as applied to the rule determining the terms of a transaction. Professor Thayer exposed these fallacies; and it may now be hoped that perhaps some day our practice can after all be got to discuss this subject, in its everyday applications, in language that does not constitute a disgrace to the science of law. We even dream that

some day a book will be written which will claim for its special field "Legal Acts; their Formation and Interpretation," and will demonstrate that the subject is as much entitled to a separate treatment as "Contracts" or "Corporations," a claim, indeed, which our Continental brethren, more given to juristic analysis than ourselves, have long ago conceded, even in their Codes. Mr. Gulson is also under no illusions as to the true nature of an extra judicial admission; it is (pp. 402, 404) merely "a statement made by the party against whom it is offered by his adversary in a legal trial;" moreover, it is merely "an evidentiary fact." This ought to help banish the ancient unthinking phrases of Starkie and Greenleaf, which still becloud our judicial opinions, though wholly inconsistent with the rules of law. Incidentally, Mr. Gulson here adds some just comments (p. 412) on the rule in Slatterie *v.* Pooley. There are other good things which space forbids our noticing, on estoppel (p. 422), burden of proof (p. 445), best evidence (pp. 450, 452), *res inter alios acta* (pp. 457, 461), *res gestae* (pp. 466–468), and opinion (pp. 470, 473). We trust that the science of the subject in England will be advanced by Mr. Gulson's wholesome criticisms. J. H. W.

JURISPRUDENCE (Mohammedan). The third and last installment of "A Historical Sketch of Mohammedan Jurisprudence," by Abdur Rahim, appears in the April *Columbia Law Review* (V. vii, p. 255). It deals with the "Jurists" who gained authority after the death of the Prophet, the modern writers, and the British Indian courts.

JURISPRUDENCE (The Spanish Code). "A Spanish Object-Lesson in Code-Making," by Charles S. Lobingier in the April *Yale Law Journal* (V. xvi, p. 411) is a brief and highly eulogistic article on the Spanish Code of 1889, which is in force in Cuba, Porto Rico, and the Philippines. The author, who is himself a judge of the Court of First Instance in the Philippines, says of it: "When it first came to the attention of critical American judges and lawyers in our new possessions they were amazed at its comprehensiveness and completeness — charmed with its clearness, conciseness, and simplicity. They, who were wont to engage in the tedious and reason stifling process of pursuing, through the maze of precedent, with the lame assistance of cumbrous digests, voluminous treatises, and multitudinous reports, some fine point in the law of contracts or real property, found in this brief Spanish Code, smaller than almost the least of American text-books, a logically arranged group of principles from which the law applicable to a given case could be deduced rationally and with little difficulty. Coming at an epoch when business interests as well as the legal profession are beginning to demand relief from

> "The lawless science of our law
> The Codeless myriad of precedent,"

this discovery of the achievement of the hitherto unappreciated Spaniard is most timely and serviceable. It is one of the far-reaching consequences of the Spanish-American War which was never foreseen and is even now little suspected. Much has been said and rightly of the improvements of the courts of our insular possessions through the introduction of the simpler and more practical American system of procedure. The benefits will not be altogether one-sided if through this contact of legal systems the American people shall learn the merits of the Spanish *Código Civil* and from it the feasibility and gain of codifying their private substantive law.

JURISPRUDENCE. "Conformity of Legal Decisions to Ethical Standards of Right," by A. G. Tibbetts, *Canadian Law Review* (V. vi, p. 141).

LABOR LITIGATION. Jeremiah Smith concludes in the April *Harvard Law Review* his valuable article on "Crucial Issues in Labor Litigation" (V. xx, p. 429). In the previous installments general propositions as to the requisites for justification were stated; in the present one these tests are applied to thirteen hypothetical cases as Judge Smith conceives they must be worked out. These disposed of he takes up the unsettled question, "Whether bad motive operates as a rebuttal of an otherwise sufficient justification?" On grounds of public policy the author thinks it should not so operate, as in fact personal enmity is very seldom the real motive in labor disputes, and in the only cases where it would be of importance, those where

there is apparent justification on the ground of self-interest, it would be very difficult to prove it the real impelling cause and permitting the raising of this issue "would very materially diminish the value of the right to justify on the ground of self-interest. The allegation of bad motive is easily made and the contention would prolong litigation and, if tried, might involve great expense. . . .

"If the issue of bad motive can be thus raised in labor conflicts, it must also be allowed in cases of ordinary trade competition, a very wide field. We think that the rarely occurring punishment of a personal enemy, who has masked his hostility under the guise of competition, would not offset the harm caused honest competitors by their being compelled to litigate the question of the fairness of their motives whenever assailed by a disappointed rival."

LIBEL. "Fair Comment in an Action for Libel," by Silas Alward, *Canadian Law Times* (V. xxvii, p. 168).

LYNCH LAW (The Remedy). Hannis Taylor's article in the March-April *American Law Review* (V. xli, p. 255), entitled "The True Remedy for Lynch Law," asserts that "It is impossible to mistake the cause of lynch law in this country; it is the outcry of a conservative and law-loving people against the abuses of a system of criminal procedure which has become intolerably inefficient." Many will think Mr. Taylor is ignoring equally potent causes who will agree with his suggestions for increasing the efficiency of our courts.

"Pandora's box was opened when the bulk of the American states made a radical departure from the English system of criminal review, and established in its stead an unchecked and unguarded system of appeal under which any defendant, after reserving every possible exception, however frivolous, can, as a matter of right, call upon one or more revising courts to thresh out every point presented to the end that, if a single apparent error has been made, a reversal of the judgment of guilty must follow as a necessary consequence. This new American creation stands without a prototype. . . . It represents the extreme swing of the pendulum, an intemperate outcry against an old system which was too narrow and too severe. When judged by its fruits — which exist in the form of over technical dissertations which often remind one of the medieval debates as to the number of angels that can stand on the point of a needle — condemnation is inevitable. Its chief function has been to upset just verdicts rendered by honest juries upon some ground so archaic, so narrow, so technical as to be unintelligible save to experts in criminal law. The theory upon which all such refinements rest is that the innocent citizen, unjustly accused of crime, must be discharged if the slightest irregularity in the proceedings can in any way be ferreted out. When we add the disastrous consequences of such a licentious system of appeal to the evils resulting from the degrading of the trial judge from his normal position of adviser of the jury to that of a moderator of a New England town meeting, we find the true origin of lynch law. The jury system as it now exists in England is the best and most efficient engine for the punishment of crime anywhere to be found. Of that system we have in the United States only an emasculated imitation, a manikin instead of a man. Its two great points of weakness are; (1), the too limited power and influence of the trial judge; (2), an unbalanced and unguarded system of appeal ever ready to upset just verdicts upon purely technical grounds. The path to reform is plain and straight — we can advance by simply falling back. . . . A beginning should be made with the destruction of the prevailing system of absolute and unqualified criminal appeals which is the most prolific source of existing evils. Fortunately we have, as a standard for imitation, the system of review now existing in the ancient commonwealth of Virginia, which has so modified the English system as to remove all its real hard ships without impairing its efficiency. . . . In Virginia a review of a judgment of conviction in a criminal case is a matter of grace and not of right. Every convicted person has the absolute right to present the record of his case either to individual judges, or to the whole Court of Appeals in term time, with a list of the errors of which he complains. Such was the course pursued in the case of McCue whose counsel presented a record of nearly fifteen hundred typewritten pages with a list of the

errors which they claimed had been committed by the trial judge, together with a brief in support of their contentions. After all those documents had been carefully considered by the judges it was held that the errors assigned were too frivolous to warrant the granting of a writ of error, which was denied. If the judges had considered the errors assigned grave, they would have granted the writ of error, and thereupon the case would have been docketed and heard at the bar. Thus an appeal upon unsubstantial ground was prevented, after the judges had determined, from a careful inspection of the record, that no good grounds for it existed. The execution which promptly followed prevented an appeal to lynch law. It is not too much to say that the Virginia plan is ideal. In theory it is perfect, and in practice it has proven entirely efficacious. Under such a system the backbone of the trial judge is sufficiently stiffened. He does not fear reversal upon a series of frivolous objections; he knows if he conducts the trial firmly and promptly the result will not be a failure of justice, provided no grave error of law is committed. In no state in the Union is the administration of criminal law upon a more wholesome foundation than in Virginia. The trial of the Strothers now in progress for the killing of Bywaters is a striking illustration of the promptness of the trial courts. Within a few months after the tragedy the case is in the hands of the jury. If all the states would simply adopt the Virginia plan, which is proving so efficacious and so just in practice, lynch law in this country would soon become a thing of the past. No constitutional amendments would be necessary anywhere. Nothing more would be required than a few statutory changes that could be condensed within a very narrow compass. The moment that the people are convinced that they can safely rely upon the courts for the prompt and efficient enforcement of the criminal law, all motive for mob violence will disappear. Until that result is reached Judge Lynch will continue to reign."

MORTGAGES. "The Law Relating to Mortgages in India, Edit., *Bombay Law Reporter* (V. ix, p. 89).

MUNICIPAL CORPORATIONS. "Municipal Corporations — Their Powers," by John Roaten, *Oklahoma Law Journal* (V. v, p. 280).

NEGLIGENCE. "Telegraph Companies and 'Gross' Negligence," by A. R. Watson, *Bench and Bar* (V. viii, p. 91).

PRACTICE (Appellate Jurisdiction). In the April *Columbia Law Review*, Everett P. Wheeler writes on "Appellate Jurisdiction," in New York, strongly supporting the movement to have an appeal take up the whole cause and allow new trials only when the error committed can be seen to have worked injustice. The tendency of New York Appellate Courts to decide on technicalities is adversely criticised.

PRACTICE (Insular Possessions). "Writs of Error and Appeals from the New Territorial Courts," by Howard T. Kingsbury, in the April *Yale Law Journal* (V. xvi, p. 417), outlines briefly "the procedure necessary to invoke the appellate jurisdiction of the United States Supreme Court in cases coming up from Porto Rico, from Hawaii, and from the Philippines."

PRACTICE. "How to Get Law Practice," by Lewis E. Stanton, *Yale Law Journal* (V. xvi, p. 405).

PRACTICE. "The Power of Appellate Courts to Cut Down Excessive Verdicts," by R. L. McWilliams, *Central Law Journal* (V. lxiv, p. 267).

PRACTICE. "Res Judicata," by J. D. Dixit, *Bombay Law Reporter* (V. ix, p. 73).

PROPERTY. "Do Freight Carrying Interurban Electric Railways Impose a Servitude on Streets?" by Edward F. White, *Central Law Journal* (V. lxiv, p. 283).

PROPERTY. "Is Rolling Stock of a Railway Real or Personal Property?" by S. W. Jacobs, *Canadian Law Times* (V. xxvii, p. 159).

PROPERTY. "Cujus est Solum ejus est usque ad Coelum," by S. Varadachari, *Madras Law Journal* (V. xvii, p. 1).

PUBLIC POLICY (Executive Justice). The March *American Law Register* has a suggestive article by Roscoe Pound on "Executive Justice" (V. lv, p. 137). He finds an increasing reaction against the doctrine of "a government of laws and not of men." "Nothing is so characteristic of American public law of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review.

The tendency was strong to commit matters of unquestioned executive character to the courts, and no small number of statutes had to be rejected for such violations of the constitutional separation of governmental powers. But the paralysis of administration produced by our American exaggeration of the common law doctrine of supremacy of law has brought about a reaction. And that reaction . . . has brought back the long obsolete executive justice, and is making it an ordinary feature of our government.

"Contemporary legislation shows clearly enough that the recrudescence of executive justice is gaining strength continually and is yet far from its end. . . . Nor is the legislature alone in bringing back this extra-legal — if not anti-legal — element to our public law. A brief review of the course of judicial decision for the past fifty years will show that the judiciary has begun to fall into line, and that powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions.

"As yet, the judicial acquiescence in the revival of executive justice is a tendency only. The courts are not agreed; some courts hesitate, while some are willing to give up everything but formal actions at law and suits in equity. The tendency, however, is well marked. In general, the cases prior to 1880 tend to hold all matters involving a hearing and determination, whereby the liberty, property, or fortune of the citizen may be affected, to be judicial and not capable of exercise by executive functionaries. Since 1880, the cases, at first requiring an appeal or a possibility of judicial review, but later beginning to cast off even that remnant of judicial control, tend strongly to hold every sort of power that does not involve directly an adjudication of a controversy between citizen and citizen — and in the case of disputes over water-rights and election-contests some which do — to be administrative in character and a legitimate matter for executive boards and commissions."

Mr. Pound sees "in this recrudescence of executive justice one of those reversions to justice without law which are perennial in legal history and serve, whenever a legal system fails for the time being to fulfil its purpose, to infuse into it enough of current morality to preserve its life.

"Equity, both at Rome and in England, was originally executive justice. It was a reversion to justice without law. The prætor interposing by virtue of his *imperium*, the emperor enforcing *fideicommissa*, 'having been moved several times by favor of particular persons,' the Frankish king deciding, not according to law but *secundum æquitatem* for those whom he had taken under his special protection, and the Chancellor granting relief 'of alms and charité,' acted without rule in accordance with general notions of fair play and sympathy for the weaker party. The law was not fulfilling its end; it was not adjusting the relations of individuals with each other so as to accord with the moral sense of the community. Hence prætor or emperor or king or chancellor administered justice for a season without law till a new and more liberal system of rules developed. The executive justice of to-day is essentially of the same nature. It is an attempt to adjust the relations of individuals with each other and with the state summarily, according to the notions of an executive officer for the time being as to what the public interest and a square deal demand, unincumbered by rules. The fact that it is justice without law is what commends it to a busy and a strenuous age. Hence we must attribute the popularity of executive justice chiefly, if not wholly, to defects in our present legal system; to the archaic organization of our courts, to cumbrous, ineffective, and unbusinesslike procedure, and to the waste of time and money in the mere etiquette of justice which for historical reasons disfigures American practice. Executive justice is an evil. It has always been and it always will be crude and as variable as the personalities of officials. . . . Nothing but rule and principle, steadfastly adhered to, can stand between the citizen and official incompetency, caprice, or corruption. Time has always imposed a legal yoke and incorporated its results into law. But any justice is better than injustice. The only way to check the onward march of ex-

ecutive justice is to improve the output of judicial justice till the adjustment of human relations by our courts is brought into thorough accord with the moral sense of the public at large.

"Legislatures are pouring out an ever-increasing volume of laws. The old judicial machinery has been found inadequate to enforce them. But they touch the most vital interests of the community, and it demands enforcement. Hence the executive is turned to. Summary administrative action becomes the fashion. An elective judiciary, sensitive to the public will, blithely yields up its prerogatives, and the return to a government of men is achieved. If we are to be spared a return to oriental justice, if we are to preserve the common-law doctrine of the supremacy of law, the profession and the courts must take up vigorously and fearlessly the problem of to-day — how to *administer* the law to meet the demands of the world, that is. 'Covenants without the sword,' says Hobbes, 'avail nothing.' If the courts can not wield the sword of justice effectively, some other agency will inevitably take it up."

PUBLIC POLICY. "Law and Industrial Inequality," by George W. Alger, *The Brief* (V. vii, p. 1).

TREATIES (Japan). In the April *Yale Law Journal*, Edwin Maxey writes on "The Compromise in the Japanese Controversy." As in a former article Mr. Maxey, who was retained as counsel for the Japanese Government, argues that our treaty with Japan gave Japanese children a right to attend our public schools, which was violated by the San Francisco segregation, and the Federal Government has full power to make such a treaty. He is of the opinion that the Supreme Court will ultimately have to decide this question of the extent of the treaty-making power, too vital to the conduct of our foreign relations to remain unanswered. It is therefore unfortunate that the compromise will probably result in the present case being dropped instead of being carried to the Supreme Court for decision. . . .

"In order to avoid forcing the issue, California has agreed to admit the Japanese children into the public schools on condition that Japanese coolies not already here shall be excluded from this country. This satisfies the labor organizations, and it was they who were responsible for the act excluding Japanese children from the public schools. It also satisfies Japan, as the amendment to our immigration laws will be general in terms and hence will not wound the pride of the Japanese and will have the effect of turning the Japanese laborers toward Korea and Manchuria where their labor will contribute far more to the progress of Japan than if they emigrated to the United States.

"While, therefore, the settlement reached accords very well with the economic interests of Japan and with the political exigencies of both countries, it leaves the main question raised in the controversy precisely where it found it. It leaves room for the suspicion that the school question was raised by the labor leaders in order to furnish a *quid pro quo* in negotiations looking to another end, viz., the reduction of competition by Japanese laborers in the California labor market. It merely postpones the settlement of the legal question of the extent of the treaty-making power of the Federal Government — a question of far more importance than the presence or absence of a few Japanese laborers in any section of our country."

TREATIES. "The Japanese School Question," by Victor E. Ruehl, *The Brief* (V. vii, p. 13).

TRUSTS (Purchaser at Sheriff's Sale). Roland R. Foulhe in the March *American Law Register* (V. lv, p. 147), examines the Pennsylvania law on "Purchaser at Sheriffs' Sale: When a Trustee." The conclusion is: — "If property in which A has an interest is about to be sold at sheriff's sale, and B by promising A before the sale to buy the property and hold for A's benefit induces A not to protect his interest, whereby B obtains the property for less than its value, B will be held to his promise, and if the subject-matter is real estate, the Statute of Frauds will not be available as a defense to B."

TRUSTS. "The Loss of the Fiduciary Principle," by Thomas Nelson Page, *Albany Law Journal* (V. lxix, p. 43).

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.)

ALIENS. (Property.) **Wash.** — The provision of the Washington constitution relating to rights of aliens to acquire and hold property was recently construed in Abrams *v.* State, 88 Pac. Rep. 327. Section 33 of article 2 of the Constitution prohibits the ownership of lands by aliens except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and provides, with certain exceptions, that all conveyances of lands made to aliens, directly or in trust, shall be void. In 1890 plaintiff conveyed by deed certain property in the city of Seattle to a resident alien, a citizen of the German Empire, who entered into immediate possession, made valuable improvements, and continued in the exercise of acts of ownership until her death, intestate, nearly thirteen years later. An administrator of her estate was appointed and took possession of the premises. Deceased never became a citizen of the United States, and her only heirs are aliens. Plaintiff brought an action against the administrator and heirs for the recovery of the property, alleging that as the grantee was an alien his conveyance to her was absolutely void and that the title still remained in him. The state and the county in which the land is located intervened, each claiming that the property escheated to the school fund. Plaintiff had received the consideration for his conveyance and had stood by while valuable improvements were being made without claiming any right to the property, and the court said that notwithstanding no estoppel could be predicated upon a void deed, yet he was estopped by his acts from now setting up any claim to the property. In passing upon the claim of the state, it was said that under the common law, as modified by St. 11 and 12, Wm. III, c. 6, in the year 1700, English subjects were given the right to inherit from aliens estates held by them at the date of their death, even though they had been defeasible up to that time, and that when the Washington constitution conferred upon aliens the right to inherit it gave them as full and complete a right as that of citizens. The final conclusions arrived at were that the deed from plaintiff devested him of all title to the property; that up to the time of the death of the grantee the state might, by proceedings in the nature of office found, have declared an escheat, but that having failed to do so prior to her death this right was lost and the property descended to her alien heirs. Judge Dunbar dissented on the ground that the title of the alien grantee being defeasible the heirs could only take a defeasible title, and that the property in their hands was subject to escheat the same as it would have been prior to the death of their ancestor.

BILLS AND NOTES. (Anomalous Indorsement.) **Ill.** — In Kistner *v.* Peters, 79 N. E. Rep. 311, the Supreme Court of Illinois passes upon the construction to be put on an anomalous indorsement of a promissory note. The payee had placed on the back of the note, above her name, the following indorsement: "I hereby acknowledge myself a principal maker of this note, with E. N. R., and my liability as such principal jointly with him." But the court held her liability to be that of an indorser, and not a maker. In the course of its discussion of the case the court said that it was undoubtedly true that it made no difference as to the position in which the names appeared on the note, but the liability incurred was to be determined by the intent of the parties; that a note payable to one's self is void until assigned, and it could not be believed that the payee meant to nullify the instrument by her indorsement.

CARRIERS. (Passengers.) **N. Y. S. C.** — Gerardy *v.* Louisville & N. R. Co., 102 N. Y. S. 548, is a case in which the question arose as to the liability of a carrier for damages occurring from the failure to run trains on time. The plaintiff, a musician, having an engagement to play in another city, boarded a train which at the time was

two hours late. He claimed that he made known to the company's agent his engagement in such other city, and was told that the train would arrive on time. As a matter of fact the train was two hours and twenty minutes late at his destination, by reason of which he was unable to keep his engagement, at a loss to him of four hundred dollars, the contract price of such engagement. The court, in deciding that the carrier was not liable, said that the obligation of a carrier to run its trains in conformity to its schedule is not an absolute and unconditional one, for it will not be liable for want of punctuality or failure to comply with its published schedule, where such failure is not due to its negligence. The mere taking of a ticket does not of itself prove a contract upon the part of the carrier, or impose upon it the duty to have a train ready to start at the time at which the passenger is led to expect it. The court also decided that the ticket agent had no authority to make such a special contract as plaintiff claimed was made, citing Dresser *v.* Railway Co., 116 Fed. 281, 53 C. C. A. 559; Railroad Co. *v.* Cameron, 66 Fed. 712, 14 C. C. A. 358; Railway Co. *v.* Smith (Tex. Civ. App.), 84 S. W. 852.

CARRIERS. (Passengers — Communication of Contagious Diseases.) Tex. Civ. App. — In M., K. and T. R. Co. *v.* Raney, 99 S. W. Rep. 589, the question is discussed as to the proximate cause of damages resulting from plaintiff's wife contracting smallpox from him after he contracted it from a ticket agent. It appeared that plaintiff, to whom the agent sold a ticket for the transportation of himself and wife, was afflicted with smallpox, and that such agent was the only person to whom plaintiff was exposed, who had the disease, and that it was contracted within the usual time after such exposure. Preliminary to a discussion of the principal questions involved, the court answered the contention that knowledge of the ticket agent that he had the smallpox at the time he sold the tickets to plaintiff would not constitute knowledge on the part of the railroad company. Reference was made in the argument of this question to the case of Long *v.* Railway (Kan.), 28 Pac. 977, 15 L. R. A. 319, 30 Am. St. Rep. 271, which holds in effect that notice to an agent in cases of the character involved did not constitute notice on the part of the principal. The court declines to follow the holding, and concludes, as the better solution of the question, that as the agent at the time he sold the ticket was in the discharge of the duty incumbent on him as an agent and knew that he was suffering from a contagious disease, his knowledge became that of his principal, the railroad company. The main contention that there was an independent intervening cause between the wrongful act of the agent in communicating the disease to plaintiff and the contracting of the disease by his wife, was discussed at considerable length. The well-known Squib case, Scott *v.* Shepherd, 2 W. Bl. 892, was discussed and applied. The court in its argument declares that under the common law the railroad company owed to the individuals composing the public who dealt with it the duty to keep them from having contagious diseases communicated to them by its agent while they were dealing with it through such agent. It states in this connection that there are two classes of cases in which the duty is owed to the public: one where the duty is owed to the public as such, and for a failure to perform which no action lies. The other is where the duty is due to or intended for the benefit of the individuals composing the public for the failure to perform which an action lies in favor of any one injured by such failure. The case at bar is said to belong to the latter class, because whatever affects the health of the community necessarily affects the individual members thereof, and when the duty to prevent the spread of contagious diseases rests on a private corporation or person, the obligation arises in favor of each member of the community, and a right of action exists in favor of him who suffers for its breach. In conclusion, the court decides that the railroad company having notice through its agent at and prior to the time plaintiff was exposed to him that he had the contagious disease of smallpox, and such agent having communicated the disease to plaintiff and his wife, it was liable to him for damages sustained as the direct and proximate result of such wrongful act of its agent.

CONSTITUTIONAL LAW. (Municipal Corporations.) Neb. — State *v.* Withnell, 110 N. W. Rep. 680, is a case involving the validity of an ordinance providing in part as follows: "Before constructing any building or structure, to be used for the manufacture of illuminating or fuel gas, and before erecting any tank, storage reservoir, or other receptacle for the purpose of storing either illuminating or fuel gas, and before remodeling or using any building or structure, tank or reservoir, for such purpose, the party or parties desiring such privilege shall first obtain the written consent of all the property owners within a radius of one thousand feet of the proposed building, structure, tank or reservoir to be used for such purpose, and file such permission with the building inspector of the city of Omaha, and comply with all other ordinances, rules and regulations relating to buildings." The charter of the

city of Omaha granted the following specific authority: "The mayor and council may regulate or prohibit the transportation and keeping of gunpowder, oils, and other combustible and explosive articles." They were also given the usual powers to prescribe fire limits, and to regulate the erection of all buildings within the corporate limits. It was in the exercise of the last two mentioned powers that the above ordinance was enacted. The gas company of the city of Omaha, wishing to build a gas tank, complied with all the conditions of the ordinance, with the exception that it did not file the consent of the property owners with the city officials. On the refusal of the city authorities to give the requisite building permit, mandamus was brought to compel them so to do, and the constitutionality of the act was directly assailed. It was contended that the ordinance was unconstitutional, first, because it is, or in practical operation may readily become, prohibitory, on account of the difficulty or impossibility of procuring the unanimous consent of all the owners of property in any locality of the city; and second, because it assumes to confer upon individual property owners within the prescribed radii absolute and arbitrary powers, whose exercise is dependent solely upon caprice, and which have no necessary connection with public safety, health, or morals, and are of such a nature that the governing body itself could not safely or lawfully be intrusted with them. The court adopted the arguments of the gas company, and held the act unconstitutional as an unlawful delegation of power, and cited and relied upon the cases of Mayor of Baltimore *v.* Radecke, 49 Md. 217, 33 Am. Rep. 239; Sioux Falls *v.* Kirby (S. D.), 60 N. W. 156, 25 L. R. A. 621; Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; City of St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721. The court also passed upon the case holding a contrary doctrine, of City of Chicago *v.* Stratton, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325, and, besides distinguishing said case from the other cited cases, repudiated the doctrine there announced.

The decision is in accord with that of the Supreme Court of Missouri in St. Louis v. Russell, 116 Mo. 248. But, as was observed in Chicago v. Stratton, 162 Ill. 494, the requirement of consent in the Missouri case related to a business which could not have been prohibited entirely within the city, while such entire exclusion might have been the result of the requirement. In the Nebraska case, the court deems it unnecessary to decide whether the council might have prohibited gas reservoirs within the city limits entirely; therefore it is proper to assume that the ruling would not have been different, had the business been held to be subject to absolute prohibition within the city limits.

From the point of view of legislative policy, a great deal is to be said in favor of the principle adopted by the Supreme Court of Nebraska. As a matter of constitutional law, the delegation of the power of consenting to the location of "trade nuisances" to residents or property owners, is distinguishable from a similar delegation to the unregulated discretion of administrative officials. In view of the well established practice of the former kind of delegation in the matter of liquor saloons, it is impossible to maintain that there is a clear constitutional rule against the validity of such delegation. E. F.

CONSTITUTIONAL LAW. (Police Power.) Colo. — The City of La Junta, Colo., owns a water works system, taking water from the Arkansas River, and also owns some artesian wells within its own boundaries. The city council passed an ordinance relative to the regulation, use, and sale of artesian water within the corporate limits, and providing that any one engaging in peddling, selling, or giving away water from an artesian well should first apply to the board of trustees for a permit, "and if such board in its discretion grant such permit, shall pay to the town treasurer the sum of fifty dollars for a license for one year." Other provisions provided for punishment for violation of the ordinance. The validity of these enactments of the council came up for determination in the case of City of La Junta *v.* Heath, 88 Pac. Rep. 459. Heath had been accused of violation of the ordinance, and discharged. The city appealed. The Supreme Court said that the business of selling water was a lawful occupation, and distinguishable from the business of liquor selling, where the character of the person applying for the privilege became a proper subject of inquiry, and while granting to a city the right to make all proper health regulations relative to its water supply, held that the ordinance in question was not enacted for that purpose, and that it interfered with the right to pursue a lawful calling, and was void.

CRIMINAL LAW. (False Pretenses.) N. Y. C. of A. — In the case of People *v.* Tompkins, 79 N. E. Rep. 326, the Court of Appeals of New York reaffirms the doctrine laid down in McCord *v.* People, 46 N. Y. 470, that a prosecution for larceny by false pretenses cannot be sustained where the person parting with his money or property does so for an illegal purpose. The court admits that the weight of authority is to the contrary, but feels bound to follow the doc-

trine as settled by the earlier decision. It recommends a change in the law by the legislature, and in refusing to overrule the earlier decisions, says: "It has become a rule of personal liberty, quite as firmly established in this state as the rule of property recently reaffirmed in the case of Peck *v.* Schenectady Ry. Co., 170 N. Y. 298, 63 N. E. 357. Although it may be admitted that this rule, which exists only in New York and Wisconsin, is at variance with what now appears to be the more reasonable view adopted in at least twelve of our sister states, and although it may seem to be too narrow for the practical administration of criminal justice, as applied to modern conditions, we are admonished that the remedy is not with the courts, but in the legislature. We cannot change the existing rule without enacting, in effect, an *ex post facto* law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule."

This case affords another illustration of the apparent reluctance of legislatures to enact remedial legislation where judicial decisions disclose a defect in existing law. (See 18 Green Bag, 426.) The doctrine of a "Rule of Liberty," in analogy to rules of property, as an inhibition against the correction by a court of a previous erroneous construction of a criminal statute is of doubtful policy or propriety. It would seem that a better reason for the decision of the present case was that the legislature for thirty-six years after the court had given the law this construction failed to amend it, and in that way indicated an intent in effect to legalize the swindling of one who is himself attempting to swindle. At last, and evi dently as a result of this latest decision, a bill is before the New York legislature amending the statute in this respect. F. I.

The court very properly recognizes that the doctrine of the New York and Wisconsin courts, that a man may commit a crime with impunity provided the victim is himself endeavoring to commit a crime, is indefensible on principle. Two wrongs do not make a right; and the state is no less wronged by one party because the other is also attempting to offend it. On the question of *stare decisis* this decision may be questioned. If the court had decided that the defendant was punishable it would not by such decision have created a new crime *ex post facto*. The defendant had without question violated a criminal statute and offended the state; if he is not punished, it is because of a defense interposed by public policy and entirely unmerited by him; and it would seem that he has no more vested right to the benefit of such a defense than to the continuance of a favorable rule of procedure or form of pleading. J. H. B.

DOMICILE. (Change — Intent.) Ore. — Pickering *et al. v.* Winch *et al.*, 87 Pac. Rep. 763, is a good example of the rule that residence and domicile are vastly different terms. The action itself was a contest over the construction of a will which depended on the domicile of the parties. Decedent and his wife resided in Portland, Ore., for forty years, and there accumulated a fortune. Then, in failing health, decedent took up his abode in California, first living at a hotel and then in a private residence. He never voted in California or otherwise recognized such state as his domicile, and kept his business as formerly in Oregon. After three years' residence in such state, he died, and his wife took out letters of administration in Oregon, though continuing her residence in California. She made no change in the business affairs of her husband, and after nine years' residence in California, she died, and the present contest arose. The court, in holding that the domicile of both husband and wife was in the state of Oregon, said as to the distinction between residence and domicile: "Residence and domicile are not interchangeable terms. Domicile embraces more than mere residence. Residence denotes a place of abode, whether temporary or permanent; while domicile denotes a fixed and permanent home, and need not be the actual place of abode. It does not depend upon mere naked residence, but is the legal, the juridical seat, of every person, — the seat where he is considered to be in the eyes of the law, for certain applications of the law, whether he be corporeally found there, or whether he be not found there;" citing Drevon *v.* Drevon, 34 L. J. (N. S.) Eq. 129; Moorhouse *v.* Lord, 10 H. L. C. 272; Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502; Tipton *v.* Tipton, 87 Ky. 245, 8 S. W. 440; Long *v.* Ryan, 30 Grat. (Va.) 718; Stout *v.* Leonard, 37 N. J. Law, 492. The court further held that to constitute a change of domicile, three things were essential: first, residence in another place; second, an intention to abandon the old domicile; and third, an intention of acquiring a new one, and as to such intent as a necessary ingredient to a change of domicile, said: "Every person is assumed by the law to have one domicile and one only, and when this is shown to exist, it is presumed to continue until not only another residence and place of abode are acquired, but until there is an intention manifested and carried into execution of abandoning the original domicile and acquiring another by actual residence, and

the burden of proof is upon the party who asserts the change;" citing Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546; Dupuy *v.* Wurtz, 53 N. Y. 556; Ennis *v.* Smith, 14 How. 400, 423, 14 L. Ed. 472; Isham *v.* Gibbons, 1 Bradf. (N. Y. Sur.) 69; Aikman *v.* Aikman, 3 Macq. 852, 877; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. R. 511.

EVIDENCE. (**Best and Secondary.**) **Pa.** — In Cole *v.* Elwood Power Co., 65 Atl. Rep. 678, a question was raised as to the admissibility of a carbon copy made on a typewriter at the same time as the original. The offer of the copy was refused on the ground that it was secondary evidence and that the testimony did not disclose any effort to secure the original. It appeared that the instrument was an exact carbon copy made on a typewriter at the same time as the original, signed by the same officers, executed in the same manner, and in every respect was an exact duplicate. It was contended that as both the instruments were contemporary writings and counterparts of each other, they might both be considered as originals. The court sustains the contention and holds that where an original paper and a carbon copy are made on a typewriter in the manner stated both may be considered as originals, and that either is admissible in evidence without notice to produce the other.

EXECUTION. (**Poor Debtor's Oath.**) **R. I.** — In Mowry *v.* Bliss, 65 Atl. Rep. 616, a writ of prohibition was sought against the justice of the district court to prohibit him from proceeding to administer the oath for the relief of poor debtors to the husband of the petitioner on his request to be admitted to take the same, based on his complaint that he had no estate real or personal wherewith to support himself in jail or to pay the jail charges. The petition was under Gen. Laws, 1896, c. 260, Sec. 1, as amended by Court and Practice Act, 1905, p. 354, Sec. 1153, providing that any person who shall be imprisoned for debt, whether on original writ, mesne process or execution, etc., may complain to the justice of any district court in the county where he shall be incarcerated that he has no estate whereof to support himself in jail or to pay jail charges, and may request to be permitted to take the poor debtor's oath. It appeared from the petition that in a suit for divorce by the petitioner against her husband, the court granted an allowance for her support, and ordered the husband to pay such amount at fixed times; that he failed to comply with the order of the court, whereupon petitioner took out an execution for the amount of such sums accrued, and for the want of goods and chattels, the husband was committed to jail under the execution. He applied to a justice of the district court of the county for the benefit of the poor debtor's oath. The court holds that where a defendant in a divorce proceeding is incarcerated for failure to satisfy an execution for alimony and suit money, he is not simply imprisoned for debt, but also for contempt for failing to comply with the court's decree, and concludes that the district court had no jurisdiction to permit him to take the poor debtor's oath, and obtain his discharge.

EXECUTION. (**Wrongful Levy.**) **Mo. App.** — The question of the right of an officer to take under execution money in the hands of a debtor arises in Richards *v.* Heger, 99 S. W. Rep. 802. It appeared that plaintiff had just received a sum of money, and was engaged in counting it when the officer, approaching from behind, grabbed the package, stating: "I levy on this," and then offered to read the execution to plaintiff. In discussing the question that the officer was guilty of trespass against the person of plaintiff in seizing money in his hands, the court refers to Green *v.* Palmer, 15 Cal. 411, 76 Am. Dec. 492, where it appeared that a bag of gold held in the hands of plaintiff was seized and levied on by the sheriff after a scuffle between him and the plaintiff for its possession, and quotes from the opinion by Field, C. J.: "The coin was contained in a bag, which was held by plaintiff in his hand, and from its seizure thus situated the plaintiff could not claim any execution as he might, perhaps, do in reference to money on his person. Thus situated, it is like a horse held by its bridle subject to seizure under execution against its owner." After approving such holding, the court stated that the seizure of property attached to the person of a defendant would be a trespass against his person, as it would tend to provoke a breach of the peace, but to seize his property found in his possession not pertaining to his wearing apparel, nor worn or carried on his person for use, nor as an ornament, would not be an indignity against his person nor under ordinary circumstances a trespass. It asserts that the circumstances of the seizure in question were no more likely to provoke a breach of peace and possessed no more of the elements of a trespass than an entry by the officer on the premises of the defendant in the execution and seizure there, in his presence, of his personal effects against his will and over his protest. It concludes that an officer commits a trespass when he seizes and levies on defendant's property exempt from execution, or when to make a levy he commits unlawful violence against his person; but to take a package of currency from

his hand is not committing violence against his person, and is not a trespass.

The rule and distinction emphasized in the above case are, to say the least, technical, for, as pointed out by Mr. Freeman, it is difficult to see why levying on a horse on which one rides should be deemed provocative of a breach of the peace while snatching a bridle from the owner's hand or entering his house and levying upon his goods should not be so considered. In this connection the case of State v. Dilliard, 3 Iredell 102, 38 Am. Dec. 708, is well worth reading and the distinction therein made between a writ of distress and an execution proper worth noticing. In this case the Supreme Court of North Carolina, in an opinion which decided that an execution could be levied upon a horse while ridden by the owner, made the following distinction: "It is stated by Lord Coke, 1 Inst. 47a, that a horse, when a man or woman is riding on him, or an ax in a man's hand cutting wood, are for that time privileged and cannot be distrained. But this does not apply to a seizure in execution, though it is probable the objection here taken may have been drawn from it, upon some notion that the cases were similar. Very clearly the passage does not justify it, for it is confined to distress for rent or of beasts damage feasant, and we know that many things can be taken on execution, which cannot, under like circumstances, be distrained. Though we find the rule thus clearly stated, with respect to distress, there is no such doctrine in any author, with respect to process on execution. There is an obvious distinction between the cases, which furnishes the reason of the difference, which is, that making distress is the act of the party himself, to whom the law intrusts to some extent the power of self-redress, and the seizure upon execution is the act of an indifferent minister of the law, not probably disposed to make an unnecessary seizure, or to make it at an unreasonable period. A man's house protects him and his property, if to be got at only by breaking the house. But there is no authority or reason which would exempt from seizure an article in the use of the owner which would not equally protect it, if in his presence merely. It is as much the duty of the party to surrender to the officer the horse he is riding, as it is to allow him peaceably to take the horse from which he has just dismounted; and a breach of the peace, or resistance to the authority of the officer, is not more provoked or probable in the one case than in the other: the law requiring in each case submission to its process, and conferring the power to use such force as may be needed to execute the process effectually." On the general subject of the Writ of Distress, its abuse and the statutes passed to remedy that abuse, see Reeves' History of English Law, Vol. 2, 305, 326, 396, Vol. v. 151.

Andrew A. Bruce.

EXECUTORS AND ADMINISTRATORS. (Liability for Expenses of Wake.) N. Y. S. C. — McCullough *v.* McCready *et al.*, 102 N. Y. S. 633, is a case in which the executors put in a claim for wine, food, cigars, liquors, etc., used in the celebration of a wake, as a proper charge against decedent's estate. The majority of the court upheld the charge as legal, depending upon the case of McCue *v.* Garvey, 14 Hun. 562, in which the court considered that the rule had been recognized. There was a dissenting opinion, however, which repudiated such claim as illegal, and insisted that the cited case was not in point.

EXTRADITION. U. S. C. C., S. D. N. Y. — In the case of *Ex parte* Browne, 148 Fed. Rep. 68, the Circuit Court for the Southern District of New York passed on the question of the rights of one who had been convicted of crime and fled from justice, upon extradition for another offense. Several indictments had been found against Browne, in one of which he was charged with conspiring to defraud the United States of duties upon imports, and in another with procuring the admission of goods into the United States in violation of Revised Statutes. He was convicted upon the charge of conspiracy and sentenced to a term of imprisonment. He was released on bail pending an appeal from his conviction, and after affirmance of the judgment by the Appellate Court, fled to Canada. The United States demanded his extradition as a convict, but this was refused. Thereupon another demand was made for his delivery, based on an indictment under which he had not been tried. This requisition was honored by the government of Great Britain, and after arrival in this country and while still on the train, in charge of the extradition officer, Browne was arrested on a warrant based on his former conviction, and incarcerated in prison. He then instituted *habeas corpus* proceedings to obtain his release, alleging that he was held in violation of the obligations of the Ashburton Treaty. Article 3 of that compact declares that no person surrendered shall be triable or be tried for any crime or offense committed prior to his extradition, other than that for which he was surrendered, until he shall have had opportunity of returning to the country from which he was extradited. It was contended that as this provision by its terms only prohibited a trial of the person surrendered, there was no prohibition against punishment for an offense of

which he had already been tried and convicted. The court referred to the case of Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425, and held that under the proper construction of the decision therein rendered, and of the acts of Congress bearing on the subject, no one should be "detained" for a crime other than that for which he was extradited here, for the purpose of future trial or punishment for a past conviction.

INSURANCE. (Accident Policy.) **Mass.** — Lewis *v.* The Brotherhood Accident Company, 79 N. E. Rep. 802, involved the construction of a clause in an accident policy limiting insurer's liability, the terms of which were that in the event of any accidental bodily injury, fatal or non-fatal, contributed to, or caused by . . . drowning or shooting, when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness, . . . then, and in every such case, the limit of the liability of the company shall be one-twentieth of the accidental death benefit provided for in the policy. The evidence in the present case showed that insured, along with a young lady, was canoeing on a river, and that there were two witnesses in a skiff on the river, rowing in an opposite direction. The occupants of the canoe recognized the witnesses on passing, and otherwise showed themselves to be in good spirits. Upon the canoe passing around a bend in the river, the witnesses heard a cry, but did not turn back. Later in the day the upturned canoe was found, and various articles which were in the canoe were found floating near. The insurance company defended the action on the policy on the ground that there was no eyewitness to the accident within the provision of the accident policy, and hence that they were liable only for one-twentieth part of the death benefit. The court, in holding that the witnesses were, as within the accident policy, sufficient eyewitnesses to the accident, cited the case of National Accident Association *v.* Rallstin, 101 Ill. App. 192, and considered that it was the only case in which such question had received judicial attention. That case was one of shooting, and the injury was not fatal, and it was held in such case that the plaintiff, who was the injured person, was an eyewitness to his own injury.

INTEREST. (Insanity of Creditor.) **Pa.** — In Gorgas *v.* Saxman, 65 Atl. Rep. 619, an interesting question is presented as to the liability to pay interest on a debt not paid because the debtor believed the creditor was insane. The interest was claimed on installments due on a mortgage. The mortgagor claimed that before the payments were made, he received notice that he should not pay the mortgagee because he was of unsound mind, and not competent to transact business. Acting on such information, he called in person on the mortgagee in company with a physician, and having satisfied himself that the mortgagee was not of sound mind did not either tender the amount of the money then due or make any further arrangement in reference to its payment. It was contended that what was done was equivalent to a tender, and that interest should not be charged since the date of the discovery of the alleged inability of the mortgagee to receive payment. It was urged that the good faith of the mortgagor in making an effort to ascertain the mental condition of the mortgagee, and in relying on such information, was shown by the subsequent proceedings instituted under Act June 25, 1895 (P. L. 300), in which the mortgagee was found to be of weak mind and a guardian was appointed. The court stated that a proceeding under the provisions of such act was different in scope and character from one *de lunatico inquirendo*, and that it was intended for the protection of persons unable to care for their own property and was not so far reaching as a proceeding in lunacy. The court concludes "that so far as the record shows, no legal reason appears why the mortgagor would not have been justified in making payment to the mortgagee, and if such payment had been made and the record properly receipted, it would have been held to be a good acquittance. Again, if the mortgagor thought he could not safely make payment to the mortgagee and had desired to stop interest, he could have asked leave to pay the money into court, and permission so to do would have relieved and fully protected him."

MONOPOLIES. (Shipping.) **U. S. C. C., S. D. N. Y.** — The applicability of the Sherman Anti-trust Law to foreign commerce was passed upon in Thomson *v.* Union Castle Mail S. S. Co., 149 Fed. Rep. 933. Defendants were vessel owners who had entered into a combination for the purpose of controlling the carriage of freight between New York and South African points. Whenever a vessel of a competing line arrived in New York for the purpose of taking on a cargo for the African points reached by vessels of defendants, the latter put in berth for loading what was called a "fighting vessel," and made rates as low as or lower than that of the competing vessel, and apportioned the space among their regular patrons. A circular was issued by defendants in which they promised a rebate to shippers who would send no freight over competing lines and who would ship nothing to dealers who received cargoes from

vessels other than those belonging to persons outside of the combination. Plaintiffs engaged in the South African trade, and for some time used plaintiffs' vessels exclusively and received the regular rebates. Trouble eventually arose owing to the claim that plaintiffs were shipping to persons who were receiving freight over competing lines, and further rebates were refused. The present action was brought for recovery of treble damages under section 7 of the Sherman Act, it being specially alleged that complainants had suffered injury in the sum of £ 1112 for loss of rebates, and that defendants had formed an unlawful combination and monopoly in restraint of foreign commerce. The court held that the combination would not be invalid at common law, and that the Federal Anti-trust Law did not apply to it, and dismissed the complaint, though intimating that plaintiffs might have a good cause of action upon the contract or for deceit to recover the rebates which they claimed to be due them.

MUNICIPAL CORPORATIONS. (Contracts.) Ark. — The subject of the legality of contracts in which a city officer is interested is involved in People's Savings Bank *v.* Big Rock Stone and Construction Co., 99 S. W. Rep. 836. A bank, of which the mayor of a city was a stockholder and president, took an assignment of the claim of a contractor against the city for the price of work which he had performed for the city. The work was to be inspected and accepted for the city by a board of which the mayor was chairman. It appeared that the bank, acting through its president and officers, in good faith, advanced the contractor certain sums of money to enable him to carry out his contract with the city, and to secure the loan, took from him an assignment of his claim against the city. At the time this was done the work had not been completed, and, therefore, had not been inspected or accepted by the city. Kirby's Digest, Secs. 5644, 5647, forbids the board of public affairs to make any contract with any person associated in business with or related within the sixth degree of consanguinity or affinity under the civil law to any member of the board or member of the city council, and declares that every contract in which any forbidden person shall have an interest shall be void. In referring to this statute the court declares that it does not justify a member of the board in becoming interested in a contract, even after it has been made to the lowest bidder, when his duty requires that he shall inspect and determine whether or not the work due under the contract shall be accepted by the city. In this case the original contract with the contractor was valid, for no member of the board or council was interested therein, but the subsequent contract, by which the contractor, before his work had been completed and accepted, assigned his claim against the city under the contract to the bank, of which the mayor was president and a stockholder, was within the rule that contracts which place the individual interests of public officers in conflict with their duty to the public, places them under an inducement to act in violation of such duty, and are illegal. By the assignment the mayor as president and stockholder of the bank became interested in a contract, the work done under which he, as a member of the board of public affairs, had to approve and accept for the city. The conclusion is that such contracts were void under the statute, which was only a restatement of the rule of the common law, and being illegal, no court could enforce them.

SALES. (Contracts.) Idaho. — Harrison *et al. v.* Russell & Co., 87 Pac. Rep. 784, is a case which presents the disposition of courts to hold parties to contracts to justice as between themselves, regardless of limitations which one party may attempt to attach to the agreement. The contract in question was one for the sale of a threshing machine containing a warranty limited and conditioned by the following provision: "Continued possession or use of machinery for six days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim on Russell & Co. under warranty." Notice of defects in the machine was not given six days from time of delivery, but was given six days after use was made of the machine. The court, in holding that such notice was sufficient within the terms of the contract, said: "Now it certainly could not have been the fair intention of either of the parties that the purchaser should for the purposes of this warranty be considered in possession of the property until such time as they might have the property at a place where it would be possible to use it for the purpose of threshing grain. The company and its agents, when selling this property to plaintiffs, undoubtedly learned their place of residence and the community in which they expected to work and operate the property. It certainly could not be said that the six day period began to run at the time of the receipt of the machinery from the warehouse, if, as a matter of fact, the purchasers would have had to transport the machinery 75 or 100 miles across a mountainous region in order to reach the community where they lived and expected to do threshing. A construction that would hold the 'possession' of the machinery in this warranty to commence, in every case, at the time the

machinery was received at the depot or warehouse, would convert the contract of warranty into simply a waiver of warranty and give the purchaser no benefit whatever."

This case is far from satisfactory from a logical standpoint. It seems to be one of those cases where the court has taken it upon themselves to make a contract for the parties, rather than to interpret the contract which the parties made. The parties agreed that "continued possession *or* use of machinery for six days shall be conclusive evidence that the warranty is fulfilled;" but the court has read into this an implied condition that the possession should be "at a place where it would be possible to use it for the purpose of threshing grain," and held that the plaintiff should have been allowed to submit evidence to the jury to establish the fact "that it was impossible for them to use or test the machinery for any given length of time after they received it at the defendant's warehouse." It is in effect construing the word "possession" as equivalent to the words "possession where it would be possible to use it for the purpose for which it was intended." We do not consider that the case is likely to have any great influence in the construction of warranties.

Oscar Storer.

SHIPPING. (Passengers.) U. S. D. C., N. D. Wash. — The case of *The Charles Nelson*, 149 Fed. Rep. 846, discusses the liability of a vessel for carrying an excess number of San Francisco refugees from that city at the time of the earthquake. The libel was filed by some steerage passengers who alleged an insufficient number of berths, overcrowding, lack of water, etc., and also asked for the penalty for carrying more passengers than allowed by the certificate of inspection. The evidence went to show that on account of the difficulty in communicating between the different offices of the steamship company during the confusion then existing, several steerage tickets in excess of the number allowed by the certificate of inspection had been sold, but that every reasonable effort had been made to prevent more than the lawful number of passengers from boarding the vessel. The steamer left at night, and there were no lights on the dock. After the number allowed had gone aboard the officer in charge directed other passengers appearing with tickets to return them to the offices where they had been purchased, with the assurance that their money would be refunded, and it was not until the next day, when far out at sea, that it was discovered there were several extra ticket holders and some stowaways on board. Every effort was made to have things as comfortable as possible, but as no water supply could be obtained at San Francisco and the fuel supply ran short, thus preventing the use of the condensers a part of the time, it was necessary to somewhat restrict the use of water. The vessel's accommodations were not perhaps all that could be desired, but seemed to be as good as could be well provided under the circumstances. The court dismissed the libel, using the following language: "It is the opinion of the court, however, that the extraordinary conditions existing at San Francisco when the voyage was undertaken justify and require the exercise of judicial discretion, and that according to principles of equity the libellants are not entitled to prevail. . . . It is plainly apparent that the desire of libellants to get away from San Francisco was too strong to admit of any questioning of the sufficiency of the accommodations afforded by *The Charles Nelson* before going aboard of her, and their demands are as ungracious as would be the case if they had been castaways and were suing the rescuing ship which had brought them away from a desolate shore."

This an interesting example of a defense because of the existence of a sudden emergency. One who is in such an emergency acts reasonably for the benefit of all concerned is excused. The equitable nature of an affirmative defense is recognized by the court.

J. H. B.

TRADE-MARKS AND TRADE-NAMES. (Copyright.) N. Y., S. C. — The right of publishers of uncopyrighted books to restrain unfair competition receives attention in E. P. Dutton & Co. *v.* Cupples, 102 N. Y. S. 309. Plaintiff had conceived the idea of getting out a set of Christmas books consisting of well-known hymns and poems, printed in illuminated type and illustrated with copies of old masterpieces, and in some instances by pictures made by artists employed by them. Portions of the work were in colors, and the volumes were bound in highly decorated covers. The subject-matter was old and of course not subject to copyright. Defendants by some photographic process made cheap copies of plaintiff's books and put them on the market. The court granted a preliminary injunction, saying: "Upon the general right of plaintiff to protective relief, we cannot see any reason why the same rule should not be applied to a book that has been applied to a game or to cigars or to anything else which is distinguished by a label or by the distinctive form or style of the package."

WATERS AND WATER COURSES. (Subterranean Connection.) Cal. — Newport *v.* Temescal Water Company, 87 Pac. Rep. 372, is a case not

so interesting from the points of law involved as from the peculiarity of the facts in issue. The plaintiff was a water company which in the course of years had built up a trade of selling water and had invested in round numbers two million dollars. The water was taken from the Perris Valley, a basin of forty or fifty square miles in extent. Contiguous to Perris Valley is Menefee Valley, a somewhat similar, though smaller tract of land, separated by a ridge. The company in the first instance drew their supply of water almost wholly from the Perris Valley, but later, they attempted to draw water from the Menefee Valley, and it was attempted to enjoin them from so doing, on the grounds that the plane of saturation, when not illegally interfered with, stands from within eight to twenty feet of the surface of the ground; that upon their lands were growing trees, vines, grasses, and shrubbery, sustained by the waters so standing at this level; that by capillary percolation, and like natural forces, these waters were drawn towards the surface, moistening and nourishing the roots of herbage and vegetation; that the effect of the pumping of defendant was to lower the plane of saturation, so as to render it impossible for the water to reach the roots and thus to destroy these vegetable growths; that Menefee Valley with Perris Valley formed a part of one and the same catchment basin, and that the effect of defendant's pumping in Perris Valley was to lower the plane of saturation, under plaintiff Newport's land in Menefee Valley, and thus to work the same disastrous result. The defense was that in a state of nature the saturated gravels in no way contributed to the nourishment of the vegetation, and that the lands were in great part alkaline and unfit for husbandry. It also was insisted by defendants that underlying the surface of Perris Valley and but a few feet below the surface, was a stratum of hard-baked clay known as "hard pan" below which stratum lay the saturated gravels, and which stratum prevented the capillary drawing of the waters to any point so near the surface as to aid vegetation. It was also urged in defense that on account of the money invested and the greatness of the work, that an absolute injunction should not be granted, but that damages, if any, should be allowed in lieu of such absolute injunction. The lower court sustained the contention of the defendant, and the appellate court upheld their decision in denying the absolute writ of injunction, and allowing an injunction conditioned on the payment of the damages incurred.

THE LIGHTER SIDE

BEST WISHES

WHEN Governor Guild was recently called upon to appoint a new associate justice for the First District Court of Eastern Middlesex the name of Albert R. MacKusick of Malden was prominently mentioned. At about this time he received the very remarkable letter, a copy of which we print below. We have not yet discovered whether Alberto recovered his damages or not.

"12½ Madison Ave.,
North Cambridge,
Jan. 3, 1907.

Honor Sir;

I humbly beg allowans to give to your honor best wishes for luky candidature in regard to your mater of aspiring Judgship I hear from my lawyer and from Italian papar I read how you maybe Judg in Malden. I think Judgs ought be elected by people then maybe best Judgs like your honor get in if Judgs elected were Judg Dewey should perhaps be again choose in Boston once more and you a republican and grand armee oficer I vote for you in Malden sure, only I liv in North Canbidge. I feal care for good Judgship in Malden bekaus thers my lawyer he mak the suit gainst ice company who damag my little boy an I know if you gett chose not hard sort Judg for to let Trusts rob poor italians sqeezed litle boys fote with ice blok so I pray the Saints to help you to get a Judg in Malden where my suit is and you will rember prays peepl who like wood to vote for you.

With depess reverencial respets and devotissi solicitacion for felicitous candidature

Hopingly
Antonio Garabediano.

My littl boy got damagd named Alberto like you honor in italian."

What is a Team? — At the commencement of the head-note and of the report of Osborne *v.* Boston Ice Co., 191 Mass. 596, it is said that the action was for personal injuries from being kicked by one of "a pair of *horses attached to* an ice *team.*" It is a matter of wonder how in a book of this character the word *team* could have been used to describe anything but the horses themselves, and, if it was not used for that purpose, how it could have been used to describe anything that they were attached to.

SEEN IN NEW YORK

"MAUD says she loves to see other people made happy."

"Now I understand why she goes to every trial for divorce in town."

"BRIDGET," said the noted judge's wife to her new cook, "my husband is a great man. He has sentenced some of the most noted criminals of our day."

"Faith, an' long afore I come here I heard he was quite sententious."

"BRIGGS's ward is the most beautiful girl and he has cheated her out of fifty thousand dollars, but he doesn't consider it a crime."

"What does he call it?"

"He calls it 'doing the handsome thing.'"

As Howard was paying his fine for scorching, he asked the magistrate enthusiastically:

"Have you ever noticed the shadows made by a swiftly running auto?"

"Yes," said his Honor, "I have. Have *you* ever noticed the *shades?*"

A PRETTY girl went to a famous New York lawyer last month and asked him to conduct a breach of promise case for her.

"What evidence have you?" asked the noted jurist.

"Evidence in plenty," replied the broken-hearted one. Then she burst into tears and added: "In the first place he always called on me in a business suit, and — and — and in the second he has married another girl."

PETER NEWELL tells a story of a little Southern boy who sat reading while his colored mammy was doing the mending. The child looked up and asked:

"Mammy, what does 'lapse of justice' mean?"

"For de Lawd, honey, I sut'inly doan know. All de justices what visits your pa am so fat dey aint got no laps." — *Henry Miller, New York City.*

Much Law, Poor Case. — Among lawyers there is a saying that in the trial of a case an attorney, if light on facts, must be heavy on law. The other day an attorney was preparing to leave his office, in one of the big office buildings, to go to the court-house to try a case. From the shelves of his library he had taken many large law books containing decisions and opinions of higher courts. At intervals a boy went in and out of the door, and each time he bore in his arms a stack of the books, which he carried to an express wagon that stood in the street below. The attorney was to use the books in the court-room.

Another lawyer, who is of Southern birth, and who always addresses his friends with some army title, watched the boy as he went in and out, carrying the law books. Then he dug his hands deep into his trousers-pockets and said to the lawyer:

"Well, Ah'll sweah, Kunnel, you must have no case at all." — *Kansas City Times.*

Fees. — *Client.* — This bill of yours is exorbitant. There are several items on it I don't understand.

Lawyer. — I am perfectly willing to explain it, but the explanation will cost you five dollars. — *Christian Register.*

Advice of Counsel. — The magnate faced St. Peter.

"What sort of a life have you led?" inquired the keeper of the gates.

The face of the magnate grew dull and stolid.

"By advice of counsel," he replied, "I refuse to answer."

The gatekeeper slowly nodded.

"In that case," he said, "you had better consult your counsel before this goes any further. He is waiting for you in the anteroom below."

Whereupon the saint pressed the button and the elevator platform upon which the magnate was standing dropped into the sulphurous depths. — *Cleveland Plaindealer.*

Incompetent. — In a lawsuit in Pennsylvania not long ago the question was put to a miner on the witness stand:

"Were you ever hurt in the mines?"

"Indade I was," responded the man; "I was half kilt once."

"Now tell the court whether you were injured at any other time," continued the cross-examiner.

"Yes. I was half kilt in another accident shortly after that."

"Your honor," smilingly interjected counsel for the other side, "I object to this man's testimony."

"Upon what ground?" asked the judge.

"On the ground that, having been half killed twice, he is a dead man and therefore incompetent as a witness."

GLADSTONE'S SENSE OF HUMOR

The Lord Chief Justice of England doubted some of the marvels of Mr. Gladstone's really wonderful memory, and once, hearing a story of Gladstone's early years, he determined to improve upon it. So he said that he remembered when he was only six months old, and lying in his cradle, he saw his nurse surreptitiously help herself to a glass of brandy, and said to himself: "As soon as I can speak, shan't I tell my mother!" "The thing is absolutely impossible," was Mr. Gladstone's comment, in his gravest tone. The Lord Chief Justice said afterward that he had been beaten because he had reckoned on Mr. Gladstone's having a gleam of humor. "I was mistaken," he said sadly. — *Christian Register.*

An Aboriginal Writ. — A suggestion for simplification of pleadings is found in a valuable and interesting brief prepared by Hugo A. Dubuque, City Solicitor of Fall River, accompanying a petition to the legislature for a grant of lands in the Fall River Indian Reservation which contains much entertaining Indian lore. He says "Some of the praying Indians were at times given minor offices such as constables and justices of the peace, with jurisdiction over their own people. And they were highly pleased with these commissions. The following warrant directed to an Indian constable was issued by one of these native magistrates. For sententious brevity it is in striking contrast with our modern writ:

"'I Hihoudi, you Peter Waterman,—Jeremy Wicket, quick you take him, fast you hold him, straight you bring him before me, Hihoudi'."

Legal Plea for Her Hand. — The judge's daughter was perturbed.

"Papa," she said, knitting her pretty brow, "I am in doubt as to whether I have kept to

the proper form of procedure. In law one can err in so many little technicalities that I am ever fearful. Now, last evening, George " —

The judge looked at her so sharply over his glasses that she involuntarily paused.

" I thought you had sent him about his business," he said.

" I did hand down an adverse decision," she answered, " and he declared that he would appeal. However, I convinced him that I was the court of last resort in a case like that, and that no appeal would lie from my decision."

" Possibly the court was assuming a little more power than rightfully belongs to it," said the judge, thoughtfully; " but let that pass. What did he do then? "

" He filed a petition for a rehearing."

" The usual course," said the judge, " but it is usually nothing but a mere formality."

" So I thought," returned the girl, " and I was prepared to deny it without argument, but the facts set forth in his petition were sufficient to make me hesitate and wonder whether his case had really been properly presented at the first trial."

" Upon what grounds did he make the application? " asked the judge, scowling.

" Well," she replied, blushing a little, " you see he proposed by letter, and his contention was that the case was of that peculiar character that cannot be properly presented by briefs, but demands oral arguments. The fact that the latter had been omitted, he held, should be held an error, and the point was such a novel one that I consented to let him argue it. Then his argument was so forceful that I granted his petition, and consented to hear the whole case again. Do you think " —

" I think," said the judge, " that the court favors the plaintiff." — *Chicago Post.*

In Utah. — The difficulties of an administrator in Utah were recently demonstrated by the following questions propounded by the court to the perplexed legal representative of a deceased poligamist:

The Court. — How many wives did your father have, Mr. Scott?

Mr. Scott, the administrator. — You've got me there, judge. I have found five, but I'm told that he had two or three more.

The Court. — How many children did he have?

The Administrator. — Well, I've rounded up sixty, your Honor, but I believe there are some more scattered around the country.

Wine at the Bar. — An applicant for admission to the Bar of a district court of a territory which is now a state, was being questioned by the examining board. The examination was nearly finished, and the applicant was beginning to wonder what right he had to aspire to legal honors, when the gravity of the situation was relieved by the following questions:

Q. — Mr. Blank, now that the examination is about concluded, I desire to ask you if you have brought with you a case of wine?

A. — Why, I didn't know that wine should be produced on an occasion of this kind.

Q. — Well, Mr. Blank, do you think we could possibly recommend you for admission to the Bar if we were not drunk?

Advertising. — The difficulties that the young men of the profession have to contend with was recently illustrated by a letter received by a publishing house from a beginner in one of the small towns of the far west. The letter contained a postal card on which was written an acknowledgement of the receipt of an order for two hundred and fifty volumes of the American Reporter system of reports. The letter read as follows:

Gentlemen: — I intend to buy the full set of the American reports when I am able to do so and on the strength of my promise, which is made in good faith, I want you to do me a favor. You will find enclosed a card, which please mail to me. I am located here in a very small town where there are but two lawyers besides myself, but they are old men and have all the practice cornered. They also have plenty of books, while I have but about a dozen that I have picked up here and there. Now, I have often heard it said here, and the people believe it, that one can't practice law without lots of books, and that if I were able to make such a showing in regard to books I would get some practice. If, therefore, you will mail me the enclosed card the post mistress will read it and spread the news, and the result, I hope, will be what I have been struggling for.

Sincerely yours,

———

Text from the Wrong Side. — A Boston lawyer who was recently asked to talk to the boys of a business school prefaced his address by a few extemporaneous remarks. "My young friends," he said, "as I approached the entrance to this room I noticed on the panel of the door a word eminently appropriate to an institution of this kind. It expresses the one thing most useful to the average man when he steps into the arena of life. It was ——— "

"Pull!" shouted the boys with a roar of laughter, while the horrified lawyer recognized that he had taken his text from the wrong side of the door. — *Boston Herald.*

Mistrusted. — "I used to know Mr. Sneeker, who was with your firm. I understand he is a tried and trusted employee ——"

" He was trusted, yes, and he'll be tried, too, if we're so fortunate as to catch him." — *Philadelphia Press.*

Divorce. — Abraham Leakin, a New York tailor, brought action in July for divorce from his wife, Dvosi, alleging that " she " is a man. They had been married eleven years.

A Long Island man, whose wife had decided to establish residence in Sioux Falls that she might divorce him, traveled west with her, as she was unaccustomed to going about alone, and didn't like to, anyway.

A Manchester (Eng.), mechanic applied for separation from his wife on the ground of her " goodness." " She puts in so much time prayin' for me," said he, " that she has no time for housework, an' I have to do the cookin'."

Heard Accepted the Authority. — The late Frank F. Heard, for many years a prominent member of the Boston Bar, was the author of a work on law which was much used and quoted by lawyers. He was once trying a case, the opposing lawyer being Gustavus Somerby. Mr. Somerby made his argument, when Heard suddenly said: " That is wrong. What is your authority? "

" F. F. Heard, page —," replied Somerby.

" Oh, well," said Heard, " if Heard says so it is so." And the case proceeded, with much amusement on the part of the spectators. — *Boston Herald.*

All a Matter of Doubt, Anyway. — A young man from the South who, a few years ago, was so fortunate as to be enabled to enter the law offices of a well-known New York firm, was first entrusted with a very simple case. He was asked by the late James C. Carter, then a member of the firm, to give an opinion in writing. When this was submitted, it was observed by Mr. Carter that, with the touching confidence of a neophyte, the young Southerner had begun with the expression, " I am clearly of opinion."

When this caught his eye, he smiled, and said:

" My dear young friend, never state that you are clearly of opinion on a law point. The most you can hope to discover is the preponderance of the doubt." — *Success.*

The Verdict. — Judge: " What is the verdict of the jury?"

Foreman of the jury: " Your honor, the jury are all of one mind — temporarily insane!" — *Lippincott's.*

Friends. — Case on trial before justice of the peace in Texas. A lawyer suggested that he would like to be heard as Amicus Curiae.

Justice, " And pray what is that? "

" Friend of the Court."

Justice, with great dignity. " I will have it understood that this court has no friends."

Garnishment. — A prominent attorney of the Galveston Bar used to tell this on himself as too good to keep. He represented a judgment for $800 and had failed to find any property of defendant. A curbstone broker came into the office and said he knew of the judgment and if paid ten per cent on it for the information, would show where the money could be reached. This was agreed to, payment when information accepted as satisfactory. Said the broker, " The debtor has placed in my hands for sale bonds for more than amount of judgment, and I have sold but not delivered the bonds, and if you get out a garnishment against me will have the money before writ is served on me." The ten per cent was paid, writ served, and broker was sent for and it was suggested that he pay the money into court. He replied, " There is but one difficulty, as soon as the writ was served, I had use for the

money and spent it. You will get your judgment against me in due course of the law," and it was done, and stands against the broker yet. To have held the money against the principal would have been a criminal offense. The garnishment made it a simple debt to garnishing creditor, and broker got amount of judgment and ten per cent on it.

A Strong Line. — Judge: With what instrument or article did your wife inflict those wounds on your face and head?

Micky: Wid a motty, yer Honor.

Judge: A what?

Micky: A motty — wan av thim frames wid "God Bliss Our Home" in it.

Expert Testimony. — In *Hirschils Trial Tactics*, the author says, "When experts are put in they should be given to understand that they should make themselves plain to the jury. In a recent case a physician was called to give evidence in regard to a certain injury, and the testimony of the physician was as follows: 'Anterior to the right parietal eminence running parallel with the conorary suture into the squamous portion of the temporal bone, there is a fracture of the bone as long and wide as the finger. Its edges run parallel to each other and are slightly arched with the convexivity posterior; the anterior is sharp, the posterior depressed. On the inner surface of the skull the vitreous table is detached and the dura lacerated. In addition there is found between the latter and the internal meninges a thick layer of blood coagula.' It appeared that the subject had been kicked in the head by a horse."

Related. — Since we, in the United States, have begun to look up our ancestors so that we can join the Sons of the Revolution and similar societies, we have become more or less familiar with great-uncles, second cousins, and the like, but some of our adopted citizens are still a little ahead of us on relationship. This is illustrated by the following answers made by witnesses in court.

"Are you related to the defendant?" counsel asked of a witness whose replies were being interpreted from the Yiddish.

"Yes, I am related," was the prompt reply.

"How are you related?"

"My wife's brother is married to the defendant's sister-in-law."

And again; it was an Irishman this time.

"Are you related to the plaintiff?"

"Sure, I am. That is, I think I am."

"In what way are you related?"

"My father and his father were fourth cousins."

Shocking. — "I am sorry," he said to the conveyancer as he laid a deed on the desk, "but my wife won't stand for this." "Why not? It's all right. We compared the description with great care and we have been over the whole deed and it is in the usual form." "Well," said the client, "there isn't but one letter wrong that I know of, but you just look at that acknowledgment clause."

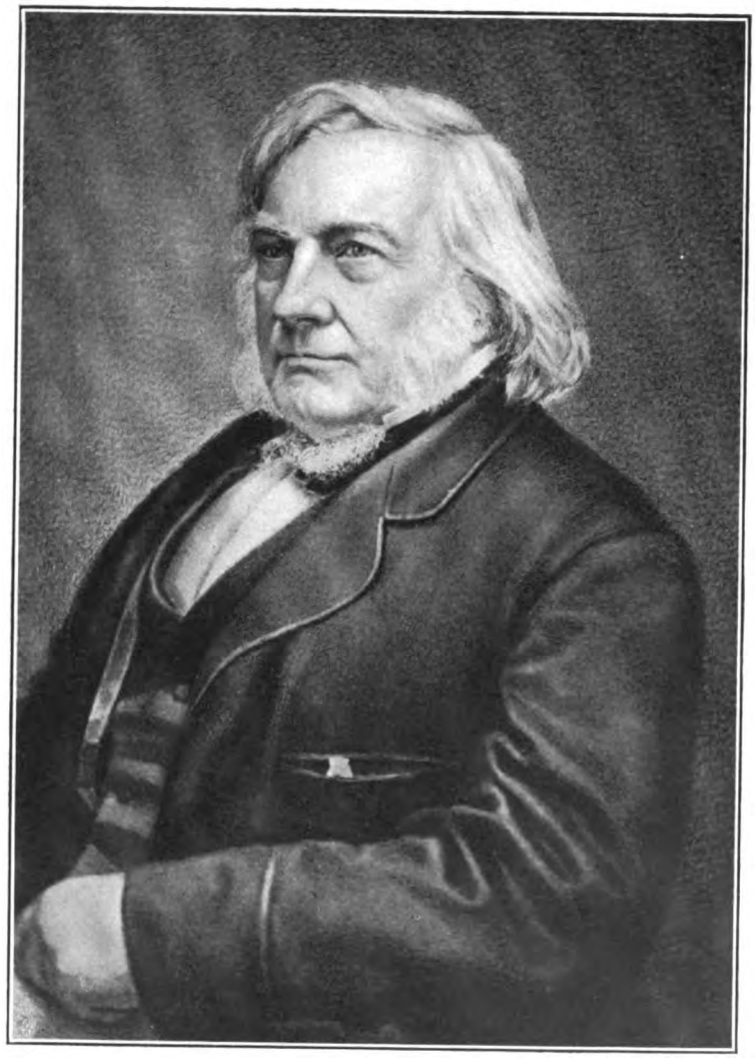
It read as the conveyancer rapidly ran through it, "Then personally appeared the above named Mary Jones and acknowledged the foregoing instrument to be her free act and deed." Then he read it a second time and found to his horror that the typewriter had struck a "k" instead of an "m" in writing the word "named."

Damages. — He had had a serious accident and had told his attorney all about its general features and they were getting down to the details of the damages.

"And how much," asked the lawyer, "was your doctor's bill?"

"I didn't have a doctor," was the answer, "but I took five bottles of *swamp root*."

Identification Complete. — Some humor was interjected into a case in a magistrate's court in Germantown. Two local lawyers were representing plaintiff and defendant, and became excited and somewhat personal in their argument. Matters proceeded to such a pitch that the lawyers began to call each other names. "You're an ass," said one to the other. "You're a liar!" was the quick retort of the opposing attorney. Then the magistrate, in a very dignified manner, said, "Now that the counsel have identified each other, kindly proceed to the disputed points." — *Philadelphia Record.*



Samuel Nelson

The Green Bag

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SAMUEL NELSON

By Edwin Countryman

JUDGE NELSON was born in Hebron, Washington County, New York, on the 11th day of November, 1792. He was a lineal descendant, in the second generation, of Scotch-Irish immigrants, who had settled in that vicinity in 1767. Remaining at home during his early boyhood, he received the rudiments of his education in the common school. His natural brightness and eager inclination to make the most of his limited educational opportunities were regarded by his parents as unerring indications of his summons to the service of the church; and they therefore determined to furnish all the facilities within their reach to qualify him for this calling. He was sent, accordingly, at the age of fifteen to the Washington Academy at Salem, where he remained two years; and after devoting still another year to special preparation at the Granville Academy he entered college as a sophomore, at the same time that Silas Wright enrolled as a freshman, at Middlebury, Vermont.

Graduating in 1813, he disappointed the expectations of his parents by preferring the law to the church, and immediately entered the office of Savage & Woods, at Salem, and pursued his studies as a clerk for two years, and then removed, with the junior partner, to the county of Madison, and continued with him two years longer, when he was admitted to the bar. He had previously married Mr. Woods' daughter, who died childless three years afterward. In 1817, at the age of twenty-five, he located for the practice of his profession in the village of Cortland, and remained there until 1825, when he removed to Cooperstown, and in the same year married the daughter of Doctor Russell, a prominent resident of that village. There were several children of this marriage, one of whom, Hon. Rensselaer R. Nelson, of St. Paul, served as U. S. District Judge for the State of Minnesota nearly forty years, and until his resignation of the office.

While residing at Cortland, Mr. Nelson was chosen in 1820 by the Legislature one of the Presidential Electors, and as such cast his vote for the re-election of President Monroe and Vice-President Tompkins. He also received in the same year the appointment of postmaster at Cortland. In 1821 he was elected a member of the Constitutional Convention to revise the fundamental law of the state, and twenty-five years later was again chosen to the Constitutional Convention of 1846.

The judiciary system of the state was largely re-organized by the Constitution of 1821. The Supreme Court Justices were relieved from holding the trial terms; and the state was divided into eight circuits, to each of which was assigned a judge to preside at all the circuit courts for civil business and the terms of Oyer and Terminer for the trial of criminal cases. Governor Yates, who had served with acceptance on the Supreme bench under the old regime, displayed excellent judgment in the selection of the new judges, naming, among others who subsequently became famous, Samuel Nelson, as judge of the Sixth Circuit. His nomination was confirmed, and he entered in 1823 upon that remarkable judicial career, which continued without interruption until he was obliged by the

infirmities of age nearly fifty years afterward to relinquish further service.

As a circuit judge he was *ex officio* vice-chancellor, and therefore had original jurisdiction of all suits in equity commenced within his district, consisting of nine counties. The inevitable result of his judicial experience in this two-fold capacity was to counteract the tendency of long and exclusive acquaintance with the technical rules of the common law to the formation of narrow views, and to keep his mind free and open to the reception and toleration of the more liberal and reasonable rules of equity jurisprudence. The principles of law and equity thus became partially blended in his mind many years before the more perfect union of the systems, which was accomplished and now obtains under the Constitution of 1846.

After serving nearly eight years as circuit judge and vice-chancellor, Judge Nelson was appointed by Governor Throop to succeed William L. Marcy as a justice of the Supreme Court. One of his old preceptors, John Savage, was Chief Justice, and they sat together in the court for six years. In 1837 Judge Nelson was appointed, by Governor Marcy, Chief Justice, and he remained at the head of the court for nearly eight years. During this period of fourteen years while sitting in the Supreme Court, he was *ex officio* a member of the Court for the Correction of Errors, then the court of last resort in the state, with the right to vote in all cases in which appeals were brought from decisions of the Court of Chancery.

Judge Nelson had now, after an experience of twenty-two years on the bench, reached the culmination of his powers, and had developed a judicial capacity of the highest order. The bar and the public were unanimous in his praise. Nature intended him for a judge. All of his leading mental characteristics were of the judicial type. He inherited the leading traits of his ancestry, — courage, firmness, energy and perseverance. His fund of "common sense" was inexhaustible; and this natural endowment, quickened by cultivation and strengthened by exercise, guided his mental faculties with so steady a poise that he was able to discern and determine the true relations of things almost to a moral certainty in the most involved and complicated affairs, as well as in the common occurrences of life. His conclusions were not intuitive or rapid, but logical and often labored — the result of calm and cautious deliberation, untinged with bias and unaffected by impulse. His opinions are pervaded by a humane and liberal spirit. He never claimed to be wiser than the law, and was reluctant to ignore a precedent or overrule an authority. He preferred to recognize the demands of justice in the particular case by making an exception to or a qualification of the general rule, founded upon the novel nature or unusual collocation of the facts contained in the record and presented for adjudication. And yet it may be doubted whether any judge which this country has produced was more uniformly guided in applying legal principles to concrete cases by the suggestions of natural reason.

But the best commendation, perhaps, that can be given to his discharge of the duties of associate justice and Chief Justice, is that during all the years of his tenure the Supreme Court of New York maintained the prestige and reputation for learning and ability which it had gained under his illustrious predecessors, James Kent, Smith Thompson, Ambrose Spencer and John Savage; and its decisions continued to be cited in the courts of all the states as among those of the highest authority. His opinions were read and admired for their terseness, directness, lucidity and practical comprehension of the cases under consideration, by the members of the bench and bar throughout the country, and his reputation was clearly established as a wise, discreet and able magistrate.

Judge Nelson was selected by President

Tyler in 1845 to succeed Mr. Justice Thompson as an associate justice of the Supreme Court of the United States. The circumstances leading to his appointment clearly indicate the high appreciation of his judicial career and character entertained at the time by the general public and the representatives of all parties in national affairs. The majority of the Senate was politically opposed to the President, and even personally hostile, owing to his abandonment of the party by which he had been elevated to his high office, and it was evident that his nomination for such an important post must be clearly unexceptionable to receive a confirmation. The President first selected John C. Spencer, one of the great lawyers of his time, who had a been member of his cabinet, and whose political predilections were in unison with those of the senatorial majority. But he had given umbrage to his fellow partisans by remaining in the cabinet after the death of President Harrison, and was rejected for that reason. The appointment was next tendered to Silas Wright, then a senator of the United States, who declined it from an apprehension that his long withdrawal from the active practice of the profession had unfitted him for the proper discharge of judicial duties. The President then selected Chancellor Reuben H. Walworth, whose judicial career commenced at the same time with that of Judge Nelson, he having been appointed by Governor Yates in 1823 as circuit judge of the fourth circuit, which position he had retained until his appointment as chancellor in 1828. The Senate, however, delayed action on the nomination for so long a period that the President finally withdrew it, and without any expectation on the part of Judge Nelson or his friends, nominated him for the vacancy; and the nomination was immediately and unanimously confirmed.

Having reached the summit of judicial honor and influence, some apprehensions were entertained by those who were not conversant with the old judicial system of New York, which required him to keep in touch with the "gladsome light" of equity jurisprudence, or who were not familiar with his habits of thorough and systematic investigation of all questions that came before him as a judge, that his long and large experience in the common law courts might render it difficult for him to conform to the more modern and in some respects more liberal methods prevailing in the federal tribunals, especially in the administration of maritime, prize and international law. He soon, however, demonstrated, to the delight and admiration of the bar, his ability to discharge the additional duties and to comply with all the conditions imposed upon him in the exercise of his new jurisdiction. He grappled successfully with the most intricate and perplexing problems of National jurisprudence, including those involved in the then comparatively recent branch of patent litigation, frequently requiring the mastery of the most abstruse and complicated questions of physical science and the mechanical arts; and he became in later years an acknowledged authority in this particular department of judicial investigation.

Notwithstanding his patience and industry in the elucidation of evidence or legal research, his opinions were invariably couched in simple English, and confined to the terse and direct expression of his views on the vital issues of the case. He never indulged in elaborate discussions of academic questions, and his successors on the bench will seldom be annoyed or misled by his *obiter dicta*. Perhaps no better illustration of his wisdom and moderation, and of his accurate perception of judicial propriety in this respect, can be given than his opinion in the celebrated case of Dred Scott. The case affords a most effective and impressive lesson to the judiciary of the perils and disasters that may be incurred by the needless assumption of extra-judicial power and responsibility.

The case came before the Supreme Court

on a writ of error from a judgment of the Circuit Court of the United States for the District of Missouri. Dred Scott, a negro, brought the suit to recover the freedom of himself, his wife and children, who were held in slavery. The claim of freedom was based on the following facts. His master, a surgeon in the army, had taken him from Missouri to Rock Island, in the State of Illinois, and thence to Fort Snelling, in the Territory of Wisconsin, remaining at Rock Island several months and at Fort Snelling two years or more. Scott had married his wife who was also a slave at the latter place, and had been taken there under similar circumstances; and both of them afterward returned with their master to the State of Missouri. If Scott had brought his action in the State of Illinois, while held there, he would doubtless have recovered his liberty under the rule subsequently recognized and enforced in the Lemmon case.[1] Or, if he had done so while at Fort Snelling, the same result would have followed, unless the prohibition contained in the Act of Congress known as the Missouri Compromise were adjudged to be in violation of the Federal Constitution; and even in that event he would still have been entitled to his freedom unless the court was also prepared to decide that the Constitution protected slavery in the Territories. But the last question could not arise or be subject to judicial determination until it was necessarily involved in the decision of the case. In the language of Judge Nelson, it was "a question *exclusively* of Missouri law, which, when determined (as it had been) by that state, it was the duty of the federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the state is supreme over the subject of slavery within its jurisdiction."[2] And after examining the authorities he added: "Our conclusion, therefore, is, that the question involved is one depending solely upon the law of Missouri, and that the federal court sitting in the state, and trying the case before us, was bound to follow it."[1] The Supreme Court of Missouri had previously decided that Dred Scott and his family, upon their return with their master to their old home, retained their domicile there, and were subject to the local law, which remanded them to slavery. It was upon this ground that the circuit court had pronounced its judgment in favor of the master, and on which the Supreme Court after the first argument determined to place its decision of affirmance, selecting Judge Nelson to write the opinion. This opinion was prepared and read in conference, and did not assume to determine a question mooted at the bar, whether the writ of error brought up for review a preliminary decision of the trial court overruling a plea in abatement interposed by the master before filing his plea in bar to the declaration. In the discussion which followed on that question, it was found that the other judges, eight in number, were equally divided, and Judge Nelson, deeming it immaterial, had not given it sufficient consideration to reach a definite conclusion. He therefore suggested a re-argument, and that course was adopted. The case was re-argued at the next term. A majority of the judges in consultation concurred in holding that the ruling at the circuit on the plea in abatement was *not* before the Supreme Court for review, the majority consisting of Justices McLean, Catron, Nelson, Grier and Campbell, and the minority including Chief Justice Taney and Justices Wayne, Daniel and Curtis.[2]

[1] 20 N. Y., 562–3.

[2] 19 How. (U. S.) 459.

[1] Id. 465.

[2] This view is sustained over the signatures of Justices Nelson and Campbell, as appears in Tyler's Memoir of Chief Justice Taney, p. 382–5. These letters throw a lurid light upon the official report of the case in which the opinion of the Chief Justice on this question is given as the opinion of the court.

In the meantime several members of the court conceived the project of allaying and if possible subduing the political agitation then beginning to assume threatening proportions in the Northern States, on the questions of negro citizenship and slavery in the Territories, by treating those questions as presented in the record of the case, and therefore as proper subjects for judicial determination. These judges accordingly met together, in the absence of Judge Nelson, and concluded to discuss and formally decide these collateral issues; and the Chief Justice was selected as their organ to write the opinion. When Judge Nelson was informed of this "new departure" he advised his brethren that he should adhere to the original decision, and read as his own the opinion he had prepared as the judgment of the court.[1] The mournful and disastrous events which ensued clearly demonstrate the wisdom and propriety of the course he pursued in this great controversy. The opinion of the Chief Justice, instead of quieting the agitation, proved to be a political "boomerang" which recoiled with terrific force upon its authors and aroused the public indignation beyond all precedent. And it constituted one of the most remarkable incidents of the political upheaval which culminated in the Rebellion of the Southern States and the total abolition of the "peculiar institution."

Judge Nelson took no active part in politics after his elevation to the bench. He retained, however, a deep interest in public affairs and entertained decided opinions upon all questions of National policy. In 1845, shortly after his appointment to the Federal Supreme Court, he was supported by a large number of Democratic members of the New York legislature for United States Senator, as the successor of Silas Wright, who had been elected Governor of the state. He received forty-one votes against fifty-one for John A. Dix, who was finally chosen.

In 1871 Judge Nelson was appointed, by President Grant, one of five members, on the part of the United States, of the Joint High Commission to act with five commissioners of Great Britain, in negotiating and adjusting the various subjects of dispute between the two nations, which had on one occasion nearly involved them in the calamities of war. Some important questions of maritime and international law were to be settled, and the judge was selected to obtain the benefit of his learning and experience in those departments of jurisprudence. It was also in the mutual contemplation of the two governments to establish and define the jurisdiction of a tribunal of arbitration for the final determination of several matters in difference, involving controverted facts; and his practical wisdom and extensive knowledge of judicial procedure were deemed indispensable in forming rules and regulations for the guidance of an international court of judicature, a court deriving all of its powers from the terms of the treaty, and, it is believed, without a prior historic example. The limits assigned to this paper will not permit further reference to Judge Nelson's connection with this notable international compact, than to add that he fully met the expectations of his countrymen. The treaty of Washington resulted in the settlement of five serious subjects of controversy between Great Britain and the United States, and will stand out in history as the beginning of a new era in the diplomacy of nations.

But it is as a judicial magistrate that the name of Judge Nelson will be known and honored by our people. It was the felicity of his life to be early placed and constantly retained in a position of all others the best adapted to his tastes, his talents and his character. Conscious of

[1] These facts also appear from the letters above referred to in Tyler's Memoir of the Chief Justice. See also the remarks of Judge Campbell in memoriam of Judge Curtis, 20 Wallace, p. XI. 1 Life and Writings of B. R. Curtis 234–7, note by G. T. Curtis.

his fitness for his calling, he applied himself with a courage and confidence that never wavered, and an industry that never flagged, to the conscientious discharge of his judicial duties. He may be said to have had a genius for judicial insight and discrimination, and his ruling passion was the search for and the dispensation of remedial justice.

Retiring from active service at 80 years of age, he spent the remaining year of his life in the quiet enjoyment of his own home in Cooperstown, where he received and welcomed with generous hospitality his numerous friends and admirers from all sections of the country. During this period he was the recipient of testimonials from the bench and bar of his native state, as well as from the Federal Circuit, in which he had presided, and the Supreme Court, of which he was so long a member, all uniting in the highest encomiums upon his judicial life and labors — encomiums which may well be regarded as trustworthy indications of the final verdict of posterity concerning his career and character. His death occurred in 1873.

ALBANY, N. Y., February, 1907.

THE ORIGIN OF THE SYSTEM OF RECORDING DEEDS IN AMERICA[1]

By Joseph H. Beale, Jr.

THE origin and history of the system of recording deeds in this country is yet to be written, and even the materials for such history have not been brought together. I shall attempt merely to sketch the apparent origin of the system and to make a few suggestions as to its possible derivation.

The characteristics of our recording system which distinguish it from other systems are these: the document recorded is a deed, not a memorandum of a transfer or an agreement for a transfer; the deed is operative without record, the title passing before the deed is recorded; the record is not a mere device for preserving evidence, but gives a legal priority to the grantee of the recorded deed. In the first particular it differs from the medieval registry system; in the second from the continental registry systems and our own Torrens system of registration; in the third from the recording system in England under local customs, like those of Middlesex and Yorkshire.

As the present Massachusetts act goes back with no substantial change to Oct. 7, 1640, the origin of the system must be sought before that date, which narrows our enquiry to the few colonies settled before that time; and we must first examine the system of Virginia, the colony first settled. Unfortunately the earliest records of that colony are not available. The first legislation on the point which survives is a vote of October, 1626, that all sales should be brought to Jamestown and enrolled in General Court within a year of their date.[2] This vote evidently proved ineffective, as did similar votes in all the colonies; and in January, 1640, an act was passed providing that a deed or mortgage of land without delivery of possession should be adjudged fraudulent unless entered in some court.[1] This was re-enacted in 1656 in terms which show that it was an adoption of the English statute of fraudlent conveyances.[2] This act lacks one very characteristic feature of our recording system; it is not enforced by giving priority to a recorded deed, but by making the unrecorded deed void unless possession is delivered. It would not be possible under such an act to investigate title at the registry. It seems plain enough that this act, which was re-enacted as late as 1656, cannot be the origin or have contributed to the invention of a system which was in operation with all its present characteristics in 1640.

We next turn to Plymouth, as the colony next settled by Englishmen. While lots in Plymouth were temporarily assigned to the settlers from the beginning, land was originally held in common, but was divided in 1623. The record of votes then passed is lost, and it is impossible to tell just how far transfers of land were required to be recorded. That some action was taken before 1627 is very probable. In Plymouth, as in all the American village communities, the community had two strong desires: to have the village land improved, and to keep out undesirable immigrants. For these purposes the holding and transfer of land must be regulated by the town; and this was the easier because the town was still seen and known to be the source of title. The consent of the

[1] A paper read before the Massachusetts Conveyancers' Association.

[2] Bruce, Economic History of Virginia, vol. i, p. 570.

[1] Hening's Statutes, vol. i, p. 227.

[2] *Ibid*, p. 417.

town was doubtless required to the transfer and this consent was proved by an entry on the town books. As at this time the town and the colony were identical, the entries in fact appear on the records of the colony.

The original allotments of "meersteads and garden plotes," that is, of the original assignments of homesteads to the original settlers from 1620 to 1623, are spread upon the record. The earliest record on the books of the colony of a transfer of land is a deed in 1627, which is not merely copied into the book, but was apparently written out for the first time on the book and there signed by the parties, the writing on the page of the book being the actual deed itself. This instrument is really a brief contract or memorandum of a bargain and sale of the land. It begins, "Phillip Delanoy hath sold to Stephen Deane one Acre of Land lying on the North side of the towne between the first and second brooke in the Vpper fall of the said field & bounded" etc. The bounds, the terms of the sale, and the terms of payment are then precisely given.[1] After this follow more concise memoranda of sales interspersed with records of votes until 1633. Several of these memoranda contain the name of a witness. Several sales of land in 1634 are entered, not in the book in which ordinary deeds are recorded, but in the book of records of the acts of the colony;[2] these are interspersed with records of contracts of apprenticeship. One record of a sale of land has entered on the margin an acknowledgment, dated a year later, before the governor of a payment of the consideration. The next year a contract for the sale of land was entered in the records under the heading "William Bradford Governor" as if this was an official transaction before the governor.[3] On May 28, 1623, "Thomas Litle came before the Gove'r and acknowledged that he had given unto Robart Bartlet" a parcel of land.[1] These entries were all made while Bradford was governor. In 1636 a commission was appointed to alter and revise the laws; and the revision, as reported by them and adopted, contained the following provision: "that all sales exchanges giftes morgages leases or other Conveyances of howses and landes the sale to be acknowledged before the Gov'r or any one of the Assistants and committed to publick Record and the fees to be payd."[2] Records of deeds thus acknowledged began on June 24th, 1637, and are from that time continuous. This was the law under which conveyances in Plymouth were made until the union with Massachusetts in 1692.

It will be noticed that the Plymouth system lacks the characteristic feature of our modern system of recording deeds, namely, the priority of right given to the prior record. It has, however, one feature of the present system which appears to have originated in Plymouth, so far as American legislation goes; that is, the requirement for an acknowledgment of the deed before recording.

The next colony in point of time was Massachusetts, and the public recording of conveyances began there very early in its history. The first records were made under votes of the towns. It has already been pointed out that the early colonists desired not merely to have the land improved, but also to keep control of the admission of new colonists. To secure these ends, the Massachusetts towns early provided that any one desiring to sell his land should offer it first to the town and that no stranger should be permitted to buy land without the consent of the town. Such orders were made, for instance, in

[1] 12 Plymouth Colony Records 7.
[2] 1 Plymouth Col. Rec. 24.
[3] *Ibid.* 33.

[1] *Ibid.* 34. Another similar entry is found on the same page.
[2] 11 Ply. Co. Rec. 12.

Cambridge in 1632 and 1634, in Dorchester in 1634, and in Boston in 1635.[1] Meanwhile the colony passed an ordinance which is important in the history of our recording acts. On April 1, 1634, the general court ordered that the constable and four of the chief inhabitants of every town, to be chosen by the freemen, with the advice of some one or more of the next assistants, should make a survey of houses and lands and enter the same in a book with the several bounds and quantities by the next estimation: "& shall deliuer a transcript thereof into the Court within sixe monethes nowe nexte ensueing, & the same soe entered and recorded shal be a sufficient assurance to every such ffree inhabitant, his & theire heires and assignes, of such estate of inheritance, or as they shall haue in any such howses, lands, or ffranke-tenements."[2]

This provision, which practically made an entry in the book of possessions a guaranteed title of the land, seems to furnish the first indication of the present rule of priority.

Many of the towns properly prepared their books of possessions under this ordinance, and these books form the basis of land titles in such towns. But the work was slow and not altogether satisfactory to the General Court, and from time to time they passed additional orders for doing work. Finally on Oct. 7, 1640, the court passed a general ordinance in almost the exact terms of the present law.[3] "For avoyding all fraudulent conveyences, & that every man may know what estate or interest other men may have in any houses, lands or other hereditamants they are to deale in, it is therefore ordered, that after the end of this month no morgage, bargaine, sale, or graunt hereafter to bee made of any houses, lands, rents, or other hereditaments shalbee of force against any other person except the graunter & his heires, unless the same bee recorded, as is hearafter expressed." Provision is made for acknowledging the deeds, and they are to be recorded within the districts into which the Colony had already been divided for holding courts. The ordinance further provided that "it is not intended that the whole bargaine, sale, &c. shalbee entered, but onely the names of the graunter & grauntee, the thing & the estate graunted & the date; and all such entryes shalbee certified to the recorder at Boston." Magistrates were also appointed to take acknowledgments.

This ordinance of 1640 remained the law throughout Colonial times, omitting, however, in the revisions the express provision against recording the deed in full; and it was further provided that the clerk of every shire court should be the recorder.[1] The provision appears substantially unchanged in the Revised Laws of 1902.[2]

The only other colonies which legislated before 1640 were Rhode Island and Connecticut, and neither of them appears to have contributed anything to the system of recording deeds.[3] We may, therefore, safely conclude that the American registry system as it prevails at present throughout

[1] Cambridge Town Records, vol. ii. pp. 4, 10; Boston Record Commissioner's Reports, vol. iv, p. 8. *Ibid.* vol. ii, p. 5.

[2] 1 Records of Massachusetts 116.

[3] *Ibid.* 306.

[1] Colonial Laws, ed. 1672, p. 33.

[2] "A conveyance of an estate in fee simple, fee tail, or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it . . . is recorded in the registry of deeds" etc. R. L. Ch. 127, Sect. 4. Considering that the act has passed through twelve revisions and has been amended at least twice, the language is very close to the original.

[3] A vote of the town of Portsmouth in 1638 was similar to the ordinance establishing Books of Possessions in Massachusetts. Rhode Island Colonial Records, vol. i, p. 54. No other vote in Rhode Island was earlier than 1644. *Ibid.* p. 127. Similar legislation in Connecticut was adopted in 1639. Connecticut Colonial Records, vol. i, p. 37.

the country has its origin in Massachusetts legislation; only the provision for acknowledging the deed before its record being derived from Plymouth colony.

Now where did the inexperienced legislators of Plymouth and Massachusetts get the ideas which led to this system of land transfer? It is, of course, possible that the whole plan was original with them, as it is certain that this particular application of the ideas was their invention; but it is more likely that they derived some hints from Old-World practice.

Four sources occur to one as possible. First, the system of registering titles that prevailed on the continent of Europe, was carried by the Dutch settlers to Cape Colony, and was probably there investigated by Sir R. Torrens on his way to Australia, and thus gave a hint for the modern system of registering land titles. Second, the customs of some of the English cities and boroughs, of passing title by judicial process in the local courts, which after all is closely related to the common law system of passing title by fine and recovery, and to the transfer of copyhold land. Third, the statutory process of enrolling deeds of bargain and sale. Fourth, the local customs of York, Middlesex, and perhaps other counties, providing for the registration of deeds.

As to the continental system, it is not probable that any of the Puritan colonists were influenced by it. The Pilgrims, to be sure, spent some time in Holland before settling in Plymouth, and might possibly have derived some hints from the law of that country, but the distinctive features of the continental system were lacking in the Plymouth legislation. The continental system is one of registering titles. By it, the contract or deed is of no importance except as a memorandum, or as a proof to be presented to the officer in charge of the registration. The operative act is the entry of transfer on the public books. There seems to be in Plymouth legislation no idea of such a notion as that the entry in the book was in itself an operative act. The ordinary document entered on the Plymouth book was a more or less elaborate bargain and sale deed in the English form; and the fact that deeds were recorded side by side with other contracts, and especially contracts of service, indicates that there was no idea that the transfer derived any additional force from the recording of it. The record was merely for purpose of evidence. But whatever may be true of the Plymouth ordinance it is clear that in the Massachusetts ordinance there was no notion whatever of an entry on the book as of itself operative to pass the title. The deed still remained the document of title.

More must be said as to the claim of borough customs to furnish the idea of our registry acts. The type of such custom is that of London, and this custom is stated in these words: "The persons that sealed the deed must go before the Lord Mayor, or the Recorder and one Alderman, and make acknowledgement that the same is their act and deed; if a wife be a party, she is to be examined by them, whether it was done with her full and free consent, without any kind of compulsion; in testimony of which the Lord Mayor or Recorder and Alderman set their hands to it, for which each may demand 4*d.* and the attorney's fee for the judgment is 2*d.* Afterwards the deed must be delivered to the clerk of the Inrolements who at the next Hustings will cause proclamation to be made thereof according to the custom of the court."[1]

Many, if not most of the English boroughs had similar customs. It will be noticed as to this custom, first, that it provides for an acknowledgment before the mayor or other city magistrate just as the Plymouth ordinance provided for an acknowledgment before the governor or assistant, and in that respect it seems to furnish the type

[1] Bohun, Privilegia Londini, 241.

from which the Plymouth provision for acknowledgment was copied. The subsequent proceedings are, however, different from those that prevailed in America. The deed having been acknowledged was proclaimed in open court, and, no one appearing to deny it, it was enrolled as a judicial acknowledgment and had force as *res judicata*.

The provision for acknowledgment, which was found in the borough customs, was not unknown in the manorial courts. Thus when a mortgage on a copyhold interest was paid off, the mortgagee made acknowledgment before the lord or his steward of the payment.[1] When a feme covert owned copyhold lands, she might join with her husband in a surrender; in which case she must be examined by the steward apart from her husband.[2] These points are remarkably like certain features of our land system. The Plymouth practice of acknowledgment originated, as has been seen, during the governorship of William Bradford, and the ordinance by which acknowledgment was required was passed while Edward Winslow was governor. These two men, the greatest leaders of the colony, seem to have adopted this practice of acknowledgment either from borough or from manorial customs with which they had been familiar in England.

It is possible that the Plymouth ordinance, so far as the provision for recording was concerned, was based upon the English law as to the enrollment of bargains and sales. I have already pointed out that the Plymouth deeds were deeds of bargain and sale, which was to become the typical American form. The provision that the deed should be recorded is not unlike the provision of the English law.[1] Be that as it may, this portion of the Plymouth act did not influence the Massachusetts ordinance of 1640; and there seems to be nothing in that ordinance which is based upon the English law for enrolling bargains and sales.

The local customs by which a registry was provided in York and in Middlesex are more likely to have influenced the Massachusetts ordinance. The ordinance provided for recording in districts, and to that extent it followed the plan of the local registry. But the English customs provided a record of the deeds only for the purpose of safely keeping the evidence. No additional power was given to the deed by reason of its being recorded; the county merely furnished a safe place of deposit for the deeds of such persons as chose to avail themselves of it. The legislators of Massachusetts, therefore, derived at most nothing more than the provision for recording the deeds in the local registries from this source.

The most distinctive feature of the American system, the priority given to the earliest recorded deed, appears to have no prototype among foreign systems. It was foreshadowed in the ordinance providing for books of possessions, and was fully developed by the earliest settlers of Massachusetts as a remedy for difficulties newly felt as consequence of the democratic land-holding system of the Puritan Commonwealth. The distinctive features of the American system of recording deeds are therefore indigenous.

CAMBRIDGE, MASS., May, 1907.

[1] 1 Watkins Copyholds 184. This is very similar to the earliest recorded instance of an acknowledgment in the Plymouth records, above mentioned.

[2] *Ibid* 101.

[1] 27 Hen. VIII, chap. 16.

HAS TRIAL BY JURY IN CIVIL ACTIONS BEEN ABOLISHED?

By William Hamilton Cowles

ONE of the most familiar of Broom's Legal Maxims, cited by him from Coke, has been freely paraphrased thus:

"It is the office of the judge to instruct the jury in points of law; of the jury to decide on matters of fact." [1]

A stock instruction to juries, familiar as the alphabet to trial lawyers in most states, is commonly put in some such form as this:

"You are the exclusive judges of the weight of the evidence, of its credit and value. It is for you to say what credit shall be given to the various witnesses in this case."

The Supreme Court of the United States has said:

"It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor — that is the business of the jury — but conceding to all the evidence offered the greatest probative force, which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial." [2]

The gist of the doctrine set forth in each quotation is that the jury are the judges of the facts. This sounds so much like a matter of course that it will be something of a puzzle to make out what occasion there is now for stating it once, say nothing of three times. The fact is that it has but recently dawned on the writer that, while the maxim referred to has a certain approximate truth in its main scope, this chief implication, or corollary, for which it is really cited, is not true at all; that the stock instruction is not law now, and never was; and that the passage quoted from the Supreme Court has been wholly repudiated and superseded. And with the ingenuousness of the tyro, he assumes that because this is new to him, it may be new to others.

Whether the verdict of a jury, on evidence which, if believed, is sufficient to warrant it, really settles anything, presents itself as a practical question when we come to consider the grounds on which a court may grant a new trial. The decision in Pleasants *v.* Fant, 22 Wall. 116, referred to above, does not stand alone by any means. In its time it doubtless scarcely started a query. And from that position, as a starting point, it looks as if it would be very easy in a state having the usual constitutional provision preserving trial by jury, and enumerating among the only grounds for granting a new trial, "That the verdict is not sustained by sufficient evidence," to show that allowing the trial judge to grant a new trial whenever he does not agree with the jury as to the facts, is wrong. Of course in states which authorize a new trial because the verdict is "contrary to the evidence," or better, because eliminating questions of interpretation, "against the weight of the evidence," the point of contest moves back a step to whether such a statute infringes on the right of trial by jury. Some decisions taking essentially the same view as to the function of the jury as is set out in Pleasants *v.* Fant, are collected in a note.[1]

[1] Penn. Co. *v.* Conlan, 101 Ill. at 107 ('81).

[2] Pleasants *v.* Fant, 22 Wall. 116, at 122 ('74).

[1] Drennen *v.* Brown, 10 Ark. 138 ('49); St. L. S. W. Ry. Co. *v.* Byrne, 73 Ark. 377 ('04); Amsby *v.* Dickhouse, 4 Cal. 102 ('54); Bishop *v.* Perkins, 19 Conn. 300 ('48); Burton *v.* R. R. Co., 4 Har. 252 ('44); Stewart *v.* Elliott, 2 Mackey, 307 ('83); Walker *v.* Walker, 11 Ga. 203 ('52); Warner *v.* Robertson, 13 Ga. 370 ('53); Spurlock *v.* West, 80

From this point of view the question presented to the trial court on a motion for a new trial on the ground that the verdict is not sustained by sufficient evidence, is a question of law,[1] essentially the same question that is, or may be, earlier presented by a motion to direct a verdict. It does not call upon either the trial court or the appellate court to weigh the evidence.[2]

This is definite and workable. It brings to the appellate court the same question that is presented to the trial court. It therefore avoids all occasion for the endless conflict of authority about a new trial on the weight of the evidence being a matter of discretion, and therefore not reviewable; about its being a question for the trial court, because the reviewing court cannot safely pass on the weight of the evidence without seeing the witnesses; and about reversal only when the verdict is "plainly and palpably" against the weight of the evidence — matters which for present purposes are all passed by. We are asking whether any court has to determine the preponderance of the evidence in a jury case.

The difficulty with this line of decisions seems to be that notwithstanding our great admiration for the jury; notwithstanding a succession of statutes curbing the power and influence of the judge in handling a jury trial; notwithstanding the pains taken to prevent the judge not merely from obtruding his view of the facts, but even from dropping a hint, neither courts nor the people have wanted the actual settling of the facts to rest with the jury. The drift of judicial decision against any such right of the jury has been simply overwhelming. An array of authority was cited above that would seem to be sufficient to settle most questions. But most of the cases are old; and in number they make some brave show of balancing the later list the other way only because such decisions are relatively so scarce that there has been no hesitation in citing several from the same jurisdiction. Cases that typify the present state of the law read like this:

"The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. . . . He has the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. . . . But in con-

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Ga. at 306 ('87); Kincaid *v.* Turner, 7 Ill. 618 ('45); Chicago City Ry. Co. *v.* McClain, 211 Ill. 589 ('04); Muldowney *v.* R. R. Co., 32 Ia. at 178 ('71); Cavender *v.* Fair, 40 Kan. 182 ('88); A. T. & S. F. R. R. Co. *v.* Hine, 5 Kan. App. 748 ('97); R. R. Co. *v.* Matthews, 58 Kan. 447 ('97); Milo *v.* Gardner, 41 Me. 549 ('56); Griswold *v.* Lambert, 89 Me. 534 ('97); Baker *v.* Briggs, 8 Pick. 121 ('29); Cunningham *v.* Magoun, 18 Pick. 13 ('36); Hicks *v.* Stone, 13 Minn. 434 ('68); Kansas, etc. Ry. Co. *v.* Dawley, 50 Mo. App. at 489 ('92); Beckwith *v.* R. R. Co., 64 Barb. 299 ('65); Cothran *v.* Collins, 29 How. Pr. 155 ('65); Swartout *v.* Willingham, 26 N. Y. Sup. 769 ('93); Layman *v.* Anderson, 4 App. Div. (N. Y.) at 126 ('96); McGatrick *v.* Wason, 4 O. St. 566 ('55); Hall *v.* Hodge, 2 Tex. 323 ('47); Gibson *v.* Hill, 23 Tex. 77 ('59); Campbell's Lessee *v.* Sproat, 1 Yeates 327 (1794); Morien *v.* N., etc. Co., 102 Va. 622 ('04); Fearing *v.* DeWolf, 3 Woodb. & M. 185 ('47); Gilmer *v.* City, 16 Fed. 708 ('83); Davey *v.* Aetna L. I. Co., 20 Fed. 494 ('84); Plummer *v.* Granite M. M. Co., 55 Fed. 755 ('93); Pringle *v.* Guild, 119 Fed. 962 ('03); Alsop *v.* Com. Ins. Co. 1 Sumn. 451 ('33); R. *v.* Poole, Lee's Cas. t. Hardwicke, 23 (1734); Carstairs *v.* Stein, 4 M. & S. 192 ('15).

[1] See, for example, Birdseye's Appeal, 77 Conn. 623 ('05); Stewart *v.* Elliott, 2 Mackey, 307 ('83); Simmons *v.* R. R. Co., 110 Ill. 340 ('84); Backus *v.* Clark, 1 Kan. 303 ('63); Met. R. R. Co. *v.* Moore, 121 U. S. 558 ('87); Hodges *v.* Ancrum, 11 Exch. at 218 ('55).

[2] It may be doubted whether this is literally true; whether the question for the court is in fact different in kind from the question for the jury merely because the evidence is substantially one way. Cf. Prof. J. B. Thayer's paper on "Law and Fact," in Jury Trials, 4 Harv. Law Rev. at 159, and the opinion of Lord O'Hagan in Dublin, etc. Ry. Co. *v.* Slattery, 3 App. Cas. 1155 ('78). But if it only means that it is for the court, and not the jury, it is not difficult to apply.

sidering the question upon the motion he must act upon his own judgment as to the effect of the evidence.[1]

"These courts ought to independently exercise the power to grant new trials, and with entire freedom from the rule which controls appellate tribunals; they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case.[2]

"A trial court will be reluctant to set aside a verdict where a doubtful question of fact exists, simply because its judgment inclines the other way; but the mere fact that there is a conflict in the testimony does not relieve the court from examining the sufficiency of the evidence, nor make the verdict of the jury conclusive. . . . Whenever the trial court determines that the verdict is clearly against the weight or preponderance of the evidence, it should not hesitate to set it aside and grant a new trial, and, in arriving at this determination, the judge of the trial court must be controlled by his own judgment, and not by that of the jury.[3]

"Upon a motion for a new trial the court is to weigh the evidence, where it is conflicting, and if, in its judgment, it is manifest that the weight of the evidence is against the verdict as returned by the jury, its plain duty is to set it aside. While it is conceded that it is the province of the jury to find the facts, it is nevertheless the duty of the trial judge to see that the action of the jury is intelligent and just in the exercise of this function. This is a judicial discretion with which every court is invested, and which gives the trial judge a salutary supervision over the verdict of a jury.[4]

Decisions supporting this view of the matter are very numerous. Some of them, mostly recent ones, are collected in a footnote.[1]

The line of distinction between this group of citations and the previous one is, perhaps, brought out most distinctly by some recent cases in which trial judges are rather brusquely reversed for acquiescing in verdicts with which they did not agree, because they supposed that the jury was the tribunal to decide the facts, and that a verdict, at least on conflicting evidence, settled something.[2]

[1] Green *v.* Soule, 145 Cal. 96 ('04).
[2] Dewey *v.* R. R. Co. 31 Ia. 373 ('71).
[3] Coal, etc. Co. *v.* Stoop, 56 Kan. 426 ('96).
[4] Ulman *v.* Clark, 100 Fed. at 183 ('00).

[1] Lee *v.* DeBardeleben, C. & I. Co., 102 Ala. 628 ('93); Schnittger *v.* Rose, 139 Cal. 656 ('03); Birdseye's Appeal, 77 Conn. 623 ('05); McCullough *v.* Ry. Co., 97 Ga. 373 ('95); Lincoln *v.* Stowell, 62 Ill. 84 ('71); Wetherell *v.* R. R. Co., 104 Ill. App. 357 ('02); Rarick *v.* Ulmer, 144 Ind. 25 ('95); Tathwell *v.* City, 122 Ia. 50 ('03); Werthman *v.* R. R. Co. 128 Ia. 135 ('05); Williams *v.* Townsend, 15 Kan. 563 ('75); Buoy *v.* Milling Co., 68 Kan. at 443 ('04); Hurt *v.* R. R. Co., 116 Ky. (App.) 45 ('03); Reeve *v.* Dennett, 137 Mass. 315 ('84); Hyde *v.* Haak, 132 Mich. 364 ('03); McKenzie *v.* Banks, 103 N. W. (Minn.) 397 ('05); Loevenhart *v.* Ry. Co., 190 Mo. 342 ('05); Murray *v.* Heinze 17 Mont. 353 ('95); Sang *v.* Beers, 20 Neb. 365 ('86); Wendell *v.* Safford, 12 N. H. 171 ('41); Treadway *v.* Wilder, 9 Nev. 67 ('73); Dickerson *v.* Payne, 66 N. J. L. 35 ('02); Kummer *v.* R. R. Co., 21 N. Y. Sup. 941 ('93); McDonald *v.* Met. St. Ry. Co., 167 N. Y. 66 ('02); McCord *v.* R. R. Co., 134 N. C. 53 ('03); Ross *v.* Robertson, 12 N. D. 27 ('03); Dean *v.* King, 22 O. St. 118 ('71); Yarnell *v.* Kilgore, 15 Okla. 591 ('05); Dinan *v.* Supreme Council, etc., 213 Pa. 489 ('06); Agnew *v.* Adams, 26 S. C. 101 ('86); Robert Buist Co. *v.* Lancaster Merc. Co., 73 S. C. 48 ('05); Rochford *v.* Albaugh, 16 S. & D. 628 ('03); Spoke & Handle Co. *v.* Thomas, 114 Tenn. 458 ('04); White *v.* Ry. Co., 8 Utah 56 ('92): Brugh *v.* Shanks, 5 Leigh, 649 ('33); Welever *v.* Advance Shingle Co., 34 Wash. 331 ('04); Clark *v.* Gt. North. Ry. Co., 2 Am. & Eng. Annot. Cas. (Wash.) 760 ('05), collecting many cases; Distilling Co. *v.* Bauer, 56 W. Va. 249 ('04); Collins *v.* Janesville, 117 Wis. 415 ('03); Mt. Adams, etc. Ry. Co. *v.* Lowery, 74 Fed. 463 ('96); Felton *v.* Spiro, 47 U. S. App. 402 ('97); Met. R. R. Co. *v.* Moore, 121 U. S. 558 ('87); Capital Traction Co. *v.* Hof. 174 U. S. 1 ('99); Wood *v.* Gunston, Style 466 (1655); Davies *v.* Roper, 33 Eng. L. & Eq. 511 ('56); Dublin, etc. Ry. Co. *v.* Slattery, 3 App. Cas. 1155 ('78).

[2] Thompson *v.* Warren, 118 Ga. 644 ('03); Kansas City, etc. R. R. Co. *v.* Ryan, 49 Kan. 1 ('92); Yarnell *v.* Kilgore, 15 Okla. 591 ('05);

The Washington case is a sample.[1] The trial court is reported thus:

"I am compelled, though reluctantly, to deny the motion for a new trial in this case. My reluctance arises from the fact that. in my opinion, the weight of the evidence did not sustain the contention that excessive force was used in ejecting the plaintiff from the train; but that issue was submitted to the jury, and was decided in favor of the plaintiff, and as, under our judicial system, the trial judge in a civil case has little more power or authority than a 'mentor at a town meeting,' I am not at liberty to disturb the jury's finding on that issue."

On this the supreme court says:

"It appears from the foregoing statement that the trial court labored under an entire misapprehension as to its powers and duties. Our statute provides that a new trial may be granted, among other grounds, for insufficiency of the evidence to justify the verdict; and this power must be exercised by the trial courts, if at all. These courts should take care not to invade the legitimate province of the jury, but if, after giving full consideration to the testimony in the light of the verdict, the trial judge is still satisfied that the verdict is against the weight of the evidence, and that substantial justice has not been done between the parties, it is his duty to set the verdict aside."

The upshot of the decisions along this line, of which those just cited are merely examples, is that a trial judge may set aside a verdict on the facts alone whenever he deems it expedient. But the appropriate legal phraseology for expressing this result is by no means settled. Even the cases that agree in holding that he has the power, do not agree as to whether he is required to set aside a verdict when he differs with the jury. It is quite as easy to collect citations to the effect that it is not error for the trial court to decline to set aside a verdict though he is not satisfied with it.[1]

As the Massachusetts, Ohio, and Federal cases cited specially point out, if a judge *always* sets aside a verdict that he would not have found as a juror, he is infringing on the province of the jury! Such decisions, of course, leave it a little uncertain whose duty it is to decide on the facts.

Nor is there any greater unanimity among the courts which allow a trial court to set aside a verdict, whenever it takes a different view of the facts, as to just what the question is that is presented to the appellate court. It is frequently not quite clear whether the reviewing court addresses itself to the question, Was the conclusion of the jury the one that, in fact, ought to have been drawn from the evidence? Or, to the "very different question,"[2] Was the evidence such that the trial judge could, as a reasonable man, draw from it his opposite conclusion?

Generally, perhaps, they say, on practical grounds, that they are in no position to weigh evidence, and they will not reverse the trial judge for granting or refusing a new trial, if there is *any* evidence to sustain his ruling. "It is the constant practice of the courts to refuse to disturb an order granting a new trial even where it would have done the same thing had a new trial been denied."[3]

This practically makes the statutory ground for a new trial mean one thing in the trial court, and something else in the reviewing court.

Dinan *v.* Supreme Council, etc., 213 Pa. 489 ('06); Clark *v.* Ry. Co., 37 Wash. 537 ('05); Felton *v.* Spiro, 78 Fed. 576 ('97).

[1] Clark *v.* Ry. Co., 37 Wash. 537 ('05).

[1] Daley *v.* R. R. Co., 26 Conn. 591 ('58); R. R. Co. *v.* Matthews, 58 Kan. 447 ('97); Reeve *v.* Dennett, 137 Mass. 315 ('84); Rohde *v.* Biggs, 108 Mich. 446 ('96); Wendell *v.* Safford, 12 N. H. 171 ('41); Dickerson *v.* Payne, 66 N. J. L. 35 ('02); McCord *v.* R. R. Co., 134 N. C. 53 ('03); Fleming *v.* Smith, 44 Barb. 554 ('65); French *v.* Millard, 2 O. St. at 53 ('53); Davey *v.* Aetna L. I. Co., 20 Fed. 494 ('84).

[2] Cf. Capital and Counties Bank *v.* Henty, 7 App. Cas. at 776 ('82); Bishop *v.* Perkins, 19 Conn. 300 ('48).

[3] Ruffner *v.* Hill, 31 W. Va. 428 ('88).

The notion that a motion for a new trial is addressed to the discretion of the trial judge, and is reviewable only for abuse of discretion, makes it a mere matter of "personal equation" in both courts. It is not very uncommon for reviewing courts to weigh the evidence as best they can; but even those who do not want the trial judge to interfere with a verdict unless the weight of the evidence is "plainly and palpably" against it, are not inclined to reverse him unless it is "very clear" that the weight of the evidence is "plainly and palpably" against him[1]—if that furnishes any rule.

Some of these courts seem to think a verdict may be properly set aside when it is "obviously" the result of passion, prejudice, or corruption; that is, when from some moral lack the jury have returned a verdict without setting themselves honestly to determine what the evidence in fact proves. This is, of course, too vague to be workable. Most of them frankly add to this moral ground, mistake. And by this they mean either that the facts were so complicated that they were beyond the capacity of the jury; or the jury failed to grasp the salient point, and so misjudged the relative importance of different parts of the evidence; or they forgot some of the testimony; or they were sleepy, and failed to take it in; or simply that they drew the wrong conclusion. This throws the whole field open, and means that there is nothing conclusive about any verdict. There was a tendency at one time to hold a verdict on conflicting evidence impregnable, but any such distinction is now practically dropped.[2]

[1] Cleckley *v.* Beall, 37 Ga. 607 ('68); Moran *v.* Harris, 63 Ia. 390 ('84); Anthony *v.* Eddy, 5 Kan. 129 ('69); Hicks *v.* Stone, 13 Minn. 434 ('68); Bank *v.* Wood, 124 Mo. 72 ('94); Kummer *v.* R. R. Co., 21 N. Y. Sup. 941 ('93).

[2] Curtis *v.* Starr, 95 Cal. 376 ('90); C. & A. R. R. Co. *v.* Klaybolt, 112 Ill. App. 406 ('03); Tathwell *v.* City, 122 Ia. 50 ('03); Coal and Mining Co. *v.* Stoop, 56 Kan. 426 ('96); Herndon *v.* Lewis, 175 Mo. 116 ('03); Treadway *v.* Wilder, 9 Nev. 67 ('73); McDonald *v.* Walter, 40 N. Y. 551 ('69); Linderman *v.* Nolan, 16 Okla. 352 ('05); Brugh *v.* Shanks, 5 Leigh, 649 ('33); Miller *v.* Insurance Co., 12 W. Va. 116 ('77).

There is nothing clearer than that the courts have never been satisfied to be tied down to a verdict. The first reported case that has come down to us, disclosing the determination to control the jury, other means having failed, by granting new trials, was decided in 1655, and shows that the practice was not then new. The new trial was asked for because of excessive damages in a slander case. It is there said:

"It is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them, and it is for the people's benefit that it should be so; for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the court; wherefore let there be a new trial at the next term."[1]

This attitude has been consistently maintained, but the courts have been generally, perhaps increasingly, more deferential toward the jury. Even those that most ruthlessly override it, purport in terms to recognize some very important and inviolable function belonging to it. This makes the decisions abound in a curious self-contradiction. For example:

"The grand principle which is at the basis of jury trial, is never to be lost sight of, that to all matters of law the court are to answer, to all controverted facts the jury. The verdict of the jury is practically to be taken for truth. . . . To render such a mode of trial safe and tolerable, there must exist a power somewhere to re-examine verdicts with some freedom, and when it is manifest that juries have been warped from the direct line of their duty, by mistake, prejudice, or even by an honest desire to reach the supposed equity contrary to the law of the case, it will be the duty of the court to set the verdict aside."[2]

[1] Wood *v.* Gunston, Style 466 (1655).

[2] Cunningham *v.* Magoun, 18 Pick. 13 ('36).

"And the district courts cannot shirk their responsibility by saying that the jury are the exclusive judges of all questions of fact. For, while this is true as long as the jury have the case under their consideration, yet, when the jury have rendered their verdict — then the judge himself becomes the exclusive judge of all questions of fact." [1]

"The facts of a case and the force and effect of testimony to support said alleged facts belong exclusively to the jury under the constitution, subject to no control — except the circuit judge, whose judgment is final." [2]

There is in fact a strange vagueness in the whole discussion of the matter. The only legal principle canvassed as the controlling factor is the right to have the facts found by a jury, and yet attorneys and judges but infrequently grapple pointedly with the constitutional question. The citations both ways are from the same jurisdictions, and they change sides without taking the trouble to overrule, or even to notice, the conflicting decisions. In places where reporting courts are numerous enough, as in New York and the Federal jurisdictions, they decide both ways simultaneously. Pleasants *v.* Fant, 22 Wall. 116, from which is taken one of the quotations with which this paper opens, though by no means the earliest, may be accounted the leading case for the doctrine that the question of which way the evidence preponderates, is one with which the judge has nothing to do. Late California decisions are its direct opposite for doctrine. Yet Ulman *v.* Clark, 100 Fed. 180, from which one of the quotations on the other side is taken, quotes the same passage from Pleasants *v.* Fant which is set out above, and then purports to follow both it and the late California cases in setting aside a verdict because the evidence "largely preponderates" against it. The lower Federal courts even later than this do not treat Met. R. R. Co. *v.* Moore, 121 U. S. 558, and Capital Traction Co. *v.* Hof, 174 U. S. 1, which in substance utterly repudiate Pleasants *v.* Fant, as really settling anything.[1] In fact no decision either way seems ever to have commanded any general attention.

But however indefinite and discordant the opinions, the result now is pretty uniform. The latest cases are very generally against the jury. In substantially all jurisdictions the stock instruction with which we started needs amplifying so as to run something like this:

"You are the exclusive judges of the weight of the evidence, of its credit and value. It would be a gross error for me to let you get the least inkling of how the facts appear to me; but if you do not happen to reach my conclusion, your verdict does not count. I have to set it aside, and keep summoning new juries, though it take ten years, and cost $10,000, till we do happen to get one whose minds work like mine, or one whose dominant spirit knows as much about the principal witness as I do, or one shrewd enough to surmise from what sort of verdicts get set aside, what sort will have to be rendered to amount to anything. With these qualifications it is for you to say what credit shall be given to the testimony of the various witnesses in this case."

And this transition in the law seems to have come about in this way. For some two centuries the courts, without quite realizing it, have been struggling with Broom's maxim about juries, or rather Coke's. That did not mean anything in particular.[2] It is the function of maxims to mean something in general, only. But it was in the air that the jury are the exclusive judges of the facts. So much in the air that our courts have assumed that it is

[1] Williams *v.* Townsend, 15 Kan. 563 ('75); R. R. Co. *v.* Ryan, 49 Kan. 1 ('92); C. R. I. & P. Ry. Co. *v.* Reardon, 1 Kan. App. 114 ('95).

[2] Agnew *v.* Adams, 26 S. C. at 105 ('86).

[1] Pringle *v.* Guild, 119 Fed. 962 ('03); Occid. C. M. Co. *v.* Comstock T. Co., 125 Fed. 244 ('03).

[2] "Law and Fact" in Jury Trials, 4 Harv. Law Rev. 147.

in the constitutions. This being taken for granted did not need to be verified. But when anyone did inquire what the jury trial was that is preserved by the constitutions, it has always been clear enough that:

"Trial by jury in the primary and usual sense of the term at the common law and in the American constitutions, . . . is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." [1] Blackstone, who was writing of the very state of the law which is embalmed in our constitutions, enumerates among the grounds for a new trial, "Also if it appear by the judge's report certified to the court that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith." He further says that the former strictness of law courts in granting new trials having driven many to equity for relief from oppressive verdicts, they are now more liberal in granting them, "The maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another." [2]

This doctrine has been reasserted at intervals ever since, though in early days applications for a new trial were not so multitudinous as now. Early in the last century England again brought it to the front rather emphatically by granting a new trial in an important case merely because the judge at the trial expressed a view contrary to the verdict, though to the reviewing court he reported himself not dissatisfied.[3] Tennessee pointed out that the trial court ought to be the more careful in enforcing the common law rule by granting a new trial when dissatisfied with the verdict, because the Appellate Court is not in a position to enforce it.[1] Georgia said squarely that the Constitution does not restrict the power of trial courts to grant new trials.[2] New York said: "While the general rule should be preserved, it would not be safe to assert the uncontrollable supremacy of the jury. Both in England and in this country, therefore, the court has always exercised the power of reviewing the evidence on a case made for the purpose, and of granting a new trial where, upon a cool and deliberate examination, the ends of justice seemed to require it." [3] But rather oddly none of these decisions seem to have made much impression beyond the immediate case.

Story pointed out early in the century that the provision of the Federal Constitution that, "The Supreme Court shall have appellate jurisdiction *both as to law and fact*," is one of the things that came near preventing ratification for fear it abolished jury trial in civil cases. So this was fixed by the 7th Amendment, providing expressly for jury trial in the federal courts, and that, "No fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law." [4] As late as 1887 the Supreme Court of the United States said this prevented the Appellate Courts from granting new trials because the verdict is against the weight of the evidence, as is frequently done in the state courts.[5] It looks as if the attention of the court in Capital Traction Co. *v.* Hof., 174 U. S. 1, may have been called to the true state of the law by the decision of Judge Taft in Felton *v.* Spiro, 47 U. S. App. 402 ('97), in which he points out that judges set aside verdicts as being against the weight of the evidence as early as Lord Mansfield, and

[1] Capital Traction Co. *v.* Hof, 174 U. S. at 13 ('99).

[2] 3 Blackstone, Commentaries, 387.

[3] Earl of Mount Edgecombe *v.* Symons, 1 Price 278 ('15).

[1] England *v.* Burt, 4 Humph. 399 ('43).

[2] Spears *v.* Smith, 7 Ga. 436 ('49).

[3] McDonald *v.* Walter, 40 N. Y. 551 ('69). To the same effect: Bishop *v.* Busse, 69 Ill. 403 ('73).

[4] Story, Constitution, 1763, et seq.

[5] Met. R. R. Co. *v.* Moore, 121 U. S. 558.

earlier, and hence reëxamination for a new trial on this ground is "according to the rules of the common law." As was said by the Supreme Court of California, it is a recognized part of trial by jury.[1] The long contest against the assumption by the court of power to interfere on the facts in "jury" cases, has been based vaguely on constitutional grounds. This objection being absolutely without foundation, there is no possibility of a reversal by the courts themselves of the present trend of decision on the point.

This means that as the law now stands, and has really stood for certainly one hundred and fifty years, the verdict of a jury in a law case is merely advisory to the court, exactly as when he voluntarily calls in a jury in an equity case, except that he has not the power to ignore the verdict and enter immediate judgment, but must go through the form of summoning new juries till he finds one that agrees with him as to the facts.[2] This is thoroughly absurd. So absurd that some courts have sought to mitigate it by holding that when juries prove obdurate, and persist in bringing in successive verdicts the same way, the court will surrender after two or three trials.[3] This seems to be abdicating on the part of the courts, and is apparently not permissible. Statutes purporting to authorize such practice seem even more dubious. It is a straddle anyhow. and does not affect the fact that we need to decide whether we want the facts to be settled by the jury or the judge.

[1] Ingraham *v.* Weidler, 139 Cal. 588 ('03). To the same effect: Bird *v.* Bradburn, 131 N. C. 488 ('02).

[2] One recent instance where the court with apparently unconscious sarcasm calls this process getting the facts determined by the "proper tribunal" is, McDonald *v.* Met. St. Ry. Co., 167 N. Y. 66 ('02).

[3] Slocum *v.* Knosby, 80 Ia. 368 ('90); Clark *v.* Jenkins, 162 Mass. 397 ('94); Hyde *v.* Haak, 132 Mich. 364 ('03); Van Doren *v.* Wright, 65 Minn. 80 ('96); Haven *v.* R. R. Co., 155 Mo. 216 ('99); Milliken *v.* Ross, 9 Fed. 855 ('81); Foster *v.* Steele, 3 Bing. N. C. 892 ('37). Cf., Graham & Waterman, New Trials, 1366.

Trial by jury has a powerful hold on the feelings of lawyer and laymen alike. But notwithstanding the slow progress of the idea hitherto, it does seem that we have reached a point where lawyers, at least, must come soon to a realization of the fact that the institution we are so proud of is very largely imaginary, and very ill adapted to its present purpose.

In the first place, we deceive ourselves in talking about the antiquity of the jury. While it is true that the institution can be traced back more than a thousand years with a certain amount of historical continuity, what was called a jury a thousand years ago was pretty nearly the opposite of the jury of recent times. In its beginnings the jury was a cautious attempt at a mitigation of barbarism. Litigation, if we may use the term, was chiefly of a criminal nature, and involved directly personal liberty. The first juries were a considerable, but indefinite number of citizens best posted as to the facts, who were assembled as a sort of town meeting to decide what, on the whole, had better be done under the circumstances; and to bring some pressure, at least of public opinion, to bear on the parties to induce them to acquiesce in the conclusion of the "jury," instead of fighting it out.

It appears from Fortescue, who wrote his *De Laudibus Legum Angliae* about 1470, that the quality of jurors as witnesses was still the chief thing in his day. It appears from Bushel's Case,[1] which ended the coercion of jurors by fine, that they could still render a verdict on their own knowledge in 1670. The late Prof. J. B. Thayer, than whom no one is better authority on such a point, says it was not until R. *v.* Sutton, 4 M. & S. 532 ('16), that the true quality of jurors became just reversed, and it was required that they know nothing about the facts, instead of as much as possible.[2] So we are not using language with much technical precision if

[1] Vaughan, 135.

[2] See his sketch of the history of the jury in 5 Harvard Law Review, at 385.

we apply the term jury trial to anything more than, say, two hundred and fifty years old. But we need not go back further than this to discover the source of the exceptional pride in and admiration for trial by jury. At a time when the crown was all-powerful, the aristocracy the only people, parliament corrupt, the judiciary servile, the church established, the press feeble and censored, public meetings suppressed, the jury was the one place where common people got the slightest opportunity to make themselves felt in public affairs. And the way they stood out against king, and noble, and church, and judiciary, and the only public opinion possible in such a civilization, and made an ever increasing place for common people and common rights as against the privileged, was very astonishing and very magnificent. But the real ground for their glory was much more political than juridical.

Trial by jury was never consciously studied out and adopted as the expedient and practical method of ascertaining the facts in technical legal proceedings. It "just growed." At a time when most litigation had rather a criminal cast, when only the simpler and more obvious offenses were taken notice of, when we were just beginning to get away from the régime of self-help and to recognize the State as the party primarily injured, and when, therefore, the mitigating circumstances were reasonably entitled to more weight, and both the expediency and the practicability of rigorously enforcing the penalty were more doubtful, the actual results of leaving the matter to a sort of town meeting were tolerably satisfactory. But that transition was effected a long time ago. The relative importance of civil litigation as compared with criminal has been steadily changing, and is now at least reversed. In the last century or two, and particularly in the last fifty years, the amounts involved in litigation, and the reach of the effect of decisions, have been enormously extended. The variety, and the complication, and the technicality, of the facts involved in modern litigation, have put the ascertainment of them in many cases simply beyond the capacity of any tribunal with no extensive education, no sort of familiarity with large affairs, no experience in weighing testimony or witnesses, and no training in continuity of attention.

On the other hand, it is clear that a modern jury is not usually as representative of the community as in former times, We still want a jury of the vicinage, but we want them not to know anything about the facts. Under modern conditions, freedom of motion, frequency of public meetings, and the indefatigableness of newspaper reporters, exclude from the jury all but the inert, secluded, ignorant, non-readers. The tension of modern life makes jury service a much more serious interruption of business than formerly to the class that are really representative of the community. Possibly, too, the increasing contempt for jury service on the part of those whose active participation is imperative, if the work of the jury is to be respected, is enhanced by at least a partial comprehension of the essentially farcical position occupied by a numerous and imposing tribunal, summoned at much inconvenience to themselves, to a task absolutely out of their line, which they are poorly fitted to perform, and which, however well they do it, is either mere surplusage because they reach the same conclusion as the trial judge, or is an utter nullity because they reach a different conclusion.

Then, too, the chances of unanimity are increased the greater the common ground among the jurors, whether of race, or nationality, or politics, or religion, or occupation, or financial standing, or other promoter of sympathy and common point of view. In all these respects as well as in education and in aggressive independence of personality, there is more diversity among jurors than formerly. And the "hung" jury causes the

same increase of expense and delay as the wrong verdict. Moreover, under code pleading, the issues for the jury are something very different from the narrow, concrete fact which common law pleading brought up to them; different both in number, in generality, and in the necessary commingling of law involved in the generality. This adds enormously to the difficulty of the task for an untrained tribunal. So it is not strange that the results of jury trial grow steadily more unsatisfactory.

This final denial that the jury are the exclusive judges of the weight of the evidence, does not mean that trial by jury in civil cases has been abolished. It is a reassertion of a long established power of the courts, and is the only thing that has made jury trial endurable for the last fifty years. We have only just found out what trial by jury is, and got the real thing fairly well established. But now that we know what it is, we do not like it, and it ought to be abolished as soon as possible. Obviously that is not very soon, unless the people generally can learn faster than the lawyers.

One mitigation may, perhaps, be compassed by the influence of bench and bar long before it would be practicable to carry constitutional amendments enabling us to abolish the jury. It is perfectly clear that the jury trial preserved by the constitutions included the right of the trial judge to comment on and analyse the evidence, and indicate the salient points, and tell the jury how it appeared to him, as is done in England to-day, and in our Federal courts and in some state courts. The statutes forbidding it are obviously unconstitutional,[1] and the way they were given free sweep and no opposition is another comment on the universality and persistence of the misapprehension as to the relation of courts to jury trials. If the courts cannot now hold these statutes bad, perhaps they can be repealed. This would help some, because perverse verdicts are not the main trouble. A man with the judge's training in seizing the main point, in "sizing up" witnesses, in holding onto the thread, can be of great assistance to the jury; and the jury is generally very willing to be assisted. Illinois long ago suggested this remedy, going in fact a little farther than is here advised.

"If a verdict is to be overthrown because it does not entirely correspond with the judgment of the court, we had better abolish the trial by jury altogether, or at least *require* the judge to tell the jury precisely and distinctly what his opinion of the case is, and require them to find accordingly, and thus save the expense of a second trial."[1]

The trouble is, that requires amendment of the constitutions as much as the other solution. But restoring the power of the court to *advise* the jury what verdict to return, besides getting some additional cases disposed of without two or three trials, and besides appearing still to preserve the "palladium of our liberties," would in fact bring out the absurdity of having a jury merely to *advise* the *court* what the facts are, in a way that would certainly hasten the time when the voters would consent to abolish the jury. But that this is no complete solution of the difficulty, sufficiently appears from the fact that England, where this practice has always prevailed, is even ahead of us in getting disillusioned as to the value of the jury in civil cases under modern conditions.

The retort that it is idle to talk about abolishing the jury until some satisfactory substitute is proposed, comes simply from the survival of the old idea that the jury now performs some function. The proposal is merely to cut out an expensive, tedious, error-breeding survival, now obsolete. This leaves us, so far as effective machinery is concerned, just what we now have. Advising the elimination of an incumbrance does not of itself impose any special responsibility for suggesting improvements.

Jury trial brings certain incidental and

[1] 23 Am. Law Rev. 781 ('89).

[1] Kincaid *v.* Turner, 7 Ill. 618 ('45).

secondary advantages of considerable importance, which assist in blinding us to its failure in its primary purpose. It is the most effective means we have for giving ordinary citizens any actual share or interest in the administration of justice. It gives them some vivid understanding of their personal and civil rights. It shows them how difficult a matter it is to arrive at exact justice, and makes them more intelligent as to the function and success of courts. It furnishes some preparation for their duties in selecting judicial and prosecuting officers. It broadens the horizon and the acquaintance of some who have little other occasion to deal with things or with men of much moment. It protects the court somewhat from the anger of disappointed litigants, and from the envy and malice of professional rivals, and from charges of partisanship in certain political and factional cases, to the considerable increase of his total efficiency. But changed conditions have lessened most of these secondary advantages. They pretty nearly vanish when we can no longer blink the fact that the whole jury juggle is essentially a sham. They cannot begin to atone for the fact that jury trial adds atrociously to the delay, and the expense, and the uncertainty of judicial proceedings.

Some of these advantages can be measurably retained by allowing the judge, and perhaps the parties, in certain cases, to call in a "special" jury of, say, three to find the facts, or certain specified facts. By special is meant that they need not be chance jurors, but persons having some peculiar competence for the task required. In some classes of cases the facts are simple: the questions can be put with precision, and separately from the law; and their answer requires rather familiarity with common things and with human nature, than any special knowledge or experience. Among such have been mentioned cases based on negligence, defamation, personal injury, fraudulent representations, and common usage. On these it is possible that a jury is a trifle more likely to be right than a judge, and he might well have the option to call such a jury.

As to the number three, we can offset the reasons for having twelve because there were twelve tribes, twelve apostles, twelve months and so forth, with the three Fates, three Graces, three persons in the Trinity, and other equally weighty and relevant reasons. Besides, it is at once the largest number that will keep down the present delay and expense in obtaining a jury, preserve individual responsibility, and prevent tie votes; and at the same time the smallest number that will minimize the risk of individual peculiarities and idiosyncrasies. It is the number that the business world in fact resorts to for the arbitration of questions they are afraid to trust to twelve.

There is, of course, no really logical reason for discussing jury trial in civil cases, as distinguished from criminal cases. In fact from a pedantic logical point of view it is a little more absurd in criminal than in civil cases. It is settled that, if a defendant is acquitted, the court has nothing to say; while if he is convicted, the judge may set the verdict aside. "Heads, the accused wins; tails, the state loses!" Courts have had the courage of their convictions and directed a verdict of guilty.[1] Juries have been independent, and convicted when the court told them to acquit.[2] But such verdicts are not allowed to stand. The right to render a general verdict of guilty or not guilty, gives the jury in a criminal case the power, if not the right, to judge both the law and the facts. This *prima facie*, is much less rational than making the court judge of the law and the facts.

But this decision of criminal cases is nearer to the original function of the jury; and on the whole they perform it better. Sometimes they ignore or override the law; and sometimes such conduct constitutes a

[1] U. S. *v.* Taylor, 11 Fed. 470 ('82).

[2] People *v.* Knutte, 111 Cal. 453 ('96).

serious miscarriage of justice. But sometimes it merely means that rigid, universal rules, when applied to a variable and incalculable thing like human nature, do not always fit; that it is practically impossible to frame a safe general rule that will yield justice in all conceivable circumstances; and here is one of the cases where, on the whole, there had better not be any further punishment by the State.

While we are getting away from the notion that any sort of a tribunal, if only it is numerous enough and "common" enough, will yield results marvelous for justice and wisdom, still the opposite of this, "personal government," suits us still less. We want "a government of laws, and not of men." We do not want the laws framed so that the judge may apply them, or not, as he thinks expedient; and yet we do not want them applied when the net result is wrong. For a concrete and identifiable person like the judge to ignore or override the law would be very shocking, and tend to anarchy. But for a nebulous, impersonal, shifting, evanescent tribunal like the jury to do the same thing is merely one of the accidents of jury trial. It is difficult to put the blame on anybody in particular, and no one attempts to place the blame when the actual result is not seriously objectionable. In short, we are rather content to have a jury on hand to "take up the slack," or give a little freer play to the legal machinery, as may be needed; and to get this we are willing to tolerate some blundering and some perversity.

As has been said, we are pretty nearly past the stage where it is possible to convict any innocent person; the query now is whether we can convict any guilty person. This situation is not satisfactory; but both because it is harder to remedy than is the case with civil proceedings, and because it is the public that is hurt and not definite individuals, the abandonment of the jury in criminal cases is farther in the future. It is practical, if not logical, to consider the matter in its civil aspect separately. If we do reach a point where we want the criminal law enforced as it stands we can get it done by having such a jury, as was suggested for civil cases, answer special questions, instead of returning a general verdict, and leaving it to the court to apply the law.

If the reaction from democracy goes far enough so that we will tolerate it, a slight extension of the maximum and minimum penalty idea will put it in the "discretion" of the judge to say whether the particular case in hand is not so far exceptional that the law does not apply. It grinds a little now to have any mere man say what we shall, or shall not do. But the golden mean is somewhere between a government of laws and a government of men, and a good deal of legal reform lies in the direction of giving the judge a larger discretion. This ought to assist some in securing a cordial recognition of the fact that it is the judge and not the jury that really determines the facts.

It is entirely possible that a legislator who proposed frankly to abolish the jury in civil cases would find that the opposition is largely imaginary. If we recall that business is done very satisfactorily without a jury in habeas corpus cases, and in chancery, probate, admiralty, and bankruptcy courts: that it is voluntarily waived in, perhaps, half the civil cases where it might be insisted on, and in many criminal cases; that Scotland has abandoned it; and that we have pretty generally abandoned the grand jury because it is an absurdity as a means of discovering and apprehending criminals in an age of newspapers, telegraphs, telephones, and lightning expresses, it is clear that the maintenance of the petit jury in civil cases is not vital to civilization; and it may be that reformers only need the courage of their convictions to get it speedily dropped.

TOPEKA, KANSAS, May, 1907.

ANCIENT MORTMAIN AND MODERN MONOPOLY

By Richard Selden Harvey

PART I — MONOPOLY

At the inception of this account of one form of what a recent work has characterized "the greatest of all mediæval problems, the relation of Church and State," it will be wise to define the meaning of mortmain, and the Century Dictionary has supplied this in the words following, "Possession of lands or tenements in dead hands, or hands that cannot alienate, as those of ecclesiastical corporations."

This declaration of the meaning of the Norman-French law term, should not be accepted without a protest that the true intent implies that the "dead hand" is unwilling rather than unable to alienate the riches once acquired and firmly affixed among its treasures. Sir William Blackstone travels somewhat afield in discussing this very subject, and after expressing his disagreement with Coke's views therein, evolves the theory that the name is due to the character of the recipient, *i.e.*, a religious body, who were "professed" and accordingly "were reckoned dead persons in law."

But whatever the exact definition and whencesoever the derivation — the fact remains that within one century after the Conquest, to wit, in 1122, the Church was the largest land owner in England, and on the authority of Hallam, "possessed nearly half the lands of Europe."

A century later, in the middle of the thirteenth century, the envoys from England at the Council of Lyons, in a solemn remonstrance, assert that the Church drew from their realm a yearly sum far exceeding the royal revenue.

These statements have sufficed to show the magnitude of the vested interests of the Church at the period named, and of the formidable task presented to any state or order undertaking to limit or curb such transcendent power, and it may, perhaps, be permitted to turn aside from the general theme for a moment to inquire the source of such vast wealth.

Of the British Church under the English and Danes, we know little outside of the pages of Bede in his "Historia Ecclesiastica Gentis Anglorum."

St. Columba, Augustin, and Theodore each exercised his influence in the establishment of the English Church, which was in full force before the year 700. The system was largely monastic, and as we know from Bede, the discipline was often of the laxest kind. Furthermore, the relation to the State was always very intimate, up to the time of the Conquest, and this in turn made the Church secular and political.

Edward the Confessor viewed this tendency with concern, but his remedy was not without its defects, for by forcing foreign ecclesiastics into the higher dignities of the Church, he aroused mistrust and hatred on the part of the people, at the same time that he infused new energy and loftier ideals into a decadent institution. Foreign influence did in time prevail, but only after the fiery trials and deep humiliation attendant upon the then impending Conquest.

This invasion, indeed, partook in a large degree of a religious movement. It has been called "a crusade before the crusaders," and the host assembled under William was blessed by the Pope, and the cause included among its objects a change in the ideals and the personnel of the English Church; indeed, William was pledged to that course. But while these facts interest us, they are potent only to explain the new element which became dominant in things ecclesiastical — they do not show the sources from which the Church derived its vast wealth. This we will now explain.

That the acquisition of property by the clergy was a settled policy, throughout the Christian world, except in the earliest times, cannot be gainsaid.

Blackstone says on that point:

"But, though the being the spiritual head of the Church was a thing of great sound, among men of conscience and piety, yet the Court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore its attention began very early upon every method that promised pecuniary advantage."

Perhaps the most clear description of the machinery by which this prudential design was made effective, is found in Hallam's "Middle Ages." The following is from that work:

"Large estates, or, as they were termed, patrimonies, not only within their own dioceses, but sometimes in distant countries, sustained the dignity of the principal sees, and especially that of Rome.

"But it must be remarked that many of these donations are of lands uncultivated and unappropriated. The monasteries acquired legitimate riches by the culture of these deserted tracts, and by the prudent management of their revenues, which were less exposed to the ordinary means of dissipation than those of laity. If the possessions of ecclesiastical communities had all been as fairly earned, we could find nothing in them to reprehend. But other sources of wealth were less pure, and they derived their wealth from many sources. Those who entered into a monastery, threw frequently their whole estates into the common stock; and even the children of rich parents were expected to make a donation of land on assuming the cowl.

"Some gave their property to the Church before entering on military expeditions, gifts were made by many to take effect after their lives, and bequests by many in the terrors of dissolution. Even those legacies to charitable purposes, which the clergy could with more decency and speciousness recommend, and of which the administration was generally confined to them, were frequently applied to their own benefit."

Continuing, the author next dwells upon that source of wealth which in all ages the sacerdotal power has wielded with mighty results, *i.e.*, the superstitious fear of the hereafter.

"They failed not, above all, to inculcate upon the wealthy sinner that no atonement could be so acceptable to Heaven as liberal presents to its earthly delegates. To die without allotting a portion of worldly wealth to pious uses was accounted almost like suicide, . . . and hence, intestacy passed for a sort of fraud upon the Church, which she punished by taking the administration of the deceased's effects into her own hands."

Whatever of truth there may be in the ancient adage, "To be executor is better than to be heir," there is no doubt that a substantial legacy was often interlined in those proceedings.

But on the other hand, it must be stated that their management of these vast properties when as we have seen "they did enjoy, according to some authorities, nearly one half of England," was not without its advantages to the realm. The same authority tells us that "The devastation of war from the fifth to the eleventh century rendered land the least costly of gifts, though it must ever be the most truly valuable and permanent.

"Many of the grants to monasteries which strike us as enormous, were of districts absolutely wasted, which would have probably been reclaimed by no other means. We owe the agricultural restoration of a great part of Europe to the monks. They chose, for the sake of retirement, secluded regions which they cultivated with the labor of their hands." W. H. Hutton, in "Social England," says, "Even in 1130 the land lay waste round York for a breadth of

sixty miles. It was the monks . . . who turned the wilderness into a fruitful field."

So much for the means — some creditable, others disreputable — whereby one half of the richest kingdom of Europe passed under Churchly control.

The great and far reaching effect of this preponderance of influence is readily seen. It enables the Church at times to stand for the rights of the people, and as in the case of William Rufus and Henry II, to keep in check natures so arbitrary and cruel as to brook no control founded on right or reason, when it conflicted with their own love of power. This influence certainly made for good; but there were other departments where the great extent of Church property endangered the state, as in the time of Edward III, 1377, when, as Hume informs us, "The taxes levied by the Pope exceeded five times those which were paid to the King." Thus, too, in the matter of raising an army, the possession of vast tracts of territory by clerics, was a distant element of weakness.

Not only were the monks and the parish clergy — numbering in all some forty thousand souls, about one-fifth of the total population — exempt from service in war, but their lands were not required to provide a proportionate quota of the knights and armed retainers who together made up the armies of the feudal system. For the whole system was founded upon such an apportionment, and whoever will look into the "Doomsday Book" will see how carefully the Conqueror defined the burden which each manor or other estate was obliged to bear in the national defense.

As an indication of the generalness of such armament, in 1252 all holders of forty shillings in lands, were expected to equip themselves with "a sword, dagger, bows and arrows." The preponderance of Church lands did therefore constitute a distinct menace to the State, by withdrawing a great source of men and supplies in time of public peril.

Nor was this all. The exchequer of those days, as now, was in large measure dependent upon the taxes collected at time of death, and on stated occasions, such as marriage, knighthood, etc., for the support of the nobility and of the government. All or most of these sources of income were cut off, where the title became vested in "dead hands." The Church being a corporation, property once passing into its control was lost to the State, for many purposes. It was this feature which brought about the first statutes of mortmain, and which led to a general policy of restraint — "for that," in the quaint language of Coke, "a dead hand yieldeth no service."

In Saxon England, it appears probable that some sort of license was required to authorize a conveyance to the Church, though this provision seems to have been little enforced.

Frederick Barbarossa was the first European monarch to limit, in 1158, the right of transfer of fiefs to the Church, though Louis IX. afterward passed similar enactments, and such a restriction was enforced in Castile.

The Barons included a like provision in Magna Charta, in 1215, and this clause in time was construed to prohibit all gifts to the religious houses, without the consent of the lord of the fee — "And by the seventh Edward I," says Hallam, "alienations in mortmain are absolutely taken away."

In Blackstone there occurs this tribute to the ablest of England's kings, and to his attempt to stay a great abuse: "Edward the First, who hath been justly styled our English Justinian, . . . effectually closed the great gulfs, in which all the landed property of the kingdom was in danger of being swallowed up, by his repeated statutes of mortmain; most admirably adapted to meet the frauds which had been devised, though afterward contrived to be evaded by the invention of uses."

This subject of "uses" not only introduces a novel and most interesting chapter in the

subject before us, but marks the termination of the first stage of the conflict between the Church and the State.

Thenceforward, the Church, defeated in its effort to add to its already vast accumulation of lands, was obliged to yield the point of actual ownership, and through a legal trick and device, content itself with the income and profit of real property held, it is true, in the name of an individual, but with the "use" thereof vested in the ecclesiastical beneficiary.

Thus the struggle changed from a contest for the physical and open mastery, to a contest in which all the arts of the ablest counsel of the day were employed in securing secret benefits — a trial of wit rather than of strength, which extended from the passage of the statute of mortmain, 1279, to the Mortmain Act of George the Second's time, 1736, prohibiting all secret conveyances for charitable purposes.

The efforts of the State to protect its powers and prestige against an institution so powerful as the Church, — including as it did the immense vested interests, the naturally pious instincts of the English people, and with the authority of the Vicar of Christ always in the background, — now instituted a contest which seems like the struggles of Laocoön, or the mad heavings of trained wrestlers.

At first, the statutory power seemed to prevail, but the subtlety of able men, schooled in the sophistries of Norman law, discovered means to evade the plain mandates of the law. The Church felt that its most vital interests were at stake, and to quote the language of Sir William Blackstone in this connection, "The aggregate ecclesiastical bodies (who, Sir Edward Coke observes, in this were to be commended, that they ever had of their counsel the best learned men they could get) found many means to creep out of this statute." In this instance, the means of evasion were "uses," later known as "trusts."

By the same authority, we know that this subterfuge was introduced into England "about the close of the reign of Edward III, by means of the foreign ecclesiastics; who introduced it to evade the statute of mortmain, by obtaining grants of lands, not to religious houses directly, but to *the use of* the religious houses; which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience."

"But," as we learn further, "unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device."

The Statute 15 Richard II, Chap. 5., met this move by a counter-attack, whereby all "uses" were declared equally with the lands themselves, liable to the forfeitures and penalties of the mortmain statutes.

Again the acute minds of the lawyers of the ecclesiastical institutions were requisitioned, and by adding another link in the chain, *i.e.*, a use to one person, to the use of another, to the use of the Church, an excuse was offered the willing chancellors of those times to hang thereon a decision that land could thus be safely and effectually transferred for pious purposes.

This new invention was not easily met, and the Church may be said to have seen its star in the ascendency, until it was extinguished by the light which lurked in the eyes and radiated from the smile of gentle Anne Boleyn — an infatuation no less fatal to the temporal interests of the Church than to the fair recipient of Royal favor.

That impulsive monarch, Henry VIII, would brook no opposing influence near his throne, and the world can read in the title deeds of many abbeys and manorial estates a record of what befell the ecclesiastical powers of that day, when the Church set itself against his untenable but apparently honest effort to divorce himself from Catherine on the ground of her affianced relations to his deceased brother.

Before this onslaught had run its course, one third of the best lands of England and

Wales had been confiscated, to satisfy the anger of the king and the cupidity of the courtiers. It is said that twelve million acres in all were thus seized, constituting the former endowment of six hundred and forty-five monasteries, ninety colleges, and one hundred and ten hospitals, an array which indicated the strength of the Church in former times, when it was reënforced by popular sympathy and support.

Not satisfied with wholesale confiscations which left the Church humiliated and prostrated, and disparaged at home and abroad, laws were enacted to prevent the return of the sequestered estates to churchly hands. Not only were the older provisions relating to "mortmain" strengthened and enforced, but in 23 Henry VIII, Ch. 10, it was declared that all future grants of land (to uses), if granted for any longer term than twenty years, should be void.

Some blazing up of the embers there was at occasional intervals, but the power of the Church to oppose was largely spent. The munificent gifts with which the pious fervor of the faithful had equally displayed itself in endowments at home and in the Crusades abroad, could no longer be expected in a cooler and more material age.

The inmates of the vast institutions which had provided always generously, often profusely, for all who asked in God's name, were beggared, and cast abroad into a practical and unsympathetic world. The very acres which were once tilled by the monks or by their tenants, for the Church's benefit, now poured their stream of rentals into the laps of adversaries, and these resources were at command to protect the title of the usurper. The Church had defied the State, but the combination of a doting monarch and the wave of religious unrest culminating in the Reformation, had brought about a deadly "trial by combat," and the State had won.

It is true that under Philip and Mary, the enforcement of the mortmain statutes was suspended, and under the mild reign of Edward VI, there were conscientious waverings on the part of the Crown, in maintaining the aggressive position assumed in the time of "Bluff King Hal." These things, though time was all the while making the rights of the occupants of Church lands more adverse and secure, afforded the ecclesiastics some signs of relief; but with the coronation of Elizabeth, Protestant daughter of a Protestant queen, the last glimmer expired, and the mediæval struggle — that grappling of titans to win a moiety of the "Garden Isle" — was near its close.

It is true that some final acts remained to effectuate the completeness of the overthrow.

In the time of George II, in 1736, the last of these laws, the Mortmain Act, was written on the statute books; but it was an act of supererogation. It was "killing the already dead." The pride and power of churchly possessions had fled, and these final acts were but inscribing the mortuary lines.

The State is supreme!

Happily for us in America, no part of this struggle has been felt on these shores. The laws of mortmain were and are contained in the law as handed down to us from Colonial times (2 Kent's Com., 272), but while we share in the benefits, the contest itself was a part of an earlier era than ours.

PART II — MODERN MONOPOLY

Modern monopoly is not merely a phrase; it is a situation. He can but poorly read the sign of the times, who does not recognize in the continual uniting of interests, an era of combination which must, humanly speaking, have only one termination — monopoly.

Let us pause for a moment to scan the field about us, and see the transition as it is progressing before our eyes. Perhaps the most tangible object lesson is the United States Steel Corporation.

Fifty years ago, when individual furnaces were turning out pig iron, which was either sold to some jobber in Pittsburg or Cleveland or elsewhere, or corded up beside the furnace, to await a favorable turn in the market, the investor relied upon the vicissitude of trade for the single profit which was his sole reward. The sailing vessel upon the Great Lakes, or the local railroad, carried his product to the distributing point, and in time, it percolated into the establishments where it became the material for plows, nails, wire, engines, and all the legion forms which modern life requires in the employment of metal.

When trade was brisk, and the demand created good returns, numerous furnaces were "blown in," and their fires lighted the hilltops throughout the mining regions. Such an output quickly equaled, then surpassed the needs of the country, and with the first approach of depression, the weaker companies ceased work, and the larger and stronger heaped up a surplus of output which in turn had to be "carried," if it did not over-weigh and break down the owners before the advent of a renewed demand.

Thus it was "feast or famine," and capitalists who were not adventurous were more attracted to safer if not saner, means of investment.

To-day we have the modern corporation, with its ownership of a whole range of iron mines, with a further range preëmpted and held in reserve; a fleet of steamers solely engaged in carrying the ore to the receiving port, with colossal equipments at the termini for loading and unloading these crafts in a marvelously short period of time; railroads to haul it to the vast plants, where it is not only turned into staple forms of pigs or ingots, but is transformed into wire, tubing, girders, rails, and many of the finished products which the builder or the railway requires.

The output is adjusted to a nicety to the demands of the year or season, and the price, if not controlled, is at least regulated for its competitors as well as for itself, — to the general benefit of all who must figure upon an element of stability in prices, when computing the cost of structural iron or steel.

It must be recognized, we believe, that in comparing the old system with the new, no element of rancor over changed conditions has been permitted to enter into this brief epitome; and that full credit for the element of stability has been accredited to the latter phase of the subject. With no discount for the loss of individual effort — which certainly *is* an element in the upbuilding of the American character — and with no antagonism against mere size, as such, it must be maintained that the result is in effect monopoly, and must be approached and treated of in that way, or the whole subject is seen in a partial and distorted light.

The recent developments of an investigation into certain of the railroads of the United States, have disclosed the ownership by one system of the control or of a substantial interest, in supposedly competing lines extending from ocean to ocean, and from the wheat fields of the Canadian Northwest to the Gulf and the Mexican frontier. Like conditions prevail in mineral oil, in coal, in lumber, in flour, in the meat trade and even in such domestic *minutia* as butter, poultry, and eggs, in connection with the cold storage establishments.

To localize the view point, what is the situation in and about Greater New York, the metropolitan city of the New World?

The means of transit, excepting in Brooklyn, is now so far united that whether the traveler takes his way from home to office by the elevated, surface, or subway routes, his fare is transferred into the same ultimate fund.

Gas and electric companies are substantially one; the telephone is unquestionably a field where competition is unknown; "independent" ice companies exist only in name. The river steamers and the coast-

wise lines to Boston and to southern ports are among the latest arrivals in this procession of "combinations." "Chains of banks" controlled from a central office exist merely as branches, where time-honored institutions formerly embodied the life efforts of distinguished financiers, and endeavors to divest the management of two of the "big three" life insurance companies from the old régime, seem destined to be futile, and to leave these institutions in the list of virtual monopolies.

Like influences are at work in other centers, but space and time do not permit us to carry our illustrations into other fields. Enough has been given, and "enough is as good as a feast."

The age of consolidation, and whether intentional or otherwise, the era of monopoly, is upon us, and like "good men and true," we must gird up our loins, and with Fabius of old, we must "cease not to think hopefully of the Republic."

PART III — COMPARISON

Whether we do or do not agree with the radical statement of a recent speaker before the Economic Section of the American Association of Scientists, that one per cent of the population of the United States controls ninety-nine per cent of its wealth, it is past denial that skill and daring, coupled with the opportunities of great combinations of capital, have enabled those fortunate possessors of ample means to increase their holdings out of proportion to the accumulations of the middle or the working class.

The recourse of the people is in their political power, and in the regulations which can in that way and in that way alone, control, and as it were, *harness*, this mighty force, and compel it to work for the common good.

Subterfuges and devices will be invented and brought into use, but the political power which could curb and subjugate an influence so potent as the Church, entrenched behind the conservatism of vested rights and aided by all the terrors which superstition has at command, will in the end prevail.

It is only necessary to be vigilant, to be courageous, to eternally "think hopefully of the Republic;" and to believe that the solution of this problem forms one phase of the Divine plan, in which we each fill some, though it may be an insignificant part.

New York, N. Y., May, 1907.

THE ABOLITION OF CAPITAL PUNISHMENT

By James H. Vahey

NO question, aside from economic ones, has received as much attention, or been so thoroughly discussed in Massachusetts in the last twenty-five years or more as the abolition of the death penalty.

The prejudice against a change in the law, which now permits the punishment by death, arises from a variety of reasons. One is lack of information on the subject; another is the old theory that capital punishment is Bible inspired; and a third is an unreasoning fear that the abolition of the death penalty will increase the crime of murder. On the other hand a large number of people believe: first, that the state has no right to take life; second, that not only is capital punishment not Bible inspired, but is directly contrary to all the teachings of that great Book. If we were to adopt the old Mosaic law in all its severity, and to invoke those passages of the Bible which seem to breathe a spirit of vengeance, we would again have a code of blood. No one would now contend that we again go back to the Mosaic code, with all its harshness and its rigor, for the punishment of offenses which existed at that time.

In the time of George II of England, two hundred and twenty-three crimes were punishable by death. Cursing one's parents, Sabbath breaking, blasphemy, and picking pockets, were all capital offenses. It has not yet been contended by anyone that the abolition of the death penalty for these crimes has increased them. In proportion to the increase in population, it is gratifying to note that crimes of this character are decreasing.

I am one of those who believe that the commonwealth has no right to take life. I assert that an irrevocable decree requires an infallible tribunal; that, so long as mankind is liable to err, and human processes to fail, society has no right to put itself beyond the power of rectifying any wrong which it commits. Measured by human tests, many a man has suffered the punishment of death when a large number of the community believed in his innocence.

Robert Rantoul said, in his great report to the legislature of 1837, that all government, at best, was a necessary evil. In a pure form of democracy, no government would be necessary. Any submission to a higher human authority is an admission of weakness, proneness to err, and inability to refrain from committing crime. I am aware, however, that it is not of much service, practically, to urge this belief at the present time, although I hope we may look into a future not far distant when this will be the accepted view of the commonwealth.

Neither can the advocates of capital punishment urge that there is any reason for the infliction of the death penalty because of vengeance. The logical argument, if this were true, would be that those nearest to the victim of a murder should themselves have the power to revenge the wrong, the result of which would be an absence of law and order, and anarchy would reign.

The only practical way in which the death penalty can now be discussed is its value as a deterring influence upon those who are criminally inclined and might not otherwise refrain from committing the crime of murder. What deters men from committing murder? Is it the certainty of punishment, or the severity of it? Does not every criminal believe that he will escape the consequences of the law, no matter what they are? Is not every man who takes the life of another so overcome by the passion that is upon him at the precise moment of killing, whether it be anger, envy, malice, jealousy, lust, or the desire

for gain, that he does not think of consequences, and the punishment is the last thing that is in his mind?

The history of England will greatly aid the student of the philosophy of crime. An English clergyman talked with one hundred and sixty-seven men who were sentenced to death. Out of that number all but three had witnessed executions.

It is also related upon good authority that a certain man had been executed for counterfeiting. His body was turned over to his wife and friends. In the very house where his dead body lay, his wife and his confederates were discovered using counterfeiting machines for the purpose of making money, and when the police raided the house, his wife was discovered in the act of thrusting the counterfeit bills into the mouth of her dead husband.

It is also related that, in olden times, picking pockets was a capital offense; that while executions were taking place upon the mountain side, in the presence of a vast number who had come from the country all around to witness the great festival, and while the prisoner's body was actually swinging from the gibbet, pickpockets were plying their nefarious trade on the outskirts of the multitude.

It is very patent to the ordinary observer who gives this matter but slight reflection, that a law has no power to deter a man from committing the crime of murder if, at the very moment of committing it, he is witnessing an execution for an exactly similar offense.

Another strong reason for the abolition of the death penalty is the present difficulty of securing the conviction of men accused of the crime of murder. Statistics show that, in Rhode Island, where the death penalty has been abolished, sixty-three per cent of those accused of the crime of murder are convicted, while in Massachusetts only seventeen per cent are convicted. This is due to the aversion of the ordinary jury to sentence a man to death, which is exactly the meaning of a verdict of murder in the first degree.

The tendency of the law has been to help the weak and prevent crime rather than to punish offenders. A notable illustration of this is the Massachusetts probation system. The prison population of this commonwealth, five years ago, was eight thousand; to-day it is sixty-one hundred. One of the crimes which was formerly punished by death, namely, adultery, is now most frequently not punished at all, but the offenders are placed on probation.

We should learn to construe our laws upon the principles of reason and from a knowledge of human nature, instead of constantly copying what was intended for a character unlike our own, it is our duty to imitate our forefathers in the great trait of their characters, the courage of reform.

I believe that a large majority of the people of Massachusetts want the death penalty abolished. It is not because of any sympathy for a murderer, but to advance the cause of civilization.

We look back with shame to the days of witchcraft in Massachusetts. We recognize that many great men of that time had much to do with securely establishing the foundation of this government, but we view the spectacle of Cotton Mather, the great divine, riding on horseback around the multitude who had gathered to witness the execution of a witch, inciting them to further lawlessness, to punish others accused of the same crime, as a blot upon our civilization.

I firmly believe that in the future, this generation will be pointed to also with shame, because of the continuance of this wretched relic of barbarism.

I am very glad that the Senate of Massachusetts has passed a law, for the first time in its history, which permits a jury to discharge its duty and satisfy its conscience, and at the same time be merciful to a man who would otherwise suffer the punishment of death.

I believe that the abolition of the death penalty will soon come in Massachusetts.

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CITATION OF OPINIONS

Every intelligent suggestion which may lead to a reduction in the labor of citation of the ever-growing mass of case law deserves careful study, and when such a suggestion comes from a man who has devoted his life to the publication of law reports and legal text-books it brings to the discussion a point of view which, with all due allowance for the possible self-interest of the publisher, ought to have merits in practical application, which would be productive of valuable results. Mr. John B. West, the well-known publisher of St. Paul, in a recent issue of Current Law (Vol. vi, No. 4) publishes a brief monograph entitled "Universal Citations for All Opinions." He calls attention to the necessary multiplication of citations caused by the different unofficial publications of reports, which have become so valuable an addition to our law libraries that publishers find it necessary to add to the references to the official state reports the volume and page references to these private publications. In the production of a work of any magnitude the space required by these additional citations is surprisingly large. "After many years of experience as a publisher, the writer has reached the conclusion that this difficulty, like many others, arises out of complexity and artificiality, and may be solved by a return to simplicity of methods." He contends that reports of decisions are simply official documents which should be filed in numerical order and cited with reference to their numbers. Under this system no matter how many decisions or systems of reporting be adopted each case can be readily found and cited by reference to this official number, entirely regardless of the volume and page of the particular publication. This method was adopted when the early decisions of the lower federal courts were collected in the edition of "Federal Cases," and proved entirely satisfactory.

Another advantage would be that the permanent citation of a case could be ascertained the moment it is rendered, and thus a text-book giving the most recent decisions before going to press, would cite them in a final form. The suggestion, we understand, does not contemplate the abandonment of the addition of the names of the parties, which in itself is a valuable means of remembering and identifying for purposes of discussion, the leading cases on a particular subject. It would simply render more uniform the system of reference by which a particular case may be found in print. There seems to be no difficulty whatever involved in the adoption of the suggestion, with reference to future cases, but the difficulties involved in obtaining a general agreement on such a policy are probably too great to be overcome by any interest which is likely to be aroused by the suggestion. It is likely also that the conflicting interests of law publishers would lead them to discourage any such reform. The suggestion, however, is an interesting one and deserves further discussion.

ILLINOIS STATE BAR ASSOCIATION

The executive committee of the Illinois State Bar Association announce that its annual meeting will be held at Galesburgh, July 11 and 12, and that the principal address will be delivered by Hon. Edward M. Shephard of New York. The principal subject for discussion by the association will be "Railroad Rate Regulation," which will be led by James H. Wilkerson of Chicago.

PUNISHMENT FOR BUSINESS FRAUDS

Interesting suggestions for criminal law reform are made by District Attorney Arthur

Train of New York City in a volume entitled "The Prisoner at the Bar," consisting of a series of popular magazine articles explaining the usual course of a criminal case in a large city, recently published by Charles Scribner's Sons. One of the most striking, as well as practical, suggestions in the line of modernizing our ancient criminal practice, to make it more justly apply to modern conditions, is in line with the thought frequently expressed by recent writers that our modern standards fail to recognize the danger to the public from what may be generally termed as "business frauds." Yet our criminal statutes, which have descended, with slight modifications, from an age when physical violence was the greatest public peril, still make a distinction in classification of crime and punishment between the common thief and the modern "grafter." Mr. Train says "There is no practical distinction between a man who gets all of a poor living dishonestly and one who gets part of an exceedingly good living dishonestly. The thieving of the latter may be many times more profitable than that of the former. So long as both keep at it systematically there is little to choose between the thief who earns his livelihood by picking pockets and the grocer or the financier who swindles those who rely upon his representations. The man who steals a trade-mark, counterfeits a label, or adulterates food or drugs, who makes a fraudulent assignment of his property, who as a director of a corporation declares an unearned dividend for the purpose of selling the stock of himself and his associates at an inflated value, who publishes false statements and reports, makes illegal loans, or who is guilty of any of the thousand and one dishonest practices which are being uncovered every day in the management of life insurance, banking, trust, and railroad companies, is precisely as 'real' a criminal as one who lurks in an alley and steals from a passing wagon. Each is guilty of a deliberate violation of law implying conscious wrong, and each commits it for essentially the same reason.

"Yet at the present time the law itself recognizes a fictitious distinction between these crimes and those of a more elementary sort. The adulteration of foods, the theft of trade-marks, stock-jobbing, corporation frauds, and fraudulent assignments are as a rule only misdemeanors. The trouble is that we have not yet adjusted ourselves to the idea that the criminal who wears a clean collar is as dangerous as one who does not. Of course, in point of fact he is a great deal worse, for he has not the excuse of having a gnawing at his vitals."

The author shows that the professional criminal class constitutes but a small fraction of the law-breakers, and that it is not from them that we have most to fear. "Our real danger lies in those classes of the population who have no regard for law, if not an actual contempt for it, and who may become criminals, or at least, criminal, whenever any satisfactory reason, coupled with adequate opportunity, presents itself." "The man who deliberately violates the law by doing that which he knows to be wrong is a real criminal, whether he be a house-breaker, an adulterator of drugs, the receiver of a fraudulent assignment or a trade-mark thief, an insurance 'grafter,' a bribe giver, or a butcher who charges the cook's commission against next Sunday's delivery. The writer fails to see the slightest valid distinction between them and believes it should be made possible to punish them all with equal severity. There is no reason why one should be a felon, another guilty of only a misdemeanor, while still another is guilty of nothing at all. The cause of crime is our general and widespread lack of respect for law, and this in turn is largely due to the unpunished, and often unpunishable, dishonesty which seems to permeate many phases of commercial activity."

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

The most interesting article of the month for the general reader is probably Bruce Wyman's analysis of the restrictions on the use of ordinary business methods due to the principle of public employment. Those with a fondness for philosophical analysis of legal conception will be interested in E. Hilton Young's article on foreign corporations and Albert S. Thayer's dissection of the ideas of possession and ownership. The student of constitutional law will find all three *Columbia Law Review* articles devoted to his specialty. James Barr Ames' article on constructive trusts is an especially clear statement of a subject which has caused much diversity of judicial opinion.

ADMINISTRATION. "A Note on Retainer," by Edward Jenks. April *Law Quarterly Review* (V. xxiii, p. 171). Discussing liability of an executor in England for preferring a debt of lower degree in ignorance of the existence of a higher.

BIOGRAPHY (Maitland). "In Memoriam: Frederick William Maitland," in the April *Law Quarterly Review* (V. xxiii, p. 137) consists of appreciations in English, German, French and Italian, written by Oliver Wendell Holmes, John C. Gray, R. Saleiller, Paul Meyer, Heinrich Brunner, F. Liebermann, Joseph Redlich and A. Zocco Rosa.

BIOGRAPHY. "William Morris Meredith," by Richard Lewis Ashhurst, April *American Law Register* (V. lv, p. 201). Sketch of a prominent figure at the bar and in the politics of Pennsylvania during the middle fifty years of the nineteenth century.

CODIFICATION. "Commercial Aspect of Uniform State Laws," by Francis B. James, *Michigan Law Review* (V. v, p. 509). An address before the Cincinnati Credit Men's Association, February 19, 1907, explaining the advantages to business men of codification of the commercial law and adoption of the results by the several states.

CONFLICT OF LAWS (Foreign Law in Germany). "L'Application Du Droit tranger D'Après Le Code Civil Allemand," by Ludwig Fuld, *Revue de Droit International Privé* (V. iii, p. 138). A discussion of the effect of Article 328 of the German code of civil procedure, refusing recognition of foreign judgments or decrees that are contrary to good morals or to some German law.

CONFLICT OF LAWS (Jurisdiction.) A person wishes to bring an action in a French court against an opponent domiciled in some other country; or an action brought in the court of some other country against a person domiciled in France: How shall the plaintiff proceed to give the court jurisdiction, constrain the defendant to appear and secure a judgment of any value? These questions are discussed by Jules Valery, professor in the Law Faculty of Montpellier, in the January-February *Revue de Droit International Privé* (V. iii, p. 5), under the title "La Demande En Justice Envisagée Dans Les Rapports De La France Avec Les Pays Étrangers." It is to be continued.

CONFLICT OF LAWS (Marriage in Foreign Countries). "Mariage À L'Étranger Des Déserteurs Et Dés Insoumis," by Camille Jordan, *Revue de Droit International Privé* (V. iii, p. 128). A discussion of the validity of the marriage abroad of deserters from the French army or those who are evading service and of the marriage in France of foreigners of the same classes. To be continued.

CONFLICT OF LAWS (Nationality in Turkey). "De L'Autorité Compétente Pour Statuer En Turquie Sur Les Questions Relatives A La Nationalité Et Des Conflits De Lois En Matière De Nationalité," by E. R. Salem, *Revue de Droit International Privé* (V. iii, p. 25). Discussion of the proper tribunal to decide questions of nationality in

Turkey, and of questions in the conflict of laws in relation thereto. To be continued.

CONFLICT OF LAWS (Renvoi). "La Theorie Du Renvoi," by A. Lainé, professor in the Law Faculty of Paris, in the *Revue De Droit International Privé* (V. iii, p. 43) continues a discussion of the *renvoi* theory begun in the preceding number and to be still further continued.

CONFLICT OF LAWS (see Corporations, Status Abroad).

CONSTITUTIONAL LAW. "Regulation of Commerce under the Federal Constitution," by Thomas H. Calvert. Northport, N. Y., Edward Thompson Company, 1907, pp. xiv, 380. 8 vo. This book is a straightforward summary of the more important phases of the vital problem of the possible regulation of Interstate Commerce under the Federal Constitution. One is pretty certain to find the principal decisions on salient points, especially the many cases of very recent years when so much has been settled and so much unsettled. On controverted points the author is cautious at all times, although he duly indicates his opinion; for example, he finds grounds for believing that Congress has power to provide for the fixing of the rates for interstate carriage, although he points out the constitutional guaranties against confiscation under the guise of regulation.

CONSTITUTIONAL LAW. "The Federal Power over Carriers and Corporations." By E. Parmalee Prentice. New York, The Macmillan Company, 1907, pp. xi, 244. 8 vo. Those who believe that governmental problems are settled in the end by public opinion will welcome to the discussion of any fundamental question every sincere presentation of any serious view. In particular it is desirable that both the conservative position and the progressive program should be adequately set forth so that the ultimate decision may have much moderation in it, if not, indeed, some compromise. Of the crucial importance of the pressing problem of federal power over the instrumentalities of commerce there can be no doubt. Our whole scheme of government, if not our whole conception of liberty, depends upon the outcome. In the discussion of this issue no one is better fitted, both by temperament and training, than Mr. Prentice to present the conservative side of the argument. In this concise work he gives a partial, but not often prejudiced, account of our legislative policies and judicial opinions from the adoption of the Constitution to the present day. It must be admitted that to a considerable extent the strict limitations upon federal power, which he so consistently urges, were once prevalent doctrines although never unopposed. Upon all issues contested at the present time, Mr. Prentice takes this conservative position that the primary relations of interstate carriers and interstate traders are to the state in which they are operating at the time, and that Congress is concerned only with the exercise of the one function of intercourse. To the present reviewer, however, it seems that all the signs of the times point a different solution and that the federal power over carriers and industries already extends as far as Mr. Prentice obviously fears it may.

CONSTITUTIONAL LAW (Judicial Power). "The Function of the Judiciary," by Percy Bordwell, in the May *Columbia Law Review* (V. vii, p. 337) is the first of two articles on "that peculiar contribution of the United States to law and political science — the function of the judiciary to declare legislative acts inoperative because unconstitutional." The principles laid down by the Supreme Court in Juilliard *v.* Greenman, 110 U. S. 421, furnish the text for the author "as showing the limitations which the Supreme Court has placed on itself in its function of declaring acts of Congress unconstitutional." These propositions are laid down in the case:

"(1) that grants of power in a constitution are not to be construed by the same rules as powers of attorneys or trust deeds; (2) that subject to the prohibitions of the Constitution, the powers granted in the United States Constitution are to be interpreted in the light of the practice of civilized nations; (3) that political questions should be left for the political departments. These are perhaps but phases of the same subject, but it is believed that their separate treatment will be advantageous in view of the important bearing they have on the questions of the day. Only the first of these will be considered here, as the second and third need extensive treat-

ment and will be taken up in the article which is to follow."

The reasons for the first proposition are summed up by the author as follows:

"We have, then, this situation — the courts exercising a power which its greatest expounder considered an implied one and which is denied to the courts in almost every other nation of the earth. It is not meant here, on that account, to question the right or even its expediency, for our co-ordination of departments and division of powers between the state and federal governments necessitate its exercise by the federal judiciary; but it is desired here to lay stress on the fact that it is an extraordinary power, that it is widely different from the right of interpreting private delegations of powers, and that the reasons which operate with other countries to deny the right altogether, operate with us also to make the rules of interpretation laid down in the one case inapplicable in the other.

"The maxims that ye cannot serve two masters, that the house divided agains itself will fall, that authority is indivisible, and countless others, are merely illustrations of the general principle that if there is something to be done there must be one head to do it. Europe learned that in emerging from the anarchy of feudalism, and it is embodied in her law. Our forefathers, however, were impressed by their experience with an aversion for arbitrary power, and established in the Constitution the system of checks and balances. As long as the government could do only a mimimum of harm many were indifferent as to whether it could do much that was good. To-day the feeling is quite different. Increased governmental activity is desired on all hands and though we may not have the concentration which is considered so essential in Europe, we must at least have co-operation. Grants to the legislature must not be too narrowly construed. Only in the clearest possible case should acts of the legislature be declared unconstitutional, otherwise we will have what Napoleon had, a three-chambered legislature impotent for good or ill alike. Happily the law as interpreted by the Supreme Court accords with the views here expressed. It were well if the state courts had also borne more strictly in mind the injunction of Chief Justice Marshall to remember that it is *a constitution* they are interpreting."

CONSTITUTIONAL LAW (Police Power). In the May *Columbia Law Review*, Walter W. Cook asks, "What is the Police Power?" (V. vii, p. 322). He makes some exposition and criticisms of recent expressions of Mr. Burgess, Mr. Freund, and Mr. Hastings, "attempts to formulate a definition, or perhaps better, a description of the police power by doing two things, viz: (1) by tracing briefly the history of the phrase, 'the police power' in American law, and (2) by analyzing our constitutional system with reference to the distribution of governmental power between the national government and the states." . . .

The definition of the police power which he offers is "that it is the unclassified, residuary power of government vested by the Constitution of the United States in the respective states."

CONSTITUTIONAL LAW (Taxation of Movables). An interesting and important example of the way in which "old rules, which were accepted as unquestionable and were supposed to be simple in application and easy of execution, are in time found to work results which even the courts feel justified in essaying to remedy," is treated by John Bassett Moore, in the May *Columbia Law Review* (V. vii, p. 309), under the title, "Taxation of Movables and the Fourteenth Amendment."

"In levying taxes upon personal property two rules were supposed to be applicable. It must be within the jurisdiction of the taxing power, and this condition of subjection was conceived to exist when the property had either an actual or a legal situs within the jurisdiction. The property had an actual situs when physically present; a legal situs when, although it was physically absent, the owner was domiciled within the jurisdiction. The latter rule was deduced from the theory that personal movables, in contemplation of law, follow the person of the owner, or, in the usual Latin formula, *mobilia personam sequuntur*.

"That this theory was, without regard to the question of its logical justification or continuity, accepted as an established prin-

ciple of law can hardly be doubted. It was also accepted that personalty might be taxed where it was actually located.

"A tendency was visible in judicial decisions and in legislation to enlarge the conception of the actual situs of tangible moveables so as to expand the power of taxation. In 1888 it was held that Pennsylvania could tax an Illinois corporation on its capital stock, taking as the basis such proportion of the capital stock as the number of miles of railroad over which cars were run by the company in Pennsylvania bore to the whole number of miles everywhere over which its cars were run. 'It was obviously not decided that tangible movables, either temporarily or permanently outside the state of the owner's domicil, were not taxable in such state, but, in extending the conception of actual situs, the decision tended to weaken the claims of domiciliary situs, and, by increasing the liability to double taxation, to render more general the existence of conditions requiring remedial action.'

'In 1903 the Fourteenth Amendment, forbidding any state to 'deprive any person of life, liberty or property, without due process of law,' was held by Louisville, etc. Ferry Company *v.* Kentucky, to prevent the imposition by one state of taxes on realty in another. In 1905 in Delaware, etc. Company *v.* Pennsylvania, it was held on the strength of the Kentucky case that a state could not tax movable property of one of its corporations having a permanent situs outside of its limits. The authority of the case, as affecting the power to tax foreign movables, is qualified by the admission made by counsel for Pennsylvania, that the statute under which the tax was levied did not authorize the taxation of such property.

"No such qualification existed in the case of Union Refrigerator Transit Company *v.* Kentucky, which was soon afterward decided, in 1905. A Kentucky corporation owned two thousand cars which were rented to shippers, who took possession of them from time to time at Milwaukee, in Wisconsin, and used them in the United States, Canada and Mexico, the company being paid by the railroads in proportion to the mileage made over their lines. Kentucky sought to tax the company on all its cars, the laws of the state authorizing the taxing of its corporations on all their movable property within or outside the state. Counsel for the company admitted that it was impossible to ascertain how many of the cars, which were constantly moving, were in any state on any named day, and that the state had the right to devise a fair method of ascertaining the average number, without regard to particular cars, and to tax such number, but they challenged the claim to tax all the cars, on the ground that it involved the denial of due process of law. The Supreme Court sustained this contention. The decision was not unanimous, and Mr. Justice Holmes, conceding that the result was probably desirable, said he could 'hardly understand how it can be deduced from the Fourteenth Amendment.'

"The court did not omit respectfully to inter the rule *Mobilia personam sequuntur*, so far as it relates to tangible property. There doubtless were, said the court, cases in the state reports announcing that this 'ancient maxim' still applied to 'personal property,' but upon examination 'all or nearly all' would be found to relate to 'intangible property, such as stocks, bonds, notes and other choses in action.'

"If the principle that property can be taxed only by the government that protects " should be carried to its logical conclusion the results would be far reaching. The court expressly confined its decision to tangible property. 'There is,' declared the opinion, 'an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly: that there is no method by which its existence or ownership can be ascertained in the state of its situs, except perhaps in the case of mortgages or shares of stock.' The exception here suggested is as palpable as it is important. A citizen of New York, let us suppose, owns shares of stock in a foreign corporation which owns and operates a railway in another state. The value of the shares consists in the right of way, the tracks and the rolling stock. The property is tangible in the fullest sense. It receives no protection whatever from the state of New York; nor does the owner of the shares receive in respect of his certificate any protection other than he would enjoy in respect of a bill of

sale of a stock of merchandise in New Orleans, such as was under consideration in the case of Hoyt *v.* Commissioners of Taxes. If the question is to be determined on principle, the Fourteenth Amendment, if it precludes the taxation of the one in New York, seems equally to preclude the taxation of the other.

"That the principle laid down in the Union Refrigerator Transit Company *v.* Kentucky, will not in all cases be carried by the Supreme Court to its logical conclusion is indicated by the subsequent decision in New York Central Railroad *v.* Miller. The case was one of a franchise tax, imposed under a law requiring every corporation created by the state to pay a tax to be computed 'upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount.'"

It was held that the company was taxable in New York on all its cars and that no deduction, on account of cars constantly employed out of the state, could be made from its entire capital, in order to ascertain the capital stock employed within the state. This was a tax upon a franchise while the Kentucky case was of a tax upon the cars, but Mr. Moore declares that though the New York case does not in express terms conflict with the previous decision, "yet tested by principle, it disappoints the expectation, which those decisions had raised, that the Fourteenth Amendment would be consistently applied so as to prevent the double taxation of tangible movables."

CONSTITUTIONAL LAW (Treaties). Amos S. Hershey in the *American Political Science Review* (V. i, p. 393), adds another to the numerous articles discussing the Japanese school question, under the title "The Japanese School Question and the Treaty-Making Power."

"The writer, although by no means a strict constructionist, does not believe that the federal government has the right, by treaty or otherwise, to encroach upon the police power or reserved rights of the states to the extent of directing or controlling their public school systems. If there are any constitutional limitations upon the treaty-making power, if the states retain any autonomy whatsoever, they surely preserve a right to the exclusive control of the schools which they maintain out of their resources. What greater trespass upon the province of self-government, what more serious violation of fundamental rights can be imagined than federal interference with a state's management of its own schools? If our federal government should barter away such fundamental rights as these, and the courts hold such action constitutional, then the double structure of state and federal government which our fathers reared will crumble into ruins, and a new centralized edifice will take its place in which the states will be reduced to mere provinces or administrative units."

CONSTITUTIONAL LAW. "The State Tax on Illinois Central Gross Receipts — Another View," by James Parker Hall, *Illinois Law Review* (V. ii, p. 21).

CONSTITUTIONAL LAW. "Centralization by Construction and Interpretation of the Constitution," by Hon. J. M. Dickinson, *Albany Law Journal* (V. lxix, p. 98).

CONSTITUTIONAL LAW. "Interstate Judicial Relations," by Wolfe Fink, *Commonwealth Law Review* (V. iv, p. 97).

CONSTITUTIONAL LAW. "The Growth of the Commerce Clause," by John W. Davis, *American Lawyer* (V. xv, p. 171).

CONTRACTS. "Formation of Contract in English Law," by Ernst Schuster, *Canadian Law Times* (V. xxvii, p. 248).

CORPORATIONS. "Corporation Lawyers," by William Wirt Howe, *Yale Law Journal* (V. xvi, p. 497). Defending the corporation adviser against popular misjudgment.

CORPORATIONS (Debentures or Shares?). Man ever seeks to have his cake and eat it too. The short article on "The Evolution of the Debenture" by George A. MacDonald, in the April *Law Quarterly Review* (V. xxiii, p. 195), treats two recent English promoters' attempts to appeal to that tendency in human nature by giving "a hybrid commodity which the writer has ventured to call the 'Share-debenture,' and which from the legal standpoint needs careful consideration.

"Shares and debentures are two very distinct orders of investment. Each has, or has hitherto had, its essential features, its inevitable advantages and disadvantages. Shares alone reap the full measure of successful enter-

prises and respond freely to the exciting influences of the Stock Exchange. Debentures, on the other hand, can be issued at a discount, are not dependent upon profits for a return, are free from some of the restrictions of the Act of 1900, and in the hour of disaster enable their holders to seize assets and rank before the outsider who has merely traded and given credit to the company. It is obvious that if something can be invented which combines the excellencies of both orders, the hard-pressed promoter of modern times has a new and valuable commodity to place before the speculating public.

"Two prospectuses which essay the desirable combination lie before the writer. One offers a 'profit-sharing perpetual debenture stock' the holders of which 'will be entitled to 5½ per cent cumulative interest on the amount paid up on the stock and in addition thereto to a sum equal to one moiety of the balance of net profits available for dividend in any one year, etc.' The other offers 5 per cent debentures of £8 each at par 'convertible at the option of the holders at any time up to the 31st day of December, 1911, into fully paid £1 shares of the company at the rate of one fully paid share for every £8 of the nominal amount of the debentures i.e., one share for each debenture.'"

Mr. MacDonald thinks these offers offend the ancient equitable rule against clogging the equity of redemption. And in the first scheme there is a further difficulty.

"'Debenture' is not a term of art. It may take many shapes and cover very different contractual obligations. There is, however, a principle governing it, a fundamental idea at the back of it. It imports a *debit*; it involves some obligation of repayment. There is no virtue or charm in the appellation itself. Calling a thing a debenture does not make it one. An interest or holding which is perpetual, which shares profits, which votes and appoints directors, and assists in management may not be recognized by the courts as a debenture at all. It may even be regarded as a highly irregular and wholly unauthorized sort of share. . . . Here . . . is a security possessing all the attributes of a share but escaping in its inception the duty payable under the Stamp Act, 1891, escaping in its allotment many of the obligations of disclosure laid down by the Companies Act, 1900, capable of being issued at a discount and of receiving interest paid out of capital, and entitled in liquidation to rank in front of the creditors of the company. Such holdings, it is submitted, stand every chance of being held mere attempts to evade the spirit and letter of the Companies Acts."

CORPORATIONS (Status Abroad). A careful study of the rights and duties of a juridical person operating abroad is begun by E. Hilton Young in the April *Law Quarterly Review* (V. xxiii, p. 151) under the title "The Status of Foreign Corporations and the Legislature." He reduces the many varieties of opinion to two: a restrictive and a liberal system. According to the former a foreign juridical person enjoys few if any rights, and scarcely even possesses civil personality; according to the liberal system it enjoys with specified exceptions the same rights as a natural person and possesses civil personality in the same manner and for the same reason.

"In legal systems derived from Roman law, the orthodox doctrine as to the nature of juridical personality is that it is a mere creature of the sovereign power, having no other existence than a fictitious one which the law concedes to it. This is also the doctrine of our own common law, introduced into it by Canonists.

"All supporters of the restrictive system agree on the 'fiction' theory, and, therefore, that where the law that feigns it does not operate a juridical person cannot exist. As to the consequences of this theory there is not the same agreement. The most restrictive theory is that since a juridical person can exist only in so far as it is contemplated by the law of some state, to confer upon it civil personality in a foreign state, a special act of the foreign sovereign power is necessary. By virtue of the personal status there by acquired it enjoys certain capacities, which are regulated by the territorial law, i. e., 'it has forced upon it the character of the juridical persons of the same type which are domestic in the foreign state.'

"Supporters of the restrictive system usually admit some relaxation of its severity in

the case of commercial associations. . . . The concessions in fact made . . . amount to little more than a recommendation that this sort of juridical person should be dealt with leniently and admitted to recognition on easy terms.

"In the United States the consequences of the principle that a foreign juridical person has *de jure* no personal status have been worked out in a different manner. The principle itself is fully accepted. A corporation, it is said, is an invisible, intangible, and artificial being, and certainly not a citizen. It exists only in the contemplation of law and by force of the law, and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. Being a mere creature of local law, it can have no existence beyond the limits of the sovereignty which created it. Such opinions are universally accepted, and still repeated. But, under the compulsion of the practical necessities of interstate commerce, judges have declined to draw from them the conclusions of the more severely restrictive school. Story's theory of comity provides a means of escape. . . . All laws, it is said, are of territorial application only, but 'in the silence of any positive rule, affirming, or denying, or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interest.' This is the comity, not of the courts, but of the nation. . . . Amongst other foreign laws tacitly adopted by comity must be included those which create juridical persons and clothe them with capacities. No express recognition of the foreign juridical person is necessary. . . . Together with civil personality it must enjoy a personal law. The laws of its domestic state which regulate its existence are the subjects of comity just as much as the laws which create its existence, and therefore it must be recognized to possess the capacities conferred upon it by those laws. Thus all controversies relating to the internal management of the foreign juridical persons, and all disputes between its members in their capacities as members only, must be ruled by its domestic law, and the courts of the state of origin only should exercise jurisdiction over them. At the same time comity is not compulsion. . . . When the interest or policy of any state requires it to abolish or restrict the rule of comity, it has but to declare its will by the legislature, and the legal presumption of admission to status and capacity is at once abolished or restricted accordingly. "The position of the foreign juridical person under this theory is in practice almost like that allowed it in the liberal system.'"

The vast inconvenience of the restrictive theory is pointed out by Mr. Young. Recognizing that that is not a sufficient answer to a theory he attacks the soundness of the reasoning on which it is based. Leaving the truth of the "fiction" theory to be criticized in connection with the liberal system and admitting it for the present there is serious confusion in concluding from it that a foreign juridical person is incapable of enjoying civil personality abroad, or of possessing a personal law. Juridical like other persons "have two sorts of function to perform. On the one hand they can sue and be sued, contract, and own property. These are their civil capacities. On the other hand they have their purpose to fulfil; they can educate, heal the sick, insure lives, or mine gold. This we may call their capacity to discharge their functions, or functional capacity. There is nothing in the nature of a juridicial person to prevent it from exercising the former without exercising the latter. A commercial company may sue for a debt in a country without carrying on any business there. A state may buy goods in a foreign country without exercising any function of government there. All reasoning hostile to the status and capacity of foreign juridical persons based upon the fact that they concern social interests, and are therefore inseparably connected with the organism of some particular state, ignores this distinction. Their functional capacities may concern the social interests of a particular state, but their civil capacities do not. . . . The same confusion appears in the conclusion that a foreign juridical person has no status or capacity because its existence is indistinguishable from its object. Suppose that its object can be pursued and its functional capacity exercised in the country of its origin only, and that it can have no object and can exercise no func-

tional capacity abroad; none the less can it exercise civil capacity abroad, because the exercise of civil capacity does not necessarily entail the exercise of any functional capacity. Of the two capacities it is the functional capacity only that concerns social interests. The true conclusion, therefore, to be drawn from the premiss that social interests are involved in the existence of every juridical person is that foreign juridical persons must obtain the express permission of the territorial authorities before exercising their functional capacity, and no conclusion can be drawn limiting their power to exercise civil capacity. . . . In practice this distinction is clearly recognized in our own law as to service of process, and in that of the United States."

CRIMINAL LAW. "The Definition of Criminal Responsibility," by T. W. Harrison, *Virginia Law Register* (V. xiii, p. 1).

CRIMINAL LAW. "Defence of Insanity in Murder Cases," by Goodwin Gibson, *Canada Law Journal* (V. xliii, p. 265).

CRIMINAL LAW. "Cocainism and some Medico-Legal Relations," by T. D. Crothers, *Medico-Legal Journal* (V. xxiv, p. 604).

EDUCATION. "Humanistic, and Particularly Classical Studies, as a Preparation for the Law," by Harry B. Hutchins, May *Michigan Law Review* (V. v, p. 545).

EQUITY. "The Attitude of Equity towards the Strike and Boycott — Use of Injunction," by W. F. Meier, *Law Notes* (V. xi, p. 27).

EQUITY. "Latent Equities," by George A. Lee, *Central Law Journal* (V. lxiv, p. 363).

HISTORY (Chicago Anarchists). In the May *Harpers'* (V. cxiv, p. 889) appears another of the "Decisive Battles of the Law," described by Frederick Trevor Hill. This time he gives a narrative of the trial of the Chicago anarchists. Though, of course, intended chiefly for popular reading, the article seems superior in style to those of the series that have preceded and without neglecting the dramatic scenes of the trial gives a simple but very interesting and impartial account of this famous case.

HISTORY (English). "The Bench and Bar in the Golden Age of the Common Law," by John Maxcy Zane, May *Illinois Law Review*, (V. ii, p. 1). An account of English lawyers under the Norman kings.

HISTORY (French). "The French Bar," by Paul Fuller, *Yale Law Journal* (V. xvi, p. 457). A sketch of the history of the profession in France and its present requisites and position.

HISTORY (Haywood Case). An impartial discussion of the proceedings preliminary to the trial of Haywood entitled "The Idaho Murder Trial," by Luke Grant in the *Outlook* for April 6 (V. lxxxv, p. 805) will clarify the ideas of those who have been much confused by the conflicting statements that have appeared in the press regarding this trial which is now attracting national attention.

HISTORY (Patrick Case). Arthur Train, in the May *American Magazine* (V. lxiv, p. 97), relates the remarkable narrative ending with the commutation of the sentence of Albert T. Patrick, under the title "The Patrick Case Complete." In conclusion the author says, "Technically the case against Patrick was not a strong one; dramatically it was overwhelming. His own failure to testify, and his refusal to allow his lawyer, Mr. House, to relate what passed between them at the Tombs, remains significant, although not evidence proper for a jury to consider."

INTERNATIONAL LAW (Contraband of War). "Hobbs *v.* Henning," by E. L. De Hart, in the April *Law Quarterly Review* (V. xxiii, p. 199), is a discussion of a case much quoted by writers on international law, who are opposed to the application of the principle of continuous voyages or ultimate destination to contraband of war. The author says such writers overlook Seymour *v.* London, etc. Co., 41 L. J. C. P. 193, which did not find its way into the Law Reports although in this case the court explained their previous decision so as to make it impossible to rely on Hobbs *v.* Henning as authority for the proposition for which it is usually cited.

In the later case "the court decided that goods of a contraband nature are liable to seizure on a voyage which, so far as the ship is concerned, ends at a neutral port, when they are intended to be carried by inland navigation to a place in the enemy's territory. The court did not profess to deal with the question whether goods can be condemned as contraband, when they are intended to be sent by land from a neutral port to an ulterior

destination in a belligerent state. In Hobbs *v.* Henning, however, the court seem to have been of opinion that goods can only be condemned as contraband when they have been seized on their way to an enemy's port, i.e., when their transport to the enemy's country is intended to be effected entirely by water. . . I fail to see any logical distinction between the case of goods which the owner intends to send by inland navigation from a neutral place to the territory of a belligerent and goods which he intends to send thither by road or rail."

INTERNATIONAL LAW (Jurisdiction in Bays). "Claims of Territorial Jurisdiction in Wide Bays," by A. H. Charteris, in the May *Yale Law Journal* (V. xvi, p. 471), is suggested by a recent decision (Mortensen *v.* Peters, *Scots Law Times*, xiv, p. 227) of the High Court of Justiciary in Edinburgh, whereby "a clause in an imperial statute has been interpreted as an affirmation by the British Parliament of territorial jurisdiction, at least for the purpose of fishery regulation, over an area of water on the northeast coast of Scotland more than two thousand geographical square miles in extent, and bounded by an imaginary line drawn between headlands eighty miles apart. Correct as the decision no doubt was, it arrested the attention of those interested in international law by its attribution to the British Parliament of a reaffirmation of the theory of the 'King's Chambers,' which, though at one time supported by Kent, Wheaton and Phillimore, has found but little support from more recent English authorities like Hall and Westlake, and has been regarded by continental writers as having been abandoned as a general principle by Great Britain and the United States in the second half of the nineteenth century." With this as a text, Mr. Charteris reviews the general question of jurisdiction over bays at much length and with copious citation of cases. He regards the decision itself as inevitable for it "is not the business of a British court to decide whether an imperial statute does or does not contravene a rule of international law." . . .

"To international lawyers the interest of this case lies less in the decision than in the legislation on which it turned. And here one cannot help feeling that the British Parliament, without perhaps being fully aware of what it was doing, has made, in reference to the Moray Firth, a claim to jurisdiction to which there is almost no parallel. The nearest claim is that made by Russia for purposes of war and neutrality over the White Sea, whose headlands are more than sixty miles apart, but other states are not particularly concerned with claims which a neighbor may make over waters within the Arctic Circle."

INTERNATIONAL LAW. In the *American Political Science Review* (V. i, p. 410) is an article on "The Recent Controversy as to the British Jurisdiction over Foreign Fishermen More than Three Miles from Shore; Mortensen *v.* Peters," by Charles Noble Gregory. The author criticises the doctrine involved in the decision of this case, which he contends "would make all indentations in the coast, however wide and however open, capable of appropriation by the adjoining countries and the present limitation of littoral dominion to three miles from shore, would apply solely to the extreme headlands. The fishing grounds of the world would substantially all pass into local control, a circumstance which would tend greatly to limit the freedom of the seas which ever since the voice of Grotius was lifted in its defense has grown and ought to grow."

INTERNATIONAL LAW (Mexican Extradition). "Note Sur L'Extradition au Mexique Pendant Les Années, 1897 à 1906," by M. P Le Boucq, in the January-February *Revue de Droit International Privé* (V. iii, p. 145), is an examination of the Mexican decisions in extradition cases. The article is to be continued.

INSURANCE (France). The legal position of foreign life insurance organizations in France under the law of March 17, 1905, is expounded at length by an anonymous writer in the January-February *Revue de Droit International Privé* (V. iii, p. 85), under the title "De la Condition Légale en France des Sociétés Etrangéres d'Assurance Sur la Vie." The text of the law is appended.

INSURANCE. "An Interesting Insurance Case," by F. Beecher, *Central Law Journal* (V. lxiv, p. 325).

JURISPRUDENCE. "Possession and Ownership," by Albert S. Thayer, in the April

Law Quarterly Review (V. xxiii, p. 175), is a careful analysis of the development of the ideas represented by the significant words of the title. Beginning with the definition of the right of possession as "positive right to deal with a thing as against everybody" the author discusses first the ideas that taking gives the right of possession, that possession gives the right of possession, that each of two cannot have the right of possession as to the same thing; then ownership and the idea that taking gives the right of possession and ownership; the modification by Roman law of the idea that taking gives the right of possession and ownership, through adoption of rules for the punishment of taking; the recognition, under Roman law, through adoption of the action of vindication, of ownership in one and right of possession in another; the Roman law of possession and ownership as modified by the adoption of the action of vindication, and the adoption of rules for the punishment of taking. The article is to be continued.

JURISPRUDENCE (Indian). "The Origin and Development of the Bengal School of Hindu Law," by S. S. Setlur, April *Law Quarterly Review* (V. xxiii, p. 202).

JURISPRUDENCE. "Notes on Mahommedan Jurisprudence," by Abdur Rahim, *Calcutta Law Journal* (V. v, p. 21n).

JURISPRUDENCE. "Origin and Development of Bengal School of Hindu Law," by S. S. Setlur, *Bombay Law Reporter* (V. ix, p. 121).

JUVENILE COURTS. In the May *Ladies' Home Journal* (p. 14), William MacLeod Raine describes "How Judge Lindsey Handles His Boys." This is another entertaining addition to the series of popular articles describing the work of the Children's Court of Denver, concerning which Judge Lindsey himself has already written in this magazine. It is full of instructive anecdotes.

NEGLIGENCE. "Telegraph Companies and Gross Negligence," by A. R. Watson, *Bench and Bar* (V. viii, p. 91).

NEGLIGENCE. "Negligence in the Use of Automobiles," by J. W. Thompson, *Central Law Journal* (V. lxiv, p. 300).

NEGLIGENCE. "The Doctrine of Imputed Negligence," by Silas Alward, *Canada Law Journal* (V. xliii, p. 268).

NEGLIGENCE. "The Doctrine of Imputed Contributory Negligence as Applied to Persons *Sui Juris*," by John T. Marshall, *Central Law Journal* (V. lxiv, p. 347).

PLEADING. "Pleading Denials apart from the General Issue," by Raymond D. Thurber, *Bench and Bar* (V. ix, p. 16).

POLICE (New York). In the *Outlook* for May 4, page 21, is an interesting article on "The New York Police," by L. B. Stowe. The article discusses the necessity for and effect of the new Bingham bill, under which it is hoped the commissioner can root up corruption in the New York Courts.

PRACTICE (British). "The Judicial System of the British Colonies," by Raymond H. Arnot, *Yale Law Journal* (V. xvi, p. 504).

PRACTICE (Eng.). "Circuit Reform," by Cecil V. Barrington, *The Law Quarterly Review* (V. xxiii, p. 165).

PRACTICE (New York). "Admission to the Bar in New York," by Frank S. Smith, *Yale Law Journal* (V. xvi, p. 514). Statement of the requirements and the methods of the State bar examiners.

PROCEDURE (Jury — Scotland). "The Scottish Jury," by Rufus Fleming, May *Michigan Law Review* (V. v, p. 520). Careful and valuable study of the history and present working of the Scotch jury, with strong commendation of the working of the majority verdict system.

PROPERTY. "Transfer of Land in Old English Law," by Paul Vinogradoff, May *Harvard Law Review*, (V. xx, p. 532). Customs connected with the transfer of land in Northamptonshire in the tenth century, gleaned from ancient memoranda.

PROPERTY (Remainders). "Professor Kales and Common Law Remainders," by Joseph W. Bingham, in the May *Michigan Law Review* (V. v, p. 497) is a criticism of an article in the *Law Quarterly Review*, previously noticed in this department, which attempted a reclassification of future interests in land. Mr. Bingham presents briefly his own conception of the common law theory of estates in land, and the nature of remainders, vested and contingent, and argues that Professor Kales "misconceives the orthodox view of contingent remainders to be that they are remainders subject to some sort of condition

precedent *to vesting in possession*." He concludes "that Professor Kales has run into error because (1) he has not a clear conception of what is meant by the *vesting 'in interest' of a remainder*, and therefore (2) has failed to grasp the distinction between a condition precedent to the vesting of a remainder and a condition precedent to its coming into possession."

PUBLIC EMPLOYMENT (Restrictions on Policy). Taking admittedly advanced ground, Bruce Wyman writes in the May *Harvard Law Review*, a very interesting article on "Business Policies Inconsistent with Public Employment" (V. xx, p. 511). The following extracts show somewhat the scope and tendency of his ideas.

"It should now be apparent that the fundamental question under discussion is how far public duty must necessarily deprive those who conduct public employments from basing their business policies upon the elementary principle of the law of increasing returns. That net returns tend to increase with the volume of business in a normal case of an industrial enterprise is obvious; and the question is whether a public service company is to be permitted without hindrance to shape all things so as to hold its present business and to add to it. Some managers of public service companies assert this boldly, and a few say frankly, for example, that they base their rates upon what the traffic will bear, making high charges against business from which high rates can be got, conceding low rates in order to get business which could not otherwise be obtained. Of course this consideration has some place in every philosophy of rate making, but it is submitted that it is a dangerous principle which may often operate to the disadvantage of the public.

"The real truth of the matter seems to be that, while in private business nothing need be considered except the law of decreasing cost, in public business there is the law against discrimination to be reckoned with. As the court said in the case of Tift *v.* Southern Railway Company, it is no excuse for raising the rate upon a particular article, as lumber, that it will bear the advance; the question is rather what price it is fair lumber should pay in comparison with other commodities. It must be admitted, however, that the view of many economists, that it will be to the advantage of all concerned if railroad managers are permitted to adopt any schedule of rates which will produce the most tonnage, because that policy will by the law of decreasing costs tend with an enlightened management to the lowering of all rates, is occasionally adopted by lawyers. . . . But if railway managers are left practically unrestrained by law, it is sufficiently plain that they will maintain a high schedule of rates between localities where they have control of the situation and for valuable goods which will bear high rates, while at the same time making disproportionate concessions from this standard to get business at competitive points or to induce the movement of low grade commodities.

"The authorities upon these questions are a seething mass. The various commissions which are near to actual conditions seem to show a tendency to condemn the fixing of the differing rates between localities and the differential rates between commodities solely by economic principles of demand and supply, the unequal and unjust results of which the courts are apparently too far removed from the vital facts to realize or appreciate. But even in the courts a reaction seems to be at hand; in the Naval Stores case the court seemed to be much shocked, at least, by the disproportion between the locality rates there disclosed; and in the Window Shade case the court considered the proportion to be observed between the rate established on raw material and the rate on the finished product. It is not enough to say that this power to make preferential rates may be used for the benefit of a railway's territory as a whole or the industries of the whole country the fact remains that it is a power which may be abused. So long as this power is left in the hands of the railway management without power of review by any authority upon any fundamental principle, it is in the hands of the railroad officials to build up an artificial market where the natural conditions are adverse, or to turn an industrious city into a wilderness again; and, without restrictions by law, it is within their power to protect certain lines of industry and to crush out others. It is believed that these are too great powers

to entrust to private hands without governmental control based upon some recognized standards. Indeed, the public law in this, as in the other cases, should put sufficient limitations upon any business policy, however profitable, which comes in conflict with the fundamental principle of equal service to all applicants. And it seems that there can be violation of this principle by disproportionate rates in different services as well as by discrimination in the same service. . . .

"It is submitted, therefore, that the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, a fair return upon proper capitalization. It must be admitted that the law relating to disproportion is still in the making; it is as indefinite as the law relating to discrimination was twenty-five years ago. A lawyer who saw no visions then would have relied upon the fact that by the weight of authority there was no law whatever against discrimination as such. Provided each applicant for the same service was quoted a rate reasonable in itself, all was then well; although outrageous differences even at that time might be evidence that the higher rate was unreasonable. In the same way to-day, very probably by the weight of authority, there is no law against disproportion as such. Provided each applicant for different service is quoted a rate which is reasonable in itself, it may be that there is no redress by established law, however outrageous the disproportion may be; although it seems to be agreed that outrageous differences may be evidence that the higher rate is unreasonable in itself. And yet it is quite in the line of the evolution of the public service law that a rule against disproportion as such may eventually be recognized, despite the fact that it might interfere with the business policies of the public companies even more than the present rule against outright discrimination has done.

"That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is hardly an enlightened selfishness; for it seems to many who appreciate the temper of the public, that the time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of the present condition of individual enterprise."

PUBLIC POLICY. "The Law and Industrial Inequality," by George W. Alger, *Albany Law Journal* (V. lxix, p. 121).

PUBLIC POLICY. "Justice and Mercy," by J. A. Saldanaha, *Bombay Law Reporter* (V. ix, p. 105).

TEXT BOOKS. "A Practical Guide for Authors in Their Relations with Publishers and Printers," by William Stone Booth, Houghton, Mifflin & Co., Boston, 1905, fifty cents net.

This little book should be in the hands of every aspiring author as it contains indispensable information as to their relations with printer and publisher, especially emphasizing the form of manuscripts, agreements with publishers, advertising, etc. The most valuable part, however, is that devoted to proofreading and the signs used in correcting proof. There is also an extended discussion of spelling and punctuation from the printer's point of view.

TRUSTS (Constructive, in Land). "Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land," by James Barr Ames, May *Harvard Law Review* (V. xx, p. 549). In the face of the statute of frauds which provides that in the absence of a writing, the trust shall be "only void and of none effect" equity cannot compel the performance of an express oral trust of land. Dean Ames clearly and with copious citations discusses the rights of the parties in the three classes of cases that arise: (1) Declaration of trust by the owner; (2) conveyances upon trust for the grantor or a third person, and devises upon trust for a third person; (3) conveyances by the seller, by direction of the buyer, to a third person.

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.)

CARRIERS. (Passengers.) Wash. — The various laws recently enacted regulating carriers, especially railroads, give rise to many interesting and novel questions of law. A question of this nature is presented in the recent case of Bradburn *v.* Whatcom County Railway & Light Co., 88 Pac. Rep., 1020, wherein a carrier sought to avoid liability for injuries to a passenger on the ground that the latter was riding on a free pass in violation of law at the time of the injury. The court refuses to sustain the contention of the carrier and points out the right of a passenger to maintain an action to recover damages for injuries received through the negligence of the carrier, does not depend on the existence of a contract of carriage. The passenger may maintain an action *ex delicto* for the breach of duty to carry himself safely as well as an action *ex contractu* for a violation of the contract of carriage. The fact that a carrier is prohibited by a law from issuing passes, does not render a person a trespasser who travels upon such a pass unlawfully issued to him. If the pass is unlawful, the conductor should demand the regular fare and his failure to do so will not make the traveler a trespasser and destroy his right as a passenger. In support of this holding, the court cites Buffalo, etc. R. Co. *v.* O'Hara, 9 Am. & Eng. Railroad Cases, 317 and Philadelphia & Reading R. Co. *v.* Derby.

CARRIERS. (Street Railroads, Baggage.) Conn. — In the recent case of Sperry *v.* The Consolidated Railway Co., 65 At. Rep., 962, a passenger on a street railroad, sought to hold the railroad company liable for the loss of a suit case which she had brought with her when taking passage on a car. In defining plaintiff's right to recover, the court lays down the rule that before a recovery can be had, it must be shown either that the street railroad has accepted the baggage under a contract, express or implied, to carry and deliver it as common carriers or that the loss of the baggage was due to defendant's negligence. "Electric street passenger cars," the court remarks, "are never furnished, either in the manner in which they are constructed or in the way in which they are operated, with facilities and means to enable the companies themselves to take into their custody and control the baggage of passengers." That street cars are not equipped with baggage compartments and that the duties of the conductor and motorman necessarily prevent them from taking charge of baggage, indicate that the companies do not assume control of baggage brought by passengers. Under such circumstances, the companies are liable only in case of negligence. Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 8 Sup. Ct. 60, 31 L. Ed. 92; Kinsley *v.* Lake Shore, etc., R. Co., 125 Mass. 54, 28 Am. Rep. 200; Whicher *v.* Boston & A. R. Co., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314; Carpenter *v.* New York, etc., R. Co., 124 N. Y. 54, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; Voss *v.* Palace Car Co., 16 Ind. App. 271, 43 N. E. 20, 44 N. E. 1010; 3 Amer. & Eng. Ency. of Law (2d Ed.) 574–582; 6 Cyc. 661.

CONFLICT OF LAWS. (Taxation.) N. Y. Ct. of App. — The transfer taxes enacted in many of our states cause perplexing questions with reference to the rights of states to collect such taxes on personal property in cases where the parties are not all residents of the same state. The question as to where the proceeds of an insurance policy are to be taxed in case the company has its home office in one state and the insured was at the time of his death domiciled in another state is disposed of in the recent case of *In re* Gordon's Estate, 79 N. E. 722. In this case it appeared that a New York company had issued a policy to a resident of New Jersey, in which latter state the company had designated a person on whom process might be served. The policy was kept by the insured in New Jersey, the premiums paid there and the proceeds paid to the executor of the insured in the same state. Under these circumstances, the court regarded the proceeds to be within the state of New Jersey so as not to be taxable in New York. State Tax on Foreign Held Bonds, 15

Wall. 300, 21 L. Ed. 179; New Orleans *v.* Stemple, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174, and cases cited therein. But it was urged that as the insurance company was organized with its principal place of business in New York, and as the policy holder must go thither for collection of his claim, the proceeds of the policy must be regarded as property taxable in New York; and in support of this contention were cited the cases of Blackstone *v.* Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Matter of Houdayer's Estate, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235, 55 Am. St. Rep. 642; and Matter of Clinch's Estate, 180 N. Y. 300, 73 N. E. 35. The court, however, could not agree that the cases cited were applicable in this case, for in each of those cases the creditor unlike the beneficiary of the policy in this case was really under the necessity of going to the domicile of the debtor in New York for protection and collection of his claim. In view of the general policy of the states to compel foreign insurance companies seeking to do business to submit to the jurisdiction of the local courts by provision for substituted service, the court regards itself entirely justified in its view that this class of legislation was distinctly intended to abrogate the very idea that insured could only obtain redress by resorting to the laws of the state wherein the insurance company had its organization and principal place of business which is made the basis of taxation in the decisions above cited. As confirming this view, the court cites New England Mutual Life Ins. Co. *v.* Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379; and Sulz *v.* Mutual Reserve Fund Life Ass'n, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379.

CONSTITUTIONAL LAW. (National Flag.) U. S. S. C. — In Halter *v.* State, 27 Sup. Ct. Rep., 419, the Supreme Court of the United States upholds the constitutionality of the Nebraska Law of 1903, making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes. By way of preface the court notes that the constitutionality of a similar law has been denied in two cases — Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30; People *ex rel.* McPike *v.* Vandecarr, 178 N. Y. 425, 70 N. E. 965, 102 Am. St. Rep. 516, 66 L. R. A. 189. In the Illinois case the statute was held to be unconstitutional as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, given by the Federal Constitution, as unduly discriminating and partial in its character, and as infringing the personal liberty guarantied by the state and Federal Constitution. In the other case, appealed from the Court of Appeals of New York, the statute in its application to articles manufactured and in existence when it went into operation, was held to be in violation of the Federal Constitution, as depriving the owner of property without due process of law, and as taking private property for public use without just compensation. In the first place the court takes the position that the protection of the national flag against use for illegitimate purposes is not so exclusively within the power of Congress as to prevent action by state legislatures on the failure of congress to act. In the second place the court holds that the law in question does not violate any privilege of American citizenship, nor any right of personal liberty, nor does it invade any property rights. As the law contains an exception in favor of newspapers, books, phamphlets, etc., on which shall be printed representations of the national flag, disconnected from any advertisement, it was contended that the law violated the 14th Amendment by denying equal protection of the laws. The court here notes that all are alike forbidden to use the flag as an advertisement. It is easy to be seen how a representation of the flag may be wholly disconnected from advertisement and be used upon periodicals, books, etc., in such a way as not to arouse a feeling of indignation nor offend the feelings of those who respect and reverence it. In any event, the court regards the classification made by the state to be neither unreasonable nor arbitrary.

There can be little doubt as to the constitutionality of a law of this kind making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes.

As the flag is, with us, the symbol of sovereignty, in a more emphatic sense than anywhere else in the world, chiefly because we cannot personify national sovereignty in a president usually elected by a strict party vote, it may be of interest to consider what principles are applied in monarchical countries when the name or title of the sovereign, the expression of national sovereignty, is used for advertising or other similar purposes. For the sake of brevity we will confine ourselves to the Civil Code of the German Empire.

Here it is to be noted that the name or title of the sovereign is not expressly protected as such. Whatever protection is given to the emperor must be found in that section of the Code which provides that anyone whose rights or interests are violated through the unlawful use by another of his name, may demand of the offender the removal of whatever injury has resulted and may, in case of reasonable apprehension of further injuries, secure an injunction. See section 12, BGB. The name or title of the emperor or of any member of the imperial house are generally used in connection with (1) ships, boats, launches, etc; (2) hotels, restaurants,

and commercial or industrial establishments; (3) goods, wares and merchandise, in which latter case the law of trade-marks has also to be considered.

The right to use one's name or title is the right to the exclusive use of such name or title as against everybody that has not also the right to the use of the same. One using the name without right cannot, however, be taken into court and mulcted in damages unless it can also be shown by plaintiff that he has sustained at least nominal damages. It follows that, as a matter of practice as well as law, the name or title of the emperor when given by an owner to his ship will be registered by the proper officer without any difficulty, and that regardless as to whether previous permission to use the name has been obtained. Such permission is, as a rule, nearly always applied for, chiefly because the owner's social prestige is greatly enhanced by reason of the imperial assent, which is rarely, if ever, refused. When it comes to the naming of hotels and industrial establishments, the custom of the country — more powerful than written laws and paragraphs of the Code — has always permitted the use of such names as "Hotel zum Kaiser Wilhelm," "Hotel zum Kronprinzen," "Restaurant Prinz Heinrich," and "Kaufhaus Hohenzollern," names familiar to all tourists in Germany. It is only when the name is either expressly calculated or else likely to mislead the public, either as to the nature or extent of the business or the personal relationships of the owner, that names such as these could possibly become unlawful. Finally, as to goods, wares, and merchandise, section 4 of the law of trade marks — Gesetz zum Schutze der Warenbezeichnungen — provides that three enumerated classes of names may not be registered, but is silent as to the name or title of the sovereign. A later section of the same law, s. 14, provides that if anyone, knowingly or from gross negligence, unlawfully uses the name of another he shall be liable to the party injured in damages: also, where the wrong was done knowingly, to a fine or imprisonment not exceeding six months. What is forbidden is the creation of an impression as if the wares sold stood in some special connection with the party whose name is used, to the injury of such party, but it is only the bearer of that name that can sue, and the sovereign forms no exception.

In view of this state of the law professional opinion as expressed in the law magazines of Germany just to hand, considers as legally untenable a recent decision of a county court of the empire declaring unlawful the assumption of the name of "Hohenzollern" by a company engaged in the manufacturing of automobiles, especially as that decision professes to have been reached under section 12 of the Civil Code.

W. E. WALZ.

CONSTITUTIONAL LAW (Property — Water Courses.) N. J. — The growth of our cities presents grave problems in securing adequate water supply for the population of such cities, and especially so in case of cities located near state boundary lines. The state of New Jersey has passed an act whereby it is made unlawful for any persons or corporations to transport through pipes, conduits, etc., the water of any fresh water lake, pond or stream of the state into any other state. The constitutionality of this statute was upheld in McCarter *v.* Hudson County Water Co., 65 Atl. 489. The constitutional objections are taken up by the court and as to the disposition thereof we quote from the opinion: "It is insisted the act in question is unconstitutional: First, as contravening tne first section of the Bill of Rights contained in our state Constitution, which declares that all men have certain natural and unalienable rights, among which are those of acquiring, possessing, and protecting property, etc. In our view, however, this clause does not guaranty to any man the right of acquiring property in anything that is not the subject of private property by law, nor the right of disposing of property that has not been duly acquired under the law of the land. It is argued that, while the act does not prohibit the owner of water from selling it to another person or corporation within this state, it absolutely prohibits him from selling it to any person or corporation without the state, to be used without the state. The answer is that the act, properly construed in subordination to the Constitution, does not prohibit the owner of water from selling it where he will; what it prohibits is the acquisition of ownership in flowing waters for the purpose of transporting them out of the state. Secondly, it is objected that the act contravenes the fourteenth amendment of the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law. To this the like answer may be made. Thirdly, the appellant cites article 4, § 2, of the Federal Constitution, that, 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' It may be a sufficient answer to this to say that the appellant is a citizen of this state, and cannot be heard to plead the privilege of a citizen of any other state. But, besides, it is clear that the statute does not discriminate between citizens of different states; its prohibition is aimed at all persons, whether citizens of this state or of any other state, who may presume to do the prohibition act. Certainly it is not within the intendment of the constitutional clause that citizens of the state of New York, while resident there, shall have all the privileges that they would enjoy

if resident within our borders. Fourthly, The principal constitutional argument is rested upon that clause of the Federal Constitution (article 1, § 8) which empowers Congress to regulate commerce among the several states. If the water whose transportation is prohibited, including the water of the Passaic river, of which the appellant seeks to make merchandise beyond our territorial borders, is the proper subject of interstate commerce, the state, of course, cannot interfere with the proposed traffic. Such right as the appellant claims to withdraw the water from the Passaic river and make merchandise of it is derived by grant from the East Jersey Water Company. Whatever rights this company may have as against the state must rest upon its chartered powers, upon its status as a riparian owner upon the Passaic river, or upon both of these combined." It may be added that the court does not consider the charter of the company to give it the right to divert the state's streams for the purpose of conveying the water beyond the borders of the state.

CORPORATIONS. (Fraudulent Issue of Stock to obtain Control.) Mass. — A case of more than passing interest in times when the control of corporations is repeatedly shifting, is that of Elliott *v.* Baker, 80 N. E. Rep., 450. In this case, it was sought to annul an issue of stock by which a majority of the directors of the corporation attempted to gain the control of the corporation, the stock having been issued to confederates of such directors. As the reason of the court in upholding the lower court's decree cancelling the stock issued is exceedingly able and of general public interest, and as it lays down important rules of moral conduct, it is herewith given in full.

"Mere belief that they are acting for the interests of the corporation on the part of a majority of the directors, who at the time represent a minority of the stock then outstanding, does not justify the issuing to confederates of a sufficient amount of stock to give to themselves, and to oust their opponents from, the control of the corporation, when the issuing of the stock is not required by the condition of the corporation or reasonably necessary for the proper prosecution of its business. The directors of a corporation act in a strictly fiduciary capacity. Their office is one of trust and they are held to the high standard of duty required of trustees. They cannot be permitted so to manage the affairs of their *cestui que* trust that the system of business corporations by which so large a part of the world's work is now conducted 'may become a system of frauds.' Peabody *v.* Flint, 6 Allen, 52, 55; European & North American Railway Co. *v.* Poor, 59 Me. 277. Corporate directors cannot manipulate the property, of which they have control in a trust character, primarily with the intent to secure a majority of the stock or of directors in any particular interest. This is not a fair exercise in good faith of the power with which they are clothed. Punt *v.* Symons & Co., Ltd. [1903] 2 Ch. 494, 515. This is especially true when the issuance of the stock is for the express purpose of retaining in power the very persons who authorize the issue, and who are therefore distinctly benefitted to the disadvantage of another and substantial part of their stockholders. Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Cannon *v.* Trask, L. R. 20 Eq. 669; Luther *v.* Luther Co., 118 Wis. 112, 94 N. W. 69, 99 Am. St. Rep. 977; Way *v.* American Grease Co., 60 N. J. Eq. 263, 47 Atl. 44."

CORPORATIONS. ("Treasury Stocks.") N. J. — The New Jersey Act concerning corporations, it has been held, impliedly grants power to a corporation to purchase shares of its own capital stock if such purchase is for legitimate corporate purpose. In Knickerbocker Importation Co. *v.* State Board of Assessors, 65 At. Rep., 913, the court decides that this implied grant of power does not authorize a corporation to acquire its own stock for the purpose of creating so-called treasury stock, as such purpose is not a legitimate corporate purpose. Furthermore, the court holds that a corporation cannot, by the purchase of its own shares, withdrew such shares from the class of stock issued and outstanding and thus reduce the amount of franchise tax to the extent of the shares, thus purchased. Stock once issued is and remains outstanding until retired and cancelled by the method provided by statute for the retirement and cancellation of capital stock. The words "retirement" and "cancellation" whenever used in the franchise tax act or in the amendment of that act, mean termination, retirement and actual cancellation, not simply purchase of stock.

EVIDENCE. (Census Returns.) Mo. — In the absence of official records of births, it is often difficult to prove the ages of persons in our courts. Evidence of varying nature is relied on to supply this want of official records. Recently the United States census has been availed of for this purpose and in Priddy *v.* Boice, 99 S. W. 1055, the Missouri Supreme Court gives its sanction to the use of properly certified copies of the United States census to prove the age of a person. These records are by law required to contain not only the sex, color, occupation, etc., of each inhabitant, but also the age. They are therefore available to prove the age of an inhabitant. As bearing directly on the point, the court cites Flora *v.* Anderson, 75 Fed. 231, and as supporting its position by analogy it further cites Evanston *v.* Gunn, 99 U. S. 666, 25 L. Ed. 306; People *v.* Wil-

liams, 64 Cal. 498, 2 Pac. 393; Levels *v.* Railroad, 196 Mo. 622, 94 S. W. 278, and numerous other cases.

GAMING. (Trusts — Notice.) **U. S. C. C. A. 9th. Cir.** — The right of a *cestui que* trust to recover from a bucket shop owner trust funds lost by the trustee is upheld in Joslyn *v.* Downing, Hopkins & Co., 150 Fed., 317. In this case, it appeared that the bucket shop owner knew that his customer was financially embarrassed and was therefore put on inquiry as to whose money the customer was using. The *cestui que* trust did not participate in the gambling transactions and had no knowledge that its money was so used. Under these circumstances, the court held that the *cestui que* trust was entitled to recover, and this the court held to be true even though the bucket shop owner had not been put upon inquiry as to whether or not its customer, the trustee, was using his own money.

INTERSTATE COMMERCE ACT. (Passes — Existing Contracts.) **U. S. C. C. W. D. Ky.** — The effect of the provision of the Interstate Commerce Act of 1906 prohibiting free transportation is considered in the recent case of Mottley *v.* Louisville & N. R. Co., 150 Fed. Rep. 406, with reference to a prior contract for free transportation for life, made by a carrier in consideration of a release of damages for injuries. The contract in question, the court considered to be based on a valuable consideration. Applying general rules of construction to the provision in the statute, the court held that the provision did not invalidate the contract nor did it authorize the carrier to refuse longer to issue passes good beyond the boundaries of the state.

LANDLORD AND TENANT. (Removal of Furniture.) **Sup. Ct. N. Y.** — Marder *v.* Heinemann, 100 N. Y. Sup. 250, was an action by a tenant against the landlord for the conversion of an ice box. The defendant leased a store to the plaintiff, who carried on in it the business of retail dealer in butter and eggs. The ice box he put in for his business being too large to go through the door, he took out the large plate glass which formed part of the front of the store, and was set in the building itself, instead of in a movable sash, and put the ice box in through the opening, and replaced the plate glass. The landlord was present while the ice box was being put in in that way, and did not forbid or prevent it, but only asked who was to repair the damage by the removal of the glass, the plaintiff saying he would. When the tenant was moving out at the end of the term the defendant prevented him from taking the ice box out in the way he took it in and there was no other way to take it out. It could not be taken apart without being destroyed, or greatly injured. The court held that the refusal of defendant to allow plaintiff to remove the plate glass to take out the ice box was conversion, as by assenting to the removal of the plate glass to take the ice box in, defendant assented to the taking of it out in the same way. Kelsey *v.* Durkee, 33 Barb. 410.

LARCENCY. (Securing Baggage of Another by Transferring Checks.) **Ill.** — A novel scheme for obtaining possession of the personal goods of another with the intent to convert them to the taker's own use without the consent of the owner, is disclosed in the case of Aldrich *v.* People, 79 N. E. Rep. 964. A passenger, boarding a steamer in Michigan and bound ultimately for California, checked her trunk to Chicago, and upon arrival there rechecked the trunk to California by simply surrendering the first check and taking another in exchange for it, without actually seeing her trunk in the office of the transportation company. The trunk delivered to her in California was not her own, and on being opened was found to contain nothing but waste paper. The passenger's trunk was afterwards identified while being shipped from Chicago to Milwaukee, and the contents of the trunk were found in the room of the person who held the checks for the trunk on its passage from Chicago to Milwaukee. It seems that during the passage from Michigan to Chicago, the defendant transferred the baggage checks on the trunks, and in this way secured the delivery to him of the trunk of the passenger who was bound for California. The court holds that such an act is larceny if there was a felonious intent throughout the entire scheme to steal the baggage. While the transportation company was unknowingly made the agency for securing actual possession of the trunk, the court does not regard this as an act relieving the accused from liability for the offense. An asportation may be effected by means of innocent human agency as well as by mechanical agency or by the offender's own hands. Where, with intent to steal, a wrongdoer employs or sets in motion any agency, either animate or inanimate, with the design of effecting the transfer of the possession of the goods of another to him, in order that he may feloniously convert and steal them, the larceny will be complete, if in pursuance of such agency the goods come into the hands of the wrongdoer and he feloniously converts them to his own use. In support of this rule, the court cites Commonwealth *v.* Barry, 125 Mass. 390; Woods *v.* People, 222 Ill. 293, 78 N. E. 607; and Clark & Marshall on Law of Crimes, p. 446.

MUNICIPAL CORPORATIONS. (Torts — Vaccination Order.) **Mass.** — The liability of a town for the action of a school board in excluding from the public schools a pupil not vaccinated

though having a certificate that she was not a fit subject for vaccination is determined in favor of the town in the recent case of Hammond *v.* Town of Hyde Park, 80 N. E. Rep. 650. By law it is provided in Massachussetts that a child who has not been vaccinated shall not be permitted to enter a public school except by presentation of a certificate signed by a regular physician that she is not a fit subject for vaccination. This law, the court held, impliedly permits a child who is not vaccinated but presents a proper certificate to attend school when there is no particular reason to apprehend danger but is not intended to take away from the school committee the power to make proper regulations for the protection of all the pupils if the prevalence of smallpox seems to require special precautions. As the school board in this case acted in good faith in excluding pupils not vaccinated during an epidemic of smallpox and had relieved the plaintiff from the suspension as soon as the crises had passed, the court held that the town was not liable.

NEGLIGENCE. (**Electricity.**) **Miss.** — In Temple *v.* McComb City Electric Light & Power Co., 42 So. Rep. 874, an electric light company is held liable for injuries to a small boy received by coming in contact with an uninsulated wire while climbing a tree through which the wire passed. The tree in which the accident happened was a small oak tree, abounding in branches extending almost to the ground. As the light company had knowledge of the tree and what kind of a tree it was, the court held that it also knew what any person of practical common sense would know — that it was just the kind of a tree children might climb into, to play in the branches. The court remarks that the immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit which corporations stretching wires over such trees must take notice of. As far as within the court's power, it is going to safe-guard the right of small boys to climb such trees.

NEGLIGENCE. (**Proximate Cause.**) **Ill.** — The liability of a railroad company for injuries to a child received while the child was playing on a clay pile alongside the railroad track received consideration in Seymour *v.* Union Stockyards and Transit Company, 79 N. E. 950. In this case it was sought to hold the railroad company liable on the theory that it had by leaving clay piled along its track created a nuisance attractive to children. It appeared in the case, however, that though the child injured was attracted by the clay piled along the railroad track and went thereon and was there at play, he was not while so engaged in any danger; but as a train passed, the child, no longer absorbed by the attractions of the clay pile, began touching, playing with and running alongside the slowly moving cars, finally falling under them and sustaining the injuries complained of. Under such circumstances, the court was of the opinion that an element intervened between the acts induced by the allurements of the clay pile and the injury, viz., the movements of the boy in placing himself in contact with and running along side the cars. Thus the case at bar was distinguished from Kansas City, Ft. Scott & Memphis R. Co. *v.* Matson, 68 Kan. 815, 75 Pac. 503, relied on by plaintiff. Counsel for plaintiff made no claim as to negligence which might otherwise have been predicated on the fact that the clay was not so leveled down or was not placed at such distance from the track as to make or leave the approach to the railroad track over smooth or level ground. The court holds that the railroad company was not liable in this case, the proximate cause of the injury not being the pile of clay, nor any danger with which the child was brought in contact while gratifying any curiosity or desire excited by that pile, but the movements of the child in placing his hands upon and running alongside the car.

NEGLIGENCE. (**Street Railroads — Subway Crowds.**) **Mass.** — Passengers frequently receive more or less serious injuries while struggling to board street cars in crowds. A case dealing with this question and exhaustedly discussing the company's liability under such circumstances is that of Kuhlen *v.* Boston and Northern Street Railway Company, 79 N. E. 815. In this case plaintiff was injured in a crush while attempting to enter a car at a subway station in Boston. The court notes as cardinal principles that a carrier is bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of vigilance and care to which it is held, it had reason to anticipate, and that it is its duty to use all proper means and precautions to protect its passengers against injuries caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against. Numerous authorities are cited in support of these rules. As there was evidence in this case that there was an unusually large crowd in the subway station at the time of day plaintiff was injured and that there had been on many previous occasions the same surging and struggling as occurred at that time, the court held that the jury had the right to find that the defendant and its servants ought to have anticipated just what actually took place, and ought, in the exercise of necessary care, to have taken reasonable precautions to guard against such injuries as were caused to plaintiff, and that they were negligent in fail-

ing to do so. The fact that plaintiff had been in similar crowds before and that she had many times narrowly escaped injury, and that, notwithstanding the knowledge gained by such experiences, she joined in tne general rush to get into the car did not show her guilty of contributory negligence as a matter of law.

PATENTS. (Monopoly — Right to Equitable Aid.) U. S. C. C. A., 1st. Cir. — A question of tremendous importance to the general public with reference to monopolies and combinations is scrutinized with exceeding care and exhaustiveness by Judge Aldrich in a dissenting opinion in Continental Paper Bag Company *v.* Eastern Paper Bag Company, 150 Fed. 741. In this case the owner of a patent which had not been put in use sought the aid of a court of equity to enjoin its infringement. The majority opinion, after determining whether defendants were infringing the patent, passes very lightly over the question as to the right to an injunction by saying that the Supreme Court has not, so far as the court is informed, directly passed on the question in any considered decision but that the weight of authority is in favor of the right of complainant to an injunction. As constituting the weight of authority are cited: Fuller *v.* Berger, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381; Bement *v.* Nat. Harrow Co., 186 U. S. 70, 88, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058; Heaton Peninsular Button Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 28 C. C. A. 267, 35 L. R. A. 728; Crown Cork Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 868, 48 C. C. A. 72; Broadnax *v.* Central Stockyard Co. (C. C.) 4 Fed. 214, 216; Consol. Roller-Mill Co. *v.* Coombs (C. C.) 39 Fed. 803; Campbell Printing Co. *v.* Manhattan Ry. Co. (C. C.) 49 Fed. 930. In an elaborate and well considered dissenting opinion, Judge Aldrich takes issue with the majority on this point. He says that there is no pretense in the case that equitable aid is asked to protect from infringement a patent the plaintiff is using in its business. In the aspect most favorable to the plaintiff the relief sought is injunctive protection to a business or an industry built up in using a particular invention, and through acquiring and holding in deliberate nonuse a competing invention by way of protection. It results, therefore, he says, that a court of equity is asked not to protect from infringement the statutorily intended monopoly of the right to make, use, and vend under a particular patent, but to protect a monopoly beyond and broader than that, a monopoly in aid of the rightful statutory monopoly of the patent in use. The proposition involves the idea of a secondary monopoly maintained to stifle patent competition in the trades and industries, and thus contemplates a condition which at once contravenes the purpose of the Constitution, and a monopoly of a kind and breadth and for a purpose in no sense ever contemplated by the statutory contract which safeguards the legal right to make, use and vend under a particular patent. Simple nonuse, he concedes, is no efficient reason for withholding injunction, for there are many reasons for nonuse, which on explanation are cogent, but a court of equity may look beyond the fictitious issues in a suit; and when acquiring, holding and nonuse are only explainable upon the hypothesis of a purpose to abnormally force trade into unnatural channels, this is quite a different thing from simple nonuse. Under the Constitution and statutes in aid of the constitutional provision with reference to inventions and discoveries, it was intended to stimulate art and invention on competitive conditions by protecting the right to each inventor, or each owner, to make, use and vend, and if equity is to aid in stultifying this plain intent through affirmative relief by injunction by protecting patent aggregations held in deliberate nonuse for the purpose of excluding all patent benefits except such as the holder sees fit to bestow, it will help to overthrow the intended meritorious patent competition under normal conditions in trade and will help to deny the intended benefits to the public. He cites numerous cases, among others Heaton Peninsular Button-Fastener Case, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Livingston *v.* Van Ingen, 9 Johns. 507, and Root *v.* Railway Co., 105 U. S. 189, 26 L. Ed. 975, to show that the patent right is granted on the reasonable expectation that the inventor will put his patent in practical use or permit others to avail themselves of it upon reasonable terms. A writ of certiorari in this case was granted by the Supreme Court on March 11th.

This decision is another example of what I have ventured to call the decadence of equity (see 5 Columbia Law Review, 20). Application of an equitable remedy in a hard and fast legal manner, without regard to the inequitable consequence, or to the purpose for which the plaintiff desires relief, is an interesting sign of the times, coming, as it does here, not from a Western Code State, but from a Federal Court in which the distinction between law and equity is supposed to be maintained.

R. P.

PLEADING. (Constitutional Law.) Ala. — A rather liberal view as to the sufficiency of an objection to the constitutionality of an enactment is taken in Beauvoir Club *v.* State, 42 So. Rep. 1040. In this case the legislative enactment had been pleaded as a defense to a prosecution. This plea was demurred to on the broad ground that the enactment was " unconstitutional

and void." Though this presented the constitutional objection in a general statement, the court held this sufficient, and, if it found that the statute contravened any provision of the Constitution, the ruling of the trial court in holding the statute unconstitutional should be sustained under such an objection. To this proposition the court cites two prior Alabama cases — Montgomery *v.* Birdsong, 126 Ala. 632, 28 South. 522; Shell Road *v.* O'Donnell, 87 Ala. 376, 6 South. 119. But it is to be noted that this holding contravenes the weight of authority, as it is generally held that one insisting on the unconstitutionality of an act must point out the specific constitutional provision that is violated. As cases supporting the general doctrine may be cited: Rohrbacker *v.* Jackson, 51 Miss. 735; *In re* League Island, 1 Brewst. (Pa.) 524; Davis *v.* State, 71 Tenn. (3 Lea) 374; People *v.* Rucker, 5 Colo. 455; Crowley *v.* State, 11 Ore. 512, 6 Pac. 70; Mauldin *v.* City Council of Greenville, 42 S. Car. 293, 20 S. E. 824, 46 Am. St. Rep. 723, 27 L. R. A. 284; Houston & T. C. Ry. Co. *v.* Harry, 63 Tex. 256.

PRACTICE. (**Trade Secrets — Necessity of Disclosure in Suit for Injunction.**) **N. J., Ch.** — A manufacturer engaged in the manufacture of steel, in accordance with a secret process discovered by him, who sues a former employee and a competitor who has employed the employee to restrain the employee from disclosing the secrets to the competitor, and to restrain the competitor from retaining the employee in its service, is, according to Taylor Iron and Steel Co. *v.* Nichols, 65 At. Rep. 695, not required to disclose on the trial the secret process of his business. To require the manufacturer to prove such process would be destructive of his rights, the court holds. The character of the business the impossibility of discovery by the analysis used, added to the ordinary secrecy observed by all manufacturers of goods of this class, would render almost hopeless the discovery of infringement, should the defendant take advantage of information thus acquired. In support of this position the court cites: Moxie Nerve Food Co. *v.* Beach, 35 Fed. 465; Eastman *v.* Reichenbach, 20 N. Y. Supp. 110, and Stokes Bros. Mfg. Co. *v.* Heller, 56 Fed. 297.

PRACTICE. (**New Trial.**) **N. Y. S. C.** — By the New York Code of Civil Procedure the defendant in ejectment is entitled to a new trial within three years from entry of judgment as a matter of right on the payment of costs. In Townshend *v.* Keenan, 102 N. Y. S. 792, it was contended that the collection of costs by execution did not constitute a payment so as to entitle the defendant in ejectment to a new trial as a matter of right under the statute, but the court was of the opinion that if plaintiff saw fit to issue an execution on the judgment for costs and collected them in that manner, this was as good a payment as though voluntarily made by defendant. If collection was effectuated in this manner the defendant was entitled to the benefit of the payment on a motion for new trial.

TAXATION. (**Federal Inheritance Tax.**) **U. S. C. C. A. 4th. Cir.** — The Federal statute of 1898 imposing a succession tax was the subject of construction in Kerr *v.* Goldborough, 150 Fed., 289. This law classified legatees and distributees with reference to their degree of blood relationship to the deceased and regulated the taxes accordingly. In the first class were placed the lineal issue of lineal ancestor, brother or sister of the decedent; in the second, the descendants of a brother or sister; in the third, the brother or sister of the father or mother or a descendant; in the fourth, the brother or sister of the grandfather or grandmother or a descendant; and in the fifth, the beneficiaries found to be in any other degree of collateral consanguinity or who may be strangers in blood to the person dying seised of the property. Though an adopted child was under the laws of the state entitled to all the rights of heirship of a child born in lawful wedlock, the court held that such child was not "a lineal issue" within the first class, but a stranger in blood within the fifth class.

TORTS. (**Unfair Competition.**) **U. S. C. C. S. Da.** — Of late years, the business of what is known as mail order houses has increased rapidly in the agricultural communities. This has more or less seriously affected the business of local retailers who have in several communities in the western states combined to check the inroads on their business made by the mail order houses. The validity of such a combination recently came up for consideration in the case of Montgomery, Ward & Company *v.* South Dakota Retail Merchants & Hardware Dealers Association, 150 Fed. 413. In this case, the court held that the retailers could lawfully agree among themselves not to purchase merchandise from wholesalers and jobbers who sold to catalogue or mail order houses and to inform each other as to what wholesalers and jobbers did make such sales, that in the furtherance of this agreement, it was not unfair competition, intimidation or coercion for the retailers whether by persuasion or any peaceable means to seek to prevent wholesalers from selling to catalogue houses.

THE LIGHTER SIDE

Immortality. — " If this decree could be forgotten, like a judgment in an ordinary personal action, I should feel less mortification at the result. But, in impairing the usefulness of this great thoroughfare of the western world, we have erected a lasting monument. Its voice, like the herdsman's call, will reverberate along the hills and valleys after the original sound shall have died away; and the light which it sheds upon railroad science, like that reflected in the evening sky, will remain after the body from which it emanates shall have departed," — Per Lewis, J. in Comm. *v.* Erie & N. E. R. Co., 27 Pa. 339 (at page 373).

A New Legal Story. — The list of good legal stories has been increased by one that is creating a good deal of amusement among judges and lawyers. As it goes, Chief Justice Falconbridge, of Ontario, Mr. Justice Britton and Mr. Justice Riddell, a newly appointed judge, were sitting together as a court in Toronto not long since. According to some legalists who were present, the presentation of argument on behalf of one of the clients was rather prolix and not very much to the point, to put it mildly. Mr. Justice Riddell, who, by the way, was not to the same extent inured against the tediousness of the proceedings as were his colleagues, was observed to pass one of them a slip of paper, on which, presumably, were written some notes on the case. Immediately the " notes " were read, however, by his colleagues, there was a subdued suggestion of mirth apparent on their part. It turned out that the " notes " read after this fashion.

THE " NOTES."

(With apologies to Mr. Rudyard Kipling.)

" 'Oo is it makes that bloomin' noise? "
Asked Files-on-Parade.
" It's counsel's openin' argument"
The color-sergeant said.
" 'Oo 'as to 'ear the bally stuff? "
Asked Files-on-Parade.
" The chief and his two hired men,"
The color-sergeant said.
" For he doesn't know his law, he misrepresents the facts:
His logic is so rotten you can see through all the cracks,
And he's pretty sure to get it where the chicken got the axe,
When the court delivers judgment in the morning." — *Montreal Star.*

The Justice's Admission. — The proprietors of a celebrated Swadeshi toilet preparation have been collecting testimonials from the leaders of Indian society. One learned justice ingenuously offers the following surprising testimony: " Very efficacious for weakness of the brain. I use it daily." — *Allahabad Pioneer.*

Intemperate. — " I vent to lawyer apoud some advice on my pizness, und he charged me fifty dollars for fife minutes conversation."

" Gracious! Vot extravagant languich he must use." — *Philadelphia Press.*

Safety in Silence. — *Mrs. Gaymon.* — Yes, auntie, now that I am Herbert's wife, he is another man.

Aunt Martha. — Well, don't you go telling people you're another man's wife or you'll be getting tried for bigamy.

Baxter Dictating to a new Stenographer. — " Now, I hope you can spell. You have heard the story of the senior partner who said ' that stenographer spells ridiculously ' and the junior partner replied, ' well, if she does, it is the only word I ever heard of her spelling correctly! "

Stenographer. — " I think I can spell as well as some of your correspondents."

Baxter. — " Take a letter to the Superintendent of the County Hospital of ——— and we will see."

In reply to the above letter in due course of mail, the Hospital superintendent adds as a post script. " *I am stuck on this letter of yours. I can reede it with eas. I like tipe writen.*"

Judgment. — Stenographer wins.

A Telling Retort. — Two prominent lawyers generally opposed to each other were engaged in a warm discussion over the power of a certain city council and one spoke of it in the singular number as "the Council is" when he was interrupted by his opponent, who exhibited considerable irritation, with "Why don't you use good English? The Council are." The attorney ignoring the discourteous interruption, continued addressing the court as follows: "Your Honor it is my misfortune that I had not the benefit of earlier association with counsel that I might have improved my knowledge of English. His misfortune is that he did not have the benefit of earlier association with me that he might have improved his knowledge of the law, for I humbly conceive it is better to be mistaken as to your grammar sometimes, than to be mistaken as to the law always."

Full Dress for the Ladies. — From Sioux Falls, South Dakota, comes the report of a breach of promise case worthy of record. The trial of the case consumed the greater part of two days, and during the time it was pending the court room was constantly crowded with spectators. Standing room, in fact, was at a premium.

An interesting feature of the trial was the fact that all of the officers of the court, with the exception of the presiding judge, appeared in dress suits during the trial, with white ties and white vests. — *St. Paul Pioneer Press.*

A Compound Sentence. — There is a custom in French jurisprudence that sanctions the consultation by a judge, in provincial courts, with colleagues on the bench when sentence is to be passed upon certain classes of malefactors.

"What ought we to give this rascal, brother?" a judge in the Department of the Loire once asked the colleague on his right.

"I should say three years."

"What is your opinion, brother?" This to the colleague on the left.

"I should give him four years."

Whereupon the judge, assuming an air of great benevolence, said:

"Prisoner, not desiring to impose upon you a long and severe term of imprisonment, as I should have done if left to myself, I have consulted my learned brethren and shall take their advice. Seven years." — *Argonaut.*

WOMAN'S SPECIALTY.

No woman can expect to be
A lawyer of renown,
She can't take up the law, for she
Likes most to lay it down.
— *Philadelphia Press.*

Application of Meeting of the Minds. — The following humorous illustration of a contract was given by a South Carolina magistrate in his charge to a jury: "The attorney for the defendant, in an action upon contract, had made an oral request of the magistrate to charge that in order to constitute a contract, the minds of the parties must meet upon the same subject in the same sense. The magistrate replied: 'Yes, gentlemen of the jury, that is good law; it is just like welding two pieces of iron. Both ends must be red hot at the same time when the hammer strikes, in order to weld. If one is hot and the other cold, they won't tie together. I charge you that as matter of law and matter of fact."

He was Administrator to Receive. — George Washington Johnson was a colored preacher of no small fame among his own race and was consequently entrusted with the settlement of the affairs of his parishioners in life and in death. One of his parishioners, a whitewasher by profession, died leaving a small estate which the Rev. Johnson was selected by the heirs to administer and settle up. Among the bills receivable he found a small account for a job of whitewashing deceased had done for Col. D. W. Searle, now judge of the courts of Susquehanna County, Pa. Meeting the colonel one day, the reverend gentleman addressed him thus:

"Mr. Searle I am de duly appointed administrator ob de estate of Mr. Bacon, one of my beloved parishioners, and am charged wid de collection of his accounts, and I find among them a small bill for whitewashing agin you dat I must request be promptly adjusted, sah." "Oh! that's all right, Mr. Johnson," said the colonel, "but I loaned Mr. Bacon twenty dollars when he was working for me and took his note for it, so I'll credit his bill

against me on the note and you can pay me the balance whenever you get around to it." "I can't do dat, Mr. Searle," replied the reverend gentleman, "I can't do dat, sah, I'se de administrator to receive."

Tim. — An Irishman came into the lawyer's office one cold morning with left arm in a sling and asked the lawyer, "Have you any work a poor man could do to earn something for his fambly to eat?" "What is the matter with your arm?" asked the lawyer. "I slipped on the ice, and fell and broke it." "What work could you do with a broken arm?" "Oh! I could saw wood and many things." "What, with one hand?" "Yes." "I have a couple of cords of wood up at my house. What is it worth to cut it in two, once?" "A dollar a cord." "Here is two dollars, but you need not cut it now, you can cut some for me when you are well." The Irishman took the money and went out. That evening when the lawyer went home, the wood was cut and nicely piled up. Tim had done it with one hand. The lawyer thought such pluck deserved reward, so in a day or two he said to the man whom he met in the street, "Tim that was a pretty good job you did with one hand. How much family have you got?" "My wife, two girls and a boy all nearly grown and three smaller children." "What do you do for a living?" "I works at what I can find to do." "Tim, I have a building near where the work is being done down at the river. How would it do for you to take it and keep boarders there?" "It would do all right and I would be proud if I could, but I have nothing to do with, no furniture or bedding, and I would have to have that." "How much money would it take to fix you up?" "I don't know, but I can go to the second hand store and find out." "Do so and let me know." He went away and returned saying it would take sixty-five dollars, but there was no use talking, he could not raise the money. He wished he could, it would be a good thing. "I will buy the things for you, Tim," which he did. Tim started in making money from the start. Before long he had a saloon adjunct to the boarding house. As soon as it started trouble began. Tim was arrested frequently. His friend, the lawyer, by personal influence with the courts, managed to have Tim let down easy in his troubles, so it became a matter of talk that Tim did not suffer in being arrested, which was very often. One day a friend said to Tim, "How is it you are arrested nearly every day but never go to jail nor pay any fines?" "It's just this way," said Tim. "I have Mr. Gillman for my lawyer and what he don't know about the law, I tells him."

Nothing. — Tim Shaughnessy came into Mr. Gillman's, his patron's office one morning looking dejected. "Mr. Gillman I was arrested again this morning." "Oh Tim, why do you get into trouble all the time, why can't you behave yourself? What is it this time?" "I had some trouble with a nagur. I was having some plastering done down at the house and to save expense I was tending him myself. As I came out the door a great big buck of a nagur came along and put his big huff of a foot into the mortar I had mixed up and scattered it out." "What did you do to him, Tom?" "Nothin' at all, Mr. Gillman, except to hit him in the head with the mortar hoe."

A Good Job. — A country woman came into the lawyer's office one morning and asked if her man had been there. Being told he had not, she said, "We sold forty acres of our land yesterday, and we had to make the papers before a lawyer. He told me to come here and wait for him. "All right, sit down and make yourself comfortable." She sat down and the lawyer turned to his work. "Say, Mr. Lawyer, How is the lawyerin' business?" "Pretty good, I guess," said the lawyer. "Sometimes I think of having my man run for a lawyer."

Appendicitis. — A suit was being tried in court before a jury. A commission man had sued for advances in casings for sausage consigned to him which had not realized the amount of the advances. Defendant claimed the casings were light salted for immediate use when consigned in February and he had directed an immediate sale. The market being down for casings the commission man had held them several weeks, and found in April they were useless. The defendant had taken depositions at the commission man's city to

prove value of light salted casings in February when the casings were ordered sold. Objection being made by plaintiff that the depositions were immaterial for the reason they did not tend to show any measure of damages. That if the plaintiff had converted the casings to his own use by failing to sell as ordered the measure of damages was their value when and where delivered to plaintiff, which was when the casings had been shipped and given to the carrier for delivery to plaintiff. The objection being sustained the defendant called to the witness stand a butcher of the town, who was sworn and asked, "What is your business?" "I am a butcher." "How long have you been a butcher here in town?" "Fifteen years." "What was the value of light salted casings about February 10, in this town?" "I don't know dat." "Why not?" "I never bought any casings and never sold any. When I make sausage I always use my own guts."

The Qualifications. — A lawyer in his office one day was visited by a tall, raw-boned woman who partly led and partly dragged a boy. Accosting the lawyer she asked, "Be you the lawyer?" "Yes," he replied. "What can I do for you?" "I want you to take this boy and make a lawyer of him." "Your son seems young to begin the study of law. How old is he?" "Six years old." "He is entirely too young, have you no older boy?" "Yes," she said, "we have older boys and younger ones. We intend to make farmers of the others, but a lawyer of this one." "What is there about this boy that makes you determine to make a lawyer of him?" "Well, I'll tell you, mister, when that boy was four years old he was as sassy and impudent as could be, when he was five he would lie like all creation. Now he steals everything he can get hold of."

The Press. — A story is told of the late John L. Toole, the comedian, and Mr. Justice Hawkins, now Lord Brampton. They were at supper together discussing the events of the day. The judge incidentally mentioned that he intended, on the morrow, giving the man he had been trying fifteen years, because he deserved it. As Toole was leaving he blandly inquired: "Oh, would you mind my calling at the newspaper offices and telling them about that fifteen years? It will be a tip for them — exclusive information, you know — and will do me no end of good with the press." "Good God! No, sir," exclaimed the judge, who took the precaution of accompanying Toole to his hotel and seeing him safely to bed. — *Rochester Herald.*

A Quaint Old Bill for Damages. — Though this was paid immediately, it is scarcely likely to serve as a model for less modest present-day claimants.

A claim for damages against a railroad company is so often a license for exorbitant charges that a simple bill, such as was received by an American railroad company many years ago, even apart from its humorous aspect, is refreshing. It ran as follows:

The —— and —— Railroad Company,
To John Smith, Dr.

July 19, 1837 — To running your Locomotive into my wife; as per Doctor's bill for curing her	$10.00
To smashing ban box and spilling her hat	3.87
To upsetting my deer born (wagon) and breaking it	35.00
To hurting *me*	5.00
	$53.87

There is authority for stating that the claim was paid immediately. —*Scrap Book.*

Could Take His Choice. — At a recent inquest in a Pennsylvania town, one of the jurors, after the usual swearing in, arose and with much dignity protested against service, alleging that he was the general manager of an important concern and was wasting valuable time by sitting as a juror at an inquest.

The coroner, turning to his clerk, said: "Mr. Morgan, kindly hand me 'Jervis' (the authority on juries)." Then, after consulting the book, the coroner observed to the unwilling juror:

"Upon reference to 'Jervis,' I find, sir, that no persons are exempt from service as jurors except idiots, imbeciles, and lunatics. Now, under which heading do you claim exemption?" — *Success.*

Charged the Jury. — Congressman Sydney Mudd, of Maryland, is said to have told this story about an old negro who, by some peculiar election twist, was elected a justice of the peace in the backwoods of Georgia.

His first case happened to be one in which the defendant asked for a trial by jury. When the testimony was all in and the argument had been concluded, the lawyers waited for the judge to proceed with his instructions to the jury.

The justice seemed somewhat embarrassed. Finally one of the lawyers whispered to him that it was time to charge the jury.

Looking at the jury with a grim judicial air, the judge said:

" Gentlemen ob de jury, sense dis is a very small case, I'll jes charge ye a dollar an' a half apiece."

A Sentence. — A man employed by a farmer living in St. Lawrence County, N. Y., was arrested and indicted on a charge of grand larceny in stealing a watch from his employer.

At the trial the Hon. A. B. James presided. James was sternness itself in appearance and manner; but underneath his stern exterior there existed, it was well known, a dry humor and a subtle sort of wit.

The defendant was convicted and was told by the judge to stand up for sentence.

" Prisoner," said the judge, " why did you steal that watch? "

" Well, you see, judge," replied the prisoner, " I went into the bedroom and saw it lying on the bureau, and the devil tempted me to take it, but I didn't. I went in again and the devil tempted me again to take it and I did."

" Yes? " said Judge James, somewhat quizzically. " Well, now, sir, I will give you one year and seven months — seven months for stealing that watch and one year for slandering the devil."

He Couldn't be Bribed on Credit. — In one of the Upper Peninsula Counties of Michigan, is a lawyer, not a bad fellow, but possessing the capacity to say the wrong thing at the right time. He was recently employed as attorney for the plaintiff in an action before a justice growing out of an assault. The defendant and plaintiff are laborers, both foreigners, and the defendant, as soon as process was served, anxious to settle, went to see the plaintiff's attorney to effect a compromise. He had no money, but was profuse in promises to fix it up " pay day " and told the attorney if he consented to fixing the matter up he would make it right with him personally. Assuming that dignity which pertains to the profession, and filled with righteous indignation over the mere suggestions of payment from the opposition, he replied in just anger, —

" My Dear Sir: — I am the plantiff's attorney in this case, and can't accept any compromise without consulting my client, and you must not come to me with such a proposition. I want you people to distinctly understand once for all time, that you can't bribe an honest lawyer, *on credit.*"

Monument for a Mule. — Jacob Goetz, proprietor of the Coeur d'Alene Theater, has given orders for the erection of a marble shaft costing $250 over the grave of a donkey, which died a few days ago. " Bill," the name that will be inscribed on the shaft, was no ordinary donkey, but was known far and near as the " famous $4,000,000 donkey." Even this title did him scant justice, as he was the discoverer of the Bunker Hill and Sullivan gold mines, estimated to be worth $10,000,000, and the total output of which has already exceeded twice this sum, with a yearly dividend of $2,160,000.

The mines were estimated to be worth $4,000,000 at the time the donkey, while standing in the court at Boise, Idaho, marked " exhibit A," heard Judge Norman Buck hand down the following opinion, which determined the ownership of the mine:

" From the evidence of the witnesses this court is of the opinion that the Bunker Hill mine was discovered by the donkey, Phil O'Rourke and N. S. Kellogg, and as the animal was the property of the plaintiffs, Cooper and Peck, they are entitled to a half interest in the Bunker Hill and a quarter interest in the Sullivan claims."

N. S. Kellogg thereupon bought the donkey for $250 cash, and employed a man at a salary of $50 a month to care for the animal the rest

of its life. That was twenty-one years ago. Bill was six years old at the time. For twenty-one years he has enjoyed every luxury, has been the pet of children in the neighborhood, and honored by visitors from all parts of the world.

A few days ago Bill was called to that place where all good donkeys go, and it was the receipt of this news that caused Goetz to announce that he would erect a monument to the memory of the famous animal.

Peers. — The Hon. Joseph Chamberlain is fond of relating an incident that occurred while he and Lord Rosebery were returning from the theater one night.

While crossing the street they were accosted by a ragged boy who, after sweeping the mud from their path, asked for alms.

Lord Rosebery was about to give the boy a coin when an idea struck him. "My boy," said Rosebery, "if you will hit that policeman a swat on the back with your muddy broom I will give you ten shillings." Prompt to the word the boy crept in back of the officer and raising his broom struck him in the back, then turned and ran, but to the dismay of Rosebery the officer caught the boy after a chase of a few yards.

Not wanting to leave the boy in a fix Rosebery tried to fix things up with the officer, but the worthy gentleman would not listen, and took them all three up to the station.

They were taken before the judge of the station, and after surveying them through his glasses he took down a book and turning to Chamberlain asked his name. "Hon. Joseph Chamberlain," was the reply, and the judge smiled.

Rosebery responded also with his full title, "Lord Rosebery."

The boy was next, and stepping to the front he drew himself up to his full height and waited for the usual question, "Your name?"

"My name?" said the boy. "Well, judge, I'm not the kind as what goes back on me pals, I'm the 'Duke of Wellington'."

The Law's Delay. — "A young limb of the law defended an old convict on the charge of burglary. The rules of the court (it was in Massachusetts) allowed each side an hour in which to address the jury.

"The young lawyer, just before his turn came, consulted a veteran member of the bar who was in the court room.

"'How much time do you think I should take in addressing the jury?' he asked.

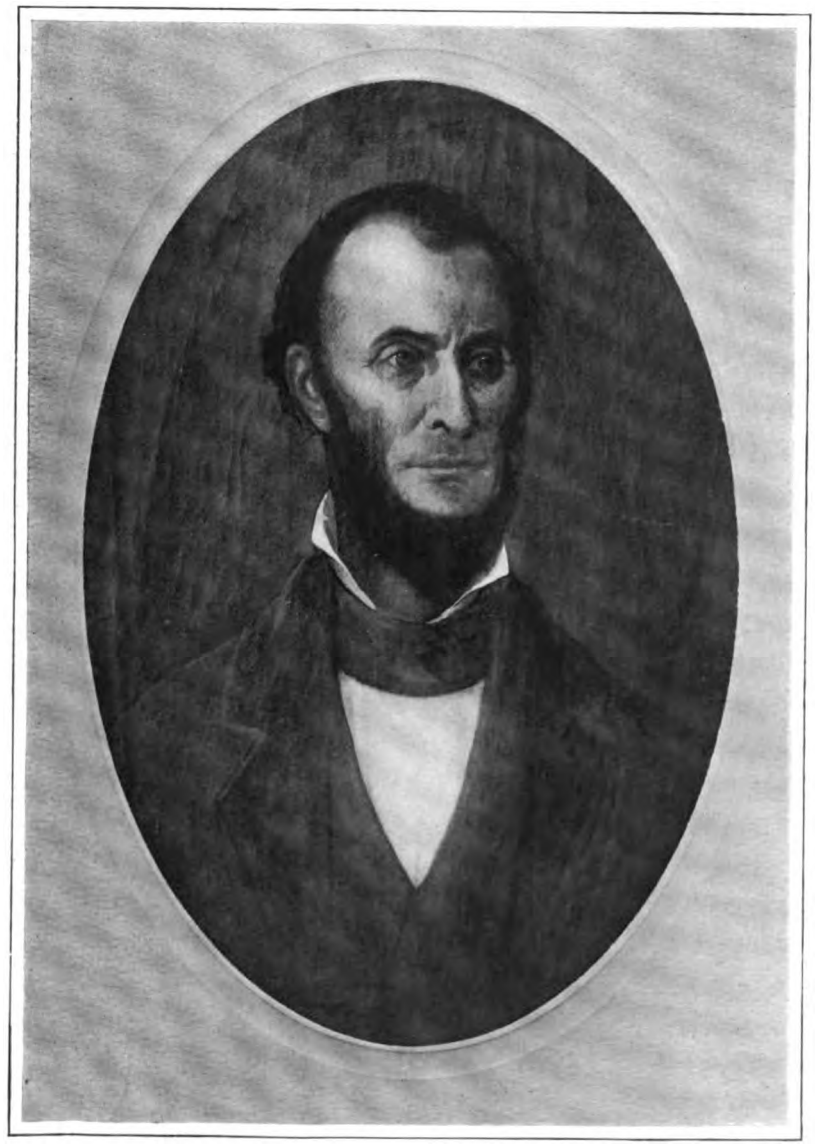
"'You ought to take the full hour.'

"'The full hour. Why, I was only going to take ten minutes.'

"'You ought to take the full hour,' reiterated the old lawyer.

"'But why?'

"'Because the longer you talk the longer you will keep your client out of jail.'" — *Philadelphia Telegraph.*



Thomas F. Marshall

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THOMAS F. MARSHALL

By Charles Fennell

THOMAS F. MARSHALL was the most brilliant and accomplished orator and advocate that Kentucky has ever produced, although the state has been justly noted for both. In the words of the scholarly Judge Donovan of the Detroit Bar, author of the famous "Tact in Court" and "Modern Jury Trials," Marshall's "work ranked with the best lawyers in America, like Webster, O'Connor, Choate, Ryan, Carpenter, Jere. Black and Reverdy Johnson — the highest class of advocates."

He was to the South and West what Erskine was to England, Curran to Ireland, and Choate to New England. His original genius, early training, natural tastes, and studious habits all fitted him preëminently for the Bar and public life.

He was born at Frankfort, Ky., June 7, 1801, being the eldest child of Dr. Lewis Marshall, himself the youngest brother of the great chief justice, and a man of eminent ability who, after having served as the fourth president of Washington College (now Washington and Lee University) removed to Kentucky and built his country home, Buck Pond, in Woodford County near Versailles.

In his early life Thomas was taught by his mother, Agatha, a woman of strong mind and character. Later, in company with Robert J. Breckinridge, afterward the famous divine, who was living with Dr. Marshall, he began the study of the classics under a private tutor, and became so proficient in these studies as to be able, during the remainder of his life, to read the classics with fluency and ease. At the age of twenty he was sent to Virginia to study history as the basis of jurisprudence and moral and political philosophy. These studies he pursued under his uncle, James Marshall, a recluse student of great erudition. He remained with this relative two years, when, returning home, he pursued the course of study marked out for him by his uncle so diligently, it is said, that he became prostrated by disease. He was twenty-five years of age when he began the study of law under that master orator and advocate, John J. Crittenden, whose name was already a synonym for eloquence, and who at that time, as the reports show, was employed in practically all of the cases before the Court of Appeals at Frankfort.

After two years of study under Crittenden he was admitted to the Bar of Kentucky and settled down to practice in the little village of Versailles. In about a year he gave up his office and went to Richmond, Va., to attend the debates of the Constitutional Convention then sitting in that city. For five months he attended the sittings of the convention with even more regularity, it is said, than any of its members, and listened to the arguments of such giants as his uncle, John Marshall (with whom he resided), Randolph, Madison, Monroe, Leigh, C. Johnson and Tazewell. Returning home by way of Washington, he stopped over there to hear the speeches of Hayne and Webster on Foote's Resolution. The excitement produced by the great debate is sometimes said to have awakened in him that love of political discussion and public controversy which later became so eminently his characteristic. The truth is, however, that he had several years before

begun to win fame as an orator, and few "court day" crowds ever left Versailles without first having had the pleasure of listening to a speech from "Tom" Marshall.

It was the custom in those days to form in crowds about the court-house and be addressed by the best speakers of the town. In anticipation of these events, Marshall, it is said, would carefully prepare a speech, and when called on would electrify the multitude by a brilliant and finished effort. These early marks of esteem and admiration by the people fanned in his breast the flames of ambition and that yearning for distinction in public life which proved to be a drawback to him in many respects. He was too independent in his views and above all in his votes to be a successful politician, and many bitter animosities were engendered that would never have sprung into existence had he confined himself to the practice of his profession.

Yet, while the consequences to him were in a measure disastrous, we of to-day can find little in his life to regret aside from the unfortunate (and with him it *was* unfortunate) habit of intemperance which he had been led to form, no doubt, by the custom then in vogue of serving wine at the table, and by the sentiment which did not recognize a teetotaler as a perfect gentleman. But this fault did not detract from his mental vigor. His speeches are models of eloquence, learning, and logic.

His eulogy of the life and character of Richard H. Menefee, a brilliant genius who died "too soon," is in all probability the greatest, truest, and most eloquent memorial oration ever spoken by human lips. The language is classic in its purity and wonderful in its simple beauty and expressiveness. He could express more in a phrase than many another could in a volume. His portrayal of the character of Menefee is said to have been perfect as was indeed to be expected, coming from such a master. The speech was delivered on the occasion of Menefee's death, before the Law Society of Transylvania University, at Morrison Chapel, Lexington, Ky., a short time before Marshall left for Washington to take his seat in the Twenty-seventh Congress to which he had been elected without opposition from the famous Ashland District.

On July 6, 1841, he delivered a speech on the land bill granting preëmption rights which John Quincy Adams pronounced to be the finest he had ever heard on the subject, which, after having just listened to Clay's great speech in the Senate on the same bill, is no small eulogium. Adams did not probably enjoy so well the speech against himself, though he is nevertheless quoted as saying that it combined the eloquence of Sheridan and of Burke, a compliment as true as it was manly. One has only to consult the diary of the great president to learn the regard in which he held Marshall. Such sentences as "Marshall followed for an hour in a speech of incomparable eloquence," etc., occur very frequently despite the fact that Adams conferred praise very discriminatingly, and was not, moreover, a warm personal friend of Marshall. But he was a man of learning and culture, and could fully appreciate the taste and classic eloquence of the Kentuckian.

While in Congress, Marshall became a friend of Mr. Briggs of Massachusetts, afterward for many years a governor of that state. Briggs was the president of a temperance society which he had little difficulty in inducing Marshall to join. Once a member, he was active in his support of the cause and delivered many beautiful speeches on the subject in the various cities of the country, notably New York, Louisville, and Washington. They were distributed in the form of bound pamphlets all over the East. These speeches spoken, many of them, on consecutive days, were in a manner at once entertaining and instructive. Some of them, indeed, contain as fine passages as are to be found in our language. In one of them, for instance, he portrayed the effects of the cruel articles written about him upon the

hearts of those who loved him. He told in simple language of the mother waiting eagerly to hear of his progress in the world — her ears strained to catch the first sound of the rumbling coach that would bring her tidings of her boy. "Then think," he said, "what a bitter balm to pour into a mother's soul. Then even the drunkard's heart can feel, that can feel nothing else, the pangs that nothing known on earth can equal." His love of his mother was one of the marked traits of his character. He always spoke of her in tones of the most reverent affection.

During his one term in Congress he incurred the enmity of Clay by voting and speaking against many of the favorite measures of the Whig leader. Clay was his one stumbling-block in life, although Marshall was the more eloquent and able of the two. Still, owing perhaps to his intemperance, he chafed and became restless under the moral mastery and imperious bearing of the sage of Ashland, whose genius he nevertheless admired to an exalted degree. No greater compliments have ever been paid to Clay than some of those by Marshall.

There have been many stories told of his first meeting with Clay in the practice of his profession. According to Mr. Bowmar, an editor of a Versailles paper, and a friend of Marshall, it was in a will case of great importance, with much evidence to sustain each side. Marshall's speech was a surprise to everyone. It was eloquent beyond all description. Clay himself was borne away by admiration, and with characteristic and winning grace complimented his new rival, saying, "The young man has taken my laurels from me." Clay's speech also was a great one, but not even the witchery of his majestic eloquence could overcome the impression made on the minds of the jury by Marshall's speech, and "the young man" was victorious.

The above is probably the true version because Mr. Bowmar was in a position to learn the facts from Marshall himself and from eyewitnesses.

Another version, very amusing, indeed, but not very reliable, relates it as follows in language purporting to be the exact words of "Tom" Marshall, and which "implicates" Robert J. Breckinridge who, as is well known, was a law partner of Marshall in early life before becoming a minister.

"Bob and I had been practicing for some time and had arrived at that degree of excellence at which we stood at the head of the Kentucky Bar (at least in our own estimation) with one exception. We had never conquered Henry Clay. Indeed, we had never met him, although we had long yearned for the opportunity to dispose of him also, and thus place ourselves indisputably at the head of the Kentucky Bar. So one day when we heard that Mr. Clay had been employed to represent the plaintiff in a certain important case, we at once rushed to the defendant and offered our services gratis. They were gladly accepted. When the case came up for trial we were ready to make the fight of our lives. The evidence having been heard, it was arranged that I, being the junior partner, should speak first, Bob was to follow, and Mr. Clay would reply to us both, he being the only counsel for plaintiff. I was in fine form that day, and addressed the jury in a speech which I considered very effective. I really felt sorry for Bob, for I didn't think that the poor fellow would be able to say anything after the able and thorough manner in which I had presented our side of the case. But Bob surprised me. It was wonderful the way he availed himself of his limited opportunities. He transcended himself. Never had I heard such a torrent of sarcasm and argument. He left not a hair or vestige of our opponents. He literally annihilated them and sat down. Then the old lion rose and with one swoop of his paw he drove Bob to the pulpit and me to the bottle, and we have been there ever since."

This story was probably concocted by

some clever writer "after the war," and need not be taken too seriously.

Marshall and Breckinridge were kinsmen, and had been raised together, and in after life the orator was said to have been fond of arousing the ire of the great divine. Walking up to him one day and slapping him familiarly on the back "Tom" remarked; "Bob, you and I started to practice law together. You quit for the Bible and I for the bottle, and the world says I have stuck to my text closer than you have to yours."

Despite the many stories told of the witty clashes between the two they were known to entertain for each other feelings of the highest regard. It has been said that Marshall himself, when a young man, was so overcome by the eloquence of a certain minister that he rose hurriedly and left the church, afterward explaining to his friends who inquired the reason of his strange conduct, that if he had remained he would, himself, have become a minister, whereas he had already determined to be a lawyer, statesman, and orator. Whatever may be thought of the story it contains one truth — his ambition to become a great orator. This ambition in one of his genius seems perfectly natural when we remember that from his boyhood he had listened to such orators as Clay, Barry, Bledsoe and Crittenden, and had seen in what honor those men were held because of their eloquence. In that one object the life of Tom Marshall was a success, for it is doubtful, indeed, if his country or time can produce better or more eloquent speeches than those of the gifted Kentuckian. Men who had listened with wonder to Clay, Webster, Everett, and Crittenden, were simply amazed by Marshall. Many of them testify that they did not believe it possible for a human being to be so transcendently eloquent.

The description given of his style as an orator by that accomplished and scholarly journalist, Paul R. Shipman (an Eastern man, by the way), who for a time was on the editorial staff of the *Louisville Journal*, is so elegant and so correct that I quote it here in preference to attempting the description myself.

"Nature in truth had denied him no gift essential to the orator, and no accident serviceable to his gifts. Never had orator a fairer physique in which to wreak himself upon expression. He was six feet two inches in height, erect, symmetrical and lithe. His bearing was self-possessed and graceful, his voice clear, rotund, and penetrating, and his enunciation so distinct that his words all came forth clean-cut like coin fresh from the die. It is true his gestures were sometimes open to the charge of extravagance, and his wit to that of buffoonery; but these blemishes from which not even Cicero was entirely exempt, were carried off by the prevailing grace and power of his manner. Though a highly cultivated man he was a natural orator. He never seemed so thoroughly at home as when on his legs. In speaking, whether on the platform, in the Senate, or at the Bar, his mental equilibrium and his mental vitality were invincible. Nothing from within or from without could disturb the one or dash the other. Interruptions of all sorts only added fuel to the fire of his oratory. From the first sentence to the last he was master of the situation, the whole effort being stamped with unity and instinct with grace. To borrow the phraseology of the drama there was no break in the action, no pause in the acting. Not a link was missing; not a minute lost. He would tell an anecdote while he was looking for a citation, and throw off a flash of wit as he wiped his forehead. Even a glass of water he would take with rhetorical effect, dextrously weaving the act into the texture of his speech, or carelessly tossing it among the flowers of the border. When *he* was on the boards neither the stage nor the audience ever waited. He never hesitated for a thought or a word; yet (such was the aptness and weight of his matter) no one ever thought of calling him *fluent*.

The word, if it had occurred, would have seemed absurdly disparaging. He was, in fact, neither flippant nor hurried. His movement had the simple but resistless impetus springing from the free play of his faculties. His style was racy and at the same time lofty. He touched nothing that he did not elevate as well as assimilate. He made everything his own and transfigured himself. I have heard many of the great orators of our time in both hemispheres, but taking all in all, I have never heard one who, in my opinion, was his equal. Although Marshall as I said at the outset, made a slight impression on his time, he made a decided impression on the oratory of his time, particularly the oratory of the South and West, which still bears the impress of his manner, though sometimes (I will not say, generally) the contortions are more apparent than the inspiration. The effect might put one in mind of the grotesque imitations of Moslem architecture in those parts of Germany once overrun by the Turk, wherein copies of the airy minarets of St. Sophia may be seen crowning alike the stable and the church. But the attempt to imitate Tom Marshall, however unsuccessful, deserves not to be mentioned harshly. The attempt is natural enough; and so is the failure. He was inimitable."

That entire self-possession of which Mr. Shipman spoke was one of the many attractions of the orator. Many stories are told of his readiness in meeting an interruption, from among which I will select two — one of them in a broad vein of humor, the other very lofty.

While speaking, during a presidential campaign in a large eastern city, he was suddenly assailed by a torrent of abuse from an Irishman, who bore upon his face the indelible stamp of his nativity. Marshall waited patiently until he had ceased, then with the light of sudden recognition illumining his face he bent forward and peering down quizzically at the miscreant exclaimed, "Ah! it is me ould frind Pat Murphy who spells God with a little 'g' and Murphy with a great big 'M.'" In the roar of laughter which greeted the sally poor Pat was permitted to slink back in the crowd and regret his folly.

The other incident occurred at Buffalo during the exciting presidential campaign of 1840, and has been many times referred to as the most brilliant remark of its kind ever made, and is even now occasionally used with great success to silence similar interruptions. During his speech someone in the rear of the room persistently shouted, "Louder, sir, louder," at intervals, with the evident intention of annoying the speaker. Perceiving the object of his tormentor, Marshall, after a fresh interruption, raised his arm gracefully, and in his most solemn manner said: "Sir, when the angel Gabriel shall place one foot upon the land and one upon the sea, and sound a blast upon his historic horn to notify the living and the resurrected dead that time is no more, I haven't the least doubt that even the solemnity of that awful scene will be interrupted by some infernal fool from Buffalo starting up and shouting, "Louder, sir, louder." The effect was electrical, and when the cheering subsided he was able to proceed without interruption.

But this quality, brilliant as it was, was not the predominating faculty of his intellect. He was a debator with the highest powers of logic and an opponent to be dreaded not only before juries and popular assemblies, but in the more august presence of the higher courts as well. But still, perhaps, his greatest efforts as a lawyer were before juries. To defend a human being seemed to enlist the ardent sympathy of his nature and spur him to the accomplishment of masterpieces of eloquence. It gave, moreover, free rein to an appeal to the passions and the impulses which are fixed in the moral fibre of man. Such appeals to such passions require greater skill, tact and eloquence, and give wider scope to the powers of an orator sometimes than do the

more profound causes before the higher courts.

During his career Marshall was engaged as counsel for the defense in at least two cases which attracted national attention and interest. The first of these was in 1842 and was tried in New York City. The trial was that of the notorious forger Monroe Edwards who had led a life of crime until that time unparalleled in the history of the American courts. The prosecuting attorney at the time in New York City was the famous Ogden Hoffman, a lawyer of great genius and eloquence. Edwards realizing no doubt that his case was a most desperate one immediately procured the services of Marshall and John J. Crittenden. After a desperate and most brilliant struggle between counsel he was convicted, as he deserved to be, not even the skill and eloquence of Marshall and Crittenden being able to save such a wretch. There was in fact nothing in his life or character on which to base an appeal for sympathy, and the facts of the case were all against him, the proof being conclusive.

Marshall was in Congress at the time of this trial and by his able fight against Clay's bank bill had incurred the enmity of James Watson Webb, editor of the *New York Courier and Enquirer*. In consequence of the ill-feeling aroused at Washington, Webb attacked Marshall's conduct of the case in an extremely bitter and scurrilous editorial which angered the Kentuckian to such a degree that he intimated at the close of his address to the jury that he was open to a challenge from the editor. Not receiving this, he himself issued one. It was accepted, and after some delay, occasioned by the vigilance of the authorities who suspected what was brewing, they met on New Jersey soil. At the first fire Webb fell, shot in the knee. When told where his shot had taken effect Marshall exclaimed, "What, did I hit him in the knee? It is the d——dest, lowest act of my life," and then insisted on another fire saying that no man had ever wronged him so foully as had Webb. This was denied by order of the physician accompanying them who said that Webb would be at a great disadvantage.

The other great case in which he took a leading part was the trial of Matt Ward, a gifted young Kentucky author, for the murder of Mr. Butler, a highly respected and beloved teacher of Louisville. It seems that Ward and two of his brothers called on Butler at his school and became engaged in an angry altercation with him. Blows were threatened, and Ward shot Butler who lingered a day or so and died. The facts in the case were not favorable to Ward, and public feeling against him was running high. The prosecution of the case was conducted by able lawyers, chief among whom was the celebrated R. B. Carpenter, an intemperate and dissolute man, but one of the ablest prosecutors that Kentucky ever produced. Among those for the defense, besides Marshall, were John J. Crittenden and Nat Wolfe. Dispatches were sent daily to the *New York Herald*, etc., describing the progress of the trial, and later the entire proceedings were published in pamphlet form. Such a brilliantly conducted trial has seldom been witnessed in this country. Wit, humor, argument, eloquence, courtesy and learning were shown by all. Carpenter spoke eight hours in a speech of wonderful power and eloquence. Wolfe's effort was his masterpiece. Crittenden delivered the greatest speech of his career. The speech of Marshall is above all praise. Following on the heels of Carpenter's great effort it swept the audience before him like leaves of the forest. Referring to the inherent right of self-defense (the plea made for Ward) and the uselessness of life without it he exclaimed "Had I no other right than that of existence I would raise my own wild hand and throw back my life in the face of heaven as a gift unworthy of possession." He reproached Carpenter for the bitter tone of his speech and mingled in

his own every emotion of the human heart. The case was tried at Elizabethtown, Ky., whither it had been removed from Louisville, the scene of the homicide, because of the public excitement in that place. When the news reached Louisville that the jury had acquitted Ward, the popular fury knew no bounds. A mob formed in the streets and attacked the office of the *Journal*, because of the part Mr. Prentice had taken as a witness for the defense, he having testified to the previous good character of the defendant. They also burned Crittenden in effigy, he having volunteered his services to the defense because of a long-standing friendship with Ward's father, an act of true manhood, in keeping with the character of Crittenden, which received the approbation of all thinking men even at the time. To procure an acquittal for one against whom the popular feeling was running so high, and whose case, judged by the facts alone, was unfavorable at best, required the highest degree of skill and eloquence, and it is an everlasting monument of praise to the great lawyers associated in the defense that they fully supplied all that was necessary of both, and that, too, in the teeth of an exceedingly able prosecution.

But it was not alone as orator and lawyer that Marshall became known. At the outbreak of the Mexican War he organized a cavalry company in Woodford County of which he was made captain. This company was attached to the regiment commanded by Col. Humphrey Marshall, and marched by land to the seat of war. At Camargo, Marshall became involved in a quarrel with Lieut. James Jackson, and a duel was fought between the two at a spot some twenty miles from camp which they were compelled to reach on horseback. Marshall was suffering from the flux and had frequently to dismount so that when he reached the place of meeting he was barely able to stand. He told a friend afterward that he had made up his mind to kill Jackson, and had braced himself so that even if wounded he could return the fire with steady aim. As the signal was given, Jackson fired without effect. Marshall then took deliberate aim and fired. The cap was true, but there was no explosion, and of course Jackson stood unhurt. Marshall turned to his second, Sam Patterson, who was also his lieutenant, and asked what that meant. He replied that the ramrod was too short, and that he had not rammed the ball home." "Oh, yes," said Marshall, sarcastically, "I understand. You are my lieutenant, and if I had been killed you would have succeeded me." Col. Tom Hawkins, who was Jackson's second, then stepped up, took the pistol, rammed the ball home, and handed it back, offering another fire, but Marshall was by that time too weak to stand any longer.

Just before crossing over into the enemies' country Marshall had violently abused Cassius M. Clay, shaking his fist in Clay's face and branding him in no uncertain terms as a cur and a blackguard. Clay made no attempt to resent the insults. The next day Tom was rather the worse for liquor and hearing a remark addressed by Clay to one of his officers asked him what he had said. Clay in a great fury told him that when he spoke, he spoke to gentlemen and not to a cur. Then Marshall said, "Oh yes, Cash, you see I am in a bad condition and you want to make me mad and have me rush on you so you can shoot me down like a dog." Whether this was Clay's intention may well be doubted but it was certainly given color by his behavior the day before. At another time while Marshall was walking through the camp armed only with a small dress sword, Clay stepped to his tent door and covered him with his pistol. Marshall instantly turned his back and looking over his shoulder at Clay, said, "Shoot away, Cash, but its got to be a clear case of murder. I am not going to give you a chance to assassinate me as you did Sam Brown." The taunt referred to a deadly fray in Kentucky and was undeserved.

A similar adventure happened to him once before. He was speaking in a case in the court house at Versailles when he was interrupted by Judge A. K. Woolley, who threatened to strike him. With a graceful wave of his hand he replied, "Consider the blow as struck, Mr. Woolley," and finished his speech. He then challenged Woolley but through the intervention of Henry Clay and Crittenden the affair was amicably adjusted.

Marshall, through no fault of his own, missed being in the battle of Buena Vista, a fact which he treasured against his kinsman and colonel. On returning home from the war he stopped over in New Orleans and delivered an eloquent speech by invitation of the leading citizens.

In 1849–50 a new constitution was placed before the people of Kentucky for ratification. Marshall opposed it with pen and voice. Few more able papers have ever been written than his pamphlet "The Old Guard" in which he discussed the failings of the proposed new instrument. His special plea was for an independent judiciary, which he considered to be the most necessary part of government and the surest safe-guard against tryanny and oppression. In this campaign he reached, in the public estimation, the culminating point of his career as an orator. At Louisville he made three speeches in four nights to immense crowds, and it was the verdict of his auditors — friends and foes — (and there were many competent judges among both), that his speech was the finest they had ever heard. George D. Prentice thus noticed the last in the *Journal:*

"We hardly know how to speak in adequate terms of this great speech. It was above all compliment. Mr. Marshall had devoted the two preceding evenings to a discussion of the various provisions of the proposed new constitution and had reserved until last night the subject of the judiciary, the change in which he regarded as the most momentous topic to be discussed. Great expectations were raised and an audience, which in numbers and intelligence, we have rarely seen equalled in Louisville, thronged the room at an early hour. And most nobly did the orator sustain his own fame. He was full of wit and sarcasm and felicitious illustrations. But it was in his appeal to the sober reason of the audience that he was transcendently great. The main portion of his speech was an argument against an elective judiciary — an argument, which for sledge-hammer power, we have seldom if ever heard equalled. It was massive and beautiful in its proportions as the old monuments of genius which have survived the wreck of ages and still live in immortal strength. . . . If Mr. Marshall had never given to the world any other evidence of his great power of mind than his masculine argument of last night, it alone would stamp him as one of the first orators of his time."

On April 1, 1852, Marshall was married to Miss Elizabeth Yost in Versailles. She was many years younger than the orator and became attached to him in rather a romantic manner. It seems, that when she was quite young, Marshall, then in his golden prime, boarded at the house of her mother. He being a fine conversationalist and enjoying particularly the presence of a good listener soon discovered in the young girl an interesting and almost indispensable companion and he was, as a consequence, to be frequently found in her society. During these conversations she conceived so great an affection for him that though a noted beauty and much sought after by the beaux she would have none other. She survived her husband many years, removing to Shelby County where she died not long ago.

In 1856 Marshall removed to Chicago but returned in the fall of that year, at the request of friends, to take part in the campaign against Buchanan. During the campaign he contracted pneumonia, which kept him confined to his bed in Frankfort all winter.

In 1858–1859 he visited various cities and towns in all parts of the country delivering lectures on history from the earliest times to his own day. These were delivered without notes or other aid to the memory, for he despised, as he said at Cincinnati, to speak "in that hybrid fashion." These lectures produced a wonderful impression on all who heard them, both because of his familiarity with his subject and of the almost supernatural eloquence with which he described the great characters and scenes of the past.

United States Senator James B. McCreary while a student at Cumberland University, Lebanon, Tenn., heard Marshall lecture there on Napoleon Bonaparte and the French Revolution. After the lapse of almost half a century he still says that it was as interesting and eloquent a lecture as he ever heard in his life. In some places he delivered a series of lectures, sometimes as many as twenty. Among the other places he visited are Louisville, Memphis, Cincinnati, New York City, and Yale University.

Before becoming a lecturer Marshall had been a judge at Louisville and was much respected for his learning and impartiality, but his experience on the bench does not seem to have prevented him from being occasionally exasperated by an adverse ruling of the court, if the following anecdote is to be believed. The case against Marshall's client was a strong one, and when by great perseverance and skill he had finally begun to make some headway, the adverse ruling of the judge, coming as it did without apparent reason, thoroughly aroused him. "Sir," he said, "such a ruling has been made by no other court since the days of Pontius Pilate." "Mr. Clerk," said the judge, "fine Mr. Marshall ten dollars for contempt of court." "Sir," retorted the lawyer, "I didn't know it was contempt of court in a Christian country to abuse Pontius Pilate." "Mr. Clerk," again said the imperturbable judge, "fine Mr. Marshall twenty dollars more for contempt of court." "Well, your Honor," said Marshall, "as you won the last cent I had in that poker game last night I will ask your Honor for the loan of thirty dollars with which to pay the fine." "Mr. Clerk," said the judge, quickly, "remit the fines against Mr. Marshall. The State can afford to lose that money better than I can."

The chief records which have come down to us of Marshall's skill in arguing points of law are his written briefs and articles. These productions are entirely different from his popular addresses. They are all analysis and argument, very seldom, indeed, did he ever use sarcasm or humor in such a speech, although on one occasion, involving in some way the discussion of deep financial problems, he was constrained to remark of his opponent who had "skimmed over" the question with the assured air of an authority, without even touching the point at issue, that he reminded him of a "swan swimming gallantly and proudly across a deep lake, drawing about two inches of water and all unconscious of the mighty depths that lay beneath."

Though a Southern man by birth and training, and proud, too, of his nativity, he was nevertheless intensely national in feeling. His collisions with Adams and Giddings had no more effect in arousing in him a hatred of the North, than had those with Wise and Botts in arousing a like feeling toward the South. He took no active part in the Civil War. His personal sympathies were with the people of the South, but he believed that they had been deluded. He thought that the rebellion should be put down and the Union restored as it was. He was not an admirer of Lincoln and wrote many articles for the Lexington *Observer and Reporter* attacking his administration. He was, by the popular voice, however, reputed to have been a secessionist and he did make a speech at the States Rights Convention at Frankfort in 1862.

There is nothing on record, however, as far as the writer can discover, which goes

to show that he ever contemplated anything more than a rigid adherence to the Constitution, a view which he had held all his life. In the summer or spring of 1864 his house was burnt and his papers destroyed. Admiring friends built him another, into which he moved before it was completed. In September he was taken sick with an affection of the heart and lungs which baffled the skill of his physicians. Shortly before his death, Mrs. Cox, a kind neighbor, brought him over some delicacies. Coming into the room where he lay on a couch she asked him how he felt. "Ah, madam," he replied, "what a life I have lived, and what a death I am dying." He expired on September 22, (1864).

The press of the entire country paid glowing tributes to his genius as an orator, coupled with regrets for his unfortunate habit. The following is the notice by Prentice in the *Journal;* "The people seemed to think, and so did he, that his greatest powers were wit, humor, fancy, poetry, and eloquence. He had all these, but his chief power was none of these. It was argument — logic — stern, inexorable, cast-steel logic. His other powers, great as they were, served but as adornments of the limbs of his giant logic. No orator had greater resources in debate. They were inexhaustible, and rendered him unconquerable. Men think of him and muse upon him as he appeared in the long past and they fancy themselves gazing upon a bright star seen through a golden haze."

A duelling pistol, which he owned, and which had been used in the Burr-Hamilton duel, is still preserved by his nephew, Mr. Lewis Marshall, (a son of the famous Ed. L. Marshall), of Versailles, Ky. While it was in his possession Marshall had it changed from flintlock to percussion cap and used it in some of his own duels.

Before his death he had indicated that he wished to be buried in the open country under the spreading branches of two great trees. "I have been cramped all my life," he said, "and I want to be buried where I shall have plenty of room." His remains were laid where he desired. It is an idyllic spot, which strikes one as being the fit place for the grave of a poet or other genius — a type to which Marshall belonged. A man of many virtues and few faults, it has been truly said that he might have passed for a better man had he been in reality a worse. It was not a part of his nature to hide his faults. With him all was open and above board. Intemperance alone prevented him from attaining all the honors to which his genius entitled him.

As a practical man seeking the temporary honors and offices of the day his life was a failure; but as an orator of soul-stirring power, an advocate of unsurpassed ability he was an eminent success.

LEXINGTON, KY., June, 1907.

THE EQUITABLE LIFE ASSURANCE SOCIETY—A POSSIBLE REMEDY TO CANCEL THE STOCK CONTROL[1]

ROBERT RENTOUL REED

A CORPORATION is in legal effect the sum of the legal relations established by it. These relations differ very materially between different classes of corporations. Corporations have been roughly classified as lay and eleemosynary, public, quasi-public, and private, membership and stock corporations. There are also classifications such as banking, railroad, and insurance corporations. The latter have been subjected to a further classification of stock, mutual and "mixed" corporations.[2]

In a strictly eleemosynary corporation, there are, generally speaking, no persons outside of the corporation itself having any ownership in its assets. Its members are specially selected or designated persons having the power of control over its assets for a public or charitable purpose. Removed in character but close in analogy to such a corporation is that of a savings bank which is quasi-public in its aim and nature. The control is usually vested in a body of trustees whose original probation, selection, and management is specially and carefully safeguarded by the enabling statutes which authorize their formation. The assets, however, are owned by the depositors, as a continuing body, entitled to a periodic distribution of the increase of their investment by way of interest, and entitled also to withdraw their deposit upon proper notice at any time.

The distinction between such corporations and corporations for profit has as a rule been clearly recognized, and the relations established between the incorporators and the state, and the special interests confided to them, have been carefully defined and regulated.

To some degree insurance corporations have been recognized as subject to special supervision, but they have for most purposes been classified as business corporations, all the parties to which are able, mentally and financially, to make their own contracts and abide by them. They have been formed both under general and special laws, and as a rule no public supervision or safeguards have been provided for the selection of the trustees or directors. In these, as in other corporations, this has been left to the members, whether stockholders or policyholders, and the normal rule of relationship between these members, as between the members of other business corporations, is that of joint ownership of the assets and joint management of the corporation.

The normal rule of voting under modern statutes has been one share one vote, for stock corporations, while in the absence of statute or by-law and in membership and mutual insurance corporations, the rule of the common law, one member one vote, survives.[1] Such is the general rule around which principles and precedents have developed, the rule of joint control and management as the normal incident of joint ownership surviving the change in form from that of the individual to ownership united in the corporate body.

This rule underlies practically all the reasoning and decisions on general corporation law. The possibility of a relationship between members and co-owners, other than that of joint control and management, does not enter into the practical legal principles

[1] This subject was first proposed and discussed by the present author in an article in the GREEN BAG, July, 1906. ED.

[2] See Cooley's Briefs on Insurance, Vol. 1, p. 53.

[1] Am. & Eng. Enc. Law, 2d ed., Vol. xxvi., p. 1003.

on this branch of jurisprudence. But that such a relationship has been established in business practice is well known to every corporation lawyer.

With the introduction of different classes of stock, with different rights and subject to different restrictions and liabilities, all the basis of contract, came a natural desire to contract with respect to the voting power. Each class of stock supposedly represented substantial interests, one superior in title, value, and equity to another, and having therefore a right to special protection. And so it seemed and is natural and proper that provision should be made to protect these interests and to give to one class under certain circumstances and conditions a superior voting power. It was also natural that, in granting the general power to make such provisions, the possibility and extent of its abuse should not be recognized. And as a matter of fact the abuse of this power has been the exception and not the rule. Only exceptional inducements or exceptional blindness can lead a man to place his money in a corporate enterprise without a voice in its management and without a right under any circumstances to withdraw his investment. But that is just what has been and, so far as precedents show us, can be done by a proper use or abuse of the corporate organism. Many corporations have been formed having all the elements of a trust present in an eleemosynary corporation or in a savings bank, but without any of the statutory safeguards, and without any recognized power in the *cestuis que trustent* to withdraw from the investment, or in the courts to cancel the trust.

The simplest instance of such a corporation arises where A. and B. desire to place their money in a certain business under the management of C., and a corporation is formed by C. in which he takes a small relatively nominal amount of so-called preferred stock, *with exclusive voting power*, and A. and B. receive for their investment common stock without voting power. The statutes of many states will be found on examination to authorize, expressly or by silence, such special provisions as to voting power to be inserted in the articles of incorporation, or even the by-laws, the corporate existence being perpetual and the power of amendment of the charter or by-laws being exclusively in the preferred voting class of members. It will be seen at once that A. and B. have no power under the statutes, the charter, or any recognized legal precedents to dissolve the corporation, to gain control of their own property invested in it, or to cancel the control given to C., while he on the other hand may mismanage their property without fear of losing control, or, if he desires, may sell his stock and right of control to the highest bidder.[1]

That such an arrangement constitutes a trust in fact, no one can or will deny. Precedents are not needed to make it such — they cannot make it otherwise. This fact makes it necessary for us to examine very carefully the nature of such a trust to enable us to arrive at the correct principles which should govern its definition, existence, and control. For nothing could be more obnoxious to our jurisprudence than the idea that a trust can exist and not be subject to the power of chancery to regulate and, if necessary, destroy that existence.[2]

[1] A further instance of the possibilities embraced in this class of corporations has come to the notice of the writer. It is that of a mining corporation, in which an issue of $100,000 so-called "founders' stock," issued *gratis*, is given the perpetual power to elect seven out of twelve directors, and to control assets represented by some $10,000,000 preferred and common stock.

[2] In Hamlin *v.* Toledo, St. L. & K. C. R. Co. (C. C. A.) 78 Fed. 664, the preferred stock was "non-voting." Lurton, J., Taft, J., concurring, said, page 671; "They surrendered the privilege of voting. That was perhaps a valid agreement between stockholders, though of doubtful public policy. They thereby gave some additional value to the common stock. The latter was the exclusive voting stock, and that was worth something as railway management now goes. The surrender of the right to vote does not make them creditors."

This trust differs in form from an ordinary trust. The legal title is placed in the corporation, the control in C., and the ownership in A. and B. The corporation in its control, in its officers and management, is the creature of C.; in its business and assets it is the property of A. and B. A. and B. are not in any event entitled to the stock of C. C. has no title or control over the stock of A. and B. This stock as to each represents primarily the property rights of each in the corporation. C.'s stock represents a nominal ownership of or claim upon its assets, together with the exclusive voting power. The stock of A. and B. represents the substantial ownership of the entire assets of the corporation, perpetually deprived of any voting power. The vesting of the voting power in C., the denial of that voting power to A. and B. whose property is the property of the corporation, establishes the relationship of a trust between the two classes of stock, and between the owners, for the time being and successively, of the two classes of stock, each divisible and transferable, and the stock represents the rights — as well as the duties — of each in the corporation, and against and toward each other. The owner, for the time being, of this stock has the rights, owes the duties, and is subject to the liabilities belonging to or imposed upon the stock acquired and held by him, and a purchaser of the stock (certainly a purchaser with knowledge) takes it subject to these rights, duties, and liabilities, including the rights, duties, and liabilities against and to the other members of the corporation.

In the case of the Equitable Life Assurance Society with its $100,000 stock and $400,000,000 assets, the policyholders have all the rights of ownership and membership [1] except the right to vote. The original charter provided for a periodic ascertainment of the surplus or profits and that "each policyholder shall be credited with an equitable share of the said surplus." [1]

The exclusive voting control given to the stock has been notoriously abused, and this abuse has, it is believed, given to the policyholders a definite fixed right to the cancellation of the trust existing in the stock, and to be restored to their full right of joint management of their own property which they surrendered (while retaining ownership) when they placed it with the society under its original charter.

The conclusion that a remedy existed in favor of the policyholders was as far as the writer went in his former article on this subject. It is now desired to suggest a specific remedy, the idea of which has grown out of an effort to apply the foregoing views to a pending case. This remedy, if allowed,

[1] Some question has also been made of the proposition that the policyholders are in fact members of the Equitable Life Assurance Society, a proposition that can be very readily established, even apart from the fundamental proposition that ownership is the common law test of membership in a corporation. It will not be denied that in an ordinary stock corporation having $100,000 preferred stock with exclusive voting power, and $400,000,000 common stock without voting power, the common stockholders are members of the corporation. Now, there are three recognized classes of insurance corporations; stock corporations, mutual corporations, and "mixed" corporations, the latter including all those in which both stockholders and policyholders have a proprietary interest and membership. Most of the "mixed" corporations are formed under the New York Act of 1853, *under which the Equitable is formed.* Their chief characteristic is a minimum stock, *contributed as the security fund* required by this act, and either a joint ownership of assets between stock and policies or an exclusive ownership by the policies, as in the case of the Equitable, with, in most cases, some concession of voting power to the policyholders. The original Equitable charter provided that merely by a vote of the directors the policyholders might be given the voting power. It also made the policyholders the owners of the assets. It can hardly be seriously contended that under this state of facts the Equitable policyholders are any less truly members than those of the other "mixed" companies, or than the non-voting common stockholders of the corporation instanced above.

[1] See article in GREEN BAG, July, 1906.

is adaptable to the case of every corporation having the characteristics indicated above, formed under a general statute, *and having power under the statute to amend its charter so as to cancel the exclusive voting power*. Our assumption is that this exclusive power has been fraudulently abused, and that there is no express or reserved power in the charter by which the non-voting stockholders or members may cancel the exclusive voting feature.

The remedy proposed is analogous to that found in the decree of the lower court in the Northern Securities Case, 120 Fed. 721, 732–733, affirmed on appeal in 193 U.S. 197, 354–355. The gist of that action was the conspiracy of the defendant individuals and the illegality of the defendant company; illegal in its inception and necessary operations, because a corporate instrument created by the individuals to evade the Anti-trust Act of 1890. The bill was directed at the life or living functions of the defendant company, and the decree restrained it from exercising those functions, but added a *proviso* that nothing therein should prevent the company from returning the stock of the constituent companies in cancellation of its own stock outstanding. This was merely a new application of equitable principles and remedies long established. In the case of the Equitable Life, or of any other corporate trust so created and abused, the corporate organism itself becomes the direct object of attack, which must be destroyed or radically reformed by whatever means are best adapted to that end. The statute under which it was created, the sovereign consent that gave it being, consents also to its reformation by act of the parties *inter se*, and it is within the power of the court acting *in personam* to make this reformation a condition of its further existence.

Manifestly where the trust exists and by reason of the fraud, the right to the exclusive control has become forfeited, its continued exercise is a continuing injury to the *cestuis que trustent*, and the existing management and exercise of corporate functions (*which is the exercise of the trust*) is the very thing that they have a right to attack and enjoin. A court of equity has ample power to restrain corporate acts, and acts of officers and stockholders, in violation of equitable rights. It may use these powers in furtherance of an equitable remedy. It may, therefore, in the case supposed restrain the officers representing the trust control from further handling the assets of the corporation, and it may restrain the stockholders having this control from voting upon their stock. But it may also, to make the remedy fit the wrong, add to its decree a *proviso, permitting these stockholders to amend the charter, so as to cancel the exclusive control*, and restore to all the members of the corporation that voice in the management of their own property, which is the normal incident of ownership and the surrender of which is the essential element of a trust; further providing that such an amendment of the charter shall satisfy the decree. When this is done, the appropriate remedy is complete. The trust is revoked, but the corporation and its business, and in the case of the Equitable, the policies and insurance rights of the policyholders are saved.

Some question is made as to the nature and extent of the voting power thus to be given to the members of the corporation. In the case of a stock corporation, the one share one vote principle is now recognized as the normal rule. In the case of the insurance company, we are thrown back on the common law rule giving each member one vote. In either case recourse must be had to the statute. Sec. 52 of the amended insurance law in New York expressly authorizes the amendment of the charter of a domestic mutual stock corporation giving to the policyholders the right to vote in the election of any or all of the directors.[1]

[1] L. 1906, ch. 326, sec. 13.

Sec. 95 also authorizes by appropriate proceedings the entire mutualization of the society.[1]

In the case of the Equitable Life Assurance Society, there is a further or cumulative equitable right involved, which it would seem can only be remedied in the same way. The original charter expressly limited the stock to seven per cent dividends and provided for the periodical distribution of the surplus to be credited among the policyholders. Such has been the construction of the charter by its officers, and such have been the representations made to the policyholders from the time of its organization. This construction was, however, denied by certain minority stockholders prior to the purchase by Mr. Ryan,[2] and since the purchase by him the present management have taken no steps to settle the question, certainly not in favor of the policyholders, and are to-day defending an action in which policyholders are seeking to enforce their claim.[3] Their silence in this respect is however a minor matter. *They have adopted and filed a new revised charter entirely omitting those provisions of the old charter upon which the rights of the policyholders as members and owners rested.*[4] This revised charter was of course adopted and filed without the consent of the policyholders, and also without their knowledge. Its advertised purpose was to give the policyholders the barren right to elect twenty-eight out of the fifty-four directors, thus recognizing their membership in one respect while apparently seeking to defeat it in the more essential respect of ownership as declared in the original charter.

[1] *Ibid.*, sec. 31.

[2] Lord *v.* Equitable Life Assurance Soc., 47 Misc., 187.

[3] Brown *v.* Equitable Life Assurance Society, 151 Fed. While the Society is not defending on the expressed ground that the policyholders do not own its assets, it does not either in brief or argument admit this claim, which was repeatedly admitted in former cases by counsel representing the former management.

[4] See note at end of article in GREEN BAG, July, 1906.

These facts would seem to give the policyholders a further and important ground on which to attack the present charter, and the only way they can attack it would seem to be by the same action in which they attack the still dominant voting power, an action in which the only complete remedy would be a decree restraining the society's present officers from a further exercise of control over the assets, with a *proviso* permitting the amendment of the charter so as to expressly declare the ownership of the assets and surplus by the policyholders, and so as to give them the right to vote in the election of *all* the directors, or else a *proviso* permitting the entire mutualization of the society under section 95 of the amended insurance law. Mutualization would, of course, involve the necessary determination of all the rights of the present stockholders and present policyholders.

Such an action would, in its essential nature, be an action to cancel the trust and to reform the contract embraced in the charter.

It is urged that to thus destroy the trust control, on the ground of its abuse by the majority stockholder, is unfair to the minority stockholder, who may have been entirely innocent. Conceding our premises, the conclusive answer to this plea is, that *the stock control in its character as a trust is indivisible*, and must stand or fall by the legality of the whole in its inception, and by the fraud or honesty of the whole in its operation. The minority stockholder loses nothing of his own property, or right to vote. He loses only the power to deny this right to the other members of the society — the exclusive trust which has been betrayed.

It is also urged against this remedy as applicable to the Equitable Life Assurance Society, that the purchaser of this stock control has already created a voting trust for the declared benefit of the policyholders, and that the stockholders have surrendered their exclusive control by already amending the charter so as to give to the policy-

holders the right to elect twenty-eight out of fifty-four directors. I have already referred to this amended charter. It would, perhaps, have been better for the stockholders not to have conceded in theory, what they seek to deny in fact, the right to regain control that came to the policyholders on the discovery of the fraud. For conceding this right to exist, it is for the policyholders themselves, or a court at their instance, to declare the fullness of the remedy which they will accept, or to which they are entitled. An equity court will recognize the fact that the scattered body of policyholders cannot possibly elect twenty-eight directors who will actually represent them in the control of the society against the twenty-four selected by the single majority holder of the stock. It will also recognize the fact that the charter is still subject to amendment by the stockholders so as to destroy this right, and the fact that the so-called trust declared for the benefit of the policyholders by the present majority stockholder is in law temporary and revocable, if not invalid.

"It is unnecessary to comment upon this sale (to Mr. Ryan) and the transfer to the trustees, except to suggest that a present reform in the management of the society is not a remedy for the abuses inherent in it and clearly ineradicable under its present organism, that the rights of the policyholders against Mr. Hyde they necessarily retain against Mr. Ryan, and any transfers, to trustees, or otherwise, and any reforms made to defeat those rights, must, to be effectual, be both complete and permanent. Such is not the character of the concessions made by Mr. Ryan to public clamor. Under any other form of trust, an attempted transfer, without the consent of the *cestui que trust*, would render the trust *voidable*. But if this trust is good at all, the right to transfer it would seem to be given. Yet this should hardly be held to make it possible for a guilty trustee to save the trust by a transfer such as is shown in this case. By such a device, the *cestui que trust* would indeed be powerless."[1]

New York, N.Y., June, 1907.

[1] Quoted from Brief of writer as *amicus curiæ* and counsel for Intervening Policyholder, Brown *v.* Equitable Life Assurance Society, *supra*.

This was an action commenced prior to the amendment of the charter, by a policyholder suing on behalf of himself and all others against the society, and seeking to declare a trust in the society itself in favor of its policyholders, and, by reason of the fraud and mismanagement of the society, to have a receiver appointed to manage its business for the benefit of the policyholders. The complaint contains the following prayer: —

"Seventh — That the defendant society, its directors, officers and agents, pending this suit and forever thereafter, be enjoined from further retaining or controlling or expending in any way the said funds received from the policyholders and annuitants, and the accretions thereof, and constituting the insurance funds and so-called surplus of the society, or with the funds and investments representing the original capital of the society, or from doing any other act or thing in connection with the same, except to transfer the same to a receiver or receivers to be appointed by this court."

The eighth prayer is for a receiver, to administer the assets under the direction of the court. The court below sustained the defendant's demurrer to this complaint. Upon appeal, a brief was received and filed by the writer as counsel for an intervening policyholder, embodying the views expressed above, and maintaining that the complaint stated a good cause of action for a decree, in effect under paragraph seventh of the complaint, with a *proviso*, however, permitting the mutualization of the society by amendment of the charter as suggested above. The Circuit Court of Appeals reversed the judgment below, but the opinion deals only with the allegations of fraud, which are said to make out a cause of action, and is silent as to the remedy. The complainant now seeks the mutualization of the Society, and an effort will be made to review the interlocutory judgment in the United States Supreme Court. If a decree is finally obtained in the complainant's favor, it is not unlikely that it will follow the lines suggested above, and to that extent establish the principle suggested and contended for above. It is difficult to see any other remedy that does not involve the dissolution of the Society.

PLEADING

By J. J. Godfrey.

Tho' modern Solons strongly hold,
That there's more light and sense
In modern pleadings than the old,
I'm somewhat on the fence.

Exactitude we lose, I think,
By being too verbose,
The modern pleading to the brink
Of evidence draws close.

The Ancient pleas, tho' somewhat crude,
Affording meagre light,
With greater care, were always viewed,
Than those which meet our sight.

Your declaration you must mould,
Down to the smallest fraction,
In such a method as to hold
A legal cause of action.

The modern rule, the same is found,
But is the labor sweet,
In pleadings, which in chaff abound,
To pick that grain of wheat?

Plead now the facts on which you trust
By rule and common sense,
The law, however, says you must
Not plead the evidence.

You need not — suing neighbor Pat,
Or any other foes,
State color of his coat or hat,
"In trespass on your close."

Verbosity you should avoid,
Or take chance on this fix,
The Learned Judge may be annoyed
And say you're too prolix.

The taxing officer will frown
And low your pleadings rate,
And by your foliage cut down,
Your sin you'll expiate.

But still if you no 'mala' had,
And if your heart were pure,
One not so good as Galahad
Amendment may secure.

The Court may justly asservate,
This favor only lies,
When you can amply compensate
By costs or otherwise.

A word in fine, I merely say,
To wise men not to fools,
To learn the practice and to play
According to the Rules.

Vancouver, B. C., June, 1907.

THE PROTECTION OF UNUSED PATENTS

By Paul Bakewell.

In The Green Bag of June, 1907, vol. xix, No. 6, p. 381, in Notes of Recent Cases, under the heading "Patents," is found a reference to the dissenting opinion of Judge Aldrich in the case of Continental Paper Bag Co. *v.* Eastern Paper Bag Co., 150 Fed. 741.

The record and briefs on file in U. S. Circuit Court at Milwaukee and in U. S. Circuit Court of Appeals for the Seventh Circuit, in the case of Wisconsin Compressed Air House Cleaning Co. *v.* American Compressed Air Cleaning Co. (see 60 C. C. A. 529, 125 Fed. 761) will show that as early as 1902 I had fully argued and presented, first, in 1902, to the U. S. Circuit Court sitting at Milwaukee, and afterwards, in 1903, to U. S. Circuit Court of Appeals sitting at Chicago, the following proposition:

A complainant in equity who fails to allege and to prove that the invention of the patent in suit has been put into commercial use before the filing of the bill of complaint, or who fails to show good reason why the invention of the patent has not been put into commercial use before the filing of the bill of complaint, is not entitled to any equitable relief by way of injunction; to grant a complainant equitable relief by way of injunction, under the circumstances stated above, is contrary "to the course and principles of courts of equity," and therefore, to exceed the "power" granted to the several courts vested with jurisdiction of cases arising under the patent laws of Section 4921 of the Revised Statutes of the United States.

The Circuit Court of Appeals for the Seventh Circuit (see 60 C. C. A., 533 and 125 Fed. 765) did not pass on this question, because, as it reversed the decree of the Circuit Court (a decree sustaining the bill) for other reasons, it deemed it "*unnecessary to agitate*" the question raised by the proposition above stated.

I am now asked by the Editor of The Green Bag to give a short article in support of the aforesaid proposition, to supplement the note contained in The Green Bag of June, 1907, which has been referred to at the head of the article.

There are authorities, well founded on the true history and policy of our patent system, which support the proposition that one who has never used the patented invention involved in a suit and who fails to show good and sufficient excuse (such as poverty, for instance) for not having done so, is not entitled to equitable relief. Some of these authorities are the following:

Robinson on Patents, V. i, sec. 43, pages 65–66;

Hoe *et al*, *v.* Knapp *et al*, 27 Fed. 204–212;

Judge Putnam's opinion in New York Paper Bag Co., *v.* Hollingsworth, 5 C. C. A., 496–497;

Christie *v.* Seebold, 5 C. C. A., 33;

Campbell Printing Press Co., *v.* Duplex Co., 86 Fed. and what Court there says at page 331; and Judge Grosscup's dissenting opinion in Fuller *v.* Berger, 120 Fed. 281.

It is also true that in the case of Ball and Socket Fastener Co., *v.* Kroetze, 150 U. S. 111, the Supreme Court has held that a court of equity will not give relief where there has been a mere technical infringement of a patent in respect to an immaterial feature thereof; that to incite the action of a court of equity substantial, as distinguished from mere abstract or theoretical, rights must be affected.

It is also the settled law and practice, the reasons for which are clearly stated by Justice Wayne in Mott *v.* Bennett, 17 Federal

Cases, 909 (case No. 9,884), that in granting or refusing equitable relief in patent causes the courts of the United States have followed the English Chancery practice.

It would also seem to be well settled law that in order to show a *prima facie* case for equitable relief by way of injunction, in a suit for infringement of letters patent, the bill should allege: (1) that complainant has the title to the patent; (2) that he is in enjoyment of the patented invention, having put the same into practical use. See McCoy *v.* Nelson, 121 U. S., 484–487, where the question of the sufficiency of the allegations of the bill were in question; also Justice Washington's opinion in Ogle *v.* Ege, 4 Wash. C. C., 584; Mott *v.* Bennett, 2 Fisher's Patent Cases, 665; Neilson *v.* Thompson, Websters Patent Cases, 277; and Curtis on Patents, sec. 328.

As to the proposition discussed by Judge Aldrich in his dissenting opinion in the Paper Bag case, *supra*, it is said in THE GREEN BAG for June:

"In the aspect most favorable to the plaintiff the relief sought is injunctive protection to a business or an industry built up in using a particular invention, and through acquiring and holding in deliberate nonuse a competing invention by way of protection. It results, therefore, he says, that a court of equity is asked not to protect from infringement the statutorily intended monopoly of the right to make, use, and vend under a particular patent, but to protect a monopoly beyond and broader than that, a monopoly in aid of the rightful statutory monopoly of the patent in use. The proposition involves the idea of a secondary monopoly maintained to stifle patent competition in the trades and industries, and thus contemplates a condition, which at once contravenes the purpose of the Constitution, and a monopoly of a kind and breadth and for a purpose in no sense ever contemplated by the statutory contract which safeguards the legal right to make, use and vend under a particular patent. Simple nonuse, he concedes, is no efficient reason for withholding injunction, for there are many reasons for nonuse, which on explanation are cogent, but a court of equity may look beyond the fictitious issues in a suit; and when acquiring, holding and nonuse are only explainable upon the hypothesis of a purpose to abnormally force trade into unnatural channels, this is quite a different thing from simple nonuse. Under the constitution and statutes in aid of the constitutional provision with reference to inventions and discoveries; it was intended to stimulate art and invention on competitive conditions by protecting the right of each inventor, or each owner, to make, use and vend, and if equity is to aid in stultifying this plain intent through affirmative relief by injunction by protecting patent aggregations held in deliberate nonuse for the purpose of excluding all patents benefits except such as the holder sees fit to bestow, it will help to overthrow the intended meritorious patent competition under normal conditions in trade, and will help to deny the intended benefits to the public."

However sound the conclusions reached by Judge Aldrich in his dissenting opinion in the Paper Bag case may be (I believe they are sound), nevertheless, I firmly believe that the sounder reason for reaching his conclusions is merely that the complainant in that case, under the facts stated in the opinion, was not entitled to equitable relief, simply because the complainant had not put the patented invention into commerical use, had not licensed others to do so and had shown no sound excuse for not putting the invention into commercial use.

The mere ownership by the complainant of other patented inventions which it did use, had it even owned all the other existing patents for paper bag machines, should place the complainant in no worse position than if it held only the patent in suit, which it had not used and would not allow others to use.

It seems pretty well settled that as

patents for inventions are just and lawful monopolies, one corporation or individual may, by the accident or good fortune of ownership of all patents in a particular art, hold a lawful monopoly of the industry to which that art may relate.

Bement *v.* National Harrow Co., 186 U. S. 70.

But what has not yet been squarely decided by the United States Supreme Court, is whether or not the owner of a patent for an invention, which he has not used himself and which he has not allowed others to use, who shows no sound excuse for nonuse of the invention, can, in respect to a patent for that invention, obtain equitable relief by injunction, etc., against an infringer of such a paper patent. The mere fact that such a complainant may own other patents for inventions relating to the same art, which other patented inventions he does use commercially, is no reason, *per se*, for refusing him equitable relief. To so hold is to punish the complainant for holding a just monopoly under the other patents, though they may be all the other patents in that art, when, as to those other patents, he has used commercially their invention.

In the words of Mr. Robinson (Robinson on Patents, Vol. i., sec. 43) it is "the infringement of the use, and not of the ownership of an invention, that the public have contracted to prevent or to redress; and the degree of injury committed by the infringer is to be estimated by his interference with that use as already made, or likely to be made, by the inventor. To give one who, having patented a valuable invention practically suppresses it, the same redress, in quantity as well as in kind, which justly could be claimed by one who was engaged in its employment, is a perversion of the true idea of the relation of the inventor to the public, and sanctions his neglect of a duty impliedly imposed upon him by his grant."

Mr. Robinson's proposition, just stated, is one which warrants the conclusions, though not the argument, of Judge Aldrich in the Paper Bag case; and, I believe, not a well reasoned case can be found in the books which holds to the contrary. True there are decisions of the Circuit Court and Circuit Court of Appeals which, like the majority opinion of the Circuit Court of Appeals in 150 Fed. 741, pass on the question lightly, merely holding that the owner of a patent, because it is a patent, may use it or not as he pleases and still apply for and obtain equitable relief; and thus an array of decisions, ill considered and poorly reasoned, may be culled from the books; but such decisions, not founded upon the true history and policy of our patent laws, can hardly be called authorities which persuade the mind and which shall have the homage of reason, whatever binding force they may have in the particular circuits in which they were decided pending the decision of the Supreme Court on this precise question.

The history of the patent system in England and in the United States clearly attests that Mr. Robinson is absolutely correct in the following statements, found in the extract from his valuable work quoted *supra*.

(*a*) That it is the infringement of the use, and not of the ownership of an invention that the public have contracted to prevent or redress.

(*b*) That there is an implied duty resting upon a patentee to put the patented invention into commercial use or to license others to do so.

It is an easy matter to trace this policy and this implied duty resting upon the patentee in the history of the patent law.

It is now well established and has been well settled, both in England and the United States, by the decisions of the Courts and by distinguished authorities in the matter of political economy, that a patent for a new and useful invention, granted in conformity with law, is a just and lawful monopoly. This has been recognized as sound and true since the passage of the Statute of

Monopolies in England (21 Ja. i, c. 3. A. D. 1623–4).

The excepting clauses of the Statute of Monopolies, found in sections V and VI of that statute, constitute the foundations upon which the patent laws of England rest. It is also true that, historically at least, the Statute of Monopolies has a relation to the basis of our patent system in the United States, *i.e.* to clause 8 of sec. 8 of Article 1 of the Constitution of the United States.

In the celebrated case of Pennock *v.* Dialogue, 2 Peters (U. S.) 7, Mr. Justice Story discusses this Statute of Monopolies in relation to our patent system and says:

"The words of our statute are not identical with those of the Statute of James, but it can scarcely admit of doubt that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke."

To the same effect, see United States *v.* E. C. Knight Co., 156 U. S. 9–10. In Butcher's Union Co., *v.* Cresent City Co., 111 U. S. 746, Mr. Justice Bradley said:

"As a mere declaration of the common and statute law of England, the case of monopolies (11 Rep., 84 b) and the Act of 21 Ja. i., c. 3 (Statute of Monopolies) would have but little influence on the question before us, which concerns the power of the legislature of a State to create a monopoly. But those public transactions have a much greater weight than as mere declarations and enactments of municipal law. They form one of the constitutional land marks of British liberty, like the Petition of Right, the Habeas Corpus Act, and other great constitutional acts of Parliament. They established and declared one of the inalienable rights of freemen which our ancestors brought with them to this country."

No one can doubt that the opinions of Jeremy Bentham, the great apostle of utility, who gave the word "utilitarian" to our language, whose writings were much in vogue when the Constitution of the United States was conceived, drafted, and ordained, did have an influence upon the minds of those great statesmen to whom we are lastingly indebted for our great Federal Constitution. Writing as an authority on political economy, on the subject of patents for inventions, Bentham says:

"A patent of invention, is an instance of a reward peculiarly adapted to the nature of the service, and adapts itself with the utmost nicety to these rules of proportion to which it is most difficult for rewards artifically instituted by the legislature to conform. If confined, as it ought to be, to the precise point in which the originality of the invention consists, it is conferred with the least possible waste or expense. It causes a service to be rendered which, without it, a man would not have a motive for rendering, and that only by forbidding others from doing that which, were it not for that service, it would not have been possible for them to have done. Even with regard to such inventions, for such there will be when others besides him who possesses the reward have scent of the invention, it is still of use by stimulating all parties and setting them to strive which shall first bring the discovery to bear. With all this it unites every property that can be wished for in a reward. It is variable, equable, commensurable, frugal, promotive of perseverance, subservient of compensation, popular, and reasonable."

The books are replete with decisions of the courts recognizing the wisdom and justice of a patent system which rewards the patentee for bringing "the discovery to bear," as Bentham puts it.

In Magic Ruffle Co. *v.* Douglas, 2 Fisher's Patent Cases, 333, Judge Shipman shows the justice and equity back of our patent laws in these words:

"The public, who thus, through the law, secure to the inventor the exclusive property in his invention for a limited period, receive in return either new, more valuable or cheaper production during the life of the

patent, and from its expiration the free enjoyment of any benefits which may flow from it forever thereafter."

It was thus, in this twofold way, of the commercial benefit to the public; (*a*) by use of the invention, under tribute to the patentee, during the limited term of the patent; and (*b*) by free enjoyment of the invention disclosed by the patent after its limited term, that the purpose of clause 8 of sec. 8 of Article 1 of the Constitution of the United States was intended to be carried into effect, by just patent laws to be passed by Congress and by equitable interpretation of such laws by the courts.

For that purpose is thus expressed in that part of the Constitution of the United States just referred to:

"That Congress shall have power" . . . "to promote the progress of science and useful arts, by securing, for limited terms, to" . . . "inventors, the exclusive right to their" . . . "discoveries."

It was progress, action, reward for present use, for a limited time, to the inventor who made, disclosed, and used his invention, that those who framed this part of our Constitution had in mind, as is clear from the language used, from the history of the times, and from the interpretation of the law enacted in pursuance of that provision, as that law has been interpreted by such learned judges as Judge Shipman, and by such a truly learned, scholarly, lawyer-like and philosophical text writer on patent law in the United States as Mr. Robinson.

In England the best text writers on patent law have all shown that it is essential to and inherent in the history and policy of the law that the owner of a patent for an invention shall have brought his invention into commercial use, so that he is injured in his business of making, using, or selling his invention by the infringer, before a court of equity will heed his complaint.

Mr. Cunynghame, in his work on patents, published in England in 1894, expresses this very thought, in his discussion of the history and policy of the patent laws of England; at pages 20 to 25 of his work he says:

"It is to be observed that the publication of the invention by the patentee was not originally insisted on, nor was it any part of the terms or conditions upon which the grant of letters patent was founded. The object of the framers of the Statute of Monopolies seems rather to have been the introduction of new mysteries or manufactures into England than the publication of the methods of working them, for no provision of publication is contained in that statute." . . .

Then, speaking of the consideration for the grant, Mr. Cunynghame states:

"The true consideration upon which it was founded was the creation or planting on English soil, of some trade which was previously not in use within the realm, and the greatest publicity expected was that which would arise from the training of a number of apprentices and artificers in the practice of it."

Also at pages 316 and 317 of this same work, Mr. Cunynghame states:

"In order to constitute an infringement, the act complained of must be one calculated to injure the trade profits of the patentee. Having regard to the words, '*the whole profit and advantage of the invention*,' and remembering that the object of patent law is not to reward scientific discovery, but to encourage trade, *it follows that in general only those acts will be treated as infringements which are held either directly or indirectly to injure the trade of a patentee.*

"And, therefore, merely to use a patented invention for experiment will not be an infringement. And, perhaps, even to use a patent in a private way for self-instruction, not for profit or for business purposes, would not be an infringement, though that is more doubtful. But to make, use, or sell an object made according to the invention for the purposes of profit will be an infringement, and to buy an article made according

to the patent would also be an infringement. *The true test in every case will be whether the acts complained of are calculated substantially to interfere with the profits of the patentee.*"

(The italics in the last quotation are mine).

This same principle has been recognized in the decisions of our Federal Courts in this country, some instances of which are the following:

The learned and distinguished Judge Blodgett, in the case of Hoe *et al. v.* Knapp *et al.*, 27 Fed. Rep. 204–212, says at page 212, what is strictly applicable to the principle which I am contending for, as follows:

"I think, under a patent which gives a patentee a monopoly, he is bound either to use the patent himself or allow others to use it on reasonable or equitable terms, and as I refused an injunction on the motion before the hearing, I shall refuse an injunction in the interlocutory decree, and allow the defendants to continue to use the patent on their giving bond as they have heretofore."

In Kendall *v.* Winsor, 21 How. 322, in speaking of the policy of our law, the court says:

"It is undeniably true that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or benefit; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

In Grant *v.* Raymond, 6 Peters 218, Chief Justice Marshall says:

"The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of the individuals."

In the case of New York Paper Bag Co. *v.* Hollingsworth, 5 C. C. A. 490–497, Judge Putnam agreed with the majority of the court that the bill should be dismissed because infringement was not made out.

"If the record in this case is to be opened, I agree with the conclusions of the majority of the court; but as the patentees have never made any use of their alleged invention, nor attempted to do so, nor permitted its use by others, nor given an explanation of the non-user or any reason for it, I doubt whether the case submitted is not one of mere legal right, and whether the complainant should not be left to its remedy at common law, if entitled to any relief at all."

The "power" vested in the United States Courts under section 4921 of the Revised Statutes of the United States, to grant injunctions in patent causes, is limited to granting such injunctions "according to the course and principles of Courts of Equity."

It would seem that in determining this "power," courts of equity should take into consideration the history and policy of the patent law.

Judge Grosscup, in his dissenting opinion in the case of Fuller *v.* Berger, at p. 281 of 120 Fed., recognizes this principle, in the following words:

"A patent is not a private contract, nor a transaction between private individuals. It is a contract between the patentee and the public; and to every suit brought to enforce the patent, the public is beneficially a party. How a patentee has used his contract right, and how he intends to use it in the future, is a matter not unconnected with the public's interest in the litigation, and comes, therefore, to be a pertinent inquiry when an enforcement of his contract rights is asked for."

If laches in filing the bill be a good defense, why is it not a good defense in equity that the complainant, without good excuse, has not put the patented invention into use nor allowed others, under license from him, to put the invention into use?

As Mr. Justice Brewer said, when circuit judge, in Baltimore & Ohio Tel. Co. *v.* Bell Tel. Co., 23 Fed. 539:

"There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such."

St. Louis, Mo., June, 1907.

THE PUBLIC SERVICE COMMISSIONS ACT OF NEW YORK

By Travis H. Whitney.

OF the Public Service Commissions Act, the most comprehensive constructive legislation of the first year of Governor Hughes' administration, the president of the street railway system of Buffalo, who was the leader in an eleventh-hour attempt to create public sentiment against it, made this astonishing statement:

"Never until now has it been proposed to say to any man that his business, his property or himself, shall be subject to the order of another without right to question or review in court the justice of such order. Man's property, like man's liberty, should be taken from him only by due process of law and not by arbitrary orders where his accuser sits as final judge."

Yet a careful examination of the measure discloses that it follows closely the Interstate Commerce Act and is founded upon principles of public control and supervision that have been sustained by Federal and State courts, and that as to many important subjects is either a re-enactment of existing New York law or a reassignment of duties already imposed upon important state commissions. For example, the important functions as to new transit lines in New York City heretofore exercised by the Rapid Transit Commission are transferred to the Commission of the First District, and the Rapid Transit Act which defines these functions is not changed in the slightest extent. Furthermore, the provisions as to gas and electrical corporations are, with slight changes, those contained in the act of 1905 creating the State Gas and Electricity Commission with jurisdiction over corporations supplying those public services. As a matter of fact, the measure is one that is calculated to restore in large measure the proper relations between the public and the public service corporations, and, taken in connection with the Governor's vetoes of the two-cents-a-mile and the three-brakemen bills, it indicates that the Commissions, the Governor's appointees, will have quite as much regard for the rights of the corporations as for the rights of the public.

The commissions and officers abolished and superseded are the State Railroad Commission, the State Gas Commission, the State Inspector of Gas Meters, and the Rapid Transit Commission.

The first Rapid Transit Commission was created in 1875 and reorganized in 1891. This one, by an act of 1894, was superseded by a Commission for cities of over one million, composed of the mayor, comptroller, president of the Chamber of Commerce, and five others named in the act. Vacancies were to be filled by the remaining members. This Commission, in 1900, signed a contract for New York's first subway, just twenty-five years after the first Commission was created. Two years later a contract was signed for a subway to Brooklyn, but the most vexatious delays, unexpected and inexplicable to the public, have hindered the completion of all of this subway save the small section from City Hall to the Battery, which was finished in record time. It happens that this portion was needed as a part of the existing subway by the Belmont interests, who had the contract for construction and operation. The self-perpetuating feature of the act of 1894, the provisions that construction and operation must be let to the same contractor, and that franchises might be let in perpetuity, combined to create a public opinion determined upon a change in the law. Consequently, after three years of effort and in spite of

the most strenuous opposition by the Commission itself, the Legislature of 1905 was induced to pass amendments which allowed separation of contracts, cut down the possible length of franchises, gave the local Board of Estimate authority to approve or reject the plans of the Commission, and provided that future vacancies should be filled by the mayor. It still remained a state commission with such broad jurisdiction that the moment that the population of Buffalo reached one million this Commission could have begun handling its transit franchises. The Public Service Act does no more, therefore, than substitute one state commission for another with this difference, that the new commissioners must be residents of New York City. For some time one of the Rapid Transit Commissioners was a resident of Connecticut and another of New Jersey. The cry, therefore, that the substitution of the Public Service Commission for the Rapid Transit Commission was a violation of the sacred principle of home rule seems somewhat absurd.

Rightly or wrongly the public has become convinced that the Rapid Transit Commission is too subservient to the interests that control the present transit monopoly in New York City, and it has noted that its chairman is president of one of the great insurance companies that holds millions of dollars' worth of bonds in public service corporations. The public has seen a subway given for seventy-five years to Belmont who on every difference that has arisen has rubbed the fur the wrong way. With immense profit in the construction and later in the operation, the subway has been consolidated with the elevated lines, and finally the public has seen a complete merging of control of subway, elevated and surface into the Interborough-Metropolitan Company with over one hundred million dollars of water injected. Meantime no energy has been displayed in construction of additional or independent lines by the Rapid Transit Commission. Brooklyn has watched with the greatest impatience the real estate development of New Jersey through the building of private tunnels from New Jersey under the Hudson River, and has not been able to obtain for itself even a public subway nor any relief to the scandalous crushing at the Brooklyn Bridge which was overcrowded years and years ago. These and many other facts combined to create a condition of undeveloped transit within New York City that must be solved, and solved very rapidly. Yet the solution seems to lie largely in the personnel of the Commission. The Public Service Commissions Act, so far as authority for the future extension of transit in New York City is concerned, merely wipes out of office, as has been said, the Rapid Transit Commission and provides that the Public Service Commission of the First District, in addition to the powers and duties hereinafter described, shall perform all the duties described in the Rapid Transit Act. The city will therefore obtain a new Commission, appointed by Governor Hughes and pledged to action, in the place of a Commission, most of whose members, if they were Supreme Court justices, would have been retired under the age limit.

Another Commission abolished is the State Railroad Commission, formerly of three members, increased to five in 1905 in order to change the Republican factional control, never anything more than a political board, without the confidence of the public, and, even had it the will, without power to enforce its recommendations.

The third Commission, Gas and Electricity, was created in 1905 as a result of the Stevens legislative investigation of the lighting situation in New York City, the investigation in which Governor Hughes became known to the public. Broader powers were granted than the Legislature had theretofore delegated, yet so slowly did the Commission act on the matter of fixing the price for gas that the Legislature of 1906

passed the eighty-cent law, and at the same time the Commission determined upon the same rate. The enforcement of the lower rate has been prevented by injunctions obtained from the Federal Courts, and the success of the companies, without a broad court review provision in the Gas Commission law, indicates that the public service corporations will not lack a day in court upon any orders that may be issued by the Public Service Commissions.

By the new act the state of New York is divided into two districts about equal in population; one containing the counties embraced within the City of New York, and the other, the remaining counties of the state. For each of these districts a commission of five members is created with five-year terms, at salaries of $15,000. Each commission is to appoint a counsel at $10,000, with power to appoint attorneys and counsellors and a secretary at $6,000, and such inspectors, experts and other employees as are necessary. An appropriation of $150,000 for each district is made for the remaining seven months of the fiscal year created by the act. The commissioners are to be appointed by the Governor, by and with the consent of the Senate, but the consent of the Senate is not necessary for the removal of a commissioner. This provision was one of the most hotly contested provisions of the bill. At the present time practically all members of commissions and other state officers appointed by the Governor are removable only on charges before the Senate. In the opinion of Governor Hughes this was an entirely unnecessary and vicious limitation upon the executive power of the state, and his point of view was emphasized in the Kelsey case which came up for consideration in the Senate at the time of the greatest crisis on the utilities bill. The facts of this case are too familiar to repeat other than to say that Mr. Kelsey was an honest and conscientious superintendent of insurance, but believed to be totally lacking in the great initiative and ability required to put the Armstrong insurance law into effect, and because of this, Governor Hughes asked his removal by the Senate. That body, however, actuated largely by personal and factional motives, voted not to remove. This action so solidified public opinion as to the wisdom of the Governor's position that the Senate was forced to capitulate on the utilities bill and to surrender the privilege of the power of removal, a concession that it was believed, in the beginning of the session, the Senate would never make. The provision as it now stands is that:

"The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defence, upon not less than ten days' notice."

If the Governor shall then remove such Commissioner he shall file with the Secretary of State a complete statement of all charges against the Commissioner and his findings thereon, together with a complete record of the proceedings.

The Commissioners must be residents of the district for which they are appointed, and no person shall be eligible for appointment or retain office either on the Commission or under it who holds any official relation to any common carrier, railroad or street railroad, gas or electrical corporation subject to the provisions of the act or who holds stocks or bonds therein The Commissioners are furthermore prohibited from securing or recommending, directly or indirectly, appointment for anyone by any public service or common carrier, and these in turn are prohibited from offering to any Commissioner or employee of the Commission any position or appointment or free or reduced transportation or any present or gift.

Proceedings and records of the Commissioners are made public records, and they are

required to submit an annual report to the legislature containing copies of all orders issued, as well as information deemed of value to the legislature and to the people, together with abstracts of reports made by corporations subject to the act and accompanied by recommendations as to such new legislation as it deems wise or necessary in the public interest. Furthermore, the Commissioners are directed to give hearing and take testimony as to the advisability of any proposed change of law relating to common carriers or railroad or street railroad corporations, if requested to do so by the Legislature or either Committee on Railroads, or by the Governor, and may conduct such a hearing when so requested by any person or corporation, and shall report its conclusions to those requesting the investigation.

The act defines the meaning of various terms used, such as "railroad," "street railroad," "street railroad corporation," "railroad corporation," "gas corporation," "electrical corporation," "transportation of property or freight," and "common carrier." The term "common carrier" is defined as including "all railroad corporations, street railroad corporations, express companies, car companies, sleeping car companies, freight companies, freight line companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this State." The term "transportation of property for freight" is defined as including "any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property and freight transported."

The jurisdiction, supervision, powers and duties of the two Commissions are distributed as follows:

Those of the first district (New York City) are to extend (1) to railroads and street railroads lying exclusively within that district, and to persons or corporations owning, leasing, controlling or operating the same.

(2) To street railroads any portion of whose lines lies within the district, to all transportation of persons or property thereon within the district, or from a point within either district to a point within the other district, and to persons or corporations owning, operating, controlling or leasing them, provided, however, that the Commission for the Second District shall have jurisdiction of such portion of the lines of such street railroads as lies within the second district, so far as concerns their construction, maintenance, equipment, terminal facilities and local transportation facilities.

(3) To such portion of the lines of any other railroad as lies within that district so far as concerns the maintenance, equipment, terminal facilities and local transportation facilities to persons or property within the district.

(4) To any common carrier operating or doing business exclusively within the district.

(5) To the manufacture, sale and distribution of gas and electricity for light, heat and power, and to the persons or corporations owning, leasing, operating or controlling the same.

(6) All the powers under the Rapid Transit Act.

The Commission of the Second District is given all jurisdiction, supervision, powers and duties under the act, not specifically granted to the Public Service Commission of the First District, including the regulation and control of all transportation of persons or property and the instrumentalities connected with such transportation on any railroad other than a street railroad from a point within either district to a point within the other district.

All salaries and expenses of the Commission of the Second District are to be paid by the State, as are the salaries and expenses of the Commissioners of the First District and its counsel and secretary. All other

salaries and expenses of this Commission, however, are to be paid by the Board of Estimate of New York City upon requisition by the Commission. In case the Board of Estimate fails to make any appropriation, the Commission may apply to the Appellate Division of the First Department to determine what amount should be appropriated for the necessary purposes of the Commission, and the decision of the Appellate Division thereon shall be final and conclusive. It is possible, however, for the city to be relieved from all of the expenses, for the act provides that the Commission may provide that such expenses are to be repaid with interest by the bidder at the public sale of rights or franchises under the Rapid Transit Act.

This, therefore, does not place any additional burden upon the City of New York. The Rapid Transit Commissioners, although not paid a salary, each year made application to the Appellate Division for an annual allowance which was imposed upon the city. The Public Services Act actually relieves the city from this expense, for the state assumes the salaries of the Commissioners, and the other expenses will be incurred only in the planning and development of subway routes which are proper local expenses, and can be repaid by the bidders. It may, therefore, happen, that although the city will receive great benefits from this new Commission, it will be actually relieved from all of its expense.

Powers of the Commissions. The Commissions are given general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations, as before described, and power as well as the duty to examine and keep informed as to their general condition, capitalization, franchises and the manner in which their lines, whether owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all provisions of law, orders of the Commission, and charter requirements. In addition the Commissions are given general supervision over persons and corporations having authority to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under public streets and places for the purpose of furnishing or distributing gas or electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors.

At first the Commissions were given jurisdiction over pipe lines, but on the ground that the only ones in the state (in the western part and belonging to the Standard Oil Company) were subject to the Interstate Commerce Act, they were finally omitted. Neither are telephone or telegraph companies included, but it is altogether probable that they will be brought under the operations of the act next year.

The scope of investigations by the Commission is indicated by the provision that each Commission may of its own motion investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any common carrier, and the Commission must make inquiry in regard to such matters or violations of any provision of law or of an order of the Commission. In addition, complaints may be made by any person or corporation aggrieved, by petition or complaint in writing, and thereupon a copy thereof shall be forwarded to the person or corporation complained of, accompanied by an order requiring the matters complained of to be satisfied, or that the charges be answered in writing within a time to be specified by the Commission. If reparation for the injury be made or the violations cease and the Commission so notified before the time to answer, the Commission need take no further action upon the charges; otherwise the Commission shall investigate such charges and take such action within its powers as the facts justify, but every such action must

be finally determined by the Commission by an order either dismissing the complaint or directing the common carrier to satisfy the cause of the complaint.

A majority of the Commission is made a quorum for any purpose, and an investigation or hearing may be undertaken or held before any Commissioner and shall be deemed the action of the Commission, and any order made by him, when approved and confirmed by the Commission, shall be deemed to be the order of the Commission.

Investigations, inquiries, or hearings may be conducted by the Commission or a Commissioner under rules adopted and prescribed by the Commission, and are not to be bound by the technical rules of evidence. Subpœnas may be issued by a Commissioner or by the secretary, and under a subpœna *duces tecum* the production may be compelled of all books, articles, records, documents and papers of any person or corporation. Failure to obey a subpœna without reasonable cause, or a refusal without reasonable cause, to be sworn or examined, or to answer a question, or to produce a book or papers when ordered so to do by the Commission or a Commissioner, or to subscribe and swear to a deposition, is made a misdemeanor to be prosecuted in any court of competent jurisdiction. If a person in attendance refuses, without reasonable cause, to be examined, or to answer any legal or pertinent question, or to produce a book or paper when ordered so to do by the Commission or a Commissioner, the Commission may apply to any justice of the Supreme Court upon proof by affidavit of the facts for an order returnable in not less than two or more than five days, directing such person to show cause before the justice who made the order, or any other justice, why he should not be committed to jail. Upon the return of such order the justice shall examine, under oath, such person, giving him an opportunity to be heard. If the justice shall determine that he has refused, without any reasonable cause or legal excuse, to be examined, or to answer a legal or pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, to remain there until he submits to do the act or is discharged according to law. This detailed provision was inserted in the act for the reason that the Code provision supposed to cover such procedure has recently been declared unconstitutional.

Orders of the Commission. —The determinations of either Commission are to be expressed in orders which shall take effect at a time therein specified, and continue in force for a period therein designated, unless earlier modified or abrogated by the Commission, or unless such order be unauthorized by the act or any other act to be in violation of a provision of the Constitution of the state or of the United States. The orders of the Commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy. And it is made the duty of every person and corporation to notify the Commission forthwith, in writing, of the receipt of the certified copy of every order. Within a time specified in the order every person and corporation upon whom it is served must, if so required in the order, notify the Commission whether the terms of the order are accepted and will be obeyed.

After an order has been made any party interested may apply for a rehearing, which may be granted if the Commission determines that sufficient reason therefor appears, but it must be finally determined within thirty days. An application for a rehearing shall not excuse a common carrier from complying with or obeying any order or any requirement of an order, or operate in any manner to stay or postpone the enforcement thereof, except as the Commission by order may direct. If the Commission after a rehearing determines that the original order or any part thereof is unjust and un-

warranted, it may abrogate or modify the same. An order abrogating or modifying the original order shall have the same force as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order.

Court Proceedings and Preferences. — All actions and proceedings under the act or commenced or prosecuted by the order of the Commission, and all actions or proceedings to which either Commission or the state may be parties, and in which any question arises under the act or under the railroad law or under or concerning any order or action of the Commission, shall be preferred in the state courts over all other civil causes, except election causes, and shall be heard and determined in preference to all other pending civil business, except election cases, irrespective of position on the calendar, and the same preference shall be granted upon application of counsel to the Commission, in any action or proceeding in which he may be allowed to intervene.

Immunity of Witnesses. — No person shall be excused from testifying or producing any books or papers in any investigation or upon any hearing when ordered so to do by the Commission upon the ground that the testimony or evidence, or production of books or documents, may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for or on account of any act, transaction, or anything concerning which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from any prosecution or punishment for any perjury committed by him in his testimony. This provision, however, is not to be construed as in any manner giving immunity of any kind to any corporation.

Summary Proceedings. — Mandamus or injunction proceedings in the state courts may be begun by counsel for the Commission whenever the Commission shall be of the opinion that a common carrier, railroad corporation or street railroad corporation is failing or omitting, or about to fail or omit, to do anything required by it by law or by order of the Commission, or is doing anything or about to do anything or about to permit anything to be done contrary to or in violation of law or of any order of the Commission. The proceeding is to be begun by a petition to the Supreme Court which shall thereupon specify a time not exceeding twenty days for service of a copy within which the corporation complained of must answer, and in case of default or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings and without respect to any technical requirement. The court may join upon application of counsel to the Commission such other persons or corporations as shall be deemed necessary or proper. Final judgment in such an action or proceeding shall either be a dismissal or an order that a writ of mandamus or injunction or both issue.

Power over Rates, etc. — When the Commission shall be of the opinion after a hearing upon a complaint that the rates, or that the regulations or practices of any common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, the Commission shall determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served on all common carriers by whom such rates, fares or charges are thereafter to be observed; and whenever the Commission shall be of the opinion after a hearing, either upon its own motion or upon complaint, that the regulations, practices, equipments, appliances or service are unjust, unreasonable, unsafe, improper or

inadequate, the Commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipments, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons, freight and property, and so fix and prescribe the same by order.

The Commission is given specific power to require any two or more common carriers or railroad corporations whose lines, owned, operated, controlled or leased, form a continuous line of transportation or could be made to do so by the construction and maintenance of switch connection, to establish through routes and joint rates, fares and charges, and in case such through routes and joint rates are not established within the time specified, the Commission shall establish just and reasonable rates and charges for such through transportation, and declare the portion thereof to which each common carrier or railroad corporation affected thereby shall be entitled, and the manner in which the same shall be paid and secured.

If repairs or improvements or changes in any tracks, switches, terminals or terminal facilities, motive power or any other property or device used by any common carrier or railroad corporation reasonable to be made or any additions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities, the Commission shall, after a hearing, make and serve an order directing such repairs, improvements, changes or additions, and the corporations so affected are required to obey the order.

The Commission is given power to order after a hearing, an increase in the number of trains or cars or motive power or change in the time schedule, or make any other suitable order deemed reasonably necessary to accommodate the traffic.

Uniform Accounts. — Each Commission may establish a uniform system of accounts to be used by common carriers, and may prescribe the manner in which they shall be kept, which may include the accounts of the movement of traffic as well as the receipts and expenditures of moneys. The system of accounts to be established by the Commission shall conform as nearly as possible to those established by the Interstate Commerce Commission. For the purpose of insuring the correct keeping of accounts in accordance with its orders, the Commission is given access to all accounts and books of the corporation, but any employee or agent of the Commission who divulges any fact or information which may come to his knowledge during an inspection or examination, except in so far as he may be directed by the Commission or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

Control over Franchise. — In order to prevent the exploiting of so-called sleeping charters of which there are a considerable number in New York City, the act provides that without first having obtained the permission and approval of the proper commission, no railroad corporation, street railroad corporation, or common carrier, shall begin construction of a railroad or street railroad or any extension for which a certificate of public convenience and necessity had not been obtained from the state board of railroad commissioners, or where the corporation had not become entitled by virtue of its compliance with the provisions of the railroad law to begin such construction; nor, except as so provided, shall any such corporation or common carrier exercise any franchise or right under any provision of the railroad law or of any other law not heretofore lawfully exercised without first having obtained the permission and approval of the proper commission. The permission and approval of the proper commission is to be made after due hearing and determination that such construction or such exercise of a franchise or privilege is necessary or convenient for the public service.

Furthermore, the act specifically provides that no franchise or any right to or under any franchise to own or operate a railroad or street railroad shall be assigned, transferred, or leased; nor shall any contract or agreement affecting any such franchise or right be valid or of any force or effect whatsoever unless approved by the Commission. But the permission and approval of the Commission either to the exercise of a franchise or to the assignment, transfer, or lease of a franchise is not to be construed as reviving or validating any lapsed or invalid franchise, or enlarging or adding to the power and privileges contained in any grant of any franchise, or of the waiving of any forfeiture.

The last provision was added in order to fit the case of the so-called Steinway tunnel now under construction, but which it is believed has forfeited its rights. The city has not been as prompt in preventing construction of this tunnel as some of those conversant with the facts believe it should have been, and it is hoped that the new commission will take the matter of this important franchise up promptly. The route covered by this tunnel is an ideal connection between Manhattan and Queen's, but it should be built under proper public authority.

The Commission is given power to make reasonable regulations for the furnishing and distribution of freight cars to shippers.

Issue of Stocks, etc. — The provisions of the act as to stockholding, which are very important, were subjected to very considerable discussion. The act provides that no railroad corporation or street railroad corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold any part of the capital stock of any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of the State of New York unless authorized so to do by the Commission. Furthermore, except where stock is transferred or held as collateral security (only with the consent of the Commission), no stock corporation of any description other than a railroad or street railroad corporation shall acquire or hold more than 10 per cent of the total capital stock issued by any railroad or street railroad corporation or other common carrier. But it is provided that this shall not be construed to prevent the holding of stock heretofore lawfully acquired. The act goes on to provide that every contract, assignment, transfer, or agreement of assignment of transfer of stock in violation of this provision shall be void, and no such transfer or assignment shall be made upon the books of any such corporation or shall be recognized as effected for any purpose.

The provisions of the act as to the purpose for which stocks and bonds and other forms of indebtedness may be issued are equally important. It is provided that stocks, bonds, notes, or other evidence of indebtedness payable at periods of more than twelve months may be issued (1) when necessary for the acquisition of property, the construction, completion, extension, or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, and (2) when the Commission has authorized such issue and the amount thereof, and stating that in its opinion the use of the capital to be so secured is reasonably required, and for the purpose of so determining, the Commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, documents, etc., as it may deem of importance. Notes for proper corporate purposes and not in violation of any provision of this or any other act, payable at periods of not more than twelve months, may be issued by such corporations without the consent of the Commission, but no such notes shall in whole or in part, directly or indirectly, be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve

months without the consent of the Commission. An exception is made, however, to the power of the Commission by the provision that the Commission shall have no power to authorize the capitalization of any franchise to be a corporation or of any franchise or the right to own or operate or enjoy any franchise whatsoever in excess of the amount, exclusive of any tax or annual charge actually paid to the state or a political sub-division thereof as the consideration for the grant of such franchise or right. Considerable objection was raised to this because the state recognizes the value of such franchises by taxing them. Nor shall the capital stock of the corporation formed by the merger or consolidaton of two or more other corporations exceed the sum of the capital stock of the corporation so consolidated, at the par value thereof, or such sum or additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized; nor shall any corporation issue any bonds against or as a lien upon any contract for consolidation or merger.

Each commission is given power to investigate freight rates on interstate traffic on railroads within the state, and when such are in its opinion excessive and discriminatory or in violation of the Interstate Commerce Law or of its orders or regulations, the Commission may apply to the Interstate Commerce Commission for relief or present to that Commission all the facts gathered by it.

Each commission is directed to investigate the cause of all accidents on railroads or street railroads within its district which result in loss of life or injury to persons or property, and which, in its judgment, shall require investigation, and every common carrier, railroad, and street railroad is required to give immediate notice of every accident to the Commission in such manner as it may direct. It is provided, however, that such notice shall not be admitted as evidence or used for any purpose against such corporation in any suit or action for damages growing out of any matter mentioned in the notice.

Duties of Common Carriers.

The duties imposed upon those engaged in the transportation of passengers, freight, or property from one point to another within New York State are:

1. That the service and facilities shall be safe and adequate and in all respects just and reasonable.

2. That all charges for such service shall be just and reasonable and not more than allowed by law or by order of the Commission, and every unjust and unreasonable charge made and demanded or in excess of that allowed by law or order is prohibited.

3. That no common carrier shall directly or indirectly, by any special rate, rebate, or other device or method, obtain a greater or less compensation from any person or corporation for any service than it charges or receives from any other person or corporation for doing a like and contemporaneous service of a like kind of traffic under the same or substantially similar circumstances and conditions.

4. That no undue or unreasonable preference or advantage shall be given to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disdavantage in any respect whatsoever.

5. (*a*) That upon application of any shipper tendering traffic for transportation, a railroad corporation shall construct, maintain and operate upon reasonable terms switch connection with a lateral line of railroad or private sidetrack.

(*b*) That upon application of any shipper a railroad corporation shall provide upon its own property a side track and switch connection with its line of railroad, whenever such is reasonably practicable, can be

put in with safety and the business therefor is sufficient to justify the same.

The Commission may upon application and investigation order the installation of such connection fixing a reasonable compensation, and may order a discontinuance of such connection.

6. That there be filed with the Commission and be printed and open to public inspection schedules showing rates, fares and charges within the state, including joint rates. The schedules must include all classifications and terminal, storing, icing and other charges and all privileges or facilities as well as rules or regulations that may affect the rates or the value of the service rendered. The form of the schedules is to conform as closely as possible to that required by the Federal Commission under the Interstate Commerce Act. Changes may be made in the schedules so filed after thirty days' notice to the Commission and publication for a like period, and indicating the proposed changes and the time when they will take effect. The Commission may, however, order changes in rates without requiring the thirty day notice and publication. All carrier parties to a joint tariff agreement must file schedules or evidence of concurrence therein to schedules already filed.

7. That no common carrier shall after Nov. 1, 1907, engage or participate in the transportation of passengers, freight or property between points within the state, until its schedules have been filed and published and no compensation shall be charged greater or less than that applicable and as specified in its schedules filed and in effect at the time, nor shall there be any refunds or privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

8. That no common carrier shall give free transportation for persons or property except to certain classes of persons, conforming closely to the provisions of the Federal Act on this subject. As to mileage, excursion or commutation, passenger tickets or joint interchangeable mileage tickets with special privileges as to the amount of free baggage that may be carried, a common carrier before issuing such must file with the commission copies of the tariffs of rates, fares or charges on which they are to be based. Exchange of passenger transportation for advertising space in newspapers at full rates is allowed, however.

9. That no common carrier in any manner, shall assist or permit any person or corporation to obtain any kind of transportation at less than the rates then established and in force by false billing, classification, weight or weighing or false report of weight or by any other device or means. Furthermore, no person, corporation or its representative, who shall deliver freight or property for transportation, shall seek to obtain or obtain such transportation at less than the lawful rates by any false billing, classification, weight or weighing, false representation of the contents of a package or of weight or by any other device or means whether with or without the consent or connivance of the common carrier or any of its officers, agents or employees.

10. That every common carrier shall file with the commission sworn copies of every contract, agreement or arrangement with any other common carrier relating in any way to the transportation of passengers, property or freight.

11. That every common carrier must afford all reasonable proper and equal facilities between its lines and the lines of other common carriers for the interchange of traffic and no discrimination as to rates or facilities shall be made between carriers or between passengers or freight. The handling and hauling of standard freight cars is required but the interchange of cars is not required except upon the terms and conditions directed by the Commission, but this is not to be construed as requiring a com-

mon carrier to permit or allow another to use its tracks or terminal facilities.

12. That no common carrier shall charge more for the transportation of passengers or of a like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction. Upon application, the Commission may, however, authorize a common carrier to charge less for longer than for shorter distances in special cases, but the order must specify and prescribe the extent to which the common carrier is relieved from this prohibition.

13. That every common carrier engaged in the transportation of freight shall upon reasonable notice furnish to all persons and corporations applying and offering freight for transportation sufficient and suitable cars. Moreover, every railroad and street railroad corporation is required to have sufficient cars and motive power to meet all requirements for the transportation of passengers and property which may reasonably be anticipated unless relieved therefrom by order of the Commission. In case at any particular time there are not sufficient cars to meet all requirements, all cars available shall be distributed among the several applicants without discrimination between shippers, localities or competitive or non-competitive points, but preference may always be given to the shipment of livestock or perishable property.

In addition, the Commission is given power to make reasonable regulations for the furnishing and distribution of freight cars to shippers, for the switching, loading and unloading thereof, for demurrage charges and for the weighing of cars and freight.

14. That every common carrier, railroad and street railroad corporation shall upon demand issue either a receipt or bill of lading for all property delivered to it for transportation. No contract, stipulation or clause therein shall exempt or be held to exempt any such corporation from any liability for loss or injury caused by it to freight or property from the time of its delivery for transportation until it shall have been received at its destination and a reasonable time has elapsed after notice to permit its removal.

15. A penalty of $5000 for each offense or each day's continuance is imposed for violation of the provisions of the act or orders of the commissioners by a common carrier. Moreover, every officer and agent of any such common carrier or corporation who shall violate or who procures, aids or abets any violation by any such common carrier or corporation or any provision of the act or of an order of the Commission shall be guilty of a misdemeanor.

16. That no common carrier or railroad corporation shall enter into any combination, contract or understanding, written or oral, to prevent by any arrangement or understanding or by any other means or device by which the carriage of freight and property shall be prevented from being continuous from the place of shipment to the place of destination, and no breakage of bulk, stoppage or interruption of carriage made by any common carrier shall prevent the carriage of such property from being treated as one continuous carriage; nor shall any breakage of bulk, stoppage or interruption of carriage be made or permitted by any common carrier except to be done in good faith for a necessary purpose without intention to avoid or unnecessarily interrupt or delay a continuous carriage, or to evade any of the provisions of law or order of the Commission.

17. A smaller penalty is imposed for violation by other corporations than carriers. Every person, who, either individually or acting as an officer or agent of such a corporation, shall violate any provision of the law or an order shall be guilty of a misdemeanor.

The act specifically provides that as to forfeiture and penalty, the act of any director, officer or other person acting for or

employed by any common carrier, railroad or street railroad corporation, acting within the scope of his official duties or employment shall be in every case and be deemed to be the act of such corporation.

Action for Penalties. — Such penalties or forfeitures are to be recovered in an action to be brought in the name of the people by the counsel to the Commission, and all penalties and forfeitures incurred to the time of the commencing of the action may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be a waiver of the right to recover any other penalty or forfeiture, which is a provision added to the law to overcome the effect of a much criticized decision of the Court of Appeal.

At the last moment a provision was added to the law providing that if the defendant in such an action shall prove that during any portion of the time for which it is sought to recover a penalty or forfeiture for a violation of an order, it was actually and in good faith prosecuting an action or proceeding to set aside the order of the Commission, the court shall remit the penalties or forfeitures incurred during the pendency of such action or proceeding.

Liability for loss or damage caused by violations of the act or of orders is imposed and for loss or injury to property caused by delay in transit due to negligence and in any action to recover for such damages the burden of proof shall be upon the defendant to show that the delay was not due to negligence. Every common carrier and railroad corporation shall be liable for loss, damage and injury to property carried as baggage up to the full value and regardless of its character. But the value in excess of $150 shall be stated upon delivery and a written receipt stating the value shall be issued by the carrier who may make a reasonable charge for the assumption of such liability in excess of $150 and for the carriage of baggage exceeding one hundred and fifty pounds in weight upon a single ticket.

Gas and Electricity. — As has been stated before, the provisions relating to gas and electricity are substantially the same as those contained in the Gas Commission Law of 1905. It is therefore sufficient at this time to point out that the supervision of such public services as well as the control over rates are substantially the same as those over transportation services which have already been enumerated. The same care is to be exercised over issues of stocks and bonds and other forms of indebtedness and the approval of incorporation and franchises and of the transfer of franchises. In this connection it is interesting to note that no municipality can build, maintain and operate for other than municipal purposes any gas or electric works for lighting purposes without a certificate of authority from the Commission. There is a provision that if it is alleged and established in an action brought by the company for the collection of any charge for gas or electricity that the price demanded is in excess of that fixed by the Commission or by statute in a municipality wherein the action arises, no recovery shall be had.

ALBANY, N. Y., June, 1907.

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, facetiæ, and anecdotes.

STRAIGHT THINKING.

At the recent dinner of the Boston Bar Association, Bishop William Lawrence, who was present as the guest of the Association, defined in a striking way one of the most insidious errors of modern business life as a "failure to think straight." As an illustration of a pervading fault he referred particularly to the failure of officers of corporations to realize their legal and moral duties to the intangible organizations they represent. It has often been noted in recent essays that the modern method of conducting business is through a legal instrument originally not designed for that purpose, and which has only slowly been adapted by our laws to the uses to which it has been put by the business men who have found it a flexible and efficient means of conducting semi-speculative enterprises upon credit. Though no thoughtful person to-day would for a moment suggest that our great enterprises can hereafter be conducted in any other form, events are constantly demonstrating the necessity of the development of the law to meet these new conditions. Bishop Lawrence insists that still more we need a clear conception of legal and moral relations. It is not only the startling instances in the management of our great corporations that show the need of straight thinking in this regard, for it is a common experience of lawyers, who deal with the affairs of insolvent corporations which have been conducting business upon a small scale, to discover that there has been an utter failure on the part of the officers, otherwise respectable, to appreciate the obligations imposed upon them by their acceptance of office. The vast number of small enterprises now conducted through the means of corporations, requires the education of business men, inexperienced in corporate management, to a comprehension not only of their moral obligations which, if conscientiously observed, would always suffice to keep them from violation of fiduciary obligations, but to impress upon them the fact that there are already legal principles sufficient to enforce the strictest integrity, and to impress upon a solvent director serious liabilities for misconduct. The moral bond of agency and trust, though we are all prone to forget it, exists not only in theory but in fact in the promotion and management of corporations to do business with other people's money.

COSTLY LEGISLATION IN ENGLAND

American lawyers will be interested in the comments made by *The Daily Telegraph* (London) of June 4 on a number of protracted trials which have taken place in England during the past few years. Some comparison can thus be made between the English and the American procedure, and more particularly in the cost of legislation in the two countries. This is striking when it is remembered that in England counsel cannot take cases upon a contingent fee, but must be paid the sum marked upon their briefs at the time they are delivered, together with the subsequent daily "refreshers." Thus each of the leading "silks," or King's Counsel, in the case referred to (Bryce *v.* Bryce and Pape) were paid 150 guineas when the briefs were delivered. This sum served only for the first day of the trial. For each subsequent day each counsel received a refresher of 100 guineas. Putting it into American currency the "silks" each received $750 on the brief and $8,000 in refreshers. Each King's Counsel must have a junior whose fee depends upon that of his leader, and is, roughly speaking, two-thirds of it. Thus, each junior received 100 guineas on

his brief and 66 guineas refresher, his total fees for the sixteen days of the trial being roughly $5,750. Both sets of counsel get these fees in cash whether they win or lose their client's case. Furthermore in England the costs generally follow the event, that is the unsuccessful party pays his adversary's costs, although the trial judge has a discretion in saying who shall pay them. In Bryce *v.* Bryce and Pape, the unsuccessful petitioner for divorce has had to pay his own and his wife's costs and a part of the co-respondent's, the latter being required to pay all costs which were occasioned by his unsuccessful plea of connivance, which he was compelled to withdraw.

For costliness and prolonged hearing the divorce suit Bryce *v.* Bryce and Pape, concluded yesterday before Mr. Justice Bargrave Deane, will long be remembered. From beginning to end the case occupied sixteen days. There were engaged in it four King's Counsel and three juniors, and as the briefs of the three leading " silks " were marked 150 guineas, and there was added a 100-guinea refresher each day on each brief, the earnings of this trio of eminent lawyers alone amounted to £5,250. To that has to be added the smaller fees of the juniors, the cost of consultations, and of the preparation of the case by expensive solicitors exercising a free hand, and court fees. Roughly, it may be computed that such a case absorbs very little short of £1,000 a day. The Bryce case involved some very long speechmaking, and put the respondent in particular through a most severe ordeal, for she was in the witness box for three days, and answered 2,300 questions. Mr. Duke, K. C., the petitioner's counsel, took five or six hours to open his case, and four hours for his closing speech. Mr. Isaacs, K. C., for the respondent, spoke for five hours — a whole day — in addressing the jury at the close of his case. Sir Edward Carson's final speech occupied two hours; and the same time was absorbed by the judge in his summing up.

The case, therefore, stands high in the list of prolonged trials which have occupied the divorce court in recent years. The Kirk *v.* Kirk suit, heard a few months ago, lasted ten days, and was then abruptly stopped, and the Pollard *v.* Pollard case, when it came up on the intervention proceedings instituted by the King's Proctor, with the result that a decree nisi was rescinded and a judicial separation granted, occupied eleven days. Even the famous and costly Hartopp *v.* Hartopp and Cowley case is eclipsed by Bryce *v.* Bryce and Pape, for it lasted only thirteen days. In that petition half a dozen King's Counsel and seven juniors were engaged. For a case giving a clear lead we have to go back to the Colin Campbell suit of 1886, when eight " silks " and six " stuffs " were kept busy in court for eighteen days.

Both the Chancery and the King's Bench Divisions have also dealt with cases celebrated for their lengthy hearing. In 1900 thirteen days were taken up with the action brought by the Taff Vale Railway Company against the Amalgamated Society of Railway Servants, which resulted in a verdict for the plaintiffs for £23,000. The great London and Globe Finance Corporation case was also very prolonged, and almost unique in the number of counsel engaged, there being in all twenty-three, including eleven King's Counsel. The patent case, J. and P. Coats *v.* Crosland, took fourteen days and occupied sixteen counsel, of whom nine were " silks "; and Chang Yen Mao *v.* Moreing, heard by Mr. Justice Joyce in 1905, occupied sixteen days, and subsequently four days on appeal. Some will also recall the historic Epping Forest case of 1874, which turned on a question of common rights. That matter employed twenty-one lawyers for twenty days.

All these, however, sink into insignificance before such criminal cases as the Thaw trial, which lasted almost continuously for ten weeks, of which two weeks were absorbed in the swearing of the jury. Neither the old nor the new hemisphere has had anything for several generations like the action instituted on the Continent in 1210 by the Count of Nevere against the town of Neuzly, which did not terminate until 1848; or like the litigation which arose in Campan *v.* Quatre Vezlan d'Ane in 1254, and is said to be still in the courts.

THE CORPORATION MILLS

Incorporators of companies will be interested to know that the legislatures of two of

the states most frequently resorted to for this purpose have materially altered during the last session the annual franchise tax on corporations. Maine considerably increases the annual tax on corporations having a capital of $200,000 or more. The incorporation fee, however, remains the same. Delaware, on the other hand, reduces the incorporation fee and beginning with 1908 decreases the annual tax on corporations having a capital of $25,000 or over. The decrease on the rate is progressive with the size of the capital so that it is now much less than the tax in Maine. There is also a provision for a discount to corporations not actively engaged in business which will doubtless prove attractive to a certain class of companies. In the competition of states for revenue from this source under our present absurdly artificial system of incorporation these new rates will doubtless cause a migration of our intangible legal entities to the milder climate of Delaware.

CRIMINAL LAW REFORM

In reply to a recent editorial in the Nation upon criminal law reform Mr. Herbert L. Baker of Detroit has written a letter to that journal commenting with keen insight upon the causes of anachronisms in the law from which we quote the following:

"The commercialism which now pervades American society at large pervades also the legal profession, and largely determines its character. American lawyers may be roughly divided into two classes, one of which is struggling for wealth and the other of which is struggling for existence; and each class is so absorbed as to have little time and no inclination for the cultivation of legal science or plans for social betterment.

"From the very nature of its calling the legal profession is intensely conservative. Its primary function is to administer rather than to make the laws — to deal with the law as it is, rather than as it ought to be — leaving it to the lawmaker to determine the latter. Moreover, it realizes more vividly than any other class that changes are always dangerous, because the entire framework of society is supported by an intricate network of laws which are so intimately interwoven that any radical change is likely to work harm rather than good. In all progressive countries the law must be constantly changing, because conditions are constantly changing. These changes would naturally be made by legislation, but in common-law countries like our own they are made for the most part indirectly by judicial decisions. Through long and devoted adherence to this method of adjusting laws to social needs we have strengthened and confirmed the habit of its use, and at the same time caused the legislative method to be neglected.

"The situation may be briefly summed up by saying that in some of its essential features our system of trial by jury has become an anachronism, and that the work of revising it to meet changed conditions without destroying it, is one of the most important and difficult problems that we now have to face. It requires the coöperation not only of lawyers, but of intelligent and public-spirited citizens of all classes."

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

Echoes of Secretary Root's speech about the power of the national government are ringing through the legal magazines. Articles on constitutional law are noted this month in unusual number, and several of them are of unusual merit. It seems fair to say that the tendency is toward the recognition of the force of the secretary's contentions, even if the writers regard them as more inevitable than desirable. A spirited defense of the practice of taking contingent fees where clients are poor, appearing in the *Yale Law Journal*, presents a different view than usually finds expression in the magazines. The articles of Professor Brannan and Messrs. Cunningham and Warren in the *Harvard Law Review* are clear discussions of law points of importance to a practicing lawyer.

ADMINISTRATIVE LAW. "To What Extent have Rules and Regulations of the Federal Departments the Force of Law?" by Morris M. Cohn, in the May-June *American Law Review* (V. xli, p. 343), summarizes the subject in the following manner:

"The executive department of the federal government, through the President and the heads of departments, has an inherent right to issue regulations bearing upon matters committed to it by the Constitution; but the extent of this power has not been defined. It has been said that this exercise of power cannot conflict with acts of Congress; which means that where Congress are acting within their constitutional powers, their acts will prevail. Subordinates, and persons who invoke the benefits of such regulations, so promulgated within constitutional limits, cannot question them. And where the action is that of the President, through the head of the proper department, in relation to a political matter committed to him by the Constitution, it will be binding upon all. But it does not follow that every officer, in every branch of the government, is under the exclusive direction of the President. And the right to promulgate rules and regulations, to have the force of laws, is not conceded to others than heads of departments, where an act of Congress does not so provide. Where the regulation of the head of a department, or approved by the head of a department, is under an act of Congress, it cannot conflict therewith, nor add anything thereto by creating new offenses, nor additional civil liability nor additional conditions not mentioned therein. But regulations have been sustained where they were in aid of the acts under which they were issued. However, where Congress indicated by an act passed to cover omissions in a previous act that there was no intention on their part to leave the matter to the regulation of the commissioner of internal revenue, even though they had conferred power upon him in general terms to create regulations upon the subject, the courts will not enforce such regulations when they concern manufacturers and dealers, so as to impose penalties denounced by act of Congress for failure to observe the law. Nevertheless, general provisions in an act of Congress will sometimes justify a regulation which has the traditions of the department and of legislation, and the inherent power of the head of a department, to sustain it. The courts take judicial notice of those rules and regulations of the departments that have the force and effect of laws."

BANKRUPTCY. "The Law and Practice of Bankruptcy under the New York Bankruptcy Act of 1898," by William Miller Collier, 6th edition by Frank B. Gilbert, Matthew Bender & Co., Albany, 1907.

The rapid accumulation of decisions upon this important subject makes necessary frequent renewal of treatises which endeavor to be exhaustive. Six hundred cases have been decided in the two years since the 5th edition was published and many of these settled questions of importance. This has required

some modifications of the text of the former editions, but in general the treatment of the subject adopted in the former editions is continued, and the new decisions added in the notes. In addition to the general index each chapter begins with a synopsis for convenience of reference. The arrangement of the book follows the order of the sections of the statute in the form of commentaries. Although this somewhat hinders a discussion based upon the broadest principles and requires some repetition and cross reference, the arrangement is doubtless most convenient for the purposes of the practitioner.

BANKRUPTCY (Separate Estates of Partners). "The Separate Estate of Non-Bankrupt Partners in the Bankruptcy of a Partnership Under the Bankrupt Act of 1898," by J. D. Brannan, June *Harvard Law Review* (V. xx, p. 589). "Assuming the firm to be an entity under the Bankrupt Act" this article considers "the question of the treatment of the firm and individual estates where the firm alone has been made a bankrupt." Space forbids analysis of this suggestive and valuable article.

BIOGRAPHY. "John H. Fulton," by Robert C. Jackson, June *Virginia Law Register* (V. xiii, p. 89).

BIOGRAPHY. "Christopher Columbus Langdell," by William Schofield, May *American Law Register* (V. lv, p. 273).

BIOGRAPHY. "Frederick William Maitland," by D. P. Heatley, April *Juridical Review* (V. xix, p. 1).

BIOGRAPHY. "The Centenary of Samuel Warren" (author of the famous legal novel, "Ten Thousand a Year") by Lewis Melville, the June *Bookman* (V. xxv, p. 412).

BIOGRAPHY. "Judge Jacob W. Wilkin," by Isaac N. Phillips and Orrin N. Carter, June *Illinois Law Review* (V. ii, pp. 67, 77).

BOYCOTTS. "Evolution of the Law Relating to Boycotts," by Robert L. McWilliams, in the May-June *American Law Review* (V. xli, p. 336), after examining the cases, which, as is usual, are not all in agreement, sums up briefly as follows:

"1. The rights connected with business being only relative, any damage done by one or more persons to the business of another by the use of the boycott, for the purpose of benefiting the person or persons inflicting the loss, and effected by means that are not unlawful *per se* should not be held actionable. 2. But the justification which exists when the boycott is effectuated under the circumstances stated, disappears when unlawful means are employed, and a cause of action thereupon accrues to the person suffering the loss. 3. Where no legitimate interest is being subserved, but the boycotters are inspired primarily by malice or a desire to injure the complainant, a cause of action also accrues regardless of the nature of the means employed."

CIVIL CODES (Brazil). "Le Projet de Code Civil Du Brésil et Le Droit International Privé," by Solidonio Leite, *Revue de Droit International Privé* (V. iii, p. 377). A short analysis of Brazil's proposed civil code, on which a commission has been working for several years, with verbatim quotation of the systemization of the conflict of laws.

"COMMERCIAL LAW," condensed and tabulated by Adolph M. Schwartz. A handbook for those interested in credits and collections. Privately printed, New York, N. Y.

CONFLICT OF LAWS. "Suits by Foreign Corporations," by Raymond D. Thurber, *Bench and Bar* (V. ix, p. 54).

CONFLICT OF LAWS (Renvoi). "La Théorie du Renvoi en Droit International Privé," by A. Lainé, *Revue de Droit International Privé* (V. iii, p. 313). Continuing a discussion of the *renvoi* theory, to be still further developed.

CONSTITUTIONAL LAW. "'Truck Acts,' 'Scrip Laws,' and 'Pluck-me-Stores,'" by O. H. Myrick, *Central Law Journal* (V. lxiv, p. 387).

CONSTITUTIONAL LAW. "The Courts and the Railroad Question," by M. C. Freerks, *Central Law Journal* (V. lxiv, p. 647).

CONSTITUTIONAL LAW (Due Process). "Due Process of Law," by Hannis Taylor, in the May-June *American Law Review* (V. xli, p. 354). A résumé of the United States Supreme Court decisions on the subject, concluding with the prophecy that "in the important contests now arising under state laws designed to assert state control, in a more extreme form than ever before, over railroad corporations, the due process of law clause is destined to be the dominating factor."

CONSTITUTIONAL LAW (Executive Power Over Legislature). James D. Barnett concludes in the May-June *American Law Review* (V. xli, p. 384), his article on "The Executive Control of the Legislature," begun in the preceding number.

CONSTITUTIONAL LAW (Federal Labor Legislation). The right of a state to regulate the employment of children is settled, the foundation for the right being found to lie in the conception of the child as a future citizen in whose welfare the state is concerned. "The Beveridge Child Labor Bill and The United States as Parens Patriæ," by Andrew A. Bruce, in the June *Michigan Law Review* (V. v, p. 625), says "the question now remains as to how far the Federal government may itself assume the position of *parens patriæ* and itself take measures for the protection of the children of the nation." The Beveridge bill sought to forbid the transportation of the products of child labor over interstate lines. Senator Beveridge took the position in his argument before the Senate that the power of Congress over interstate commerce was supreme. Mr. Bruce considers this position untenable, disagrees with the senator in his view of the result of the "Lotteries Case," and declares the other statements of the courts relied on by him to be dicta inapplicable to the facts now in question.

"There is another theory, however, on which Congress perhaps may act in the matter, and that is the theory that the citizen of a State is also a citizen of the United States; that the United States has the right to protect its own citizens; that it, as well as the State, is *parens patriæ*.

"This is no doubt a new governmental theory in the United States, or at any rate a theory which has not been judicially promultated. Since the Civil War, however, and the adoption of the Fourteenth Amendment, it has had much in its support. Every person born or naturalized within the United States and subject to the jurisdiction thereof is a citizen of the United States as well as of the State in which he resides. The whole is no greater than the sum of its parts, and the strength of a nation certainly depends upon the strength and intelligence and morality of its individual citizens. . . . De Tocqueville, in the middle of the last century, asserted that there was practically no national power in America and that an attempt to enforce a compulsory conscription would result in a dissolution of the Union. The Civil War, however, and the almost uniform acquiescence in the practice of drafting soldiers therein pursued, have totally disproved the assertion. The struggle also taught, as no other lesson could have taught, the absolute dependence of the nation upon the virility and morality of its citizenship. No one during that struggle would have doubted the power of Congress to punish those who should cut off their fingers or in other ways render themselves unfit for military service and thus seek to escape the drafts. . . . Can anyone deny that the employment of child labor has been a potent factor in the physical deterioration of the British people, and is not only now rapidly becoming but has always been a potent factor in the deterioration of the American?

"Congress then, it would seem, should act in the matter directly, though perhaps punish indirectly. It should take the broad position that the protection of the health and of the lives and of the morals of its citizens is as much a matter of national concern as the protection of the currency or of the flag. . . . It should directly prohibit the employment of child labor and establish, as far as possible, a uniform rule in relation thereto — a rule, however, which should adapt itself to climatic and other conditions. It should punish violations of this rule in part by denying the right of interstate commerce to those who have violated it. Whether we are so far a nation that this may be done, is for the courts to decide. The direct attack is certainly just as constitutional and defensible as the indirect. In fact, the indirect method suggested by Senator Beveridge can alone be justified on this theory of national citizenship and on the assumption that the direct attack could be made. It stretches the Constitution just as far as would the direct attack itself. It is dangerous because it is covert, because if we once establish the precedent and grant to Congress the unlimited right to destroy commerce, not as a punishment for crime, or because the thing transported is injurious, but

because it enters into competition with other articles, or its method of manufacture is not approved by the majority in Congress, we place in the hands of the national legislature a power which may prove absolutely subversive of individual liberty and of that freedom of commerce which the Constitution was, above all other things, created to preserve."

CONSTITUTIONAL LAW (Federal Labor Legislation). "The Constitutionality of Federal Legislation Concerning Employer and Employee Engaged in Interstate and Foreign Commerce," by Carl Wisner, in the June *Michigan Law Review* (V. v, p. 639), is a discussion of the power of Congress to legislate concerning employer and employee in interstate commerce, recently questioned in several important cases, wherein the issue was:

"Does the regulation of the relation of employer and employee, determining rules of liability in case of accidents, limiting the right to contract, and imposing the performance of duties on those assuming the relation, constitute a proper regulation of commerce by Congress within the meaning of the commerce clause?"

As a result of its historical development Mr. Wisner discusses the subject in the following four general divisions.

"(1) Legislation by Congress affecting employer and employee engaged in transportation by water; (2) Legislation by Congress affecting employer and employee engaged in railroad transportation; (3) Legislation by Congress regulating hours of labor and (4) Legislation by Congress securing the right of the employee to belong to Labor Unions."

A valuable review of the legislation and the cases leads the author to the conclusion that the statutes questioned "must be regarded as a part of the general system of commercial regulations adopted by Congress for the benefit of the general public, the protection of the shipper, the traveling public, and of employees engaged in a difficult and hazardous occupation, whether they relate to employees engaged in transportation by water, or by railroad," and that they are valid.

"By viewing the legislation discussed as a whole, it becomes apparent that no great or sweeping changes in the law have taken place. Constitutional principles do not change, but new conditions call for new applications of well-known and long tried rules."

CONSTITUTIONAL LAW (History and the Future). "A Written Constitution in Some of Its Historical Aspects," by Andrew C. McLaughlin, June *Michigan Law Review* (V. v, p. 605). This address, delivered at the celebration of the fiftieth anniversary of the adoption of the Constitution of Iowa, March 19, 1907, analyzes with skill the historical elements that entered into the Constitution of the United States. Unlike some recent writers who have expressed themselves very vigorously, the author thinks our Supreme Court's right to refuse recognition to unconstitutional laws is a logical and necessary result of the fixity of our Constitution. "From the mere fact that the Constitution was law, the courts were under obligation to recognize its binding force." Leaving the historical field the author speculates as to the future.

Is the rigidity of our Constitution yielding? The development of the police power is encroaching on the individualism on which our structure was based. The effort to continue in accord with a Federal Constitution drawn up in days of individualism has demanded numerous adjustments. These adjustments have been made easy in part by the general terms in which the Constitution is framed, making it unnecessary to follow literally the ideas in the minds of its framers.

"Can our elastic Federal Constitution, framed under conditions so different from those now existing, continue to be respected, in so far as it limits the competence of Congress? Many things have been done in the past and are done daily that are so far in advance of any conception of the Fathers, that we find difficulty, by processes of devious ratiocination, in reconciling them with the idea that the Constitution is a document of enumerated powers. But these changes have come slowly, and we have thought that we were still clinging tenaciously to the principle of law and the theory of constitutional limitation. Now, however, we are frankly told that the great fact of a national conscience, national will, and a national need must be recognized; if the states cannot individually do their duty,

it will be done for them. This frank statement is not, as I conceive it, a threat, at least not a declaration of any imperious purpose to disregard the law or arrogantly to sweep state rights into the muck heap. It is an honest, clear-headed avowal of a very evident social truth: state negligence, state incompetence, state selfishness will not be permitted to stand in the way of overpowering national desire and a demanding national conscience; to say so is only to speak plainly what students of history know. The preservation of state rights depends, as ever, on the performance of state duties."

The author fully recognizes that if in our efforts to secure what we now regard as right we go beyond the powers granted to the national government "we shall consciously give up the idea of a law-abiding state and enter once again upon a government of men and not of law. . . . If the Federal government can under pressure reach beyond its legal competence to do things for the state, there cannot in logic be an end; the very framework of government itself may be warped and broken under the pressure of opportunism and exigency. It is easy enough to argue that a president can go beyond his constitutional limits because he can act more expeditiously than a cumbersome congress. Even now, at least one able, influential, and thoughtful journal (I do not mention the hair-brained variety) is demanding "centralized democracy," which is a euphemism for consolidated government and centralized authority. But from the highest point of view, can there be any greater danger than the conscious breach of confining law, unless it arises from the hypocritical pretense of regard for law, while one is consciously going beyond its limits? Have we reached that stage in our fretting against the bars of legal federalism?

"It is strange . . . that the two fundamentals that were striven for so long, the two great ideas which were embedded in our constitutions, and which appeared to make them the lasting resting place of permanent principles, the product of centuries of discussion and combat, are now in especial peril. To say the least, we are looking at them critically and pondering their value. Have we outgrown the idea of essential individualism with which our constitutions are impregnated, and the great idea of building up a competent federal republic, not on opportunism or a temporary view of justice, but on law?"

CONSTITUTIONAL LAW (Suits Against States). In the May-June *American Law Review*, William Trickett writes on "Suits Against States by Individuals in the Federal Courts" (V. xii, p. 364). His conclusion is:

"A survey of the cases, and of the reasonings of the courts too painfully discloses the absence of a clear and definite criterion for deciding when a suit is to be deemed a suit against a state. It need not be named as defendant. Its agents or officers may be so far identified with it that a suit against them will be virtually a suit against it. Whether they are or not, ought not to depend on their dignity. There is no valid reason for saying that the governor is the state any more than that the other officers or agents are. The nature of the right contested is a better test. If the state will be deprived of the possession of property which it holds through the defendant, if the plaintiff prevails; if a state statute will be explicitly declared null and its execution by the appropriate officer arrested, if the plaintiff is to succeed, the suit is practically a suit against the state. But neither these criteria, nor any other, can be found consistently enforced in the decisions."

CONTRACTS. "Commentaries on the Law of Contracts," by Joel Prentiss Bishop, second edition by Marion C. Early, T. H. Flood & Co., Chicago, 1907. A new edition of this standard work will be welcomed by the profession, though since it does not purport to be an exhaustive digest it less quickly becomes obsolete. The alterations that have been made in this edition have been chiefly under the subject of illegal contracts and contracts in restraint of trade. The new work is admirably indexed, and cross-references to unofficial reports have been added where possible. The most recent decisions illustrative of principles have been added to the citations. It is refreshing in this age of prolixity in law writing to take up again a work whose author set before him as his ideal brevity of expression.

CONVEYANCING. "The Registration of Title in Scotland," by H. W. Gibson, the *Law*

Magazine and Review (V. xxxii, p. 291). Exposition of a system which "has attained great perfection."

CONVEYANCING. A very suggestive article on "Conveyancing Considered as a Progressive Science," by Charles Wetherill, appears in the May *American Law Register* (V. lv, p. 297). It is written with special regard to the Pennsylvania law, but its abstracts of various foreign systems which make the transfer of land easier, cheaper, and safer than our methods make it interesting for readers everywhere.

COPYRIGHT (England). "Some Recent Copyright Decisions," by J. Andrew Strahan, *Law Magazine and Review* (V. xxxii, p. 257).

COURTS (England). "A Supreme Imperial Court of Appeal," by George S. Holmested, *Canadian Law Review* (V. vi, p. 210).

CRIMINAL LAW. "The Parole System — an Historical Review," by W. P. Archibald, *Canadian Law Review* (V. vi, p. 222).

CRIMINAL LAW. In the *Independent* of April 25 (V. lxxii, p. 955), Louis H. Machen tries to answer the question, "Should the Unwritten Law be Written?" He believes that public sentiment demands that violation of the home be sufficient justification for homicide, and that this should be enacted as law to relieve juries of the necessity of surreptitiously enforcing this policy. He answers the objection that such law might encourage killing upon suspicion by explaining that his proposed statute would restrict the justification to cases where the provocation shall have proved to be real. Apparently he does not limit the justification to a killing in the heat of passion.

CRIMINAL LAW. "The 'Brain Storm' or the 'Irresistible Impulse' Test as Effecting Criminal Responsibility, and as a Substitute for the 'Unwritten Law' Defence." By Frederick Wilmer Sims, June *Virginia Law Register* (V. xiii, p. 93).

CRIMINAL LAW. Note by Samuel J. Barrows in *Charities and the Commons*, (V. xviii, p. 95), urging a new defense of insanity in New York to cover such cases as the Thaw trial.

CRIMINAL LAW (Eng.). "Appeal on Matter of Fact in Criminal Cases," by W. W. Sibley, in the May *Law Magazine and Review* (V. xxxii, p. 314), is a reply, favoring a bill to allow criminal appeal in England, to an adverse pamphlet by Sir Harry Poland and Herman Cohen.

CRIMINAL LAW (Indeterminate Sentence). In *The World Today* (V. xii, p. 637), M. P. Evans, Superintendent of the Chicago Bureau of Identification, briefly describes the working of the parole law in Illinois. Under this law a system of indeterminate sentences is administered in the interest of reformation of prisoners after conviction. Valuable statistics of improved conditions are given and it is recommended that the system be extended by releasing first offenders at once on parole.

CRIMINAL LAW (Larceny). "Regina *v.* Ashwell," by Charles R. Lewers, June *Columbia Law Review* (V. vii, p. 395). Discussion of a case famous in the law of larceny, the author taking the view that there is no common law larceny when possession is voluntarily given up, though the giver is mistaken as to the nature or value of what he gives.

CRIMINAL LAW (Larceny). The case of George W. Perkins, accused of larceny in having taken funds of the New York Life Insurance Company to reimburse himself for a contribution made to the Republican National Committee by request of the officers of the company, is summarized and the conflicting views of the judges who found he had committed no crime commented upon by Francis M. Burdick in the June *Columbia Law Review* (V. vii, p. 387) under the title "Larceny and the Perkins Case."

According to the majority "the prosecution does not make out a case of larceny (even under the Code provision . . .), unless it shows that the prisoner had in some degree the conscious, unlawful, and wicked purpose to disregard and violate property rights of another which characterizes the ordinary burglar." According to the minority, while "no one can become a thief or an embezzler by accident or mistake," the prosecution makes out a *prima facie* case of larceny by showing that a defendant who, having in his possession, custody, or control, as an officer of a corporation, property of such corporation, appropriates the same to his own use, or that of any other person than the corporation, with the intent to deprive the corporation of the property."

"Counsel for the prosecution asked the

court to adopt the following doctrine as governing this case and others like it:

"'A corporate officer paying out funds of the corporation without consideration moving to it, and without authority of its members or directors, for a purpose foreign to its business (if not also against public policy) and known or feared by him to be wrong, although payments for that specific purpose have not been specifically covered by any provision of the Penal Code, nevertheless commits the crime of larceny.'

"Is it not clear that the adoption of such a doctrine by a unanimous court would have produced a better effect than the decision which was rendered in this case? Would it not have exercised a wholesome influence in restraining directors, who belong to the modern school of high finance, and in protecting stockholders and the public, without harming any honest and faithful officer or director? Such a doctrine, it is submitted, would better accord with the language and purpose of the New York Penal Code than that announced by the majority of the judges.

DAMAGES (Effect of Insurance). "Accident Insurance as Affecting the Measure of Damages," by J. Campbell Lorimer, in the April *Juridical Review* (V. xix, p. 58), calls attention to the anomaly and injustice of the rule by which "according to the existing law of England 'money received from an insurance company upon the death of the relative must be taken into consideration in estimating the amount of the compensation awarded under Lord Campbell's Act' (Mayne on *Damages*, 9th ed., pp. 552–3)."

Lord Campbell himself in 1857 directed the jury to consider the compensation as if there were no insurance and deduct any amount due under an accident policy. As to general life policies he said there should be deducted the premium that the deceased would have paid if the fatal accident had not happened.

"But, in the case of an accident policy, it appears that the whole amount recovered under it is to be deducted from the ascertained damages, and the balance only paid over. The result obviously is that, in the case of an ordinary accident policy, the deceased, in effecting the insurance and keeping it up, it may be for years, really does so for the good of the railway or other wrongdoer, through whose negligence his death is occasioned, for the latter alone reaps the benefit, without even the obligation of recouping the premiums. This is a strange result, and the anomaly becomes even more striking when it is considered that, if the sufferer had only been injured, and a claim had been made by himself, no such deduction would be claimable," by a decision of the Court of Exchequer.

The situation is the more unsatisfactory in that the law of Scotland gives no countenance to the deduction of money recovered under an accident policy, in the case of either death or injury; and, further, one important company, wiser in its generation than its neighbors, so long ago as 1864 secured in its private Act of Parliament a clause protecting claimants under its policies from the effect of Lord Campbell's Act, as above explained. Two insurance companies are this year promoting bills each containing a similar clause, and it is understood that the Parliamentary authorities are not disposed to raise any difficulty, though the subject is one more suited for public than for private legislation. "There is nothing special in the circumstances of these three companies, and one is glad to hear, therefore, that it is proposed to introduce a short public bill of one clause which would put all insurance companies on the same footing. This is obviously desirable, for otherwise the favored few would be able to claim superiority for their policies over those of their rivals, in securing the benefit to the family of the insured who paid for it, and not to the wrongdoer, who paid nothing and has no right to it."

DOMICIL. The English cases on the puzzling subject of "Domicil" are carefully analyzed and discussed by G. Addison Smith, in the May *Law Magazine and Review* (V. xxxii, p. 268).

EDUCATION. The address of Henry Wade Rogers, President of the Association of American Law Schools, delivered at its annual meeting last summer is printed in the June *Yale Law Journal* (V. xvi, p. 545).

EQUITY (Practice). "The Tool Case of Colorado — Right of Appellate Tribunal to Assume Charge of Elections by Writ of In-

junction," by Edward P. Costigan, *Central Law Journal* (V. lxiv, p. 402).

EQUITY (Accounting). "A Phase of Accounting in Trade-Mark Cases," by Guy Cunningham and Joseph Warren in the June *Harvard Law Review* (V. xx, p. 620). In the very recent case of Regis *v.* Jaynes, 191 Mass., 245, the unusual question was directly presented whether, in an accounting in a trade-mark case, the defendant can show in relief of himself that he made no sales by reason of the resemblance between the two labels, and that there had been no confusion of the competing commodities in the public mind. The court held, expressly dealing with the case apart from the Massachusetts trade-mark statute, that a defendant must account for all profits earned by the infringing trade-mark irrespective of the question whether the purchasers had in fact bought the goods of the plaintiff believing them to be the goods of the defendant. The case was not governed by any authority in Massachusetts, and the closest authorities are in conflict. The authors contend that the case was wrongly decided. They say the profits, under the facts of the case, being due to the defendant's reputation and not to the plaintiff's, are properly the property of the defendant and the court should not confiscate them and give them to the plaintiff. Against any further confusion, the plaintiffs are amply protected by injunction and ex hypothesi there has been none in the past.

Not content with giving the plaintiffs all the money actually earned by the defendants, without the aid of any resemblance to the plaintiff's trade-mark, the court gave in addition a fictitious profit by refusing to permit the defendant to charge as a part of the expenses of the business a fair proportion of rent, heat, light, and clerk hire on the ground that the defendant could not prove that these charges would have been less if the infringed goods had not been sold. This is an artificial profit instead of the real profit as it would be figured by any business man. The authors suggest that if the rule requiring the plaintiff to prove what profits are derived from confusion, and what are not, is too heavy a burden to place on injured merchants, a just result would be obtained by shifting the burden of proof so as to allow the plaintiff to recover all profits unless the plaintiff can show affirmatively that none were the result of deception.

ETHICS. "Ethics of Advocacy," by W. F. Chipman, *Canadian Law Review* (V. vi, p. 230).

HISTORY. "The Monroe Mission to France, 1794–1796," by Beverly W. Bond, Jr., The Johns Hopkins Press, Baltimore, Md., 1907.

HISTORY (Haywood Trial). The series of articles by C. P. Connelly beginning in *Collier's* for May 11, 1907, on the Moyer-Haywood case explain the history of the troubles between the owners and the miners in Colorado and Idaho which have distressed that community for many years and which will be thoroughly aired in the trial now proceeding at Boise. The narrative bears the stamp of accuracy and impartiality and is a great improvement over the current newspaper accounts. The gist of the whole matter is well summarized in the following editorial.

"The Moyer-Haywood Case goes far down into the roots of Western life. When the Rocky Mountain States passed from the pioneer age to the period of industrial development they inherited from old years two classes of 'undesirable citizens.' On the one hand were the bad men, the legitimate successors of Slade, Billy the Kid, and their kind. These, when the period of highway robberies, saloon brawls, and cattle rustling were no more, settled down to mine and ranch labor, bringing with them their lawlessness and their love of trouble. On the other hand was the reckless and conscienceless entrepreneur, the mine owner or mine buyer eager only to rip his pile out of the earth and hurry East to spend it. The fight between these two classes goes as far back as Leadville in 1880. In the Cœur d'Alene, in Butte, in Cripple Creek, it was the same old fight. This Moyer-Haywood case is only its most recent round. And whether these men are guilty or not guilty, the moral responsibility for this state of affairs in the Rockies hangs in balance between the two classes."

INSURANCE LEGISLATION (Armstrong Committee's Work). In the May-June *American Law Review* is found an article by James McKeen on "Mr. Samuel B. Clarke and the Armstrong Committee's Life Insurance Legislation," (V. xli, p. 321), which takes issue

sharply with many of the contentions made by Mr. Clarke in the March-April number, noted in the May GREEN BAG.

INSURANCE (See Damages).

INTERNATIONAL LAW (Destruction of Neutral Vessels). "The Knight Commander Case," by Theodore S. Woolsey in the June *Yale Law Journal* (V. xvi, p. 566). A study of an incident of the Russo-Japanese War, from which the author lays down "as probably the usage of to-day,—with the sole exception of Russia,—that neutral ships which cannot be taken before a court for trial must be released. If military necessity demands they may be appropriated or destroyed subject to full payment.

INTERNATIONAL LAW (Foreigners in Korea). "La Condition Juridique des Etrangers en Corée," by Francis Rey. *Revue de Droit International Privé* (V. iii, p. 359). Continuation of an exposition of the legal position of foreigners in Korea, to be further continued.

JURISPRUDENCE. Dr. C. A. F. Lindorme contributes to the June *Open Court* (V. xxi, p. 345) a criticism of a system of justice which involves employment of partisan advocates, under the title of "Law and Justice." There is little that is novel in the ideas he suggests though his manner of statement is entertaining. It is the usual attitude of those who have had no experience with the difficulties of ascertaining and administering abstract justice.

The editor in an article entitled "Justice, Its Nature and Actualization" in the same issue replies to the preceding article with a fairness and insight quite unusual in comments by laymen on the methods of the bar. While he agrees that there is an eternal rule of justice, he realizes that we may be unable to formulate it, and although the law lags behind actual justice, "so long as life remains a struggle in a bodily world of conflicting interests" we cannot avoid an administration of justice which amounts to a settlement between contending parties, the views of which must be presented by argument to the tribunal that decides.

JURISPRUDENCE (Interpretation of Laws). "Spurious Interpretation," by Roscoe Pound, in the June *Columbia Law Review* (V. vii, p. 379), makes no direct allusion to any present day political speeches, but a Yankee might guess it to have been suggested by them. The author deals with that form of judicial law-making under the guise of interpretation which Austin has styled "spurious interpretation."

"The object of genuine interpretation is to discover the rule which the law-maker intended to establish. . . . On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process, made necessary in formative periods by the paucity of principles, feebleness of legislation, and rigidity of rules characteristic of archaic law. . . .

"No one will assert at present that the separation of powers is part of the legal order of nature or that it is essential to liberty. We recognize to-day that it is a practical device, existing for practical ends; that it is only the principle of division of labor applied to government, and that it exists in modern states as a mere specialization, for the reason that any function will be better fulfilled by a special organ than by one charged with many functions. It is often better that some other organ perform the special function in single instances than that it go wholly unperformed. Just as in the organic body, when any one organ fails in its function others are pressed into service to do its work as well as they may, so in the super-organic body politic failure of one organ to do its whole work, or to do it well, puts pressure on the other organs to fill the gap. Hence, while invasion of the province of one department by another is by no means wholly evil, it is a sign either of backwardness in development or of organic disease. Rigid constitutions, difficult of amendment, particularly where, as in the case of the Fourteenth Amendment they seek to impose the political or economic views of one time upon all times to come, are presenting to modern common-law courts the same problem which the rigid formalism of archaic procedure, and the terse obscurity of ancient codes, put before the jurists of antiquity. Cases must be

decided, and they must be decided in the long run so as to accord with the moral sense of the community. This is the good side of spurious interpretation. It is this situation that provokes the general popular demand for judicial amendment of constitutions, state and federal, under the guise of interpretation.

"Looking at the matter purely from the standpoint of expediency, and leaving legal theory out of account, the bad features of spurious interpretation, as applied in the modern state, may be said to be three: (1) That it tends to bring law into disrepute, (2) that it subjects the courts to political pressure, (3) that it reintroduces the personal element into judicial administration. . . . .

"Are the temporary advantages to be derived from speedy judicial amendments of constitutions in any wise compensation for the serious and permanent injury to the legal system which is involved? Courts must decide cases; they must decide them in accord with the moral sense of the community so far as they are free to do so. If the proper agencies of government do not supply the necessary rules, they must administer justice without rules or must make rules. Granting this, the fact remains that there should be no such necessity, or at least it should be reduced to a minimum, in the modern state. Over-rigid constitutions, carelessly drawn statutes, and legislative indifference toward purely legal questions are not permanently remedied by wrenching the judicial system to obviate their mischievous effects. As the sins of the judicial department are compelling an era of executive justice, the sins of popular and legislative law-making are threatening to compel a return to an era of judicial law-making. Both are out of place in a modern state."

JURISPRUDENCE (The Place of Roman Law). "What if anything did the Roman really initiate in the matter of law?" In the June *Harvard Law Review* (V. xx, p. 606), A. H. Fl Lefroy interestingly answers that question, maintaining "the following proposition, — that the true interest of the study of the history of Roman law lies in this, that the Romans, through their national practical intelligence, stimulated by external circumstances, and also ultimately by the philosophical theory of a 'law of nature,' as they conceived it, developed a system of private law which did in fact answer to the true nature of private law, and that they were the first people who did develop such a system. . . .

"'The true nature of private law' is an expression which certainly demands explanation. By private law is here meant that portion of the law of a state which deals, directly or indirectly, with the mutual relations and transactions of private individuals *inter se*. By the true nature of private law is meant neither more nor less than the nature which such private law would have if the legislator were perfectly wise. If any justification is demanded for calling this the 'true nature' of private law, it is perhaps sufficient to appeal to the view which the common use of language supports, that the most perfect development of anything is a development in accordance with its true nature, and that anything which derogates from the perfection of such development is an infringement upon and interference with its true nature. We need not go deeper and cite in support metaphysical theories of the stoic, or other philosophies, or appeal to religious beliefs as to the divine ordering of the universe. Not, of course, that it is meant that any one can dogmatically assert what the different rules of private law would be if the legislator were perfectly wise, but only that it is possible to discern very clearly what the general nature of private law would be in such a case.

"It is surely clear that, in the first place, its rules and principles would be co-extensive with all the transactions and relations into which men in society enter, permitting, and, so far as necessary, regulating or restraining them, but ignoring none, except such as public policy requires to be deliberately left outside the range of legal cognizance. That is to say, all relations and transactions of mankind which can be wisely dealt with at all by the legislator should be within the purview of the law. In the second place, the law should be as simple and natural as it may be without permitting such a degree of looseness as unduly to facilitate fraud or mistake — that is to say, law should, so far as is in this sense possible, recognize the natural ways of doing business, and the natural ways of entering into relations, whether business relations or other —

such ways as people spontaneously adopt when not obliged to conform to any express legal requirements. And if these should be the characteristics of private law as properly conceived of, so also as to the methods of its development we may say with confidence that the proper method is by a process of juridical analysis of the transactions and relations of mankind, or, in other words, by the discovery of the true nature of these transactions and relations from a juridical point of view, with the object, that is, of bringing to light the reciprocal rights and obligations between the parties to such transactions and relations in the light of reason, justice, common sense, and public policy. Private law should consist, in the main, of rules thus elicited for the governance and regulation of such transactions and relations by the tribunals of the country, from which other rules may be deduced by a process of season and analogy, and thus a completed system of law ultimately built up. Now the Romans were the first people who attained to such a conception of law, as distinguished from systems consisting mainly either of usages and customs, more or less arbitrary or fortuitous and implicated with religious ideas and superstitions, or of regulations imposed at will by the legislator."

The steps by which the Romans developed their system are carefully traced.

MILITARY LAW. "Military Law and the Procedure of Courts-Martial," by Colonel Edgar S. Dudley, LL.B., LL.D., Judge Advocate, United States Army, and Professor of Law at the United States Military Academy at West Point. John Wiley & Sons, New York. The procedure of courts-martial is something with which every officer in the military service of the United States has almost constantly to deal. At present the most used work on military law is in two volumes. Colonel Dudley's work is in one volume, yet it is both interesting and comprehensive. Officers in the militia of the several states are concerned in courts-martial less frequently than the regulars, but for that very reason there is the greater need that they should have at hand a guide book to this procedure well filled with forms and with copious citations of precedents. This book will enable military officers to prepare and conduct trials by court-martial with a considerably less expenditure of time. It is also a text-book. The author says in his preface that the book has been prepared to "meet the existing necessity at the United States Military Academy, for a text-book which would give a clear and thorough outline of the science of military law, including all recent changes and developments."

The contents of the book are admirably arranged for easy reference. Another very excellent feature is the way the articles of war are taken up. They are considered separately, the offences under them discussed, and reference to opinions of the Judge Advocate General, the courts and other authorities given.

A set of blank forms connected with courts-martial is to be found in Appendix E. Federal Legislation up to date on courts-martial is also reprinted in an appendix. Some of the important chapters are:

CHAPTER I. On Military Jurisdiction, Military Law, Military Government, Martial Law.

CHAPTER III. Military Tribunals, their Jurisdiction and Functions.

CHAPTER XXIX. Rules of Evidence applied by Courts-Martial.

CHAPTER XXX. Employment of troops in the enforcement of laws, and the relations of military persons to civil authority.

MUNICIPAL CORPORATIONS. "Local Bodies' Statutory Liabilities," by Sir Robert Strout, *Commonwealth Law Review* (V. iv, p. 145).

PEERAGE LAW (Eng.) "The Earldom of Norfolk," by R. Geoffrey Ellis, in the April *Juridical Review* (V. xix, p. 35), discusses the principles involved in the case which gives the name to the article, judgment in which was handed down last Michaelmas term. Many features of interest for the student of peerage law and English feudal history naturally appear in a case, the turning point of which was the invalidity of the surrender of an earl dom in 1302, because earldoms, like baronies, are incapable of surrender.

PRACTICE. "Taking Advantage of Variance on Appeal." A study of the Illinois cases on this subject, by Albert Martin Kales, June *Illinois Law Review* (V. ii, p. 78).

PRACTICE (Contingent Fees). "Attorneys and Counsellors," by Henry H. Ingersoll, in the June *Yale Law Journal* (V. xvi, p. 577), defends as entirely legitimate and reasonable the taking of cases by lawyers on contingent fees, and attacks the motives of some of those who condemn the practice.

"This censure has never been directed against the commercial lawyers for charging commissions on their collections. And yet what is that but taking contingent fees? Is this exemption from blame awarded because they represent the creditor class or because the actions which they bring are *ex contractu*? Their functions surely belong to 'business' rather than 'profession'; and surely there is no logic or law for censuring one class of lawyers for plaintiff, those who bring actions to obtain compensation for breaches of social and legal duty, and passing without query, even, the class who sue for breaches of contract. . . .

"This new ethical movement for the regulation of attorneys and counsellors, if not originated by the great insurance, railway, mining and manufacturing corporations, seems to have their undivided support. The presidents, directors and general counsel greatly admire those noble professional institutions of London, the Inns of Court, and unanimously appreciate and approve their stringent rules and venerable authority. They are true exponents of the common law, existing 'time whereof the memory of man runneth not to the contrary,' and their customs and usages speak to them with the authority of the ages. Their members not only may not take contingent fees — they may not invoke the aid of the courts to collect the fees they have earned, whether upon express or implied contracts; nor may they soil their hands with any of the details or drudgery of preparation of cases. . . .

"This justly distinguished body of gentlemen, the English Bar, professional sacrosancts of a foreign land, are held up for imitation to the American attorneys and counsellors, and our decadence deeply deplored in the hall of the general counsel. We are actually doing the work of solicitors and attorneys, the business of the profession. Just as in England, our clerks 'introduce' clients — as also do other attorneys and solicitors — and may stipulate for part of the fees. Like the English solicitors, we may make advances for our client and pay the expenses of his action; or, since lawing may be done on credit in America, we may become his surety for costs, to the end that he may obtain legal justice in the courts; and some even have shocked the delicate sense of honor of the general counsel by receiving conditional fees from the victims of negligence or fraud, or their helpless widows, in the unequal contest for compensation which they must needs wage with their powerful and conscienceless adversaries. . . .

"And yet, say the corporation moralists, you must not stipulate for a contingent fee, although it would be proper to await the result and then take or accept proper compensation! Indeed! Sit as judge in your own case, or 'have a scrap' with your client over your fee at the end, when agreement beforehand might have avoided both horns of the ugly dilemma! Is there any good reason for leaving the solid ground of common sense and flying into the empyrean for solution of this practical problem of ethics?

"The courts of civilization are substitutes for the bludgeon and torch of barbarism, and those suffering legal wrongs are invited to come to them for redress. Widows and orphans of killed employees must have lawyers to enable them to accept the invitation. The American attorney and counsellor is rarely a gentleman of fortune who can afford to carry on such litigation without fee or reward or the hope or promise thereof. If the statutes of champerty and maintenance forbid contingent fees and material assistance, he obeys them, and does the best he can for himself and client, and, if successful in some way gets *quantum meruit* at the end. But if the laws do not forbid it, and both himself and client prefer to this uncertainty a definite arrangement, a fixed *per centum* of the recovery, what principle of ethics can forbid the agreement, or deny to himself and client *in limine* the right of contract enjoyed by all other citizens, subject to the same legal and equitable rules?"

PLEADING. "Eighteenth Century Pleading," by John A. Inglis, in the April *Juridical Review* (V. xix, p. 42), gives many interesting and amusing illustrations selected from eighteenth century Scotch court papers.

PRACTICE. "Scandalous Matter, Prolixity, and Impertinence in Proceedings in Court," by William Steers, *Canadian Law Times* (V. xxvii, p. 343).

PRACTICE. "What Should a Lawyer Charge?" by "J. C. M.," *Law Notes* (V. xi, p. 46).

PRACTICE. "The Power of a Court to Compel a Plaintiff in a Suit to Submit to a Physical Examination," by Sumner Kenner, *Central Law Journal* (V. lxiv, p. 248).

PRACTICE. "Disqualification in Judges," by Editor, *Scottish Law Review* (V. xxiii, p. 152).

PUBLIC POLICY. "The Judiciary and Public Sentiment," by Edward J. White, *American Lawyer* (V. xv, p. 219).

SALES. "Is the Furnishing of Liquors to its members by a Bona Fide Social Club a Sale?" by B. F. Watson, *Central Law Journal* (V. lxiv, p. 442).

TRADE DISPUTES ACT (Eng.). Legislation has often unexpected results. The English Trade Disputes Act, 1906, passed in response to the demand of the labor unions to secure them immunity from suit, is said in the article on "Trusts and the Trade Disputes Act," by D. F. Pennant in the May *Law Magazine and Review* (V. xxxii, p. 262), to have the startling result of giving immunity to a masters' combination "much more ample than that given to a workmen's combination.

"This results from the curious way in which the fourth section of the act is drawn. It begins by giving all trade unions complete immunity from all actions for wrongs they may have committed. Then by sub-section (ii) this is limited by leaving the trade union free to be sued through its trustees, in cases in which they could be sued under section 9 of the Act of 1871, 'except in cases of trade disputes.' The effect of this sub-section is not very clear, but it is unnecessary to consider precisely to what cases it applies, for it has no application at all to these masters' trade unions, and for this reason. Section 9 of the Act of 1871 applies only to registered trade unions, and masters' trade unions are not in point of fact registered. Registration is optional, and masters, having nothing to gain by it, leave it alone.

"It follows, then, that while sub-section (ii) limits the immunity conferred on workmen's trade unions, which are almost all registered, a combination of employers that comes within the definition of a trade union is completely exempt from actions of tort, at any rate actions to recover damages for torts. . . .

"By section 16 of the Trade Union Act, 1876, a trade union is defined as meaning 'any combination whether temporary or permanent for regulating the relations between . . . master and masters, or for imposing restrictive conditions on the conduct of any trade or business.'

"It is to be observed that it is in no way limited to combinations aiming at some restriction on the conditions upon which labour shall be employed. A combination not to sell a ton of coal under 20*s*. is within it just as much as a combination not to pay more than 20*s*. a week wages. Is there, then, any limit to the extent to which traders may combine in conducting their trade in such a way as to gain for the combination so formed the privileges conferred by the Trade Disputes Act?

"It would seem that the only limitation is that imposed by section 4 of the Companies Act, 1862, which provided that 'no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this act, for the purpose of carrying on any . . . business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered as a company under this act.'

"This leaves any body of masters numbering not more than twenty absolutely free to form any kind of combination they please for regulating the relations between themselves, and the combination so formed will be a trade union. And of the combinations of masters numbering more than twenty, only those are prohibited which 'carry on a business that has for its object the acquisition of gain.'

"This has been interpreted to mean that the company, association or partnership, must itself do a succession of acts having the acquisition of gain for their object; it has therefore no application to a combination working under agreements, which merely provide that

no number of the combination shall buy over or sell under a price to be fixed by a committee appointed by the members of the combination, or to a combination by which the output of each member was limited in a similar manner. Generally speaking, then, a trade union may consist of any number of employers bound to each other by restrictive covenants."

Mr. Pennant points out that the United States "Trust," formed " by restrictive agreements controlling the several members of a combination of manufacturers or traders so as to ensure complete uniformity of action in carrying on the trade and an entire cessation of competition among them " is exactly what the English law knows as a trade union. Such combinations have been declared illegal in numerous cases in the United States.

" It is curious, then, to note that one of these trusts, worn out by a long struggle with the law in the land of its origin, would, on its arrival in the United Kingdom, find itself welcomed, not only as a lawful, but as a cherished and privileged institution. It could spread libels broadcast about its trade competitors, it could hire men to obstruct their premises, it could bribe those who had contracts with them to break them, it could use any means it might please to effect their ruin, without one penny of damages becoming recoverable against it."

TRADE-MARKS (See Accounting).

TORTS. General Principles of the Law of Torts, by Jno. C. Townes, LL.D., Austin, Texas, 1907.

The author is Professor of Law in the University of Texas and states that his book is the result of fifteen years of classroom experience. It is intended for students, and deals chiefly with general principles applicable to all torts and only in the appendix briefly summarizes the Texas law as to particular kinds of torts. The book covers a somewhat wider field than many by including some subjects usually treated under the head of persons, agency, employers' liability or practice, especially in treating of the responsibility for torts. The book does not attempt full citation of cases and its notes are intended chiefly for illustration. While some of the author's definitions seem not scientifically correct, in most instances they are accurate and there is much originality of arrangement and statement. It should prove particularly valuable to students intending to practice in our southwestern states.

TORTS (See Boycotts).

WILLS. " Appropriation of Trust Funds to Legacies," by Will C. Smith in the April *Juridical Review* (V. xix, p. 19), examines the English and Scotch decisions on cases where trustees under wills appropriate certain portions of the trust estate to meet particular legacies payable at some future time, and questions arise as to the distribution of gain or loss arising from appreciation or depreciation of the appropriated share of the trust estate.

WITNESSES. " A Recent Case of Patents' Privilege," by William A. Purrington, *Bench and Bar* (V. ix, p. 48).

CORRESPONDENCE

SPEEDY PUNISHMENT OF GRAFTERS

To the Editor of the Green Bag. — An effectual criminal prosecution has recently been concluded in London which, although of only local, but nevertheless very great, importance, appears to have attracted some attention in the United States. The fact that peculations by municipal officials in England has resulted in their conviction has occasioned the complacent comment in certain American newspapers that "graft" is not unknown in England, or at least is not confined to the United States, and that probably it is as prevalent abroad as at home, the only difference being, as one editorial writer puts it, that the English people do not wash their dirty linen in public.

At the risk of destroying the satisfaction that may be derived from the companionship of misery, it may emphatically be stated that "graft," either in kind or degree, as it is known in the United States, does not exist in England. The fact that an isolated case has occurred is not an indication of an epidemic, and the celerity and effectiveness with which the grafters in this particular instance were punished, indicates a very healthy condition of the body politic. The story of the peculations, their discovery and the trial of the peculators, ought to prove interesting reading in America, and particularly to those who have apparently lost faith in all efforts to bring bosses and municipal grafters to book.

In 1903, Bond, a coal contractor, who up to that time had been honestly supplying the West Ham Union with coal, was approached by Crump, one of the guardians, who intimated to him that he could not obtain a renewal of his contract unless he submitted to the exactions of a ring of officials composed of guardians and executive officers of the Union. He yielded to the pressure, consented to the terms, and, until the discovery of the conspiracy, in the early part of last winter, carried out his contract for the supply of coal. The guardians who were in the ring advised him what tenders other contractors were making, and he was thus enabled annually to secure a renewal of his contract. They also so controlled the appointment of certain officials that short weights and inferior coal were regularly passed without comment. Six of the guardians were in the ring, and also four officials — Hodgkin, the master; Hill, the steward of the infirmary; Baird, the engineer; and Riches, the weighing clerk. The total amount paid by Bond to these individuals was the small sum of £260 a year, or about $1300.

In the autumn of last year a zealous government official, in auditing the accounts of the West Ham officials, had his suspicions aroused by erasures in the weighing clerk's book, and by the extraordinary amount of coal consumed. His investigations led to the prompt arrest of Bond on the charge of receiving money upon false pretences. Bond pleaded guilty and was sentenced to six months imprisonment. Furthermore he made a confession, which resulted in the arrest of the members of the ring who have just been tried. Several weeks were necessarily occupied in their examination before the committing magistrate, and in the preparation of the indictments, which charged the specific offenses of bribery, receiving bribes, and falsification of books, against each one of the accused, as well as conspiracy among them all to do the unlawful things complained of in the 90 several counts. Notwithstanding the necessary delay occasioned by these examinations the trial began on the 2d of May, less than six months from the time the offenses were discovered. The accused were represented by no less than 15 counsel altogether, some of them having a King's Counsel and two juniors to appear in their behalf. Each was tried separately, and then the whole ten together, on the charge of conspiracy. The first twelve men who entered the jury box constituted the jury who heard the evidence separately as to each of the accused and conjointly as to all of them. No objection was made to any juror, and hardly an objection was made as to the introduction of evidence offered by the prosecution. There

was no wrangling among counsel and no waste of time over the discussion of technicalities. Everyone engaged in the proceedings, was as is usual in this country, impressed with the gravity of the issues at stake and a sense of duty and fairness. The newspapers, as is also customary, took no part in the trial, refraining even from comment and innuendo in the modest headlines which prefaced their reports. The case was, nevertheless, a subject of absorbing interest, as it held at issue the fate of a number of public men prominent in local politics, and of a system of party government which had recently been on trial in a heated municipal election. The trial, or more properly the trials, as there were separate trials of each of the accused, lasted two weeks, during which a large number of witnesses were examined and searchingly cross-examined, and an unusual number of addresses were made to the jury. Nine men in all were convicted, and one was acquitted. The political boss received a sentence of two years hard labor, and disqualification forever from holding public office, and deprivation of the parliamentary and municipal franchise for seven years. Both the other guardians received 15 month's hard labor and similar deprivation of political rights. The officials of the Union were sentenced to from two year's to six month's hard labor and a partial disqualification to hold office or exercise the franchise.

There were no appeals or motions for new trials, and within a few hours of their sentences the convicted officials were in prison garb and entering upon their hard labor.

R. Newton Crane, Esq.

LONDON, ENG., June, 1907.

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.)

CONSTITUTIONAL LAW. (Bible in Schools.) **Tex. Civ. App.** — The use of the Bible in the public schools appears to be a source of irritation in many jurisdictions. The question whether the Bible can be used constitutionally to a limited extent has been up for consideration in several courts, the latest case dealing with this question being that of Church *v.* Bullock, 100 S. W. Rep. 1025. The Texas Constitution provides that no one shall be compelled to attend or support any place of worship, and that no money shall be appropriated from the treasury for the benefit of any religious society or for the support of any sectarian school. These constitutional provisions, it was contended, were violated by the morning exercises in the public schools consisting of the reading by the teacher, without comment, of nonsectarian extracts from King James' version of the Bible and by repeating the Lord's Prayer and the singing of appropriate songs in which pupils were invited but not required to join. The court observes that this contention is sustained by Weiss *v.* District Board, 44 N. W. 967, 76 Wis. 177, 7 L. R. A. 330–336, 20 Am. St. Rep. 41; Board of Education *v.* Minor, 23 Ohio St. 211, 13 Am. Rep. 233; Freeman *v.* Scheve, 91 N. W. 846, 93 N. W. 169, 65 Neb. 853, 59 L. R. A. 927. But the court is of the opinion that these exercises do not contravene the Constitution, and states that the great majority of the cases sustain their views. Such cases are cited, Hackett *v.* Trustees, 87 S. W. 792, 27 Ky. Law Rep. 1021, 69 L. R. A. 592; Billard *v.* Board, 76 Pac. 422, 69 Kan. 53, 66 L. R. A. 166, 105 Am. St. Rep. 148; Pfeiffer *v.* Board, 77 N. W. 250 118 Mich. 560, 42 L. R A. 536; Moore *v.* Monroe, 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444; Spiller *v.* Woburn, 94 Mass. 127.

In passing upon a similar question the Supreme Court of Michigan, in the case of Pfeiffer v. Board of Education, 77 N. 250, said, "Since the admission of almost all the American states into the Union, and in many cases for a period extending over half a century, the practice has maintained in almost all the state institutions of learning of not only reading from the Bible in the presence of the students, but of offering prayer. The text books used in the public schools have contained extracts from the Bible and numerous references to almighty God and his attributes and all this without objecton from any source. Of these usages the courts may well take judicial notice. In doubtful cases involving other questions than those which appeal so strongly to the prejudices of men, would not these universal usages, extending over such lengthy periods, be deemed decisive as practical constructions of the constitutional questions involved?" The view, indeed, which will perhaps come to be generally adopted is that which was recently taken by the Supreme Court of Nebraska in the case of State v. Scheve, 59 L. R. A., 927. In this case the court repudiated the idea that the mere reading of the Bible makes of the schoolhouse a place of religious instruction or that the mere reading of the Bible is sectarian worship, and held that the point where the courts may rightfully intervene and where they should intervene without hesitation, is where legitimate use has degenerated into abuse, that is, where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist. That sectarian instruction may be given by frequent reading without note or comment is or course obvious as is well pointed out by Mr. Justice Cassoday in the case of Weiss v. District Board, etc., 76 Wis. 177. Persistent reiteration indeed is the most effective means of forcing alien conceptions upon reluctant minds. Whether it is prudent or politic to permit Bible reading in the public schools should therefore be a question for the school authorities to determine. But whether Bible reading has taken the form of sectarian instruction should in each particular case be a question for the courts to determine upon evidence. This position is entirely consistent with Mr. Justice Cassoday's argument, though not with his conclusion in the case of Weiss v. District Board

before referred to and which perhaps goes farther than any other in strictly construing the words "sectarian instruction" as they are found in the various state constitutions.

Andrew A. Bruce.

CONSTITUTIONAL LAW. (License Tax.) U. S. Sup. Ct. — The right of a state to impose a license tax on the business of selling intoxicating liquors within the state by any traveling salesman who solicits orders is upheld in Delamater *v.* South Dakota, 27 Sup. Ct. Rep. 447, as under the Wilson act the power of a state attaches to intoxicating liquors when shipped into the state from another one after delivery, but before the sale in the original package, so as to authorize the state to regulate or forbid such sale. The court holds that it follows that the regulation by the state of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors are situated in other states, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in the state — a right which, by virtue of the Wilson act, does not exist. It was contended that as under the Wilson act a resident of one state has the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use, an agent or traveling salesman of a nonresident dealer in intoxicating liquors has the right to go into the state and there carry on the business of soliciting from residents orders for liquors, to be consummated by acceptance of the proposals by the nonresident dealer whom he represents. This premise the court says is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use, and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of the court. That a state may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain. Hooper *v.* California, 155 U. S. 648, 39 L. Ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. But that this power to prohibit does not extend to preventing a citizen of one state from making a contract of insurance in another state is also settled. Allgeyer *v.* Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427.

CORPORATIONS. (Foreign — Doing Business.) U. S. Sup. Ct. — In Peterson *v.* Chicago, Rock Island & Pacific R. Co., 27 Sup. Ct. Rep. 513, the federal supreme court holds that the ownership by a foreign railway company of the controlling interest in the stock of a domestic railway which retains its own officers, has property of its own, and is responsible for its contracts and to persons with whom it deals, does not make the foreign corporation liable to service of process within the state on the theory that it is doing business therein through the agency of the domestic corporation. The fact that the foreign railway owns the controlling amount of the stock of the domestic company and has thus the power to change the management, does not give it present control of the corporate property and business so as to make it amenable to process in the state. Among the authorities relied on may be cited Conley *v.* Mathieson Alkali Works, 190 U. S. Sup. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113, and Pullman's Palace Car Company *v.* Missouri Pacific R. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499.

Green v. C. B. & Q. Ry. Co., recently decided but not yet reported by the Federal Supreme Court, is an important case on this same question of "doing business." The plaintiff, a resident of Pennsylvania, was injured while traveling on the defendant railway in Colorado. Defendant is an Iowa corporation. Suit was brought in the U. S. Circuit Court, Eastern District of Pennsylvania, and a motion was made to vacate the service on the ground that defendant was not "doing business" in Pennsylvania. The facts were undisputed and were that defendant had an office in Philadelphia, Pa., on the windows and door of which the defendant's name was displayed. Defendant's name was in the city directory and telephone book. In the office the defendant employed a District Freight and Passenger Agent, who had assistants, clerks and stenographers under him, all employed by the defendant. Passenger tickets were not for sale at the office and the business was principally soliciting freight and passenger traffic. Anyone wishing to ship freight over the defendant railway from its junction with any other line could surrender his bill of lading and obtain a receipt in the form of a bill of lading which was, by its express terms, not binding on the defendant or in force until the goods were received by the defendant. The Philadelphia agent also sold orders for reduced rate tickets to employees of other railroads. The Circuit Court made the rule to vacate service absolute

and this decision was affirmed by the U. S. Supreme Court in an opinion by Mr. Justice Moody.

The case was a new one in the U. S. Supreme Court, so far as these or like facts were concerned.

The plaintiff relied principally on Denver &c. Co. R. R. Co. v. Roller, 100 Fed. Rep. 738, and Tuchband v. Chicago &c. Co. R. R. 115 N. Y. 437.

The defendant relied on Maxwell v. Atchison &c. Co. R. R. 34 Fed. Rep. 286; Fairbanks &c., v. Cincinnati &c., 54 Fed. Rep. 420; Union Associated Press v. Times-Star Co. 84 Fed. Rep. 409; and Earle v. Chesapeake &c. R. R., 127 Fed. Rep. 235, all of which cases were referred to in Mr. Justice Moody's opinion. The decision was confined to the facts in this case, and the court refused to lay down any general rule as to what would be "doing business," apparently preferring to consider separately each case that might come before it.

The facts in this case, however, would seem to cover what is done by most of the trunk lines which maintain branch offices in the large cities of many states in which they have no tracks and operate no trains. E. A. Waters.

CORPORATIONS. (Liability of Purchaser of Franchises and Property.) **Mo. Sup.** — A corporation which purchases the franchises and property of another corporation at an agreed price per share is, in Hagemann *v.* Southern Electric R. Co., 100 S. W. Rep. 1081, held not to be liable to the creditors of the corporation whose franchises and property have been purchased for debts which were not liens on the property at the time of the transfer. This decision, however, is based on the ground that a fair consideration was paid by the purchaser.

CORPORATIONS. (Stockholders — Subscription Rights.) **N. Y. Ct. of App.** — The right of a stockholder of a corporation to a proportionate share of new stock issued, is upheld in Stokes *v.* Continental Trust Co., 78 N. E. Rep. 1090. The court notes that the rights of a stockholder in this matter are not regulated by statute and that the question has never been directly passed upon by the court, and only to a limited extent has it been considered by New York Courts. The New York cases in which the question has been referred to, either directly or indirectly, are Miller *v.* Illinois Central R. R., Co., 24 Barber, 312; Matter of Wheeler, 2 Abbot's Practice (new series), 361, and Currie *v.* White, 45 N. Y. 822. The fair implication from the opinions in the last two cases is that if a stockholder has preserved his rights, he will be entitled to his proportionate share of new stock issued. In other jurisdictions, the decisions support the rights of a stockholder as contended for in the case, with the exception of Ohio Insurance Co. *v.* Nunnemacher, 15 Ind. 294, which turned on the language of the corporation's charter. The leading authority is Gray *v.* Portland Bank, decided in 1807 and reported in 3 Mass. 364, 3 Am. Dec. 156. In that case the court held that stockholders who held old stock had a right to subscribe for and take new stock in proportion to their respective shares. This decision the court says has stood unquestioned for nearly one hundred years and has been followed generally by courts of the highest standing. It is the foundation of the rule on the subject that prevails almost without exception throughout the entire country. Other authorities relied on are Way *v.* American Grease Co., 60 N. J. Eq. 263, 269, 47 Atl. 44; Eidman *v.* Bowman, 58 Ill. 44, 447, 11 Am. Rep. 90; Dousman *v.* Wisconsin, etc., Co., 40 Wis. 418, 421; Jones *v.* Morrison, 31 Minn. 140, 152, 16 N. W. 854; Real Estate Trust Co. *v.* Bird, 90 Md. 229, 245, 44 Atl. 1048; Jones *v.* Concord & Montreal R. R. Co., 67 N. H. 119, 38 Atl. 120; Bank of Montgomery *v.* Reese, 26 Pa. 143, 146; Reese *v.* Bank of Montgomery, 31 Pa. 78, 72 Am. Dec. 726, and Morris *v.* Stevens, 178 Pa. 563, 578, 36 Atl. 151.

DISCOVERY. (Parties.) **U. S. C. C. A.** — Where an action is brought against a railroad company alone for an alleged violation of the interstate commerce act, the corporation's officers and agents are not, according to Cassatt *v.* Mitchell Coal & Coke Co., 150 Federal, 32, "parties" within the federal statute (Rev. St. § 724, U. S. Comp. St. 1901, p. 583), authorizing federal courts, on notice, to require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issues. In support of the decision, the court cites Rose *v.* King, 5 Serg. & R. 241, wherein the Supreme Court of Pennsylvania, dealing with an order made under the Pennsylvania statute, evidently modeled on the federal statute cited, declared that there was no power under that statute requiring a third person, not a party to the record of the case, to produce books or papers at the trial of the action, and also Ridgely *v.* Richard, 130 Fed. 387, wherein the Circuit Court followed the same rule in construing section 724 of the federal statutes. The court in this case further holds that the statute does not authorize an order requiring a party to produce books and papers before trial. If such relief is desired, it must be obtained by a bill of discovery.

INSURANCE. (Entire or Severable Contracts.) **Cal. Sup. Ct.** — Where the defense of forfeiture is interposed in an action on an insurance contract, the question quite frequently arises as to whether or not the contract is entire or severable. There is considerable conflict between the courts as to

what conditions will make an insurance contract severable. In some jurisdictions, it is held that where the property insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property, even though the premiums be entire. Again, in some jurisdictions, it is held that such contracts are entire, and a breach of any condition vitiates the whole insurance. The better rule, however, appears to be that where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy must be regarded as entire; but where the property is so situated, that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk on one item does not affect the risk on the others, the policy must be regarded as severable. This latter rule has now received the approval of the California Supreme Court in the case of Goorberg *v.* Western Assur. Co., 89 Pac. 130.

MUNICIPAL CORPORATIONS. (Negligence.) Mo. App. — What will constitute constructive notice to a municipality of a defect in a street is the main point at issue in Vance *v.* Kansas City, 100 S. W. Rep. 1101. This was an action for injuries received by falling over a pile of building stone placed in the street. It appeared that though the particular stone over which plaintiff fell had been placed there only a few hours before the injury, other loads had been left unguarded for three days, continuously maintaining the obstruction. Under such circumstances the court held that an instruction that the piling of the last lot was too short a time before the accident to impart constructive notice to the city, was erroneous. The identity of the stone, the court considered, was of no moment so long as the obstruction was continuously maintained. This decision the court regards as supported by Drake *v.* Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759. But on this point, see Hutchins *v.* Inhabitants of Littleton, 124 Mass. 289; Breil *v.* City of Buffalo 144 N. Y. 163, 38 N. E. 977, and Mattimore *v.* City of Erie, 144 Pa. 14, 22 Atl. 817.

MUNICIPAL CORPORATIONS. (Negligence — Automobile Races.) N. Y. Ct. of App. — Johnson *v.* City of New York, 78 N. E. Rep. 715 denies the right of a municipality under the New York Laws to authorize an automobile club to conduct speed trials on a highway and suspend ordinances regulating the speed of vehicles. By doing so, it is held that the city participates in the commission of the unlawful act of speeding automobiles at a greater rate of speed than allowed by law. The case at Bar was an action for injuries received by a spectator at an automobile race. The main question was whether plaintiff could recover though she knew that the race was illegal. The Appellate Division of the Supreme Court (109 App. Div. 821, 96 N. Y. Sup. 754) appears to have attached much importance to the fact whether plaintiff knew that the race was illegal, and the court of appeals observes that in some jurisdictions the law is, that a participator in an illegal exhibition is without right to recover in case of injury, but such, the court says, is not the law in New York. In support of this statement is cited Platz *v.* City of Cohoes, 89 N. Y 219, 42 Am. Rep. 286. Plaintiff, in that case, while driving on Sunday for the purpose of pleasure, was injured from a defect in one of the streets of defendant. It was held that the fault of plaintiff in driving on the Sabbath was not to be considered a defense to the action and did not constitute the proximate cause of the accident. The same principle, the court remarks, is applicable to the case at Bar. The illegality of the speed contest does not create a liability against the defendants if they were at fault in the conduct of the race in no other respect. On the other hand, it does not preclude a recovery by plaintiff if the injury was caused to her by misconduct or fault of the defendants. As supporting this proposition, the court further cites Scanlon *v.* Wedger, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395; Frost *v.* Josselyn, 180 Mass 389, 62 N. E. 469. The court overrules the opinion of the Appellate Division in this case, which was previously noted in this department. See, 96 N. Y. Supp. 754, 109 App. Div. 821.

NEGLIGENCE. (Duty of Care.) — A surprising extension of the doctrine of Heaven *v.* Pender appears in Depue *v.* Flateau, Ill. N. W. Rep. 1. It appears in this case that plaintiff visited the home of defendant in the course of his business as a cattle buyer, and that while there he was taken with a fainting spell. Prior to this he had made a request for lodging of defendant and had been refused, and after recovering slightly from his indisposition, plaintiff renewed his request and was again refused. With the assistance of defendant's son, plaintiff got into his sleigh and started homeward. The following morning he was discovered by a passing farmer, nearly frozen to death some distance from his home and taken there. Plaintiff thereafter brought this action on the theory that his injuries were occasioned solely by defendant's neglect and wrongful conduct in refusing him lodging. Defendant insisted that he owed plaintiff no duty

to entertain him on the night in question and was not guilty of any negligent misconduct in refusing him lodging or in sending him home under the circumstances disclosed. In support of this contention, he relied on the case of Union Pacific Ry. Co. *v.* Cappier, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513, wherein it is said that though feelings of kindness and sympathy may move the Good Samaritan to minister to the sick and wounded at the roadside, the law imposes no such obligation, and suffering humanity has no legal complaint against those who pass by on the other side. This the court concedes is no doubt a correct statement of the general rule, but maintains that the rule in such narrow sense by no means controls a case like the one above. The facts of this case the court holds bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another, that it is obvious that if he does not use due care in his own conduct he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger, and a negligent failure to perform the duty renders him liable for the consequences of his neglect. In support of this position, the court cites Barrows on Negligence, 4, 304; 2 Thompson on Negligence, 1702; Heaven *v.* Pender, 11 L. R. Q. B. Div. 496; Railway Co. *v.* Marrs, 27 Ky. Law Rep. 388, 85 S. W. 188, 70 L. R. A. 291.

NEGLIGENCE. (Release.) **Wis.** — The doctrine that a sole beneficiary of a claim for the death of one person by the act or default of another, under Lord Campbell's Act, has power to make a valid and binding settlement with the wrongdoer, notwithstanding the fact that any action for such damages must be brought by the personal representative of the deceased, is reiterated in McKeigue *v.* Chicago & N. W. Ry. Co., 110 N. W. Rep. 384, wherein the court further holds that such settlement and release by the beneficiary will bar a subsequent action by the administrator of the deceased where the estate is otherwise sufficient to pay all claims against it. In support of this holding the court cites Vail *v.* Anderson, 61 Minn. 552, 64 N. W. 47; Foote *v.* Foote, 61 Mich. 181, 28 N. W. 90 ; Johnson *v.* Longmire, 39 Ala. 143; Walworth *v.* Abel, 52 Pa. 370; Woodhouse *v.* Phelps, 51 Conn. 521.

PROPERTY. (Restriction — Garage.) **Mass.** — A garage is, in Evans *v.* Foss, 86 N. E. Rep. 587, held under the facts to come within the restriction of a deed preventing the erection of a building which would be "offensive to the neighborhood for dwelling houses." The garage proposed to be erected was designed to accommodate about 125 automobiles of the larger type. A part of one story was designed for a repair shop, and it was intended to place in the building a portable forge. Demonstration cars were to be kept, with demonstrators to run them, and it was expected to store 75 to 100 automobiles in the garage, such machines to go in and out an average of once a day.

STREET RAILROADS. (Rules.) **Tenn.** — A rule of a street railway company fixing $5.00 as the limit on the amount of change it will undertake to furnish passengers is in Knoxville Traction Company *v.* Wilkerson, 99 S. W. Rep. 992, upheld as reasonable. Street railroads are constructed and operated in cities and intended to furnish frequent, speedy, and cheap transportation. To effect this purpose, they are required to have many lines and numerous cars and employees. Their patrons are numerous and they cannot, with convenience to themselves or the public, provide for the sale of tickets or require them of passengers. The fare usually charged is a uniform one for all parts of the city, and the amount is a matter of common knowledge or it can be ascertained by any one proposing to take a car. In Barker *v.* Central Park N. & E. R. Co., 151 N. Y. 237, 54 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626, a rule fixing the maximum amount of change at $2.00 was held reasonable.

TORTS. (Interference with Employment.) **Minn.** — The right of a person to recover damages from another because the latter has without excuse or justification induced an employer to refuse the first-named person employment, is upheld in Joyce *v.* Great Northern Ry. Co., 110 N. W. Rep. 975. Plaintiff in this case was employed by a union depot company whose depot was used by defendant. While in such employment plaintiff was injured by one of defendant's engines. After his recovery, on reporting to the depot company for work which had been promised him, plaintiff was informed that he would not receive employment except on condition that he release defendant from all claim for damages on account of his injury. The depot company imposed this condition at the request of defendant's claim agent. The court first takes up the question whether the right of action in this case was against the depot company or the defendant, a wrongful intermeddler. The court cites numerous cases to show that nearly all the courts now sustain the doctrine that an action *ex delicto* will lie against the mischievous wrongdoer who procures a breach of a contract. Queen *v.* Leatham, App. Cases [1901] 495; Lumley *v.*

Gye, 2 El. & Bl. 216; Walker *v.* Cronin, 107 Mass. 555; London Guarantee Co. *v.* Horn, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185; Perkins *v.* Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603, 108 Am. St. Rep. 499, 5 L. R. A. (N. P.) 899. But though the court appears to be inclined to follow these authorities, it does not find it necessary to do so in view of the fact that Minnesota has a statute declaring it unlawful for two or more employers of labor to combine or confer together for the purpose of preventing any persons from procuring employment. Such statute the court holds to be a valid enactment.

TORTS. (Procuring Breach of Contract.) Mass. — Where one agrees in a contract to act as the exclusive agent of another in a certain territory, he may obtain an injunction to prevent a third person from also acting as agent in his territory according to Beekman *v.* Marsters, 80 N. E. 817. Plaintiff in this case had obtained from a hotel corporation conducting a hotel on the Jamestown Exposition grounds a contract whereby he was made their exclusive agent for the New England States to solicit patronage for the hotel. Defendant had induced the hotel corporation to break this contract with plaintiff in order to allow him to act also as their agent in the New England States. The court held that equity would enjoin defendant in acting as such agent. The court notes that the rules applicable to enticing away a servant, apply to the case. If a defendant by an offer of higher wages entices a laborer who is not under contract to enter his (the defendant's) employ in place of the plaintiff's, the plaintiff is not injured in his legal rights. But it is quite different if a laborer is under contract and the defendant knowing that, intentionally entices the laborer to leave plaintiff's employ by an offer of higher wages. As to the necessity of showing malice, the court says that this was not a case where there was an abuse of what, if done in good faith, would have been a justification, but a case where the defendant, with knowledge of the contract between the plaintiff and the hotel corporation, intentionally and without justification, induced the hotel corporation to break it. That is proof of malice.

TORTS. (Right of Unborn Child.) Mo. Sup. — Kirk *v.* Middlebrook, 100 S. W. Rep. 450, is worthy of note for a point discussed therein, though not decided. This was a suit against a physician's estate to compel the performance of a contract to educate a child and provide for him in the physician's will, in consideration of a release by the child's mother of a claim for damages for injuries inflicted by the physician on the child during birth. The court first holds that if the child has a cause of action for the injuries, the action is not barred by the release executed by the mother. Then is taken up the question whether damages flowing from negligent injuries to a quick child about to be born — that is, ready and about to be severed from the mother under the mysterious and inexorable laws of nature — belong to the mother to be contracted away as she elects, or belong in the law to the child as a sentient being. In the discussion of this proposition it is said: "Few cases are in the books, where that question has been up. Under Lord Campbell's Damage Act it was held that a posthumous child could sue to recover damages sustained by the death of its father. The George and Richard, 3 Ad. & Eccl. [L. R.] 466. The Supreme Court of Texas came to a similar conclusion under the statutes of that state. Nelson *v.* Railroad, 78 Tex. loc. cit. 624 et seq., 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. Rep. 81, where an illuminating discussion may be found. See, also, T. & P. R. R. Co. *v.* Robertson et al., 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; 1 Blackstone Com. 129, 130; Aubuchon *v.* Bender 44 Mo. loc. cit. 568, arguendo. But it has been held that the common law gives no right of action to an infant for injuries received by it while *en ventre sa mere.* Allaire *v.* St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176; Dietrich *v.* Northampton, 138 Mass. 14, 52 Am. Rep. 242; Walker *v.* Railroad 28 L. R. (Ireland) 69." As counsel on both sides had assumed that the right of action was in the mother, no decision is announced on this most novel and "anxious" question.

THE LIGHTER SIDE

A Student's Quiz. — Upon a written quiz on Real Estate and Conveyancing, the following answers disclose that the law is not altogether settled, at least in the minds of certain young men:

Q. — Are gas fixtures removable?

A. — No. How is the second tenant to see, if you pull the means of lighting out?

Q. — Is a mortgage personalty or realty?

A. — A mortgage is a personality.

Q. — May an easement allowing the use of a right of way for carriages be extended by implication to include the right to drive live stock?

A. — A carriage way cannot be used for driving live stock. Freight cars are the only means of transportation.

Q. — In what three methods may a private way be created?

A. — By way of stream, road, and railway.

The Lawyers' Revised Dictionary (*By a Layman*). — *Client.* The means of subsistence. Also, the Mouse in the Trap.

Counsel. An accomplice of a lawyer.

Corporation. An artificial person created by law to prey upon the *real* things.

Adverse Decision. An exhibition of the ignorance of the court to be explained to the client.

Per Curiam. The method adopted by judges to evade individual responsibility for an uncertain decision or one they are ashamed of.

Dictum. What a court thinks, but is afraid to decide.

Appeal. A method of getting more money out of a client.

Rules of Evidence. The means by which the truth is not allowed to be heard. Knowledge of how to utilize these to suppress facts is essential to success at the bar.

Legislature. A body of men elected to make laws for a consideration — sometimes several considerations. By a legal fiction they are supposed to represent the people.

Statute. A law framed in general terms to conceal the conferring of a special personal benefit. Also, the ninepins in a bowling alley to be bowled over by the lawyers.

Constitutional and Vested Rights. The last recourse of the robber. Also, the refuge for the Receiver of Stolen Goods. Also, the means by which the court knocks out the legislature.

Justice. Something men ask for but would be sorry if they got every time. Also, a blind Goddess who being blind necessarily goes astray.

Court. A place where what was confused before becomes more unsettled than ever. Also, a place where Law and Justice have a bout and Justice gets worsted.

Lawyer. An officer of the court who watches to see that Justice does not peek out from under her bandage. Being an officer of the court it is his duty to bamboozle it.

Judge. A vehicle of Justice who pokes holes through her with the Law. See definition of Law hereinafter.

Appellate Court. A number of judges who agree to disagree and have the trouble started over again.

Jury. Twelve men doomed to listen to what they might understand if they didn't hear so much, having nothing to do with it, and it were n't for the lawyers and Court. Also, the court's football. Also, a body of men for the purpose of discouraging reading and promoting obstinacy.

Fee. Money paid by a client to a lawyer to find out the difference between Law and Justice. Also, a perpetual sinking fund.

Retainer. The preface to the cash book. Also, the Caviar sandwich that precedes the feast as an appetizer.

Equality before the Law. A pet legal fiction.

Contempt of Court. Something you are often justified in feeling, but it is expensive to express unless you're an Oil Magnate.

Equity. A more expensive and protracted process of law than the common. Also, the conscience of the court after the law has stunted it. Also, morals as they are not practiced in litigation.

Criminal. A person without sufficient means to employ expensive lawyers.

Bond. An obligation promising more litigation after the first is ended if it ever is.

Injunction. An effective gag for throttling free speech. Also, the means whereby judges demonstrate that however it may be with other people *they* are above the Law and Constitution. Also, as in *contempt*, the whereby a judge makes a jury of himself as well.

Sheriff. The tenth point of the law who knocks the spots out of the other nine. Also, an officer of the law who appropriates what the lawyers leave available.

Judgment. A nice reading document which tells you you are entitled to money you can't usually collect. Also, a joke on a client.

Law. An instrument of Justice used to cut her head off. Also, the science of making simple things complex.

—*Henry Waldorf Francis.*

"Misunderstood." — In a recent divorce case in England Mr. Justice Deane discoursed on the ethics of friendship between women and men. He had never heard that a married man was not to have an affection for any woman but his wife. "If it were an innocent affection, not diminishing his love for the wife herself, it could not be classed as 'cruelty' in a suit for divorce." This is a high and philosophic view; but, as a reporter of the case remarked: "There are certainly wives who cannot rise to its impartial note."

A 444-Year Lawsuit. — In the two villages of Luceran and Lancoque, in the Alpes-Maritimes, France, June 10 was kept as a public holiday to celebrate the end of a great lawsuit which had kept the two villages divided since Nov. 14, 1462. The question of dispute was the possession of a piece of land at Lova, which each village claimed. A few days ago the court at Nice definitely settled the matter by dividing the land equally between the villages.

The total cost of this lawsuit during the 444 years amounts to £30,000, while the value of the land in dispute was about £400. The law papers which had accumulated were docketed in 1,856 parcels, which weighed sixteen tons, and were stored in a large, disused church.

Nothing for Lawyer Folks to Fight About.

I'm jes' a'keepin' even; which is doin' purty good.
Haven't made the fortune that I used to hope I would;
Haven't caused the trump of fame o'er distant hills to sound,
But kin allus face the music when the landlord comes around.
I've had my share of sunshine an' I seen the flowers smile,
Have had the rheumatiz, but only fur a little while,
An' when I come to quit this scene of hope an' likewise doubt,
I'll hardly leave enough fur lawyer folks to fight about.
I have had my disappointments an' I've had my silent fears,
But I reckon that the laughs will easy balance all the tears;
It ain't a brilliant record, but I want it understood
That I'm still a'keepin' even, which is doin' purty good.

—*Washington Star.*

His Hope for Revenge. — Judge (to barber sentenced to death). — "If you have a last request, the court will be glad to grant it."

Barber. — "I should like to shave the prosecuting attorney."

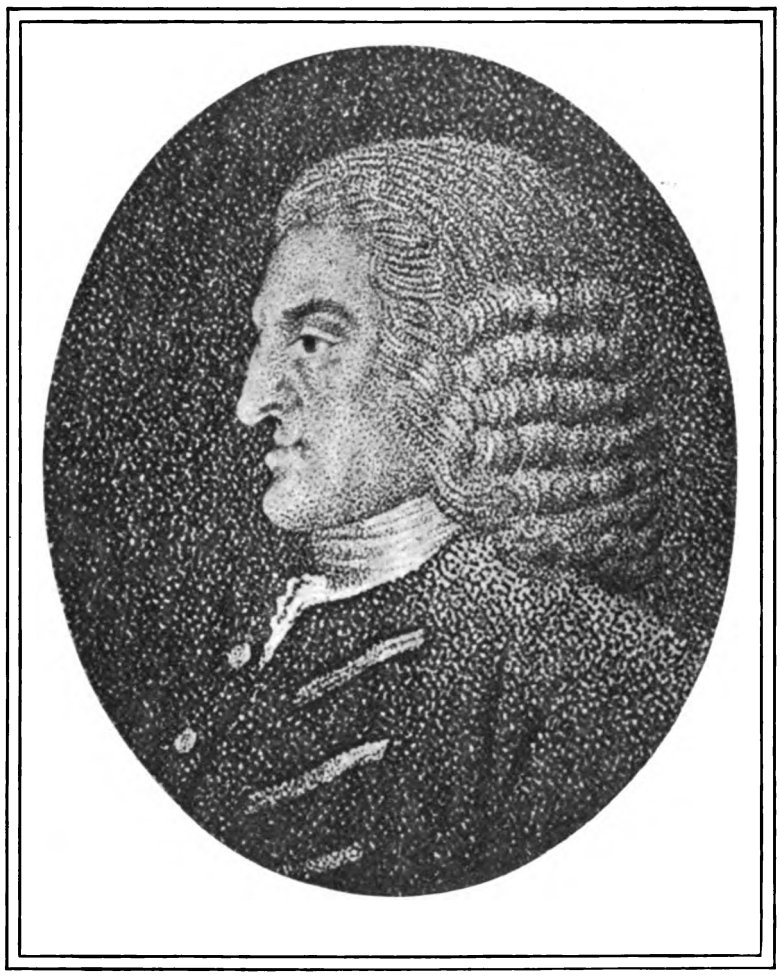
Legal Philology. — The following extract from the North Carolina Reports gives an interesting commentary on the origin and growth of legal terminology.

In June, 1826, Justice Henderson of the North Carolina Supreme Court in defining the word "heirs" said: "All those appointed to take under the Statute of Distributions, are embraced, the law speaks and designates the heirs. Unless this expression is tolerated and permitted to bear this meaning we shall be totally unable to express the idea without using a phrase instead of a term; for I know of no other term which will convey the idea. Distributee is sometimes used, but scarcely ever without an apology for it; a term of our own coinage, which is not to be found in Johnson's Dictionary, in Jacobs' Law Dictionary, or in any other that I know of. I do not recollect to have seen it, in any English work of

note, or not of note." Groom *v.* Herring, 11 N. C. 398.

But in December, 1848, in the case of Henry *vs.* Henry (31 N. C. 279) in the Supreme Court of the same state, Justice Richmond Pearson says: "The other word 'distributees' is new in pleading, but my brother Nash and myself deem it admissible to denote the persons who are entitled, under the Statute of Distributions, to the personal estate of one who is dead intestate. No one word has heretofore been used for that purpose, and it has been necessary, in order to convey the idea, to make use of a paraphrase or set of words."

That is the decision of the court, and thus established the word "distributees" as good legal English; but Chief Justice Thomas Ruffin in the last mentioned case says: "But 'distributees' is not a word at all known in the law or the language. Until my brothers told me they knew what it meant, I must humbly beg pardon for saying that I looked upon it as a newly invented barbarism, and without any settled sense. I believe I may add that up to this day it has not obtained admission into any American dictionary, though at least one of them has been supposed to have taken in every word that could possibly be tolerated. Pleadings and the entries of Judgments and Decrees ought to be in the language of the law. For them there are precedents, settled long ago by the wise and the learned, and used from generation to generation by those who were and are as discreet and well informed as any among us can claim to be. I think it, and always thought it, right to observe them myself, and would fain beg the respect of others for them; asking why despite should be done to forms venerable for their antiquity, certain in their meaning, and, for these reasons, insuring order and precision in the despatch of business and the sense of records."



HENRY FIELDING

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HENRY FIELDING AS A LAW REFORMER

By Charles Morse

TWO hundred years ago, on the 22nd of April, there was born at Sharpham Park, Glastonbury, England, a man who was destined to win from a better-known man, and certainly a better-known writer, coming after him the title of the "Father of the English Novel." It was Henry Fielding who was so acclaimed, and his encomiast was Sir Walter Scott.

It is interesting to note, by the way, that both these distinguished literary men were lawyers by profession and that each held, for a period in his life, a minor judicial office.

It is a common thing for Literature to take tithe and toll from the intellectual resources of the Bar, but it is not often that the historian can record a reprisal Fielding, however, applied himself to the study of the law after he had achieved some fame as a literary man. It was not until he had reached his thirtieth year that he became a student of the Middle Temple; and before that time he had produced some clever, but not very successful, plays, and had managed a theater of his own. His bold satires on the Walpole Ministry, *Pasquin* and the *Historical Register*, led to the passage of the Licensing Acts of 1737, which had the almost instantaneous effect of closing up business for the "Great Mogul's Company of Comedians" in the Haymarket, and ending the proprietor's career as a mere playwright. And be it said, by the way, that if in that career he proved a Gay to the politicians, he certainly was something of an Aristophanes to his dramatic compeers. His *Miscellanies* might be consulted with advantage upon this point.

In the year 1737, with a wife (whose small fortune he had squandered) to support, Fielding concluded that as he had suffered at the hands of the law in his former avocation, to the law he should look to retrieve his mischances. Accordingly we find the following entry in the books of the Middle Temple:

"(574G 1 Novris 1737.
Henricus Fielding, de East Stour in Com. Dorset Ar. filius et haeres apparens Brig: Genlis: Edmundi Fielding admissus est in Societatem Medii Templi Lond. specialiter et obligatur una cum etc.
Et dat pro fine 4.0.0".

Undoubtedly this legend would have commended itself to the new student's critical taste had it been couched in better Latin, for Fielding was no mean scholar. When he left Eton in his youth it was said of him that he was "uncommonly versed in the Greek authors, and an early master of the Latin classics." Indeed, in some verses addressed to Walpole, he says of himself:

"Tuscan and French are in my head:
Latin I write, and Greek I — read."

From Eton, Fielding is said to have gone to the University of Leyden, but conceding this to be doubtful, he certainly could not have echoed Charles Lamb's lament —

"I was not train'd in Academic bowers,
Mine have been anything but studious hours."

Nor did he fail to apply himself as sedulously to his maturer studies. Murphy, one of his earlier biographers, relates of him that notwithstanding his addiction to the ways of the *comes jucundus* of his day, he was "frequently known by his intimates to retire late at night from a tavern to his chambers, and there read, and make extracts from, the most abstruse authors for several hours before he went to bed." A digest of the Statutes at Large, in two folio volumes, prepared by him at this time, but never published, further attests the sincerity and earnestness with which he applied himself to his professional studies. During all his probation, continuous writing for the *Champion*, and other periodical publications, claimed most of his leisure, the financial returns therefrom helping him somewhat to hold at bay the peremptory wolf at the door.

On the 20th of June, 1740 Fielding was "called"; but notwithstanding his careful training and keen desire to make his way in the courts, ill-health proved a serious handicap to success at the Bar, — a matter which his antecedents, too, were not likely to promote. It is said that he travelled the Western Circuit; and that for a time he put in constant but fruitless attendance at the Wiltshire sessions. He was on familiar terms with Charles Pratt, afterwards Lord Camden, and Robert Henley, (who subsequently divided the plaudits of fame, first, as the supposed original of the drunken barrister in Hogarth's *Midnight Modern Conversation;* and, secondly, as the Lord High Chancellor of England) was also an acquaintance if not a friend. But it was not as a practising lawyer that Fielding was to do his work as an advocate of law reform and prepare the way for the coming of such a practical reformer as John Howard later in the century. It was reserved for him by means of works of fiction, to the production of which he was impelled by his lack of briefs, to first shock, and shock rudely, the stolid complacency of the British public in the management of their prison system. Always a keen critic of the abuses of the law, even before he went to the Bar he could write a satire (*Life and Death of Common-Sense*) in which we find the following:

QUEEN COMMON SENSE — My Lord of Law,
I sent for you this morning;
I have a strange petition given to me;
Two men, it seems, have lately been at Law
For an estate, which both of them have lost,
And their Attorneys now divide between them.

LAW. Madam, these things will happen in the Law.

Q. C. S. Will they, my Lord? Then better we had none:
But I have also heard a sweet bird sing
That men, unable to discharge their debts
At a short warning, being sued for them,
Have, with both power and will their debts to pay,
Lain all their lives in prison for their *costs*.

LAW. That may, perhaps, be some poor person's case,
Too mean to entertain your royal ear.

Q. C. S. My Lord, while I am Queen I shall not think
One man too mean, or poor, to be redress'd!
Moreover, Lord, I am informed your laws
Are grown so large, and daily yet increase,
That the great age of old Methusalem
Would scarce suffice to read your Statutes out."

In this passage we can discern the psychic trend toward that temperament of maturer life which was to produce *Amelia*, the earliest English example of the true *tendenz-roman*, and one of the most caustic satires ever written in the interests of honest public life and a pure administration of

justice. We shall speak of this work with some detail later on, but in the meanwhile it will be interesting to observe in his earlier writings the manifestations of this ever-increasing desire for law reform. Toward the end of his short life this may be said to have become not only a prepossession, but a profession with him; and it is to be noted that, unlike Dickens, Fielding wrote of present evils, not of those that had become largely historical in his day.

In the *Coffee-House-Politician, or Justice caught in his own Trap*, published in 1730, we have in Justice Squeezum a type of the venal magistrate such as Dante declared once infested the city of Lucca (*Inferno*, Canto XXI).

"All there are barrators
No into *yes* for money there is changed."

Fielding would elevate the tone of party politics, moreover, because decent public life is an antecedent of honest administration of justice. In his *Don Quixote in England*, sketched if not fully written in his "salad days," he makes one of the *dramatis personæ* say:

"I like an Opposition, because otherwise a man may be obliged to vote against his Party; therefore when we invite a gentleman to stand, we invite him to spend his money for the honour of his Party; and when both Parties have spent as much as they are able, every honest man will vote according to his conscience."

During his *lehrjahre* at the Middle Temple, Fielding, in conjunction with his friend James Ralph, edited the *Champion*, a series of periodical essays modelled on the *Tatler*, and, in still further resemblance to it, published on Tuesdays, Thursdays, and Saturdays. The supposititious authors of the essays in the *Champion* were declared to be members of the "Vinegar family." There was, *inter alia*, Nehemiah Vinegar, whose domain was history and politics; his brother, Councillor Vinegar, who presided over law and judicature; his son, Captain Hercules Vinegar, who exploited all questions relating to the army and navy and "fighting part of the Kingdom;" and Dr. John Vinegar, his cousin, who indoctrinated the ignorant concerning matters of medicine and natural, philosophy. One of the essays written by Fielding on *Charity* contains a fine argument against imprisonment for debt, a subject which, doubtless, ever had a keen interest for the extravagant and impecunious author. Another essay from the same pen parodies in an inimitable way the old Norman-French gibberish of the law, which at that time had not ceased to make a naturally dry study gratuitously repellent. But possibly Fielding's legal knowledge never served him to better purpose than in his pasquinade at Cibber's expense, published in the *Champion* in 1740. Cibber had shortly before printed his "Apology," in which Fielding had been set down in terms which were not euphemistic to say the least; and, in sooth, our author pretty well deserved all he got, for he had never spared his rival when he could score against him in print. Cibber, who at a later date in literary history could make the author of the *Dunciad* "writhe with anguish" by his sarcasm, declined to mention Fielding's name on the ground that it "could do him no good and was of no importance," but referred to him as "a broken Wit" who did not scruple to assail "Religion, Laws, Government, Priests, Judges and Ministers," and finally twitted him with being silenced as a scurrilous playwright by the Licensing Acts. Fielding was not slow to furnish a riposte to this allonge, and it took the form of a mock trial of Cibber, arraigning him before the Bar of literary criticism for that "not having the fear of Grammar before his eyes" he had committed a breach of the peace upon his mother-tongue. This burlesque occupies part of several issues of the *Champion* for 1740, and, besides its keen analysis of

Cibber's defects, displays Fielding's intimate knowledge of legal forms and phraseology. It greatly enhanced the author's reputation among the critics of the day.

Although Fielding's cessation from periodical writing synchronized with his admission to the Bar, it was reserved for him afterwards to make his real and abiding fame in literature. In 1742 *Joseph Andrews* was published, and Taine calls it "his first literary work" — alas, for his claims as a writer of plays! *Joseph Andrews* was deliberately written to parody Richardson's *Pamela*, and yet, probably *malgré soi*, Fielding's creative genius overrides the parody the purpose and the occasion and gives us "Parson Adams — " one of the most finished delineations of character in the records of fiction. Its charm is instant and abiding. *Joseph Andrews* has been a veritable treasure-house of suggestion to those who have followed its author's lead; and it speaks ill for our knowledge and critical discernment if we find nothing reminiscent of this work in Goldsmith and Sterne, not to mention Sheridan and Dickens. Before he had concluded his parody of Richardson's sentimentalism, Fielding "found himself" as the first, if not the greatest, of English realists in prose fiction.

Midway in point of publication, although possibly not in time of writing, between *Joseph Andrews* and *Tom Jones*, stands *Jonathan Wild* (1743) a study in the psychology of crime, written in an ironical vein, but with the serious purpose of showing that the qualities of the moral degenerate in all stations of life, and at all times, are the same. Critics profess to find in *Jonathan Wild* Thackeray's cue for *Barry Lyndon*.

It is neither within our space nor our purpose to discuss *The History of Tom Jones, a Foundling*, which is the cornerstone of Fielding's literary fame and one of the greatest books of its kind in the round world. In its composition he declared that he had spent "some thousands of hours;" and in the result he produced a brand-new thing in literature — whereof we have glimmerings toward the close of *Joseph Andrews* — the prose comic epic. When we recognize this we readily concur in Sir Walter Scott's estimate of Fielding's true place in English letters.

Tom Jones was published about the time that the author was appointed a justice of the peace for Middlesex and Westminster. This appointment is said to have been a reward for his editorial direction of the *Jacobite's Journal* in the interests of the Hanoverian succession. Fielding entered upon his public office with the fine zeal that characterized him in all his undertakings. On the 12th of May, 1749, he was unanimously chosen chairman of Quarter Sessions at Hick's Hall (afterwards known as the Clerkenwell Sessions) and in the following month he delivered his famous charge to the Westminster Grand Jury, dealing largely with the social vices besetting the metropolis at that period. Shortly after he presided at the trial of Bosavern Penlez for rioting and theft, at the conclusion of which he sentenced the prisoner to death. This sentence was the subject of so much adverse criticism that the presiding magistrate was constrained to vindicate it in a formal pamphlet. In 1750 the increase of violent crimes had become so marked in the metropolis that Fielding felt obliged by his commission of the peace to suggest measures of reform. In *An Enquiry into the Causes of the late Increase of Robbers, etc., with some Proposal for remedying this growing Evil*, dedicated to Lord Chancellor Hardwicke, he professed to find in the prevalence of excessive gin drinking the chief cause of the lawlessness of the times. This practical brochure demonstrated the many-sidedness of Fielding's mind, and greatly strengthened his hold on the public. It is said that the *Enquiry*, followed up by Hogarth's horribly realistic etching

Gin Lane, resulted in the "Act for Restricting the sale of Spirituous Liquors" being passed in 1751. So it may fairly be said that Fielding discharged his public duties with credit to himself and with corresponding benefit to the interests of law reform and the efficient administration of justice.

But it was reserved for his last essay in fiction, *Amelia*, to embody his greatest brief for the betterment of the legal order existing in his day and generation. That the book does not contain the intellectual affluence, the pure literary art and fascination of *Tom Jones* is undoubtedly true; but that there is much of the atmosphere of the earlier work about it, that there are occasions when the author (to use George Eliot's observation upon the earlier work) "seems to bring his arm-chair to the proscenium and chat with us in all the lusty ease of his fine English" is equally true. Professor Cross has very well said: "It is not precisely the Fielding who wrote *Tom Jones* that is speaking; it is Fielding, the Bow Street Justice, who had delivered an impressive charge to the Westminster Grand Jury. The younger Fielding had seen one side of vice, its gayety and its flaunts; he now sees the other side, the lo thsomeness and its enervation. As in *Tom Jones*, he brings before the imagination the masquerade, with its glaring lights and its rich and fantastic costumes, but for a new purpose — to place his finger on the libertinage beneath."

It has been said that each one of Dickens' novels after *Pickwick* is a lawyer's brief for the downtrodden and the oppressed; and, indeed, there is a good deal of the same sort of thing in *Pickwick* if we recall the death of the "Chancery Prisoner" and other happenings in the Fleet, recorded in the second volume. But as we have before intimated, while Dickens' satires seem to deal with contemporary conditions of society, with the exception of *Oliver Twist*, they for the most part depict conditions which had largely passed away. The Court of Chancery as drawn by him in *Bleak House* might bear a fair resemblance to that court as it existed at the beginning of the nineteenth century; but it simply travesties the conduct of business there after the Act 53 Geo. III, c. 24 — and *Bleak House* was published in 1852–3. Then, when we turn to *Little Dorrit*, although the author admits in his preface that the Marshalsea prison had been demolished long before his fine creation of the "Father of the Marshalsea," yet the nine hundred and odd pages in the book are vibrant with indignation against an apparently existing vile and unreformed prison system. Dickens' Fleet and his Marshalsea belong to the eighteenth century, and not to the Victorian era. Not so with Fielding, however. He flogs no dead horse of reformed public order. The Newgate that he describes in *Amelia*, with all its hideous atmosphere, is the prison that a royal commission must have reported had one been authorized to investigate it at the time. The author's purpose is best explained by himself in the Dedication:

"The following book is sincerely designed to promote the cause of virtue, and to expose some of the most glaring evils, as well public and private, which at present infest the country."

Before we are introduced to the manners and methods prevailing in this institution for the suppression of crime and indigent debtors, we are enlightened as to the character and attainments of some of the author's judicial brethren as disclosed in the person of Mr. Thrasher, J. P. After very properly observing that the office of justice of the peace requires some knowledge of the law, and that this knowledge cannot be gained except by reading, the author says: "Yet certain it is, that Mr. Thrasher never read one syllable of the matter. This, perhaps, was a defect; but this was not all. . . . If he was ignorant of the laws of England, he was yet well versed in the laws of nature.

He perfectly well understood that fundamental principle, so strongly laid down in the institutes of the learned Rochefoucauld, by which the duty of self-love is so strongly enforced, and every man is taught to consider himself as the centre of gravity, and to attract all things thither. To speak the truth plainly, the Justice was never indifferent in a cause, but when he could get nothing on either side." Then follows a portrayal of certain proceedings before this excellent magistrate, in which the humorous element is never allowed to derogate from the dignity of the satire. One who is falsely charged by his assailant with a previous assault is convicted *because he admitted himself to be an Irishman!* (*Semble*, that an Irishman is presumed to be guilty until he is proved to be innocent, and such proof is inadmissible!) A poor servant who goes to fetch a physician at midnight for her sick mistress is condemned as a street-walker, without being allowed to disprove the infamous charge. Finally, Booth, the hero of the book, is sent to prison on evidence grossly inadequate to convict because he was shabbily dressed, having been unable to previously purchase his liberty from a banditti of constables, although they appraised his ransom at the modest sum of half-a-crown. Whereupon the author comments: "The magistrate had too great an honour for Truth, to suspect that she ever appeared in sordid apparel!"

In Chapters III and IV we are introduced to the interior of Newgate, and its devilish crew of inmates. That any "unfortunate" sent here for debt, or to expiate his or her first offense, could do aught but become a hardened criminal and a menace to society thenceforward is beyond belief. Later on in the book we find the governor of this antechamber to the Dantean abyss deriving a pretty income from the sale of liquor to, and the promotion of illicit intercourse between, the male and female prisoners. The scenes are too shameless to be even hinted at here; but we must remember that Fielding's motives as a reformer necessarily made him a realist, and that he wrote in an age of small refinement in any walk of life. There was no man to be found about the institution, in any sphere of authority whatsoever, who would not defeat the ends of justice for a price. Listen to one of the speeches of the governor: "I never desire to keep a prisoner longer than the law allows, not I; I always inform them they can be bailed as soon as I know it. I never make any bargain, not I; I always love to leave those things to the gentlemen and ladies themselves. I never suspect gentlemen and ladies of wanting generosity."

Beyond doubt such a book exerted a powerful influence on the mind of John Howard, to whose efforts the prison reform Acts of 1774 were chiefly due.

But it was not only prison betterment that fell with the ambit of Fielding's argument for law reform in *Amelia*. He never did anything by halves. In his *Tom Jones* he seems to have exhausted the whole range of conduct, — the result being a measurably complete *comédie humaine* in one book. Walter Bagehot thought the term "ubiquitous" the best descriptive epithet for such a study of life. And so in *Amelia*, Fielding's eighteenth century readers were furnished with portraits of every member of the rogues' gallery in order that they might be won over to the prompt purgation of existing social evils. We have already seen his picture of Thrasher, the corrupt and ignorant justice. Later on we have Murphy, the shyster lawyer, suborner and forger, called occasionally upon the stage to mouth his infamies. He wants money from a prisoner (frank enough to confess her guilt) in order to bribe a witness to perjure himself: "When a man knows from the unhappy circumstances of the case, that you can procure no other witness but himself he is always dear. It is so in all other ways of business . . . . The safest way is to

furnish me with money enough to offer him a good round sum at once; and (I think it is for your good I speak) fifty pounds is the least that can be offered him. I do assure you I would offer him no less, was it my own case." Murphy dies suddenly at a public place called Tyburn Tree toward the close of the book.

Then Mr. Bondum, the bailiff, another pretty specimen of the carrion that infested the purlieus of the law in the eighteenth century, is introduced to the reader's notice. "His desire was no more than to accumulate bail-bonds; for the bailiff was reckoned an honest and good sort of man in his way, and had no more malice against the bodies in his custody than a butcher has to those in his. And as the latter, when he takes his knife in his hand, has no idea but of the joints into which he is to cut the carcass, so the former, when he handles his writ, has no other design but to cut out the body into as many bail-bonds as possible. As to the life of the animal, or the liberty of the man, they are thoughts which never obtrude themselves on either."

Space will not permit us to quote further from the pages of *Amelia*, but enough of it has been analyzed to vindicate our opinion that the book is one of the most cogent arguments for law reform in the literature of fiction. But, as has been pointed out, law reform alone does not exhaust the purpose of the author. *Amelia* is also a plea for cleaner and nobler living by the average man and woman of the day. That stern moralist, Dr. Johnson, was so taken with it that he read the book through at a sitting, although he had previously thought very little of Fielding's motives and aims. The heroine of the book is one of the finest conceptions of womanhood in all creative literature. "Amelia is still the finest woman in England," said the author in his concluding paragraph, and he then unknowingly expressed the opinion of sound criticism down to this day. Notwithstanding the ever obvious purpose of the author, this book will always be read because of its charm and interest as a story pure and simple.

Fielding only lived three years after the publication of his last novel; but during that time his interest in law and law reform showed no abatement. He continued to write pamphlets on legal subjects, and never lost sight of the obligations of his commission of the peace. This notice was frequently to be read in the prints:

"TO THE PUBLIC.

All persons who shall, for the future, suffer by Robbers, Burglars, etc., are desired immediately to bring, or send, the best Description they can of such Robbers etc., with the Time and Place and Circumstances of the fact, to Henry Fielding, Esq., at his house in Bow Street."

He died at Lisbon on the 8th of October, 1754, in his forty-eighth year, bequeathing to literature some of its choicest possessions, and to the Bar a perpetual regret that so ardent a worshipper at the shrine of Justice, and so industrious a student of the laws, was prevented from taking that high place in its annals which, in circumstances less obdurate, would undoubtedly have been his.

OTTAWA, CANADA, July, 1907

STARE DECISIS IN CONTINENTAL EUROPE

By Charles C. Soule

An impression prevails in America that judicial decisions are not regarded as precedents in continental Europe. This opinion is natural, in view of such explicit prohibitions as that of the Austrian Civil Code, which says (§12):—

"The determinations issued in single cases and the sentences passed by the Courts in particular law disputes, have never the power of a law. They cannot be extended to other cases or other persons."

But the most casual examination of European law books will show that decisions of the courts are published in long series and cited in the manuals intended for the use of lawyers. Why should these citations be so copious, unless decisions are to be regarded as precedents?

In view of this apparent contradiction, I have tried to learn in each country, the exact force of decisions of the courts. Finding very soon that there is a marked division of what we should call text-book-literature, in Europe, into theoretical and practical, — a distinction recognized in Italy in the arrangement of booksellers' catalogues, — I have confined my principal investigations for the present, to the practical books, concerning myself not so much with what law was, or should be, as to what it now is. I have asked the advice of law professors and "jurists" as to histories of law and comparative jurispruduence, but have sought advice mainly as to practical books, from lawyers in active practice, and from judges now on the bench. Through the courtesy of our diplomatic and consular representatives, I have been introduced in every country to leaders of the legal profession, who have responded with keen interest to my inquiries. I have had the good fortune, in two countries, to get young lawyers who spoke English, to act as interpreters for me; thus getting clear comprehension, which is not always possible in dealing with a technical subject in an unfamiliar language.

One of the leading questions I have asked everywhere is "Are decisions of your courts regarded as binding precedents." In Spain, a judge of the Supreme Court — I will use this general term for the highest courts — answered that if a lawyer cited one case only, it might not be followed; but that if he could cite in support of his argument, two or more former decisions they would be regarded by the court as establishing a precedent to be followed. The Spanish lawyer who advised me, said that if he cited one Supreme Court decision, he should expect any lower court to follow it.

The Italian Supreme Court judges with whom I talked, said that there could hardly be uniform precedents for all Italy, as there are five Supreme Courts of equal authority in the five different political divisions, with as yet no common court of appeals, except in criminal cases. But he added that a lower court in Rome would be foolish to disregard a precedent cited from the Supreme Court because its decision would surely be reversed if appealed from. The Roman lawyer who interpreted for me, remarked afterwards, that if he could find a Supreme Court decision in his favor he should expect it to have "extraordinary weight," and in fact, should consider his case won in advance.

In Austria, where the original Civil Code of 1812 is still in force, a body of law has been built up from amending laws, new ordinances, and decisions of the courts. The Supreme Court indicates, in filing its decisions, which of them are on new points, and "plenar" (or binding) on the lower courts. I asked a leading lawyer in Vienna how this could be explained, in face of the provision quoted above. He called atten-

tion to §7 of the same code, which reads, — "If a case cannot be decided either from the words or from the natural construction of a law, similar cases which are distinctly decided in the laws, and the motives of other laws allied to them, must be taken into consideration. Should the case still remain doubtful it must be decided, with regard to the carefully collected circumstances, according to the natural principles of right." He added in his own words, "On a doubtful question not clearly settled by the written law, a decision of the highest court becomes law, and remains so until the legislature adopts more definite enactment."

In Hungary there are some minor codes but as yet no Civil Code has ever been adopted. Several commissions have been appointed, from time to time to prepare one (the report of the last commission is now printed and pending), but the legislative body has always hesitated, — as Common Law countries have hesitated, to put into rigid form, provisions of positive law which may require interpretation or amendment as soon as published. There is a Commercial Code, and also a Code of Procedure; but otherwise as a prominent lawyer said to me "There is a Common Law in Hungary, as in England, based on decisions of the courts. Only those decisions are published which are important, and they are binding as precedents."

Here then are four countries in which "Stare Decisis" prevails, not as law or as doctrine, but as a recognized fact. There is no question as to the leading place which decisions of the courts occupy in the law literature of southern Europe.

I asked my Austrian friend how he prepared cases for trial. His answer was: "After assuring myself that there is no statute to cover the case, I turn to the treatises. I never expect much help from them, however, for they generally state what everyone ought to know, and evade doubtful points. I then make a thorough search through the decisions of the courts to find something to support my point of law." If we remember that there are in Austria also indexes and encyclopædias to help in hunting for precedents, is not this just the answer an American lawyer would make to an Austrian inquirer?

I have just had very interesting interviews with a judge of the Tribunal Federal (Supreme Court) and with a prominent professor of the University at Berne. Before 1875 the Supreme Court convened irregularly in the different cantons whenever and wherever appeals accumulated. In that year the court was located permanently in Lausanne and began publishing its decisions in a regular series. Although there is no law to compel it these are regarded as precedents to be followed in the cantonal courts (which are courts of first instance and first appeal in federal as well as cantonal cases). When asked as to the place the decisions of his court occupied in Swiss jurisprudence, the judge answered that the court had the "high and noble part" of adapting law to the march of civilization. The court first interprets existing law, and then, if existing law does not apply to new conditions, the court "must make the law." The "project" of the new Civil Code, which will probably be adopted next December, prescribes that in absence of a written law which is applicable, the judge must decide according to customary law; in absence of customary law, following doctrine and jurisprudence. In default of these sources he will apply the rules which he would enact *if he had to fill the office of legislator.*" The court thus "legislates" on those new and difficult cases, which (as the judge said) arise from time to time and "imperceptibly but surely" form the law of the future.

Does this not indicate that court decisions are the material, next to codes and laws, for our lawyers to search for practical matters, and our students to search for the tendencies of modern law?

BERNE, SWITZERLAND, July, 1907.

A STUDY OF MEXICAN CRIMINAL PROCEDURE AS ILLUSTRATED IN THE BARILLAS CASE

By Joseph Wheless

THE conduct and proceedings of a public criminal trial in our neighbor republic of Mexico, such as I have just had the fortune to witness, are all so different from our own common law system of criminal jury trials that I am certain much of interest as well as instruction may be had from the review of the famous trial of the assa sins of General Barillas, late President of Guatemala, which I am moved to write for the readers of the Green Bag, by my interest in the subject-matter and in the notable progress, juridical, intellectual and material, of the great and friendly republic to our south.

Not only would I wish to interest my American readers by an account of a famous foreign trial as it was actually conducted before my eyes, but I would work into this narrative, written *à plume volante*, somewhat of more serious import, in a brief (and necessarily imperfect) comparative study of criminal procedure under the great system of the civil law, with our own common law administration of criminal justice. This will let us know something intimate of that most important public act, the sanction for the security of life and liberty, in the great Latin country on our borders, where so many thousands of our citizens are located and so many millions of our capital are invested, and may demonstrate that not all of scientific theory or effective practice is found in our Anglo-Saxon criminal jurisprudence.

The joint trial of Florencio Morales and Bernado Mora, accused of the assassination, on April 7th, 1907, of General Don Manuel Lisandro Barillas, ex-President of the Republic of Guatemala, began in the City of Mexico on Tuesday, June 4, 1907, and at midnight of Wednesday, June 5, sentence of death had been pronounced, following a unanimous verdict of guilty, upon both of the unhappy tools of this notorious crime of "higher politics." No criminal process in Mexico in many years has been of such importance and such intense public interest, nor in its conduct and result so demonstrated the high position to which Mexico has attained in the orderly and conservative administration of the laws. As stated with a show of justly self-reliant pride by one of the principal newspapers at the beginning of the trial: "Mora and Morales executed their infamous mission; Mexican justice is now going to comply with its duty."

The facts constituting the *corpus delicti* were very few and simple, and will sufficiently appear in the narrative of the trial, in which I chiefly wish to illustrate the more salient features wherein a common law lawyer will find most of interest for their novelty, a well as some food for thought along the lines of comparative jurisprudence and practice.

Some description of the scene of the trial at the Palacio Penal, may lend interest. The court room is about one hundred and fifty feet long, wide perhaps fifty feet, high in ceiling, rather obscure and funereal in appearance, several tall windows admitting a dim light from the street without. Within the railing which marks off the space reserved for the "Bar," there is an elevated staging entirely across the south end, upon which is the table and chair of the judge, secretary, and assistant; the judge sits behind the table facing the audience; at the end of the table to his right sits the secretary, and at the other end the assistant; the latter official, a young man, has to do with calling in the witnesses and other functions, while the secretary, a

very important officer, makes and keeps all the records of the process, and is right hand man to the judge, who can take no important step without the close association of the secretary, who is much more than a clerk as known to our courts.

Behind the judge the south wall of the room is concave, forming a sort of semicircular alcove, extending along the wall of which is a long upholstered bench seat, upon which, in crescent order, are seated the nine jurors, (and two supplementary jurors, to provide against any contingency in the trial) in whose hands is the fate of the accused. On either side of the room within the bar railing, and elevated on the level with the judge and jurors, are two enclosures somewhat like proscenium boxes in our theaters; in the one are seated the array of counsel for the prosecution; on the other side, in their own box, are seated the counsel for the defense. In the center of the stage, just in front of the judge's table, two stools are brought out and placed a few feet apart; on these the two notorious criminals are seated, facing the judge, their backs to the audience, their counsel, as indicated, being some yards away in their box to the right of the accused. There are ten or a dozen lawyers, associated in the case, or perhaps present by courtesy, in either box. The witnesses, on being severally brought in during the course of the trial, are stood up by the usher on a spot just to the right and rear of the defendant, Mora, who occupies the right hand stool, as the audience observes him, while Morales sits humped upon the stool to the left, or on the right of the judge. Outside the bar railing, reserved for the spectators, the hall is fitted with rows of opera chairs, with attachments under the seats for holding hats, just as in the theaters; and the hall is crowded with "magistrates, judges, foreigners and law students," as the audience is described in the headlines of the leading newspaper on the day of the trial. Within the bar space, on the floor level, were the tables used by the reporters of the various newspapers, busily taking or transcribing notes of the famous trial. Several cameras, on tripods, were also posted within this space, or among the audience, and frequent pictures were taken of the scene, judge, jurors, culprits, counsel, and the shifting audience. Add to this, that at all times during the trial, the judge president of debates, the jurors, the counsel on either side, and the prisoners at the bar, if they pleased, smoked stacks of black Mexican cigarettes and blew the smoke in fancy rings about the Sala (although several large signs hung around announced that smoking, spitting on the floor, etc., were utterly prohibited by the public authority) and some more or less adequate idea may be formed, from this inartistic description, of the settings of the famous scene which was being enacted with Justice and Human Life for forfeits.

I do not mean by this rather light description to imply anything of levity or want of character in the scene or in the proceedings. These were grave, dignified, and decorous in every sense and in every move; and the line of armed gendarmes in the patio and before the two large entrance doors to the hall, with sabred officers, and armed guards posted about in the court room itself, gave far more an air of serious solemnity to the proceeding than we are ever accustomed to see in our most formal courts.

Before entering upon the narrative of such features of the actual trial as I have thought might interest or instruct, I think it opportune to give as succinct *résumé* as possible of the principal features of the Mexican law which enter into this notable cause; this will serve to make more intelligible many of the incidents to be related at the trial, as well as to set forth some of the striking differences of the civil law criminal system from that of our common law. An important part of the process is the steps in its institution and preparation for actual trial, called its "Instruction,"

and the latter is best explained by the former. It may be seen how well or otherwise our institution of the grand jury is left out of the civil law system. The methods of investigating accusations of crime, of securing and educing evidence, of sifting the truth of testimony, and the safeguards which the accused has in his fight for liberty, as well as the intelligent protection of the public, all as worked out for long centuries by the wisdom of the civil jurists, may here be comprehended, even in this rough and limited sketch.

In the great chapter on the "Rights of Man," in the admirable Political Constitution of the Mexican Republic, of 1857, it is thus ordained in Article 20, which may be profitably compared with the first amendments of our Federal Constitution, and with corresponding provisions of the bills of rights of our state constitutions:

"ART. 20. In every criminal trial the accused shall have the following guaranties:

"1. He shall be advised of the cause of the proceeding and the name of the accuser, if there be any.

"2. His preliminary statement shall be taken within 48 hours counted from the time he shall be at the disposition of his judge.

"3. He shall be *faced* with the witnesses[1] who testify against him.

"4. He shall be furnished with such information appearing in the process as he may need, in order to prepare his defense.

"5. He shall be heard in his defense by himself, or by a person in his confidence, or by both, according to his wish. In the event that he has no one to defend him, a list of the *ex officio* defenders shall be presented to him, for him to select him or those whom he wishes. . . .

"ART. 24. No criminal case can have more than three instances (or successive trials in courts of different grades). No one can be tried twice for the same crime, whether he be acquitted or condemned at the trial. . . ."

Following these fundamental provisions, as enlightened as to be found in any constitution, I will trace, though with rapid and incomplete strokes, the main groundwork of Mexican criminal procedure involved in the instruction and prosecution of this *cause célèbre*, skimming through the detailed provisions of the Code of Penal Procedure; making use, so far as my condensed synopsis will admit, of the very words of the text, as I freely translate it into typewriter English.

The initiation or institution of a criminal process under the Mexican Code, and generally in the civil law systems, by what is called its "Instruction," is thus defined by the Code: "The Instruction comprehends all the *diligencias* (steps, proceedings) taken for the proving of crimes and investigations of the persons who, in whatever degree, may be responsible for them, from the commencement of the process until the rendition of the final sentence." The law authorizes only two modes of instituting an instruction, the one *ex officio* and the other upon the necessary complaint; general inquests and secret or anonymous charges are prohibited. Every person injured by a crime and every person who has been an eye witness to the commission of a crime which should be prosecuted *ex officio*, is under the obligation to bring it to the knowledge of the competent judge, of some representative of the public ministry, or of any agent of the judicial police, which statement of the facts should be in writing and signed by the person making the charge, who shall only be liable for a libel in the event that the *corpus delicti* cannot be proven or there was no just cause to suppose its existence. The complainant has the right to present in the judicial investigation the proofs which he deems proper

[1] Hereafter note the literal interpretation given in practice to this precept.

for the proof of the *corpus delicti* and of the responsibility of the accused, and to appeal from any decision of the judge by which he rejects the proofs offered or holds that no crime has been committed.

Whenever any judicial officer shall have knowledge of the existence of a crime, he shall proceed without loss of time to take the first *diligencias*, which shall consist of the following: the declaration of the complainant, if there be one; that of the accused, if he should be under arrest or be found present at the proceeding; the ocular inspection of the place in which the crime was committed, if it were such as to leave material traces of its existence; the description of the traces which the crime may have left upon the injured person, unless they are such as might offend modesty, and then it shall be made by experts, as elsewhere provided; the expert examination of the persons detained, whenever they were drunk or are said to be so, and the securing of the thing which was the object of the crime, together with such other information as he may deem proper; all of which is to be remitted to the agent of the public ministry (who is in effect attorney general or prosecuting attorney) within thirty-six hours from the start of the investigation.

In beginning any *diligencia* the *corpus delicti* must first be proved as the basis of the investigation (detailed rules being prescribed for this end in regard to the several orders of crimes).

When any person is suspected of criminal responsibility for a crime, he shall be arrested, and wi hin forty-eight hours thereafter his preliminary declaration must be taken. This shall begin with the personal record of the accused, including any nicknames (or aliases) which he may have. He shall then be informed of the reason of his arrest, the complaint, if there be any, being read to him; he shall be informed of the name of the complainant, if there be one, and he shall be interrogated about the facts which are imputed to him and about the knowledge he may have of the crime, and in the event that he denies his participation in it, about the place where he was on the day and hour when the crime was committed, and what persons may have seen him there; about his knowledge of any other persons who may be suspected of having any responsibility, and as to the last time he may have seen them; and he may be interrogated also about any facts and details which it may be thought will tend to the complete establishment of the truth. This being finished, the accused shall be advised that he may name a defender, and if he is unable to do so, the list of *ex officio* defenders shall be shown him, so that he may choose him or them whom he may wish (the duties of these public defenders, of whom one hundred are regularly appointed from among the most aspiring members of the Bar, are set forth in detail).

If through the Ministerio Público, the revelations made in the first *diligencias*, in the written complaints, or in any other wise, any persons are indicated whose examination is deemed necessary for the investigation of a crime, of its circumstances, or of the person of the accused, the judge must examine them; and during the whole course of the instruction the judge shall never fail to examine the witnesses present whose declaration may be requested by the Ministerio Público, the interested parties and the person against whom the investigation is being made, although he should not be under detention. But no confessor, physician, surgeon, accoucheur, midwife, druggist, lawyer, or attorney can be compelled to reveal the secrets which may have been confided to them by reason of their station, or in the exercise of their profession, nor to give notice of any crimes of which they may have knowledge through this means, without the consent of the interested parties. The foregoing shall not exempt physicians who have attended a sick person from giving a certificate of his death stating the sickness of which he died, whenever required

by law. Nor shall any tutor, curator, pupil, or spouse be obliged to declare against the accused, nor his relations by consanguinity or affinity in the direct line, ascending or descending without limitation of degrees, and in the collateral line to the second degree inclusive; but if these persons voluntarily wish to testify, and after the judge shall have advised them that they may abstain from doing so, their declaration shall be received, the record showing the circumstances. Each witness must be examined separately by the judge, and in the presence of the secretary or the assisting witnesses, and no one else shall be present at the examination. The witnesses shall protest to speak the truth, shall be specifically warned of the law against false testimony, and shall give their declaration, orally, which shall be written down as nearly as may be in the same words used by the witness, and when finished shall be read over by or to him, and when found correct shall be signed by him. If sufficient reason should appear to suspect that any witness has testified falsely or contradicted himself in his statements, he may be at once arrested, and a process begun against him on the spot.

The "facing of the witnesses" with the accused, as established by the Constitution as one of the sacred "Rights of Man," is known in Spanish as *careo* (from *carear*, to face), and I shall use this Spanish word, as being the most explicit, in speaking of this very interesting phase of the process. It is provided, in this respect, by the Code of Penal Procedure, that the *careos* of the witnesses among themselves and with the accused, or of the witnesses and the accused with the complainant, shall be had during the instruction as well as on the trial, that in each instance one single witness shall be "faced" with another witness, or with the accused, or with the complainant, and that when the *careo* takes place during the instruction no other persons shall be present except those to be "faced." The *careo* is effected by reading over to the witnesses those parts of the respective declarations which are considered to be contradictory, and calling the attention of the "parties faced" to the contradictions, so that they may have it out between themselves, and thus if possible develop what is the truth of the matter in dispute.

Any documentary evidence which may have been adduced during the instruction shall be added to the record, after notification to the parties. If the Ministerio Público is of the opinion that proofs of the crime may be found in the correspondence of the accused through the public mails, the judge may, upon request, order such correspondence to be detained and delivered to him; and all such letters shall be opened by the judge, in the presence of the secretary, of the Ministerio Público, and of the accused, if he is to be found; the judge will then read them privately and if they contain nothing relevant he will deliver them to the accused or some one for him, first sealing them in a new envelope; but if they contain matter bearing on the crime, he will advise the accused of the contents, and will add the letters to the record for future use against the accused.

It is provided that the process of instruction must be conducted with all possible brevity, and be concluded at the latest within six months; and the Penal Code provides that if the instruction should exceed the time above fixed, the judge may credit the excess time on the punishment which may be inflicted after judgment.

If the judge of instruction, upon the conclusion of this investigation, be of opinion that a crime, triable by jury, has been established, he shall order that the record be laid before the Ministerio Público, the accused and his defender, within the strict limit of six days, that they may offer any further proofs which they may have, in which event the judge shall take such further evidence within the term of fifteen days; at the end of which time the judge

shall declare the instruction closed, and nothing can be added to it afterwards, although during the trial, on proper application, new proofs may be heard.

Upon the instruction being closed, the record shall be remitted at once to the Ministerio Público, for three days, if it contains less than fifty pages, and for one further day for each twenty pages in excess, in order that he may "formulate conclusions"; should this official delay beyond the time fixed, he shall be considered in contempt of court and fined from two to ten dollars for each day of delay in returning the record with his conclusions. The form of these "conclusions" will appear when we get into the trial of this case.

If the conclusions formulated by the Ministerio Público show a crime triable by jury, the record shall, within the like term above indicated, be submitted to the accused and his defender, who shall within a like time submit, in precise and concrete "propositions," the defenses which he may believe exist, specifying either that he is not guilty, or any exculpating or extenuating circumstances which he may allege. If the accused fails within the above limit to return his "conclusions," that of "not guilty" shall be declared by the judge, and he shall fix a day for the trial of the cause, within the following fifteen days. At the same time the judge shall order the empanelling and drawing of the jury which is to try the case, which drawing shall take place on the eve of the day set for trial; and in the same order the judge shall direct the summoning of the witnesses for the trial. If for any reason either party is prevented from being ready for trial on the day fixed, the judge in his discretion may grant one only continuance, not to exceed fifteen days.

The empanelling and drawing of the jury (from annual lists of fifteen hundred qualified veniremen prepared by the governor of the district) shall be made in public, in the presence of the judge, his secretary, or the assisting witnesses, and the Ministerio Público; the accused and his defender may attend or not as they please. When all is ready, the judge shall put into the jar the names of not less than one hundred qualified jurymen, and from that number will draw out, one by one, thirty names; as each name is drawn, the judge shall read it aloud, and the Ministerio Público and the accused or his defender may challenge the juror without stating any cause, six challenges being thus allowed to the Ministerio Público and six to each defendant. When the drawing of thirty unchallenged jurors is completed, the judge shall order that they be summoned to appear on the next day at the hour of the trial.

At the trial, the judge, secretary, or assisting witnesses, the representative of the Ministerio Público who must sustain the accusation, and the jurors who are to try and decide the cause, must of course be present; the accused and his defender *may* attend or not, and if absent without sufficient excuse, the trial will proceed without them; although if the judge deem the presence of the accused absolutely necessary, and the latter should resist attending, the judge may order that he be brought in by the public force.

When the case is called for trial, and the thirty jurors summoned, or at least twelve of them are present, the judge shall put their names into a jar, and shall draw out nine proprietary jurors, and as many supernumeraries as he may deem advisable; the latter will sit and hear the cause with the regular jurors, and supply any deficiency in the regular panel. When the jury is thus empanelled, the judge shall order read to the jury certain sections of the Code prescribing the qualifications and disabilities of jurors, and shall then ask each of the jurors whether he has any of such disqualifications; if he states any, the matter may be argued and the juror accepted or discharged; if he fails to disclose any and it afterwards is discovered, or if he states any which it afterwards appears he did not

have, he is forthwith delivered over to a specified fine and imprisonment. The jury being finally selected and qualified, the judge "shall take from them the following oath: Do you swear that you will discharge the functions of a juror without hatred or fear, and decide, according as you estimate in your conscience and in your intimate conviction, the charges and the means of defense, acting in all with impartiality and firmness?" Each one of the jurors, called individually by the judge, shall answer in clear and intelligible voice, "Yes, I swear."

When the hearing of the case is begun, the following order shall be generally observed: (1) The conclusions of the Ministerio Publico shall be read. (2) The conclusions of the defense shall be read. (3) *The accused shall be exhorted to testify the truth*, he being made to see the advantages which may result to him thereby. He shall then be interrogated about the facts which are the cause of his being before the court; if he speaks falsely that fact may be pointed out to him, and he may be even confronted with the proofs in the record (of the instruction) which may contradict what he says; and such parts of the record may be read to him as are thought material. (4) The evidence in the record establishing the *corpus delecti* shall then be read, together with such other parts of the record as the judge may deem necessary. (5) The examination of witnesses and experts will then proceed, beginning with those for the prosecution and ending with those for the defense.

Either party may request the reading of any part of the record, at any time he deems opportune; and either party may put questions, through the judge, or directly, with his consent, to the accused and to the witnesses and experts, making any objections which are deemed proper.

The *careos* between the accused and the witnesses, or between witness and witness, may be had at any time that the judge thinks convenient, or when the parties request; and the "parties faced" may interrogate each other and make to each other all the charges and recriminations which they may deem desirable, which may be interrupted by no one except the judge. The judge shall be invested with all necessary faculties, during the trial or at any opportune time, to make the truth of the facts appear: the law leaves to his honor and conscience the employment of the means to be used to ascertain the truth. The jurors themselves may, by the leave of the judge, or through him, interrogate the witnesses and accused, putting to them such questions as they deem material to enlighten their conscience, but carefully avoiding that their opinion may be known.

Upon the conclusion of the reading of the record of instruction and the examination of the witnesses and experts, the Ministerio Público shall verbally state his conclusions, which conclusions shall be the same as previously formulated in the process, and they shall not be withdrawn, modified, or added to, except for good cause in the discretion of the judge, previously passed on by him before argument is begun. The defender shall then be heard with his defense, subject entirely to the same rules as those just prescribed for the prosecution, except that he may freely withdraw any of his conclusions, but he may not change them nor add new ones except on the conditions above indicated.

The Ministerio Público may reply as many times as he pleases, in which event the same defender or another may answer him; but the defense shall always have the right to speak last.

When the parties shall have finished speaking, the judge shall ask the accused, if he be present, if he wishes to speak, and if he shall so wish, the right shall be granted him. In this event, the accused may speak with all freedom, without other limitation than that he shall not attack the law, morals, or the authorities, or malign any

other person; if he should exceed these limits he shall be called to order by the judge, and if he should still persist, the right to speak further will be denied him, or he may be even removed from the hall and the trial proceed without him.

When the accused has finished speaking the judge shall declare the arguments closed; and he shall proceed at once to prepare the interrogatory which must be submitted to the deliberation of the jury, and which must be in the form prescribed in the thirteen sub-sections which follow, setting out in definite questions, to be separately voted on by the jury, the material conclusions of the prosecution and of the defense, including, as prescribed by the Code, first, the question "whether the accused is guilty of having done the particular act charged, without giving its legal denomination;" then questions upon the qualifying circumstastances; then those which may modify the penalty; then regarding aggravating and extenuating circumstances of the alleged crime, a separate interrogatory being formed for each defendant on trial. Either party may object to the form of the interrogatory, and the judge shall immediately pass upon the objections.

Immediately upon the settlement of the interrogatory, the judge, within the limits of the strictest impartiality, shall make a methodical, succinct and clear summing up of the facts adduced on the trial, determining the circumstances constituting the imputed crime, and of the proofs rendered during the instruction, and any modifications of the same during the hearing, beginning with those of the prosecution and ending with those of the defense; but carefully abstaining from displaying his own opinion or making any comments upon the responsibility of the accused. The judge who does not observe these provisions or who alters in any way the instructional record shall incur the penalties prescribed in the Penal Code.

The judge shall thereupon address to the jury the following instruction: "The law does not require of the jurors any account of the means by which they have formed their conviction; it fixes for them no rule upon which full and sufficient proof depends; it only commands them to interrogate themselves, and examine, with the sincerity of their conscience, the impression made upon it by the proofs rendered in favor of or against the accused. It only puts to them this question, which sums up all their duties: Have you the intimate conviction that the accused is guilty of the act which is imputed to him? The jurors fail in their principal duty if they take into account the fate which by virtue of their decision may fall to the accused in accordance with the penal law."

Thereupon the judge shall deliver the process and interrogatory to the eldest juror, who shall act as president of the jury, the youngest member acting as its secretary. A recess being thereupon declared, the jury will retire to their deliberation room, and shall not leave it or have communication with any person outside, until the verdict shall have been signed. The supernumerary jurors will remain in the court room ready to supply any vacancy that may occur.

From the foregoing epitome of the Código de Procedimientos Penales an idea may be had of Mexican criminal procedure, from the first inquiries tending to establish culpability until the sentence of guilt is pronounced. American lawyers may well consider whether the *ex parte* system of the grand jury, with its secret inquisition of but one side of the tale of alleged crime, with indictments based on the partial testimony thus only educed, the subsequent fights for delay, the technical rules of evidence, often rejecting the most important truths of proof because they fail to meet some technical requirement, the absurd fetich of the "constitutional privilege"

which allows criminals and criminal witnesses to evade and suppress the truth, — whether these and other features of our criminal procedure which will readily suggest themselves, are not put into relief as archaic, cumbersome, and destructive of the best results in the administration of justice, in comparison with the swift, rigid, and effective "instruction" of the civil law, and its subsequent "audiencia" in the civil-law criminal court.

(*To be Continued*)

St. Louis, Mo., July, 1907.

SHERLOCK HOLMES, WITNESS

THE FAMOUS DETECTIVE TESTIFIES

By Donald R. Richberg

"MR. SHERLOCK HOLMES," called the lawyer. A long, lean gentleman, with remarkably keen, penetrating eyes, walked slowly to the witness stand, followed by an inoffensive appearing man, whose air of quiet assertiveness stamped him as a practising physician.

"We will call you shortly, Dr. Watson," said the lawyer, whereat that gentleman bowed with professional gravity and resumed his seat.

"Raise your right hand," droned the clerk, following the command with a hopeless rush of words, ending explosively with "selp ye God!"

"I do," replied Sherlock Holmes.

On being asked to state his name, residence and occupation, the witness replied.

"Sherlock Holmes, Baker street, London, England, criminal investigator, analyzer and deducer."

The detective was then qualified through a long series of questions, most of them being sufficiently ungrammatical to serve as professional models. Then came the real examination.

"What do you know about this case?" asked Mr. Sharp, attorney for the defendant.

"Everything," replied the witness.

"I move to strike out that answer, incompetent, irrelevant, absurd," shouted Mr. Quick, for the plaintiff.

"Motion sustained," said the court.

"Are you familiar with the house and grounds known as Gridsly Manor?" was the next question.

"I am."

"Describe the conditions you found there on the evening of June 16th, of this year."

"As I entered my compartment in the 4:12 express at Charing Cross, I noted that the guard was laboring under great stress of emotion. While he was gazing fixedly at the small coin which I had just given him, it was evident his emotion was not gratitude. In fact he hastily removed the 'reserved' sign from the window of my compartment and ran down the platform. I had observed, however, that he had reddish hair and a slight droop of the right shoulder."

"I move to strike all this out," interrupted Mr. Quick. "If your honor please, this court is seeking light as to whether John Gridsly of Gridsly Manor, England, was murdered or committed suicide. This witness has been imported into this country by the defense to cast some alleged illumination on that question. I do not believe your honor cares to waste your time or that of counsel listening to old lady's tales of a train journey."

"Strike it out," said the court.

"If your honor please," remonstrated Mr. Sharp, "if Mr. Holmes can be allowed to tell his story his own way, I'm sure — "

"We'll be here all night," said the court. "Get off the train, Mr. Holmes, take a cab, get to Gridsly Manor somehow, then tell us what you saw."

Holmes was evidently much displeased at the court's abruptness, but he only exhibited his feelings by slightly raising his eyebrows at Dr. Watson, who smiled back sympathetically. With an accent of toleration the great detective continued:

"To give only the barest details I may say that when I entered the room wherein John Gridsly had passed away I saw at once that he had not been alone when he died."

"I object," howled Quick. "Witness

could not possibly see such a thing twenty-four hours after death.

"Objection sustained. State facts;" admonished the court.

"What did you see Mr. Holmes?" asked Sharp.

"I saw plain evidences that John Gridsly had not been alone."

"Object," said Quick.

"Sustained," said the judge.

"Was the room in the same condition when you saw it as when Mr. Gridsly died?" asked Sharp.

"Object," said Quick.

"Of course he can't tell but let him answer," replied the court.

"It was not. I telegraphed for it to be left exactly as when the tragedy had been discovered, but my order was not followed. I saw at once that two men, a young girl and a cripple had been in the room before I arrived."

"How did you discover that?" queried the court.

"Very easily, your honor, from the dust in front of the door."

"Strike out that answer," snapped the judge.

"If your honor please," implored Sharp, "kindly let the witness explain. He is a man gifted with more than ordinary sight."

"This court has never held mind-reading, prophesy, or table-rapping as competent testimony, Mr. Sharp, and doesn't intend to begin now."

"But your honor, dust will show foot-prints."

"Perhaps it may, but I do not consider it competent evidence of either health or sex. The witness may try to explain, but I shall rule the testimony out just the same. Have you brought the dust with you, Mr. Holmes?"

"No, your honor, but I may state that I found in the dust the plain traces of the shoes of two different men, also the mark of a woman's heel and a cripple's crutch."

"Huh!" said the court.

"Further," continued the detective, "I told the housemaid I would not betray her if she would give me the names of the two men and the cripple. She broke down and admitted that they were —"

"Object, object," shouted Quick.

"Sustained," said the court. "Strike out the testimony of the dust, Mr. Reporter, that's hearsay too."

"Mr. Holmes," began Sharp, patiently, "describe the condition of the body as you observed it."

"The late John Gridsly was lying stretched at full length on a low couch on the west side of the room, his left arm lay across his chest, his right hanging down by his side. Six inches and a quarter away from this hand a Parkhurst hammerless revolver, one chamber empty, lay where the tall man had placed it."

"Tall man?" shouted Quick.

"Tall man?" echoed the court.

"The one who was with him just before he died," explained Holmes, imperturbably.

"Strike it out," ordered the court wearily. "remove all that tall man from the record. Go on with what you saw, Mr. Holmes, leave imagination to the lawyers."

"I saw also," continued Holmes, biting his lips, "a round bullet hole behind the right ear. I examined closely the chair at the foot of the couch on which the satchel was placed during the quarrel."

"What quarrel," asked the court?

"Between Gridsly and the tall man."

"Did the satchel belong to the tall man also?" asked the court.

"No, your honor, I think it was his uncle's."

"Mr. Reporter," said the court, solemnly, "keep that tall man and all his relations out of the record of this case."

"Mr. Holmes," said Sharp, "kindly describe just what you physically saw in the room at Gridsly Manor the evening of June 16th."

The witness nodded gravely and drew

from an inside pocket a small silver-mounted hypodermic. Dr. Watson half rose in his chair, but Holmes waved him back to his seat.

"Nothing," said the detective, "could be more valueless and unreliable as testimony in the present case than statements as to what I saw."

Holmes placed the syringe against his left wrist and passed the plunger home, all in view shuddered and even the judge turned his face away.

"There," continued the witness, "what you gentlemen physically saw was that I injected something into my arm. As a matter of fact, there was not a drop of liquid in this instrument. Yet every one of you would have sworn falsely on the stand as to what you saw."

Seeing that both court and counsel were about to indignantly deny his assertions, the witness hurriedly added:

"As to the present case, let me forget intelligence and be a good witness. I saw three finger prints above the mantel shelf; about an ounce of red soil in front of the long window on the east, and a box of Rio cigars on a table, the ashes of cigars in an ash tray, a little spilt ashes and red soil on the chair at the foot of the couch, some dust on the floor, and a long scratch at one place on the polished surface. There was no towel on a towel rack in a curtained alcove. May I also state what I saw through a miscroscope, your honor?"

"Object," said Sharp, "not qualified to testify as to miscroscopic examinations."

After another series of ungrammatical questions the witness was declared qualified and proceeded.

"Through the miscroscope, I saw that the finger prints above the mantel shelf were oily and recent."

"Object to conclusions," snarled Quick.

"'Oily' is a fact," said the court, "'recent,' the witness may testify to as an expert."

"Does your honor overrule the objection?" inquired Sharp, breathlessly.

"I do," said the court. Under stress of joyful surprise Sharp collapsed into the arms of his chief clerk, but soon recovered his poise.

"The red soil was not red soil," continued the witness, "but rotted leather, the cigar ashes showed a large quantity of the domestic Rio cigar ashes with a small quantity of an imported clear Havana, the dust on the floor showed heel prints of one pair of shoes with whole heels and one pair with one heel torn off, so that the nails scratched the floor. May I state conclusions from these facts, your honor?"

"You may state any opinion as an expert detective based on the facts before the court."

"As a very expert detective I would say that a tall, courageous, blond man, with blue eyes —"

"Shall I take that down?" asked the reporter.

"Take it all down," said the court, "let counsel object after I hear this through."

"That a tall, blond man," repeated Holmes, "carrying a small, worn-out satchel entered Mr. Gridsly's room at 9:25 P.M. June 16th, by the low window to the east. He talked amiably for about half an hour, smoking a cigar he brought with him. Then he and Gridsly quarreled, and Gridsly was shot as he lay on the couch, the sound of the discharge being muffled in a towel, which the tall man took away in a satchel. He left the house at 10:20 and —"

"That's enough," interrupted the court, "I enjoy this little romance immensely, but I can't really listen to it in my official capacity. Strike it all out."

"Can you give out any more facts, Mr. Holmes, which will shed light on this subject?" asked Sharp, despairingly.

"Yes," said Holmes, smiling quizzically, "there is one more fact — the revolver at Gridsly's side was a 32 caliber, the bullet which passed out through the mouth I

found imbedded in the wall. It was a 36."

"That is all," said Sharp triumphantly.

Mr. Quick refused to cross-examine.

"I suppose," said Holmes to Watson a few weeks later, "if I had attempted to state that that 36 bullet was from the tall man's gun, but that Gridsly shot himself with it, our vociferous friend, Mr. Quick, would have objected and the court sustained the objection. It was plain, however, that that was just what had happened. Of course his tall friend couldn't risk leaving his gun, so he laid poor Gridsly's on the floor beside him. At all events I found the tall man dead in a cheap London hotel, so both their souls are at rest now, and I've done my duty as an expert witness. An expert, Watson, is a man who can't be trusted to state his honest conclusions, because of course he hasn't any, but whose opinion on facts (which like statistics cannot tell a lie!) is good as gold — or at any rate as good as gold can buy."

CHICAGO, ILL., July. 1907.

COMMON CARRIERS IN FRANCE

By B. H. Conner

I. Carrier of Goods.

Art. 8 of the *Code de Commerce* provides that every trader shall keep a Journal in which shall be entered all his transactions, showing day by day, his assets and liabilities, acceptances and endorsements, receipts and expenditures. This Journal must be initialed and inspected by the Mayor or one of the Judges of the Tribunal of Commerce once every year and kept for at least ten years.

(*Code de Commerce*, Arts. 10 and 11.)

Art. 96 of the *Code Civil* provides that every agent who undertakes the carriage of goods by land or water shall enter in his Journal a memorandum of the character and amount or quantity of goods received for carriage and, if required, of their value. (See also Art. 1785 of the *Code Civil*.) By means of these simple regulations a record is provided for all shipments of goods in France.

Elaborate provision is also made for the drawing up of way-bills and bills of lading. Copies of these must be kept. Bills of lading must be made out in four originals, each of which must mention the others, and all of which must be signed by both the shipper and the master of the vessel. One of them is kept by the master, a second by the shipper, a third is for the owner of the vessel and the fourth for the person to whom the goods are shipped. As a matter of practice the duplicate way-bill is superseded by a simple receipt, which must, however, contain the same particulars as those provided for way-bills. (See, as to way-bills, *Code de Commerce*, Art. 102 *et seq.* and as to bills of lading, Art. 281 *et seq.*)

After the removal of goods from the warehouse or possession of the shipper or vendor, they are carried, in the absence of any stipulation to the contrary, at the risk of the owner, subject, of course, to the owner's right of action against the carrier or agent. (*Code de Commerce*, Art. 100.) The carrier's liability begins on delivery of goods at dépôt. (*Code Civil*, Art. 1783.) He is liable for all damage from any cause whatever, including the negligence of a sub-agent, excepting that due to —

1. Defects in the goods shipped;
2. Unavoidable accident;
3. Act of God or the public enemy (*Force majeure*).

He is held to guarantee, not only the safe delivery of the goods, but their arrival in the time agreed upon. (*Code de Commerce*, Arts. 97–99, 103–4, 277; *Code Civil*, Arts. 1147, 1782–6.)

Shipment at minimum rate (by slow freight or *petite vitesse*) is a waiver of any claim on account of late delivery. Acceptance of the goods and payment of transportation charges also constitutes a waiver of all claims for indemnity for damage or partial loss unless, within three days after receipt, Sundays and legal holidays not included, notice is given by process-server or registered letter, specifying grounds of claim. This rule may not be modified by contract excepting as to international commerce. (*Code de Commerce*, Art. 105.)

The carrier may limit his liability by contract only so far as to relieve himself of the presumption of negligence in case of damage or loss and to shift the burden of proof upon the plaintiff. (See Req. 9, Nov. 1898, Dalloz Périodique, 1899–1–243.)

Goods shipped to a bankrupt may be stopped *in transitu* at any time before delivery at his warehouse or to his selling agent. (*Code de Commerce*, Art. 576.)

Actions for loss, damage or delay must be brought within one year. Other claims

growing out of the contractual relation etsablished by the shipment of goods must be brought within five years. (*Code de Commerce*, Art. 108.)

II. Carriers of Passengers.

The nature of a carrier's liability for injuries to passengers from accidents is frequently stated by text-writers to be contractual. The decisions of the courts, on the contrary, generally treat it as a question of tort. As concerns the evidence, the rule is the opposite of that in actions for damages for loss of or injury to goods, the burden being on the plaintiff in actions for personal injuries, to prove the fault of the carrier. This principle is supported by a long line of decisions, though there are some which contradict it. (See Paris, 27 July, 1892, Cie. Générale des Omnibus, S. & P. '93-2-93.)

In case of damage to a parcel carried by a passenger, recovery may be had only on proof of negligence on the part of the carrier. This appears to be on the ground of *absence of contract.* (See Trib. Civ. de la Seine, 29 Jan. 1898, Dalloz Périodique, 1900-2-172.)

The liability of the carrier may be grouped under the following heads: —

1. Liability for injuries due to negligence of employés or agents;

2. Liability for the use of defective material;

3. Liability for injuries due to the actions of third persons which proper diligence would have prevented.

Where an attempt was made to assassinate a passenger, and no violation of adminstrative rules on the part of the company was shown, the latter was held not liable. (Paris, 16 Dec., 1873, James.)

And when, in time of war, an officer took possession of a train and commanded it to be run under his instructions, the company was held not liable for a collision which ensued, (Trib. Seine, 15 Feb., 1874.) A carrier is not liable for damages due to defective material if proper care has been used in its purchase or selection. (Trib. Seine, 4 Aug., 1872.)

Contributory negligence bars recovery. But the courts sometimes allow partial recovery on a theory similar to the doctrine of Comparative Negligence. Thus by judgment of 24 March, 1904, reported in Dalloz, Receuil de Jurisprudence, Part 2, p. 54, in the cases of Chemin de Fer du Nord c: Guévord et Vinart, the plaintiffs were denied relief on the ground that their injuries were due, primarily, to their having been, without authority, on the grounds of the Railway Company. While in the case of Chemins de Fer de l'Ouest c: Langlois, reported same volume and page, where plaintiff's intestate was killed by being thrown from a train by the sudden starting of the locomotive after having once stopped, the Appellate Court sustained a finding for the plaintiff but reduced the amount of the judgment, because the plaintiff's intestate was negligent in leaving his seat before the train had stopped. (See also Repértoire du droit Français, 1893, Vol. 10, p. 640, Art. 4308 bis.)

III. Control of Railroads: Regulation of Rates.

At the time of the substitution of locomotives for horse-power on passenger lines the Legislative power succeeded the Executive in regulating rates and other details of railway traffic. The question of the ground of the state's right to interfere has given rise to a number of theories which, however interesting they may be as matters of academic discussion, throw little light on the present powers of the state or the future government of the roads. Suffice it to say that many roads have been built with the assistance of the state, by means of loans, subsidies or guarantees of interest, and there is now a tendency to take over the roads and run them as government

properties, as some roads are already held and operated in France; and that the Minister of Public Works has supervisory powers in the matter of rates, as to both passenger and freight traffic. The question will be clearer after looking for a moment into the method of creating a railroad in France. The first step necessary is to obtain a Declaration of Public Utility (Déclaration d'Utilité Publique). Then the construction of the proposed road must be authorized by the Legislature. This authorization, or Charter, is called a "Concession." The limits of the road to be built and the conditions under which it is to be conducted are set out fully in what is termed a "Cahier des Charges," so that the road is organized and the rates fixed, at the outset, under government supervision. The *Concession* may be granted to the State itself, to a department, a commune, or to a private company (Compaignie Concessionnaire). It is hardly necessary to add that the state has the power to appropriate lands for the construction or use of railroads, when necessary. This proceeding is called "Expropriation pour cause d'Utilité Publique." After the establishment of a road the rates may not be changed without the authorization of the Minister of Public Works. The method of modifying the *tariffs*, or rate of charges, is as follows.

The company publishes a bulletin informing the public of the changes proposed. At the same time it notifies the Minister of Public Works. If the Minister approves, the new *tariffs* become operative thirty days after the publication. If the scale prepared by the company is altered by the Minister of Public Works, the items so changed must be published in a second bulletin, and do not come into effect until thirty days after this new publication. These changes are made on the initiative of the companies, and it is doubtful if the Minister of Public Works has the power arbitrarily to change the schedule. From the foregoing it will be seen that the State exercises thorough supervision of the carriers' operations and the regulation of rates is a matter of national habit, presenting a very different state of affairs from that existing in the United States, where powers once exercised by the transportation companies have been gradually curtailed by the government. In France the right of government control is one of the conditions of a railroad's existence. The situation, in this aspect, is ripe for the experiment of government ownership or the ultimate socialistic régime, the sentiment in favor of which is already so prevalent in France that the Socialist Party was able to carry the last election and now holds the reins of power. A bill was introduced in the Legislature several months ago, providing for the purchase of the Western Railroad System (Chemins de Fer de l'Ouest). It is not probable that this bill, as it stands, will be passed, but it is believed that the realization of its object is only a matter of time.

PARIS, FRANCE, July, 1907.

ANCIENT LAWYERS

By Eugene F. Ware

THE first definite records of legal custom and procedure come from the ancient city of Athens, and more particularly appeared in the plays of Aristophanes over 2300 years ago. But traces of lawyers and legal procedure are very much older.

In March of the year 422 B.C. Aristophanes read one of his plays to a Greek audience in which he introduced some interesting characters. It seems that a wealthy Grecian farmer, so the plot ran, had become inoculated with what he called the "horse fever." And this horse fever impelled him to horse racing and gambling; and in the course of campaigning his horses through the country, at the various races, and betting upon them, he became seriously in debt; and as Socrates was represented as running a law school at the time, or, in the language of the author, a "thinking-shop," the farmer determined to study law, and then try and defeat his creditors. He went, so the story runs, and studied with Socrates, but could not do very well and so quit; but as he had a son who also had the horse fever, and was betting on the races, he brought this son to Socrates, to have Socrates graduate him at law, so that the son could fight his father's creditors.

To make a long story short, the young man was a failure, and the whole scheme came to naught. But in the play there are many interesting passages as showing the methods of the day. It seems that the people of Athens were extremely litigious. In fact a subsequent play, entitled "The Wasps," was written by Aristophanes to set forth that particular characteristic among the people; but in the first play to which I allude, "The Clouds," there are more interesting paragraphs than in the second. It appears from these plays that one method of issuing summons was verbal. The quarrels that were had in the street generally ended by one of the parties, then and there before witnesses, summoning the other party to appear before a certain judge on a certain day; so it appears in that ancient time each person might serve his own summons verbally, in the presence of witnesses; and hence when any accident or tort happened, one party immediately notified the other party to be and appear before a certain magistrate at a certain time to respond to such demand as might then be made, although there were professional summoners.

The author, Aristophanes, seems to be very much opposed to lawyers, and represents them as full of tricks. For instance, let me read a passage: The old farmer is represented as talking to Socrates thus:

Farmer. I have found a very clever method of getting rid of my lawsuit, so that you yourself, Socrates, would acknowledge it.

Socrates. Of what description?

Farmer. Have you ever seen this stone in the drug stores, the beautiful and transparent one, from which they kindle fire?

Socrates. Do you mean the burning glass?

Farmer. Yes, I do. Come what would you say pray, if I were to take this burning glass, when the clerk was entering the suit, and were to stand at a distance in the direction of the sun, thus, and melt out the letters of my suit?

Socrates. It would be cleverly done.

Farmer. Oh, how I am delighted that a suit of five talents ($5,000.00) has been thus canceled. (Clouds, 760.)

This picture of ancient Athens is a valuable one. There is the drug store with a lot of druggist's sundries in. It is probably on a corner. There is a glass lens, for glass had long been known, at least three thousand

years. This lens, as a burning glass applied to the parchment, blistered out the text while the clerk of the court was entering the suit. Thus, we have courts and clerks and drug stores and the materials with which to make telescopes all in this one quotation.

Athens seems to have been a modern city, because the author speaks of parasols and umbrellas and of the youths kicking foot-balls; and the characters from time to time have with them folding camp stools, and there are informers constantly bringing *qui tam* actions. One person is returning home to a distant Greek town; a colloquy occurs in which he is asked what he is going to take back, whether crockery or anchovies, and he says, "No, we have them at home; I will take back an informer," to which the querist replies, "Better pack him up like crockery." Some of these informers made a business of informing upon non-resident aliens, and attaching their property much after the methods of the present day. Others looked after resident aliens. One of them in the play is addressed as follows:

"Have you not from the first displayed impudence which alone is the protection of orators, on which you relying drain the wealthy foreigners. (.....) But, indeed, another fellow much more rascally than you has appeared, so I rejoice. He will immediately put an end to you, and surpass you, as he plainly shows, in villainy, impudence, and knavish tricks." (Knights, 325.)

Another informer is thus addressed:

"Oh, you rascally and abominable brawler. Every land is full of your audacity and extortions and indictments and law courts, oh, thou mud slinger." (Knights, 300.)

Another one is addressed as follows:

"You talk twaddle. Have you the audacity to abuse wine as senseless? Can you find anything more businesslike than wine? Don't you see when men drink they are rich, win lawsuits, and are happy and assist their friends? Come, bring out a measure of wine quickly that I may moisten my mind and say something witty." (Knights, 90.)

Another person is addressed as follows:

"If you have anywhere pleaded some little suit well against a resident alien babbling the livelong night, and talking to yourself in the streets and drinking water and showing yourself off and boring your friends, you have fancied that you were a great orator." (340.)

Another speaks:

"By Jove, if two orators were talking and one was recommending the building of ships of war, and the other, on the contrary, the spending of this money on his hearers, the one who spoke of paying his hearers having outstripped the one who spoke of warships would go his way rejoicing. (. . . .) Now tell me, if any fawning lawyer should say, "You jurymen, you get no pay unless you decide against this suit, what would you do?" (Knights, 1350.)

It appears further from the plays that in the courts of law where there were any parties litigant over sixty years of age, their cases were set in the order of precedent of their ages, so that cases of old people might be the first heard and decided. But the priority of the other cases was not as regards filing of the suit but according to lot. So that no one could tell exactly when his case was coming off, and when the case was set it was set for two days, so that the first day could be used in efforts for compromise.

The jury were also the subject of much ridicule. The jury seemed to be at that time the citizens at large who cared to come and listen to the case. There was no regular panel and no regular number of jurors, but when certain citizens as jurors became tryers in the case, they must stay until the case was closed. The pay of the jurors per day was three obolii; various slang terms were applied to jurors as "Brethern of the three obol pieces," there being a coin of three obolii in silver of the value of one of our dimes.

The farmer to whom I first referred, in the

play, being overcrowded with his debts, had trouble with his son who was unable to defend him, and the son says:

"Ah me, what shall I do, my father being crazed? Shall I bring him into court and convict him of lunacy?" (Clouds. 845.)

It will be plainly seen that the writ *de lunatico* was in vogue. The father had thought his son was a very clever young man and recommended him to Socrates as follows:

"Never mind, teach him, he is clever by nature; indeed from his earliest years when he was a little fellow, only so big, he was wont to form houses and carve ships within doors and make little wagons of leather and make frogs out of pomegranate rinds, you can't think how cleverly; but see that he learns these two cases, first, the better, whatever it may be; and second, the worse, which by maintaining what is unjust overturns the better. If not both, at any rate teach him the unjust one by all means. (Clouds, 877.)

Afterwards the practice of law is referred to in the comedy as "the practice of loquacity" (925) and speaking of the youth the same person says:

"Yet certainly shall you spend your time in the gymnastic school, sleek and blooming, not chattering in the market place rude jests, like the youths of the present day, nor dragged into court for a petty suit, greedy, insincere, and knavish." (1005.)

The farmer tells Socrates regarding the former's son:

"Teach him and chastise him, and remember that you train him properly on the one side, able for petty suits, but train his other jaw able for the more important causes." (1108.)

The farmer comes back to Socrates after the son has been educated and Socrates greets him with, "Good morning." The farmer says:

"The same to you, but first accept this present. For one ought to compliment the teacher with a fee. Tell me about my son, whether he has learned that cause which you just now brought forward?"

SOCRATES. He has learned it.

FARMER. Well done, O Fraud, thou all-powerful queen.

SOCRATES. So that you can get clear off from whatever suit you please.

FARMER. Even if witnesses were present when I borrowed the money?

SOCRATES. Yea, much more. Even if a dozen be present.

FARMER. Then I will shout with a very loud shout, Ho, weep you petty usurers, both you and your principal, and your compound interest. (1145.)

One of the jurymen tells how the eloquence of the lawyers is showered upon him, and also how he is flattered by them, and how some lawyers lament their poverty, and others tell laughable jokes from Æsop, and others bring in their children to influence the jury, and others affect a derision of wealth; and how when an actor is defendant he does not get off until he recites some beautiful passage, and how the flute players must play the flute to the jurors: — and then follows this quotation:

"And if a father, leaving an heiress at his death, give her to any one with respect to the principal clause; *we having put a long farewell to the last will and testament*, and to the case, which is very solemnly put upon the seals, give this heiress to him who by his entreaties shall have won us over, *and this we do without being responsible*." (Wasps, 585.) This indeed sounds modern.

Then the juryman goes on to say that when he comes home with his jury money, three obols, his daughter washes him up and kisses him and wheedles him out of the money. There is inserted in this colloquy a maxim of a wise man who said, "You can't judge till you have heard the speech of both."

It seems that when the vote was taken by the jury, the crier of the court said: "Who is there who has not voted. Let him rise up" (750), so that they might

know the number of votes rightfully cast, and closes, saying: "The jurymen, when the witnesses lie, with difficulty decide the matter by ruminating upon it."

One actor says, turning as a lawyer to the audience:

"Veteran jurymen, clansmen of the three obol coin, whom I feed by bawling right or wrong, come to the rescue, I am being beaten by a conspiracy." (Knights, 255.)

It does not seem to have been necessary to have known the name of the person who committed a tort when the summons was served. In one case the following form is found:

"I summon you, whoever you are, before the market clerks for injury done to my wares, having this man Chaerphon as my witness." It seems that in an action of tort for an injury the plaintiff was entitled to any judgment which he recovered, but if he recovered no judgment whatever the defendant got a judgment against the plaintiff for the sum which the plaintiff sued for. Therefore the plaintiff must needs win if he brought his suit, and if there was any doubt about his winning he put the amount of his recovery low, so as not to suffer much of a penalty. Persons are frequently spoken of, in the plays, as doing nothing else but trying lawsuits.

There seem to have been traveling summoners and informers, because in one of the plays a man is represented to be hunting around to find somebody who could furnish him with wings, and in reply to a question, an informer says:

"I am an island summoner and informer."

ACTOR. Oh, blessed thou, in thy vocation.

INFORMER. And a pettifogger. Therefore I want to get wings and hurry around the cities, and issue summons.

ACTOR. In what way will you summon more cleverly by the aid of wings?

INFORMER. Not so, by Jove, but in order that the pirates may not trouble me. I will return back again with the cranes.

ACTOR. Why do you follow this occupation? Do you inform against the foreigners, young as you are?

INFORMER. What must I do, for I know not how to dig?

ACTOR. But, by Jove, there are other honest occupations by which it more generally behooves a man to get his living than to get up lawsuits.

INFORMER. I will not shame my race. The profession of an informer is that of my grandfather. (Birds, 1425.)

In one of his plays Aristophanes starts a socialistic movement, and the following dialogue takes place:

P. I will first of all make the land common to all, and the silver and the other things, as many as each has. Then we will maintain you out of these, being common, husbanding and sparing and giving our attention to it.

B. How then, if any of us do not possess land but silver and gold and personal property?

P. He shall pay it in for the public use, and if he don't pay he shall be forsworn.

B. Why, he acquired it.

P. Yes, but in truth it will be of no use to him at all.

B. On what account, pray?

P. No one will do any wickedness through poverty, for all will be possessed of all things, — loaves, slices of salt fish, barley cakes, cloaks, wine, chaplets, chick-peas, so that what advantage will it be not to pay it in?

B. Then do not those even now steal more who have these world's goods?

P. Yes, formerly my good sir, when we used the former laws, but now, for substance shall be in common, what is the advantage of not paying it? (Ecc. 600.)

B. One thing further I ask. If one be beaten in a lawsuit before the magistrate, from what source will he pay off the judgment, for it is not right to pay it out of the common fund?

P. But in the first place, there shall not be any lawsuit.

B. But how many this will ruin.

P. I also make a decree for this. For on what account, you rogue, should there be any?

B. By Apollo, for many reasons. In the first place for one reason, I ween, if anyone being in debt denies it.

P. Whence then did the lender lend the money when all things are in common? He is by lending convicted of theft.

B. By Ceres, you instruct us well. Now let some one tell me this. Whence shall those who beat people pay off a judgment rendered for the assault? I fancy you will be at a loss about this.

P. Out of the barley cakes which he eats. For when one diminishes this he will not insult again so readily after he has been punished in his stomach.

B. And on the other hand, will there be no theft?

P. Why, how shall he steal when he has a share of all things? (660.)

Thus we see that in those days, 400 years before Christ, Athens was a boom town, was full of lawyers and lawsuits, and overrunning with wealth and population.

Let us now go back twice as far as the distance from now to the days of Aristophanes. This brings us to the palmy days of Babylon, Nineveh, Nippur, and Susa.

It has been my good fortune to have had a personal acquaintance with some who have been engaged in discovering and translating the antiquities of those ancient countries, and I have spent many hours in reading the translations of tablets which have been found and translated. I have been surprised at the evidences thus found of judicial systems, and of the fact that no legal document exists in common use to-day but that has its counterpart among the ancient forms. I made a list of some of these, and will briefly give them to you now: —

A letter from a prisoner to the king of Assyria declaring the innocence of the former of the crime charged.

A judicial interpretation of a part of the Assyrian code.

A deed of a field by Titi to Addunaid, giving price half a mana and four shekels in silver (twenty dollars). On the edge is the seizin, "the giving up of the field."

The will of Sennacherib, the king.

A contract for seventy-five oxen.

Sale of three slaves for one mana each.

Sale of house in the town of Hama for one mana.

Sale of house in Nineveh for one mana, in silver (two pounds).

A six year's lease of a plantation.

A contract for loan of eight manas and three shekels of silver at half a shekel interest for six months.

A loan of nine manas and fifteen shekels at twenty-five per cent per annum.

Many other loans running from one and two-thirds per cent to twenty-five per cent per annum.

A joint deed for a house by two brothers.

A conveyance of seven slaves for three manas; one of the slaves had two wives, who were also slaves.

A mortgage of four slaves for 210 manas of copper (430 lbs.).

An arbitration and award that Salmiaki shall pay Assursallim one and one-half manas of silver.

A judicial decision as to the ownership of a female slave, named Salmanu-naid.

An explanation of legal terms.

A record of the judgment of a court in favor of Nabushar-usur.

A loan of money "at the customary rate of interest."

A lot of various boundary stones, engraved with the deed and title of the owner.

A royal grant by Nebuchadnezzar, the king.

A written statement regarding the abstraction of various articles from the royal treasury.

A list of things supplied to the crew of a boat.

The record of the payment of a fee.

Record of payment of tithes, first year of Cambyses.

A chattel mortgage on a door to secure the loan of one mana of silver.

Concerning the dowry of (Miss) Kibitum Kisat.

A sale of land by one brother to another, 3130 B.C.

A money judgment for a debt by a Babylon court.

Satisfaction of a mortgage by a swap of land.

An account of the litigation in which (Mrs.) Bunanitu won her husband's estate from his brother after long contention.

A tablet showing the purchase and conveyance to a man and his wife, jointly, of seven canes, five cubits and eighteen fingers of land situated in Borsippa, for eleven and one-third manas of silver, including the house.

A declaration of a right of way in favor of another.

An acknowledgment of the payment of the first instalment of interest on a mortgage.

A summons in an action of debt for the non-payment of price of slave.

An award of one mana of silver for killing the servant of another.

Deed of partnership between Sininana and Iribamsin, 3400 B.C.

A bequest by a son to his father.

A renunciation by a father of his minor son, accompanied by the adoption of the son by another man.

A declaration of trust by Sini concerning certain property bought and held by him, 3120 B.C.

Record of a loan made for the purpose of paying the interest on another outstanding loan.

An apprenticing by Nubta of Attan to Beledir for five years.

A deed, in sixth year of Cyrus, of real estate in the ward of Suanna in the city of Babylon, giving dimension and abutting owners, signed by seller and witnesses.

An order for straw for workmen on canal.

A tablet concerning the rations of workingmen.

An order on another for five manas of iron, for work done.

A power of attorney from one brother to another to sell a quantity of grain.

A lease of a house by the agent, of a woman, she being the owner.

Slave having been sold when title was in dispute, the tablet shows the matter now all settled, the title perfect, and the money paid.

A loan of field produce in the third year of Xerxes.

A list of tenants who had paid their rent.

A written cancellation and withdrawal of a right of way theretofore granted.

An income mortgage of revenues of a temple.

Instructions from Bullut to an agent to loan some produce to another.

A quitclaim deed by a woman and her husband of certain portions of their revenue.

A receipt by a joint owner for his part of the produce.

The defeat of a lady in a litigation in which she sought to acquire her brother's property.

A renting of slaves for work.

An agreement to deliver a certain quantity of coined silver ("stamped for giving and receiving").

I will further continue this narrative by telling something of the firm of Murashu's Sons. It seems that old Mr. Murashu, of Nippur, was a banker, and broker, and real estate agent, collector of taxes, a sort of county treasurer, so to speak, in Nippur, and in all probability considerable of a lawyer. He carried on business for a number of years, and on his death the firm name was changed to Murashu's Sons, and continued under this name for about seventy years. One of the sons died, and an uncle came into the firm, but the name of the

firm was not changed. We do not know how long ago.

They did a very large business, and a quantity of their records were found. It would seem that when a document like a baked clay tablet became obsolete they filed it away in a cistern, and one of these filing places was found, and the contents are now in the Pennsylvania University. There were all kinds of notes and mortgages, and leases, and documents, which a person under such circumstances would expect to lay away, and which are the same as would be found among the old files of any merchant of to-day. Among these old documents I quote the following:

1. A mortgage is given on land to pay off an old debt and cancel expense of a visit to the king.

2. A debt is assigned, together with the security which was pledged for its payment, and a guaranty is given against future litigation.

3. An inventory is made out for two hundred jars full of old wine, by order of the superintendent of the house of the prince, to RIMUT the inspector of food.

4. A mortgage is given of an orchard which is rented on shares, rent to be paid into the storehouse of Murashu's Sons. The mortgage recites that no other creditor shall have any power over the orchard until the debt is paid.

5. Land and buildings are rented for sixty years. Rent to be paid annually in advance. Part of the land to be put into an orchard.

6. Seventy-two oxen are leased with irrigation implements to run eighteen irrigation stations, four oxen each.

7. Murashu's Sons pay taxes, a mana of silver, a soldier for the king, flour for the king, and gifts for the royal palace; being taxes for one month.

8. A lease of fish-ponds in which the lessee, besides the stipulated rent of about $600.00 in silver, agrees to furnish one of the firm a mess of fresh fish every day.

9. One of the firm rents a house on the ramparts of the temple and pays rent in advance with a stipulation, that if possession is demanded before the end of the lease, he is to get all of his money back.

10. Three hundred and seventy-three sheep and goats are rented out by the firm and are to be delivered by the head animal-keeper. Rent to be paid in sheep, wool, and butter. Ten per cent allowed for death of animals at time of return, but for every dead one shall be returned a hide and two and one-third shekles (one oz.) of sinews. [For bow strings.]

11. Fields cultivated and uncultivated are leased out belonging to the overseer of the carpenters, in five different municipalities, term three years, rent payable in silver, wine, sheep, and flour.

12. Murashu's Sons buy 25,240 adobe bricks to be made and delivered in instalments at their brick shed.

13. Bel-nadin, one of Murashu's sons, buys a gold ring, and takes a guaranty in writing that the emerald set will not fall out in twenty years.

14. Murashu's Sons procure the release of a man from prison, and take a bond from the prisoner's uncle for about two hundred dollars, that the prisoner would not leave town without legal permission.

But among other things there was a very peculiar document which was evidently drawn up by a lawyer of very large experience and is something of considerable interest. It is the compromise of a damage suit, and is as follows:

CONTRACT

Bagadata spoke to Bel-nadin, one of Murashu's sons, as follows:

The town RABIIA, from which silver was taken, HAZATU, and its suburbs, thou hast destroyed. Silver, gold, my cattle, and my sheep, and everything belonging to me, all, thou, thy bond-servants, thy messengers, thy servants, and people from NIPPUR have carried away.

Whereupon Bel-nadin, one of Murashu's sons, spoke as follows:

We did not destroy RABIIA, thy town, from which thy money was carried, and the suburbs. Thy silver, thy gold, thy cattle, thy sheep, everything that is thy property, all, I, my bond-servants, my messengers, my servants, and people from NIPPUR did not carry away.

BEL-NADIN, son of Murashu, gave BAGADATA, on condition that no legal proceedings be had on account of these claims three hundred and fifty "Gur" of barley, one gur of spelt, fifty gur of wheat, fifty good large jars full of old wine including the jars, fifty good large jars full of new wine including the jars, three hundred gur of dates, two hundred female sheep, twenty oxen, and five talents of wool.

BAGADATA has received all of the foregoing. There shall be no legal proceedings forever on the part of BAGADATA, his bond-servants, his messengers, his servants, and the men of those cities and their suburbs which were entered, to wit: — RABIIA, HAZATU, and the surburbs, or any of them against BEL-NADIN, his bond-servants, messengers, servants, and people of NIPPUR.

BAGADATA, his bond-servants, messengers, servants, and the men of said cities, on account of which they said concerning RABIIA, HAZATU, the suburbs of Rabiia, and everything pertaining to that property, none of them shall bring suit again forever against BEL-NADIN, his bond-servants, his messengers, his servants, and the people of NIPPUR.

By the Gods and the King they have sworn that they will renounce all claims as regards those charges.

BAGADATA bears the responsibility that no claim shall arise on the part of the men of those cities against BEL-NADIN, his bond-servants, his messengers, his servants, and the people from NIPPUR.

(Signed by) BAGADATA.

Ten witnesses and the scribe.

To the corporation lawyer; to the lawyer who has defended railroads; street car lines; manufactories and casualty companies against damage suits, the foregoing contract is one of great interest. He has seen compromises and agreements set aside, and has defended suits brought to annul them. He has heard perjury so often that he can recognize it instinctively when he hears it. He has heard the damagee swear to being unable to read; to not having read the compromise contract although able to read; to having signed the contract under false representations; to having been deceived into signing the contract; that the contract was read to him wrongly; that he did not understand the contract when he did sign it; and so forth, and so forth, and so forth. The old lawyer of NIPPUR had had all of this experience; he had been fooled often; he had had compromises set aside often, and so, in this instance, he determined to tie up the plaintiff with a double and twisted knot, and so he first had a disclaimer of liability inserted; then an adequate consideration, the receipt of which was duly acknowledged; then a statement that there should be no subsequent litigation; then a sworn renunciation of all claims; then a *guaranty* to pay any judgment which might be rendered.

No modern lawyer can excel the scientific construction of this old-time compromise agreement, and it is so old that it dates back to the time when silver was more valuable than gold, and was mentioned and classified in advance of gold.

Coming on down from the ancient days of Nippur to the comparatively modern days, the days of ancient Rome, the days of two thousand years ago, we find the law developed to a perfection which gives us great surprise. Every proposition of commercial law and property seems to have been worked out. The Romans were as great in law as they were in road building and empire making. It may be safely said that there are but few principles of modern origin in our present law. Everything was then

mapped out, even down to the details of the laws of irrigation, of rivers, of public and private sewers, of the laws of streets, navigation, and eminent domain. The ancient Romans, who desired to exercise the right of eminent domain for an irrigation ditch, or public improvement, went before the judge then, the same as in Kansas now, and the judge appointed three commissioners, the same as in Kansas, who made an examination and an award of damages for the taking of the right of way.

In 1147 A.D. there was discovered at a monastery in Amalphi, Italy, a copy of the pandects of Justinian which now go by the general name of the Corpus Juris; they give us a full insight into the ancient law. The Roman Emperor Justinian desired that the law schools should have a code of study which would contain a brief of the law, so he appointed an eminent lawyer named Tribonian, who, with forty assistants, proceeded to boil down the law. In his report Tribonian says, that he has condensed his great work from twenty-four hundred text books upon the law which were then extant, showing that law-book writers were then as busy as now. There were at that time in the Roman empire, among others, three large law schools: one at Alexandria, one at Constantinople, and one at Beyrout. The one at Beyrout was larger than any in the United States now, and was reported in the time of Tribonian to have four thousand students studying the Roman law. Justinian was somewhat vain-glorious of the success of his attempt and put a preface into his great book as follows:

"The Emperor Cæsar Flavius Justinianus, Vanquisher of the Alamani, Gothas, Francs, Germans, Antes, Alani, Vandals, Africans, Pious, Happy, Glorious, Triumphant, Conqueror, ever August, to the youth desirous of studying the law, Greeting."

Aristotle who had written a book on politics had given a definition of justice thus: "What is Justice? To give every man his due." This had stood for several centuries as the best definition of justice until the very celebrated definition of Justinian superseded it and which has never been surpassed. The first sentence is as follows: "Justice is the constant and perpetual wish to render every one his due."

It is a matter of profound regret that but a very small portion of Justinian's great work has been translated into English. The legal primer, the Institutes, being a small part of the Pandects, have been translated, but the code proper and the digest have not. And in order that you may have something of an idea as to the scope of the Roman law and the learning of the Roman lawyers I will give you here some translations. But before doing so I will say that the Pandects of Justinian are a collection of decisions and statements of law taken from the various authors of that time, and each author's name is given to each paragraph quoted from him. Therefore when I make a quotation, although it is taken from Justinian, it gives the name of the Roman lawyer or judge who made the statement. I begin from Ulpian.

"A river is distinguished from a brook, either by its size or the opinions of those living along it.

"Some rivers are perennial; some are torrential. A perennial river is one which flows continually. A torrential river is one which flows in cold weather. If, however, a river which has flowed perennially dries up during a certain summer, it is none the less perennial.

"Some rivers are public, others not. Cassius defines a public river as a perennial river. This definition, approved by Celsus, appears correct.

"The Prætor's interdict, above set forth, concerns public rivers. If private, the interdict does not apply; for a private river differs in no sense from any other private property.

"If the channel through which a public river flows is artificial, the river is none the less public, and whatever is done therein is deemed to be done in a public river.

"If a stream is navigable the Prætor ought not to grant the right that water be taken from it in such quantity as that the stream becomes less navigable; so says Labeo. And the same rule holds if even by such act another stream becomes itself navigable."

POMPONIUS. There is nothing to prevent anyone taking water from a public river, unless the sovereign or the senate forbids it, provided that the water so taken is not in public use. But if the river is either navigable, or makes something else navigable, the water is not permitted to be so used.

ULPIAN. But even if some advantage does come to him who has done a work in a public river — for instance, if the river is accustomed to do his estate great damage, and he has built strong levees or other defenses to protect it, and by reason thereof the course of the river has been somewhat deflected — why should he not receive consideration? I know that many have diverted rivers entirely and changed their beds in consulting the interests of their estates. We ought to look at the usefulness of things and the safety of him who does the work, provided that those who dwell along the river are not injured.

He who wants to strengthen the bank of a public river must give security against future damages, or else satisfaction, according to his property. It is also expressed in this interdict that upon the award of a jury a bond must be given against apprehended injury for ten years or else satisfaction.

JAVOLEMUS. If the site of a private road, footpath, or driveway be occupied by the current of a river for a length of time less than is fixed for the loss of a servitude by nonuser, and during such time the condition is restored by the formation of alluvion, the servitude is restored in its original force. If time enough has run to destroy the servitude, then the right of way must be legally renewed.

PAULUS. An island which has formed in a river does not become the common property, in undivided shares, of those having estates on the river side, but in definite parts. For each shall have as much as lies in front of him, measured by a straight line through the island in prolongation of the boundaries of his estate.

PROCULUS. Question: — "In the river fronting me an island formed in such 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 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 of 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."

MUCIUS. Ditches made for drying the fields are also made for the purpose of cultivating the estate, but ought not to be so made as to cause the water to flow in channels. One ought to so improve his own land as not to injure the land of his neighbor.

ANTILICINUS. A decree of the emperor addressed to Statilius Taurus was in these words:

"Those who were accustomed to convey water from the Sutrino estate came before me and alleged that the water which through many years they had been using from spring in said estate they could no longer use because the spring had become dry, but

that later the spring had begun to flow again. They ask me that the right, which was not lost by negligence or wrong, but because they could not get the water, be returned to them.

"As their demand does not appear unjust, I believe they should be assisted. Therefore I wish them restored to the rights they had when the spring went dry."

A PRÆTOR'S INTERDICT. The Prætor says: "*I forbid violence to him who adversely to you seeks to repair and cleanse a sewer, which from his house passes through yours. I will order security to be given as to apprehended damages from faulty work.*"

ULPIAN. This interdict pertains equally to near neighbors as well as to remote ones, through whose houses the sewer is carried.

Hence it was that Favius Hela wrote that this interdict permits one to go into his neighbor's house and tear up the stone floor for the purpose of cleansing the sewer.

Pomponius writes that in such a case it is to be anticipated that a bond for threatened damages may be compelled. Such a bond, however, will not be compelled if he shows himself prepared to restore everything which it is necessary to tear up in repairing the sewer.

Here I leave the subject of "Ancient Lawyers" with the fixed belief that good lawyers have cheered and charmed the world for several thousand years.

TOPEKA, KANSAS, July, 1907.

The Green Bag

PUBLISHED MONTHLY AT $4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

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, facetiæ, and anecdotes.

LEGAL ETHICS

The recent discussions of legal ethics are continued by two magazine articles. In the June *Putnam's* (V. ii, p. 293) Frederick Trevor Hill briefly discusses instances of what he regards as dishonesty connived at by lawyers. Although the propriety of his criticisms of some of these examples one would hardly dispute, the force of his article is weakened by the fact that he includes the defense of the statute of limitations among these. In the *Independent* of April 18th (V. lxii, p. 908), Julius Henry Cohen writes of "A Code of Ethics for Lawyers." He criticises the theory that even a guilty criminal is entitled to legal services to see that his rights are preserved, apparently on the ground that he has no rights. He too seems to regard the statute of limitations as an improper defense. While it is admitted by none more readily than the lawyers that the opportunities for dishonesty in the practice of their profession are frequent and the more reprehensible since occurring in the process of the attainment of justice it seems that the pendulum has swung a little too far in criticism of the profession, when the plea of a statutory right enacted by the people presumably upon grounds of public policy is attributed as an offense against morals and justice. It is hoped that the code which is being prepared for the American Bar Association will clarify ideas both within and without the profession concerning this most important subject.

AMERICAN BAR ASSOCIATION

The annual meeting of the American Bar Association will be held at Portland, Maine, on Monday, Tuesday and Wednesday, August 26th to 28th, at the beginning instead of at the end of the week as heretofore. This change is due to the meetings of the International Law Association, which will follow it on Thursday, Friday and Saturday, at the same place. The meetings of the Association of American Law Schools will be held during the sessions of the Bar Association, the Conference on Uniform State Laws being held at the close of the week before. The meetings will be held in the city building.

On Monday morning, President Parker will deliver his review of statute law of the past year and Monday evening Charles F. Amidon, U. S. District Judge for the district of North Dakota, will give a paper on "The Nation and the Constitution," and Charles A. Prouty of Vermont, member of the U. S. Interstate Commerce Commission, a paper on "A Department of Railways; Its Legal Necessity." Tuesday will be devoted to reports of committees and on Wednesday morning Right Honorable James Bryce, the British Ambassador, will deliver the annual address on "The Influence of National Character and Historical Environment on the Development of the Common Law." On Thursday the Cumberland Bar will give an excursion by steamship among the islands of Casco Bay, ending with a New England clam-bake. The program of the International Law Association includes addresses by Mr. Justice Kennedy and Mr. Justice Elliott of the English High Court and by eminent jurists of many other countries.

The attractions of Portland in August and the fact that so many lawyers make their summer homes in northern New England will insure a large attendance at meetings, affording such an opportunity as this.

CRIMINAL LAW REFORM

In the *Outlook* for June 15th (V. lxxxvi, p. 321) is a very clear and thoughtful discussion of " American Discontent with Criminal Law " by George W. Alger. He reminds us that a century ago public opinion in England compelled reform in the methods of the English Court of Chancery, and that the American public in the same spirit is preparing to take up the condition of our criminal law. The causes of present defects in our system are partly the fault of the law but more especially due to the attitude of the public in lack of respect for the law. Especially do we allow a vicious sentimentality in favor of the individual to override provisions established for the protection of the general public. If he were writing his manuscript to-day perhaps he would find an illustration in the reported clamor of a German mob against the conviction of Han. This indicates that we are not the only sufferers from the malady. He says, " Today perhaps the strongest and worst influence for lawlessness which our country knows, the primary responsibility for which does not belong to the courts, is yellow journalism; the journalism which in everything it recounts or describes uses exaggerated sentimentality, freely mixed with falsehood, and which at best furnishes to adult readers nothing better than dime novel pictures of daily life; the journalism whose very existence depends upon bringing some fresh excitement to startle the overfed emotions and arouse the passions of its readers." In this connection readers of the GREEN BAG will be interested to recall Clarence Bishop Smith's article on " Newspapers and the Jury " in the GREEN BAG, V. xvii, p. 223. The defect in practice which he chiefly criticises is our policy of magnifying the jury at the expense of the judge and the attitude of the appellate courts toward insignificant technical errors at the trial which have practically driven the trial judges to the position of umpire at a trial conducted by counsel.

In conclusion he says, " The two great evils of our criminal law today are sentimentality and technicality. For one of these defects the remedy must come from the hands of the legislatures, the courts, and the lawyers. The other must depend for its cure upon the growth of public opinion, under the demands of which reason, sober sense, and regard for law shall control all other influences and emotions in the jury box. Our discontent with the criminal law, to be effective, must direct itself to the removal not merely of one of these evils, but of both." It is interesting to add that the Alabama State Bar Association has begun correspondence with other State associations with a view to united action in favor of reform of the admitted abuse of criminal appeals. The result of their labors should give us a more definite conception of effective remedies for the faults for which the profession is responsible and which are usually made the excuse for the lawlessness for which unreasoning sentimentality is the cause. All this discussion is encouraging. If the lawyers can be induced to take a real interest in their sins, the rest will soon follow.

MEDICAL EXPERTS

The Medico-Legal society has taken up with energy the question of expert medical testimony, and has selected a committee of which Chief Justice Emery of Maine has accepted the Chairmanship, to see if some relief cannot be found for that condition of degradation into which medical expert evidence has now confessedly fallen. Other members of the committee are, Judge Garrickson of New Jersey, Judge Cobb of Georgia, and Chief Justice Rowell of Vermont.

THE WAR IN THE SOUTH

As we go to press the latest news from the front indicates that overtures for peace made by the Judge of the District Court of the United States for the District of North Carolina have been rejected by the Governor of the State, who has, however, intimated to the representatives of the railways, who amid fines, jails and injunctions seem to be between the devil and the deep sea, the terms on which he will submit to a suspension of hostilities, and promises upon their acceptance to use his good offices to restrain his people from guerilla attacks All of which reminds us that there are dramatic possibilities in the Federal injunction that may change from comic to tragic over night.

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

The suspension of publication during the summer by the journals published by many of our leading schools of law and the absence of most of the English quarterlies makes the material for this department exceptionally slender this month. The thoughtful article on Voluntary Associations in the American Law Register stands almost alone in importance.

BIBLIOGRAPHY. "The Public Records and the Constitution," by Luke Owen Pike, London, Eng. 1907.

BIOGRAPHY. "A Great English Scholar." An appreciation of the late F. W. Maitland, by H. A. L. Fisher, July, *Putnams*, (V. ii, p. 420).

CONTRACTS. "Discharge of Contracts by Alteration — A Discussion of Material and Immaterial Alterations," by Geo. A. Lee, *Central Law Journal*, (V. LXV., p. 18).

CONVEYANCING. "The Torrens System: Is it Suitable to American Industry?" by Eugene C. Massie in the June *American Lawyer* (V. xv, p. 251). An analysis of the old and the Australian system of title registration and an unqualified approval of the latter.

CORPORATIONS (New York). "Suits by Foreign Corporations," by Raymond D. Thurber in the May *Bench and Bar* (V. ix, p. 54). A résumé of the cases in New York.

CORPORATIONS. A treatise on the Law of Corporate Bonds and Mortgages, being the third edition of "Railroad Securities," by Leonard A. Jones, the Bobbs-Merrill Co. Indianapolis, 1907.

The importance of litigation which involves corporate securities makes a new edition of this standard work of great interest, for although the general principles seem now well settled, the constant variation in the form of particular securities invented to conform to the needs of involved methods of financing modern business enterprises requires attention to every new decision on the application of these principles. These seem to have been fully and carefully discriminated in this new edition, though it may be regretted that some of the modern English cases on debentures were not included. While the English securities are usually quite different in form from our own there is a tendency on the part of our corporation solicitors to imitate the English forms, so that with proper distinctions the English cases are likely to be of authority.

The plan of the book is the same as that of the last edition, and therefore needs no further comment. The most important chapter relate to the construction of corporate mortgages and bonds, especially with reference to after acquired property, remedies and jurisdiction of courts, and foreclosure and bankruptcy proceedings.

CORPORATIONS. Second Edition of Clark's Handbook of the Law of Private Corporations, by Francis B. Tiffany. West Publishing Company, 1907.

This second edition of the work appears ten years after the publication of the first edition. It is arranged, like other volumes in the Hornbook Series, with a brief summary of the law as a caption for each section. The notes are full with occasionally an important case abstracted at length, and references are generally to several different collections. The work is written directly from the cases themselves and is a succinct, laborious and painstaking statement of what they decide, without theorizing on questions which might arise but have not. Thus the author accurately states that the meetings and proceedings of a corporation are not rendered illegal by the fact that one of the shareholders is under a legal disability, but indulges in no ingenious discursiveness as to what would be the legal rights and obligations of a corporation if all or a majority of the

stockholders were children or insane people. If the learned reader desires a book to which he may turn and find to his gratification that the last case that went against him was erroneously decided, let him go to Thompson's Commentaries rather than to Tiffany's Clark; but if he wishes to review in brief form the law of corporations as it is, or if a student wishes to work up the subject by himself, he will get much of real value from the volume under discussion. For office practice the work, though a handbook of but 700 pages, will be serviceable, for it cites some 2500 authorities, has a table of cases, and a good index. The literary style is sometimes marred by confused English. W. A. R.

COURTS. (English and American). "A Comparison between English and American Appellate Courts" by Thomas H. Hardcastle, in the June *American Lawyer* (V. xv, p. 261), admitting the superiority of the English courts in their celerity of decision, finds the reasons therefore in the following:

(*a*) Fewer number of cases appealed.
(*b*) Larger number of judges.
(*c*) Very much larger judicial salaries.
(*d*) A simplified and settled course of pleading and practice.
(*e*) No criminal appeals.
( ) No original jurisdiction in Appellate Courts.
(*g*) The universal high standard of training and learning among the English Bar and Bench.

CRIMINAL LAW. "The Criminal Appeal Bill." A Symposium, *The Law Journal* (V. xlii, p. 406).

CRIMINAL LAW. "The Thaw Trial," by Samuel J. Barrows, *Charities* (V. xviii, p. 95).

CRIMINAL LAW. "The Trial of Thaw as seen by a Juror," by Juror Number Six, *The Brief* (V. vi , p. 94).

CRIMINAL LAW. "Confession and Autobiography of Harry Orchard," July *McClures* (V. cxcvii, p. 296).

CRIMINAL LAW. "The Idaho Murder Cases," illustrated, the *Independent* for May 16th, (V. lxii, p. 1117).

CRIMINAL LAW. "Abducting, kidnaping, or aiding in the escape of an inmate of a hospital for the insane," by Norvelle N. Henley, July *Virginia Law Register* (V. xiii, p. 169.)

DOMESTIC RELATIONS. "Adoption of an only Son," by Surendranath Ray, *Allahabad Law Journal* (V. iv, p. 181).

ETHICS. 'A Monograph on Legal Ethics,' by John Charles Harris, Texas Bar Ass'n. 1907.

ETHICS. "Law and Lawyers," by Benj. F. Hegler, *The Brief* (V. vii, p. 88).

ETHICS. "Standards of Public Morality," by Arthur Twining Hadley. The MacMillan Company, New York, 1907.

The book is composed of the lectures delivered by President Hadley on the John S. Kennedy foundation in New York in November and December of 1906, which are entitled,

1. The Formation of Public Opinion.
2. The Ethics of Trade.
3. The Ethics of Corporate Management.
4 The Workings of Our Political Machinery.
5. The Political Duties of the Citizen.

The chapter on The Ethics of Corporate Management is of greatest interest, and the author shows that our industrial corporations grew up into power because they met the needs of the past. To remain in power they must meet the needs of the present and arrange their ethics accordingly. If they can do it by their own voluntary development and the sense of trusteeship, that is the simplest and best solution,— if not one of two things will happen, vastly increased legal regulation or state ownership of monopolies.

EVIDENCE. "Oral Proof of Contents of Writings," by George I. Woolley, *Bench and Bar* (V. ix p. 88).

FRAUDULENT CONVEYANCES. "Scope of Traders' Act" by James Fontaine Minor, July *Virginia Law Register* (V. xiii, p. 172.)

HISTORY (Marshall) "Influence of Chief Justice Marshall in the Supreme Court of the United States," by John A. Shanck, *The Brief* (V. vii, p. 65).

HISTORY. "The Fight for the Minnie Healey," by C. P. Connolly, July *McClures* (V. cxcvii, p. 317).

HISTORY. "Haywood trial. The Moyer-Haywood case," by C. P. Connolly, in *Collier's* (V. xxxix p. 21 and 23). A Continuation of the narrative referred to in our last number.

HISTORY. In the July *Harper's* (Vol. cxv, p. 165) in an article by Robert Shackleton entitled, "Where King Edward is Still Duke of Normandy," is an entertaining account of life on the island of Guernsey, including its quaint judicial system.

HISTORY. By far the best of Frederick Trevor Hill's "Decisive Battles of the Law" is published in the July *Harper's* (Vol. cxv, p. 244) on the case of Dred Scott v. Sanford. The author has investigated the original records of the earlier stages of this famous litigation which have hitherto been shrouded in mystery, and shows that its origin was not only of a humble, but of a rather mercenary nature and that it was only in the latter stages of the case that it was taken up by those interested in the anti-slavery cause and made a matter of national importance.

JURISPRUDENCE. "Custom and origin of Law," Editor, *Madras Law Journal* (V. xvii, p. 81).

LEGISLATION. "The New Citizenship Law," by Gaillard Hunt, *North American Review* (V. clxxxv, p. 530.)

MUNICIPAL CORPORATION (Validity of Ordinances). "Validity of Municipal Ordinances Vesting Discretion in Public Officers or Departments," by Eugene McQuillin. *Central Law Journal*, (Vol. lxv, p. 2). A résumé of the cases under the firmly established fundamental principle that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, leaving no opportunity for arbitrary discrimination by officers or departments.

PARTNERSHIP (See Voluntary Associations).

PUBLIC POLICY (Function of The Courts). "Consideration of a German View of Americans as Law-Builders," by Fred Bracted in the June *American Lawyer* (V. xv, p. 261), starts from a consideration of Von Holst's declaration that the Americans are prone to accept half-truths and "vague ideas for unimpeachable principles" and "sovereign laws." He finds enough truth in it to warn the new state of Oklahoma to take special care to safeguard its courts from susceptibility to popular clamor and confine them to the duty of declaring what the law is, not what it ought to be, leaving amendments to the legislature.

PUBLIC POLICY. "Sunday Baseball," an unsigned article in the July *Law Notes* (V. xi, p. 69), discussing the moral aspect of the question thinks the game should be permitted. Discussing the legal aspect it reviews the situation in Indiana, Ohio, Michigan, Nebraska, Missouri, Illinois and New York. In some theory forbids it but in practice it is allowed, in others it is perfectly legal. New York has this confusing situation.

"We have an *obiter dictum* by the Court of Appeals that Sunday baseball is illegal, but we have a positive declaration by the Supreme Court not yet overruled, that Sunday baseball is not illegal except when an admission fee is charged to witness the game, or when the public peace is unduly disturbed. This contrariety of views is largely responsible for the fact that baseball is played on Sunday in some parts of the State and not in others. The magistrates before whom the cases of alleged violation of the law come for decision are at liberty to adopt either view, or to declare, as has been done in some cases, that the question is too unsettled to warrant them in rendering any decision whatever."

SALES. "Is the Furnishing of Liquors to its Members by a Bona Fide Social Club a Sale?" by B. F. Watson, *Central Law Journal* (V. lxiv, p. 482). An elaborate analysis of the conflicting decisions on the subject, concluding that the overwhelming weight of authority is that even a *boni fide* social club, in furnishing liquors to its members for a price, either for cash or on credit, is engaged in the sale of liquor.

TAXATION. "Recent Reports on Taxation," by E. R. A. Seligman, Political Science Quarterly (V. xxii, p. 297).

VOLUNTARY ASSOCIATIONS (Liability). "The Personal Liability of Members of Voluntary Associations," by G. A. Endlich, in the June *American Law Register* (V. 55, p. 337), discusses the cases where a liability is attempted to be fixed upon members of a committee, a club, or any voluntary association by reason of the act, contract or expenditures of some of them or of their chosen officers. Omitting the analysis of cases the article may be summarized as follows:

By a familiar rule outsiders may hold members as partners, though they were not such in fact, if they held themselves out as such and were so dealt with. And it is clear that if persons associated as a committee, club or voluntary association of any description are *inter se* partners, they are liable as such to one another and to outsiders.

An early American case lays down the rule in substance, that a voluntary association for private or individual profit or pleasure, emolument or benevolence is a partnership, but that members of an association for objects of a public nature are not partners *inter se*, whatever may be their relation as regards outsiders. These conclusions were based on old English chancery rulings, now long abandoned in England. Recent American cases give a perplexing echo now and then, but "the weight of authority surely inclines to the view that in associations not for trade or commerce the existence of public objects, as distinguished from objects of benevolence, sociability, pleasure, improvement or protection confined to the membership, is not indispensable to forbid the application of doctrines peculiar to the law of partnership. To that extent, at any rate, the ancient rule must be deemed to be modified by the modern one; the latter being understood as conceding partnership attributes, if at all, only to business associations. In such, where regarded as partnerships, the problem of the liability of members *inter se* and to outsiders present no questions which do not find their adequate solution in the general principles of partnerhsip. In associations which are not partnerships those questions must obviously be approached upon different lines. As to them the rule laid down by the Lord Chancellor in *Re St. James's Club* is fundamental; viz., that 'no member . . . is liable . . . except so far as he has assented to the contract in respect of which such liability has arisen,' — that rule determining his liability or non-liability both to his fellows and to outsiders in the absence of special and necessarily exceptional circumstances.

"The effect of this rule is manifest. Whenever a member not directly participating in the making of the contract is to be visited with responsibility for a debt or an expenditure incurred beyond the resources of the association by its managers or by a fraction of its membership in its behalf, the question is one of agency on the part of those incurring the debt or expenditure."

Whether there is agency or not depends on the ordinary principles of agency and must rest in antecedent authorization or subsequent ratification. If the antecedent authorization is expressed there is little room for trouble. Whether authorization is implied depends largely on the kind of association. One for the purpose of obtaining a charter for a banking company may be held impliedly to authorize needfully incurred expenses.

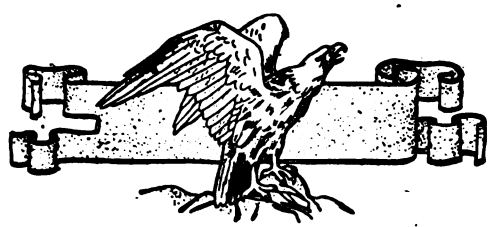
One for whose scheme "contemplates the defraying of all expenses out of funds provided by subscription, dues, etc., implies no authority to any one, member or officer, to pledge without limit the personal credit of the members. It goes without saying that this scheme may be modified by explicit provisions to the contrary or by the adoption of measures in themselves inconsistent with and therefore to that extent displacing it. But nothing of that sort being in the way, common experience and observation, which are the sources of legal presumptions, make the rule stated broadly applicable to associations not for business, trade or commerce. It follows that as to such as a class it may be declared that no general implied authority exists in any individual member, in any fraction of the membership, in any officer or managing committee to bind the remaining members for debts incurred or for expenditures made on behalf of the association beyond the fund provided for its purposes by subscriptions, dues or other contemplated revenues. . . .

"The rule stated has an important bearing also upon the question of subsequent ratification, which again may be express or implied. If the presumed understanding on all hands is that the association is to be managed within the funds provided and that there is no implied power to exceed them, every member has a right to believe that it is being so managed until he is apprized of the contrary. When therefore is becomes a question whether this or that act or omission on the part of a given member is to be treated as an mplied ratification of expenditures, etc., beyond the available resources, the principle that there can be no inference of ratification where the act set up as constituting it was done in excusable ignoance of material facts is one to be reckoned with."

WILLS (Publication). "Testimony Concerning Publication of Wills," by Charles C. Moore, in the July *Law Notes* (V. xi, p. 65). Deals with the weight of evidence on the question whether the requirements of several states that the testator shall declare the document to be his last will and testiment was observed or not, citing many rules laid down by judges in dealing with such evidence.

WITNESSES (Patent's "Privilege"). "A recent Case of Patients' Privilege" by William A. Purrington, in the May *Bench and Bar* (V. ix. p. 48), discusses the case of Clifford *v.* Denver & Rio Grande R. R. Co., in which the New York Court of Appeals, reversing the Appellate Division, recently held that a plaintiff who had secured a commission to take the testimony of an attending physician had waived the privilege, though she did not offer it in evidence and objected to its admission.

WITNESSES. "Witnesses and their Examinations," by B. A. & S.R, *Calcutta Law Journal* (V. v, p. 67n).



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.)

BANKRUPTCY. (Liens.) **Texas.** — A novel question as to the rights of a secured creditor against a bankrupt is decided in Jungbecker *v.* Huber, 101 S. W. Rep., 552. In this case it appeared that a note was secured by a vendor's lien as well as by a mortgage on real property. After the execution of the mortgage, the property became a part of the mortgagor's homestead, and after he was adjudged a bankrupt, was by the Court of Bankruptcy set aside to him out of a larger tract of land, which, exclusive of the improvements at the time of its designation as a homestead, exceeded in value $5000. The holder of the note brought a suit in a state court by authority of the bankruptcy court against the trustee of the bankrupt to foreclose her liens on the property before the note, as shown on its face, was due. The principal question in the case was, could she do this? In answering this in the affirmative, the court says that a secured creditor of a bankrupt can resort to one of three remedies: First, he may rely upon his security; second, he may abandon it and prove the whole debt as not secured, or, third, he may be admitted only as a creditor to the balance after deduction of the value of the security. Plaintiff in the case at bar pursued the latter remedy. Had she chosen the first, she would have had no recourse on the general fund in the hands of the trustee, and would have taken the risk of the property bringing the amount of her debt at a foreclosure after the note matured. Had she pursued the second the abandonment of her liens would simply release the property from sale by the trustee, and nothing could be realized from it for the payment of any of the bankrupt's debts, and she would have been told that as a creditor having a lien on the bankrupt's homestead, she was required to exhaust her remedy by foreclosure before she could resort to the general fund. In order for plaintiff to be admitted as a creditor for the balance of her debt, after deducting the value of the property on which she had liens, it was essential for her to foreclose her liens and have the property sold under the decree of foreclosure. If she was required to wait until her debt matured before she could do this, lapse of time would prevent her from being admitted as a creditor for the balance of her debt. A contention that the course pursued by plaintiff cut off defendant's equity of redemption, the court holds defendant estopped from asserting, on the ground that he had by his own acts in having the property covered by the lien set aside as his homestead, compelled plaintiff to pursue this course.

CONSTITUTIONAL LAW. (Insurance — Suicide as Defense.) **U. S. Sup. Ct.** — The validity of the Missouri Statute (Rev. St. 1879, Sec. 5982) which excludes suicide as a defense in a suit on a life insurance policy unless such suicide was contemplated at the time application was made for the policy is upheld in Whitfield *v.* Hadley, 27 Sup. Ct. Rep. 578. It was suggested that the statute "merely encourages suicide, and offers a bounty therefor, payable, not out of the public funds of the state, but out of the funds of the insurance company." The court says that there is some foundation for this suggestion in Ritter *v.* Mut. Life Ins. Co., 169 U. S. 139, 42 L. Ed. 693, 18 Sup. Ct. Rep. 300, wherein it was held that public policy, even in the absence of a prohibitory statute, forbade a recovery on a life policy silent as to suicide, where the insured when in sound mind wilfully and deliberately took his own life; but the court observes that the determination of the case at bar depends on other considerations than those involved in the Ritter Case. An insurance company is not bound to make a contract which is attended by the results indicated by the statute. If it does business at all in the state it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot for that reasonal one be disregarded,

for it is the province of the state, by its legislature, to adopt such a policy as it deems best, provided it does not in so doing come into conflict with the Constitution of the State or the Constitution of the United States. There is no such conflict in the case at bar.

CONSTITUTIONAL LAW (Nuisance, Action by State). U. S. Sup. Ct. — In State of Georgia *v.* Tennessee Copper Company, 27 S. C. Rep. 618, the United States Supreme Court lays down the proposition that foreign corporations will be enjoined at the suit of the state of Georgia from so discharging sulphurous fumes from their works in Tennessee as to pollute the air over large tracts of territory in Georgia, and to cause and threaten wholesale damage to forests and vegetable life therein, if not to health. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in the United States Supreme Court. Missouri *v.* Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 231. In writing the opinion, Mr. Justice Holmes says: "It is a fair and reasonable demand on the part of the sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source." He is of the opinion that the state may be granted relief notwithstanding the hesitation that the court might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property, they should not be left to an action at law. Mr. Justice Harlan concurs in the result, but he is of the opinion that the suit when instituted by the state stands on the same footing as if it was instituted by an individual. He says: "If this were a suit between private parties, and if, under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a state, possessing some powers of sovereignty. Georgia is entitled to the relief sought not because it is a state, but because it is a party which has established its right to such relief by proof."

CONSTITUTIONAL LAW (Police Power). U. S. C. C. A. 6th. Cir. — The validity of a Kentucky statute creating a state racing commission and regulating the racing of running horses is upheld in Grainger *v.* Douglas Park Jockey Club, 148 Fed. 513. The statute while exempting from its provisions trotting meetings or races and races conducted by fair associations, prohibits the conducting of any running race in the state except by a corporation or association licensed by the state racing commission, which is empowered to grant and reject such licenses, to adopt regulations for racing which must be observed by licenses, and to fix the time in each year during which any association may conduct racing, which must be between the first of April and the first of December, its action in certain matters to be subject to review by the courts. This statute while it may operate to deprive persons or corporations of their liberty or property and to create discriminations, the court is of the opinion cannot be held to have any real and substantial relation to the public welfare, nor to be in violation of the 14th amendment of the Constitution, as denying to any person the equal protection of the laws. In the opinion a large number of cases bearing on the question are cited and exhaustively reviewed.

CONSTITUTIONAL LAW (State Regulation of Connecting Carriers). U.S. Sup. Ct. — An order of the North Carolina Corporation Commission, requiring the Atlantic Coast Line Railroad Company to restore the connection at Selma with a train of the Southern Railway Company, which afforded the principal means of travel between the eastern and western parts of the state, is, in Atlantic Coast Line Railroad Company *v.* North Carolina Corporation Commission, 27 Sup. Ct. Rep. 585, held to be not so arbitrary and unreasonable as to amount to a denial of due process of law or to a deprivation of the equal protection of the law, if other connections are inadequate for the public's convenience, although the compliance with the order may necessitate operating an extra train at a loss, or extending, with like result, the run of a local train, so long as the income of the railroad company, from its business in the state, affords adequate remuneration after allowing for any possible loss resulting from the operation of the train. The court draws a distinction between the case at bar and the cases in which it has been held that a statute or order fixing unremunerative maximum rates is invalid on the ground that property is taken without due process of law in violation of the Federal Constitution. In the case of a statute or order fixing a schedule of rates which prove unremunerative, it necessarily

follows that the business of the railroad will be run at a loss. The requirement, however, that a particular train shall be run though a loss will be incurred does not bring on such result. The business of the company in the state may, nevertheless, prove remunerative.

Probably the most important doctrine in this case is the general principle that in governmental regulation of public utilities it is permissible to go so far in a particular matter as to cause actual loss without unconstitutionality; provided that the operations of the public company, taken as a whole, produce fair returns. The case is also noteworthy for the extension of the power of regulation so far as to be actual dictation as to the very details of public service without constitutional objections. B. W.

CONTEMPT (Justification). La. — In State *v.* Reid, 43 So. Rep., 455, which was a contempt proceeding against an attorney, the court holds that where the matter is abusive or insulting, evidence that the language used was justified by the facts is not admissible as a defense, as respect for the judicial office should always be observed and enforced.

COURTS (Exclusive Jurisdiction of Federal Courts). U. S. Sup. Ct. — The exclusiveness of the jurisdiction conferred by the Act of Congress of Aug. 15, 1894, delegating to the Federal Circuit Courts the power to determine controversies necessarily involving the title to, and incidentally the right of possession of, Indian allotments, while the same are held in trust by the United States, is construed in McKay *v.* Kalyton, 27 Sup. Ct. Rep. 346. The court notes that it is observed in the Smith Case, 194 U. S. 408, 24 Sup. Ct. Rep. 676, 48 L. Ed. 1039, that prior to the passage of the Act of 1894 the sole authority for settling disputes concerning Indian allotments resided in the Secretary of the Interior. This being settled, controversies necessarily involving title of Indian allotments, while held in trust by the United States, prior to the Act of 1894, were not primarily cognizable by any court, either state or federal. Therefore it results that the Act of 1894, which delegated to a court of the United States the power to determine such questions, will not be construed as conferring on the state courts the power to pass on such questions on which prior to the Act of 1894 no court had any authority. This decision the court regards as fortified by the subsequent act of Congress, of Feb. 6, 1901, providing that in suits respecting Indian allotments, "the parties thereto shall be the claimant as plaintiff, and the United States as party defendant," and by the provision of the Act of 1894, that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior.

DAMAGES (Mental Anguish). Tex. — Mental anguish as an element of damages receives consideration in the case of Southern Pacific Company *v.* Milner, 100 S. W. Rep., 1170, recently decided by the Court of Civil Appeals of Texas. In this case it appears that plaintiff's wife was ill and about to undergo a surgical operation and desired the presence of her mother, and plaintiff purchased transportation of defendant railroad to be delivered by defendant to the mother in a distant town to enable her to come to her daughter. Through delay in delivery of the transportation, the mother's arrival was delayed for two days; but because of the serious illness of the daughter, the operation had been delayed until a week after the mother's arrival. The evidence showed that the wife was suffering from mental anguish by the absence of her mother before she was sent for, and before any notification came that the mother would not arrive at the time expected. The court held on authority of Western Union Telephone Co. *v.* Giffin, 93 Tex. 530, 56 S. W. 744, 77 Am. St. Rep. 896, that no recovery could be had for a simple prolongation of the mental sufferings of plaintiff's wife, caused by defendant's negligence.

DIVORCE (Foreign Decree). S. C. — The validity of a divorce obtained in a sister state on what might be termed constructive residence, receives another blow in State *v.* Westmoreland, 56 S. E. Rep. 673. On authority of Thompson *v.* Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897, and a long line of decisions following this case, the court holds that the jurisdiction of a foreign court in rendering a divorce decree may be inquired into in a collateral proceeding, and it may be shown that plaintiff in a divorce action was not a citizen of the foreign state, but of the state of the forum when the divorce decree was obtained, though the averment of the record is that he was a citizen of the foreign state. The court quotes from Thompson *v.* Whitman, *supra:* "The records of the domestic tribunals of England and some of the states, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record; but . . . that rule has no extraterritorial force.

DOMESTIC RELATIONS. (Adoption, Religion). Mass. — The right of a mother to have her child brought up by foster-parents in her religious faith is exhaustively considered in Purinton *v.* Jamrock, 80 N. E., 802. The court announces it as the general policy of the Commonwealth to secure to those of its wards who are children of tender years, the right to be brought up, when this is practicable, in the religion of their parents. But in a case such as the one at bar, which involved the adoption of a child, the court says that it is not the rights of the parent that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child. The wishes of the parent as to the religious education and surroundings of the child are entitled to weight; if there is nothing to put in the balance against them, ordinarily they will be decisive. If, however, those wishes cannot be carried into effect without sacrificing what the court sees to be for the welfare of the child, they must so far be disregarded. The court will not itself prefer one church to another, but will act without bias for the welfare of the child under the circumstances of each case. This is the fair consensus of judicial opinion, although a difference of circumstances has caused the use of different expressions and the reaching of different results in the different cases. As was said in substance in F. *v.* F. [1902] 1 Ch. 688, the parents' religion in *prima facie* the infant's religion, and the infant should be brought up in that religion and protected against disturbing influences from persons of a different religious faith; but the infant's welfare must be first of all regarded and its requirements must be treated as paramount. See Stoneton *v.* Stoneton, 8 De G., M. & G. 760; Davis *v.* Davis, 10 W. Rep. 245; In re Nevin [1892] 2 Ch. 249; McGrath *v.* McGrath [1892] 2 Ch. 496, s. c. on appeal, [1893] 1 Ch. 143; In re Meades, Ir. R. 5 Eq. 08; Matter of Jacquet, 40 N. Y. Misc. Rep. 575, 82 N. Y. Supp. 986; Matter of De Marcellin, 24 Hun. (N. Y.) 207; Matter of Turner, 19 N. J. Eq. 433.

EQUITY (Unfair Trade). U. S. C. Ct., R. I. — In Moxie Nerve Food Company *v.* Modox Company, 152 Fed. Rep. 493, the court lays down the proposition that a maker of a proprietary medicine, seeking the aid of a court of equity in the protection of his trade-mark rights should be required, as a part of its affirmative case, to allege and prove that its preparation is what it purports to be, there being no presumption that such representations are true upon which a court can act. The court says: "If a complainant seeks protection in the sale of bottled goods, he should be willing to swear that his bottles contain what he represents to the public that they contain, and that his goods are in fact what they are sold for. If a complainant in a bill of equity should allege, 'I am selling to the public under a certain trademark an article which I represent to the public as fig syrup,' such a bill, in my opinion, should be demurrable on the ground that the complainant has no right to protection in a mere business of making representations to the public, but only in a *bona fide* business of selling an article for what it is in fact. A court of equity should not extend protection to a business of selling medicine for paralysis or other serious diseases simply upon proof that the preparation is a harmless beverage with some slight tonic properties. Missouri Drug Co. *v.* Wyman (C. C.) 129 Fed. 623, 629.

INSURANCE (Rebates). Wis. — Various states have enacted statutes prohibiting the giving of rebates by life insurance companies. Wisconsin has such a statute which authorizes a revocation of the company's license in case of a violation of the statute. The effect of this statute on the validity of a policy on which a rebate had been given came up for consideration in Laun *v.* Pacific Mutual Life Insurance Company, 111 N. W. Rep. 660, wherein plaintiff sought to recover back the premiums paid. The court after an exhaustive review of the authorities bearing on the question comes to the conclusion that, considering the subject matter of the statute, the relation of other nonoffending policy holders to the corporation and its funds, the feature of the statute permitting rebates if written in the policy, and the particular consequences prescribed by the statute for its violation falling only upon one of the parties to the prohibited transaction (the revocation of the company's license) the contract of insurance itself was neither illegal nor invalid, and that consequently the insured could not recover back the premiums paid or any part thereof.

MASTER AND SERVANT (Volunteers). N. Y. Sup. Ct. — Bamberg *v.* International Ry. Co., 103 New York Supplement, 297, was an action by a passenger on a street car to recover for injuries received in a collision with a wagon at a street crossing. It appears that the driver of the wagon had disobeyed instructions of his employers and permitted a boy to drive the team prior to the collision. The boy drove the team at a trot towards the crossing, and seeing he was unable to stop in time to prevent the collision called to the driver, who seized the reins, which had been at all times within his reach, but was unable to stop in time. Under these facts, the court held that the boy at the time of the accident, though not

employed by the driver's employers, was nevertheless engaged in their business, and they were therefore liable for his negligence as well as the negligence of the driver. The court distinguishes the case at bar from Long *v.* Richmond, 68 App. Div. 472, 73 N. Y. Supp. 912, affirmed in 175 N. Y. 495, 67 N. E. 1084, on the ground that in the latter case the offending third person was not engaged in the defendant's business at the time of the accident complained of.

PUBLIC LANDS (Jurisdiction). U. S. Sup. Ct. — The extent to which the rulings of the United States Land Office are conclusive, receives further elucidation in the case of Love *v.* Flahive, 27 Sup. Ct. 486, recently decided by the United States Supreme Court. In this case it appears that the Secretary of the Interior had made findings to the effect that a party to a controversy before the Land Office had a right to enter land as a homestead. It was contended that such finding was conclusive, so that the Land Office could not subsequently, and before patent had issued, institute further inquiry and on such inquiry finally award the land to a party held to have a better right than the one to whom it had been awarded in the first instance. This contention was based on the rule that the conclusions of the Secretary of the Interior are, in the absence of fraud or imposition, conclusive on the courts on matters of fact. The court holds, however, that while the jurisdiction of the Land Office over a land case ceases when once a patent had issued, and that while it may be conceded that a right of property may become vested by the decision of the Land Office, of which the occupant cannot be deprived except by proceedings directly therefor, and of which he has notice, the jurisdiction of the Land Office does not terminate until a legal title has passed, and until a patent has issued the department may make further inquiry, the parties having notice of the proceedings. Knight *v.* United Land Ass'n, 142 U. S. 161, 12 Sup. Ct. Rep. 258; 35 L. Ed. 974; Michigan Land & Lumber Co. *v.* Rust, 168 U. S. 589, 18 Sup. Ct. Rep. 208, 42 L. Ed. 591. Another point of interest to homesteaders especially, is decided in this case, to the effect that a sale of a homestead claim, before patent is issued, although void, may by the Land Office be treated as a relinquishment or abandonment of the homestead application and entry.

SALES (Conditional Sales). Iowa. — In Flaherty *v.* Ginsberg, 110 N. W. Rep. 1050, it appeared that defendant had sold household furniture to plaintiff on a contract giving the vendor the right to retake the property on a failure of the purchaser to pay the instalments thereof as they became due. After two instalments had become past due, defendant insisted on taking the goods unless the arrears were paid. Plaintiff told defendant's agent that she had been sick and needed the goods; that she desired to hold them longer and try to pay for them herself. The court held that plaintiff had no ground of recovery against defendant for re-possessing the goods and that the mere fact that the purchaser is in ill health, and needs the goods, does not make its retaking under the contract wrongful. To have such effect the purchaser's needs must be such that to deprive her of the goods would be to expose her to increased sickness and suffering, and such facts must be known to the person demanding and removing the property.

TAXATION (Exemption of National Securities from State Taxation). U. S. Sup. Ct. — A tax imposed under authority of section 1322 of the Code of Iowa, directing that shares of stock of state banks shall be assessed to such banks and not to individual stockholders, was in Home Savings Bank *v.* City of Des Moines, 27 Sup. Ct. Rep. 571, held to violate the immunity of national securities from state taxation, as the substantial effect of the tax was to require taxation upon the property, not including the franchises, of such state banks, and to adopt the value of the shares as the measure of taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks. The court in arriving at the decision distinguishes the case at bar from the line of cases in which it has been held that a state may levy a tax upon the value of the franchises of corporations created by it or upon the right of succession of property on the death of its owner without first deducting the amount of United States security owned by the corporation whose franchise is taxed or by the estate transmitted under the inheritance law of the state. The theory of such cases is that the taxes are not imposed on the assets of the corporation or the property of the decedent but in the one case upon the franchise granted by the state and in the other case upon the right of succession to property on the death of the owner which is conferred by the state. The court also notes that the case of Van Allen *v.* Assessors (Churchill *v.* Utica) 3 Wall. 573, 18 L. Ed. 229, has settled the law that a tax upon the owners of shares of stock in corporations, in respect to that stock, is not a tax upon United States securities which the corporations own and that accordingly such taxes have been sustained whether levied upon shares of

national banks, by virtue of the congressional permission to tax such shares, or upon shares of state corporations by virtue of the power inherent in the state to tax the shares of such corporations. Such tax assessed to shareholders may be required to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholders, leaving to the corporation the right to reimbursement, but the court holds that there is nothing in the line of the cases upholding this rule which justifies the tax assessed directly to the banks on its stock. A tax levied on a corporation measured by the value of the shares in it, is not equivalent to a tax upon the shareholders in respect to their shares. The two kinds of taxes are not equivalent in law. That the tax is eventually paid by the shareholders the court considers of no moment. It says that the question is one of power, not of economics. If the state has not the power to levy this tax the court will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. As supporting this proposition is cited Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 43 L. Ed. 850, 19 Sup. Ct. 539. There it appeared that a tax on the intangible property of a national bank had been levied on under the name of a franchise tax. Such a tax upon one of the agencies of the national government is beyond the power of the state, but it was contended that though the tax was not in form upon shares in the hands of shareholders (a tax lawful by the permission Congress has given), it was the equivalent of such a tax. The correctness of this contention was, however, denied by the court.

TORTS (Boycotts). N. J. — In awarding an injunction against a boycott, Vice-Chancellor Stevenson, in Booth & Bro. *v.* Burgess, 65 At. Rep. 226, notes that there are three rights, the violation of each of which is a distinct tort, which must be fully recognized and carefully distinguished: First, we have the right in a contract. When a third party intentionally by the use of any kind of means causes a breach of the contract involving damage, he is *prima facie* guilty of a tort. Second, we have the right to contract, or to refrain from contracting. The common instance of the violation or attempted violation of this right is where the state intervenes and undertakes arbitrarily to penalize the exercise of this right in certain particular cases. Third, we have the right to a free market. The tort exhibited by the violation of the right to a free market consists in coercing the market, *i. e.*, interfering with the right of a particular dealer to enjoy the advantages of freedom to deal with him on the part of all who may voluntarily desire to deal with him. A fourth right, or a wide extension of the right above defined as the right to a free market, has undoubtedly been involved in, if not expressly recognized by, the decisions of some courts in strike and boycott cases. This wider right concedes to every man not only a free market, but a market where transactions occur naturally according to the ordinary laws of trade and commerce, unaffected not only by coercion, but also by persuasions or noncoercive inducements from outside parties, applied by them with intent and with the effect to interfere with his dealings and thereby to cause him damage.

The full recognition of the fundamental right to probable expectancy in business relations is most necessary if there is to be scientific development in the common law to meet present exigencies. Such cases as this with such insistent iteration are still necessary, for no doctrine is valuable until it can be stated in such a way as to command general acceptation. **B. W.**

TORTS (Strikes, Picketing). U. S. C. C., Wis. — The right of the members of a labor union out on a strike to maintain "peaceful picketing" about the works of their employer is upheld in Allis-Chalmers Co. *v.* Iron Molders' Union No. 125, 150 Fed. 155. But the court remarks that "peaceful picketing" is very much of an illusion. In upholding the right of striking employees to maintain pickets, the court lays down the rule that indirect interference by a labor union with the employer's business, not amounting to coercion, by preventing him from getting workmen to carry on his shop, is not unlawful so long as the combination is merely taking measures to secure its own legitimate advantage or economic advancement, although harm may incidentally result to the employer. So long as the betterment of labor conditions is the main object sought, even though the strikers may succeed in persuading all the available laborers to join their union and support the strike, and having thus secured a monopoly of the labor market, compel the employer, after long struggle and great loss of profit, to yield to the demands or go out of business, yet such injuries cannot be regarded as malicious, or such acts as criminal or unlawful, either at common law or under the Wisconsin statute. Wabash R. Co. *v.* Hannahan, 121 Fed. 563. But in this connection the court also holds that the action of pickets established by strikers may amount to coercion and intimidation, and a violation of an injunction against the use of such means, though no act is done which would be unlawful if done by a single individual, where the mere number of

pickets acting together and their persistent following of the workmen to and from their work day after day for months is in itself a constant threat producing fear and alarm among the workmen. Judge Sanborn, writing the opinion, reviews at considerable length the American and English authorities relating to the right of striking employees.

TORTS (Conspiracy). Mass. — In the recent case of Aberthaw Construction Co. *v.* Cameron, 80 N. E. Rep. 478, the Supreme Judicial Court of Massachusetts holds that a corporation is not, because it is a corporation, immune from the consequences of an unlawful combination with others to compel a contractor to employ only union workmen in the construction of a building, under penalty of a strike. As supporting this doctrine the court cites White *v.* Apsley Rubber Co., 80 N. E. 500, and Buffalo Oil Co. *v.* Standard Oil Co., 106 N. Y. 669, 12 N. E. 826. In the present case it appeared that the contractor was doing the work for the corporation involved. On the ground that the contractor was employing non-union labor, a strike was threatened. To avoid this, and the consequent delay in the building operations, the defendant corporation requested the contractor either to remove the non-union workman employed and procure employment for him elsewhere, or permit it to do so. This request, which was at most advisory only, was not regarded as making the defendant corporation a co-conspirator with those who had threatened the contracting employer with a strike, but its participation, with knowledge of the action of the other bodies involved, in the transaction which brought on a breach of the building contract, was held to make the corporation, as well as the other defendants, liable for a conspiracy.

THE LIGHTER SIDE

From Quebec. — Dear Mister: I have the honour to tole you that the Reverend Messieurs of the Grande Seminary have ordained me with instructions to poursuivre you for the scandalous nuisance to that vicinity of the paraquet which already yet because you have on your residence which makes much by abominable fracas; The Reverend Messieurs are interfered with when they make their devotions, and when the band of the Grande Seminary of 113 pupils was begin for play, and your dam paraquet was begin for schreech it is dreadful. Also one of the neighbors on the same street with yourself was very mad, he can't sleep on the afternoon and when he go for play the piano your bird yell and spoil his improvision.

Altogether you must put away that bird.

Please give me that undertaking without delay otherwise I must institute the procedure.

Receive the assurance of my consideration.

Your obedient servent.

Mandamus in Tennessee. — State of Tennessee, Morgan County,

Personally Came before me J. C. Jackson a J. P. for Said County.

John Langley Sr who being by me Sworne sayes that he is entitled to a rit of Mandamus in order that he may gain possession of the following named property whitch was wrongfulley taken from him By J. M. Langley John D. Kries and William M. Jones and T. A. Morris and D. L. Hall and W. D. Wright their Sureties in the Supreme Court viz one Horse and Buggy Harness value $125 one cow and calf $40 4 hed of Hogs $20d one tract of Land worth $500 it Being my Homested I John Langley Sr the defendant in said cause to your Honor George L. Burk Judg of the Circut Court at Kingston Roan co Tenne prayes your Honer to Issue a Rit of Mandamus for the above named property that I may gain possession of the Same

Signed this aug the 28th 1906

John Langley.

Sworne to and Subscribed before me this aug the 28th 1906

J. C. Jackson J. P.

Justifiable Assault. —A very unusual method of cross-examination of a witness is that disclosed in Bernhard *v.* Kelley, 42 So. Rep. 723. A negro farmer, having some difficulty with his white neighbor relative to the ownership of a heifer, brought an action in a magistrate's court for the possession of the animal. Defendant acted as his own attorney, and on conclusion of the examination-in-chief of plaintiff, proceeded to cross-examine him. The answers of the witness proved very unsatisfactory to defendant, and, as he claimed, were very insulting. He thereupon picked up a buggy spoke which was near at hand, and struck plaintiff over the head with it. There being numerous representatives of both races present, a general scuffle ensued. Plaintiff being knocked down and severely bruised, brought an action for assault and battery. The court said it was " not inclined to kindle fuel and fan this occurrence into a matter of some moment. It was a sudden break, an outburst of temper on a warm day in August; " but notwithstanding this mitigating circumstance, it held that " the rules of evidence do not sanction any such extraordinary manner of conducting an examination," and awarded judgment for plaintiff in the sum of $500.

Convulsed Pleadings. — A correspondent for Stanford, Ky., sends in two specimens of pleadings prepared by a brother attorney whose style is said to have more than once disrobed judges of their dignity and convulsed juries with laughter.

LINCOLN CIRCUIT COURT. Jane Herzog, *Plaintiff*, *v.* (Answer and counterclaim) J. U. Herzog, *Defendant*.

The defendant, for answer to the petition and for counterclaim, denies that . . . (here follows denial of allegations of petition) . . . He states that on the day of 1901 the plaintiff, after piling up his beds, bedding, clothing, among which was a fine overcoat belonging to defendant, and piling up other valuable combustibles belonging to defendant, Erostratus-like set fire to them and burnt them, and taking defendant's watch, pistol, and such

valuables as could not be burnt left and abandoned the bed and board of defendant. But after several months' absence she returned to defendant's home, apparently repentant, and he again gave her food and shelter, and all was condoned.

Defendant states that on election day of November, 1902, plaintiff again mounted the camel of Lust and took her Hegira from his bed and board without fault on his part. He states that he is a merchant, and that she took the goods out of his store to the amount of $10.00 to $15.00 per week and sent them to her children, and sent his money to her son Wm. Clymer, who is a convict in the state penitentiary at Frankfort; these are her children, but not the children of defendant.

Defendant makes this answer a counter-claim against plaintiff, and says that plaintiff is a migratory, lascivious bird, and when the baleful fires of illicit love begin to burn fiercely on the altar of lust she flies away to some soft Persian gulf or Italian sea, and after being laved and cooled in its Ionian waves then returns to the reedy margin of some northern lake, and for a time leads a purer, chaster life. Defendant charges that plaintiff has on divers occasions, both in former separations, not so well known then as now, and therefore condoned, and before and since the last separation, committed adultery, has soiled his snowy sheets, dishonored his name as husband by the commission of acts violating the sacred vows at the marriage altar taken, and has forfeited all claim to the sacred name of wife, or to maintenance *pendente lite*, alimony, dower, or to any of defendant's estate. He says that she has piled honor, virtue, good name and fair fame in one grand heap, and set fire to, and burned them into ashes on the smoking altar of lust, and from those Dead Sea ashes Virtue can never rise, Phœnix-like, to live again.

Defendant states that he is now in advanced years, and the lengthening shadows are now stretching far toward the East, and life's declining sun is almost ready to pillow his weary head upon the broad bosom of the West to rise no more.

Wherefore he prays that the petition of plaintiff be dismissed, and that he be granted a divorce *a vinculo matrimonii* from plaintiff, and that he be restored to all the rights and immunities of an unmarried man.

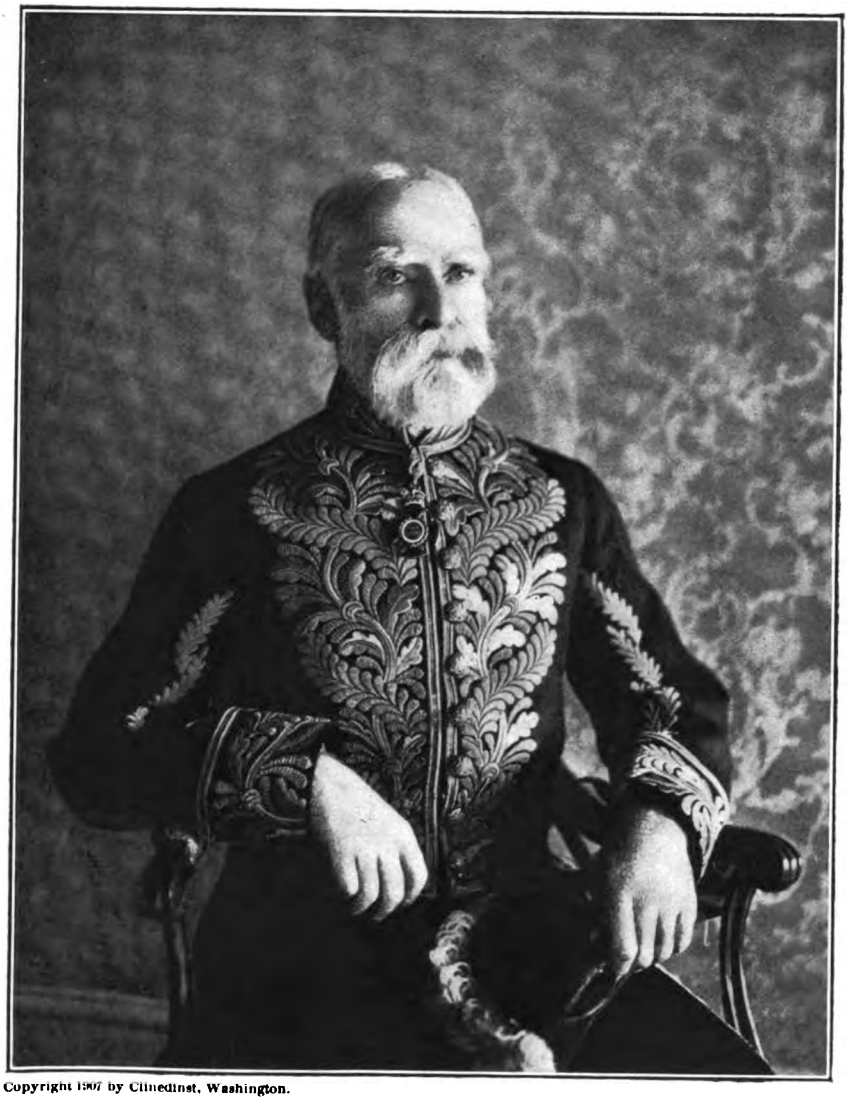
F. F. Bobbitt, for Defendant.

LINCOLN CIRCUIT COURT. Ida Saylor, *Plaintiff*, *v.* (Petition in Equity) Granville Saylor, *Defendant*.

The plaintiff Ida Saylor states that she and the defendant Granville Saylor were married on the first day of August, 1904; that before they had been married six months she discovered that she had made a great mistake in committing her happiness upon the ship of matrimony to such a pilot and captain, who had not the nautical skill to navigate such waters, and soon lost his bearings, and wrecked plaintiff's happiness upon the coast of desolation. She states that she is quite young, and endowed by nature with an attractive face and the form of Hebe; and the defendant, being much plaintiff's senior, was soon afflicted with the Shakespearean green-eyed monster, became insanely jealous of her, and though he offered her no personal violence, yet by his cruel tongue has lacerated her heart and wounded her feelings beyond endurance. She states that for more than six months he has behaved toward her with insane jealousy day and night, which has so increased as to make it dangerous for her to live with him longer. She states that she has left him, and now resides separate and apart from him, never to return again. She says that it would be cruel to ostracize her from society and the possible happiness she might find with a more congenial mate, after time, the great anodyne, shall have cicatrized the ghastly wounds inflicted by defendant.

By way of a kind of second paragraph of rehearsal of defendant's cruel treatment she further says that he selected a gloomy pass in the adjacent hills known as Wolf Pass, and erected a rude cabin there and took this plaintiff to this isolated spot, where in the dead waste and middle of the night she is serenaded by the dismal hooting of the horned owl, and ever and anon the fierce scream of the wild cat and the barking of the fox, which digs her den in the hills unscared. Wherefore she prays for a judgment to release her.

F. F. Bobbitt, Attorney for Plaintiff.



James Bryce

The Green Bag

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THE RT. HON. JAMES BRYCE

BY EDWARD MANSON

NOT long ago the *Journal of Comparative Legislation* in giving an appreciation of Mr. Bryce said: "Politics have of late seemed to claim Mr. Bryce for their own. They have, however, filled but a fragment of a singularly varied career. He has cultivated literature and history with signal success; he has been a traveller and explorer: long ago he won a great academic reputation; and more recently he has shown himself a skilful administrator and a powerful and ready debator. To describe concisely and accurately the place in English life of one who has attained a foremost position in the House of Commons, who has been Professor of Civil Law, Under Secretary of State for Foreign Affairs, Chancellor of the Duchy of Lancaster, President of the Board of Trade, and a Cabinet Member — who has climbed Mount Ararat and has been President of the Alpine Club — who has written works so diverse as "The Flora of the Island of Arran," "The Holy Roman Empire," and "The American Commonwealth" — and who can address a popular assembly in French, German or Italian — is difficult. If he has found little leisure for the exercise of the legal profession, what he has written — notably his essays on jurisprudence, make every lawyer his debtor. Of the many books which have flowed from his prolific pen two at least — "The Holy Roman Empire" and "The American Commonwealth" have become classics, and in the many years which have passed since their publication, their reputation has steadily grown. It is often a sore disappointment to Englishmen talking of their men of letters and lawyers with foreigners to find that names much extolled here are almost unknown beyond our borders. It is not so with Mr. Bryce. He is one of a very small group of Englishmen who are held in high honor by the scholars of France, Germany and America. He is indeed everywhere known and not least for his services to the causes which this Journal seeks to further.

It is with these — Mr. Bryce's contributions to Jurisprudence — that this sketch is namely concerned: for of all his many activities they are perhaps the least known and appreciated.

OXFORD DAYS.

When Queen Elizabeth asked young Francis Bacon how old he was the precocious young courtier replied "Two years younger than your Majesty's happy reign." The youthful Bryce might have made the same reply to Queen Victoria. His career like Bacon's has synchronised with a remarkable epoch of our national history and there are few of the many sided developments which have not enlisted his sympathies or in which he has not borne a part. Coming to Oxford, as so many clever young Scotchmen do, to complete his university course, he won a scholarship at Trinity — one of the leading colleges at Oxford — and from that beginning went on to a long series of academic successes. He gained the Garsford Prize for Latin verse and prose, the Vinerian Law Scholarship, the Latin Essay, the Craven, and the Arnold (historical) Prize. He took a double first — in Literes Humaniores and in the school of Law and

Modern History and was elected to a fellowship at Oriel — one of the most coveted distinctions at Oxford. In the common-room of Oriel he had the stimulating companionship of Dr. Stubbs, then busy with his researches with English constitutional history, while at Corpus Sir Henry Name was delivering those brilliant and suggestive lectures on "Ancient Law" which have created a new era in the history of jurisprudence.

But charming as the academic life at Oxford is for a time, it is still a quiet backwater, detached from the main current of life. Energetic spirits chafe at its philosophic calm and yearn to be in the full stream of human life. Bryce was one of these and he chose the career "ouverte au talent." In 1867, just forty years ago, he was called to the Bar by Lincoln's Inn, took chambers in the Temple, No. 6 Crown Office Row, and went the Northern Cicruit. The judicial Bench was then remarkably strong. In the Queen's Bench was the brilliant Cockburn, the Lord Chief Justice, and the learned Blackburn. Lord Chelmsford was Chancellor, Turner and Cairns were Lord Justices of Appeal. Willes, one of the greatest exponents of the common law of England, was at the Common Pleas; Brommel was a Baron of the Exchequer Sir Lurkingham was making the law in Admiralty by his luminous judgments. In his "Studies in Contemporary Biography" Mr. Bryce has given us some admirable appreciations of the great men he has known — the men whose fame has gone forth into all lands. Gladstone and Disraeli, Manning and Freeman, Parnell and Dean Stanley and not the least interesting among them are the sketches of the two most eminent judges of his time, Lord Cairns and Sir George Jessel.

LORD CAIRNS AS A JUDGE.

"Cairns," he says, "was broad, massive, convincing with a robust urgency of logic which seemed to grasp and fix you, so that while he spoke you could fancy no conclusion possible save that toward which he moved. His habit was to seize upon what he deemed the central and vital point of the case, throwing the whole force of his argument upon that one point and holding the judge's mind fast to it. Palmer (Lord Selborn) made an admirable Chancellor and shewed himself more zealous for reform than did Cairns. But Cairns was the greater judge, and became to the generation which argued before him a model of judicial excellence. In hearing a case he was singularly patient, rarely interrupting counsel and then only to put some pertinent question. His figure was so still, his countenance so impassive that people sometimes doubted whether he was really attending to all that was urged at the Bar. But when the time came for him to deliver judgment, which in the House of Lords is done in the form of a speech, addressed to the House in moving or supporting a motion that is to become the judgment of the tribunal, it was seen how fully he had apprehended the case in all its bearings. His deliverances were never lengthy but they were exhaustive. They went straight to the vital principles on which the question turned, stated these in the most luminous way and applied them with unerring exactitude to the particular facts. He is as a storehouse of fundamental doctrines that his judgments are so valuable. They disclose less knowledge of case law than do those of some other judges, but Cairns was not one of the men who love cases for their own sake and he never cared to draw upon, still less to display, more learning than was needed for the matter in hand. He was in the grasp of the principles involved, in the breadth of view which enabled him to see these principles in their relation to one another, in in the precision of the logic which drew conclusions from the principles in the perfectly lucid language in which the principles were expounded and applied that his

strength lay. Herein he surpassed the most eminent of contemporary judges the then Master of the Rolls for which Jessel had perhaps a quicker mind than Cairns he had not so wide a mind nor one so thoroughly philosophical in the methods in which it moved."

SIR GEORGE JESSEL AS A JUDGE.

"The Rollo Court used to present while he (Jessel) presided over it a curious and interesting sight which led young counsel, who had no business to be there to frequent it for the mere sake of watching the judge. When the leading counsel for the plaintiff was opening his case, Jessel listened quietly for the first few minutes only, and then began to address questions to the counsel, at first so as to guide his remarks in a particular direction, then so as to start his course altogether and turn his speech into a series of answers to the Judge's interrogatories. When by a short dialogue of this kind, Jessel had possessed himself of the vital facts, he would turn to the leading counsel for the defendant and ask him whether he admitted such and such facts alleged by the plaintiff to be true. If these facts were admitted the Judge proceeded to indicate the view he was disposed to take of the law applicable to the facts, and by a few more questions to the counsel on the one side or the other, as the case might be, elicited their respective legal grounds of contention. If the facts were not admitted, it of course became necessary to call the witnesses or read the affidavits — processes which the vigorous impatience of the Judge considerably shortened, for it was a dangerous thing to read to him any irrelevant or loosely drawn paragraph. But more generally his searching questions and the sort of pressure he applied so cut down the issues of fact that there was little or nothing left in the controversy regarding which it was necessary to examine the evidence in detail, since the counsel felt that there was no use in putting before him a contention which they could not sustain under the fire of his criticism. Then Jessel proceeded to deliver his opinion and dispose of the case. The affair was from beginning to end far less an argument and counter argument by counsel than an investigation directly conducted by the Judge himself in which the principal function of the counsel was to answer the Judge's questions concisely and exactly so that the Judge might as soon as possible get to the bottom of the matter."

IN PRAISE OF THE CIVIL LAW — THE ROMAN JURIST.

A few years after his call to the Bar the Regius Professorship of Civil law at Oxford fell vacant, and Mr. Bryce was appointed to the post. It had peculiar advantages, for it kept the London barrister in touch with University life. At Oxford he could study law in its scientific aspect, at Westminster and Lincoln's Inn he watched and worked at its practical administration. The inaugural lecture which he delivered on his appointment is an eloquent plea for the study of the Civil Law — Rome's great gift to the world: "no people ever" he says, "formed so worthy a conception of what law ought to be." "What is it" he goes on to ask, "which we admire in the Roman jurists and in the Roman law generally? The characteristic merits of the Roman law are its reasonableness and its consistency. It is pervaded by a spirit of good sense, except in two departments, those of the paternal power and of slavery, its rules almost always conform to considerations of justice and expediency. Very little needs to be excused as the result of historical causes. Even slavery and the *patria popestas* — the former universal in the ancient world, the latter so deep rooted among the Romans that it could never be altogether expunged — are in the later centuries so steadily and carefully mitigated that most of their old harshness disappears. The moral tone of

the law is, take it all in all, as high as that of any modern system, and in some few points higher than our own. By its consistency, I mean the harmony and symmetry of its parts, the maintenance through a multiplicity of details of the leading principles, the flexibility with which these principles are adapted to the varying needs of time, place and circumstance. So the excellence of the jurists resides in their clear practical sense, in the air of enlightenment and of what may be called intellectual urbanity which pervades them. Most of them express themselves with a concise neatness and finish which give us the truth of their view in the fewest and simplest words. They dislike what is arbitrary or artificial, taking for their aim what they call elegance (elegantia juris), the plastic skill, so to speak, in developing a principle which gives to law the character of art, preserving harmony, avoiding exceptions and irregularities. Yet they never sacrifice practical convenience to their theories, nor does their deference to authority prevent them from constantly striving to correct the defects of the law as it came down from their predecessors.

Compare Lord Coke, for instance or Lord St. Leonards with Papinian or Gaius. Lord St. Leonards was a man much admired by the profession and his books seemed an authority unsurpassed or indeed equalled by any other legal writers of the century. His knowledge was immense and it was minute. His treatises show the same acuteness and ingenuity in arguing from cases, which his forensic career displayed. But these treatises are a mere accumulation of details, unillumined and unrelieved by any statement of general principles. In literary styles and no less in the case and quality of his intellect he is harsh and crabbed. How different are the Roman jurists. They reason and they write as men who have been thoroughly trained, who have been imbued with a large and liberal view of law, who have philosophy and analysis and the sense of historical development at their command." Twenty-two years later in delivering his valedictory address he was constrained to admit the occasions on which the practicing lawyer in England can make a professional use of Roman law are but rare. "Once," he says, "in addressing the House of Lords on a Scotch appeal, I discovered a pretext for quoting the *Digest*, which that august body received with grave approval as not unbefitting the large survey they are wont to take of every matter which comes before them: but he bated not one jot of his claims on behalf of the Civil Law as an educational discipline and as an interpreter of all the modern continental systems.

ROME AND GREAT BRITAIN.

In the *Studies in Comparative Law* — which contain Mr. Bryce's most valuable contributions to jurisprudence — he has drawn a series of instructive parallels between Rome and Great Britain — in the "History of their Legal Development," in their "Methods of Law," and their "Marriage and Divorce." One of the most striking of these parallels is a comparison of the Roman Empire and the British Empire in India as conquering and ruling powers acquiring and administering dominions outside the original dwelling place of their peoples and impressing upon those dominions their own type of civilization. Among other points of similarity he notes their road making, their tolerant attitude towards religion, their beneficent despotism in the case of subject races; but he finds the vital secret of their success in the *character of* the conquerors. "Both triumphed by force of character. The triumph of the Romans was a triumph of character as their poet felt when he penned the famous line:

"Moribus antiquis stat res Romana viris qul."

And after the inhabitants of the city had ceased to be the heart of the empire this consciousness of greatness passed to the whole population of the Roman world when they compared themselves with the barbarians outside their frontiers.

The conquest of India (by the British) was a splendid achievement, more striking and more difficult, if less romantic than the conquest of Mexico by Cortez or the conquest of Peru by Pizarro. Among the English as among the Romans the sense of personal force, the conscious ascendency of a race so often already victorious, with centuries of fame behind them, and a fine contempt for the feebler folk against whom they were contending, were the main sources of that dash and energy and readiness to face any odds, which bore down all resistance. These qualities have lasted into our own time. No more brilliant examples were ever given of them than in the defence of the fort at Lucknow and in the seige of Delhi at the time of the Indian mutiny of 1857–8.

It is by these qualities that the English continue to hold India. In the higher grades of the civil administration which they fill there are only about one thousand persons, and these one thousand control two hundred and eighty-seven millions, doing it with so little friction that they have ceased to be surprised at the extraordinary fact.

The British Raj fills them with a sense of mystery and awe. I heard at Lehore, an anecdote which slight as it is illustrates the way in which the native thinks of these things. A tiger had escaped from the zoological gardens and its keeper hoping to lure it back followed it. When all other inducements had failed he lifted up his voice and solemnly adjured it in the name of the British government to which it belonged to come back to its cage. The tiger obeyed. It reminds us of another story told by W. Haldane. A traveller who had penetrated into a remote part of India found the natives offering up a sacrifice to a far off but all powerful god who had just restored to the tribe the land which the government of the day had taken from it. He asked the name of the god. The reply was, "We know nothing of him but that he is a good god and that his name is the Judicial Committee of the Privy Council."

The Nature of Sovereignty, The Relation of Law and Religion, the Law of Nature, the Constitution of the United States as seen in the Past Primitive Iceland are often topics on which Mr. Bryce discourses with the knowledge and insight of an accomplished scholar and man of the world. A curious and strangely interesting picture it is which Mr. Bryce gives us here of Ultima Thale with its little groups of inhabitants scattered along the edges of a barren desert interior of glaciers, precipices and morasses. Its wild blood feuds, its voracity and plunderings, yet united through it all by its judicial "Alpine," one of the oldest national assemblies of the world) a folk court presided over by the "Law-say Man," or speaker of the Law whose duty it was to recite aloud each year the whole of the common law, to rehearse the formulas of actions and to answer all questions which might be put as to the provisions of the law.

JUSTINIAN.

His article again on Justinian is an instructive account of the great reform associated with that Emperor's name. The law of the Roman empire when Justinian ascended the throne was in a state of great confusion. There was the old law (*jus vetus*) and there was the new law (*jus novum*). The old law comprehended (1) the statutes (*leges*) passed under the republic and early empire; (2) the decisions of the Senate (*senatus consulta*); and (3) the writings of the jurists, more particularly of those jurists to whom the right of declaring the law with authority (*jus respondendi*)

had been committed by the emperors. These writings formed a vast mass of literature. They were so scarce and so costly that even the public libraries had nothing approximating to a complete collection; full also of discrepancies and contradictions, though special weight attached to the writings of five eminent jurists, Papinian, Paulus, Ulpian, Modestinus and Gaius. The new law (*jus novum*) consisted of the ordinances of the emperors promulgated during the middle and later empire (*edicta*, *rescripta*, *mandata*, *decreta*) usually called by the general name of Constitutiones and now in a condition not much better.

Immediately on his accession in 528, Justinian appointed a commission to deal with the imperial constitutions (*jus novum*). The commissioners ten in number were directed to go through all the constitutions to select such as were of practical value to retrench all unnecessary matter and gather them in order of date into one volume, getting rid of any contradictions by omitting one or other of the conflicting passages. These statute Law commissions as we may call them set to work forthwith and completed their task in fourteen months.

This Codex Constitutionum was formally promulgated and enacted as one great consolidating statute in 529, all imperial ordinances not included in it being repealed at one stroke.

The success of this first experiment encouraged the emperor to attempt the more difficult enterprise of simplifying and digesting the older law contained in the treatises of the jurists. A new commission was appointed (Dec. 530) consisting of sixteen — the president tribune (Quaeter of the Empire), four professors of law and eleven practicing advocates. They were instructed to procure and peruse all the writings of all the authorized jurists (i.e. those who had enjoyed the *jus respondendi*) to extract from their writings whatever was of the most permanent value, avoiding repetition and contradictions and giving only one statement of the law on each point. They were to distribute the results of their labors into fifty books and subdivide each book into titles. These directions were carried out with surprising speed. Though the mass of literature which had to be read through consisted of no less than 2,000 treatises comprising three millions of sentences the commissioners presented their selection of extracts to the Emperor within three years (in 533), and he published it the same year as an imperial statute. "This is the volume which we now call the "Digest" (*Digesta*) or Pandects. It is the most precious monument of the legal genius of the Romans, and whether we regard the intrinsic merits of its contents or the prodigious influence it has exerted and still exerts, the most remarkable law book the world has seen."

THE LAWYER IN POLITICS.

Mr. Bryce entered Parliament as member for the town Hamlet in 1880 and has been there ever since. It has been said that the House of Commons is "strewn with the wreck of lawyers' reputations." "Lawyers" as Mr. Bryce has himself said, "are under the double disadvantage of having had less leisure than most other members to study and follow political questions, and of having contracted a manner and style of speaking ill suited to an assembly which listens with impatience to a technical or forensic method of treating the topics which come before it." May it not be added that the lawyer is strongly suspected of taking up politics more as a useful move in the professional game than from any sincerity of conviction? To this common fate of the political lawyer Mr. Bryce has been a brilliant exception. As a debator, as a party leader, and as an administrator, whether at the Foreign office, the Board of Trade or Dublin Castle he has earned high distinction and he has crowned his career in the still higher and nobler office which he now holds,

the office of drawing more closely the bonds which unite the two great English speaking nations of the world.

THE ASCENT OF ARARAT: A RELIC OF NOAH.

Here is a concluding picture: the learned civilian, the busy barrister, the active member of Parliament, mounted on a Caucasian steed with pistols stuck in his belt, snow-spectacled and brandishing a heavy ice axe in the intervals a bridle and a big white umbrella. Before him the glittering peak of Ararat beginning like an eastern beauty to draw over its face the noonday veil of cloud. In the foreground, the first simple life of the world, a band of Kurds with their beautiful flocks, the exquisite colors of the women's dresses and ornaments, their own graceful figures, the clear pool, the rolling pasture.

"Mounting steadily along the same ridge, I saw at a height of over thirteen thousand feet, lying on the loose blocks, a piece of wood about four feet long and five inches thick, evidently cut by some tool and so far above the limit of trees that it could by no possibility be a natural fragment of one. Darting on it with a glee that astonished the Cossack and the Kurd, I held it up to them, made them look at it and repeated several times, the word "Noah." The Cossack grinned, but he was such a cheery genial fellow that I think he would have grinned whatever I had said and I cannot be sure that he took my meaning and recognised the wood as a fragment of the true Ark. Whether it was really gopher wood, of which material the Ark was built, I will not undertake to say, but I am willing to submit to the inspection of the curious the bit which I cut off with my ice axe and brought away. Anyhow it will be hard to prove that it is not gopher wood. And if there be any remains of the Ark on Ararat at all — a point as to which the natives are perfectly clear — here rather than the top is the place where one might expect to find them. Since in the course of ages they would get carried down by the onward movement of the snow beds along the declivities. This wood, therefore, suits all the requirements of the case — in fact, the argument is, for the case of a relic, exceptionally strong; the Crusaders who found the holy lance at Antioch, the archbishop who recognized the holy coat at Treves, not to speak of many others, proceeded upon slighter evidence."

LONDON, ENGLAND, August, 1907.

CONSTRUCTIVE CONTRACTS

GEORGE P. COSTIGAN, JR.

IN a discussion carried on in the *Columbia Law Review* by Professor Walter W. Cook and Mr. John S. Ewart in regard to the essential nature of "Agency by Estoppel," [1] the real difficulty confronting the disputants appears not to have been faced fairly. That difficulty is with the present classification of contracts and is manifest when the controversy about agency by estoppel is stated.

Professor Cook's argument in his articles seems to be in essence that the so called agency by estoppel of which he is treating, i.e., the agency which binds a principal where the agent exercises an ostensible authority, which unknown to the other party the principal has forbidden the agent to exercise, is in fact and not by fiction actual agency because in the law of contracts a man who has made an offer is often held to be bound by contract although he has started a revocation of his offer on its way before the offer is accepted and so there is, at the time a contract is declared by the law to arise, no genuine mutual assent. Professor Cook's own language is:

"My first proposition is this: It is fundamental in the law of contracts that a person is bound not by his real but by his manifested intention, i.e. by his intention as manifested to the other party. For the sake of brevity, I shall, in the remainder of the article, refer to this as the principle of 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." [2]

And he proceeds to assert that there is as much "manifested intention" in the agency cases as in the contract cases. Then he insists "that the liability of the principal in [the case of] apparent authority rests as truly upon a contractual basis as it does in the case of real authority." [1] and asks how, from the point of view of contracts, it can make any difference whether the agent has obeyed the principal's instructions or not in the making of the contract so long as he has kept within the principal's "manifested intention" found in the apparent scope of the agent's authority?

In reply to Professor Cook, Mr. John S. Ewart resorts to old fashioned argument to prove to Professor Cook that contracts do not depend upon manifested intention. What he has to say reminds one of the old argument against the existence of motion: A body cannot move where it is and it cannot move where it is not and therefore it cannot move. A man, says Mr. Ewart, cannot have two contradictory intentions upon one subject at one time, so he cannot have a real intention and a different manifested intention at that time. And his conclusion is that "in the law of contracts a man is not bound by intentions of any sort but only by contract" [2] and that Professor Cook's doctrine seems to be founded upon "a very erroneous notion of the importance of intention in the law of contracts." [3] What a contract in essence is he fails to tell us.

And now we see why the real difficulty has not been faced fairly by either Professor Cook or Mr. Ewart. That difficulty is with the law of contracts and not with the law of agency and arises when we ask whether the contracts which Professor Cook

[1] Walter W. Cook on Agency by Estoppel, 5 *Columbia Law Rev.* 36; John S. Ewart on "Agency by Estoppel," 5 *Columbia Law Rev.*, 354; Walter W. Cook "Agency by Estoppel: A Reply," 6 *Columbia Law Rev.*, 34.

[2] 5 *Columbia Law Rev.*, 40.

[1] 5 *Columbia Law Rev.*, 43.

[2] 5 *Columbia Law Rev.* 356–7.

[3] 5 *Columbia Law Rev.*, 365.

properly calls genuine contracts, despite the fact that mutual assent is absent, really are entitled to be identified with those contracts which rest upon an undeniable mutual assent in fact? Are they actual contracts in a true sense as distinguished from things which are not really in essence contracts though the law for all practical purposes regards them as such?

Professor Cook tried to forestall the very answer to that question now to be given by saying of the case where a revocation of an offer of contract is started on its way by A before B accepts the offer, but the revocation does not arrive until after the acceptance:

"As yet no one has arisen to argue that, inasmuch as real assent on the part of A is lacking there has been no meeting of minds, and so that no contract has been made; that, therefore, the true explanation of A's liability is to be sought in estoppel — he has represented to B that the offer is still open, B has changed his legal position in reliance on this representation, and A is therefore estopped to deny that a contract has been made." [1]

May be nobody has arisen to call such contracts ones by estoppel; may be nobody will arise to do so. But certain it is that they are not, from the point of view of legal philosophy, contracts based on genuine mutual assent, though of course they are enforced as such contracts every day in the year. And why are they enforced as mutual assent contracts? Only because no name has been coined for them. It is only a short time since quasi-contracts were insisted upon as genuine implied contracts because assumpsit was the remedy on them; yet they never were genuine contracts and to-day bear the distinctive name quasi-contracts. In the same way, though we teachers in the law of contracts are, for the present, obliged to tell our students that the "meeting of minds" talked of in the contract cases is often a misnomer, — that a meeting of the expressions of the parties in an offer of contract and a communicated acceptance is enough to make a mutual assent contract despite the fact that in an accurate sense of the words the minds of the parties never meet at one and the same moment of time, — we do this because the poverty of legal phraseology so compels. Not yet have we become rich enough in legal vocabulary, because not yet have we found enough pressing necessity, to facilitate the distinction between those contracts where the minds of the parties meet in a true sense of the word and those other cases where a man is held bound by contract though he is doing all that he can at the time when the contract obligation arises to show that his mind is not in accord with the other party's mind. Such a discussion as that above outlined about "Agency by Estoppel" suggests, however, the desirability of evolving a terminology and enforcing the distinction. Perhaps "Contracts by Estoppel" may be the phrase we want, but estoppel is a strong word, implying ordinarily misrepresentation, and it may be we should not say that there is a technical misrepresentation in such cases where everything represented has been true at the time of the representation, and misrepresentation can, therefore, be found only by a fiction. The writer certainly does not favor the phrase "contracts by estoppel" for such cases.

"Constructive contracts" would seem to be just the right phrase, but for the fact that Sir Frederick Pollock, moved apparently by the un-English sound of the term quasi-contract, has recently suggested that "constructive contract" should have been applied to what we call "quasi-contract." [1] The suggestion that "constructive contract" is the equivalent of "quasi-contract" is indeed doubly unfortunate, coming as it does when we have just succeeded in sepa-

[1] 5 *Columbia Law Rev.*, 40.

[1] Sir Frederick Pollock's note in Maine's Ancient Laws, 4th Am. ed. pp. 443–4.

rating the things treated as to form of action only *as if* contracts from those which for all purposes are actual contracts, and having, as the suggestion does, the weight of a great name in the law of contracts to uphold it. "Constructive" should be kept, as in the phrases "Constructive trusts," "Constructive possession," "Constructive notice," "Constructive delivery" and "Constructive fraud" it has been kept, to apply to those things which for practical legal purposes are the things the adjective qualifies. Fortunately Sir Frederick Pollock may be quoted against himself on this matter of terminology. In his book on contracts he says:

"A man who had no fraudulent intention, or who has not even been personally negligent, may be liable as for fraud. The ground of liability in such cases is shortly described as 'constructive fraud' or perhaps less aptly 'legal fraud.' The word 'constructive' negatives actual fraud, but affirms that the actual conditions will have similar consequences. 'Constructive possession' signifies, in the same way, that an owner out of possession has certain advantages originally given only to possessors 'Constructive delivery' is a change of legal possession without change of physical custody; and we speak of 'constructive notice' where the existence of means of knowledge dispenses with the proof of actual knowledge."[1]

"Constructive contracts," therefore, would seem to be just the term to apply to those contracts which exist because the rules of the game of making contracts require them to be named and treated as genuine contracts though they do not in fact rest on mutual assent, and "consensual contracts." or some better term, should be used to designate those contracts where there is a real "meeting," i.e., coincidence, of the minds of the parties. That the phrase "consensual contract" has a peculiar meaning in the Roman law[1] would seem to be no objection to its use in the present sense in the common law, since in the common law the word "contract" necessarily affirms the existence of a consideration or the presence of a seal, while in that law the word "consensual" has no narrow meaning. In the common law, the term "consensual contract" if adopted would unmistakably refer only to "the meeting of the minds" of the parties in an agreement sustained by consideration or a seal. Until better names can be found, we should regard actual contracts, as distinguished from quasi-contracts, as divided into (1) consensual contracts and (2) constructive contracts.

It is only fair to notice that what above are called "constructive contracts" were doubtless once regarded as literally what above are called "consensual contracts." It is common to say "I gave so and so a piece of my mind" when speaking of a conversation had with, or a letter sent to, the person named. So in the eyes of the law sending an offer was doubtless conceived of by some judges as giving a piece of one's mind to the offeree and when the acceptance was communicated the law regarded the piece of the offerer's mind as met by a piece of the offerer's mind and so a genuine meeting of minds as resulting, even though the offerer had started a second piece of his mind on the way to recall the first before the acceptance took place. Such reasoning is, of course, too artificial for the pyschology of today, and the meeting of minds in cases of constructive contracts is therefore to be claimed only by legal fiction, but it seems to account for the curious insistence from time to time, in text books and cases, that there is a meeting of the minds of the parties in all cases of contract.[2]

[1] Wald's Pollock on Contracts, 3rd ed. 647–8 (7th Eng. ed. 522).

[1] See Maine's Ancient Law, 4th Am. Ed. 321 ff.

[2] Even Sir Frederick Pollock, though fully aware of the difficulty, retains in part the old phraseology. "Contract" he defines by reference to "agreement" and "agreement" he defines as

And now to return to the dispute about agency by estoppel. Professor Cook's theory that the liability of a principal for the contracts entered into by his agent within the scope of the latter's ostensible but forbidden authority is really contractual, instead of being based on estoppel, may probably be traced to Professor Holland who has pointed out in many editions of his Elements of Jurisprudence that in the case of contracts made by post "the question whether or not the contract is made turns . . . not on the coincidence of the wills of the parties, but on the fact of their having exchanged expressions of intention" and that in agency "the liability of a principal continues not merely so long as he continues mentally to empower his agent to act for him, but also so long as he has not, to the knowledge of third parties, revoked the agent's authority."[1] In any event, it is with Professor Holland as much as with Professor Cook that one who objects to Professor Cook's essential argument will have to reckon. What therefore must we say of the fight which Professor Holland has made to prove that the notion of an actual consensus of mind is not an essential ingredient of the conception of a contract? We must of course applaud it, because as a practical matter it would never have done to regard as actual contracts only those based on a genuine "meeting of minds." Yet in applauding it, we must not go so far as to say that the absence of a consensus of minds is the same thing as its presence. We must join with Professor Holland in saying that in contracts "the law looks, not at the will itself, but at the will as voluntarily manifested" and that "when the law enforces contracts, it does so to prevent disappointment of well founded expectations, which, though they usually arise from expressions truly representng intention, yet may occasionally arise otherwise,"[1] but we must at the same time insist that he separate under appropriate names the cases where the expressions truly represent intentions from those which do not. In the above quoted language he has recognized that the distinction itself exists, and has properly classified "agency by estoppel" with those cases of contracts where "the coincidence of the wills of the parties" does not exist; and to save us from confusion of ideas he must help us seek for a phrase which shall do for the law of contracts what "agency by estoppel." when contrasted with "agency by consent" does for the law of agency.

On the theory herein advanced, Professor Cook would seem to be in error in insisting on abolishing the established distinction between those cases, on the one hand, where the agent does either what his principal told him to do or what his principal has since ratified or adopted, and those cases, on the other hand, where the agent acts in violation of the principal's instructions and con-

resting on "consent." (Wald's Pollock on Contracts, 3d ed. 2.) And the consent of the parties he says, "the first and most essential element of an agreement" is expressed by the doctrine that "there must be the meeting of two minds in one and the same intention" (ibid, 3.) This definition of "consent" he modifies, however, by the statement that "when it is said, therefore, that the true intent of the parties must govern the decision in all matters of contract, this means such an intent as a court of justice can take notice of. If A, being a capable person, so bears himself towards B that a reasonable man in B's place would naturally understand A to make a promise, and B does take A's words or conduct as a promise, no further question can be made about what was passing in A's mind." (ibid, 4.) Sir Frederick Pollock tries to save his retreat from his first stand in favor of a meeting of minds by adding: "But in the common and regular course of things the consent to which the law gives effect is real as well as apparent" (ibid, 5.) In other words the consensual contract, as distinguished from the constructive contract, is the ordinary kind. The reluctance to abandon the old phraseology is explained by that fact, and the necessity of a name such as consensual contract is emphasized by it.

[1] Holland's Elements of Jurisprudence, 3d ed. '1886' 215, 216, 10th ed. '1906' 257.

[1] Holland's Elements of Jurisprudence, 10th ed. 253.

tinued repudiation and yet within the apparent scope of his authority. If, however, Professor Cook grants the foregoing distinction and makes the requisite two classes of agency, we must concede that "agency by estoppel" forms one class of actual agency. The significant thing about the "agency by estoppel" discussion is that both Professor Cook and Mr. Ewart have failed to extend to contracts some such distinction between the consensual relations and the constructive relations of the parties as exists in agency.

Professor Cook is doubtless right in saying that "agency by estoppel" is as deserving of being called "actual agency" as what are herein denominated constructive contracts are entitled to be called actual contracts; but in both agency and contracts it is a fiction born of practical necessity, or, if one prefers, a fair rule of the game of making contracts, that renders the unwilling party bound to perform, despite the fact that at the time of the creation of the obligation he was unwilling and has remained so; and it is only confusing to treat the obligations of such an unwilling party as if they rested on the same kind of consent that obligations actually intended by all parties at the time they arise rest upon. If this fact be realized, then we must yield to Professor Cook's argument sufficiently to let "actual agency" cover both "agency by consent" and "agency by estoppel."

"Agency by estoppel" and "agency by consent" seem to be reasonably satisfactory terms for agency classification purposes,[1] but for the distinction in contracts the best available terms seem to be "constructive contracts" and "consensual contracts." And if we adopt these names why not say: "Actual agency, as contrasted with agency by necessity as such [2] consists of (1) Agency by consent,[3] and (2) Agency by estoppel;" and "actual contracts, as contrasted with quasi-contracts, consist of (1) Consensual contracts and (2) Constructive contracts."

Others may find better names for the distinction in the law of contracts; the ones here suggested are of course tentative. The distinction itself is what is important.

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[1] It is doubtless too late in legal history to suggest "constructive agency" as a substitute for "agency by estoppel" where the latter phrase is used to cover cases of mere ostensible authority.

[2] That "agency by necessity," as distinguished from agency by consent and agency by estoppel, is really quasi-contractual in nature, is clear. Huffcut on Agency, 2nd ed. sec. 55. Any agency denominated agency by necessity that is not quasi-contractual must be either agency by consent or agency by estoppel.

[3] Agency by consent is of course divisible into (a) Agency by prior authority (b) Agency by ratification, (c) Agency by adoption.

LINCOLN, NEBRASKA. August, 1907.

THE WISCONSIN PUBLIC UTILITIES ACT

By Eugene A. Gilmore

BY the legislation of 1905 and amendments thereto, and by the enactment of the "Public Utilities Bill" at the recent session of the legislature, all forms of public business in Wisconsin are subject to the control and supervision of a commission of three men known as the "Railroad Commission," appointed by the governor for six years, and confirmed by the Senate. The governor may at any time remove any commissioner for cause. By the "Railroad Act" of 1905 this commission was first created, and all common carriers, including steam railroads, interurban electric railroads, bridge and terminal companies, express companies, car companies, sleeping car companies and freight and freight line companies were placed under its control. The recent legislation places under this same commission telegraph companies, urban street railway companies, and all public utility companies. "Public Utility," as used in the Act, embraces every corporation, company, individual, or association of individuals, their lessees, trustees, or receivers; every town, village, or city that now or hereafter may own, operate, manage or control, in whole or in part, any plant or equipment for the conveyance of telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly, to or for the public. The supervision and control extends to the investigation and fixing of rates, tolls, and charges; the securing of adequate and equal service; prescribing regulations as to the conditions, adequacy, and standards of service; the prevention of unreasonable preferences and discriminations; providing for a uniform system of books and accounting; and prescribing conditions for the ownership and development of public utilities.

The Public Utilities Act is the consummation of the movement towards a more effective control of public service companies, which began two years ago with the adoption of the Railroad Rate Law, and the success of this recent measure is due in large part to the confidence in commission control, which has been inspired by the efficient administration of the present railroad commission. Only seven votes in both houses were cast against the bill. The opposition was democratic, and was based upon the objection that the proposed law violated the principle of local self government, took from the municipalities the control of matters which every community was best able to regulate, and centralized too much power in the hands of a small board far removed from the community concerned. While the public service companies affected, opposed many features of the bill as inexpedient and impracticable, they favored rather than opposed the principle of centralized commission control.

Recognizing the failure of competition to secure efficient service at reasonable rates, the present law is constructed on the principle of monopoly, whether in public or private hands, adequately controlled by a strong central commission. While municipal ownership and operation are contemplated and provided for, the tendency of the Act will be strongly towards private rather than towards municipal operation of public utilities. Municipal ownership and operation is, in the main, a potentiality, and is so conditioned as to provide a constant incentive to adequate service by private operation. The object of the law is to secure adequate service from all public utilities under conditions which are fair and reasonable, not only to the public, but also to the corporations

concerned, and at the same time leave sufficient inducement for the improvement and extension of such utilities and the further installation and development of similar utilities throughout the state. Whether, as was strenuously contended by the opponents to the measure, regulation has been carried so far as to frighten private capital from this field of investment, thereby arresting the improvement and development of public service, can only be determined after some experience with the law. The friends of the measure feel confident that an efficient and conservative administration of the Act will bring certainty and stability to the situation and will attract rather than drive away investment.

The law is not wholly an experiment but is based upon and follows a long line of English legislation, dating as far back as 1855, which has dealt, apparently with great success, with the business of supplying gas for lighting and heating. Many of the provisions of the law have keen suggested by the Sheffield Gas Acts of 1855 and 1866. The framers of the bill have also drawn from the information and experience of the Public Franchise League of Massachusetts and from the legislation in Massachusetts and New York dealing with the same problem.

The important and characteristic features of the Act are as follows:

VALUATION.

In the solution of the problem of adequate service at reasonable rates, two important propositions must be established: 1. The basis of calculation. 2. The rate of calculation. With the latter the Act does not concern itself, although in the preliminary steps it was proposed to fix by law the amount of dividends which could be earned by public service corporations. The confused and unsatisfactory state of the law of public calling at present is due in no small measure to the very great intrinsic difficulty in ascertaining the value of the equipment used for the public, and the absence of any uniform and satisfactory basis of calculation. What elements should be taken into consideration and what weight should be given to each element in making up the total capitalization on which the public utility company is entitled to earn dividends is a matter of much uncertainty. The Wisconsin law has by no means removed this uncertainty. Realizing, however, that the first step in the solution of the problem is the fixing of some certain capitalization on which to compute the earnings and that the fundamental thing underlying capitalization is the value of the equipment or plant used in the service, the law provides that: "The Commission shall value all the property of every public utility actually used and useful for the convenience of the public." "Before the final determination of such value, the Commission shall, after notice to the public utility, hold a public hearing as to such valuation." After the valuation is fixed, the Commission shall certify the same to the public utility and municipality concerned and shall publish the same in its annual reports. The Commission is authorized to use in this work the information in the possession of the State Board of Assessment, thereby securing some relation between the valuation of property for purposes of taxation and for purposes of income; and the public service corporation that urges a low valuation for one purpose will be met with the similar valuation for the other purpose. The original draft of the bill was more explicit in regard to valuation. The Commission was required to proceed forthwith, and to complete as rapidly as possible the work of valuation. As finally passed, however, while the Commission is still required to make valuations, it is left with greater freedom as to the time and manner. Valuations may be made, however, of any public utility, irrespective of whether complaint has been

made against it, and it is the expectation that in the course of time a valuation on a uniform basis will be made of all public utilities in the State. In this feature the Wisconsin law differs from the New York Public Service Commissions Act. Under the New York law no general valuation is required, and presumably none will be made, except in the course of a hearing on a complaint against a particular utility.

The expression "actually used and useful for the public convenience" was selected after much consideration. While intending to leave with the Commission a wide discretion as to the elements which should be taken into consideration in reaching a valuation, the purpose of the clause is to require the Commission to ascertain the existing valuation of all property actually used for the public, and the requirement of "useful" for the convenience of the public was designed to eliminate from the valuation losses due to economic inefficiency, extravagant or bad management, improvident construction or excessive original cost, superceded or antiquated equipment. The provision of the Act relating to franchises would exclude from this valuation, certainly as to all future public utilities, and apparently as to all existing utilities, any consideration of them.

CAPITALIZATION.

In view of the wide power given in the matter of valuation, it was not deemed necessary to include in this Act any control over the issuing and transfer of stocks, bonds, and other evidences of indebtedness; thus differing materially from the New York Act which gives its commissions ample power over such matters. It was thought that the Commission could disregard in its valuations issues of stocks and bonds which represented water rather than actual valuations. But even so, this leaves unprotected the investor in such securities. So far as the fixing of rates and the control of public service companies is concerned, the Act is doubtless sufficient, but the desire to control capitalization in the future, and to protect investors, led to the enactment on the last days of the session of a separate bill to prevent stock watering and issuing of fictitious securities.

The law provides that no public service corporation, and this includes not only public utility companies as defined in the Public Utilities Act (excepting again telephone companies) but also railroad, street railway, telegraph, express, sleeping car, and freight line corporations, shall issue any stock, except in consideration of money or of labor or property, estimated at its true money value, actually received by it, equal to the par value thereof, and shall issue no bonds or other evidence of indebtedness, except for money or for labor or property, estimated at its true money value, actually received by it, equal to 75 % of the value thereof.

Before any issue of stocks or bonds is made, the corporation is required to file with the railroad commission a statement setting forth the amount and character of the issue, its purpose, a description and estimate of the value of the property or the services for which it is issued, the terms on which the issue is made, and the amount of money, if any, to be received in addition to the property or services. The commission is required to value the property or services for which the stock or bonds are to be issued, and shall make a certificate setting forth fully all the facts concerning the issue, and the value of the services or property, and no issue of stock or bonds without such certificate or in violation of its terms, shall be valid. Provision is made for a court review of the valuation fixed by the Commission. In determining the value of the property of the public service corporation or of any person furnishing service to the public, no franchise or privilege granted to such corporation or person shall be appraised at any greater sum than was

paid into the treasury of the municipality granting the same. Public service corporations are forbidden to declare any stock, bonds, or script dividend, or divide the proceeds of any sale of any stock, bonds, or script among its stockholders.

Thus ample power is now lodged in the Commission to control in the future the capitalization of public service corporations. What will be done with the inflated capital already outstanding, is not definitely settled. The method prescribed for valuation seems to contemplate that some, and possibly all, of such inflation shall be taken out at the expense of the investor.

COMPETITION.

With the exception of the telephone service, the conduct of all other utilities, as defined by the Act, is to be on a non-competitive basis. If the principle of monopoly in public service be sound, no satisfactory reason can be given for the exception of the telephone. In view of the acute struggle between the Bell System and the Independent Lines for control in Wisconsin and the advantage which the former apparently has in development, it was contended that to include the telephone in the non-competitive arrangement would mean the death of the Independents. This contention prevailed, thus introducing into the bill a glaring inconsistency.

In order to bring all public utilities under the provisions of the law, and to secure uniformity, it was at first proposed to revoke all existing franchises, and to grant in lieu thereof new franchises conditioned on the grantees being subject to the provisions of the Act. In view of the radical nature of such a proposition and the doubt as to its constitutionality, a more moderate and, in the main, wiser provision was enacted. The granting of franchises or licenses is still left with the municipalities, subject, however, to important restrictions. All franchises in the future granted to any public utility, as defined in the Act, are to be indeterminate, and are designated "indeterminate permits," and can only be granted to Wisconsin corporations. Such permits are declared to be subject to the condition that the municipality granting the same may purchase the property of the utility at a valuation, and on terms to be fixed by the Commission. The method of securing municipal ownership and operation will be noticed presently.

Existing franchises are not effected, except that they are declared to be so amended as to permit the municipality to grant an indeterminate permit for the operation of a second competing utility or to establish a municipal plant. Any public utility operating under an existing franchise may, by electing to abandon such franchise, and to come under the provisions of the Act, acquire an indeterminate permit. To induce public utilities having franchises to make such an election, certain protection is given to the utility with an indeterminate franchise from competition either by the municipality or a second public utility; for example, where a company is operating under an existing franchise, the Act permits a municipality to construct its own competing plant, or to take by condemnation proceedings an existing plant, or to grant a similar franchise to a competition company. If, however, the public utility is operating under an indeterminate permit, acquired for the first time, or acquired by abandoning its old franchise, the municipality can not grant (except in case of telephone companies) a franchise to a second company to engage in the same business, nor construct and operate a municipal plant without first securing from the Commission a declaration, after a public hearing of all the parties interested, that the public convenience and necessity require a second public utility or a municipal plant. This arrangement secures to the company operating under an indeterminate permit, a practically exclusive indefinite franchise; for so

long as its rates and service are reasonable and adequate, it is highly improbable that the municipality would vote to grant a similar franchise to a competing company, or to construct its own plant, or if it should so vote, that the Commission would declare that public necessity and convenience required the second competing utility. Every public utility, therefore, whether operating under an existing franchise or under an indeterminate permit, is given a constant incentive to furnish satisfactory service at reasonable rate. A further inducement to companies operating under existing franchises to accept the indeterminate permit will be found in the relief from the political corruption and extortion of local city councils, to which such companies are frequently subjected in getting their franchises originally or securing their renewal. As the law is framed, the probability is very great that existing public utilities will prefer to operate under the indeterminate permit and to be subject to a strong centralized control rather than face the uncertainties and vicissitudes incident to dealing with the average municipal council.

Except, therefore, for the purpose of inducing corporations operating under existing franchises to come under the provisions of the Act, and to operate under an indeterminate permit, competition in public service. while possible, is highly improbable.

MUNICIPAL OWNERSHIP.

The improbability of competition from a similar utility operated by the city or by another corporation is not due to want of power in the municipality to go into the business itself or to authorize another company to do so. The municipality has ample power to grant an indeterminate permit to a second company or to acquire and operate its own plant. The probability of competition or displacement by municipal operation is made to depend upon the efficiency of the service and the reasonableness of the charges of the public utility already in the field. In order to enable municipalities to acquire the means to exercise the power to construct or purchase and operate a municipal plant, an arrangement was adopted similar to the Mueller certificate plan used in Illinois to enable the city of Chicago to acquire its traction lines. A separate law was passed providing that, whenever the governing body of any municipality shall vote to acquire or construct, in whole or in part a public utility plant, and a majority of the voters of the municipality approve, the money required for such municipal undertaking may be raised by issuing certificates of indebteness secured by a mortgage on the plant to be acquired or constructed. In case a municipality has not reached its debt limit, it may of course raise the necessary money in the usual way by issuing municipal bonds. The probability of municipal operation is thus always present and may become a reality whenever the existing public utility corporation by its inadequate service or unreasonable charges creates the occasion.

COMMON USE OF FACILITIES.

In furtherance of the design to prevent needless duplication of equipment the Act provides that every public utility and every person or corporation having conduits, subways, poles, or other equipment in the street or highway shall, for a reasonable compensation, and on terms to be fixed by the Commission, permit the use of the same by any utility, whenever public convenience and necessity require such use, and the use will not result in irreparable injury to the owners or to the users of such equipment nor in any substantial detriment to the service rendered by such owners or to the users. The Commission is made the judge of whether such joint use is feasible.

ACCOUNTING AND PUBLICITY.

An intelligible and uniform system of accounting is a prerequisite to any efficient supervision and control over public service corporations. The preparation and publication of comparative statistics showing in detail the various items of cost of operation is the surest way to detect extravagance and inefficiency. As a basis for such statistics, each public utility should be required to keep its accounts according to some uniform system and with the proper degree of detail. The Wisconsin law requires the Commission to prescribe the form of all books, accounts, papers, and records, which must be used by the public service corporations in showing the business transacted by them, and no public service company is permitted to keep any books, accounts, papers, or records except those provided and approved by the Commission. The New York law leaves the prescribing of a uniform system of accounts and records optional with the Commission. The Wisconsin Commission is required to provide for the examination and audit of all accounts, and all items must be allocated to the accounts in the manner prescribed by the Commission. In case any public utility is engaged in any other business than that of producing or supplying heat, light, water or power, or the transmission of telephone messages, it shall keep and render separately to the Commission full accounts of such other business.

Annual reports are required to be furnished to the Commission by all public utilities. These must show in itemized detail all facts relating to the cost of service and operation. All the information derived from reports from public utilities and from its own investigations, the Commission is required to publish annually.

DEPRECIATION.

In order to keep the equipment of every public utility in efficient condition, to prevent its exploitation in anticipation of municipal acquisition, and to provide for replacement by improved equipment, each public utility must carry an adequate depreciation account, whenever the Commission, after investigation, determines that such an account can be reasonably required. The Commission is to ascertain proper and adequate rates of depreciation for the several classes of property of each utility. All monies thus derived are to be set aside ont of the earnings and carried the depreciation fund. The monies in this fund may be expended in new constructions, extensions, or additions to the property and, if invested, the proceeds of the investment shall also be carried in the depreciation fund.

CONTROL OF RATES AND SERVICE.

The present Act follows closely the Wisconsin Railroad Law of 1905, and applies to telephone, light, heat, water, and power companies the same general regulations. Every public utility is required to furnish reasonably adequate service and facilities at just and reasonable rates. Inequality of charges for like service and the giving of undue or unreasonable preferences or advantages are forbidden. The granting by any public utility, or soliciting or accepting by any person or corporation, of rebates is forbidden. Reduced rates in consideration of the furnishing by the customer of any part of the facilities are unlawful, but a public utility is permitted to rent any facilities incident to its business for a reasonable compensation. Free service in any form to any politic committee, or any candidate for office, or to any state or municipal officer is forbidden.

Every public utility is required to file with the Commission schedules showing all rates, tolls, and charges for any service, and also all rules and regulations which in any manner affect the charge for service. A copy of so much of these schedules and regulations as the Commission deems neces-

sary for the public is required to the printed and kept open for inspection at the office of the utility concerned. No change may be made by any public utility in its schedule except upon ten days' notice to the Commission, and the change shall be given the same publicity as the original schedule. No departure by the public utility from the schedule rates is lawful.

Upon complaint made against any public utility by any mercantile, agricultural, or manufacturing society, or by any body politic or municipal organization, or by any twenty-five persons, firms or corporations, that any rates are unreasonable or unjustly discriminatory, or that any regulation, measurement, or practice affecting the service is unreasonable or that any service is inadequate, or can not be procured, the Commission shall make an investigation, or may conduct a similar investigation on its own motion without complaint. No order, however, affecting the rates or regulations shall be made without a formal public hearing. If after a hearing, of which due notice must be given to the utility concerned, the Commission finds the rate or regulations are unreasonable, or the service inadequate, it is required to fix by order a reasonable rate or regulation and to determine what would be adequate service. The order of the Commission becomes effective within twenty days after service on the public utility, or within such time as the Commission may determine, and the public utility is required to conform to such order. The cost of the investigation is to be borne by the public utility found in fault.

Any public utility or any person or corporation in interest dissatisfied with the order of the Commission may within ninety days after such order is rendered, commence an action in a designated court to vacate the order on the ground that it is unlawful or unreasonable. Such an action is given precedence over every civil action of a different nature. New or additional evidence brought forward for the first time in the court proceedings must be returned to the Commission for the purpose of permitting the Commission to alter, amend, or rescind its order. If the order is changed, then the court hearing is on the modified order. If it is not changed, then the hearing proceeds on the original order. From the judgment of the trial court, an appeal is provided to the Supreme Court of the State. The rates and regulations prescribed by the Commission are made *prima facie* lawful and reasonable, and the parties seeking to vacate them must show by clear and satisfactory evidence that they are unlawful or unreasonable.

For the purpose of conducting investigations, keeping itself informed of the management of public utilities, and holding public hearings, the Commission is empowered to administer oaths, to compel testimony, and the production of papers and documents, to inspect the books, premises, and equipment of every public utility.

The Commission is required to prescribe convenient standard commercial units of product or service, standards for the measurement of service, to establish reasonable rules to secure accuracy of all meters and appliances for measuring service, to examine and test all appliances for measuring the product or service of every public utility.

SLIDING SCALE AND DIVISION OF SURPLUS PROCEEDS.

One of the most important and characteristic features of the Act and one which has great possibilities in it for securing energetic and progressive management of public utilities is found in the following section:

1. "Nothing in this Act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its customers or consumers or with its employees, for the division or distribution of its surplus

profits, or providing for a sliding scale of charges, or other financial device that may be practicable and advantageous to the parties in interest. No such arrangement or device shall be lawful until it shall be found by the Commission, after investigation, to be reasonable and just, and not inconsistent with the purposes of this Act. Such arrangement shall be under the supervision and regulation of the Commission.

2. The Commission shall ascertain, determine and order such rates, charges and regulations as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges and regulations as the Commission may ascertain and determine to be necessary and reasonable, and the right to revoke its approval and amend or rescind all orders relative thereto is reserved and vested in the Commission notwithstanding any such arrangement and mutual agreement."

While this section is permissive only and leaves the matter optional with the public service corporations, it opens the way for the adoption in all forms of public service of what is known as the "London Sliding Scale," which has worked so successfully in England, with the gas companies, and which in 1906 was adopted in Massachusetts. The principle of the sliding scale is an automatic adjustment of the rate of the dividend to the price of the commodity supplied. Its application involves four features: 1. An ascertained capitalization. 2. A standard dividend. 3. Initial price of the commodity concerned. 4. A fixed ratio of increase in net earnings to decrease in price of service. For example, in Masssachusetts, in regulating the gas companies, the standard dividend or net earning was fixed at 7% on an ascertained capitalization. The initial price of gas was fixed at 90 cents per thousand cubic feet. The ratio was 1% increase in dividends for every 5 cent decrease in the price of gas per thousand feet. In England the standard dividend for gas companies is 10% and the ratio is one to one and half per cent. increase to every 6 cents decrease in the price per thousand feet. It is entirely feasible to apply the same principle of regulation to other forms of public service. The sliding scale has had fifty years of practical test in England, and has had excellent effect in promoting efficient and economic operation of the gas business, so that these corporations have enjoyed liberal dividends, and the consumers, corespondingly cheap gas. Fully two-thirds of the gas sold in England to-day is under a sliding scale arrangement. The Wisconsin law leaves the working out of such arrangement with the corporations subject to the approval of the Commission.

The division of surplus profits among employees, contemplated in the above section, is a profit sharing device, already in successful operation in a number of English gas companies. It is an application of the sliding scale principle. The standard price of gas being fixed, for every decrease in this price, the officers and employees receive an annual bonus of a fixed percentage on their salaries or wages. This may be drawn in cash or left with the company on interest, or invested in the stock of the company. In some cases the right to the bonus is conditioned on leaving one-half of it for investment in the company's stock. The right to participate in this bonus is extended only to employees and officers showing an interest in the company, thus giving to such persons an incentive to promote efficient and progressive managment.

MUNICIPAL CONTROL.

For the successful realization of a strong centralized commission control, the principle of local self government must necessarily suffer considerable restriction. The Wisconsin Act, however, seeks to avoid undue restriction and leaves many matters with the local community. The granting

of franchises or indeterminate permits is still left with the municipalities, subject to the restrictions indicated. All terms and conditions, not inconsistent with the Act, upon which any public utility may be permitted to occupy the streets, highways, or other property within its jurisdiction may be prescribed by the municipality. Each municipality is authorized to require such additions and extentions to the physical plant of any utility as shall be reasonable and necessary in the interest of the public and to designate the location and nature of all such additions, and extensions, the time within which they must be completed, and all conditions under which they must be constructed. Municipal action in the above particulars is subjects to review by the Commission and if, after a hearing by the Commission, such action be found unreasonable, it shall be set aside.

MADISON, WISCONSIN, August, 1907.

"JOTTINGS OF AN OLD SOLICITOR," BY SIR JOHN HOLLAM

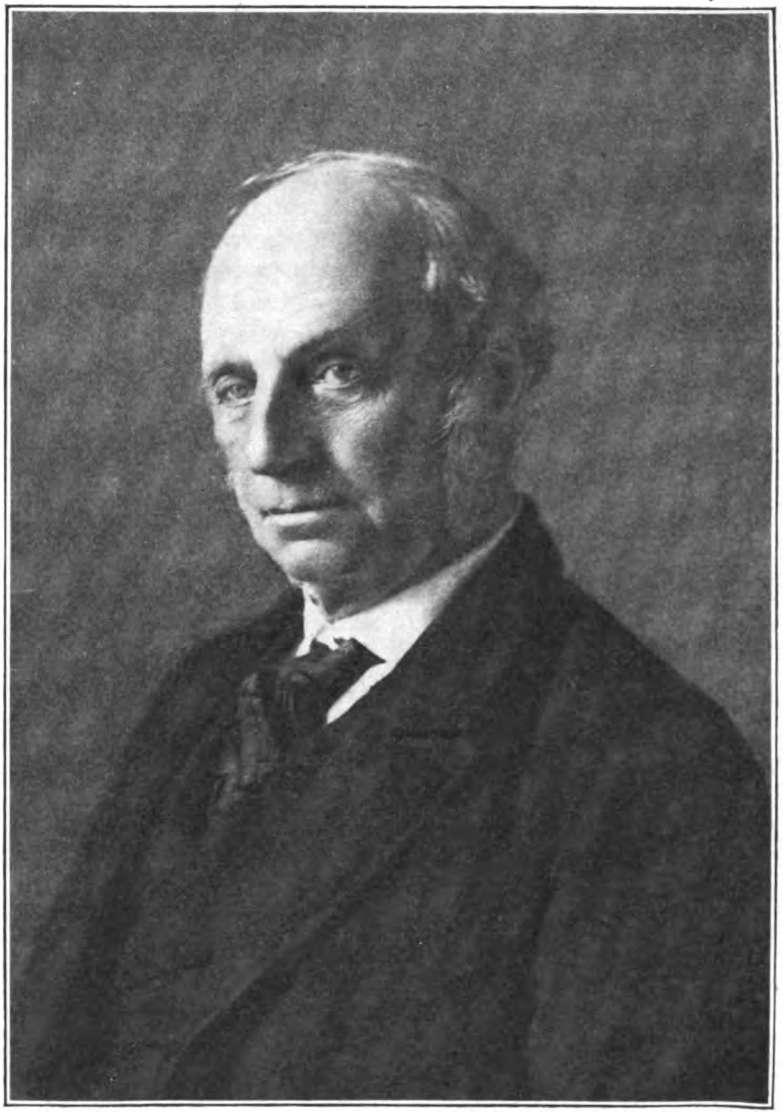
By J. G. Cotton Minchin

THOSE who take their impressions of the legal professions of sixty years ago from *Bleak House* will be startled by reading Sir John Hollam's *Jottings*. It is unfair to judge of any calling except by its best representatives, and in Sir John we have a most distinguished commercial lawyer. When in 1902 Sir John received his knighthood, a dinner was given in his honor, at which the lord chancellor presided, and at which nearly every judge of the Supreme Court was present. In recording this "wholly unprecedented" distinction Sir John remarks, —"It was indeed a most truly gratifying occasion. I most sincerely wish I could feel that I had done anything to merit such an unexampled testimonial." No book was ever written with less self-assertion. Sir John has trodden that path, which all successful solicitors must tread —*fallentis semita vitæ*, "for sufferance is the badge of all our tribe," though with solicitors of Sir John's type this sufferance takes the form of self-control and self-effacement. This is a very different spirit from that shown by most memoir writers, who might take as their motto —"*Et quorum pars magna fui.*" "So far as I am personally concerned, I have nothing of the slightest interest to record." In this manner Sir John opens his *Jottings*, and no professional reader and few students of human nature will close the book without regret.

Sir John came to London in 1840. Jarndyce and Jarndyce was in full swing; Mr. Tulkinghorn, Mr. Kenge, and Mr. Guppy were hard at work; the Court of Chancery was in those days, according to Charles Dickens's Chancery Judge, "almost immaculate." A chancery suit was then commenced by filing a bill of huge length; each defendant had to swear to the truth of the answer. Lord Lyndhurst, when sitting in court as lord chancellor, said that he himself had sworn to the truth of an answer without having read it. Sir John tells a story of his commencing an action in a court of common law for recovery of a considerable sum of money due to Russian clients. There was no defense on the merits, but there was a financial panic in the city and it was inconvenient for the English defendants to pay. They therefore filed a bill, asking the Court of Chancery to restrain the proceedings at law. To this an answer had to be made on oath by each partner in the Russian firm. Then when the answer was filed, the plaintiffs in Chancery (i.e., the original defendants) lodged exceptions to it, and so on, until the panic subsided, and the plaintiffs in Chancery paid the debt and costs, their solicitor remarking that the delay was well worth the expense his clients had incurred. There was no discovery in a common law action, and if a litigant wished to see his opponent's documents, he had to file a bill of discovery and an injunction was issued by the Court of Chancery. Now discovery can be obtained in any court, and at a trifling cost. Formerly the parties could not give evidence on their own behalf. Now they can both testify in civil and criminal cases. The order for witnesses to leave the court does not now apply to the parties to the cause, but originally all witnesses, including the litigants, had to retire. This practice was amended owing to a grave miscarriage of justice recorded by Sir John.

Trials by jury were formerly conducted on very different lines to those which now prevail. In the old days the judge made, as Sir John tells us, few remarks until he summed up. The favorite remark of Lord Campbell was "Go on." While counsel was

addressing the jury, the judge might retire to his own room for luncheon; thus the business of the court was not suspended for a moment, and the professional men played the case, when he was the only man in court who was not physically and mentally exhausted. We no longer lock up juries for the night, if they do not agree on their



SIR JOHN HOLLAM

the part of Stevenson's cow to the engine. Sir John tells us that the court at Guildhall met at half-past nine in the morning, and often sat till nine o'clock at night, or later. Sometimes grave injustice arose from the judge insisting on continuing the hearing of verdict. In Sir John's opinion, until a comparatively recent period, cases both civil and criminal were decided upon imperfect evidence. The discovery and production of documents, and the power to administer interrogatories to a litigant have

undoubtedly furthered the ends of justice. While Sir John recognizes the improvements that have been made since he began to practice — notably the simplification of pleadings — he deplores certain abuses which flourish and which induce litigants to resort to unsatisfactory arbitration, or the abandonment of just claims. These abuses are the cost of trials and the unrestricted right of appeal. The *Times* aptly referred to this as "the gambling element" introduced into litigation. Sir John goes so far as to say that unless there is a very large sum at stake no one can, in a case open to reasonable doubt, advise a prudent man to incur the risks of litigation with a powerful opponent. The cost of trials is, where expert witnesses are called, specially high. Lord Campbell recognized that experts are advocates rather than witnesses, and suggested in a bill that they should not be sworn.

There is a lighter side to Sir John's book. Some of his stories are so good that the reader will ask for more. We have a characteristic anecdote of Serjeant Ballantine, who cross-examined a female defendant with such brutality that she fell down flat in the witness box, and could not be further questioned. It so happened that one of the best judges of the reign of Queen Victoria, Chief Justice Earle, was on the bench, and in summing up to the jury he said that they had witnessed "an exhibition of brute force," which he had never before seen in a court of justice, and hoped never again to witness. A judge when speaking of another judge in court, refers to him as "my brother so-and-so." This greeting does not necessarily imply fraternal relations. For instance, no love was lost between Lord Blackburn and Lord Bramwell. Both were eminent judges, but Lord Blackburn was not universally popular. A dinner was to be given to Lord Bramwell on his retirement, and Sir John reports the following dialogue — Blackburn: "I am not coming to your dinner, Bramwell." Bramwell: "I did not suppose you were." Blackburn: "No, I do not like such things. When I retire I shall do so in vacation." Bramwell: "My dear Blackburn, it will be a very unnecessary precaution." Then we have the delicious remark of Lord Justice James — "A judge is not necessarily a fool."

Sir John depreciates his own powers, when, in the concluding sentence of his *Jottings*, he says "that the road to such success as I have had is open to any young man entering the profession," but he is absolutely right when he advises him to abstain from money lending, company promoting, and financing builders. This book is thoroughly sound and wholesome, and deserves to be "read, marked, and inwardly digested." If it has a blemish it is the blemish of reticence, the fault of a strong nature. For private conversation there can be no sounder principal than *de mortuis nil nisi bonum*, but when a man takes a pen into his hand, his guiding principle should be — *de mortuis nil nisi verum*. Of living men in unique positions, such as the lord chancellor or the headmaster of Eton, no wise man writes without great reserve, but of a dead keeper of the queen's conscience, he, who professes to record facts, should write the truth, the whole truth, and nothing but the truth. Sir John had better opportunities than any living Englishman to tell us something new and true of the giants of old, but he does not do so. We are all creatures of mingled iron and clay. Sir John writes of most judges as if they were all iron. Of Lord Chancellor Campbell he does write as of a human being — "Lord Campbell, who was generally disagreeable to everyone, and always took the popular side," with the result that he gives us a clearer picture of the old Scot than of any other judge. In conclusion, if anyone desires a picture of a London solicitor of the best type, let him read these *Jottings*, and learn how wise, modest, and capable a man can be who devotes his life to the service of others.

LONDON, ENG., August, 1907.

CORPORATIONS SUBJECT TO BANKRUPTCY

By R. Jackson Cram

IT would seem that the Bankruptcy Act of 1898 had now been in force long enough to give the legal profession, at least, if not that considerable body of laymen whose liabilities exceed their assets, some definite notion of its meaning and effect. As on three occasions previously Congress had enacted similar statutes the provisions of which the courts had construed, their faults as well as their merits should have been tolerably familiar to the national legislature. Nine years of practise under the Act has, however, shown that in many respects it is defective, not because of the unwise intentions of its framers, but by reason of clumsy wording. It is the object of this article to call attention to one instance of such faulty language and to suggest a remedy by amendment. I refer to that section which defines the classes of corporations which may be adjudged involuntary bankrupts.

Section 4 B of the Act of 1898 as to corporations is as follows: "Any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits . . . may be adjudged an involuntary bankrupt. . . . Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts." Compare the broader clause in the Bankruptcy Act of 1867: "The provisions of this Act shall apply to all moneyed, business, or commercial corporations." In this connection, too, the report of the Conference Committee on the so-called Torrey Bill, which later became the Bankruptcy Act of 1898, is important, in that it shows what the framers of the bill thought the words they had used meant. The committee, consisting of Senators Hoar, Lindsay, and Nelson, and Representatives Henderson, Ray and Torrey, say of this section[1] "(A change has been made in the bill as agreed upon as to who may be adjudged involuntary bankrupts, by including an unincorporated company and corporations engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits. It is believed that such corporations should be subject to the provisions of this bill. In these times the formation of corporations for these purposes is very common. A great railroad and transportation companies and banks incorporated under any law are left to be dealt with by the laws of the state creating them. It would lead to much confusion and hardship and many complications should we undertake to subject the great railroads and transportation corporations to the provisions of this Act. It is believed that they can be better dealt with under other laws."

The construction put upon Section 4 B by the courts shows how pitiably inaccurate were its authors in their use of their mother tongue. What does "principally engaged in manufacturing, trading, printing, publishing or mercantile pursuits" mean? Certainly not mining. In 1903, accordingly, the section was amended by the addition of that word. Courts have held warehouse,[2] water supply,[3] ice,[4] building and loan,[5] laundry,[6] mutual insurance,[7] saloon,[8] restaurant,[9] hotel,[10] theatrical,[11] construction,[12]

[1] See 144 Fed. Rep. 726. Opinion of Olmstead Referee. (Mass.)
[2] 10 Am. B. R. 474. Northern California.
[3] 3 Am. B. R. 508. Southern N. Y.
[4] 14 Am B. R. 61. Southern N. Y. Affirmed 16 Am. B. R. 832. 2d. C. C. A.
[5] 11 Am. B. R. 51. Southern N. Y.
[6] 9 Am. B. R. 30. Wisconsin.
[7] 2 Am. B. R. 372. Western Missouri.
[8] 7 Am. B. R. 173. Colorado.
[9] 7 Am. B. R. 173. Colorado.
[10] 13 Am. B. R. 403. 6th C. C. A.
[11] 5 Am. B. R. 219. Eastern Penn.
[12] 14 Am. B. R. 188. Eastern Virginia. Affirmed 15 Am. B. R. 515. 4th C. C. A.

irrigation,[1] and circulating library,[2] corporations as well as common carriers,[3] mercantile[4] and advertising[5] agencies, social clubs,[6] and corporations engaged in buying and selling bonds,[7] stocks and other securities not within the meaning of the section. While on the other hand sanatorium,[8] boarding stable,[9] bridge[10] and boat building,[11] and ice[12] companies, and a laundry which worked principally for manufacturers[13] have by other courts been held to be within its wording. The result is that many classes of corporations who ought to be subject to involuntary bankruptcy now escape, and grave doubt and difference of opinion exists as to its application to many others.

The meaning of the words printing, publishing, and manufacturing is tolerably clear, and the decisions with regard to them reach a satisfactory result. It is "trading or mercantile" that has caused the trouble. As Judge Lowell in one of the earlier cases remarked,[14] the two words are for all intents and purposes synonymous and mean probably nothing more than the word "trader" did as used in the early English bankruptcy statutes. This latter expression was found to be such an unhappy one that to put at rest further doubts as to its meaning the English Parliament in 1825, when they passed a new bankruptcy act, undertook to make a list of the trades which it embraced.[1] It would seem that our courts, however, cannot properly read into the Bankruptcy Act of 1898 the wording of the English Act of 1825, but must take the word in its ordinary historical meaning.[2]

This it seems is a person, in this connection a corporation, which buys and sells tangible property. It is obvious, then, that the statute in its application to corporations, at least, falls far short of what its makers intended[3] and what the needs of business require.

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[1] 14 Am. B. R. 370. Southern Texas.

[2] 9 Am. B. R. 568. 7th C. C. A. Northern Illinois.

[3] 7 Am. B. R. 707 Eastern Pennysylvania 10 Am. B. R. 424. Massachusetts. Affirmed 11 Am. B. R. 205. 1st C. C. A.

[4] 16 Am. B. R. 67. 3 C. C. A. overruling 13 Am. B. R. 725 New Jersey.

[5] 13 Am. B. R. 325. Northern Illinois.

[6] 7 Am. B. R. 670. Northern Georgia.

[7] 9 Am. B. R. 129 7th C. C. A. (Northern Illinois.)

[8] 2 Am. B. R. 408. Southern California.

[9] 5 Am. B. R. 763. Southern N. Y.

[10] 11 Am. B. R. 643. Western N. Y.

[11] 11 Am. B. R. 640. 2d. C. C. A. (Eastern N. Y.)

[12] 14 Am. B. R. 448. Middle Pennsylvania.

[13] 13 Am. B. R. 97. Northern N. Y.

[14] 10 Am. B. R. 424. Mass.

[1] 13 Am. B. R. 403 6th C. C. A. (Northern Ohio.)

[2] Act 6. Geo. IV. C. 16 — 1825.

Sect. II. And be it enacted, that all bankers, brokers and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against perils of the sea, Warehousemen, Wharfingers, Packers, builders, Carpenters, shipwrights, Victuallers, keepers of inns, taverns, hotels or Coffee Houses, Dyers, printers, Bleachers, fullers, Calenderers, Cattle or sheep salesmen, and all persons using the trade of Merchandize by way of Bargaining, Exchange, Bartering, Commission, Consignment or otherwise, in gross or by retail: and all persons, who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the Workmanship of Goods or Commodities, shall be deemed traders liable to become bankrupt: Provided that no farmer, grazier, common labourer or workman for hire, Receiver General of the Taxes, or member of or subscriber to any incorporated, commercial or trading Companies established by Charters or by Act of Parliament, shall be deemed, as such, a trader liable by virtue of this Act to become Bankrupt.

[3] See Article — Bankruptcy, A Commercial Regulation. 15 Harvard Law Review 829 at p. 842, where Senator William Lindsay of Kentucky is quoted as follows: "This measure is the most thoroughly analyzed piece of proposed legislation I have ever examined. Every conceivable contingency seems to have been thought out and carefully provided for. It is my judgment, that if enacted it will be a conspicuous example of matured legislation and remain for all time as an example of how laws should be prepared before being placed upon the statute books."

It would seem unwise to include within the scope of a national bankruptcy act a charitable corporation, an insurance company, or any public service corporation, whether a railroad or transportation company or not. If, however, Congress still desires to pass a statute which shall have the effect which the Conference Committee evidently thought the Act of 1898 would have, let it substitute for that part of Section 4 B, with regard to corporations, the following: "Any corporation, except national banks or banks incorporated under state or territorial laws, or common carriers, may be adjudged an involuntary bankrupt."

BOSTON, MASS, August, 1907.

A STUDY OF MEXICAN CRIMINAL PROCEDURE AS ILLUSTRATED IN THE BARILLAS CASE

By Joseph Wheless

Part II

The principles of Mexican criminal procedure described in the first part of this article we will now see in full play in the most notable criminal process of modern Mexican annals. The crime of assassination was instigated, according to confessions forced from the defendants, by high officials of the actual Guatemalan administration, one of whom, General Lima, was demanded in extradition by the Mexican Government, and the refusal of Guatemala to surrender him all but led to war with that country. The account of the trial which follows, with the incidents selected which serve best to illustrate the salient features of the Mexican procedure, are taken literally from verbatim reports of the trial appearing in the principal newspapers of the capital.

Long before nine o'clock of the morning of June 4, the large patio of the Palacio Penal was crowded with an eager throng, fortunate holders of the sealed tickets of admission, and unfortunates unprovided with this badge of privilege, who were hardly kept in order by the strong force of gendarmerie which did guard duty about the doors of the Sala de Audiencia. At 8:50 the great doors were thrown open, and in the expressive words of a daily, the great crowd "avalanched itself" into the Sala de Debates of the 3rd Presidency. At 9:30 the Judge President of Debates, Lic. José Saavedra,[1] touched the silver bell upon his table, and declared the audiencia opened.

The list of jurors drawn the day before was read by the secretary, and the names of nine actual jurors and two supernumeraries were selected by lot, neither party interposing any objection. As soon as this ceremony was over, the secretary read aloud the articles of the Code of Penal Procedure in regard to the organization of juries, and the qualifications, disabilities, and duties of jurors. The judge president then asked: "Have any of the gentlemen of the jury just drawn any legal impediment?" All remaining silent and indicating thereby that they were duly qualified for their duties, the oath required by the law was impressively administered to them, all the audience standing, and the tribunal of life and death was declared solemnly installed.

The names of the witnesses were read, it appearing that several of those summoned were not present, but no objection was entered to proceeding with those present, who were "put under the rule" and conducted to the witness room.

The trial then opened in earnest. The secretary read aloud the conclusions of the Ministerio Público, and of the defendants, which are expressed as follows:

Accusation of Morales.

1. Florencio Morales is guilty of having taken the life of General Manuel Lisandro Barillas, by stabbing him.

2. General Barillas died immediately after having been wounded and, therefore, within the term of sixty days laid down by law.

3. His death was caused by the wound described on sheet forty-four of the certificate and which in itself directly brought about death.

4. After the post mortem examination of the corpse of General Barillas had been made by the experts they declared that the wound was mortal.

5. Morales intentionally wounded Gen-

[1] In Spanish "*Licenciado*" is the title universally applied to a lawyer, by which, — "*Señor Licenciado*," — he is always addressed or spoken of, and which is always written prefixed to the name of lawyer and judge.

eral Barillas, after having considered and realized the crime.

6. Morales was armed, whereas General Barillas was not.

7. Morales took advantage of his adversary, without running any risk of being wounded or killed by him and did not act in self-defense.

8. Morales when he wounded General Barillas caught him unawares and with intent, without giving him time to defend himself or to avoid the danger.

9. Morales committed his crime without any consideration of the advanced age of his victim.

10. Morales committed the crime at night intentionally.

11. Morales did not speak the truth and made false statements with the intention of retarding justice and of making the inquiry more difficult.

12. Morales committed the crime for compensation received and promised.

Accusation of Mora.

1. Bernado Mora is guilty of acts which were the motive of the crime of murder of General Barillas by Florencio Morales, whom he induced to commit it.

2. Bernado Mora is guilty of having carried out acts which led immediately and directly to the murder of General Barillas, which act was carried out by Florencio Morales.

3. Under this head are conclusions 1, 3, 4, 5, 6, 7 and 8 of the foregoing.

4. Mora did not consider the age and position of the deceased.

5. The following are applicable: Articles 4, 7, 9, 32 and 48, fraction I, 49, fractions IV and V, 511, 515, 517, fraction IV, 518, 545, 560, 561, fractions I, II and III, 44, fractions I and II, 45, fraction XII, 46 and 520, fraction I, 523, 540, 541, 543, 544, fraction II, 47, fraction I and others of the Penal Code.

The Defense.

The lawyers for Florencio Morales, Lic. Arroyo de Anda, Francisco Olaguibel and Octavio del Conde, presented the following conclusions:

1. Morales broke a penal law in response to a moral force presaging a well grounded and irresistible fear of a serious and imminent danger.

2. Former good conduct, circumstantial confession of the crime, ignorance and lack of education.

3. Minority of age, which accounts for his lack of discernment of the true aspect of the act and its unlawfulness.

4. He was impressed with the idea that he was fulfilling a duty.

Mora's Innocence Assumed.

The defence of Mora assumed his innocence.

Mora was now ordered to retire from the court room, leaving Morales alone on his prisoner's stool. He was made to stand up and swear that he would speak the truth, whereupon he was asked his "generales," wherein he stated his name, that he was from Ocol, Guatemala, was eighteen years old, unmarried, a merchant, and was living, when arrested, in the house number 16 in the 2nd street of San Lorenzo, in Mexico City. His examination then thus began, the witness all the while standing:

Presidente: Do you know for what crime you are being tried?

"For murder," replied Morales, in a very low tone.

Presidente: Speak as loud as you can so that the gentlemen of the jury can understand well. Relate now how these things happened.

Morales then related with much detail how, being in Guatemala, Mora who was his cousin, had met him one day, and told him that if he would go to Mexico with

him they would profit by it; being pressed for explanation, Mora stated that it was to kill General Barillas; that as a reward he, Morales, would be paid for a saloon of his which had been destroyed some years before by troops operating under General Barillas; that he finally accepted the proposition and prepared to sail for Mexico, in company with Mora.

The forced examination of the accused then proceeds:

Presidente: But you came here with the object of killing him?

Morales: Yes, sir, because Mora said to me, "Let's kill him." Bernado Mora said to me every little while, "When are you going to do this?" I was afraid to commit the murder, but Mora was always telling me to do it; he was always after me, and every time said that these things were done in a minute. I did not wish to kill him, however much Mora urged me to do it. Many days passed and I did not wish to kill him; but I could not leave Mexico because I had no money, and then Bernado told me that if I did not kill him I could not return to Guatemala.

Presidente: Good. Now let us come to the seventh of April. You have already told of all the vacillations you had when you would meet General Barillas at the Zócalo; you met him at different times, and Bernado was urging you to kill him, but you did not do so for fear that they would put you in prison — is that not so?

Morales: Yes, sir.

Presidente: Now what happened on the seventh of April?

Morales: I was sleeping in my room when Bernado came and waked me. I went to the Zócalo, then into the street del Reloj. There I saw General Barillas coming along the street. When I saw General Barillas coming I did not know what to do, nor how to go about committing the murder, and I let him pass; afterwards I turned back and stopped in front of him, and I said to him: "Good evening, General"; I saluted him and told him that he should pay me for the cantina, as I had no money to return to my country and I said "Si no me paga, me pago con Vd." (If you do not pay me, I will pay myself with you.) I drew the dagger and gave him cuts.

Presidente: How many cuts did you give him?

Morales: I believe two.

Presidente: There were three, and one of them was in the shoulder — is it not so?

Morales: No, sir.

Presidente: By the autopsy of the body it is shown that General Barillas had three wounds, one of them in the shoulder, which was a very serious one. So you say that when you saw the general coming, you decided to kill him, after having vacillated many times, not wishing to do it; you let him pass, then came back, went forward, saluted him, claimed the money for the cantina his troops had destroyed, and you then killed him because he did not pay — is that so?

Morales: No, sir, not for that, but because I — the truth is — I much feared Bernado, that he would kill me.

Presidente: There are some witnesses who say that you did not speak to the General; that he was going in the direction of the street del Reloj; that you grasped the dagger, placed yourself in front of him, and gave him three wounds.

Morales: Yes, sir, but I spoke.

It will be noted that no witnesses had as yet testified to any of these details; but the Judge Presidente, with the record of the instruction lying open before him and familiar with its contents, made use of it and its more or less "hearsay" evidences, to interrogate and contradict the involuntary witness against himself.

Presidente: These facts you cannot now deny, because you have just confessed them. However, it has cost much work, enormous work, for you to confess the truth. During the process (of instruction) you have made many entirely different and contradictory

declarations; for, as you will remember, you began by denying your name.

Morales: Yes, sir, because Bernado told me to.

The Judge then cites at some length certain "hearsay" testimony from the record in regard to the plan to kill General Barillas and General Toledo, pointing out contradictions between the preliminary declarations of Morales and Mora; Morales denied them: "No, Señor."

Presidente: "But Sí, Señor; I did not invent it. Without doubt, you have studied the declarations which you had to make before the authorities."

Asked by the Judge whether he had ever before killed anyone in Guatemala, Morales replied that he had not.

"But you alone say it," retorted the Judge.

"Bernado can say it also," replied the prisoner, with quite a show of spirit, varying the monotony of his tone.

After some further questioning by the Judge, in regard to Morales' connections and actions in Guatemala, in which it appeared that persons "higher up" instigated and paid for the crime, the Judge ended his examination. It was at once taken up by Lic. José María Lozano, on the part of the Ministerio Público, who began with the warning that the witness should speak the truth and accurately; and then with vigorous and skilfully directed volleys of adroit questions led the defendant into statements, that he had accepted the proposition to go to Mexico and kill General Barillas because he was angry with him for having destroyed the cantina five years before; that he did so out of hatred and because he had not been paid for the loss of the cantina; also that he did the killing because he feared Mora and the persons who were behind him, some "high personage of Guatemala, a minister, a general, or someone of that sort." Finally, that he did it because he feared for what might befall his family in Guatemala if he should refuse. "Well, that is entirely new," exclaimed the Ministerio Pública, "never before during the instruction have you said that you acted on account of threats nor from fear of Mora!"

The Ministerio Público finally bowing to the Judge said "Nothing more;" and immediately the Lic. Rodolfo Reyes, representative of the Parte Civil, the Adonis of the Mexican Bar, lighting a fresh cigarette, bowed to the Judge in sign of leave to speak, took up the cudgel, and belabored the witness vigorously:

Reyes: When you saw General Barillas, did he give you any money?

Morales: I said that one time he gave me five dollars; but that is a lie.

Reyes: Do you think you are defending yourself by saying that he gave you money?

Morales: I do not know why I said that foolishness.

Reyes: Tell the truth!

Morales: It is not so!

Reyes: Why did you give several wounds to General Barillas? Were you afraid that the weapon with which you attacked him was not sufficient to kill him?

Morales: I,—I saw myself governed by that knife! Bernado told me that I must give him several blows with it, otherwise he may not die.

Reyes: Why did you sharpen the knife?

Morales: I sharpened it so that it would enter well!

After several interchanges of questioning between the Judge, the Ministerio Público, and the Parte Civil, which resulted in no new developments, the prosecution rested; whereupon Morales was turned over to his own defender and that of Mora, both of whom questioned him in a desultory manner, eliciting nothing that had not before been stated. At this point, twelve o'clock noon having struck, the Court took a recess until three-thirty in the afternoon.

When the Judge Presidente's bell sounded at 3:30 and he declared the session open,

even a greater crowd filled the Sala de Audiencia; the roll of the jury was called and all answered present, and the Judge ordered that the defendant Bernado Mora be brought before the Court, while Morales should be kept *incomunicado*. Mora, sullen and sour looking, was led by the guards to his stool, and then took his stand beside it to undergo the crossfire of examination. The Judge exhorted him in the name of the law to testify the truth, and called for his "generales," which Mora stated.

Judge: For what crime are you on trial?

Mora: I do not know, sir.

Judge: How, you do not know?

Mora: I am a prisoner on account of the murder of General Barillas.

Judge: You are on trial as the author of the murder perpetrated on the person of General Barillas.

Mora: Yes, sir.

Judge: State all that happened.

Mora: I have had no participation in the matter: the only thing that I did was to give money to Florencio Morales.

Judge: You spoke to Morales?

Mora: I went to find him, because General Lima ordered me to do so.

This is the General Lima whose extradition as the instigator of this crime was demanded by Mexico of Guatemala, the refusal of the latter country to surrender him being the cause of hasty preparations and threats of war. Although Lima is not even a lawyer, he has since been made a Judge of the Supreme Court of Guatemala — possibly merely a coincidence with the trial (?) and affirmed condemnation by that tribunal of some nineteen alleged conspirators against the present Cabrera régime in that Republic.

Continuing, Mora stated that one day a soldier came to him from General Lima and conducted him to the General, whom he had known about five years; that Lima told him to bring Morales to him, which he did, and Morales spoke with the General; I remained in another room and left the two together alone; directly Morales went out, and the General delivered to me money and passports.

Judge: Did he not tell you why he gave you that money?

Mora: He told me that it was for going to Mexico to kill General Barillas.

Judge: After Morales had talked with General Lima, did you talk with Morales, and what did he say to you?

Mora: That he had arranged to come to Mexico and kill General Barillas or General Toledo.

Judge: And you also came to Mexico to see that Morales fulfilled his mission?

Mora: No, sir; on the contrary I told Florencio Morales not to kill anyone; but Florencio Morales persisted and killed General Barillas; but, I repeat, I told him many times that he should not do it; yes, many times I told him not to commit that crime.

And thus at much length, now the Judge, now the Ministerio Público, plying the questions, and covering every detail of Mora's version of the affair, developing many contradictions between his statements and those of Morales. A *careo* was therefore deemed necessary, and the Judge ordered that Morales be brought into Court, and he was led in between his guards, and placed beside his stool, standing and facing the Judge President of Debates. What followed caused great sensation. In part this triangular trial by combat of words is set out, sufficiently to give an idea of its novel character, being translated literally from the verbatim report:

Judge: Morales, Mora says that you knew him; that he came here with the money to deliver it to you, in order that you should not waste it; that that was his mission.

Morales: It is not true, sir; but if that had been his mission, he would have delivered it to me all at one time; what he did was to say to me, "What are you doing that you do not kill him? I believe

that I will die in Mexico first" (Morales having testified that Mora gave as the reason why he, Mora, did not himself kill General Barillas, was because he, Mora, was sick and not able to do it).

Mora: I did not say any such thing.

Morales: I told him that I didn't know how the laws were here, that it was not possible to do it; to which Mora replied that as I had money in Mexico, I could have an assistant even here in the prison.

Mora: Judge, I told him not to do it; that we had agreed that this should not be done, that he would not kill General Barillas.

Judge: However, Mora, in the *careo* during the instruction you admitted that when Morales came to the house in San Larenzo Street, you asked him "Have you killed General Barillas yet."

Mora: I never asked him anything.

Judge: But here it is in the record; it appears here that you admitted this, and that you said that Morales, in answer to this question, replied to you that he had not been able to kill General Barillas because many people were present.

Mora: But . . . No, sir.

Judge: I am only repeating your declaration. Morales says that you were always asking him that.

Mora: I did not ask him; he told me that he wanted to kill General Barillas.

Judge: Morales, you speak to Mora in regard to this.

Morales (addressing Mora): Why did you ask me why I had not killed General Barillas?

Mora: I did not ask you anything.

Morales: You asked me; otherwise I would not have told you anything.

Mora: I did not ask him, Judge; but Morales told me that General Barillas had gone away.

Morales: Judge, he kept after me to kill the General; that then we would be saved.

Mora: I advised you not to, that you should not kill him.

Judge: You, Mora, have always been telling a multitude of inaccuracies. Can it be believed that you came with the exclusive mission of taking care that Morales did not squander his money and to give it to him only a little by little? Why do you not tell the truth?

Mora: No, sir; what Morales says is not true; I have always said the truth.

Judge: It has cost Justice an enormous work to be able to make you two confess anything; you have said one thing and then another, from first to last.

Mora: Judge, I was not commissioned to kill anyone; Morales says that because he wishes to defend himself.

Nothing having been accomplished towards arriving at the truth by this *careo*, during which the two defendants stood facing each other at arms length, glaring with looks of the intensest hatred one at the other, as if momentarily they would spring at each other's throat, they were ordered to resume their seats. They sat, still glaring at each other, while first the Judge, then one or another of counsel, kept up the crossfire of questions first to one then to the other, several times one or the other bitterly denying and denouncing some statement of the other defendant. Towards the close of an excited altercation between them, Morales said, in answer to a question, that Mora had not gone with him at any time to see General Barillas, as he, Mora, did not want Barillas to know him, so that he could kill him if Morales did not. Mora wildly denied this, using insulting terms to Morales, and crying, "Why do you keep on telling lies?" Morales exclaimed, "Ask for General Lima to testify!" The Judge replied: "Justice has already asked for General Lima."

The foregoing sufficiently well illustrates the Mexican manner of examining witnesses, and the conduct of the famous *careo*.

There is little left to be added to this already too long extended narrative. During the remainder of the afternoon, and

again during the morning session of the next day, various witnesses were produced, sworn to say the truth, and gave their testimony. This was, however, necessarily of very minor interest or importance, as the guilt of both defendants was self-confessed or sufficiently established from their own testimony. During the evidence of each witness there were frequent *careos* with one or the other defendant, who were called on to admit or deny what the witnesses testified to; and usually the admissions were freely made, although there were several sharp controversies, during which Judge or counsel would admonish the defendant to cease telling lies and speak the truth. One or two witnesses for the prosecution, who had been summoned, did not put in their appearance, and the Secretary, at the order of the Judge, as a matter of course, read the testimony of these witnesses from the record of the instruction. It may be observed, that as these declarations at the instruction are made in the presence of the defendant, subject to *careo* and cross-examination, and under practically the same conditions as if made in open court, they are not altogether objectionable as evidence.

At about noon the court took a recess until three-thirty. When the afternoon session was declared opened, Lic. José M. Sáyago, one of the counsel for the defense, arose and in the name of the corps of defenders, registered their protests against certain conduct during the trial; these related to the failure of several of the witnesses to appear, and the reading of their evidence from the record, the failure of Lic. Reyes to be duly accredited as representative of the Parte Civil, and that the *careos* had not been conducted according to law. The Judge ordered that the protests be noted of record, and that the trial proceed.

The Judge directed the Secretary to read the record of the instruction. The Ministerio Público asked, in order not to weary the gentlemen of the jury, that only such parts be read as they had not heard testified to orally, "except the declarations of Morales and Mora, which should be read so that the jury might know the constant falsehoods into which they had run for the purpose of deceiving justice." There being no objection to this suggestion, it was followed; the certificate of the autopsy of the deceased General was also read from the record. At the request of the Ministerio Público, the dagger with which Morales murdered General Barillas was exhibited to the jury.

This ended the evidence. Before arguments began, the Judge ordered the Secretary to read aloud to the public the section of the Code of Penal Procedure in regard to the behavior of the public during trials, and declared that no manifestations of either approval or disapproval should be made by any person.

The Agente del Ministerio Público, Lic. José María Lozano, at once opened the arguments to the jury with an eloquent and forceful address in which he reviewed all the incidents of the political crime, and closed with an appeal for the jury to do its solemn duty by condemning the assassins. "This," he exclaimed, as he left the tribune, "is what Mexico expects of you, with Mexico, the Republic, and with the Republic . . . the Universe!" Lic. Rodolfo Reyes, on behalf of the Parte Civil, then ascended the tribune and delivered a brilliant oration, which was received with frequent bursts of applause from the audience, notwithstanding the warning bell of the Judge President. At its close a recess of five minutes was declared, "to relieve the fatigue of the jury," during which the two orators held a veritable reception and received a hearty ovation and handshaking. This ended, Lic. Don Augustin Arroyo de Anda, the leader of the *ex officio* defenders of the accused, arose; he would undertake no argument, he said, but would ask to make

some modifications in the conclusions of the defense, and offered an amendment in these words: "The deed imputed to Mora and Morales is a political crime and of international character." This amendment was refused by the Judge, and protest noted. Next Lic. José M. Sáyago, a quite young but evidently capable advocate, made a brief address on behalf of Mora, asking clemency for his client, and pointing out that if they were executed the sole evidence against the real author of the crime would be destroyed. The notable argument of the defense, on behalf of Morales, was now that of Lic. Francisco M. de Olaguibel, which was a gem of polished oratory and literary and philosophical considerations of the difficult theme of defense which was imposed upon him; he made a gradation of criminality in the scheme of assassination: Morales was the passive instrument of death, Mora the bloody hand that wielded it; General Lima was the arm that impelled the fatal blow; and away yonder, in the shadow, was the guilty mind which conceived the tragic idea.

As this the last of the orations was ended, the Judge at once read the interrogatories to be submitted to the jury; these were acceptable to the prosecution, but objected to by the defense, who requested modifications; these were refused by the Judge, who declared that the interrogatories were in harmony with the conclusions of each party. The Judge then made a lengthy and careful summing up or review of the evidence to the jury; at the end of which, the Judge, jury, and all connected with the trial, stood up while the Judge read impressively to the jury the exhortation required by the Code of Procedure, heretofore quoted. The Judge then delivered to the jury the interrogatories and the record of the instruction, and at nearly half past ten o'clock, P.M., they retired to their room for deliberation. It was 11:50 when the jury filed again into the court room, and delivered their verdict (the interrogatories, with the record of the vote on each, duly signed and certified) into the hands of the President Judge, who declared the session resumed and read the verdict aloud. It was a unanimous finding in favor of each one of the interrogatories for the prosecution, all those of the defense being rejected. I may remark that a verdict by a majority of the jurors is always sufficient to convict.

The Ministerio Público at once arose and earnestly argued to the Court that the sentence of death should be pronounced; this was as earnestly opposed by the defenders, who pleaded instead for the extreme imprisonment of twenty years, allowed by the law. The Judge declared a further recess and retired to his chambers to prepare the sentence. Upon his prompt return, in a clear tone he ordered all to stand and the gendarmerie to present arms. The scene was very impressive.

It was a moment of tense expectation; all strained to hear the words of the fateful sentence: it was that Florencio Morales and Bernado Mora should suffer the pain of death as the murderers of General Don Manuel Lisandro Barillas; that this penalty should be imposed with all the formalities of the law, in the garden yard of the Prison of Belén; the death penalty in Mexico being by shooting to death. Five days were allowed the accused for appeal, and notice of appeal was at once given by their defenders. The accused, on whom all eyes were focused, remained impassive. Thus ended the most notable criminal trial of late years in Mexico.

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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, facetiæ, and anecdotes.

ENGLISH JUDICIAL STATISTICS

The English custom of compiling and publishing the statistics of litigation make it easier to study the development of their practice than that of our own, though it is to be regretted that their publication is so much delayed.

The latest British civil judicial statistics, those for 1905, have just been issued. They show the first decrease since 1899 in legal proceedings, the decline being from 1,518,527 cases in 1904 to 1,473,919. Among the most interesting features of the report is the section dealing with matrimonial suits, of which there were 921. There were 752 petitions for divorce, which, although thirty-two more than in 1904, were considerably fewer than in the preceding years. Husbands' petitions reached a total of 429 and wives 323. Of the marriages dissolved 23.23 per cent had lasted from five to ten years, 39.43 per cent had lasted from ten to twenty years, while 10.89 per cent had existed for at least twenty years. Another feature of the statistics is the steady growth of imprisonment for debt, 11,427 debtors having been committed, the highest number for ten years.

WORKMEN'S COMPENSATION

The workmen's compensation act, enacted by the British Parliament in 1897 and amended in 1900, received important extensions in the re-enactment which took effect July 1st the scope of which has caused some alarm to English employers. The most important change consists in a widening of the definition of workmen within the meaning of the act. Subject to the exception of: (1) any person employed otherwise than by way of manual labor, whose remuneration exceeds 250 pounds a year; (2) any person whose employment is of a causal nature and who is employed otherwise than for the purpose of the employer's trade or business; (3) policemen; (4) out workers; (5) resident members of the employer's family, workman means any person who has entered into or works under a contract of service or apprenticeship, and it is not necessary that his work be manual. Difficulties, however, will doubtless still arise in determining who are entitled to the benefits of the act, since the definition implies that an independent contractor is not entitled thereto, and the question, "What is employment of a casual nature?" has already given rise to some discussion. As applied to seamen, there are many new provisions, all in the direction of extending the liabilities of the employer, and one section has extended the right of compensation to workmen suffering from certain industrial diseases.

A far reaching change made by the act is that it will no longer be able to set up the serious and wilful misconduct of the workmen in answer to the claim, when the injury has resulted in death or serious and permanent disablement. Another change is that whereas formerly compensation was never payable until the first fortnight after the workman's incapacity, in future the only limitation will be that if the incapacity lasts less than two weeks compensation cannot be recovered for the first week. The scale of compensation has been altered in the case of a workman under twenty-one years of age. If his average weekly earnings are less than 20 shillings, the weekly payment is fixed at the full amount of his average weekly earnings, instead of 50 per cent. He is

limited in all cases to ten shillings, and where a workman is employed by several different masters at the same time working part of the time for each, his weekly earnings are to be calculated as if his earnings under all the contracts were earnings in the employment of the one whom he was serving at the time of the accident. The persistent tendency to broaden the scope of the English statute and to increase the burdens imposed upon the employer, is an important sign of the times in England and it is to be feared that it will tend to increase opposition of employers in this country to the enactment of this important legislation, since they can justly argue that the enactment of a reasonable provision in the first instance will give them no assurance that it will not prove merely an incentive to demands of a more burdensome nature.

JUDICIAL DISCRETION

There are two divergent views of the proper attitude of a judge toward the trial of a case, each born of the political conditions of the ages in which it has held sway. The one makes the judge a presiding officer at a partizan contest, who pronounces the rules by which a jury ought to be governed and leaves the parties by their counsel to conduct their own cases. The other makes the judge a public officer charged with the duty of administering justice who is to ascertain the facts and in case of doubt relieve himself of the responsibility of guessing, by leaving it to twelve plain men who have heard the evidence. The necessities of the times incline us from one theory to the other and perhaps it is well that our system should contain the elements of both and that neither method should be irrevocably fixed so that we may modify our practice when courts have swung too far in the one direction or the other. It is the belief of many that the courts in the United States have become too negative, and have lost right of justice in the confusion of conflicting principles laid down by a too voluminous collection of precedents, and many are urging changes of practice which will incline judges to a freer exercise of their prerogatives in the trial of cases in the interest less of the litigant than of the public by the expedition of causes and the cultivation of confidence in the justness of litigation. This is perhaps but one of many indications of greater regard for the people than for the individual. One of the simplest of these suggestions and perhaps the most effective in criminal cases requires a change in the attitude, and perhaps an increase in the labors of appellate courts. It is said that courts of appeal should examine the whole record and reverse a case only for error going to the merits leaving it to the good sense of the appellate body to ascertain what is a meritorious defense. This will require the abolition of the old fashioned bill of exceptions still used in many States to isolate and thus magnify minor mistakes in the conduct of trials or at least compel the excepting party to show from the record that the error of which he complains, did prevent a just decision. It is this proposition which has been recently endorsed by the Alabama State Bar Association, whose energetic committee of correspondence, of which Mr. Julius Sternfeld is chairman, is planning an active campaign of correspondence to ascertain if possible, the sentiment of the Bar throughout the United States on the subject such a wholesome work deserves and has a ready received hearty support from influential attorneys and judges and the results of the labors of the committee will be awaited with great interest.

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

The English, Scotch and French Legal magazines furnish most of the material for this department this month, although the *American Law Review* has four articles on various phases of constitutional law and one on the usual subject of the status of a foreigner who has declared his intention of becoming a citizen of the United States. The articles on conflict of laws in the French *Journal de Droit International Privé* deserve special attention.

BIOGRAPHY (Heney) "The Making of a Fighter; How Frank Heney Prepared in Arizona for the work he is now doing in San Francisco," by Lincoln Steffens, August *American Magazine* (V. lxiv, p. 339). A breezy account of a conspicuous figure in California and Oregon criminal prosecutions.

BIOGRAPHY (Taft.) "Taft; A Career of Big Tasks" by Eugene T. Lyle, Jr., August *World's Work*. The second part of this sketch deals with "the beginning of public service" in a rather volatile style.

BIOGRAPHY (Taft) "William H. Taft as a Judge on the Bench," by Richard V. Oulahan in the August *Review of Reviews* (V. xxxvi, p. 208), is a pleasant commentary on the personality of Mr. Taft illustrated by anecdotes of his judicial conduct. A more important article immediately follows it entitled "The Labor Decisions of Judge Taft," by Frederick N. Judson. This is a discriminating summary of important decisions in railway cases which have been subjected to much ignorant political comment of late.

COMMON CARRIERS. "The Toronto Street Railway Cases," Editorial, *Canadian Law Times* (V. xxvii, p. 539).

CONFLICT OF LAWS (Confiscated Trade-mark Abroad). The struggle in France between church and State presents many legal problems. "La Marque des Chartreux et les Prétentions du Liquidateur devant les Tribunana E'trangers," by A. Pillet in the *Revue de Droit International Privé* (V. iii, p. 525), discusses the interesting situation of the famous trade-mark of the Chartreux monks. The government receiver seized their property in France, including their French trade-mark; the expelled monks went to Spain and there made Chartreuse which they claim the right to sell outside of France under the old mark, registered abroad. Attempts to restrain each other from using this mark were inevitable and several have been made in European courts and in at least one South American country. A recent case in Hamburg and the arguments made therein furnish the text for the present article.

M. Weiss, for the monks, argued that the law of the 1st of July, 1901, as a result of which the monks lost their rights, is not personal and extra territorial, as touching on private interest, but is territorial only, being a police measure. For the receiver, M. Lyon-Caen argued that marks are the accessories of a manufacturing or commercial establishment, that they in general follow its fortunes and that the one carrying it on has in the absence of contrary stipulations the right to use the marks. He added that the French courts had recognized the receiver's right to use the marks in controversy.

Agreeing with M. Weisse's result the author declares the territoriality of the law has little to do with it; agreeing with M. Lyon-Caen's statements he says they do not require a decision for the receiver abroad, for there may be a transfer in France that does not operate elsewhere. The kernel of the question is to what extent a transfer, particularly a confiscation without indemnity will be considered valid abroad.

There is no doubt a voluntary transfer in France would give a right of property that

would be respected elsewhere. Professor Pillet thinks there might be more question in the case of a purchaser at a bankruptcy sale. But he finds a principle running far back in the science of jurisprudence and resting on ideas of natural justice, that laws derogating from common right or having a political origin will have only territorial effect. French courts for instance, have refused to recognize the lack of capacity of a foreigner, under the law of his own country, because it had a political or religious origin. The law under which the receiver holds is clearly a political one; that alone, he says, prevents its operation elsewhere. And clearly it is one of confiscation, thus coming under the other branch of the rule also.

A curious question of fraud and unfair competition is also treated. The expelled monks make in Spain the liqueur they formerly made at la Chartreuse, according to their secret recipe. The government official makes a liqueur at la Chartreuse in the place formerly used by the monks, perhaps even with their apparatus, though he does not know their processes, and perhaps does not even know the ingredients they used. Each sells under the old mark bearing the words: "*Liqueur fabriquée à la Grande Chartreuse.*" Which deceives the public and commits a fraud? The author has no hesitation in saying it is the government official.

CONFLICT OF LAWS (Renvoi Doctrine). "Du Renvoi d' Aprèi la Jurisprudence Anglaise en Matière de Succession Mobilière," by J. T. B. Sewell, *Revue de Droit International Privé* (V. iii, p. 507). A discussion of the English cases involving the disposition of personalty in England of persons dying domiciled abroad, since French jurisprudence has adopted nationality instead of domicile as the source of the law governing personal status. These cases involve the puzzling doctrine of *renvoi*, or English law says personalty in England is distributed according to the law of the domicile. But France regulates succession to personalty by the law of the decedent's nationality, without regard to his domicile. The English courts have not yet worked out whether this will result in the application of the English municipal law of succession, a result the author thinks has practical advantage.

CONFLICT OF LAWS. "De la Détermination de la Qualité de Commerçant et de see Conséquences en Droit International Privé," by Albéric Rolin, *Revue de Droit International Prive* (V. iii, p. 495). End of a study into the question of what constitutes a merchant and the consequences in conflict of laws. This installment takes it up when the question is looked at from the standpoint of jurisdiction.

CONFLICT OF LAWS. "De l'Avenir du Droit International Privé," by F. Despagnet, *Revue de Droit International Privé* (V. iii, p. 481). Concluding installment of an article on the future development of private international law or conflict of law.

CONSTITUTIONAL LAW. "The Power of the Supreme Court to Enforce its Decrees," by George C. Lay, *American Law Review* (V. xli, p. 515). Several times in our history the Supreme Court has made decrees which it has found it impossible to execute. Mr. Lay offers the following solution in the not impossible case of a State, defeated in a controversy with another State, declining to pay a judgment:

"In our view, there is irresistible force in the position that the States by the adoption of the Constitution clothed the Supreme Court with jurisdiction over controversies between the States, including those over title to property and public obligations, and thereby surrendered so much of their sovereignty as might otherwise obstruct the court in the enforcement of its decrees and mandates. Therefore, when it is said that the sovereignty of the States stands in the way of the collection of a public debt of the State, because neither the Supreme court nor the executive has the power to interfere with or control the administration of her financial affairs, the answer is that the State surrendered her sovereignty in this respect by conferring jurisdiction upon the Supreme Court to determine interstate controversies.

"The question of State sovereignty being disposed of, it remains to find a remedy for embarrassing conditions. If the power to enforce its own decrees does not rest in the Supreme Court, Congress is given authority by the Constitution to

> 'make all laws which shall be necessary and proper for carrying into execution the powers of Congress and all other powers vested by the Constitution in the Government of the United States, *or in any department or officer thereof.*'

"On this foundation Chief Justice Marshall built his temple of implied powers in McCullough *v.* Maryland, and paved the way for modern forces to tread with confidence and strength.

"If the Supreme Court is hampered in the execution of its powers, Congress is able to supply the omission, regulate the procedure of the Court, and prescribe the mode of carrying into effect its judgments and decrees, and the execution of its writs and mandates."

CONSTITUTIONAL LAW (Fourteenth Amendment). "Demands of Labor and the Fourteenth Amendment," by Roger F. Sturgis, *American Law Review* (V. xli, p. 481). A discussion of the cases involving the constitutionality of laws regulating the hours of labor, regulating and restricting payments and enforcing certain definite scales of wages.

CONSTITUTIONAL LAW (Fourteenth Amendment). "The Growing Importance of the Fourteenth Amendment," by Hannis Taylor, *American Law Review* (V. xli, p. 550). Address before the Bar Associations of Tennessee and Arkansas at Memphis, June 6, 1907.

CONSTITUTIONAL LAW. "The Treaty Making Power, by Shackelford Miller, *American Law Review* (V. xli, p. 527). A discussion suggested by the San Francisco school incident, concluding that the Federal government cannot take away from the States the control of local schools, a limitation of the treaty-making power of which all nations must take notice.

CORPORATIONS (Status Abroad). E. Hilton Young concludes in the July *Law Quarterly Review* (V. xxiii, p. 290) his article on "The Status of Foreign Corporations and the Legislature," noticed at length in this department in the June number. Having described the restrictive theory of dealing with foreign juridical persons in his first paper he takes up the liberal system, the foundation of which is the assimilation of juridical to natural persons. This is the modern system, he says, and gaining ground all the time. A review of the English law, which has made no express reference to either theory and comments on proposed legislation requiring foreign companies to file copies of certain documents, lists of officers and annual returns, conclude the article.

CORPORATIONS. "The Influence of Railroad Decisions in Corporate law," by Richard Selden Harvey, July *American Lawyer* (V. xv, p. 315). Mr. Harvey asserts that it is, "hardly too much to say that the influence of decisions in railroad matters, in delimiting the powers of directors and officers of corporations and in regulating the internal management of corporate affairs, has been, and bids fair to remain, the dominant factor," and that "if all decisions concerning corporations were destroyed, excepting only railroad cases, sufficient material would remain to reconstruct the framework of corporation law as it exists to-day, and to revive the study of that substantive department of law."

In support of these statements a long list of railroad cases, deciding many problems of corporation law, is given.

CRIMINAL LAW. "The London Police Court Today and Tomorrow," by "T. H.," *Law Times* (V. cxxiii, p. 325).

CRIMINAL LAW. "Capital Punishment," by Franklin E. Parker, Westwood, Mass., 1907.

CRIMINAL LAW. "Fraudulent Solicitors," by John Indermaur, *Law Students' Journal* (V. xxix, p. 183).

CRIMINAL LAW (Insanity and Expert Testimony). *The American Lawyer* for July (V. xv, p. 309) has a symposium on "The Defence of Insanity in Criminal Cases and Medical Expert Testimony," suggested by the Thaw trial. The divisions are: "A Judicial View," by Henderson M. Somerville; "An Expert's View," by Allan McLane Hamilton; "A Defence of the Present System," by James W. Osborne; "A Condemnation of the Present System," by John F. McIntyre; "Practical Steps Toward Reform," by Clark Bell. Messrs. Somerville, Hamilton and McIntyre concur in desiring an independent State expert or board to pass on the mental condition of the accussed. Mr. Osborne, opposes, saying:

"We have too many officials already, too much restriction in the matter of discussion in the courts. Authoritative commissions are dangerous, in that they still further limit the freedom that is needed in such matters. It is the very clash of expert opinion in a trial that helps a jury — just as the clash of architects helps the prospective house builder in settling on the plans for his future home.

All this would be done away with should an alienist commission be permanantly established."

CRIMINAL LAW (Death Penalty in France). "The Abolition of Capital Punishment in France," by Maynard Shipley, July-August *American Law Review* (V. xlv, p. 651). Suggested by the recent report of the French parliamentary committee against the death penalty, this article reviews, its history in France since Colbert's abolition of it in the seventeenth century.

CRIMINAL LAW (Scotland). "Insanity and Recent Criminal Practice," by J. Robertson Christie, July *Juridical Review* (V. xix, p. 165). A discussion of three recent cases, showing the unsatisfactory state of British Law as to insanity, as a defence and in the matter of procedure.

DOMESTIC RELATIONS. "The Adopted Son of A Tenant in the Province of Agra," by Indu Bhusan Bose, *Allahabad Law Journal* (V. iv, p. 199).

EASEMENTS. "Innovations on the pre-existing Law of India by the Indian Easement Acts," by R. B. Mitchell, *Madras Law Jonrnal* (V. xvii, p. 121).

EDUCATION (England). "Possibilities in Legal Education," by Edward Jenks. July *Law Quarterly Review* (V. xxiii, p. 266). Discussing various schemes for improving English legal education.

EDUCATION (England). "Legal Education in London," by Sir. Thomas Raliegh, July *Law Quarterly Review* (V. xxiii, p. 258). The substance of an address delivered at the opening of the Law Lectures of the University of London.

ETHICS. In *The American Lawyer* for July (V. xv, p. 326) John C. Mahon discusses "Legal Ethics." Dealing with the defense of criminals he says:

"What might be known as the law of extremes appears perpetually in human affairs. Religion, to be sufficiently effective in restraining loose standards of conduct, had to lapse into asceticism; and philosophy, to secure proper respect for individual rights, had to become unduly antagonistic to necessary restraints of government. The excesses of Socialism neutralize the dangers of Capitalism.

"So it would seem to be with a formal denial of the guilt of a confessed criminal, or the exclusion of evidence derogatory to an accused person; such legal safeguards are required to be of the strongest kind to effectively combat legal aggression. If the stoutest resistance be abandoned or the slightest failure to take advantage of legal privileges be shown, the tides of law would soon level all barriers. The stoutest resistance, even to the point of violence of truth would seem to be necessary to counteract legal abuses in order to preserve the equilibrium whereby rights are maintained.

"Because of the imperfection of men, practices may be justified by legal ethics based upon the requirements of conditions that violate the absolute right. But the ideal must ever be kept unclouded while submitting to the demands of conditions slowly approximating the ideal."

HISTORY. "The Evolution of the Right of Trial," by Hon. H. H. Lurton; *Ohio Law Bulletin* (V. lii, p. 442).

HISTORY (France). "Church and State in France," by John Carmont, July *Juridical Review* (V. xix, p. 134).

HISTORY (Homestead Law). In an interesting article on "Andrew Johnson and the Homestead Law," *Sewanee Review* (V. xv, p. 316), Thomas J. Middleton shows through contemporaneous speeches and records that it is most unfair to give the entire credit for this legislation to Mr. Grow, the author of the bill.

HISTORY (France). "The Bar In France — Part II.," by E. S. Cox-Sinclair. August *Law Magazine and Review* (V. xxxii, p. 406). Concluding a history of the French Bar.

HISTORY. "The Justice of the Peace: An Historical and Comparative Summary With Special Reference to the Philippines," by Charles S. Lobingier. July *Law Quarterly Review* (V. xxiii, p. 310). A four-page article giving a condensed history of the ancient office which, originating in medieval England, went through France and Spain to the Philippines, to be met there recently by the stream that had carried it to America.

INSOLVENCY. "The Workings of the Insolvency Law in India," by "X.," *Bombay Law Reporter* (V. ix, p. 161).

INTERNATIONAL LAW. "The Treaty-making Power," by L. Atherley Jones, *Law Journal* (V. xlii, p. 511).

INTERNATIONAL LAW (Declaration of Intent to Change Citizenship). An interesting paper on an unusual subject is that of

Nathan Wolfman in the *American Law Review* (V. xli, p. 498) on the "Status of a Foreigner Who Has Declared his Intention of Becoming a Citizen of the United States." Examination of the cases leads him to this conclusion.

"We thus find that from the point of view of international law, the problem of citizenship which, *per se*, involves only question of municipal law, has nothing whatever to do with the question of the status of a declarant of intention to become a citizen. That status involves the relation between a nation and one of its subjects and is, therefore, purely a question of international and not of constitutional law, and it follows that a municipal law of one of the States of the United States does not, internationally, affect the status of a declarant. Internationally, the declarant of intention to become a citizen owes to the country of his adoption a temporary allegiance resulting from the mere fact of domicile; and the fact that he still owes allegiance to his native country will not prove a difficulty to this proposition. International law in and of itself accords him protection when, for the time being, he leaves this country for another. But it will not accord him this protection as against his first native country, nor as against third countries with which treaties expressly exempt protection. This protection as to third countries entitled a declarant to the good offices of the United States in his behalf, but whether it was sufficient to authorize the issuance of a passport to such a declarant, remained in doubt until the passage of the very recent Act of Congress, approved March 2, 1907, which really defined and was declaratory of the already existing international law when it provided that a passport may issue to a person not a citizen of the United States, when such person has made a declaration of intention to become a citizen and has resided in the United States for three years. Such passport will entitle the holder to the protection of this Government in any foreign country, but it will not entitle him to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention."

INTERNATIONAL LAW. "War and Private Property," by Norman Bentwich. Boston Book Co, 1907.

In view of the fact that the Hague Conference has before it the question of exempting private property at sea from capture contraband excepted, the above is a very timely contribution to the literature of a question which has been not merely an academic question but one of practical diplomacy for over a century. As stated in the preface, the book is substantially the essay which won the Yorke Prize at Cambridge University in 1906. The author gives a particularly interesting historical survey of the practice in regard to private property on land and sea. Attention is called to the fact that while in Europe, the rules in regard to the treatment of private property on land have not been administered by any court, those in regard to private property at sea have. In speaking of the greatest single factor in securing respect for life and property in war, he says: "The immediate practical effect of Grotius' work, 'De Jure Belli et Pacis,' was remarkable. In the war of the Paletinate — which was fought while it was being written — pillage and spolisation were carried to their extreme. Gustavus Adolphus, however, who was an enthusiastic admirer of Grotius, made his soldiers pay for everything they took. His remarkable military successes proved that the old practice was as demoralizing for the spoiler as it was ruinous for the spoiled." He points out that not the same progress has been made in the adjective as in the substantive part of international law. "An International Court of appeal on prize cases sitting at the Hague would certainly seem to be one of the most pressing needs of international jurisprudence, and seeing that the questions it would have to decide would be purely legal, it cannot be objected that it would be derogatory to the sovereignty of states."

There are passages in which the author's patriotism becomes a trifle rampant, e.g., in speaking of compensation for war losses he says: "England's generous example in the South African war can hardly be regarded as a precedent for future international usages, for few other nations would pursue so enlightened a policy toward their late enemies." His views upon the advisability of exempting private property at sea from capture seem to be warped somewhat by his country's contention for the continuance of the present rule. His argument that private property at sea, "is not only private property but also a part of national com-

merce," is sufficient to cause a different rule to be applied to it to that applied to private property on land, does not seem to us sound; as a carload of goods shipped by rail from one country to another would be as much a part of "international commerce" as the same goods shipped by sea, yet at present a different rule applies to the former to that applied to the latter. Equally unsound is his argument that "there can be little doubt that the abandonment of maritime capture of enemy's property would lead to an extension or greater application of the right to blockade, and this involves a greater restriction upon neutral as well as upon belligerent trade." The same international public opinion which would force the abolition of the old rule because of its harshness would not tolerate the substitution of a harsher one in its place. He summarizes the "modifications required in the existing practice of maritime capture" as follows: (1) The abolition of prize money. (2) The acceptance by the state of its obligation to recoup its own citizens for their losses by sea. (3) The relaxation of the old laws of enemy domicil by the English and American courts, and the general adoption of the French standpoint, not on logical reasons, but from comity to neutrals. (4) The acceptance by the State of its obligations to compensate neutral owners, when innocent cargo is destroyed on an unarmed enemy vessel; (5) The exemption of mail-steamers from capture; and, (6) most important of all the classification of contraband by an international body." These suggestions are very excellent, if the old rule is to be maintained.

On the whole, the book is very well analyzed, well written, and constitutes a well-performed piece of work.

Edwin Maxey.

JURISDICTION (Scotland). "Reconvention as a Ground of Jurisdiction," by George Duncan, July *Juridical Review* (V. xix, p. 119). A discussion of the position in Scotch jurisprudence of the Civil Law doctrine of reconvention.

JURISPRUDENCE. "Responsibility in Law," by Rankine Wilson, in the August *Law Magazine and Review* (V. xxxii, p. 440), concludes an article begun in Vol. xxxi. The conditions of criminal responsibility are discussed in this last instalment.

JURISPRUDENCE. "The Origin of Punishment," by G. D. Valentine. July *Juridical Review* (V. xix, p. 152). The author sums up his position as follows:

". . . whether as regards clansmen or strangers the original purpose of punishment was not so much the satisfaction of feelings of resentment (the explanation usually given) as an attempt to make the criminal harmless. The action of the clan against strangers comes near vengeance, but may be distinguished from it by the important qualification that its object was not the assertion of clan superiority regarded as a good in itself, not slaying for the joy of it, but self-assertion for the purpose of gaining the respect, and with it the forbearance of neighbors. It was this quality that made it possible for that self-assertion to be limited in its scope. Mere vengeance is never glutted with less than the complete destruction of the enemy. It is impossible for it to enter into compositions. It can learn no law. Therefore it is not a fruitful principle from which equity can be derived. But a feud entered into with the view of rendering an offender powerless to repeat his trespass is regulated by self-interest and by the universal principle of "least action." The clan will go to no risk and trouble further than is necessary to gain the end in view. In such circumstances composition naturally comes to displace violence.

"In dealing with offences within the clan vengeance seems never to have been prominent. There punishment, as rendering the criminal harmless, soon passes into punishment as the elimination of a degenerating element. First, the man is cast out, then by various processes the wickedness is cast out of the man. There may have been a period when this conception of punishment was the dominant one — the period when the clan organization was beginning to sink into the background before central authority. From this source the idea of the "king's peace" was readily evolved. In the popular mind the preservation of public peace seems to be the ruling explanation of punishment to-day."

JURISPRUDENCE. "Possession and Ownership, II," by Albert S. Barnes in the July *Law Quarterly Review* (V. xxiii, p. 314) concludes the careful analysis, begun in the April number of the ideas represented by the significant words of the title. The author takes up in succession the modification by early common law of the idea that taking gives the right of possession and ownership

through recognition of the right of recapture; early common law rights to retake *via legis* classed as actions to punish and not as actions to establish ownership; later common law actions for the recovery of land and their derivation from the interdict *de vi*, an action given by the Roman law to punish the taking of land in violation of the right of possession; recognition under the common law of ownership in one and right of possession in another through allowance of right to retake *via facti;* the common law doctrine of relative ownership of land; ownership under the common law of chattels by one who has not the right of possession; relative ownership of chattels under the common law and the modern common law doctrine of relative ownership; the common law notion that if you cannot complain of a wrong you have no remedy and the Roman law notion that you cannot complain of a taking which did not violate your right of possession.

JURISPRUDENCE. "Ecclesiastical Influences," by Matthew G. Johnson, August *Law Magazine and Review* (V. xxxii, p. 399). Giving example of law. Modification of the common law of England through the clergy, familiar with civil and canon low.

LANDLORD AND TENANT. "The Law of Landlord and Tenant," by Percy John Crellin, *Law Students' Journal* (V. xxix, p. 185).

LEGISLATION. "Compensatory Adjustment under the Local Government Acts, Editorial, *Justice of the Peace* (V. xxi, p. 349).

LEGISLATION (Patents — England). "Proposed Patent Legislation," by J. Scott Duckers, August *Law Magazine and Review* (V. xxxii, p. 425). A discussion of three patent bills now before Parliament.

LIBEL. "Fair Comment and Qualified Privilege," by Norman de H. Rowland, *Commonwealth Law Review* (V. 4, p. 202).

MUNICIPAL CORPORATION (Special Assesments for Improvements). "The Power of Municipal Corporations to Make Special Assessments for Local Improvements," by Edson B. Valentine, *Central Law Journal* (V. lxv, p. 38). Collecting the cases on the subject.

NUISANCE. "Noise In Its Legal Aspects," by T. F. C. Demarest, July *Bench and Bar*, (V. x, p. 9). An examination of the New York statutes and decisions.

PRACTICE. "Court Fees in Licensing Matters," Anon., *Justice of the Peace* (V. lxxi, p. 362).

PRACTICE. "The Effect of an Award," by Durga Charan Banerjee, *Allahabad Law Journal* (V. iv, p. 215).

PRACTICE. "Judicial Liability," by W. W. Lucas, August *Law Magazine and Review* (V. xxxii, p. 417). A statement of the English law as to where a judge is protected, and where not, against suits by dissatisfied litigants.

PROCEDURE. "Variance between Pleading and Proof," by S. V. Iyer, *Allahabad Law Journal.* (V. iv, p. 235).

PROCEDURE. "The Fixing of Counsel's Fees," Editoral, *Irish Law Times* (V. xli, p. 197).

PROCEDURE. "Waiving the Benefit of Statutes," Editorial, *Canada Law Journal.* (V. xliii, p. 513).

PROPERTY. "Acts of Omission as Breaches of Covenants for Title," by T. F Martin, July *Law Quarterly Review* (V. xxiii, p. 331). A discussion of the Eng ish cases on the subject, interesting to real property lawyers.

PROPERTY (New Hebrides). "'British' Land Law in the New Hebrides," by James Edward Hogg, July *Law Quarterly Review* (V. xxiii, p. 304). A discussion of puzzling legal questions as to land titles likely to arise under the recent settlement of the claims of France and England in the New Hebrides.

PROPERTY (England). "Lateral Support Under the Waterworks Clause Act," by Charles Tennyson, July *Law Quarterly Review*, (V. xxiii, p. 282).

PROPERTY (Scotland). "Obligations to Relieve of Public Burdens and Supervenient Legislation," by James Ferguson. July *Juridical Review* (V. xix, p. 107). Examination of the Scotch cases in reference to obligations by a feuar to bear all future public burdens imposed on the subject feued.

PUBLIC POLICY. "Publicum Bonum Private Est Preferendum," by Franklin A. Beecher, *Central Law Journal* (V. 65, p. 79).

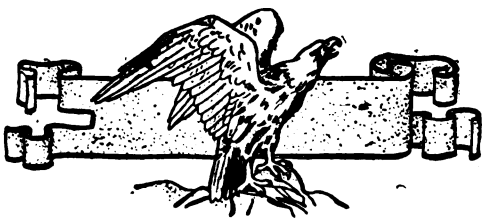
PUBLIC POLICY. "Centralization of Federal Power," by C. A. Hereshoff Bartlett, August *Law Magazine and Review* (V. xxxii, p. 385). A protest against the present tendency to increase the powers of our national government and lessen the importance of the states.

PUBLIC UTILITIES. In an article entitled, "The Wisconsin Public Utilities Bill" in the *Review of Reviews* for August (V. xxxvi, p. 221) John R. Commons, in detail explains the advanced position his state has taken in a vital question of modern legislation. He proves the law to be the result of careful consideration of the many complexities, and not, as is too often the case, merely a mass of impossible conditions imposed on public service companies to satisfy hurriedly unreasonable popular clamor.

SALES. "Specification of Goods as Affecting Documents of Title," by Richard Brown, August *Law Magazine and Review* (V. xxxii, p. 458). Discussion of a recent Scotch case of interest to commercial lawyers.

STATISTICS (England). "Civil Judicial Statistics, 1905," August *Law Magazine and Review* (V. xxxii, p. 431). Comments on the volume edited by Sir John Macdonell, giving English and Welsh statistics.

TORTS. "Local Bodies' Statutory Liabilities, II.," by Sir Robert Stout, *Commonwealth Law Review* (V. iv, p. 193).



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.)

CONSTITUTIONAL LAW. (Automobiles.) Mo. —The constitutionality of a law regulating the operation and speed of automobiles on public ways, fixing the amount of license and prescribing the penalty for violating the same, was questioned in State *v.* Swagerty, 102 S. W. 483, on the ground that it was a special law because it was applicable only to automobiles and did not apply to all vehicles using the public ways of the state. The court, however, was of the opinion that as the law applies to and affects alike all parties of the same class, that is, every one using automobiles on the public roads or ways of the state, it does not refer to particular persons or things of the class, and is, therefore, a general and not a special law. Furthermore, it is a police regulation and its passage was clearly within the power of the legislature. As a case supporting its decision the court cites Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.); 215 108 Am St. Rep. 196.

CONSTITUTIONAL LAW. (Elections — Laches.) Ky. — In the recent case of Ragland *v.* Anderson, 100 S. W. 865, which involved the validity of a law apportioning the state into representative districts, the Court of Appeals of Kentucky, in answer to a contention that if the act involved should be declared unconstitutional it would also follow that an earlier act must also be declared unconstitutional because it created unequal representative districts, though in a less degree than the later act, said that as the earlier act had gone into effect and the government had been organized thereunder, it would now be too late to question its validity, since to hold it void would be to throw the government into chaos. Such a thing no court is required to do. The doctrine thus indicated receives full support in the late case of Adams *v.* Bosworth, 102 S. W. 861. In this case it was sought to have declared invalid a law of 1893, apportioning the state into senatorial districts, but as the apportionment made by the law has been accepted without question by the people of the entire state for a period of thirteen years, the court considers that if there was no other reason for now refusing to disturb it, this long acquiescence would be sufficient. Persons who believe that their political rights are injuriously affected by unconstitutional legislation cannot condone the wrong for a long period of years by passively consenting to it, and defer taking action until confusion, if not chaos, would result from the long delay. When it is sought to vacate enactments involving the life of one of the great co-ordinate departments of the government, the public interest and the orderly administration of affairs demand that action should be taken as soon as practicable after the condition objected to becomes known and effective. It may be true, the court concedes, that laches cannot give validity to a void act, but the court maintains that when no property right is involved, and the question is purely political and administrative, individuals or parties that have seen the act in operation for years, and the affairs of state carried on under it, without offering objection or making protest, will not be heard at a late date to question its validity.

CONSTITUTIONAL LAW. (Federal Employers' Liability Act.) U. S. C. C. — The constitutionality of the Federal Employers' Liability Act, Act Cong. June 11, 1906, c. 3073, 34 Stat. 232, has been questioned in several cases up to date. In the earlier cases the courts seemed to be of the opinion that the act was unconstitutional. Thus in Brooks *v.* Southern Pacific Co., 148 Fed. 986, decided Dec. 31, 1906, by Judge Evans in the Circuit Court for the Western District of Kentucky, and in Howard *v.* Illinois Cent. R. Co., 148 Fed. 997, decided Jan. 1, 1907, by Judge McCall in the Circuit Court for the Western District of Tennessee, the act was held unconstitutional and void as not being within the constitutional power of congress to regulate commerce. But in later cases the constitutionality of the act has been upheld. Such cases are Spain *v.* St. Louis & S F. R. Co., 151 Fed. 522, decided March 13, this year, by Trieber in the Circuit Court for the East-

ern District of Arkansas; Snead *v.* Central of Georgia R. Co., 151 Fed. 608, decided March 25, this year, by Judge Speer in the Circuit Court for the Southern District of Georgia; Plummer *v.* Northern Pacific Ry. Co., 152 Fed. 206, decided March 2, by Judge Hanford in the Circuit Court for the Western District of Washington, and Kelley *v.* Great Northern Ry. Co., 152 Fed. 211, decided March 11, this year, by Judge Morris in the Circuit Court for the District of Minnesota.

CONSTITUTIONAL LAW. (Municipal Corporations.) Mich. Sup. Ct. — A provision of a city charter that the city should never be liable for any damage sustained by any person in consequence of the neglect of any person to keep any sidewalk clear of snow, etc., or other obstruction, was in Maclam *v.* City of Marquette, 111 N. W. 1079, upheld as valid and not open to the objection that it was class legislation. A case supporting the contention that the law is invalid is noted, *i.e.*, Hincks *v.* Milwaukee, 46 Wis. 566, 1 N. W. 230, 32 Am. Rep. 735, but the court remarks that this case is not in harmony with the decisions of Michigan in relation to what constitutes class legislation. The trial judge had filed a written opinion on rehearing in the case in which he reviewed the Michigan cases as to what constitutes class legislation, and this portion of the opinion is adopted by the Supreme Court. As these cases are all from Michigan, space will not be taken up with the citation of them. Anyone wishing an exhaustive review of the cases from that jurisdiction on the point is referred to the opinion in this case.

CORPORATION. (Succeeding to Partnership Business — Liability for Firm Debts.) U. S. C. C. A., N. Y. — In Du Vivier & Co. *v.* Gallice, 149 Fed. 118, the United States Circuit Court of Appeals holds that a corporation organized by the members of a partnership, to whom all the stock is issued, to take over all the property of the partnership and continue its business at the same place is liable for the debts of the partnership, even though such debts were not expressly assumed by the partnership.

CORPORATION. (Ultra Vires.) Minn. — The case of Burns *v.* St. Paul City Railway Company, 112 N. W. 412, involving the right of a newspaper publisher to enjoin the street railway from carrying advertisements in its cars, because *ultra vires*, presents a rather novel question. Counsel for plaintiff in the case states "with vivacity that is refreshing and a plausibility that is rather surprising" that the application was not "a path breaker" but that the path was not only "broken" but "well paved — macadamized with precedents." The court, however, is of the opinion that the numerous cases cited by plaintiff's counsel are not in point, and holds that the plaintiff is not entitled to an injunction against the street railroad. "His damages" the court says "if they exist at all, are entirely conjectural and extremely remote. The advertising business was incidental to the running of cars. Incidental thereto was the expenditure of considerable sums of money. That, incidentally, might result in a decrease in newspaper advertising. That, incidentally, might take from plaintiff's paper advertisements which might otherwise have come to it. Even if the street car company exceeded its powers, which, as at present advised, we think it did not, plaintiff's damage is too remote to give him any standing in a court of equity."

CUSTOMS DUTIES. (Automobile.) U. S. C. C. A., N. Y. — An automobile is in Hillhouse *v.* United States, 152 Fed. 163, held to come within the classification of "household effects" under the Tariff Act, July 24, 1897, c. 11, § 2, Free List, par. 504, 30 Stat. 196 [U. S. Comp. St. 1901 p. 1683]. This conclusion is largely based on the case of Arthur *v.* Morgan, 112 U. S. 495, 5 Sup. Ct. 241, 28 L. Ed. 825, wherein the United States Supreme Court held that carriages were properly classified as household effects.

DESCENT AND DISTRIBUTION. (Illegitimacy.) Cal. — A case illustrating the disadvantage of abandoning the common law for statutes in declaring substantive rights is the recent case of *in re* De Cigaran's Estate, 89 Pac. 833. In California there is a law which declares that where an illegitimate child, not acknowledged by his father, dies intestate, without issue, his estate goes to his mother, or on her decease, to her heirs. This law the court holds to provide a rule of succession for a special case so as to take the descent of property from an illegitimate child out of the rule provided by the general statutes as to descent. The adoption of this rule, as in the case at bar, seems to work a substantial injustice, for it is there held that the property of the deceased, an illegitimate daughter, not acknowledged by her father, passes on her death intestate and without issue, leaving surviving a husband, to another illegitimate child of her predeceased mother, by another father, who had not acknowledged her as his child, and not to the surviving husband. The court recognizes that an injustice is done, but feels bound to follow the plain and unambiguous provision of the law. The right of a surviving spouse to inherit is one solely for the legislature to determine and the courts cannot substitute their own views thereon for the views of the law-making power.

ELECTIONS. (Frauds.) Ky.— Cases of more than local interest, not so much on account of the law as the facts involved, are the consolidated cases of Scholl *v.* Bell, and Peter *v.* Wilson, recently decided by the Kentucky Court of Appeals, and reported in 102 S. W. 248. These cases involve the validity of the county and city elections held in Louisville and Jefferson County in November, 1905. The Democratic majorities at this election, as reported in the final count, range from 3,373 to 5,280 votes. The opposing candidates were nominated as fusionists. The court in reviewing the facts finds that in some precincts no polling places were open, that in others, the polling places were secretly moved, and the votes cast alphabetically, according to the registration lists, without the presence of the voters, that in others, the polls were raided by a band of armed men at about the time they should have been closed, and the ballot boxes seized, carried off, and the contents destroyed, that in others, the ballots were burned before the count had been completed, etc. By these means such a large number of voters were disfranchised that if they had all voted for the defeated candidates, they would have been elected by majorities ranging from 3,425 votes to 5,332 votes. As a result, the court feels compelled to declare the election void and the offices filled by such election vacant.

ELECTIONS. (State Committee — Powers.) N. Y. Sup. Ct. — As the democratic state committee of New York is, under the laws of that state, elected by delegates from the respective senatorial districts, and has no constitution or by-laws regulating its actions, the Supreme Court in Cummings *v.* Bailey, 104 N. Y. Supp. 283, 53 Misc. Rep. 142, holds that a majority of the state committee cannot expel the representatives of a county therein, and that an attempted expulsion will be enjoined. The court is of the opinion that no such extreme arbitrary power as to expel members of the committee and elect others in their places shall be asserted without express authority, and as the committee has no constitution or by-laws it has no such express authority conferred on it.

ELECTIONS. (See **Constitutional Law.**)

EQUITY. (Plaintiff's Misconduct.) N.J. Ch. — Several interesting points receive consideration in Vulcan Detinning Co. *v.* American Can Co,, 62 Atl. 881, recently decided by Vice-Chancellor Bergen of the New Jersey Court of Chancery. In this case it appeared that a German firm had perfected and was using a secret process for the detinning of tin scrap. The employees of this company knew that the company was trying to keep this process secret. Afterwards some of the employees went over to a Dutch firm. Later on, an American company obtained the right to use this detinning process from the Dutch firm and also secured employees from the latter. Then, another American company obtained the knowledge of the process by fraudulent means from the first American company, and the latter brought suit against the second American company to restrain the use of the process, but, as the complainant had itself obtained knowledge of the process from one who had fraudulently obtained it from the originator, and as it had knowledge of this fraud, the court held that it was not entitled to relief. Pending the suit defendant obtained permission from the originator of the process to use the same, and complainant insisted that such permission was held in trust for it, but this claim the court denied in view of the unconscionable conduct of complainant in obtaining knowledge of the process.

INFANTS. (Next Friend.) Ark. — Arkansas has a statute providing that any person may bring an action for an infant as his next friend, but this statute does not authorize the next friend to receive the money recovered in an action, according to the recent decision in Wood & Henderson *v.* Claiborne, 102 S. W. 219. Hence the payment by an infant's attorney of the proceeds of a judgment to his father, who prosecuted the action as next friend, is unauthorized. Such being the law, the minor on attaining his majority, may recover from the attorney the amount of the judgment, and the fact that the former has attempted to make collection from his father will not bar him from suing the attorney, if no recovery was in fact had from the father.

INNKEEPERS. (Liability for insults to guests.) N. Y. S. C. — That decisions of to-day are sometimes governed by precedents which seem to have outlived their usefulness, is forcibly illustrated in the recent case of DeWolf *v.* Ford, 104 N. Y. Supp. 876, decided by the Appellate Division, First Department, of the New York Supreme Court. In this case plaintiff, a guest at a hotel, brought an action against the hotel keeper on the ground that a servant of the latter had entered the room of plaintiff in the night time and against her protest, and in the presence of others had used towards her insulting language and charged her with immoral conduct. The trial court dismissed the complaint and on appeal Judge Ingraham, writing the majority opinion, held that plaintiff was not entitled to recover as the innkeeper was not liable on any implied contract to protect the guest from insults. This decision is based in the main on an early English case, Calye's Case, 1 Smith's Leading Cases (8th Am. Ed.) 249, wherein it is laid down as a rule in England that the obligation of an inn-

keeper extends only to the movables of his guests. He is not liable for insults or injuries to the person. As the court does not find that this case has ever been questioned in England, it considers itself bound, and does in effect, hold that while a guest may recover for injuries to his goods he cannot recover for injury to his person, but Judge McLaughlin writes a vigorous dissenting opinion in which he says, *inter alia:*

"The law, if anything, is a progressive science, and it has been the boast of the members of the legal profession that it not only keeps abreast, but is ahead, of the varying changes which are constantly being made for the comfort and improvement of human society. For this reason I do not think a rule which was applied 300 years ago in determining whether an innkeeper was liable, considering the advancement that has since been made and the changes that have taken place in the mode of living, is decisive of the question."

As Calye's Case decided nothing of the sort, and the contrary has been often determined, the court is hardly justified in ascribing its questionable law to precedent. **J. H. B.**

MARRIAGE. (Presumption). Mo. — The question as to the burden of proving the validity or invalidity of a marriage where it is shown that one of the parties has been previously married is discussed in Johnson *v.* St. Joseph Terminal R. Co. 101 S. W. 641. This was an action by a widow to recover the statutory penal sum for the death of her husband. It appeared that plaintiff and decedent were married in due form of law, but it also appeared that the decedent had previously been married to another woman. The question then arose as to whether plaintiff had the burden of proving the validity of the second marriage, or if defendant must show its invalidity. It was contended that defendant had the burden of proving the invalidity of plaintiff's marriage to decedent, and in support of this contention was cited the case of Klein *v.* Laudman, 29 Mo. 259. In the Klein case Klein and his wife had sued Laudman and his wife for slander. Defendants in effect denied that plaintiffs were husband and wife. Mrs. Klein had stated that she had previously been married in Germany and these admissions were proven. Based on that proof the trial court instructed that plaintiffs had the burden of proving that such marriage was legally terminated before the date of the second marriages The court on appeal, however, said that there was no presumption that a marriage which was proved to have existed at one time in Germany, continued to exist after positive proof of a second marriage *de facto* here. The presumption of law is that the conduct of parties is in conformity to law until the contrary is shown. In the Klein case the Supreme Court held that even if it had been established that Mrs. Klein's first husband was still living at the time of the second marriage she would still be entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce. The Klein case, the court notes, has been cited and approved in Waddingham *v.* Waddingham, 21 Mo. App. 609 and Leech *v.* First Nat. Bank, 99 Mo. App. 684, 74 S. W. 416, and criticised in Winter *v.* Supreme Lodge, K. of P, 96 Mo. App. 17, 69 S. W. 662. Outside of Missouri the Klein case has been upheld by Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; Schuchart *v.* Schuchart, 61 Kan. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. Rep. 342 and Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453. Numerous other cases are also cited in support of the doctrine of the Klein case, and the court comes to the conclusion that the presumption of innocence on the part of the parties to the marriage, which is stronger than all counter presumptions in such cases, casts the burden of proof on the parties denying the validity of the marriage, even to the extent of proving the negative.

MASTER AND SERVANT. (Fellow Servants.) N. Y. S. C. — In Fouquet *v.* New York Cent. & H. R. R. Co., 103 N. Y. Supp. 1105, 53 Misc. Rep. 121, it was held that a draftsman in the employ of the engineering department of the New York Central Railroad was a fellow servant with a man running the elevator in the Grand Central depot in New York, in which the draftsman worked.

MASTER AND SERVANT. (Nurses.) U. S. C. C. D. R. I. — A trained nurse performing her usual duties and exercising the skill which is the result of training in that profession, does not, according to Parkes *v.* Seasongood, 152 Fed. come within the definition of a "servant", but rather is one who renders personal service to an employer in an independent calling. In this case an employer of a trained nurse, who was occupying rooms at a hotel, was held not liable to the landlord for permitting the nurse in his employ to remain in the rooms occupied by him, and there to be delivered of an illegitimate child, an occurrence which caused considerable scandal and unsavory notoriety to the innkeeper. It was furthermore held that the employer of the nurse was not liable for passively permitting the body of the dead infant to be concealed in the rooms occupied by him, or to be concealed in another part of the building, unless he actively participated in the concealment of the body outside of

the room under his control, and suffered it to become offensive, having knowledge of its presence.

MUNICIPAL CORPORATIONS (see Constitutional Law).

NEGLIGENCE. (Charities — Master and Servant.) **Ky.** — The Kentucky Court of Appeals has recently filed an opinion on rehearing in the case of Illinois Cent. R. Co. *v.* Buchanan, which is reported in 103 S. W. 272, wherein the court withdraws its former opinion, reported in 88 S. W. 312. In this case it appears that a railroad hospital corporation was organized as a hospital independent of the railroad. Its directors, however, were certain officers of the railroad. All employees of the railroad were, as such, members of the hospital organization, supporting it by monthly contributions. No profit was derived by the railroad from the conduct or operation of the hospital. The physicians, surgeons and nurses in charge were selected by the directors and officers. Suit was brought by an employee of the railroad to recover from it for damages sustained through unskillful and improper treatment received in the hospital. On the original hearing the court held that as the hospital corporation was a separate and distinct organization from the railroad the latter was not liable, but on rehearing, the court reaches a different conclusion. The liability of the railroad is based principally on the ground that the directors who have full charge of the hospital are appointed by the railroad company and that the employees have no voice in the management of the hospital. Under such circumstances the court holds the railroad company liable for negligence in failing to exercise reasonable care in the selection of persons to have charge of the patients in the hospital.

QUASI-CONTRACTS. (Mistake — Insurance.) **Ia.** — A case presenting an interesting point of insurance law is New York Life Insurance Co. *v.* Chittenden & Eastmen, 112 N. W. 96. In this case insured had been absent and unheard of for more than seven years, and an administrator had been appointed for his estate. A demand was made on the insurance company for the insurance and this was paid to the administrator and a creditor to whom an assignment had been made by insured. Afterwards it was discovered that insured was not dead. Thereupon the insurance company brought this case to recover the payments made, but as these payments had been made voluntarily by the company, the court held that it was not entitled to recover the insurance money paid. At the time payment was made both parties had equal knowledge as to the whereabouts of insured and both assumed him to be dead. There was, therefore, no fraud or mutual mistake of fact which would entitle the insurance company to recover. As an analogous case, the court cites Sears *v.* Grand Lodge, A. O. U. W. 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204.

PARTNERSHIP. N. Y. Sup. Ct. — In Voegtlin *v.* Bowdoin, 104 N. Y. Supp. 394, it appeared that defendant, the owner of a play and a patent on an air reservoir, which makes the play possible, contracted with plaintiff and another to give each a one-third interest in both the play and the patent, and that on securing a contract satisfactory to him the three, as joint owners, should share equally all receipts, expenses and profits in connection with the development of plays and the use of the reservoirs. Such arrangement, the court held, constituted a joint adventure and made the parties liable as partners between themselves. Citing Wilcox *v.* Pratt, 125 N. Y. 688, 25 N. E. 1091; Mitchell *v.* Tonkin, 109 App. Div. 165, 95 N. Y. Supp. 669; Jones *v.* Walker, 51 Misc. Rep. 624, 101 N. Y. Supp. 22.

PARTNERSHIP (see Corporations).

PRACTICE. (New Trial.) **N. Y. S. Ct.** — A case in which the court stretches a point in granting a new trial is that of Fogel *v.* Interborough Rapid Transit Co., 103 N. Y. Supp. 977, 53 Misc. Rep. 32. In this case plaintiff had sued to recover for personal injuries. The evidence was conflicting as to whether there was a fracture of the spinous processes of the vertebræ, which might be followed by permanent paralysis. A large verdict was rendered for plaintiff which on appeal was affirmed by the Appellate Division and by the Court of Appeals without prejudice to defendant to move for a new trial on the ground that paralysis had not occurred. Several years had passed since the trial, and plaintiff's physical condition showed that the opinions of experts that the injuries would result in paralysis were not well founded. It was held that under the exceptional circumstances of the case and in furtherance of substantial justice, a new trial would be granted, though the case did not come within the settled rules as to granting new trial on the ground of newly discovered evidence.

PROPERTY. (License Irrevocable.) **Miss. Sup. Ct.** — In Frederic *v.* Mayers, 43 South. 677, it appeared that an owner of land agreed in writing that another might build an office for the publication of a newspaper on the land, and retain possession thereof as long as he used the same for a newspaper office. The newspaper publisher erected a building on the land and published a newspaper there for about two years. By successive transfers the property then passed into the hands of another newspaper publisher who made improvements upon the land with the

knowledge and acquiescence of the owner of the fee and continued the publication of a newspaper for a period of more than twenty years. On these facts the court held that the original publisher acquired more than a license revocable at the will of the owner and was entitled to exclusive use of the land, terminable only at his death or on ceasing to publish the newspaper; furthermore, that the owner was estopped to interfere with the rights of the transferee while he continued to publish a newspaper in the building erected on the land, and that as the transferee had claimed the right of occupancy openly and adversely to the owner who had not questioned his right he acquired an easement in the premises protected by the statute of limitations, so long as as he continued to publish the newspaper.

WATERS. (Irrigation — Riparian rights of States.) U. S. S. C. — In the case of Kansas *v.* Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. discussed at length in Mr. Costigan's article in our issue of October, 1905, the state of Kansas sought to prevent such use of the waters of the Arkansas River in Colorado as would diminish the flow of waters of the river in Kansas to the injury of the people in the latter state. An attempt was made by the United States to intervene on the ground that the flow of the river way subject to the superior authority and supervisors control of the national government. The right of the national government to intervene was, however, denied without prejudice to the government's right to intervene in case it becomes necessary for the preservation of the navigability of the river. The court holds that the reclamation of arid lands is not one of the powers granted to the national government. At the time of the adoption of the Constitution of the United States, there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state in which any particular tract of such land was to be found. The Constitution, therefore, made no provision for a national control of the arid regions or their reclamation. Since that time the country's borders have been extended and extensive tracts of arid lands which ought to be reclaimed have come within the domain of the United States. The court remarks that it may well be that no power is adequate for their reclamation other than that of the national government, but the court says if no such power has been granted, none can be exercised. However, as to arid lands in the territories, the court notes that Congress either by virtue of the second paragraph of section 3 of article 4 of the Constitution, or of the power vested in the national government to acquire territory by treaties, has full power of legislation, subject to no restrictions other than those expressed or named in the Constitution, and, therefore, may legislate in respect to all arid lands within their limits. As to arid lands owned by the government within the boundaries of the Western States, the national government has power to dispose of such lands and to make all needful rules and regulations respecting the same, but in doing so, it cannot override the laws of the state in which the land is located. The right of the state of Kansas to maintain the suit is sustained on the ground that the state is not acting directly and solely for the benefit of any individual citizen to protect his rights in bringing the suit, but to protect the rights of the public at large, as beyond its property rights, the state has an interest as a state in the large tract of land bordering on the Arkansas river, the prosperity of which affects the general welfare of the state. The court, therefore, considers the controversy as rising above a mere question of local private right, and as involving a matter of state interest, which must be considered from that standpoint. The main question is as to whether the state of Colorado may use the waters of the Arkansas river for irrigation purposes, and if so, to what extent such use may go. In other words, the question arises as to whether the common law rule of riparian rights should govern or the doctrine of the appropriation of waters. The court recognizes the right of each state to prescribe the rule applicable within its domain. As the state of Kansas has recognized the right to appropriate waters of a stream for irrigation purposes subject to the condition of an equitable division between riparian proprietors, the court holds that she cannot complain if the same rule is administered between herself and a sister state. As to the extent to which the waters may be used, the court is of the opinion that the dispute must be so adjusted on the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. In this connection, the court notes that while certain portions of Kansas may suffer from a diminished flow of the stream, other portions in the vicinity may be benefited by the increased cultivation of lands in Colorado, and that thus the injury to part of the lands in controversy may be more than outweighed by the benefit to other portions. Thus the court notes that since the commencement of the cultivation of the eastern part of Kansas, the area of cultivated and profitably cultivated land has extended from 150 to 200 miles further west

than farming could successfully be carried on in the early days. Then only the extreme eastern portion of the state was subject to cultivation, the western part being all arid lands. Therefore, the court is of the opinion that if the ariable district gradually extends westward from the Missouri river with cultivation, it is not altogether unreasonable to expect that as the arid lands of Colorado are irrigated and become from year to year covered with vegetation, there will move eastward from Colorado an extension of the area of arable lands until, between the Missouri river and the mountains of Colorado, there shall be no land which is not as fully subject to cultivation as lands elsewhere in the country. The court presents tables by which it is shown that since the commencement of irrigation in Colorado, the population and the value of the products raised in the counties subject to irrigation have vastly increased, and that there has been a very small, if any, diminution of the value of the products raised in the western counties of Kansas. Therefore, the court holds that Kansas is not at this time entitled to relief and hence dismisses the bill without prejudice to the right of Kansas to institute proceedings, whenever it shall appear that, through a material increase in the depletion of the waters of the Arkansas by Colorado, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river.

WITNESSES. (Experts — Additional Compensation.) Mo. App.—The right of a physician called into a case as an expert to additional compensation is often insisted upon and sometimes questioned. In Burnett *v.* Freeman, 103 S. W. 121, numerous authorities are collated on this proposition. Among the cases upholding the right of a physician to extra compensation for expert testimony and his right to refuse to testify unless paid such extra compensation are cited: Buchman *v.* State, 59 Ind. 1, 26 Am. Rep. 75; Dills *v.* State, 59 Ind. 15; People *v.* Montgomery, 13 Abb. Prac. (N. S. N. Y.) 207; In the Matter of Roelker, 1 Spr. 276, Fed. Cas. No. 11, 995; Webb *v.* Page, 1 Car. & K. 23. And among text writers affirming such right: 1 Taylor's Prin. of Med. Jurisprudence, 19; 2 Phillips, Ev. 828; 1 Redfield, Wills, 154, 155, and note; 1 Wharton, Ev. §§ 380, 456. Among those entertaining the opposite view: *Ex parte* Dement, 53 Ala. 389; 25 Am. Rep. 611; Dixon *v.* People, 168 Ill. 189, 48 N. E. 108, 39 L. R. A. 116; North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157; Commissioners *v.* Lee, 3 Colo. App. 177, 32 Pac. 841; Flinn *v.* Prairie County, 60 Ark. 204, 29 S. W. 459; 27 L. R. A. 669, 46 Am. St. Rep. 168. These are supported by later editions of Greenleaf's Evidence, vol. 1, § 310, and by 3 Wigmore, Ev. § 2203.

After a thorough discussion of the question the court comes to the conclusion that an expert is not entitled to additional compensation, and in the course of its reasoning the court says:

"If it were known that the free services (save ordinary witness fee) of the most eminent professional men of the country could be compelled at the instance of any litigant, might he not be required to devote a great part, or all, of his time in attendance upon courts or in giving his deposition, for the purpose of answering hypothetical questions on suppositional facts? It is sufficient to call for grave consideration when a rule is asked to be enforced which could lead to such results. On the other hand, all must concede that the physician, surgeon, or lawyer, is not entitled to any more consideration than an expert in any other calling. A farmer, a mechanic, a merchant, and he who follows most any avocation, may be qualified to testify as an expert in cases which call for the peculiar knowledge which he possesses, and which he has spent his time and money in acquiring. If either of these could demand compensation (more than an ordinary witness fee) the administration of the law would undergo a radical change."

THE LIGHTER SIDE

Worcester Ware. — J. R. Kane, Esq., a well known Worcester attorney, was among the visitors to the Pan-American Exposition in 1901. At that time persons visiting his office were much amused to find the following card on the door:

" My friends, do not your servant seek,
As he from town will be gone a week,
Or more, perhaps, as he does not know
The liquor law in Buffalo. J. R. Kane."

Nol Pros. — A good story is told by the Probate judge of Chittenden County, Vermont, of the days when he was a stripling at the bar, and had been elected state's attorney of Lamoille County, Vermont. He started a prosecution against a resident of Belvidere, one of those Green Mountain towns 90 per cent of the surface of which is perpendicular, for selling liquor under the old prohibitory law. Belvidere was hardly the community to frown on a liquor seller; in fact, he usually stood higher than the local clergyman in the esteem of the community, and the young state's attorney saw that he was likely to have hard sledding. The respondent called for a jury. The attitude of the jury was obvious, and, in fact, the outlook was so unpropitious that the prosecutor arose and stated that, under the circumstances of the case, he thought best to ask for a *nol. pros.* This was a new one on the justice, and he deliberated thereon. After a moment or two the foreman of the jury, who had been fidgeting about in his seat, leaned forward and said to the justice in a stage whisper, " Let him have his d——d old *nol. pros.*; we'll lick him anyway! "

Frauds. — There is a pettifogger in Addison County, Vermont, who was once trying a case that he had somehow brought, to which the defendant, although a newly admitted member of the bar, pleaded the statute of frauds. The young attorney discoursed learnedly on the statute, though his words were so much Greek to the presiding rustic. At the close of his remarks our hero, whose name was Caleb Rockwood, delivered himself as follows: " Looky here, Jedge, this 'ere is a statoot of frauds an' perjuries. Now there ain't no charge o' fraud in this case, an' if they's any perjury this 'ere defendant done it. There surely ain't no *fraud*, because the suit is on a contract for wages, and the plaintiff *done the work* an he wants his pay." Whereat the justice, before the young attorney could come out of his trance, gave judgment in full for the plaintiff.

Decision Reserved. — A newly elected squire in Wisconsin was much elated by his honors, but was not sure that he could carry them gracefully. So he haunted the court house for weeks that he might gather up crumbs of wisdom from the judicial table of the higher station. Finally he sat in judgment on his first case, and when the testimony was all in and the argument made, he said: " The Court takes this case under advisement until next Wednesday morning, when it will render a verdict in favor of the defendent." — *Argonaut.*

In Practice. — " Oh, Mr. Millyuns! "

" Well? "

" Do you think a rich man can go through the eye of a needle? "

" I don't know, my boy. However, I will say that my lawyers have dragged me through some very small loopholes." — *Louisville Courier-Journal.*

Deceiving the Court. — Two Vermont lawyers were trying a case before a rural justice and one of them, who represented the defendant, took occasion to cite a Massachusetts case that was on all fours with his contention. His opponent nudged the justice and whispered, " Look out! He's trying to ring in a Massachusetts case on you." The justice pounded on his table and asked to see the book. It was handed to him. He examined it with all the concentrated wisdom of ages in his countenance and returned it, saying, " Mr. ——— this here court may not be a lawyer, but it ain't to be imposed upon that way! That's a Mass'chusetts case. Judgment for the plaintiff."

A Distinction and a Difference. — He was young and thought that he knew much, but he confessed an occasional desire for further enlightenment. This time it was a legal

point, and he propounded the question to his counsellor:

"Mr. Jacques, can a man get a divorce from his wife because she is not religious? I read the other day that infidelity was a cause for divorce." — *Lippincott's.*

Domestic. — "What was the cause of this rumpus?" asked the judge.

"Well, you see, judge,' eplied the policeman, "this man here and that woman there are married" —

"Yes, yes, I know. But what other cause?"—*Cleveland Press.*

The Prisoner's Plea — In a rural justice's court the defendant in a case was sentenced to serve thirty days in jail. He had known the judge from boyhood, and addressed him as follows:

"Bill, old boy, you're agwine ter send me ter jail, air you?"

"That's what," replied the judge. "Have you got anything to say ag'in it?"

"Only this here, Bill. God help you when I get out!" — *News.*

Home Run Harlan. — Justice Harlan of the U. S. Supreme Court, aged 74, made a home run and won the game in a baseball contest at the annual shad bake given by the Washington bar association at Marshall Hall, Md.

When Justice Harlan went to the bat the score was a tie, and the umpire had called two strikes and three balls. It was a critical and exciting moment. Justice Harlan smashed the sphere a wicked swat to deep center. He started around the bases, and his leg work was really marvelous. His sprinting qualities surprised and delighted the fans, who were wild with enthusiasm.

The ball went over the head of the center fielder and was lost in the tall grass. Be ore it was recovered Justice Harlan had reached the home plate, where he stood sipping a mint julep which had been prepared hurriedly for the agile Kentuckian as a reward for lining out a four-base hit. — *Exchange.*

Stung. — There is a law in Texas which requires commercial travelers to purchase a licence before they may do business, a law either unknown to or disregarded by a certain patent-medicine man from New England. He was just emerging from a drug-store, where he had placed an order, when a stranger came up and addressed him.

"You sell Brown's Boston Bitters, dont you?" the stranger asked.

"Yes; and I'd like to sell you a case — cure you so quick you won't have been sick yesterday — fact!" the drummer said.

"All right. How much is she?" the stranger asked, pulling out his pocketbook, and handing over the five dollars demanded, receiving in exchange an order on the local freight agent for his case.

"Now, I'd just like to see your license to peddle — I'm the sheriff," the stranger said, pleasantly.

"You've got me — twenty-five, isn't it?" the drummer asked, offering the money. "I don't suppose it will be necessary for me to appear?"

"No, that will be all right," the sheriff replied. Then he looked at the order for the case of medicine. "What am I going to do with this stuff?" he asked.

"I'll give you a dollar for it," the drummer suggested, and the trade was made.

"And do *you* happen to have a license to peddle? Huh, I thought not. Well, you have been trading with me — selling goods without a license — guess I'll go file a complaint against you," the drummer said sweetly. And the next morning the sheriff, with a sheepish grin, paid a fine of twenty-five dollars. — *Harper's Weekly.*

Modern Legislation. That the term "automobile" and "motor vehicle" as used in this act shall be construed to include all types and grades of motor vehicles propelled by electricity, steam, gasoline, or other source of energy, commonly known as automobiles, motor vehicles, or horseless carriages, using the public highways and not running on rails or tracks. Nothing in this section shall be construed as in any way preventing, obstructing, impeding, embarrassing, or in any other manner or form infringing upon the prerogative of any political chaffeur to run an automobilious band-wagon at any rate he sees fit compatible with the safety of the occupants thereof; provided, however, that not less than ten and not more than twenty ropes be allowed at all times to trail behind this vehicle when in

motion, in order to permit those who have been so fortunate as to escape with their political lives an opportunity to be dragged to death; and provided further, that whenever a mangled and bleeding political corpse implores for mercy, the driver of the vehicle shall, in accordance with the provisions of this bill "Throw out the life-line."

Laws of Kansas, 1903, c. 67, § 1.

Wouldn't interrupt the Argument. — Down in Cochran, Ga., the affairs of civil justice are administered by Judge Edwards, who is also an enthusiastic farmer. One cloudy spring afternoon court was convened to try a peculiarly tortuous and perplexing case. Judge Edwards listened with growing unrest. He was observed at last to seize a slip of paper, scribble a few words, place the document beneath a heavy paper weight and reach for his hat.

"Captain," he called, cheerily, "excuse me fur interruptin' you, suh; you go right on with your argument, which is a darned good one. It's suah goin' to rain this evening, gentlemen, an' I got to set out my potatoes right away. But you go right on, Captain! When you an' the Major get through you-all'll find my decision under this heah paper weight."

The door closed upon an astonished orator — *Nashville Banner.*

Hard Lines. — Dr. Austin Flint, the alienist, said at the Century Club in New York, apropos of a will contest that had been tried last year:

"The plaintiff lost, and no wonder. His case was as difficult a one as that of the young man who appeared unduly depressed after the death of his rich aunt.

"'Why are you so sad?' an acquaintance said to the young man. 'You never appeared to care much for your aunt.'

"'I didn't,' said the youth, dolefully; 'but I was the means of keeping her in an insane asylum the last five years of her life, and now that she has left me all her money I've got to go to court and prove that she was of sound mind.'" — *Washington Star.*

Not Wrong, But — Emanuel Lasker, the chess expert, was discussing in New York the ethics of a certain style of play.

"Well," he ended, laughing, "I suppose it is all right; but it is intricate, eh? It is like the subject discussed in the debating society.

"'Is it wrong' — that was the subject of debate — 'Is it wrong to cheat a lawyer?'

"The decision after three hours' argument was:

"'Not wrong, but too difficult to pay for the trouble.'" — *Washington Star.*

English as Spoken. — A cockney solicitor who was characteristically mixed in the use of his h's happened to meet one of the wits of the American bar. The Englishman, commenting on the legal profession of New York, said that its members were proficient and learned, but that they were absolutely ignorant on the subject of "hentails."

"Ah!" said the American. "My dear sir, we may be ignorant of the 'hentail,' but our knowledge of the 'cocktail' is unsurpassed." — *Lippincotts.*

The Power of Liquor. — During the early days of the prohibition law in Iowa there were many cases coming up, where liquor was seized, and the question arose as to whether or not the liquor was intoxicating. Once a bottle-goods case was on for trial in one of the courts of midland Iowa and a jury was duly selected to try the issues as to whether or not the stuff called by some "sloop ale," by others "home brew joy," "white rose" etc., was intoxicating. There was evidence of the officers, and others that the stuff was kept on the premises, and sold, and that the people got drunk on it. There was evidence by the defendant and others that it was a safe, soft drink, while others did not know whether it was beer or not, although it was duly proved that these men were old hands in rushing the growler.

The liquor was brought into court in a case, and the jury wished to have the case sent to the jury room for examination. The jury was out a long time, and finally came back into the court room and asked to be discharged.

The judge asked the reason why.

The foreman arose and with a dignified bearing said "your honor, there be two jurors who refuse to vote on dis here ting, for they got noting of the beer, we drank up. Before we can agree der sheriffs must bring in some more beer dat dem other two fellers do get their share of the drinks."

A Brutal Rebuke. — The late Lyman Ellis of Clinton county was when in his prime, one of the most brilliant attorneys at the bar in eastern Iowa, although his manners were rather peculiar. In the trial of an important case a young lawyer from a distant part of the state came to try a case in which Ellis had the other side, and as the young lawyer was worsted in argument and on points of law by the tall, thin, angular and peculiar acting attorney, he thought that now was the time to act the mimic and go through the performances just as Ellis acted in the court room. There was a general titter all over the court room for the imitation was complete. Ellis sat there without cracking a smile and apparently not observing the clever trick. When he arose to reply he said to the jury

"Gentlemen of the jury, You have just heard and seen a man talk who had all the elements and actions of a smart man, but he talked like a d— fool."

Judge Thompson. — Ex. Judge Wm. G. Thompson during the seventies was a member of congress and a devoted Union man and frequently used to wave the bloody shirt. He was on the election committee, where the agnostic Colonel Ingersoll appeared almost daily in trying the contested election suits which came up from time to time.

One moring before the board met Col. Ingersoll came in smoking while the Judge sat there attending to some affairs which were about to come up. As the colonel sat down he looked over towards Judge Thomson and said, "Mr. Thomson, I like you." This remark from the brilliant agnostic pleased the Congressman and he replied, "Why do you like me Colonel?" "Well," replied Ingersoll, "when I prove that my client was running on the straight republican ticket, I have won my case with you, but it takes a lot more to convince the other members of your committee."

The Price of Justice. — During the early sixties there was one S—— who was known all over Iowa as one of its most brilliant lawyers but who had a failing — that of getting drunk. One morning during the early opening of the supreme court entries were made and motions passed on when S—— arose and in a somewhat guttural tone asked, what had become of case no. — The chief justice said "The case has not been passed upon."

S—— not to be nonplussed replied, "Mr. Chief Justice, My client is poor, he needs the money and this is the only case I have now pending in your court, and I need my fees, I'll just give you $5.00 to decide that case right now."

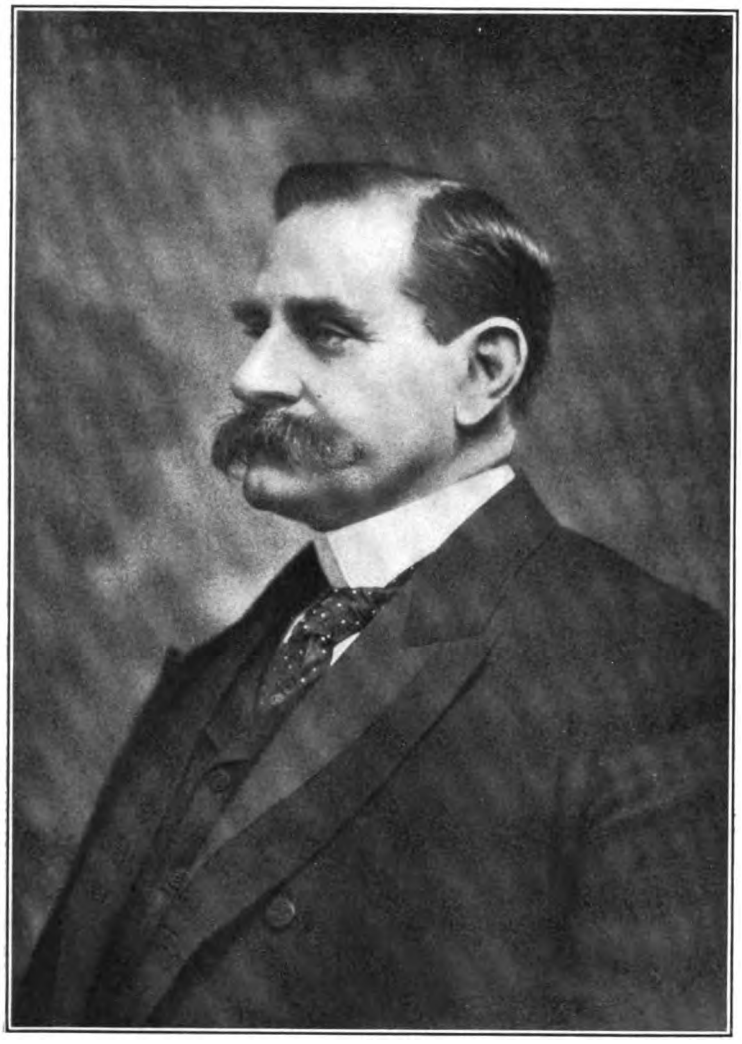
The justice called for order and replied, "this is a court of justice and we must not be insulted in this manner." S—— thought he was misunderstood and he replied, "I beg your pardon your honors, I did not mean $5.00 for all, I meant $5.00 apiece," and while the laugh became general, the attorney was led out of the court room to sober up.

Judicial Expedition. — Milo P. Smith, judge of the district court of the 18th judicial district of Iowa, after being in active practice for more than forty years was elevated to the bench, and on assuming the duties of his office began at the first term to go over the cases and see what disposition would be made of them, as he was opposed to the dilatory methods of many of the lawyers of his district.

He came to a case and called out, "Did you get this case by heirship?" The lawyer being nonplussed said, "Well, if I did, I am willing to quit claim all my interest in it now."

"Well" replied the judge, "off it goes as so much driftwood." Coming to another case he asked, "Is there anything left in case no.—?" The attorney jumped up and said, "Yes, I have a filing fee and a copy fee, I wish to get. It should stay on on that account." Smith looked up and said, when the law business gets down to a traffic in copy fees, you better close up shop young man," and off the case went like many others.

In making an assignment one member of the firm wanted time as the other members of the firm would be busy in other parts of the country. "Well," said the judge, "in case your firm is leading such a strenuous life you better take in some more new blood and try and catch up with the procession.',



J. M. Dickinson

The Green Bag

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JACOB M. DICKINSON

By S. S. Gregory

IT is indeed a great professional distinction to be chosen to the presidency of the American Bar Association; for while many accomplished lawyers are not members, nevertheless this Association contains the very flower of the American Bar and in its list of presidents, for the nearly thirty years of its existence, will be found the names of many of the great leaders of the Bar. The method, too, of selection for this high office is essentially non-political and highly professional. Each state and territory is entitled to one member of the General Council of the Association. This member is to be selected at each annual meeting by the members of the Association present from each state and territory from among their number. The General Council nominates through the Association candidates for the various offices, including the presidency, and it becomes therefore exceedingly improbable that any lawyer not conspicuously qualified will be selected for such a high honor. The wisdom of the methods thus pursued finds its best vindication in the uniformly high character and attainments of those who have heretofore filled this position.

Those who know him best can feel no doubt, that in the selection of Jacob McGavock Dickinson of Chicago to this honorable succession at the last meeting of the Association, there was no departure from the best traditions of our organization. An accomplished lawyer, a cultivated and scholarly gentleman, an upright, brave and true-hearted man, a son of the South, and by adoption of the West as well, he meets to the fullest extent the just requirements of this high position.

Judge Dickinson was born at Columbus, Mississippi, January 30th, 1851. His father was Henry Dickinson, a descendant of an ancestor of the same name who came from England to Virginia in 1654. Henry Dickinson was a lawyer of eminence at the Bar of Mississippi, a chancellor for many years, a presidential elector and also one of the commissioners sent by his state to Delaware for conference on the question of secession. Judge Dickinson's mother was Anna McGavock, the eldest daughter of Jacob McGavock and Louisa McGavock, who resided at Nashville, Tennessee. Louisa McGavock was the daughter of Felix Grundy, an eminent lawyer and statesman of his day, a senator of the United States from that state and Attorney-General of the United States.

Judge Dickinson passed his childhood at Columbus and there just before the close of the Civil War, and at the early age of 14, he volunteered in the Confederate service and was under the command of General Ruggles, in the vicinity of Columbus. He is a member of the Isham Harris Bivouac, Confederate States of America, at Columbus. At the close of the war he became a resident of Nashville, where he continued to reside until November, 1899, when he went to Chicago. He acquired his education at the public schools of Nashville, Montgomery Bell Academy there, and the University of Nashville, of which at the time Gen. E. Kirby Smith was chancellor. Judge Dickinson there took the degree of Bachelor of

Arts in 1871 and the degree of Master of Arts in 1872. At this time for about a year he was assistant professor of Latin in the University, and during the same period, animated by an eager desire for knowledge in every field, he took a night course in physiology and in the demonstration of anatomy in the medical department of that institution. In the fall of 1872 he entered the Columbia Law School at New York City and studied under that learned and accomplished lawyer and famous teacher, Theodore Dwight, taking both the junior and senior courses. Not satisfied with the very considerable advantages which he had thus enjoyed in the way of a liberal education, after traveling in Europe extensively during the summer of 1873, in the following October he matriculated at the University of Leipsic for the purpose of studying German and taking a course in Roman Law and political economy, which he there pursued. The next year he went to Paris and there took a course of lectures on literature in the Sorbonne and in the Civil Law in L'ecole du Droit. In the fall of 1874 he was admitted to practice at the Bar at Nashville. He was in extensive practice there until 1890, when he was especially appointed by the governor to serve upon the supreme bench of his state and continued by successive appointments in this capacity for several years. So acceptable was his public service in this high position, both to the Bar and to the people, that when Judge Horace H. Lurton, then chief justice of that court, resigned to accept an appointment as Circuit Judge of the United States for the 6th Judicial Circuit, Governor Turney tendered to Judge Dickinson, March 23rd 1892, an appointment to a seat upon the supreme bench of the state. Judge Dickinson did not take this position, but resumed practice at Nashville, where he remained until February 6th, 1895, when he was commissioned Assistant Attorney-General of the United States. He served in this important position with marked distinction and ability to the end of Mr. Cleveland's term, first with Richard Olney, as attorney-general, and afterwards with his successor Judge Judson Harmon of Cincinnati. He enjoyed, in the highest degree, the confidence and esteem of these two distinguished men. Upon his resignation from this office he entered the legal department of the Louisville & Nashville Railroad Company, as attorney for Tennessee and Northern Alabama, and also resumed general practice. About the same time he became an instructor in the Law School of Vanderbilt University, situated at Nashville, and continued to teach there until his removal to Chicago.

On November 1st, 1899, he succeeded Judge James Fentress as General Solicitor of the Illinois Central Railroad Company, and on the retirement of Mr. B. F. Ayer, one of the most eminent lawyers at the Chicago Bar, from the position of General Counsel for that company, a few years later, Judge Dickinson was appointed to succeed him, continuing also the duties which had been theretofore imposed upon the general solicitor. He has since occupied this position with, however, some participation in general practice in special and important cases.

While Judge Dickinson has never been a candidate for office, in Tennessee he always took an active part in politics. He was especially active during the contest in that state growing out of the state debt, always standing firmly against any suggestion of repudiation or anything less than the discharge, with the utmost fidelity, of every obligation of the state to its creditors, and, in 1882, was chairman of the so-called State Credit Wing of the Democratic Party.

On two different occasions he was chairman of the committee of fifty of the Reform Association of Nashville, which in two prolonged and severe contests completely overthrew a ring of politicians that had seemed to be firmly entrenched in power in that community.

Judge Dickinson has had a very extended experience at the Bar and has been con-

cerned in a wide range of important and interesting cases. Often while he was connected with the department of justice, and in his private practice, he has appeared before the Supreme Court of the United States, and his arguments in that exalted tribunal have always been received with attention and satisfaction by its members. Possibly his latest appearance there was when he argued the case of Howard, Administratrix, against the Illinois Central Railroad Company at the last term of that court. In that case he contended against the constitutionality of the Federal Employers' Liability Act, by which the Congress of the United States sought under the commerce clause of the Constitution to regulate and define the liability of interstate carriers to their employees. This is probably the first case involving similar questions which has gone to the Supreme Court since the President of the United States and the present Secretary of State have promulgated what is regarded in some quarters as rather advanced doctrine in respect of the nature and extent of Federal power and the true principles of constitutional construction to be regarded in ascertaining it.

Upon this general subject Judge Dickinson delivered a thoughtful and eloquent address before the New York State Bar Association, January 15, 1907. He took as his text a statement made by the President in his speech at Harrisburg, October 4th, 1906, in the course of which that distinguished man said, referring to conceded evils arising in connection with the tremendous growth and development of our commercial and industrial institutions and the necessity for governmental action to correct them: "In some cases this governmental action must be exercised by the several states individually. In yet others it has become increasingly evident that no efficient state action is possible and that we need, through executive action, through legislation and through judicial interpretation and construction of law to increase the power of the Federal Government." Judge Dickinson also referred to the observations of the Secretary of State, Mr. Root, made in New York on the 12th of December last, in the course of which that very able lawyer declared that the people of the United States would have the governmental control which they deemed just and necessary, and that if the states failed to furnish it in due measure, sooner or later, constructions of the constitutions would be found to vest the power where it would be exercised in the National Government.

Ascribing to these statements the great weight which the conspicuous abilities and exalted stations of those who made them justly suggest, Judge Dickinson, standing fast upon the ancient ways, entered a solemn and eloquent protest against this method of change or amendment of the organic law of the nation. He did not contend for any narrow construction of grants of national power in the Constitution; but against the extension of such grants by construction, to the destruction of the just autonomy of the states, under the pretext that these sovereignties lacked either the power or the disposition to correct great evils, national in character, and which, therefore, demanded regulation by the nation. He appealed to the Bar and to the courts by adhering strictly to the Constitution to stay this rising tide of aggressive and, as it seemed to him, revolutionary sentiment.

As I have heretofore discussed some of these questions publicly, I would not wish to be understood as altogether agreeing with the views of Judge Dickinson in this regard; but I have nowhere seen any weightier or more impressive statement of them than may be found in this address and his argument before the Supreme Court in the case that I have mentioned.

Of course the great professional and public triumph of Judge Dickinson's career up to this time was his participation on behalf of this country in the proceedings before the Alaska Boundary Tribunal.

This tribunal was constituted under a convention signed at Washington, January 24, 1903, between the United States of America and Great Britain, to consider certain questions relating to the boundary between the territory of Alaska and the Dominion of Canada. The commission consisted of three members appointed by the President of the United States, namely, Elihu Root, then Secretary of War, Henry Cabot Lodge, Senator of the United States from Massachusetts, George Turner of the State of Washington, and three members appointed by his Britannic Majesty, King Edward, namely, Baron Alverstone, the Lord Chief Justice of England, Sir Louis A. Jetté, Lieutenant-Governor of the Province of Quebec, and Allen B. Aylesworth, King's Counsel, of Toronto, Canada.

The first meeting of the tribunal occurred Thursday, September 3, 1903, at 11 o'clock, at the British foreign office in Downing Street. Upon motion of Mr. Root, Lord Alverstone was unanimously chosen to act as president of the tribunal. General John W. Foster was presented as agent of the United States and Clifford Sifton of Great Britain. Judge Dickinson announced that Mr. David T. Watson, one of the leaders of the Pennsylvania Bar, Mr. Hannis Taylor, author of perhaps the leading American work on International Law, and Mr Chandler P. Anderson, with himself, were counsel on the part of the United States. Sir Robert B. Finlay, Attorney-General of England, stated that Sir Edward H. Carson, Solicitor-General, Mr. C. Robinson, Mr. F. C. Wade, Mr. L. P. Duff and Mr. A. Geoffrion, King's Counsel of the Canadian Bar, and Mr. S. A. T. Rowlatt and Mr. J. A. Simon of the English Bar, with himself, were of counsel for the British government. The tribunal then adjourned until September 15, 1903, when Sir Robert Finlay commenced his opening argument and thereafter the case proceeded until the argument was concluded by Judge Dickinson, October 8, 1903.

The result is familiar. Although the tribunal determined, the commissioners from this country concurring, that the Portland Channel was located, as contended on behalf of Canada, the chief contention of the United States in respect to the boundary line along the coast was fully sustained; and it was held that this line was located so as to give to this country a continuous fringe or strip of coast on the mainland not exceeding ten marine leagues in width, separating the British possessions from the bays, havens and inlets and from the waters of the ocean, extending from a point on the 56th degree of latitude North, to a point on the 141st degree of longitude, West of the meridian of Greenwich, the two Canadian commissioners dissenting, the Lord Chief Justice voting with the American commissioners.

It is not too much to say that whatever loss of territory Great Britain may have sustained by this decision, ought to be deemed as more than compensated by the great example which she thus furnished to the world of the finest and highest judicial courage and impartiality on the part of this great man.

It is quite out of the question to trace the course of the argument in this historic case or even to deal at all adequately with that submitted by Judge Dickinson. That argument occupied about five days in its delivery and dealt with every phase of the case.

As illustrative of its high quality and admirable style, I will only quote two extracts, one found in the beginning of the argument and the other its conclusion.

In opening Judge Dickinson said:

"I feel, Mr. President, that if I am to give any aid to the Tribunal or contribute anything that will be of real value in the investigation which they have before them, I must address myself to an effort to meet the arguments that have been advanced on behalf of Great Britain. I have listened to them very intently. Coming, as I do, so shortly after the argument of the solicitor-general, it will hardly be possible for

me, certainly this afternoon, to comment upon any of the propositions advanced by him. I am sure that no one who has listened to the very facile and elegant argument of Mr. Robinson, whose style is at once a source of admiration and despair to all those who have heard him, or to the very able speech of the solicitor-general, would, as applied to either of them, advise me, by way of friendly warning to touch Ralph de Vipont's shield as my easiest bargain. I am forced by the fact that the attorney-general has gone so fully and so elaborately into all these questions, and also for the reason that I have had some opportunity for studying his argument, to ring the Templar's shield, and try conclusions with him. I do not speak in any spirit of bravado or confidence. Indeed, as was said upon an occasion where the disparity did not appear so great as now, I say, Mr. Attorney-General in all sincerity: —

"'Les palmes dont je voie ta tete si couverte
Semblent porter écrit le destin de ma perte.'

"Would that I might add in the language of the Cid:

"'Ton bras est invaincu, mais non pas invincible.'"

At the conclusion of his argument he added these words: —

"And now, Mr. President, *si parva licet componere magnis*, I announce, in the language of a distinguished Englishman closing a memorable debate, 'I have done' — that is, with the argument of this case.

"I have — I was about to say — another duty to perform, but it can never be a duty to express sentiments that come straight from the heart, and to speak words that struggle to the lips for utterance. For my associate counsel and myself I desire to thank opposing counsel for the uniform courtesy they have extended to us, the Tribunal for the patient and considerate hearing they have given us, and to thank you, Mr. President, for the impartiality with which you have directed our sessions. It is worth, not merely an ocean voyage, but a long and painful pilgrimage to enjoy what has been incident to this occasion.

"We esteem it as a rare privilege to feel at home, for a season, in these historic chambers which for so many years have been associated with the diplomacy of the world, and our souls are filled with awe when in imagination we repeople them with the disembodied spirits of the mighty dead, to whose voices they once gave echo.

"The memory of having, even for a short time, moved in the same orbit with the great legal luminaries of this country, famed for so many centuries for its great lawyers, will always be cherished.

"Even if one shall have played, in his own esteem, his part lamely, it is worth the pang of a bitter disappointment to be in the cast of such a drama, enacted upon such a stage, and in such presence.

"Whatever may be the outcome of our labors, and although there may be some immediate regrets, we may, sustained by an abiding faith in that omniscient Providence that guides the affairs of nations through darkness that is impenetrable to mortal vision, murmur, '*Forsitan et haec olim meminisse juvabit.*'"

When he had uttered these words and after taking his seat, the Lord Chief Justice paid him this high compliment: "Mr. Dickinson, on behalf of my colleagues and myself, I wish to thank you for your very brilliant and powerful argument. It has been my privilege to listen now to several of the great leaders of the American Bar and I can assure you that your argument will not suffer by comparison with those that preceded you either on this or any other arbitration, and certainly, speaking for myself, and I am sure I may speak for my colleagues, none the less powerful, because of the great courtesy and fairness with which you have treated the arguments of those who were opposed to you."

The opinion of the tribunal was announced on the 20th day of October, 1903. It was not signed, however, by the commissioners from Canada.

It seldom falls to the lot of a lawyer to be concerned with such a great historic case. Sometimes the members of the profession, impressed with the vast amount of intellectual labor which they perform in the preparation of briefs and arguments in cases involving important questions of law, sometimes important public or constitutional questions, feel, and not without some justice, that they do not receive much in the way of public recognition or reputation for their arduous labors, too often but poorly compensated in other ways, and that a little

political activity with far less expenditure of intellectual power, brings greater results.

That may be so; but it is the knowledge and training thus acquired by a long course of arduous, and not always highly remunerative professional labor, that fits the lawyers of this country to deal with great public cases and to discharge the highest public duties. It is precisely this kind of experience that has enabled Mr. Root to take the great responsibilities and discharge the difficult duties of the high public positions he has filled with such marked ability and efficiency; and it is this kind of training that enabled Judge Dickinson, when the opportunity presented itself, to earn professional immortality and win for his country a great international controversy, bloodless indeed, but not the less glorious.

After Judge Dickinson returned to Chicago the Bar Association of that city, with true Western hospitality, tendered to him a dinner. This took place at the Auditorium Hotel, on Saturday, December 19, 1903, and proved to be a most cordial and hearty recognition by the Bar of that city, of the great professional distinction which their distinguished representative had, on this occasion, earned for himself and for them.

Many letters from distinguished men and high public officials, who were unable to be present, were received and some of them were read at the dinner. I think it may not be inappropriate to quote four of these letters from persons whose opinions are certainly entitled, on such a matter, to great consideration. President Roosevelt telegraphed as follows:

"I wish sincerely that I could be present at the dinner to Judge Dickinson. I feel that he rendered the whole country a service of such high value as to call for the amplest recognition. From every standpoint the people of the United States have cause to look upon the work of the Alaskan Commission with profound satisfaction. Commissioners and counsel alike share the honor, and all who have knowledge of the facts agree that no cause of like importance was ever summed up in more masterly manner than our cause was summed up by Judge Dickinson."

John Hay, then Secretary of State, among other things said:

"I regret extremely that my engagements here render it impossible for me to go to Chicago at this time, and more especially as it would have been a great pleasure to bring my personal tribute of respect and esteem to Mr. Dickinson, whose work in London has commended him to the admiration, not only of this country, but of Europe also."

Mr. Justice Harlan paid Judge Dickinson the following fine tribute:

"His services before that tribunal were of such high character as to render it appropriate that they be recognized by the Bar of which he is an honored member. For some years, in his capacity of Assistant Attorney General of the United States, he represented the government in cases before the Supreme Court. In that field of public service, as I had occasion often to observe, he displayed marked ability and fidelity as a lawyer. And, therefore, I felt sure at the time of his appointment, that the interests of his country, as involved in the Alaskan dispute, would be carefully guarded; that his study of the issues would be most thorough; that nothing would be overlooked or left unsaid by him that was at all essential in the case; and that if his country was unsuccessful before the Alaskan Tribunal, it would not be due to any lack of ability or failure of duty on his part as counsel. He vindicated the wisdom of his appointment, and is eminently worthy of the honor which the Chicago Bar Association proposes to do him."

General Foster, who was the agent of the United States, and thus especially qualified to form an intelligent judgment as to the manner in which Judge Dickinson acquitted himself on this occasion, expressed himself as follows:

"No one knows better than I the great service which Judge Dickinson rendered our government as leading counsel of the United States before the Alaskan Boundary Tribunal, and I am highly gratified that his

brethren of the Chicago Bar have planned to recognize and do honor to this service. And well may they do so, for he has conferred great distinction upon them as well as himself in London, the fountainhead of our great system of English jurisprudence. His acute legal mind, his ability as an advocate, his genial manners, and his ready wit captivated his British associates; and his conscientious devotion to his cause and his exalted patriotism won for him the praise of all Americans. It was fortunate for our country that it had such a worthy champion, and it should be reckoned among the first of Chicago's possessions that it numbers him among its citizens."

Those who know Judge Dickinson well will not feel that these estimates of his character and professional qualities and of the nature of the service rendered to his country in this great case, are in any way exaggerated or over-drawn.

Judge Dickinson in 1876, was married to Miss Martha Overton, of Nashville, a lineal descendant of John Overton, who was one of the early pioneers in Tennessee, a close personal friend of Andrew Jackson, succeeding him as Judge of the Supreme Court of that state. In Jackson's biography may be found a long account of his early and romantic attachment for Rachel Robards and the misunderstanding that arose between him and her husband, his trip down the Mississippi with her and his subsequent marriage, which was written by Judge Overton. General Thomas Overton, a brother of Judge Overton, was General Jackson's second in his celebrated duel wth Charles Dickinson, in which the latter was fatally wounded.

Judge Dickinson has three sons, two of whom have reached manhood, and the youngest is now about to enter upon his academic studies at Yale.

Judge Dickinson has always been a Democrat in politics, although not in sympathy with the free coinage notion and possibly some other ideas which he may have regarded as modern heresies. He attends the Fourth Presbyterian Church in the City of Chicago.

Personally he is a man of commanding presence, rather above than below six feet in height, very fond of shooting, fishing and horseback riding and all out-door sports. He is an interesting and genial companion of wide reading and has a vast fund of information as to the history of this country, and as to matters somewhat local and personal throughout the South, especially those portions of it in which he has lived. He has a fund of appropriate anecdote upon which he draws for apt illustration in legal argument and in conversation.

As a lawyer he has attained the highest rank. When the Government of the United States sought by injunction to restrain the railroads in Chicago from granting rebates by bill in equity filed for that purpose, on which were presented many important and grave questions of law, the lawyers representing the railroads in that city selected Judge Dickinson to act for them in making such representations as were deemed proper to the court before whom the injunction was sought.

Judge Dickinson is a man of earnestness and strong convictions. In forensic controversy he is aggressive, persistent and forcible, but with a courtesy to court and counsel that never fails and with a high appreciation of his duty as an advocate, not merely to his clients but to the court and all concerned. He illustrates, as well as any lawyer whom I know, the high standard set by Sir Alexander Cockburn, Lord Chief Justice of England, in some remarks that he made at a banquet given by the Bar of England for M. Berryer on the 8th of November, 1864. Referring to this great French lawyer, the Lord Chief Justice said:

"And allow me to say that of all those intellectual qualities and attainments which distinguish the eminent and illustrious man whom we have this day met to honor, there is in my mind one virtue and one quality

essential as the crowning virtue of every advocate, that of having conducted the functions of his great profession with unsullied and untarnished honor. My noble and learned friend Lord Brougham, whose words are the words of wisdom, said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interest of his clients *per fas* but not *per nefas;* it is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice."

I believe that in his forensic experience Judge Dickinson has endeavored to approximate this high standard.

He enjoys the esteem of the members of his profession in the city and state where he lives and in the State of Tennessee where he has practiced, as also of the large number who know him among the Bar of the entire country. Yet in the full prime of vigorous manhood, he has accomplished much and will yet accomplish more.

We of the Chicago Bar feel a just pride in the conspicuous recognition of his high abilities and fine character by his selection to the presidency of the American Bar; and we feel also the utmost confidence that he will worthily maintain the traditions which attend upon this high office.

CHICAGO, ILL., September, 1907.

THE INFLUENCE OF NATIONAL CHARACTER AND HISTORICAL ENVIRONMENT ON THE DEVELOPMENT OF THE COMMON LAW

By James Bryce

NOT long ago I had occasion to read an opinion rendered on a point of law by an eminent legal practitioner in a Spanish-American country. The point itself, on which the opinion was given, was one which might have arisen equally well upon the Common Law as the Spanish-American law, but the way of approaching it and dealing with it, the form of thought and the forms of expression, were curiously unlike those which one would have found in a legal opinion rendered either by a United States lawyer or by a lawyer in England. Now, that difference seemed to me to point to some inherent difference in the way of looking at and of treating legal questions. I dare say, that many of you, in the course of your profession, may have had a similar experience, and I dare say that you have been led to ask, as I was, what is the cause of this difference between the legal ideas and the legal methods of those of us who have been reared in the Common Law and of those lawyers who live and practice in Continental Europe, or in the republics of Spanish-America.

Now, the cause of that difference lies very far back in the past. A similar difference might have been noted even in the seventeenth century, and perhaps it might in some ways have been more striking than it is at this moment. Two hundred years ago, long before the year 1776 — and even, perhaps, further, before the foundation of the American Colonies — the law of England had acquired a distinctive quality, and that quality has remained distinctive, both here and in England, until now, although the substantive provisions of the law have been largely altered, as they must needs be, in two countries whose economic and social conditions have been changing so rapidly as they have changed both here and in England.

Therefore, we may still in truth say, that the Common Law is a common possession both in the United States and in England, because that spirit and those tendencies and those mental habits which belong to the English stock when it was still undivided have been preserved until now. The causes which produce those habits and tendencies belong to a period long anterior to 1776, a period when the ancestors of Chief Justice Marshall and Chancellor Kent, of Story, Taney, Webster and Curtis were living in English villages, side by side with the ancestors of Coke, Hale, Holt, Hardwick, Blackstone, Eldon, and the other sages who adorn the English roll of legal fame. These causes were at work far back in the Middle Ages. Just as the character of an individual man forms itself before he attains manhood, though the circumstances of his life modify it while they reveal it to others, so in those early mediæval centuries of which I speak, there was developed that set of ideas, and that type of mind which took shape in the provisions and the procedure of the ancient law of England. The substance of those provisions was partly general, such as must exist in every organized and civilized society; partly special, such as the particular conditions of the country and the time required. The form was due to the lawyers and the judges, to writers and practitioners, and now the form has, in point of fact, greatly affected the substance and has proved scarcely less permanent. So when we study the growth of the Common Law we must

think not only of such matters as the rules of inheritance, the doctrine of consideration for a contract, the definition of felony and of the rules defining the agent; we must also think of the forms of actions, of the jury, of the authority of decided cases. All these things were well settled before the first English colonists landed on the shores of Virginia and Massachusetts.

Now, what is it that a skilled observer would select as being the peculiar and characteristic notes of the Common Law? I think he would begin by dwelling upon the firm grasp which it has of the rights of the individual citizen. The citizen is conceived of, he is dealt with, as being a center of force, and active atom, a person in whom there inhere certain powers and capacities which he is entitled to assert and make effective, not only against other citizens, but against all citizens taken together, that is to say, against the community, the State itself and its organ, the executive government.

Secondly, our observer would note as another characteristic feature the recognition by the Common Law of the State and the executive as being clothed with the authority of the whole community, as being an effective power, entitled to require and compel the obedience of the individual wherever and whenever the State does not trespass on the rights which are legally secured to him. To be effective, law must not only have executive force behind it, but also the principle of legitimate authority, the sense in every community that individual authority has its limits, and can be exerted only within the sphere allotted to it. Liberty is the child of Law. It is not his own pleasure, but the fact that the community has recognized a certain sphere of unchecked action as belonging to him, within which he can do as he pleases, that secures to the individual citizen his rights. Outside that sphere he must not only obey, but must co-operate with the executive. It is his duty to aid in preventing a crime, in suppressing disorder, in arresting an offender. A sheriff, in the due exercise of his functions, can call on all persons present to support him, and they are bound to support him. This doctrine is a wholesome doctrine, and, if you like so to call it, it is a democratic doctrine, because it expresses the sense that the whole community is behind the law.

Now, Ladies and Gentlemen, these two principles go together. The first principle, the recognition of the rights of the individual citizen, is the safeguard against tyranny; that is to say, the absolute and capricious will of the governing power; the other principle is the safeguard against anarchy, against that unrestrained and unlimited exercise of the will of the citizen which must result in collision and disorder.

It may be suggested that these two principles were not peculiar to the Common Law, because no law could grow up and no state could prosper, without both of them. That is perfectly true. But there have been systems of law in which sometimes one principle and sometimes the other was imperfectly developed, and, so to speak, overweighted by the other. The former principle, that of the recognition of the rights of the individual, has often been too feebly applied to secure due protection to the individual. It is the clearness with which both principles are recognized, and the fullness with which both have been developed in the mediæval and post mediæval Common Law, that constitutes its highest merit.

From the equal recognition of these principles there follows a third characteristic. If two principles, apparently antagonistic, are to be reconciled, there must be a precise delimitation of their respective bounds and limits. The law must be definite and exact. Now, precision, definiteness, exactitude are features of the Common Law so conspicuous that the unlearned laity — of whom there are, perhaps, some present to-day — have often thought them to have been developed to an inordinate degree. They have made

the law, not only very minute, but very technical.

With the love of precision there naturally goes a love of certainty and fixity. The spirit of the Common Law is a conservative spirit, which stands upon what exists, distrusting change, and indeed refusing change until change has obviously become necessary. There is a favourite dictum among the old school of English lawyers which says: "It is better that the law should be certain than that the law should be just," a dictum which one cannot expect the laity to appreciate as a lawyer might.

The respect for what has been settled, and the desire that what has been settled should be definite in its terms, imports a deference to precedent. No legal system, not even the Mussulman law, used in the interpretations of the Koranic traditions, has ever gone so far in basing itself upon cases judicially determined and recorded. Now, judicial decisions are given and legal precedents made as events bring them, there is no order among them, except a chronological order, and therefore, a law constructed out of them is necessarily wanting in symmetry. The Common Law is admittedly unsymmetrical. Some people might call it confused, however exact may be the propositions that compose it. There are general principles running through it, but these are often hard to follow, so numerous are the exceptions. There are inconsistencies in the Common Law, where decisions have been given at different times and have not been settled by the highest Court of Appeal or by the Legislature. There are gaps in it. Thus there has been formed a tendency among lawyers to rate principles, or, at any rate, let us say, philosophical and logical views of the law, very low compared with any positive declaration made by a court. The old maxim, that "An ounce of precedent is worth a pound of principle," still expresses the attitude of the profession in England, and very possibly may express it here also.

With the love of certainty and definiteness there naturally goes a respect for the forms of legal proceedings and for the precise expressions that have been given to legal rules. This is a quality which belongs to most legal systems in their earlier stages. In the Common Law it held its ground with great pertinacity until very recently both in England and here; nor am I sure that it is not now strong still in some of your states, possibly stronger than in the England of to-day, in which especially since the Judicature Act of 1873, the distinctions between forms of action are beginning to be forgotten.

You may think that among the features that characterize the Common Law I ought to name both the love of justice and the fondness for subtle distinctions. I do not, however, dwell upon the latter of these, because the love of subtle distinctions belongs to all legal systems, and is perhaps more conspicuous in some other systems than in our own. The robust common sense which is inherent in the Common Law never allowed fine distinctions to go beyond a certain point. As respects the love of justice, it belongs to mankind generally and to all systems of law.

Such differences as may be noted between different systems consist not in the reality of the wish to give every man his due, *suum cuique tribuere*, but to the self-control which prevents emotional impulses from overriding justice, in the practical sense which perceives that to allow the forms of law to be neglected, or unusually harsh treatment to be inflicted where a cause or a person happens to be unpopular, is really to injure the community by impairing the respect for law itself and the confidence in its administration. Americans and Englishmen may claim that although, like others, they have sometimes lapsed from the right path, they have on the whole restrained their passions from trampling upon justice and upon the regular methods of securing justice, better than most nations have done.

The foregoing characteristics of our Common Law are submitted for your consideration, gentlemen, not as being the only ones which belong to it, for I might easily add others, but as being so broad and salient as to make it comparatively easy to discuss them and to endeavor to account for them. Some exist in other systems that have reached a high level of scientific development, being, indeed, qualities without which no system could be deemed excellent. But only one other system, that of the Roman Law, possesses them in so large a measure as to deserve comparison with our own.

Now, to what are we to ascribe these qualities that are distinctive of the Common Law? The indwelling qualities of the race of men who built it up must have been a principal cause, and indeed, the primary cause.

One may perhaps say that the mind and character of a nation are more exactly and more adequately expressed in and through its law and its institutions than they are through even its literature and its art. Books and paintings are the work of individual men, many of whom have been greatly influenced by foreign ideas or foreign models, and some of whom may have been powerful enough to influence their successors although not themselves typical representatives of the national genius. But laws and customs are the work of a nation as a whole. They are indeed framed by the ruling class, and they are shaped in their details by the professional class, but they are the handiwork of other classes also, because (except in those few cases where a conqueror imposes his law on the vanquished) the rules which govern the ordinary citizens must be such as fit and express the wishes of the ordinary citizen, being in harmony with his feelings, and calculated to meet the needs of his daily life. They are the offspring of custom, and custom is the child of the people. Thus not only the constructive intellect of the educated and professional class, but also the half-conscious thought of the average man go to the making and moulding of the law.

But law is the product not of one or two generations only, but of many generations. National character is always insensibly changing and it changes the more rapidly the more advanced in civilization the nation becomes, the greater its vicissitudes, and the more constant its intercourse with other nations. Hence, institutions are the expression, not solely of those original gifts and tendencies of a race of people which we observe when it emerges from prehistoric darkness. Time and circumstances co-operate in the work. Law is the result of the events which mould a nation, as well as of the mental and moral qualities with which the nation started on its career. These two elements are so blent and mixed in their working that it is hard to describe them separately. Nevertheless, we must try to do so. Let us, therefore, begin by a brief glance at the inborn talents and temper of the race that produced the Common Law, and then see how the course of history trained their powers and guided their action.

All the Teutonic peoples were strong, resolute, and even wilful; and the Low Germans and Northmen were the most active and forceful branches of the Teutonic stock. Every man knew his rights and was ready to assert them by sword and axe. Not only so, — he was ready, where society had become advanced enough for courts to grow up, to assert his rights by the law also. Read the Icelandic Sagas, in which records of killings and of lawsuits are mingled in about equal proportions, if you wish to realize how keen was the sense that every freeman had of his own rights, and how resolute he was in enforcing them. Never was there a people more fond of legal strife than were the Norwegians and Danes who spread themselves over Eastern Britain in the ninth and tenth centuries, or than their brethren whom Rolf Ganger led to the conquest of

the Northern coast of France in the ninth century. The Norman peasant is proverbial to-day in France for his litigiousness.

In this Teutonic self-assertiveness, however, there is no disregard of duly constituted authority. The primitive Teuton had his Folk Mot in England, his Thing in Norway and Iceland. He was loyal to his chief or his king. He felt his duty to the community wherein he lived. He did not always obey the law, but he respected the law, and he felt the need of its enforcement.

Now, it belongs to a strong race to have the power of self-control. Our forefathers were fierce and passionate like other peoples, but they had this power of self-control and they restrained themselves from overriding the law and letting passion work injustice many a time when men of other races, Greeks, or Slavs or Celts would have yielded to their impulses. So too they had a latent solidity and steadiness which indisposed them to frequent or fitful change. Compared with their Slavonic neighbors to the east and their Celtic neighbors to the west, the Teutons, perhaps not more highly gifted, have always been of a conservative temper. This may be a mark of good sense and patience, or it may be an attribute of dogged and slowly moving minds. Anyhow, there it is, and for the purposes of law building, it is a merit of the first magnitude.

Further, the mediæval English mind was of a practical rather than of a speculative type. It had plenty of acumen, plenty of logical vigor, but it did not run to the spinning of theories or the trying of experiments. This has been characteristic, more or less, of the English and American mind; and I may add also of the Low German or Dutch mind, ever since the Middle Ages, as compared with the Scotch mind and with our brethren the High Germans of the European continent. For the purposes of law building this again is not a bad trait. Speaking to an American audience no one would venture to disparage ingenuity. The jurist needs it daily. But the jurist who is practicing law needs caution and practical judgment even more, and with all of your American ingenuity it has never been your way to run ahead of the needs of the time, or to pull up the plant and to look to see whether its roots are sprouting.

Here then I have given you five characteristics of the men to whom we owe the Common Law. They were strong men and pugnacious men; they respected authority; they could at need control their impulses; they were not given to change; they were not fertile in theory or invention. With these qualities they started on the work of making a law. Now, how did the conditions of England from the twelfth to the eighteenth century affect them, and so guide their action as to bring out the legal product which we have inherited, a fruit very different from that which has ripened under the sun of Germany and France.

The English king in the Middle Ages was strong, stronger than the kings of France or Castile or Aragon. He was, from the days of Henry II onwards, effective master — except for brief intervals — of his whole realm. He was able to make his executive authority feared, even if it was sometimes disobeyed. His writ ran everywhere; his judges traveling through the country brought the law to the sight of all men. His aim and that of his judges, was, during the thirteenth and fourteenth centuries, to build up one Law, instead of the variety of diverse legal customs such as had grown up in Continental Europe. Thus he and they — the judges — must needs strive to make the law clear and certain; and such it became. Here and there, as in Kent and in some old boroughs, local land customs survived, yet not enough to mar the unity and definiteness of the law as a whole.

From good motives as well as bad, the king was tempted to stretch his authority and

make himself almost a despot. The king was so strong over against the barons that they were obliged from time to time to ally themselves with the Church — usually their antagonist, and also with the middle class, consisting of small landholders and burghers.

To that alliance of the nobles with the church and the upper part of the middle class we owe Magna Charta and the long line of restrictions thereafter imposed on arbitrary government. Now Magna Charta is the declaration of one generally binding law. It announces and it consecrates, and it is of itself *Lex Terræ*, the Law of the whole land, and of all persons therein. It is for us of the English stock the parent of all instruments defining the relation of citizen and sovereign. It is the ancestor of your own Federal Constitution, as well as of the " Bill of Rights " provisions of all State Constitutions.

Just as the barons and the people were obliged to base themselves upon the solemnly made engagements of the Crown as the evidence of their immunities, so the Crown acting through its judges, not being strong enough to make its own policy or view of what was right prevail as a mere exercise of the Sovereign's own will, and desiring to have some positive authority to set against the texts which were quoted from the imperial or papal law by the civilians or the canonists, was forced to rely upon acts previously done, decisions previously delivered, and to found the law upon it. Thus both the judges on one hand and those representing the people on the other were led to appeal to and lay stress upon precedents. Under these conditions, and favored by them, there grew up that habit of recording and following eminent cases which is so eminently and uniquely characteristic of the common law.

The balance of forces in English mediæval society appeared most clearly in the relations of lord and vassal. Each of these had rights and those rights were apt to come into conflict. The adjustment of conflicting claims gave constant occupation to the lawyers and the judges, and while forming habits of exact thought and precise statement, it created a great mass of technical learning. The older English land law was as intricate and elaborately artificial a body of rules as the world has ever seen, and although modified in some important points, it lasted with us down to a century ago, when it began to be so cut about by amending statutes as to lose its ancient logical cohesion. For some reason or other which is not very clear to most of us, many of its technical doctrines were not held to be applicable to land in America, so you have escaped most of the complications it handed down to us. But the circumstances and forms of legal process which produced the ancient land law left a deep impress upon the law in general, and much of the technicality of your law and ours is due to that cause.

English freedom in our particular legal form which it took, sprang out of feudal conditions. In reality, it was older than feudality, and had lost some of its simple Teutonic breadth when overgrown by feudal notions. But the structure of Parliament, and the right of Parliament alone to impose taxes, sprang out of the relation of the king as feudal superior to his tenants, which is in a certain sense, a private relation as well as a political one. It is hardly too much to say that what we call the public or constitutional law of England is a part of, as it has certainly grown out of, the private law. Some of our fundamental constitutional principles have been established by decisions given in private suits, and although you Americans can draw a sharper line between public and constitutional law than we can draw in England, where we have not got a constitution at all (in your sense of the term), still the old character of the Common Law remains plainly visible in the face that many of the most important questions that have arisen on the construction of your Constitution, Federal and State, have arisen

in suits between private parties, where the primary issue before the Court was one in which the rights existing between plaintiff and defendant had to be determined.

I have referred to exactitude of thought and expression as one of the excellences which we justly admire in the sages of the Common Law and particularly in the judicial decisions. That exactitude has become a feature of all our legal thinking and legal writing, and has in particular made us separate more clearly than the lawyers of some other nations do, strictly legal considerations from those which belong to the sphere of morality or sentiment. We owe this system in no small measure to the system of pleading which, slowly matured and refined to a perhaps excessive point of technicality, gave to the intellects of many generations of lawyers a very sharp edge. The old system of pleading had the great merit of impressing upon them the need for distinguishing issues of law from issues of fact. The first lesson a student learns is to consider in any given case whether he ought to plead or to demur. It is a lesson of value to all of us in our daily life, and I wish our friends in the laity could have at least that amount of legal training to make them see the difference between a case where you ought to plead and one where you ought to demur. Half the confusions of thought in the world, not excepting the world of political discussion, have arisen because men have not stopped to ask themselves whether the issue is one of fact or of principle. "Do I deny the facts or do I dispute the inference?" Or in legal words, "Ought I to plead or to demur?"

It is a remarkable fact that although the Common Law came into existence at a time when personal slavery was not extinct in England, and had reached an advanced state of development before praedial slavery or Villenage had died out, the existence of slavery in the North American colonies had nothing to do with either English institution, but arose quite independently in colonial days. Though Villenage existed at Common Law, and is said to have lasted into the seventeenth century, personal slavery does not, I think, stand recorded in any Common Law book of authority.

It may be observed in passing that although one might think that the recognition of the rights of man as man would be clearest and fullest in a country where every man was free, this may not in fact have been the case. Where some men are free and others are slaves, the status of freedom may have been conceived more sharply as a positive status, and the rights belonging to the individual as a freeman may have stood out more strongly, because a freeman is legally exempt from treatment to which a slave is liable. As a freeman, he is prima facie the equal of other freemen even though the latter may belong to a privileged caste. That, however, is only a possible historical deduction which I mention because it is suggested by the history of Law of Rome, in which the presence of slavery was an extremely important institution and where the rights of the individual citizen were very clearly recognized.

On no feature of the Common Law did your and our ancestors lay more stress than on the jury, and the right of every citizen to be tried by his peers. This right has been considered a bulwark of English freedom, and was deemed in the eighteenth century to be essential thereto; yet it deserves to be noticed that the jury was an institution which, in the form in which it is known to us, arose almost, we might say, by accident. The legal genius, or instinct, of the mediæval English may be credited, however, with the use they made of this accident. Darwin has shown how a variation from a type which in its origin is accidental, that is to say, due to some cause operative in an individual organism which is beyond our power of inquiry, may become the source of a new type, possessing advantages which enable that new type to survive and prevail and reach a higher level of efficiency than the

original type possessed. Now, it may not be too fanciful to suggest that where a political or legal germ happens to fall in a fertile soil, the virtue of the soil enables it to spring up and become the parent of a flourishing progeny.

Our ancestors moulded the jury into an instrument that was serviceable not only for discerning the truth, but also for securing freedom and justice; freedom, because the jury was practically independent of royal power; justice, because the jury, although it was sometimes intimidated and occasionally even corrupted, was on the whole less liable to be tampered with by those malign influences which might poison the mind or prevert the action of a judge in days when public opinion was ill-informed or weak.

We in England have no longer that confidence in the wisdom of a jury in certain classes of civil actions which we once had, and the tendency in recent years has been to narrow the sphere of its employment. But the institution of the jury has had some notably beneficent results. Along with those rules of pleading to which I have already referred, it helped to form in us a keener perception of separating issues of law from issues of fact than exists anywhere outside of England and America, and has trained us how to make this distinction in every case we have to advise on or argue. It tended to keep judicial deliverances of the law within due limits of brevity, because when a judge finds himself tempted to wander off into the merits of the case he is reminded that those are for the jury and that his natural human tendency to do what he thinks substantial justice must be restrained by the sense that his business is to declare the law and be content with advising the jury on the facts. It formed the practice of using oral evidence at a trial, and thus, incidentally, it prevented both those secret examinations of the accused person and that recourse to torture which were common in continental Europe. It confirmed the ancient usage of requiring judicial proceedings to be conducted in public, and thus kept subject to the watchful eye of popular opinion, and it mitigated that harshness of the penal law which belongs to all comparatively harsh societies, and which was not removed from the English Statute Book, until the memory of persons still living. When men were liable to be hanged for small thefts, English juries refused to convict for such offenses, and the refusal of the juries to convict hastened the march of legislative reforms.

Now, the mention of penal matters suggests a word as to the extreme technicality of the older Common Law. Frequently as that technicality frustrated the doing of substantial justice in civil cases, it had its advantages in criminal proceedings. Often a prisoner who did not deserve a severe sentence — and no doubt also sometimes a prisoner who did — escaped on some technical ground. Our forefathers had such a respect for the law that they would rather see a guilty man escape punishment than that some of their technicalities were neglected. Perhaps they carried that principle a little too far.

The Common Law, which had the great merit of forbidding the use of torture, — abominably frequent in continental Europe even in the eighteenth century, — had also the merit of forming in the legal profession the feeling that an accused person ought to have a fair run for his life, a sportsmanlike instinct, like that which gives the hunted deer "law" a fair start, or that which forbids certain tricks by which a game at cricket might be won. A judge who bullied a prisoner was condemned by professional opinion. A prosecuting counsel who overstated his case or betrayed a personal eagerness to convict the prisoner, incurred the displeasure of his brethren, and was sure to hear of it afterwards.

I have often been struck in our criminal courts — and, no doubt the same thing occurs here — by the self-restraint which experienced counsel impose on themselves

when conducting a case, as well as the care which the judge takes to let the prisoner have the benefit of everything in his favor. How different things are in continental Europe is known to you all. It is partly because this old tradition has been so well preserved that we in England have found that convicted prisoners need comparatively few opportunities for raising points of law after the trial. The trial itself almost always secures for them whatever justice requires, though, of course, there is a power of raising by subsequent argument points reserved, and we have recently in this very session of Parliament, created by statute a court which is to hear criminal cases on appeal.

The mediæval Common Law has been charged with one serious defect, that of lacking elasticity and the power of expansion. It halted at a certain point. It refused to deal, or rather, perhaps, I should say its machinery proved incapable of dealing, with certain sets of cases, and left them to be taken up and dealt with by the Crown, acting through the Lord Chancellor. I cannot stop to inquire how far this was due to an excess of conservatism in our forefathers, how far to the circumstances of the time which, while circumscribing the action of the King through one set of machinery left him free to act through another. Anyhow the result was that the huge system which we call Equity grew up side by side with the Common Law, remained distinct from it in England until the Judicature Act of 1873, and I believe still remains distinct from the Common Law in some parts of this country. Still, in a broad sense, although, speaking technically, we distinguish Common Law from Equity, we may include Equity within the term Common Law when we use it to distinguish the law of England and America from the Roman Law of the European continent, or of Louisiana and Spanish America. And it must not be forgotten that not only had Equity become thoroughly a positive system and a technical system by the time when the North American Colonies were founded, but also that it had been largely influenced by the same historical environment and had been moulded by the same national character as had governed the growth of the law administered in the Common Law Courts. How much of its own precision and certainty the older system had given to the younger system of Equity may be perceived by whoever will compare English Equity with the civil law of most European countries in the seventeenth century.

I have kept to the last the most striking of all the historical conditions which determine the character of Anglo-American law. England was an island. The influence which governed the development of law in the mainland reached her in an attenuated form. The English people had a chance of making a new start and of creating a system of law for themselves, instead of merely adopting or adapting the Roman jurisprudence, as did at various times and in divers ways nearly all modern peoples except those of English stock.

We must not indeed exaggerate the originality of our law. It is not as original as that of Iceland would probably have been, had Iceland gone on developing the legal customs she had formed by the middle of the thirteenth century.

It is not original in the sense of owing little or nothing to foreign sources, for a great deal of law flowed from Roman fountains into the English stream. When the Lombard Vacarius taught the Roman law in the reign of King Stephen at Oxford — this is among the very first traces we have of that famous university — we cannot suppose that his hearers were confined to those who wished to practice in the ecclesiastical courts. In the next century we find Bracton, one of our earliest legal writers, copying freely from the Roman law books, though he frequently also contradicts them when English usage differed.

In the fourteenth and fifteenth centuries, the ecclesiastical chancellors who built up the system of Equity, were much influenced by Roman legal doctrines, drawn largely through canonist channels. Still the fact remains that the law of England was a new creation, not an adaptation of the law of the empire. It has a character and a quality which are all its own; and its free spirit and tendencies have always stood out in marked contrast to the despotic spirit and tendencies which France, Spain, and Germany inherited from the imperial jurisprudence. To that jurisprudence it was, during the Middle Ages and the centuries which followed, as much superior in respect for freedom and in what may be called a popular flavor as it was inferior in the philosophic breadth and elegance of the ancient sources on which that imperial jurisprudence was founded. The use of the jury, the far larger part assigned to oral evidence, the sharper separation of issues of law from issues of fact are among the most salient points in which the superiority of the Common Law to the law of continental Europe appears.

I had intended to have given you a brief sketch of the earlier history of the ancient Roman law for the sake of showing how the characteristics of that great rival system sprang from features in the national character of the Romans in their republican days, not unlike those which marked our own ancestors. They too had a genius for law. Less imaginative, less artistic, less acute in speculation, altogether less intellectually versatile and alert than were the Greeks, they had a greater capacity for building up and bringing to an almost finished and certainly unsurpassed perfection, a body of legal principles and rules. They had this capacity in respect of gifts like those of our ancestors. They realized clearly the rights of the individual as against the State. They were conservative. They had the power of self-control. They were filled with practical good sense.

But this subject is too great to be dealt with at the end of an address, and I must be content with recommending it to the attention of those who are interested in the study as throwing much light upon the general tendencies which have governed the growth of law. The best illustrations of English legal history are to be found in Roman legal history.

So far, Ladies and Gentlemen, I have spoken of the Common Law as a product of the English intellect under certain peculiar historical conditions, but I must say one word in another aspect: If it was a result, it was also a cause. It reached powerfully upon the people that made it. Just as the habit of physical or mental exercise strengthens the body or the mind where native energy has made exercise enjoyable, so the Common Law once created, began to develop further and give more definite form to those very qualities of the nation whereto its own features were due. Under its influence the national mind became more and more permeated by the spirit of legality. It grew accustomed to resist arbitrary power, but as it did this in defense of prescriptive right, it did not lapse into revolutionary ways. Thus there was formed the idea of a government of limited powers, and therewith the habit, when anyone claimed obedience, of requiring him to show his title to demand it. If it be asked why should not such a conception of the legal character of all authority belong to and arise in every duly matured system of law, the answer must be that the case of England stood alone in this respect that the law came early to be recognized as being something more than an expression of the will of the sovereign ruler. It sprang part out of the old customs, partly from an assembly which was national, although as yet not popular. It did not descend, as in continental Europe, from an ancient and foreign wisdom or authority. It was English. It came not from above, but from all around. In England, moreover, there were among the men who knew and practiced the law many

persons of some independent social standing. They were largely the lesser land holders, and the younger sons or nephews of some of the larger land holders. They formed a link between the nobles and the middle classes. Unlike the lawyers of France, those of England did not generally depend on the Crown. Some of them no doubt did, and served the Crown in a way which the best men of their time condemned. But on the whole they were not dependent on the Crown and they were ready on occasion to oppose the Crown. Thus it came about that although the people at large knew little of the details of the law, the spirit of independent legality was diffused through the nation, and it was not the docile servant of power as it became in countries where both force and the function of making or declaring the law lay in the hands of the executive ruler.

How great a part the conception of the legal rights of the subject or citizen against the Crown or the State power played in England and American history is known to you all. Still less need I dwell on the capital importance for the whole political system of the United States of that doctrine of Limited Powers which has been so admirably worked out in your Constitution, nor of that respect for a defined legal right which supports their provisions. The life of every nation rests mainly on what may be called its fixed ideas, those ideas which have become axioms in the mind of every citizen. They are stronger than fundamental laws, because it is they that give to fundamental laws their strength. They are, as the poet says, the hidden bases of the hills. Now, it was mainly by the Common Law that those fixed and fundamental ideas were moulded whereupon the constitutional freedom of America, as of England, rests.

One hundred and thirty-one years have now passed since the majestic current of the Common Law became divided into two streams which have ever since flowed in distinct channels. Water is naturally affected by the rock over or the soil through which it flows, but these two streams, separated in 1776, have hitherto preserved almost the same tint and almost the same flavor. Many statutes have been enacted in England since 1776, and many more have been enacted here, but the broad character of the Common Law remains essentially the same and it forms the same mental habits in those who study and practice it. An American counsel in an English court, or an English counsel in an American court feels himself in a familiar atmosphere, and understands what is going on and why it is going on, because he is to the manor born. We read and we quote your law reports, although we are sometimes embarrassed by the enormous quantity of the food, not all of it, perhaps, equally nutritious, but some of it highly nutritious, which you annually present to our appetite. So you quote our law reports, although they are, I am sorry to say, nowadays so largely filled by decisions upon recent statutes as to be less serviceable for the elucidation of the Common Law than they at one time were. In nothing, perhaps does the substantial identity of the two branches of the old stock appear so much as in the doctrine and practice of the law. The fact that many new racial elements have gone to the making of the American people, and that in an increasing proportion during recent years, new elements from some of which you have gained enormously, causes in the sphere of law very little difference. And this unity in the law is a bond of union and of sympathy whose value can hardly be over-rated. An English visitor who has himself been trained to the law can find few keener pleasures than that which my friends Lord Justice Kennedy, Sir Kenelm Digby, Sir Frederick Pollock and your other English legal visitors and I enjoy in being here to-day among so many eminent members of our own profession, and in perceiving how high and respected a place the legal profession holds, and always has held, and I trust always will hold, in the United States.

This is a bond of sympathy, Ladies and Gentlemen, not least because it is a source of common pride. There is nothing of which you and we may be more justly proud than that our common forefathers reared this majestic fabric which has given shelter to so many generations of men, and from which there have gone forth principles of liberty by which the whole world has profited. The law of a nation is not only the expression of its character, but a main factor in its greatness. What the bony skeleton is to the body, what her steel ribs are to the ship, that to a state is its law, holding all the parts fitly joined together so that each may retain its proper place and discharge its proper functions. The Common Law has done this for you and for us in such wise as to have helped to form the mind and habits as well of the individual citizens as of the whole nation. Parts of the law the individual citizen cannot understand, and when that is so he had better not try to understand it, but have recourse to your professional advice. But the law is all his own; the people can remould it if they will. Where a system of law has been made by the people and for the people, where it conforms to their sentiment and breathes their spirit, it deserves and receives the confidence of the people. So may it ever be both in America and in England.

INTERVALE, N. H., August, 1907.

PRESIDENT'S ANNUAL ADDRESS

By Hon. Alton B. Parker LL. D.

NEITHER we, nor the thousands of our predecessors or associates in the American Bar Association, during all the years of its history, have attended its meetings for selfish reasons. We do not seek to serve here the interests of any client, nor do we receive a fee for coming. There can be no expectation that the information acquired will aid in the cases that are to be showered upon us in the fullness of time. We know well how we shall prepare for each of those, working it out alone until it has been mastered in every detail of fact and in every proposition of law.

Nor do we come for recreation. Delightful as Portland is, hospitable as are her people, warm-hearted as is their greeting, we shall nevertheless depart, though with regret, when the session is over. We shall carry away pleasant memories, but we must meet elsewhere engagements which may be professional, or which have rest and recreation for their purpose. Whatever they may be, they have been interrupted in order to assure our presence at this meeting. Sacrifices of some kind have been made by every lawyer who attends this annual assembly.

What then moves us? The answer is not far to seek. We are here because we have ideals. Each of us would elevate the standard of the profession, strengthen the Bench, make the administration of justice more simple, more rapid, more exact, not only in the state from which he comes, but in every state throughout the nation. No one of us has a workable plan which comes up to his ideals, or hopes to be able to evolve it. But as in union there is strength, so in a multitude of counsellors there is wisdom. Therefore, each year finds us coming together striving for these ideals, each willing and anxious to do his part

It is well that we do so. Not all has been accomplished that has been striven for in the past. Much has been done, however, and greater achievement will reward us in the years to come. Only from the efforts of a people to attain high ideals can true progress result. The boy at school may fix a higher standard of achievement than either health or intellect will permit him to reach, but he will grow into a better, a stronger and more useful man because of his ideals and his effort.

There is no profession, trade or business, whose members as a body have higher ideals than have lawyers as a class. We cannot deny that there are many among them with no higher aim than mere money-making, nor can we say that there are not a considerable number who are so destitute of character as to disgrace the Bar. Unfortunately this is true. But such are the minority. The great majority are idealists who love justice, and seek it not only for clients but for society at large.

They are not mere machines selecting and grinding out authorities by which the courts are to be bound. For where a well-considered case can be found in which the facts are identical, the law is settled and the court has but to follow it. There is no opportunity for controversy. The discussions in court are, therefore, as a rule, in cases where there is no previous decision based upon precisely the same circumstances. The aim of both court and counsel is to work out justice in that special instance, and, at the same time, to establish a sound rule. To aid the court, counsel present principles which they deem pertinent, and emphasize the custom of the people relating thereto. This is vital because the foundation of our unwritten law lies in the habits and customs of the people.

It has often and truly been said, but never so well as in the address of James C.

Carter before this Association, that the people make the common law, because "we find it to spring from and rest upon the habits, customs and thoughts of a people, and from these a standard of justice is derived by which doubtful cases are determined. The office of the judge is not to make it, but to find it, and, when it is found, to affix to it his official mark by which it becomes more certainly known and authenticated." While this is so, yet the announcement of the law comes from the Bench. And for the most part it comes only after the court has had the benefit of the learning of counsel, which to be comprehensive and useful must embrace knowledge of the people and their customs, as well as knowledge of principles established by prior decisions. In this way our unwritten law, better known as the common law, has been so developed as to meet the exigencies of our wonderful growth and expansion, and of our complicated business and social conditions.

Judges who are inspired by the highest patriotism and who love justice seem to play the leading part in this procedure, because upon the Bench is charged the duty of announcing the law and rendering judgment. It may well be doubted, however, whether the public spirit, learning and ability of counsel contributes less than that of the court toward the just settlement of a majority of disputes. Be that as it may, there is no reason to doubt that our profession has contributed in a large degree toward that liberal measure of justice which we as a people enjoy to-day. I do not mean that the ideal has yet been reached. Far from it. But we can say, that many long steps toward it have been taken, since that period in England's history when controversies were decided by "wager of battel."

Moreover, we can claim, and that, too, without fear of contradiction, that our people's habits and customs bring the common law much nearer to the ideal than the statutes made and provided so plentifully. The reason for this is plain. The common law is expanded slowly and carefully by judicial decisions based on a standard of justice derived from the habits, customs and thoughts of a people. And lest the judge at *nisi prius* may make a mistake, appeal is allowed to a court composed of a number of experienced and learned judges. These again have the assistance of the printed or oral arguments of counsel, or both. And they, free from prejudice and partisan bias, and animated by that love of justice which grows stronger and more all-pervading with its daily ministration, seek with diligence and earnestness the true rule. So far as it is given us to realize an ideal method of building the law of a people, we possess it.

The proper function of the legislator is suppletory to that of the judge. He should strive to ascertain the growing but imperfect customs which spring from the effort of a people to correct errors, and give to them the dignity and force of law. This he often attempts to do, and frequently succeeds. But the task of even the wise legislator is beset with difficulties. So many bills press upon his attention that if he had the wisdom of Solomon he could not master them in one short session. Many such bills are introduced by men who do not understand them, merely that they may gain the applause of the thoughtless or the envious. Others are strike bills pressed in the hope of unlawful gain. Still others are presented from honest motives, but with no appreciation that their enactment will work injury, while still more represent the effort of untrained legislators to enact into law what they mistakenly conceive to be the will of the people.

More mischievous still, as a rule, are the bills pressed for passage in the interests of a political organization. Experience teaches that comparatively few of the many bills of a legislative session are care-

fully considered by the body as a whole. Such consideration as the average bill has is in committee, and too often the majority of that committee is influenced by party organization, or by the Governor, or by some other leader who sees in it a party or factional advantage. And its final enactment is secured by the same influence that moved the majority to report it. In other words, supposed advantage, either for the party or individual members of it, is often made the occasion for statutes which otherwise would never appear on the statute books. Thus it happens that every year many statutes are passed which ought never to have been heard of.

Every unnecessary and unwise statute is a blot upon the state escutcheon and a burden upon the public. This fact is so well appreciated in some states that the legislature is not permitted to meet every year. An illustration of the opinion of a lawyer, upon whom as Governor rested the responsibility of the exercise of the veto power as to many bills passed only this year by the legislature of the state of New York, is found in the fact that he vetoed thirty-seven, caused one hundred ninety-seven to be withdrawn, and permitted two hundred fifty to die for lack of his signature, making a total of four hundred eighty-four bills which, after passage through committees and both houses, failed nevertheless to become laws because of the Governor's action. While it is true that some wholesome and necessary statutes come out of such conditions like those I have outlined, in more instances unnecessary or positively bad ones spring from them.

One of the ideals of this Association is to elevate the standard of statute making, and to stimulate harmony in legislation on the part of the several states, for it is so provided by the First and Eighth Articles of the Constitution.

The First Article declares the object of our Association to be "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar." Of this statement of the purposes of the Association, Mr. James C. Carter in his President's Address happily said: "It recognizes the fact that though we are citizens of different states in some degree sovereign, we are yet one people, one immense human society with common interests, common hopes and a common destiny; that among the several concerns of that, as of every society, are its jurisprudence and legislation; that that great interest is, in large degree, under the care and control of the members of the legal profession; that it is their duty to reduce it to a science, to develop its usefulness, to simplify it into uniformity, to correct any evil tendencies which may beset it, and to these ends to uphold the honor of the profession and inspire its members with a just conception of their high office."

The Eighth Article devolves upon the President the duty to communicate in the address, with which he is charged to open each annual meeting, "the most noteworthy changes in statute law and points of general interest made in the several states and by Congress during the preceding year."

The length of the sessions of several state legislatures, and the delay in printing the laws, has rendered it simply impossible to perform the task as thoroughly as it otherwise would have been done. In some instances it became necessary at a late hour to ask for copies of acts deemed the most notable in order to make as full a presentation as the conditions would admit. The result shows a degree of legislative activity hitherto unsurpassed. Nor is it surprising that it is so.

For a goodly number of years our people enjoyed great prosperity. Nearly every individual and certainly every calling has participated in it in some degree. Oppor-

tunities for improvement and advancement were enjoyed by all. The food supply had become more widely diversified. The houses, apartments, or tenements in which people lived on the average improved and largely so. Thus it happened that nearly all not only realized that the country was making tremendous strides in material development, but also that each individual had some part in it. They knew, at least most of them did, that very large fortunes were being realized by some individuals — fortunes more colossal than had been accumulated during a like period at any other time in the world's history. However, they were not envious, because the majority supposed them to have been honestly earned. It had been no part of American spirit or the American education to envy those who had been the more successful.

At a time when our prosperity seemed greatest and our enjoyment of the material things of life was most general, suddenly the righteous wrath of the people became stirred, and justly stirred, by the unwelcome discovery that at least some of the large fortunes had not been fairly gained. Revelation followed revelation in quick succession of transactions in the domain of high finance, by which a few had been enabled to add to their store at the expense of the many.

The occasion thus presented called for a careful study of the situation by those engaged in state-craft. Many there were, doubtless, who attempted to perform this duty. Their purpose was to ascertain how wrongdoing became possible, and whether due in some part to direct legislation improperly procured, to inadequate legislation, or to a failure to enforce existing law on the part of those charged with the duty of its enforcement. The cause or causes being first ascertained, the next step in orderly procedure was to ascertain the needed remedies — remedies having for their purpose the punishment of the violators of the law and the prevention of similar abuses of the public in the future — remedies which, while holding in check the wrongdoer, should save from spoilation or injury the innocent stockholders or bondholders, who were in some measure the victims of their representatives.

Justice being the proper aim of all law and of all lawmakers, great care is required in such an emergency as that which came suddenly upon us, lest the innocent should suffer with the guilty, lest through ill-chosen and economically unsound legislation the people as a whole should be made to suffer because of the faults committed by comparatively few. But those charged with this duty both because of official obligation and from love of country, were not permitted to work out these problems thus presented in that quiet and orderly way which should characterize a government of law.

Indeed, when they had scarcely begun the task which the situation devolved upon them, the demagogues of the country, seeing their opportunity, seized it. They filled the land with denunciation not only of those who had been wrongdoers, but of all corporate interests of every kind. It mattered not to them that the great trunk lines of railroad contributing so largely to the magnificent and uniform development of the country, the street surface railroads, adding so largely to the comfort and convenience of a vast contingent of our population, the great manufacturing plants, bearing their part in making up the wealth of the people, and many other industries requiring large amounts of capital, could not have been built at all but for the device of the corporation, which had enabled hundreds, and in some instances hundreds of thousands of persons to unite in the construction and operation of a single great undertaking. For their purpose was not the patriotic one of discovering and applying remedies. Instead they sought power, political leadership and office. They sought them for selfish advantage, not for

the public weal. Therefore, they hesitated not because injustice would inevitably result from their forays against all wealth whether honestly or dishonestly gained, whether employed for public good or public harm.

Remedies of course they proposed, for the politician cannot succeed by denunciation alone. Some of them, apparently oblivious of the fact that the powers conferred upon Congress by the federal constitution are enumerated powers, and that all other powers are by that instrument reserved to the states and to the people, professed to see in the assumption of federal control of corporations, the true remedy.

These were divided into two principal classes. The first, and by far the larger class, insisted that through the commerce clause of the Constitution, Congress could devise a plan by which it could take control of the insurance companies, trust companies, great railroad and other corporations. In this manner, Congress could relieve the states of their several duties and obligations to their own creations, and at the same time effectively relieve such corporations from state control. In that class, in addition to the political leaders and other well-meaning persons who had not especially studied our Constitutions, both federal and state, were to be found some who were interested officially in insurance, railroad and other corporations.

In the second class were to be found those who, while not disagreeing with the first class in the assumption that Congress possesses the power by the Commerce and Post Road provisions of the Constitution, to centralize the greater portion of powers of government in the federal government, nevertheless insisted that the remedy thus proposed was not broad enough. With them the remedy of remedies is for the federal government to acquire the railroads and operate them.

There were those, however, who, mindful of the limitation of the powers of Congress and appreciating the wisdom of the Fathers in securing to the states local self-government, wisely took the ground that if the states had failed in the performance of duty, they should now proceed to repair such neglect. This class can be sub-divided into two parts, the first embracing those who deemed it wise to study the situation deeply, to provide for the immediate trial of existing remedies, and if the law be found inadequate in any respect, then to supplement it by such other statute or statutes as should be found needful. The second class composed of adherents to the power and duty of the state, opposed the slower and safer method of those who proposed to look before leaping, and loudly proclaimed the necessity for legislation that should tear up that which is, both root and branch, and start anew.

In the circumstances to which I have of necessity made but brief and inadequate allusion, the legislatures of many of the states assembled. That the majority of their members were animated by good purposes, I doubt not. Naturally they wished to meet what seemed to them the honest desire of their constituents, that all abuses be remedied. But the majority had neither the time nor the training to enable them in one short session, crowded with hundreds of bills, to go to the bottom of so vast a subject. Hence they were unable to say whether certain abuses were due to the inadequacies of law or to the failure of the authorities to enforce the law. Nor had they opportunity to make such a study of the bills presented as would enable each to determine for himself whether each bill was needed or whether it was prepared on right lines. In support of that assertion, I direct your attention to the fact that over twelve hundred bills were passed by the legislature of my own state, although four hundred eighty-four of them were prevented from becoming laws by advisory or other action on the part of the Governor. What a commentary on hasty legislation is to be found in the action of a

Governor who keeps nearly five hundred bills from becoming laws! And the Speaker of the Assembly which passed all these bills, as he surveyed the winter's work from a Chautauquan platform, said: "It is a terrible death to be governed to death. In my judgment we have laws enough."

But the New York legislature does not rank as the leader in hasty legislation, for a much smaller state made over a thousand laws in two months. Think of it, you who have spent all your lives in the study of the law. Could you ascertain the necessity for, let alone critically examine the phraseology of a thousand laws in two months?

An interesting feature of some of the legislation of the year is to be found in the efforts made to prevent the railroad corporations from contesting the validity of statutes in the courts. Under the Minnesota statute, for instance, if the General Counsel of a railroad corporation should advise, on request for his opinion by his client, that the rates prescribed by the statute were confiscatory and, therefore, in violation of the due process of law provision of the Constitution, immediately he would be liable to be taken from his office to some remote county of the state and imprisoned in the county jail for ninety days.

The material changes in state legislation are so many and the report of them so voluminous, that I have embodied them in the appendix, which follows this address. In this connection, I beg the members of the General Council to be assured of my keen appreciation of the valuable information reported by them. If the report has merit, the credit is largely due to their suggestions.

Some of the hasty legislation, disclosed by these various volumes reporting either the entirely new laws of the states or the amendments to old ones, is due, in part at least, to an agitation in favor of the assumption of a larger measure of control by the Federal Government. The arguments in favor of action in that direction by the federal authorities have been based to a considerable extent on the assertion that the states have failed in their duty. The specific charge has been made that, through their action, legislation has been secured distinctly in aid of corporate schemes which have developed into corporate evils; that efficient remedial legislation has been defeated; and that administrative officials have permitted acts in defiance of law, until men standing at the head of great corporate interests have dared openly to disregard it.

Most of the intelligent men of my state and its immediate neighboring states would, I think, concede this to be in some measure true. But the admission does not make the charge any the more palatable. Instead it tends to arouse the public-spirited citizen from his lethargy and to stimulate him to demand local civic righteousness, while the public servant, on the other hand, seeks to hide from his constituents the consequences of his failure to do his duty by much denunciative speaking, coupled with efforts toward law making and law enforcing in harmony with his loud accusations.

Now, he who surveys the action of the legislative and executive departments of the state governments during the last few months, cannot with truth say that they have been inactive during this period. Nor can he say that the federal government has been more active or more drastic in its action than have the states. But it can be said, and therefore it should be said, that the federal government began the crusade. Therein was to be found, it seems to me, the sole basis for the assumption that the federal government, had it possessed the power, would have done better than the states. That assumption, considered in the light of the circumstances preceding and possibly inducing it, presents but a feeble argument in favor of taking

away any authority now enjoyed by the states in order to confer it upon the national government. And yet many honest, patriotic men who think otherwise, men who believe that it were better that the states were shorn of much of their power, seeing the neglect of officials or citizens, or both, in the state or states to which they owe allegiance, would abandon all attempts to right the wrongs, surrender jurisdiction, and pass the responsibility on to the federal government.

There was ardent support for a strong centralized government prior to the adoption of our present system. In the beginning, the advocates of this idea could see only failure in the plan adopted. Almost a century and a quarter of actual experience has shown that they were mistaken — so mistaken that nearly a century later, after studying the federal constitution in the light not only of the circumstances surrounding its drafting, but also of its practical working, Gladstone characterized it as "The most wonderful work struck off at a given time by the brain and purpose of man." When these words were written probably few of our people would have disagreed with him.

But finding now many abuses under the present distribution of powers, some turn to their redistribution as furnishing what seems to them the only hope of relief. They urge that the powers conferred may have been judiciously distributed when the federal Constitution was created, but that the country has so expanded and conditions have become so changed as to present a situation so widely different as to require changed treatment.

So far as this argument implies that the Constitution should be so amended as to confer further powers upon the national government, it is not my purpose to consider it. The Constitution has proved the wisdom of the men who perfected it. No one provision better demonstrates this fact than that providing for the method of amendment, under which fifteen articles have to this time been added. In the course of time there will no doubt be others. Perhaps one outcome from the present situation and the resulting discussion, will be a proposed amendment to the Constitution of the United States. Until its appearance, the discussion of the merit of such a measure can be postponed. We have now to deal with a very different question.

Indeed, it is claimed that, from the adoption of the Federal Constitution down to the present time, we have proceeded upon the mistaken assumption that certain powers supposed to belong to the states, did in fact reside in the national government — an assumption which has been shared by representatives of the various powers of the federal government, as well as by the like representatives of the state governments. While no one, to my knowledge, has stated the question in terms so broad as that just used, nevertheless, in the end, it amounts to this, if the present claim is allowed, that powers hitherto exercised by the states with the knowledge and consent of the federal government, may now be exercised by the federal government. The only foundation for this doctrine would be the assertion that the powers were wrongly exercised in the first instance and that ever since the states have usurped the functions of the national government.

This must be so, since the enumerated powers vested in the federal government and the powers reserved to the states and to the people by the Constitution and in the First Amendment, comprising ten articles, have not been changed. The Thirteenth, Fourteenth and Fifteenth Amendments in no wise relate to the powers now being considered. The Constitution as to them stands as it did in the beginning. It seems rather late to argue after a century of judicial and political interpretation, with the acquiescence of every department of both state and federal governments, that

the Constitution is not after all what it has seemed to be all these years. That, as a matter of fact, although a contrary opinion has been unanimously entertained for a century, the federalists achieved in great measure the victory for which they strove.

It is however true, that, on every hand, we hear not only suggestions of a broader control by the federal government of corporations than the Constitution seems to warrant, but also arguments to the effect that, while the necessary power is not to be found among the enumerated powers in the Constitution, the desired result may be brought about under the inherent or sovereign powers of government.

The claim for federal control has been made by representatives of insurance interests as a measure of relief from state supervision, and by certain railroad officials for practically the same reason. One of the latter in a recent address, after stating that a railroad not engaged in interstate traffic is subject to the jurisdiction of the state, said: "When, however, it engages in interstate traffic by interchanging with other roads extending beyond the state, it thereby becomes interstate, and its situation under the law is entirely changed. It has become subject to the whole body of the federal law relating to interstate common carriers, and has removed itself from all state laws governing the same subject." He also said: "I believe that the capitalization of the railroads should be directly under the federal law, which would provide federal authority to construct and operate a railroad, the purpose of which is to engage in interstate traffic either over its own rails or through connecting lines."

Officials and others have suggested various schemes having for their object the bringing of railroads, other corporations and interests under the exclusive control of the federal government. To that end national incorporation has been proposed, as has also a federal license system, the plan of the latter being to prohibit common carriers and others interested in commerce from participating in interstate commerce without a license, the license only to issue upon an agreement to obey all federal requirements.

The aim of the movement in so far as it relates to railroads and one of its purposes have been stated as follows:

"There must be vested in the federal government a full power of supervision and control over the railways doing interstate business. It must possess the power to exercise supervision over the future issuance of stocks and bonds, either through a national incorporation (which I should prefer) or in some similar fashion. The federal government will thus be able to prevent all overcapitalization in the future; to prevent any man hereafter from plundering others by loading railway properties with obligations and pocketing the money instead of spending it in improvements."

Another contention of far-reaching import, is that the power of Congress to regulate commerce, which has been held to include the right to regulate the instrumentalities through which interstate commerce is conducted, involves the power to regulate the producer of articles of commerce which may or may not be destined to enter later into interstate commerce. It is insisted that any attempted regulation may be made effective by prohibiting the goods of the manufacturer or the crops of the farmer from the channels of interstate commerce. These various contentions, some of them so new and so startling, represent only a few of the many.

The object which their advocates have in view is undoubtedly laudable. But that is not enough, if in the execution of their plans, they violate the Federal Constitution and directly lead toward the destruction of our dual government. Washington's solemn admonition, in his farewell address, as to our duty in such an emergency, should be faithfully adhered to. He said: "If in the

opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

The Fathers who framed our Constitution as well as those of the original thirteen states, had a wholesome fear of arbitrary power. They sought to limit governmental power by law, the source of which should be the people — the states to be supreme as to all matters, and to exercise all powers except those specifically granted to the national government, the constitution of each state to be the supreme law and capable of amendment only by its people.

In this way the three departments of government were to be held in check and their several powers added to or diminished from time to time as the wisdom of the people should direct. And upon the Judiciary devolved the duty of preventing violations of the supreme law — a duty which has been faithfully executed. Guided by the ideas and principles which prevailed in the creation of the state governments, the framers prepared the Constitution under which our national government came into existence. Every power with which it was deemed necessary to endow the national government was given to it, and in the exercise of these it was made supreme. To prevent any possible assertion by the national government of inherent powers, those assigned to it were carefully and expressly enumerated.

But to avoid even the possibility of a contrary claim, the Constitution was at once amended by the addition of ten articles — every one of which operated as a restraint upon the national government. The last one, not only disclosing the intent with which the Constitution was framed, but establishing beyond even the possibility of cavil, that the national government is limited to the powers specified in the Constitution creating it, reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." Other powers have since been granted and in the future still others may be given, but the Constitution as it now stands forbids the exercise of any powers other than those granted by it. It leaves no room for finding in the language of the Constitution a claim that there are certain unmentioned and inherent powers which the federal government may exercise.

That claim has, however, been made in the Supreme Court of the United States on more than one occasion, only to be denied by it. Quite recently, and in that interesting and most important case, Kansas *v.* Colorado, the court was compelled by the contention of the government of the United States to pass upon its claim to exercise certain unmentioned powers as inherent and sovereign. While the suit was between Kansas and Colorado, the United States intervened, claiming, as stated by Mr. Justice Brewer, that "the determination of the rights of the two states *inter sese* in regard to the flow of waters in the Arkansas River, is subordinate to a superior right on the part of the national government to control the whole system of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the national government." Continuing, the court says: "as heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as

are expressly given, or given by necessary implication.' Story, J., in Martin *v.* Hunter's Lessee, 1 Wheat., 304, 326. 'The Government of the United States is one of delegated, limited, and enumerated powers.' United States *v.* Harris, 106 U. S., 629, 635."

The court then considered the powers conferred on Congress by Section 8 of Article 1, emphasizing its conclusion that they bestowed upon Congress no authority over arid lands. In the course of the discussion of that subject, the court cited with approval the canon of construction laid down by Chief Justice Marshall in McCullough *v.* Maryland, 4 Wheat., 405, adding, "Yet while so construed, it still is true that no unmentioned power passes to the national government or can rightfully be exercised by the Congress."

Examining the claim of the government that congressional authority over arid land is given by Section 3 of Article 4, which prescribes in part 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," the court says: "But clearly it does not grant to Congress any legislative control over the states, and must so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the government relies upon 'the doctrine of sovereign and inherent power,' adding 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference. His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. . . .

"We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution, in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

In this last sentence of Mr. Justice Brewer is to be found the just rule by which the courts, the Congress and the citizen can determine with reasonable certainty whether proposed federal action is within its author-

ity, or constitutes a usurpation of the powers of the states. Is it fairly within the spirit and purpose of some one of the grants of power? If so, then the action is justified. Otherwise he who supports it is not faithful to the Constitution.

The recent claims for federal intervention in directions heretofore unheard of, are based upon the Commerce and Post Road provisions of the Constitution. As to the first, the Constitution says the Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Is it within the spirit and purpose of that provision, that Congress may control the manufactures and all other productive interests of the states, whether controlled by individuals, or corporations, the creations of the state? The answer of even a casual student of the Constitution and the conditions surrounding its making, must be in the negative. Nor is authority lacking to support the proposition that production is not commerce (Kidd *v.* Pearson, 128 U. S., 1). And it is authority to regulate interstate commerce, not production within a state, that the Constitution confers upon Congress. An attempt, therefore, to deny to the harmless and useful products of a state entry into interstate commerce would violate the letter and spirit of the Constitution. Such a proposition, I believe, would not survive the test of constitutionality in the Supreme Court. But the result of even an attempt on the part of Congress to seize the power of the states and deprive them of so large a measure of control would be most unfortunate.

It is not my purpose to discuss the merits of the various claims for an increase of the federal power at the expense of the states. In the end such of them as are favorably acted upon by Congress, will have to pass the test of constitutionality before that greatest of all courts, the Supreme Court of the United States, and such statutes will stand or fall as they show, or fail to show, fidelity to the spirit and purpose of the Constitution.

The attempts, however, on the part of the federal government to despoil the states of the powers and functions belonging to them, will not tend to smoothness in the working of our dual scheme of government. Already it has had its effect. The indignation of the governing forces of many of the states is already aroused. It is shown in the legislation of the year. It had not a little to do, in my judgment, with the recent conflict of judicial authority in North Carolina.

From many quarters for the past two years have come the iteration and re-iteration of the necessity for the assumption of federal control, based in the main on the feebleness or neglect of the state governments. The tide of speech and writing, if not of public sentiment, has been so strong that only here and there could be found a person who would attempt to stand against it. When he was found, his motives were discredited. So, when a judge in the performance of what he undoubtedly conceived to be his duty, restrained the operation of the legislation of a sovereign state, it seemed to some, doubtless, but the culmination of a series of assaults by the federal government upon state governments. And yet we know that, by the Fourteenth Amendment, the power has been confered upon the courts of the United States to set aside state statutes, and state constitutions as well, if they deprive any person of life, liberty or property without due process of law.

It was the understanding, I dare say, of the great majority of the people who voted for it, that the purpose of the amendment was to protect the negro. But it was not so limited in terms, for, indeed, its language embraces every person. And while that amendment remains a part of the Constitution, the federal courts have jurisdiction to pass upon the question whether

a given statute does or does not violate the Fourteenth Amendment.

While this is so, it seems to me that courts, both federal and state, should always bear in mind that comity which has thus far enabled the dual jurisdictions to work together so harmoniously for the public good. And, further, that care should be taken that the procedure shall evince that deliberation that doth so become a judge at all times, and especially when the object of an action is to declare void the deliberate act of the legislative department of a state government. I have in mind an action in which application was made for injunction, but, before granting it, counsel representing the state, as well as those representing the plaintiff, were heard fully. The judge wrote his opinion and then granted an injunction upon conditions that would safeguard to the last penny every person interested. The right to grant an injunction under such circumstances cannot be denied, but the propriety of granting, on an *ex parte* application, an injunction which refuses effect to a statute can and should be questioned.

A statute, upon the face of which no imperfection appears, and which will stand, unless it can be proved that it will prevent the property affected from earning a reasonable return for the investment, is presumptively constitutional. Its operation, therefore, is not a matter to be suspended for light reasons. Indeed, I have no hesitation in saying that in many such cases an appeal to the discretion of a judge that injunction issue could well be denied until after trial.

The abuses lying at the foundation of the earnest but sometimes reckless groping for remedies, must be checked. And if it were necessary, in order to promote this result, to pass through these processes, many of which will prove destructive of the rights and interests of a multitude of innocent and honest persons — still it would be well. For the property, the services and even the life of a citizen should be cheerfully sacrificed on the altar of the country's necessities.

So much of it though is unnecessary — aye, worse than that, so much of it is deliberately mischievous, prompted by the same spirit that cries out, "Away with law and its restraints! Lynch him! Lynch him!" that every patriotic student of the times, while hoping for the best, fears that the consequences will be disastrous unless we again take up and press forward in all earnestness the shibboleth of the Fathers, "A Government of Laws, not of Men." When we do this, we shall find a faithful adherence to the constitutional plan of the Fathers, to-day as nearly ideal as it seemed to them. We shall love the common law as we have inherited and developed it in this country, because as a body of law it approaches more nearly to the ideal, in that its standard of justice is furnished by the people themselves. Hence, the better and higher the civilization, the more nearly does the common law approach the ideal.

And we shall give more attention to statute making. We shall have less of it, but that which we do have will be of better quality. It will not attempt to cover the common law field. It will supplement the common law, substituting a new rule for the old, occasionally, and providing reasonable regulations for its citizens and its corporate creations. What method will be adopted by which the necessity and efficacy of a proposed statute shall be determined before its passage, cannot be safely predicted. But that it would be wise to have it first passed upon after argument by a tribunal the equal of the best appellate courts in this country, seems to me very clear. Then would our statute law be developed with wisdom and caution, instead of being ground out from a legislative hopper at the rate of five hundred laws a month, as has been done in more than one state this year.

Now, what can we, as individuals, do to realize our ideals? Many of you are doing much. Some are most intelligently pressing on a movement which originated with this Association, having for its purpose uniformity of law in the several states on certain important subjects. Many of our committees devote time and labor to the advancement of the causes committed to them by the Association. There is still more, however, that you can do and that you ought to do. The members of this Association who are in general agreement with the proposition that we should make haste slowly in legislation, both state and national, and that until amended, the Constitution should be adhered to according to its spirit and purpose, have an opportunity to help on toward our ideal, an opportunity for which your great legal knowledge, your high characters, your skill in the use of both tongue and pen, and your undaunted courage pre-eminently fit you.

You cannot move legislators crazed with ambition. But the people can, and will do so when they fully understand the situation. And we need never fear they will not understand it after a time. But the people should be informed now. Do not forget, however, that if you attempt it, you will be denounced by the demagogue and cartooned by the yellow press, a fate which has come to the few who have appealed to reason and to justice. These tactics have enforced silence upon many whose hearts have prompted them to point out the danger of government by passion. But they cannot keep silent the earnest lawyers of this country for a minute after they have determined that duty calls them to speak out. God grant that the hour of that determination is at hand.

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THE NATION AND THE CONSTITUTION

By Hon. Charles F. Amidon.

WE have a constitutional theory and a constitutional practice, and, as often happens in such cases, the one is not precisely the same as the other. According to our theory, as lately declared by the Supreme Court, "The Constitution is a written instrument; as such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government, its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grant of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Dred Scott *v.* Sandford, 19 Howard, 393, 426: 'As long as it continues to exist in its present form it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers.'" Such is our constitutional theory. Now listen to an accurate statement of our practice:

"It is evident when one considers the nature of a rigid or supreme constitution that some method of altering it so as to conform to altered facts and ideas, is indispensable. . . . Since modifications or developments are often needed, and since they can rarely be made by amendment, some other way of making them must be found. The ingenuity of lawyers has discovered one method in interpretation; while the dexterity of politicians has invented a variety of devices whereby legislation may extend, or usage may modify the express provisions of the apparently immovable and inflexible instrument. . . . The interpretation which has thus stretched the Constitution to cover powers once undreamt of, may be deemed a dangerous resource. But it must be remembered that even the constitutions we call rigid must make their choice between being bent and being broken. The Americans have more than once bent their Constitution in order that they might not be forced to break it. . . . And it has stood because it has submitted to a process of constant though sometimes scarcely perceptible change which has adapted it to the conditions of the new age."

This is not the language of a reforming legislature or a usurping executive; it is the careful and deliberate judgment of a great scholar and great statesman, one of the most competent living authorities on comparative constitutional law, Mr. James Bryce. It must be accepted as an accurate summary of our national history, made by one who brought to the subject no partisan bias or preconceived theories.

But if it is thought that an American alone is competent to speak upon this subject, we may hear both our constitutional theory and our constitutional practice from our own highest authority, the late Judge Cooley. "A constitution is not to be made to mean one thing at one time, and another at some subsequent time, when the circumstances may have so changed as, perhaps, to make a different rule in the same case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. . . . A court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a con-

struction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty." Thus Judge Cooley declares our theory in his Constitutional Limitations.

Now let him speak as a historian in his History of Michigan:

" No instrument can be the same in meaning to-day and forever and in all men's minds. As the people change so does their written constitution change also. They see it in new lights and with different eyes: events may have given unexpected illumination to some of its provisions, and what they read one way before they read a very different way now. . . . We may think we have the constitution all before us, but for practical purposes the constitution is that which the government in its several departments, and the people in the performance of their duties as citizens, recognize and respect as such, and nothing else is. Cervantes says: ' Every one is the son of his own work.' This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."

At this time when constitutional questions are being discussed with unusual zeal, it has seemed to me worth while to bring before us in a single vision both these aspects of our constitutional life. They have seldom been looked at together, but in debate each side has put forward the one or the other according to its immediate needs. They embody the progressive and conservative forces of the nation. To give over the entire field to either would be equally disastrous. If we accept the notion that our Constitution is absolutely rigid and changeless, our government becomes a kind of legal Calvinism, logically perfect, perhaps, but wholly unfit for life. The national growth would be cramped and arrested, and confined to a purely historic mould. The dead hand of the past is oppressive when laid upon property, but becomes the worst form of tyranny when laid upon the powers of government. On the other hand, if we exalt our constitutional practice to be the only rule of conduct, all the benefits of written constitutions are swept away. The government becomes solely a control by the majority. Oblivious of the wisdom of the past, it is ruled by the passions and prejudices of the hour. The nation has been wiser than the partisans of either our theory or our practice. In utter disregard of nice logical consistency, it has insisted upon combining them both, and in their union has found that mingling of flux and permanence which constitutes the living principle of every great historic nation.

A people situated as we are is without the steadying forces which alone can give a wholesome and beneficent political growth. We have none of the usages and traditions of a historic nation. We are not only new in time, but new in condition. We started in a new world, remote from all old-world associations, and profoundly conscious of our freedom. In throwing off the abuses of the past the tendency has been to discard the wisdom of its experience. The written constitution supplies this steadying influence. It has done for us what custom, tradition, established order and historic life do for the nations of the old world. In it we have treasured up for ourselves the wisdom of the past, not merely as a measure of governmental power, but also as a test of governmental policy.

We are much nearer an absolute democracy now than when the Constitution was adopted, and have a correspondingly increased need of its restraining force. Most of those nice restraints which its framers sought to interpose between the people and their government have been abolished in practice. The only one that is left, the indirect method of electing senators, is rapidly disappearing. Party organization

was for many years a check, but its conservative force has been greatly weakened through the primary election in which the people by direct action nominate as well as elect their officers. When the government was established, the means for organizing and expressing public opinion were comparatively feeble. To-day the mail, the telegraph, the telephone, the press, gather and proclaim that opinion so fully and swiftly that all may speak and all may hear, and the condition is much as if the nation was daily assembled in a great Athenian council. Public opinion has also been organized in a thousand forms of unions, parties, and business, and in that way given a manifold intensity. As a consequence the officers of government are becoming less and less representatives clothed with an independent judgment, and are becoming more and more delegates to execute the popular will with which they are in constant communication. The practical significance of these changes is manifest. The force of passion and prejudice has been immensely increased, and at the same time the checks upon it have been greatly diminished. The Constitution, and that alone, remains between the people on one side, and personal liberty and private property on the other. Triumphant democracy, having swept away all other bounds, now stands face to face with the instrument itself.

For the first century the Constitution was worshiped by all classes, no less by those who demanded its strict, than by those who demanded its liberal construction; but within the last twenty years there has arisen a cult who regard its limitations as productive of more harm than good. Mr. Bryce notices this new doctrine in his essays published in 1901, and since that date it has experienced rapid growth. One hears it frequently among the advocates of social reform. It is a distinct feature of the journalism of trade unions. At nearly all academic centers will be found one or more members who are giving to it a body of philosophy. They believe that the Constitution serves its only beneficent purpose when it is used as a standard to which public opinion may appeal in judging of the acts of government; that the legislature and not the courts, should be, the arbiter of constitutional law. This view, of course, overlooks our democratic society, and our lack of historic moorings, and by a superficial generalization applies to our Constitution the same principle as obtains among those nations of Europe which have similar instruments. This doctrine goes to the very foundation of our system of government. A more baneful heresy could not find lodgment among our people; and yet I know of no method by which it could be given more substantial help than by the vigorous teaching and rigorous enforcement of the rule that the Constitution speaks the same meaning yesterday, to-day and forever, and that those who are charged with its interpretation will be guided by this purely scholastic spirit.

Of late we have heard quoted again and again, from the bench and from the platform, the language of Chief Justice Taney in the Dred Scott case, that the Constitution "Speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers." The only objection to that fine phrase is that it is not true. The exact contrary would be nearer the truth. viz: That not a single distinctive word or phrase in the Constitution has the same meaning to-day which it had when that instrument came from the hands of its framers. Such language is as reprehensible from that side of the controversy as on the other side are the words of the impassioned phrasemaker referred to by Senator Knox in his very able address at Yale. With a practical and rapidly progressive people like ours, the pharisaical doctrine that the nation exists for the Constitution instead of the Constitution for the nation, can

never obtain permanent acceptance. The Constitution performs its chief service when it holds the nation back from hasty and passionate action, and compels it to investigate, consider, and weigh until it is made sure that the proposed action does not embody the passion of the hour, but the settled purpose of the years. A changeless constitution becomes the protector not only of vested rights but of vested wrongs. As Bacon says, "He that will not apply new remedies must accept new evils, for time is the greatest innovator. . . . A froward retention of custom is as turbulent a thing as any innovation." A constitution which fixedly restrains a people from correcting their actual evils, becomes associated in the popular mind with the evils themselves. When it performs that role, as ours once did, it becomes in the estimation of reformers a "compact with hell," and enlightened statesmen appeal from its provisions to a "higher law."

But it is now insisted with a zeal such as has not been heard since John Taylor of Carolina, that if the Constitution is to be changed it must be done in the manner which the instrument itself provides for its amendment. To say that, however, is to say that it shall not be changed at all, for we are taught by a century of our history that the Constitution can no longer be thus amended. Since 1804 more than two thousand amendments have been proposed. Many of them have been the subject of much public discussion, have found a place in party platform; some have received the requisite vote of one branch of Congress; but with the exception of the war amendments, all have failed of adoption. The first twelve amendments may be regarded as merely formal, or as the result of the forces which produced the instrument itself. It required the fierce passions aroused by the Civil War to bring about the only direct amendment of the Constitution which has occured apart from the period of its adoption. Even these amendments could not have secured the requisite number of States had it not been for the coercion of military power and political influence such as every lover of our country will hope can never be again employed for such a purpose. This, however, was not the worst feature of those amendments. The fierce passion necessary to secure their adoption was embodied in the amendments themselves. As a result they have been nullified in some of their most important provisions, and as to other features found in the Fourteenth Amendment, the Supreme Court in order to prevent their confounding our whole system of national and local government, was compelled in the Slaughter House Cases to resort to a construction which did violence to the language of the amendment, and defeated the avowed purpose of the men who employed that language. The most impressive lesson taught by the war amendments is that the Constitution cannot be amended in the manner which it provides except as the result of passions which wholly disqualify the nation for the work of constitutional amendment.

The vast enlargement of our country has made the method of amendment provided by the fathers far more difficult than they contemplated at the time. They also believed that they had forever foreclosed the possibility of government by party, and the inauguration of that system has made the plan which they devised unworkable, for any amendment which is proposed by one party encounters the opposition of the other. If objection does not exist to the subject matter, it is called forth by partisan considerations. No amendment, therefore, is possible except when one party controls the legislatures of three-fourths of the states, and a two-thirds majority in Congress. This condition has not existed since the early part of the last century, nor is it ever likely to occur again.

But probably the greatest force opposed to constitutional amendment is the fear of radicalism by the large business interests

of the country. The wave of socialistic tendency which is now sweeping over all western nations has greatly added to this alarm. Property knows that it is safe under the Constitution as it is. There is a very general understanding that formal amendment is impossible. Every year that goes by without such a change strengthens that understanding; but if its power were once broken by an actual amendment, it is impossible to foresee the forces that might be set in operation. Hence with business interests it is the fact of amendment that controls, and not the subject matter.

It is not only true that the Constitution cannot be amended in the method which it provides, but that such a change is neither needed nor best. Formal amendment is not suitable to bring about those slight but steady modifications of fundamental law which adapt it to the progressive life of the nation. It is far too violent a remedy for that purpose. The Constitution has been and ought to be accommodated to the ever-changing conditions of society by a process as gradual as the changes themselves. Like the Kingdom of Heaven amendments such as these came not by observation. No political prophet can say of them, Lo, here! or, Lo, there! As the result of more than a hundred years of experience the nation has become acquainted with this process of amendment and is satisfied with it. It must now be accepted as a part of our frame of government of equal validity with the Constitution itself.

But if the Constitution is changed by interpretation will it not be entirely swept away by the process? We hear much of this argument *in terrorem*. In the minds of its advocates the Constitution is a kind of St. Rupert's drop, so fragile that if its elements be disturbed in the slightest degree, the entire combination will explode. Experience tells us that it is made of sterner stuff. After a century of such interpretation by which the instrument has been so altered that Mr. Ford tells us its authors would not know it, it is to-day performing its functions with far greater vigor than during the period following its adoption. Being a great instrument of government it cannot be read in the library. As the late Justice Miller stated to a company of judges and lawyers at St. Paul a short time before his death: "The great questions of constitutional law are not to be finally settled by nine men, however wise, taking them off into a room and reading and studying about them. That is the way we start the process. We place the decision the best we can, according to that light, and then see how it works in its actual application to the national life. Very frequently that illumination shows us that we have gone far to one side of the true line. With this instruction of experience we place the next case on the other side and observe its application; and so on, from time to time adding to our thought and study the results of experience and observation, we finally evolve the true solution by a process of exclusion and inclusion. The meaning of the Constitution is to be sought as much in the national life as in the dictionary,"

In our constitutional theory we habitually assume that the provisions of the Constitution have but one meaning, and that plain and precise. But this is not its real character. As Marshall declares in McCulloch *v.* Maryland, "Its nature requires that only its great outlines should be marked, and its important objects designated. . . . It was intended to endure for ages to come, and to be adapted to the various *crises* in human affairs." An instrument of such a character must necessarily leave a wide latitude for construction. The fact that the Supreme Court in constitutional cases so frequently stands five to four, each division assigning weighty reasons for diametrically opposite views, shows plainly how much the Constitution in actual application is a matter of interpretation. Now that questions of government are becoming so largely economic, the majority of our so-called constitutional

cases turn not upon the interpretation of the instrument itself, but upon the construction of the living conditions to which it is to be applied. Let me illustrate: A statute of New York provided that women should not be employed in manufacturing establishments between the hours of nine o'clock at night and six o'clock in the morning. In a recent decision of the Court of Appeals of that state, this law is declared unconstitutional upon the ground that there is nothing in the nature and duties of woman which justify the legislature in discriminating as to her employment. The gist of this decision is not the meaning of the Constitution, but the effect of labor in a manufacturing establishment upon the health of woman and her ability to perform the primary duties of home and motherhood; and while none of us would question the ability of the court to interpret the Constitution wisely, some at least would feel that in that case it fell into grievous error in its interpretation of life. Constitutional cases are in the same manner frequently decided not upon the language of the Constitution, but upon conflicting notions of life in which the courts assert doctrines at variance with both popular and legislative judgment. The danger of this practice is obvious. It gives us a government out of a law library, which, as Napoleon said, is the worst of all forms of government.

Courts are very fond of declaring that in the field of constitutional law they never exercise political power but simply declare the private rights of parties. This is true as to the form but untrue as to the result. The ultimate effect of every constitutional decision is not only to declare the rights of the litigants, but to define the powers of government. If the Constitution were precise, and capable of but one construction, then the courts in construing it would be simply declaring the rule and in no way making it. But in the case of the Federal Constitution in particular, its provisions are so general as to leave a wide latitude for judicial construction; and within the scope of that latitude the court in construing the Constitution is exercising a political power second only to that of the convention that framed the instrument.

In the attempt to catch our Constitution in a statement, we have been frequently told of late that " the powers of the federal government remain the same "; that the only change which has been wrought in our progressive history is the change of conditions to which those powers are applied. We would all agree, I think, that the powers of the federal government remain the same in number; but can any candid lawyer say they remain the same in extent? It is quite true that " no independent and unmentioned power " can rightfully be added to the federal government. But even such accurate statements cannot settle constitutional questions. When the instrument comes to be applied to a given case the question will still be open, Is the power which has been attempted an independent power, or is it so related to one of the great powers of the Consitution as to be an appropriate means for its execution? That question presents the old puzzle of the criterion of classification which Austin taught us was the most difficult problem of law, and which Madison pointed out in the Federalist to be as impossible of definite solution in the case of the Constitution as it has been in natural history. What to Marshall was an appropriate means for collecting and disbursing the public revenue, was to Jefferson and his school the exercise of an independent power. It is because the Constitution is thus general that it has been possible to adapt it to changing conditions, and make it the beneficent organ of a progressive nation.

What is needed to-day is not that the Constitution shall be construed to mean precisely what it meant to Marshall or to Miller, Field and Bradley, but that it shall be applied to present conditions by the same method and in the same spirit wherewith they applied it to the conditions of their

times. In the performance of this, their highest duty, the federal courts are no part of the administration. They will not answer to its needs or its criticism. But they are a part of the nation, and in the past have responded, and ought always to respond to the deep, abiding, organic changes in the national life.

There never was a time when the interpretation of the Constitution required a more careful consideration of living conditions than to-day. Within the last fifty years economic forces have been introduced into our life that are as revolutionary of pre-existing conditions as the introduction of gunpowder was of the state of feudalism. Seward's statement in the debate of 1850 that, "Commerce is the god of boundaries and no man now living can tell its ultimate decree," is far more true at present than when it was uttered. When the Constitution was adopted the unit of our social and business life was the commonwealth. With the exception of the foreign and coasting trade, the commerce and industry of each state was confined to its own borders. The union was political instead of industrial or commercial. To-day our industry and our commerce are national. They are made aware of state lines only by conflicting and often narrowly selfish enactments. The units of commercial and industrial organization extend to many states, often to the entire nation. Instead of being required to obey one master, business is compelled to obey many. Coincident with this enlargement of business enterprise to embrace different States, has occurred a revolution in State activity. During the first half of the nineteenth century the doctrine of *laissez-faire* was the fundamental principle of government. The state left commerce and industry to private control. To-day that is all changed. Government is now present in all lines of business. When the State regulated but little, business was not much concerned who did the regulating. But now that all governments are competing in their zeal for regulation, whether one government or many, the nation or the states, shall do the regulating, becomes a matter of paramount importance. These changed conditions in our actual life compel a reconsideration of our divided governmental authority to see what now belongs to the nation, and what to the states. The problem is not the same as it was; it cannot be answered by reading history or studying precedents.

The new condition has manifested itself most conspicuously in two fields, the railroad and the interstate industrial corporation. At the beginning the railroads were local. There was a time when in making a shipment of freight from New York to Buffalo, at least three different bills of lading were required. Now five great systems embody more than three-fourths of the total mileage of the country, and the work of consolidation is still in progress. There are no longer state roads, but all are instruments of interstate commerce Actual statistics are wanting, but persons in a position to know, are of the opinion that the local business of the railroads does not exceed fifteen per cent of their entire traffic. In a case tried in one of our western states a few years ago, it was judicially found that the local business there involved amounted to less than three per cent. In the face of these conditions, it is impossible to maintain over common carriers the manifold control of the different states and the federal government.

There is no way in which local business can be separated from through business. The same roadbed serves both; both are carried in the same train and by the same crew. Back of every schedule of rates prescribed by government is the question, Are those rates reasonably compensatory? Under our present system that question as to state rates must be decided solely upon local business, and as to interstate rates solely upon interstate business. The court cannot look to the entire traffic in judging of the reasonableness of either. While it is possible to ascer-

tain what revenue is derived from each class, it is absolutely impossible thus to distribute the cost of operation and maintenance. The evidence upon that subject is wholly speculative and conjectural, consisting entirely of opinion testimony given by parties having a vital interest in the result of the litigation. In actual operation the railroads do not, and cannot keep the two kinds of commerce separate. Why then should the law attempt to divide that which in actual life is a unit and indivisible?

Whenever a state prescribes a schedule of rates for local business, it thereby directly and necessarily regulates interstate business as well. There can be no sudden lifts and falls at state lines. They have no relation whatever to the cost of service, and can afford no justification for discrimination in rates. As the result of the schedule of rates prescribed by the state of Minnesota during the past winter, the rates on the western side of an invisible line were from twenty-five to fifty per cent higher than those on the eastern side. The railroads could not maintain both their rates without discriminating against North Dakota points in a manner which would constitute a gross violation of that portion of the interstate commerce act which forbids discrimination against any locality. The necessary result of the enforcement of the local rates was to compel a reduction of all through rates. This the Supreme Court has decided in such a direct interference with interstate commerce as to render the action of the state void. But further, if one state may prescribe a schedule of rates all states may, and the inevitable result of such a practice is to place the whole body of interstate commerce under the actual domination of state laws. In that way the authority which extends to only fifteen per cent of the business, regulates the entire business. The necessary consequence is that either the nation must take control of railroad transportation within the states or the states will take control of such transportation among the states. We deceive ourselves by a mere form of words when we speak of the separate regulation of local business by the state and through business by the nation. The state cannot formulate and enforce any schedule of rates which will not necessarily and directly regulate interstate rates; neither can the nation formulate and enforce any schedule of interstate rates which will not necessarily and directly change local rates. The truth is that governmental regulation of rates is not a regulation of commerce, but of the railroads as instruments of commerce, and when the nation and the state both prescribe to a railroad a schedule of rates, they are both regulating the same thing. This gives rise to a conflict of authority which Marshall declared in Gibbons *v.* Ogden ought never to be permitted to occur.

The chief domestic cause for the adoption of the Constitution was to destroy the power of states over interstate commerce. But does not their control of railroads re-establish that authority? To say that states shall not regulate commerce among the states, and at the same time concede to them power to regulate the only instrumentalities by which that commerce is carried on, is to establish in practice what we deny in theory. Hitherto state regulation has been inefficient and for that reason alone its localizing power has not become manifest. But now, through the investigations of economists and commissions, the general campaign of publicity, experience in rate litigation, the decreased influence of railroads over legislative bodies, there has come a new era in governmental regulation of carriers. State authority is becoming organized, energetic and effective. If continued it will work its inevitable results. In commerce as in politics, state governments will represent state interests. No rivalry can surpass that of our commercial centers, and the states in which they are located, let their power over carriers become effective, will exercise that power in support of their own cities. This is not theory.

Only recently the commission of one of our most aggressive western states warned the railroads by a written communication that if they were not more considerate of the state as to interstate rates, the commission would retaliate by the exercise of its powers over local affairs. Other commissions, while not thus frank in their avowals, have been equally local in their practices. The severest critic of railroads cannot deny that their policy has been splendidly national, and the most potent single factor in the creation of our vast domestic commerce. In thus maintaining the commercial supremacy of the nation, they have been compelled to withstand the importunities and fierce wrath of local interests. Now, however, the conflict is to be transferred from this field of economics to the field of government. Localism is to speak not by petition but by statute. Under this regime, as governmental control increases in efficiency, the irrepressible conflict between local and national interests will increase in directness as well as in the frequency of its exhibition and the intensity of the passions aroused. It has already brought us to the verge of civil war in North Carolina, and been the occasion of the sharpest acrimony in other states. Such a conflict must in the end result in the complete supremacy of one authority or the other.

It is vain to appeal to states, as did Secretary Root in his New York address, to subordinate local advantage to the general welfare. Our whole history is a confirmation of the statement of Mr. Pinckney in the constitutional convention that "States pursue their interests with less scruple than individuals." They exhibit all that lack of conscience characteristic of those who exercise delegated power. As Justice Miller points out in his lectures on the Constitution, had it not been for the dominant authority of the central government, the general welfare would have been as completely sacrificed to local selfishness under the Constitution as it was under the articles of confederation. What states require is not exhortation but authority.

The situation in the field of industry presents the same general features. To abolish local control over matters extending outside of the state was the origin not only of the article conferring power on the national government to regulate commerce among the states, but also of those provisions which forbid states to lay imposts or duties on exports or imports, and which secure to the citizens of each state the privileges and immunities of citizens of the several states. These restrictions were placed in the Constitution, not so much that men might be free, as that national commerce and industry might be free. They have been largely nullified in actual life by the fact that business is now carried on by corporations instead of persons. When the Constitution was adopted only twenty-one corporations had been formed in the United States. These were mainly for the construction of canals and turnpikes. There was but one bank and two trading companies. As business agencies, corporations had no part either in life or thought, consequently they had no place in the Constitution. The Supreme Court has held that they are not citizens within the meaning of the Fifth Amendment, and that each state may either wholly exclude them, or impose as conditions of their entering or remaining in the state such terms as local policy or interest may suggest. The result is that business, which was intended to be free, has in fact become subject to local authority. The abuses of corporate organization and management have heretofore commended this exercise of local control. Ultimately, however, we shall become increasingly aware of its injustice and folly. Business cannot be conducted in this century except through the agency of corporations; but the very enlargement of that agency has caused industry, the same as commerce, to overleap the bounds of states, and thus become subject to governments whose only interest in them

is that of the publican. "Federal," "National," "Union," "United States," "International," "American," these terms find a place in the names of the corporations that are carrying on our large business enterprises, and are not mere highsounding titles, but are truly indicative of the scope of the business conducted. They have taken national titles because their business is national and international. While engaged in the preparation of this paper I employed three young men in different libraries to examine and summarize state laws passed since 1890, directed against foreign corporations solely upon the ground of their alienage. My purpose was to institute a comparison between laws of that character now in force, and discriminatory statutes passed by the several states under the articles of confederation. But the mass of material turned in by these investigators was so great as to surpass any leisure at my command for its study and classification. The reports, however, leave no room for doubt that the laws now in force are both more vicious in character and varied in form than were those of the earlier period. At that time discrimination was confined in the main to taxation by states having ports of entry against those who had them not. To-day they embrace not only double, and frequently manifold taxation, but the thousand forms of regulation which recent governmental activity in the field of business has developed. A condition which was then deemed sufficient to cause the framing and adoption of the Constitution ought now to be adequate to compel the exercise of the power which the Constitution vested in the federal government for the very purpose of controlling such conditions.

How far may the national government go in the control of those matters which have become in fact national? The situation fits exactly the terms of the resolution passed in the convention that framed the Constitution, and which was the source of all the powers and restrictions embodied in that instrument. It presents a case "to which the separate states are incompetent and in which the harmony of the United States may be interrupted by the exercise of individual legislation." As to railroads there is no more reason why they should be subject to a divided authority than there is in the case of navigation. There will, of course, be in the one case, as in the other, local matters that can be best dealt with by local authority. But as to all that affects them as commercial agencies, whether that commerce be local or interstate, the railroad is a unit; its activities are national, and it ought to be subject solely to national authority. Divided control is inefficient in protecting the public, and grossly unjust in the burdens which it places upon the carrier. During the last winter there were passed in the states west of the Mississippi River one hundred and seventy-eight statutes dealing directly with transportation and its instrumentalities. The number of such statutes now in force throughout the entire country extends well into the thousands. They are conflicting, oppressive, inefficient. They seldom represent intelligent investigation, but in the main have had their origin in agitation, often in popular frenzy. State legislatures have not yet learned that due process of legislation, like due process of law, proceeds upon inquiry, and legislates only after hearing. Protection to the public and justice to the carrier alike unite in the demand for a single governmental control. The power under the commerce clause of the Constitution is plain. The decisions of the Supreme Court have placed that subject beyond the realm of controversy. If the railroad as an instrument of commerce can only be dealt with justly and efficiently by a single authority the federal government may assert and maintain its exclusive jurisdiction. Regulation is now inefficient because divided. If the federal government shall take exclusive control, it will then be responsible alone for such a control as shall be both efficient and just. Public

opinion will have a single point for its direction, and will not be dissipated among many conflicting authorities. The subject does not demand separate rules for the separate states. Their action refutes such a doctrine. By the legislation of the past winter Virginia and Ohio, Pennsylvania and Minnesota are combined in the same passenger rate, though they vary as five to one in density of population and travel. The subject is national, and the federal government with its national outlook can, by organized investigation and accumulated experience, best acquire the skill and knowledge necessary for its just and efficient regulation.

As to interstate industrial corporations, the subject is of much more recent development and the necessity for federal control is less urgent. It may well happen that many of the abuses in this field will disappear with the abolition of rebates and the other special privileges which such corporations have enjoyed at the hands of carriers. The evil arising from hostile state enactments may be remedied by a change of emphasis on this subject in the decisions of the Supreme Court. Heretofore that tribunal has been governed in such cases solely by a consideration of the nature of the corporate being. But the present tendency in corporate law is to look at rights rather than the nature of the being possessing them, and if the court shall adopt that view, it may yet hold that alienage alone is not a proper basis for discriminatory legislation; that legislation based solely upon that ground constitutes a denial of the equal protection of the laws. The late case of American Smelting Co. *v.* Colorado affords encouragement to expect such a change.

If, however, federal control shall be found necessary to correct the evils and protect the rights of interstate industrial corporatons, authority for its exercise exists in the commerce clause of the Constitution as already interpreted. It has been decided by the highest court that, "The power to regulate commerce among the several states is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions as are found in the Constitution of the United States." That court has also held that as a means of executing this authority Congress may create corporations for the purpose of carrying on interstate commerce. One branch of that commerce is traffic or exchange among the several states, and if national corporations may be created for the purpose of carrying on that branch of interstate commerce which consists of transportation, as was done in the case of the Pacific Railroads, the same method may be adopted as to the other branch of interstate commerce which consists of traffic and exchange. Can a corporation created for this purpose be also authorized to produce the articles in which it deals? In thought, manufacture and commerce may be separated, but in business the former is always combined with the latter. No one ever manufactured except for the purpose of sale. Under the present regime of wide markets, large sales, and small profits, commerce has become the paramount feature even of manufacturing enterprises. The incidental powers which Congress may confer upon a corporation created for federal purposes, were clearly defined in the litigation arising out of the United States Banks. There the federal feature was the collecting and disbursing of the national revenue. But to accomplish this result a corporation was created, authorized to do a general banking business and to establish branches for that purpose in the several states. Of the actual business transacted, the federal feature, though of capital importance to the nation, was a subordinate function of the corporation as a business concern. The opposition of the states was largely grounded upon this consideration. Is was denied that they were federal agents. A resolution by the legislature of Ohio put the matter plainly: "We resist the shaving shops of a club of foreigners located among us without our

consent." But the power of the federal government to create the bank and to exempt it from all local authority as to its entire business was vindicated in the fullest measure. Under the national bank act this authority has been carried much further. Usury and its consequences have been defined and all state criminal statutes affecting the transactions of these banks, or their agents or officers, have been held null and void. Now apply these well established doctrines to corporations created for the purpose of carrying on that branch of interstate commerce which consists of traffic and exchange. Would they not fully sustain the authority of Congress to confer upon such corporations manufacturing as well as commercial powers? Would not the commercial activities of such a corporation, which confessedly fall within the scope of the commerce clause of the Constitution, greatly surpass in importance the functions of the United States Bank which consisted in collecting and disbursing the public revenue? And if a bank created for that subordinate federal function might be given the power of carrying on a general banking business, why could not a corporation created for the purpose of carrying on interstate commerce, which would be a capital feature of its business, be at the same time authorized to produce either in whole or in part the articles which it applied to that commerce? It is said that *carrying on* interstate commerce is not the exercise of a federal power, as was the collection and disbursement of the public revenue, and that is conceded; but *regulating* interstate commerce is a federal power, and a corporation created as a means of such regulation may be freed from all state action that will interfere with the purpose of its creation. Surely if Congress as a means of regulatng interstate commerce may create corporations to carry it on, it may endow them with all such powers as are fairly conducive to their success as business concerns, judged by the usual activities of corporations engaged in such commerce.

Our great corporations are now national in their character, and national and international in the scope of their operations. To regulate their formation is one of the most direct and efficient means of regulating their activities. For forty-five states to create corporations and the national government to regulate their most important business cannot fail to result in inefficiency and conflict. Hitherto interests to be regulated have found advantage in the dual form of authority. It has enabled them to assert whenever either authority attempted their regulation that the power properly belonged to the other authority. We have now arrived at a state of knowledge and publicity which makes this kind of shuffling impossible. The nature of the subject to be regulated and not the shifting desires of the interests concerned must determine the place of authority.

Our first great conflict between the states and the nation was waged over the subject of banking and finance. No sooner were we started under the Constitution than the need of a national agency in that field was discovered. But the local jealousy of the states prevented its establishment for more than seventy-five years. During that period we were subject to all the injury and confusion of wild cat banking under state authority. Banking and finance, however, were not more national at that time than commerce and industry have now become, and the same conflict is again presented in this new field. We can get along with divided authority to-day on these subjects just as we got along with state bank notes. This nation can stand almost anything. But it is the duty of government in the exercise of its power to create conditions which are not simply tolerable, but those which are most conductive to the general welfare. A uniform authority in the field of interstate commerce and industry will be found as beneficent to-day as it was discovered to be in the field of finance and banking as the result of our first economic conflict.

The problem of regulating these affairs has attained its present magnitude largely because the federal government has neglected to exercise its constitutional power over the subject in the course of its development. Until the interstate commerce act was passed in 1887 the negative power of the courts was the only federal control. Even by them till 1886 the states were sustained in their authority over interstate as well as domestic rates of carriers. The truth is that the national government has so long neglected its powers under the commerce clause of the Constitution that now, when it tardily takes up its duties, it is charged by the states with usurpation.

The political revolution of 1776 required the creation of a central political power because it gave rise to great political concerns that could not be provided for by the several states. To-day as the result of an economic revolution quite as fundamental and far reaching there are certain great business interests that have become national in their character and extent which cannot be left to conflicting state authority. It is as unwise to stand timidly shrinking from the exercise of economic control now as it would have been a century ago to hold back from the exercise of political power through the fears of those who dreaded an adequate national government. We ought to look squarely at the nature and extent of our commerce and industry. Are they national? Ought they to be regulated by one or by fifty sovereignties? If in their nature and extent they are national, and in justice to the public and the interests to be regulated ought to be subject to a single authority, then we ought not to hold back from the exercise of the necessary power simply because it would add to the activities of the federal government. We cannot refrain from the exercise of necessary powers upon the ground that the federal government cannot perform the work wisely and efficiently without confessing that that government is inadequate to perform the duties which the nature of things and the Constitution alike devolve upon it. If national industry and commerce ought not to be subject to the jealousies and local interests of the several states, there is no alternative but to devolve their regulation upon the federal government. Between these two forms of regulation we must make our choice. The election is not between national regulation and some ideally perfect scheme; it lies between the single authority of the nation and the anarchy of the different states in combination with partial national control. The way, the duty, and the power are plain. Unless domestic conditions, such as in 1788 compelled the framing and adoption of the Constitution, shall be impotent to compel the exercise of those powers granted by it in order that things which are national in their nature and extent may be controlled by national authority, there must be such an extension, not of constitutional power, but of the exercise of national powers already conferred as shall bring national commerce and industry under the single authority of the federal government.

One hundred years ago those who opposed the adoption of the Constitution made "Consolidation" their cry of alarm. To-day those who oppose the control by the national government of the business affairs that have become national, raise the cry of "Centralization." The one cry is as foolish as the other. On both occasions the opposition is guilty of that highest political folly which consists in hanging to a theory regardless of changed conditions in life. Centralization has already taken place out there in the world of commerce and industry. The only question remaining is, Shall the government take cognizance of the fact?

FARGO, N.D., August, 1907.

THE NEED OF A SOCIOLOGICAL JURISPRUDENCE.

By Roscoe Pound.

IF we may credit press reports, an eminent Canadian asserted recently in an address in London that "peace and order are more assured in Canada than in the United States."[1] I do not believe that this is so. But it is noteworthy that a conservative and experienced man of affairs should so believe, and that his statement made on an occasion of some importance should remain unchallenged. And it must be admitted that the law of the land has not the real hold upon the American people which law should have, and that there is a growing tendency to insist upon individual standards and to apply them in the teeth of the collective standard which is or ought to be expressed in the law. Illustrations of this tendency are abundant. From examination of the volumes in the National Reporter System, it appears that in 1906 over ninety new trials were directed by our highest courts of review in actions against employers for personal injuries because the verdicts were not sustained by evidence warranting a recovery. During the same year, over forty new trials were granted by these courts for the same reason in actions against railroad companies for personal injuries. How many verdicts were set aside by trial courts in such cases for the same reason, we do not know. Nor is there means of knowing in how many more such cases the verdicts returned would not have been rendered if the law had been zealously applied and enforced. But it is notorious that a crude and ill-defined sentiment that employers and great industrial enterprises should bear the cost of the human wear and tear incident to their operations, dictates more verdicts than the rules of law laid down in the charges of the courts. Many jurors who evade an irksome service by affirming scruples against capital punishment are doubtless shamming. Yet the fact remains that a large proportion of the veniremen summoned in all recent trials for murder have testified under oath that they could not be trusted to investigate and determine issues of fact as sworn jurymen in a court of justice because their views as to punishment differed from those of the law. In one of these trials a venireman told the court that where an act resulting in a murder was directed against society generally, there should be capital punishment, but that where only the citizen killed was the object of attack, such punishment could not be justified; and this theory was gravely discussed by the press without suggestion that there was anything amiss in refusal of a citizen to do his legal duty in the public administration of justice because he had thought out a new theory of punishment which the state did not recognize. The appeals to the so-called unwritten law, of which we have heard so much of late, are appeals from the clear and settled law to the individual feelings of the citizen, and no one seems to be deterred from following his own inclinations in such cases by the thought that it is his duty to subordinate those feelings to the general sense as formulated in the law.[1] Much of this individual self-assertion against the law is due, no doubt, to the lack of a settled social standard of justice during

[1] "Lord Strathcona in his address referred to the increase of American immigration into Canada, declaring that many American farmers know that in the Canadian Northwest prospects are better, and that peace and order are more assured in Canada than in the United States." Nelson B. C. *Times*, July 2, 1907.

[1] Since the foregoing was written, we have been afforded a good example in the Labor Day address of Mr. Gompers, in which, if correctly reported, he said "he would obey no injunction that deprived him of his rights." Chicago *Inter-Ocean*, September 3, 1907.

a period of transition. But a large part must be attributed to a wide-spread disrespect for law, to a general sentiment that unless the individual does so assert himself, he or those in whom he feels an interest will not be dealt with as justice requires. "*Neminem opportet esse sapientiorem legibus,*" says Coke, "no one out of his own private judgment ought to be wiser than the law."[1] When everyone out of his private judgment is wiser than the law, there is a condition in which the law is of no effect. The fault, when such a condition exists, may rest with the people or with the law. For my part, I believe that current disrespect for law is not, in intention at least, disrespect for justice, and that the fault must be laid largely to the law and to the manner in which law is taught and expounded.

Political and juridical development were necessary before industrial and social development. Government and law created the environment of peace and order and stability in which alone the industrial and social organization of to-day could grow. Hence legal theory and doctrine reached a degree of fixity before the conditions with which law must deal to-day had come into existence. And at this point where legal principles were taking a final shape the growing point in human progress began to shift to the natural and physical sciences and their applications in engineering, in the arts, and in scientific cultivation of the soil and development of its resources. Titius and Seius, who in their day had driven philosophy from the schools, are not unlikely to be driven out in turn. The changed order of things has been felt in legal science. Research of almost every other sort has been endowed. Laboratories are set up to investigate every other human interest. A flood of bulletins goes forth annually to spread far and wide the latest results in the application of natural and physical science to health and wealth, in the application of economic theory to our material well-being, in the application of sociological principles to problems of state and municipal life. In all these things the public shows an enduring interest. It ought to be someone's duty to advise the people of the progress of juridical science and to make its results public property. It ought to be someone's duty to gather and preserve statistics of the administration of justice and to apply thereto or deduce therefrom the proper principles of judicial administration. Law teachers ought to be making clear to the public what law is and why law is and what law does and why it does so. But no one can obtain statistics at all complete nor at all authoritative upon the most everyday points in judicial administration. No one is studying seriously or scientifically how to make our huge output of legislation effective. There are no endowments for juridical research. There are no laboratories dedicated to legal science whose bulletins shall make it possible for the scholar to obtain authoritative data and for the lay public to reach sound conclusions. No one thinks of establishing them. In state universities where one may be trained gratuitously in the most specialized applications of science, where an engineer may obtain his technical training without expense, students of law are charged a heavy tuition. The obvious reason is that the people do not feel that jurisprudence is doing anything for them. Legal science must first exhibit some practical results. It must show that it has something to offer before it may hope for public recognition. But it should not be suffered to remain stricken with sterility in face of the fruitful tasks that await it in this era of transition.

Legal science seems to begin everywhere in the attempt to distinguish cases superficially analogous and to establish "differences" or "diversities."[1] From this comparison of rules within the legal system,

[1] Co. Lit. 97*b*.

[1] Ihering, Geist des Römischen Rechts, III, 1, 11. In the period just before Coke the reports

it is but a step to compare with the rules of other legal systems and to compare systems themselves. This was the theory of the *Ius Gentium*, and doubtless to some extent the practice. It is to be seen in our own law at least as far back as Fortescue, and, though scorned by Coke, was well marked in the seventeenth and eighteenth centuries in the development of equity[1] and the rise of the law merchant.[2] The comparative tendency is followed by a philosophical tendency. Law is felt to be reason. It is not enough that a rule exist in one system or that it has its analogues in others. The rule must conform to reason, and if it does not, must be reshaped until it does, or must have reasons made for it. This was the dominant idea of the *Ius Naturale*. It is seen in continental Europe in the period after Grotius and in the *usus modernus*. In our law it is seen in the eighteenth and nineteenth centuries in the giving of "reasons" in which Blackstone and the lecturers on law who followed him in America were so prolific. To this philosophical tendency an analytical tendency succeeds by way of revolt. The validity of the so-called reasons is examined. Being for the most part *ex post facto* and, though specious, neither historically sound nor critically adequate, they fall to the ground, and often carry the rules with them. Hence the analytical period usually coincides with a critical tendency and an era of reform through legislation. Such a tendency in Roman law culminated in the legislation of Justinian.[3] In Germany it has overthrown the long-dominant Romanism and brought forth a German code. In our common-law system it brought about the reform movement, inaugurated by Bentham, the force of which is not yet wholly spent. Along with this analytical tendency, sometimes beginning before it, sometimes after but as another phase of the revolt from the philosophical, there is an historical tendency. How far we see something of this in the classical Roman law I need not inquire. It preceded the analytical tendency in Germany, it has followed that tendency in France. In England, it seems to have followed. In either event, it completes the exposure of the specious explanations of the preceding period and insures the overthrow of pseudo-philosophy. With the rise and growth of political, economic, and sociological science, the time is now ripe for a new tendency, and that tendency, which I have ventured heretofore to style the sociological tendency, is already well-marked in Continental Europe.[1]

With us, the profession, at least, is still for the most part under the domination of the methods and phrases of the second tendency, long after that tendency has spent its force. The practitioner is little, if at all, beyond Blackstone and his nineteenth-century imitators. Even a respectable law-school advertises that it teaches "the law and the reasons." These "reasons" of the eighteenth-century type are still found in text books in common use, and the books which students read are too often full of them. They are to be found in judicial decisions also.[2] Distinctions of substantive law which have their origin in forgotten niceties of practice are

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were full of "putting differences" and "noting diversities." e. g. Keilwey, 50, 53, 57, Dyer, 111 *b*.

[1] Spence, Equitable Jurisdiction of the Court of Chancery, I, 413.

[2] Wooddesson, Elements of Jurisprudence, lxxix, in 1792 treats the law merchant as part of the law of nations.

[3] See, for instance, Code VII, 25, in which Justinian says of a classical distinction that it is "a mere puzzle" and "a vain and superfluous phrase."

[1] See Stammler, Wirthschaft und Recht (1906), Ehrlich, Soziologie und Jurisprudenz (1906), Gumplowicz, Allgemeines Staatsrecht (1907), Vaccaro, Les Bases Sociologiques du Droit et de l'État (1898), Grasserie, Les Principes Sociologiques du Droit Civil (1906).

[2] To take a striking example, if an old one, a court of high authority in explaining the rule

still solemnly explained by "reasons" that neither conform to historical fact nor satisfy any real sense of justice. Undoubtedly we have made some progress. The teachings of historical and analytical jurists are percolating through the schools into the profession. The type of "reason" that sets forth how this or that was "presumed" or was "implied" or was "constructive," which had been used to explain gradual changes in the law by covering them up with fiction, or to reconcile existing doctrines with *ex post facto* generalizations, is falling out of use. First teachers and then a few text writers began to insist upon more scientific treatment. To-day even an occasional court makes bold to speak of quasi-contract. But the books are still full of the old method, even in those matters in which progress is making. To take but one example. In a book widely cited, used during the past year in at least ten law schools, and read by the majority of those who prepare for the Bar in the offices of practitioners, we are told of a presumption of damage in trespass to lands, in the attempt to make our common law of trespass fit into a Romanized mold of *damnum* and *iniuria*[1] and we are advised that there is no quasi-contractual liability (as we should put it now) in the case of a certain act, because "we cannot suppose it would take place except as a wrongful act."[2] So long as students are set to read these "reasons" and are taught that this or that is "implied" or "presumed" contrary to common sense, or is "constructively" something other than what it obviously is, and so long as laymen listen to these explanations from the bench when they sit upon juries, or from counsel whom they consult as clients, or from the published opinions of the courts, the people are certain to be confirmed in the belief, popular in all circumstances, that law is an arbitrary mass of technicalities having no relation to reason or justice. To-day the reasons behind the law must be such as appeal to an intelligent and educated public. There must be reasons behind it, as there must be behind everything that is imposed upon the people of the present. And, if I may adapt a common-law terminology, they must be reasons in deed rather than in law.

Law is no longer anything sacred or mysterious. Judicial decisions are investigated and discussed freely by historians, economists, and sociologists. The doctrines announced by the courts are debated by the press, and have even been dealt with in political platforms. Laymen know full well that they may make laws, and that knowledge of the law is no necessary prerequisite of far-reaching legislation. The legislative steam roller levels the just rule with the unjust in the public anxiety to lay out a new road. The introduction of the doctrine of comparative negligence in employer's liability statutes and recent statutes leaving questions of negligence wholly to juries or, in other words, cutting off all assurance that like cases involving negligence will receive a like decision, afford interesting examples. The common-law doctrines, at least as explained to the people, did not commend themselves to the public intelligence. In such cases, something is to be done; and it is done too often with but little understanding of old law, mischief, or remedy. But we have no right to rail at such miscarriages. The public must move in such legal light as the luminaries of the law afford. Those who practice and those who teach the law should be in a position to command the popular ear. We must reinvestigate the theories of justice, of law, and of rights. We must seek

altered by Lord Campbell's Act tells us, following Grotius, that "the life of a freeman cannot be appraised, but that of a slave who might have been sold, may." Hyatt *v.* Davis, 16 Mich. 180, 191.

[1] Cooley, Torts, 63, 69.

[2] Cooley, Torts, 95.

the basis of doctrines, not in Blackstone's wisdom of our ancestors, not in the apocryphal reasons of the beginnings of legal science, not in their history, useful as that is in enabling us to appraise doctrines at their true value, but in a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society of to-day.

Ample reason for the present condition of jurisprudence in America is to be found in the dominance of practitioners and of the ideas and ideals of practitioners in legal education. So long as the one object is to train practitioners who can make money at the Bar, and so long as schools are judged chiefly by their success in affording such training, we may expect nothing better. Yet this is an explanation rather than an excuse. The schools must teach the rules by which the courts decide cases. They cannot teach a different law from that which is recognized and enforced by the courts. But they are not bound to teach traditional legal pseudo-science. They are not bound to teach the practitioner's philosophy of law, however much he may think it involved in the very idea of a legal system. It is not long ago that a fictitious legal history was equally orthodox. Freeman tells us of a law-teacher who "required the candidates for degrees to say that William the Conqueror introduced the feudal system at the great Gemot of Salisbury in 1086,"[1] and when remonstrance was made by the historian, replied that he was examiner in law; that "facts might be found in chronicles, but law was to be found in Blackstone; it was to be found in Blackstone as an infallible source; what Blackstone said, he, as a law-examiner, could not dispute."[2] But courts and law books can no more make authoritative philosophy than they can make authoritative history.

I do not advocate the adding of any new course or new courses to our curricula. Doubtless the schools are offering now all the courses that students may take with profit. But law schools not only make tough law,[1] they make tough legal science, as the long postponement of the German code through dominance of the historical school, the persistence of eighteenth-century theories in American legal thought, long after they had been abandoned in all other fields, and the sturdy resistance of common-law individualism to the collectivist tendencies of modern thought abundantly witness. We must not make the mistake in American legal education of creating a permanent gulf between legal thought and popular thought. But we may commit this mistake not merely by teaching legal pseudo-science and obsolete philosophy but quite as much by the more prevalent method of saying nothing about these matters at all, leaving the student to pick up what he may here and there in the cases and texts, with no hint that there are other conceptions and other theories entertained by scholars of no small authority, and to go forth in the belief that he is completely trained.[2] I have little faith in abstract courses, even if our schools had room for any new courses. Instruction of the sort required must be concrete. It must lie in the point of view from which concrete legal problems are discussed, concrete doctrines are expounded, and actual decisions are investigated and criticized. The modern teacher of law should be a student of sociology, economics, and politics as well. He should know not only what the courts decide and the principles by which they decide, but quite

[1] It is interesting to note that this statement is still with us in law-teaching. Mordecai, Law Lectures, 24 (1907).

[2] Freeman, Methods of Historical Study, 73–74.

[1] Maitland, English Law and the Renaissance, 25.

[2] Complaint has been made in France to the same effect. Vareilles-Sommières, Principes Fondamentaux du Droit. preface.

as much the circumstances and conditions, social and economic, to which these principles are to be applied; he should know the state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood. The most logical and skillfully reasoned rules may defeat the end of law in their practical administration because not adapted to the environment in which they are to be enforced.[1] It is, therefore, the duty of American teachers of law to investigate the sociological foundations, not of law alone, but of the common law and of the special topics in which they give instruction, and, while teaching the actual law by which courts decide, to give to their teaching the color which will fit new generations of lawyers to lead the people as they should, instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists.

Without trenching upon points of controversy, it may be assumed that the practical end of the administration of justice according to law, is such adjustment of the relations of men to each other and to society as conforms to the moral sense of the community. In the past this adjustment has conformed to the general moral sense by proceeding along lines of strict individualism. The idea has been, so far as possible, to allow everyone to do and to acquire all that he can. The individualist conception of justice as the liberty of each limited only by the like liberties of all has been the legal conception. So completely has this been true that sociologists speak of this conception as "legal justice," and it is sometimes assumed that law must needs aim at a different kind of justice from what is commonly understood and regarded by the community. But this cannot be. Law is a means, not an end. Such a divergence cannot endure unless the law is in the hands of a progressive and enlightened caste whose conceptions are in advance of the public and whose leadership is bringing popular thought to a higher level.[1] When, instead, law is in the hands of a highly cautious and conservative profession, whose thought on such matters lags behind, the divergence provokes irritation at law and disregard of its mandates. To-day, while jurists in America are repeating individualist formulas of justice, sociologists are speaking rather of "the enforcement by society of an artificial equality in social conditions which are naturally unequal."[2] They are defining justice as the satisfaction of everyone's wants so far as they are not outweighed by others' wants.[3] That this is the direction of popular thought is shown by the unconscious drift of the law in the same direction. It is true we still harp upon the sacredness of property before the law. The leader of our profession tells us that a fundamental object is, "preservation of the rights of private property."[4] A text book used in more than one law school advises us that "the right of property is of divine origin

[1] See Brunner's comment upon the effect of the reception of Roman law in Germany on peasant possessions. Grundzuge der Deutschen Rechtsgeschichte, 216.

[1] An excellent example may be seen in the history of equity in England. Equity was unpopular, but it was in the right line of progress. The chancellors, however, developed doctrines of an ultra-ethical character which went beyond the requirements of common sense, and these refinements of equity have been largely swept away. For instances of this, the doctrine as to compensation of trustees, precatory trusts, and the rules as to clogging the equity of redemption may suffice.

[2] Ward, Applied Sociology, 23.

[3] Ward, Applied Sociology, 22–24, Willoughby, Social Justice, 20-25.

[4] Argument of Mr. Choate in the Income Tax Cases, 157 U. S. 429, 534.

derived by title-deed from the universal creator of all things and attested by universal intuition."[1] The highest court of one of the states tells us in eloquent words that the right to take property by will is an absolute and inherent right, not depending upon legislation.[2] But the steady progress of the law is in another direction. Ihering lays down this as the difference between the new and the old: "Formerly high valuing of property, lower valuing of the person; now, lower valuing of property, higher valuing of the person."[3] He says the line of legal growth of the future is "weakening of the sense of property, strengthening of the feeling of honor."[4] And that this is true for our law in America, the continual complaints that modern legislation deprives men of the power to regulate their own affairs and to manage their own property bear abundant witness.

The progress of law away from the older individualism is not confined to property rights. A passing of ultra-individualist phases of common-law doctrines on every hand, both through legislation and through judicial decision, is sufficiently obvious. Let us note a few cases. One of the so-called natural rights, which is still insisted upon, is freedom of contract, the right of each man to say for himself what engagements he will undertake and to settle the details thereof for himself. But modern legislation is constantly abridging this right by creating classes of persons and classes of subjects, with respect to which rights and obligations are defined by law "and made conclusive upon the parties, irrespective of stipulations attempting to set them aside;"[5] and such statutes are now held constitutional within wide limits. Nor is this tendency confined to legislation. The contract of insurance has been so dealt with by the courts that it is no longer an ordinary contract, to be judged as such, but the law of insurance has become a specialized body of doctrine.[1] The older decisions were extremely strict in insisting upon the right of a surety to make his own contract in every respect. The slightest deviations, which had the effect of varying in some degree the obligation for which he engaged to become answerable, sufficed to relieve him. He and he alone could determine for what he would bind himself, and he could do so as arbitrarily as he chose, for it was his affair.[2] But the advent of the surety company has already produced a change. It was felt that the right of every person to make his own contracts for himself must give way to a public demand for enforcement of contracts of insurance unless some substantial injury to the insurer appeared, and this feeling has led to a line of judicial decisions with respect to contracts of surety companies that cannot well be reconciled with the settled course of adjudication as to natural persons.[3] Professor Gray has noted a similar phenomenon in the matter of spendthrift trusts.[4] The common law insisted rigorously on individual responsibility. It was not possible for a debtor through any device to enjoy the whole substantial benefit of property free from claims of his creditors. The American decisions which permit such trusts are, as he points out, at clear variance with the spirit of the common law. They are another sign of the drift toward equality in the satisfac-

[1] Smith, Personal Property, Sec. 33.

[2] Nunnemacher *v.* State, 108 N. W. 627.

[3] Ihering, Scherz und Ernst in der Jurisprudenz (9 ed.) 418.

[4] Ihering, Scherz und Ernst in der Jurisprudenz (9 ed.) 429.

[5] Freund, Police Power, Sec. 503.

[1] Wambaugh, Cases on Insurance, preface.

[2] Hence if the king died, surety for the peace was released "for 'tis to observe his peace, and when he is dead, 'tis not his peace." Anonymous. Brook's New Cas. 172. A typical modern case is U. S. *v.* Boecker, 21 Wall. 652.

[3] See for instance, American Bonding Co. *v.* City of Ottumwa, 137 Fed. 572, Segari *v.* Mazzei (La.) 41 So. 245.

[4] Gray, Restraints on the Alienation of Property (2 ed.) viii–x.

tion of wants rather than equality in freedom of action as the standard of justice; and the decisions which Professor Gray justly stigmatizes as "snobbish"[1] are but crude attempts to apply this standard before it has been recognized clearly or has taken definite shape. Probably nowhere is the individualism of the common law expressed more characteristically than in the doctrines as to contributory negligence. Recent legislation with respect to employer's liability is almost wiping out those doctrines. It seems to be felt that nothing short of fraud, or disregard of life or limb so gross as to amount to fraud, should preclude recovery. No less characteristic is the view which the common law takes of industrial accidents. It insists that such accidents must be due either to wholly unpreventible conditions or to the negligence of some person. Either the employer, it holds, was negligent or the employee. That the business itself, and not the negligence of some person operating therein, may be responsible for the accident, is a situation which it cannot conceive of and for which it makes no provision beyond laying down that the employee assumes the incidental risks. But it is coming to be well understood by all who have studied the circumstances of modern industrial employment that the supposed contributory negligence of employees is in effect a result of the mechanical conditions imposed on them by the nature of their employment, and that by reason of these conditions the individual vigilance and responsibility contemplated by the common law are impossible in practice. Hence, while the common law insists upon the workman taking the ordinary risks of his occupation, requires him to show negligence on the part of his employer as a prerequisite of recovery, and holds him to account rigidly for negligence of his own contributing to the accident, the public has been coming more and more to think that the employer should take the risk of accidents to his men, as of accidents to his plant and machinery, and that contributory negligence — where there is no willful self-injury and no fraud — is one of these ordinary risks. As the President put it recently in his address at the Georgia Day celebration at the Jamestown Exposition: "It is neither just, expedient, nor humane; it is revolting to judgment and sentiment alike that the financial burden of accidents occurring because of the necessary exigencies of their daily occupation should be thrust upon those sufferers who are least able to bear it. . . . When the employer . . . starts in motion agencies which create risks for others, he should take all the ordinary and extraordinary risks involved." Juries have perceived this dimly for years and have rendered verdicts accordingly. Legislation is now fast introducing rules founded avowedly upon this theory. If this legislation is constructed and applied by men thoroughly imbued with the common-law doctrine and with common-law prejudices, the divergence between legal rules and popular thought, if it does not produce legislation still more radical, will add to existing disrespect for the law. But we must note here once more that higher regard for the person and regard for equality in the satisfaction of wants are the controlling elements in the newer doctrine.

Another noteworthy sign of the shifting from the standard of so-called legal justice to that of social justice is to be seen in the tendency of modern legislation to reintroduce *status* or something very like it. The conception that rights should belong or duties attach to a person of full age and natural capacity because of the position he occupies in society or of the occupation in which he is engaged, is repugnant to the spirit of the common law. Hence courts, imbued strongly with common-law notions of this matter, have tended to hold statutes which carry out this idea unconstitutional whenever possible. But the conception is perfectly reconcilable with, and indeed is

[1] Restraints on the Alienation of Property, xi.

demanded by the idea of social justice. When the standard is equality of freedom of action, all classes other than those few and simple ones, based on so-called natural incapacities, such as infancy and lunacy, are repugnant to the idea of justice. When the standard is equality in the satisfaction of wants, such classification and such return in part to the idea of *status* are inevitable.

Even more marked and of longer standing is the weakening of extreme doctrines of *fides est servanda* through the shifting to the idea of social justice. Here again the point of view of the common law was extremely individualist. It left the individual free to assume whatever obligation he chose and to determine its details for himself. But here, as elsewhere, it imposed a responsibility corresponding to this freedom. If he chose to assume an obligation, the common law held him to it jealously. He had weighed the risk and had taken it. As he was allowed to incur it like a man, he must bear its consequences like a man. Hence common-law judges were extremely reluctant to permit contract debtors to escape by availing themselves of the statute of limitations, and for a time very nearly nullified that statute so far as it applied to debts.[1] But to-day exemption, homestead, and appraisement statutes, not to speak of bankruptcy and insolvency laws, greatly restrict the power of the creditor to enforce the liability assumed.[2] There is a growing sentiment that the creditor who extends credit should assume a risk. The principle that promises must be kept yields to the demand that satisfaction of the reasonable wants of the debtor be first reasonably provided for.

In all cases of divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end. Sooner or later what public opinion demands will be recognized and enforced by the courts. A Bench and Bar trained in individualist theories and firm in the persuasion that the so-called legal justice is an absolute and a necessary standard, from which there may be no departure without the destruction of the legal order, may retard but cannot prevent progress to the newer standard recognized by the sociologist. In this progress lawyers should be conscious factors, not unconscious followers of popular thought, not conscious obstructors of the course of legal development. To this end it is the duty of teachers of law, while they teach scrupulously the law that the courts administer, to teach it in the spirit and from the standpoint of the political, economic, and sociological learning of to-day. It is their task to create in this country a true sociological jurisprudence, to develop a thorough understanding between the people and the law, to insure that the common law remain, what its exponents have always insisted it is — the custom of the people, the expression of their habits of thought and action as to the relations of men with each other. And if in so doing they must often take issue with courts and practitioners and books of authority as to the nature of justice and of rights and the basis of current legal conceptions and of received principles, they may say as the naturalist to his more conservative colleagues: "*raisonniert so viel ihr wollt, aber fügt Euch in das wissen schaftlich unvermeidliche.*"[1]

LINCOLN, NEB. August, 1907.

[1] See an interesting discussion of this in Pritchard *v.* Howell, 1 Wis. 131.

[2] See also the recent attempt of the federal circuit court to force a scheme of reorganization upon reluctant creditors of a public service company in the Chicago Traction Cases. Whatever view may be taken of this decree, it is a sign of the times.

[1] Otto Kuntze, Revisio Generum Plantarum, III, fin.

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, facetiæ, and anecdotes.

On Thursday, August 29th, the vanguard of the American Bar Association gathered in Portland to attend the National Conference of Commissioners on Uniform State Laws. On the previous day the committee on commercial law of this body had under extended discussion the second draft of an act to make uniform the law of bills of lading, the first draft of which was submitted to the conference at St. Paul last year and subsequently to a conference of representatives of shippers, bankers, and carriers held at Philadelphia last May. These drafts are the work of Professor Williston of the Harvard Law School, who as counsel for the commissioners has rendered valuable service in preparation of its important suggestions for legislation. Attorneys representing various banking and merchant associations presented their views to the committee.

The first draft of an act to make uniform the law of certificates of stock had also been discussed. The address of President Amasa M. Eaton summarized uniform legislation of the preceding year. He also referred to the work of the National Divorce Congress and the plan of the correspondence committee of the Alabama State Bar Association to urge uniform legislation restricting new trials in criminal cases on errors not affecting the merits. The most important committee report was that on Marriage and Divorce endorsing the draft of the proposed law adopted by the National Divorce Congress. This aroused a spirited debate which extended through the two following days, but the resolution was finally adopted. The commissioners in committee of the whole meantime considered the draft of the proposed law on bills of lading, which was finally referred to the next National Congress to await action of the Interstate Commerce Commission which is expected to prepare a form for uniform bills of lading in conference with representatives of the railroads next October. The commission also commenced the examination of the law relating to certificates of stock.

The importance of the recent meeting of the American Bar Association was enhanced by the presence of distinguished foreign guests who had come to attend the meeting of the International Law Association held during the last three days of the second week. Many of these gentlemen had been present at our meetings at Buffalo and at St. Louis when similar meetings of their association were held. Their proceedings consisted of a long series of papers upon subjects relating to international law, most of them by the English and American members. Mr Gregory's paper on "Expropriation by International Arbitration" and Mr. Wheeler's on "Treaties as affected by Subordinate Legislation" aroused most discussion.

On Monday morning the first meeting of the American Bar Association was held, President Parker in the chair. The address of welcome by Governor Cobb of Maine was beautifully brief and in excellent taste, as was also that of Chief Justice Emery of the Supreme Court of Maine. The hall was attractively decorated and its acoustic properties were excellent. The president in his annual address adopted the wise innovation of President Peck of last year in omitting the portion of it devoted to the summary of statute law of the preceding year as required by the constitution of the association, though it will appear in the annual report. Thus

was nullified an impossible requirement. Since the formation of the association the volume and variety of legislation has so increased, and it has become so difficult to obtain copies of the statutes of all the states within a reasonable time before the annual meeting, that the preparation and reading of this portion of the annual address had become a serious burden both on the president and the association. The establishment of this new custom is a sad commentary on our voluminous state legislation. The address, which we print elsewhere, while referring in a general way to the progress of legislation deals chiefly with the great constitutional question of the time. It was admirably delivered. Mr. Parker's enunciation is perfect, but without the slightest suggestion of artificiality. The ideas he expressed he has declared many times before on similar occasions, but the subject is of such importance that it requires repetition, and it is fortunate that we had on that occasion so thorough a discussion of the question from all points of view. In the evening the address of Judge Amidon, which we also print in full in this number took extreme ground in the direction of liberal construction. This contrast was entirely accidental, since the subject of the president's address was not known to Judge Amidon when he prepared his own. The address of Mr. Justice Moody at the annual banquet touched upon the same subject with his usual vigor, and distinctly took a middle ground between the extremes of conservatism and radicalism represented by the two addresses which we publish. He insisted that the powers implied in the express grants of the states were broad enough to sustain all the needs of a strong national government " if the people are not wanting to themselves." We regret that we are unable to publish his extemporaneous remarks.

The second paper of Monday evening was entitled, " A Fundamental Defect in the Act to Regulate Commerce," by Hon. Charles A. Prouty of Vermont, Chairman of the Interstate Commerce Commission. Owing to an accident, which prevented his attendance, the address was read by Judge Staake of Philadelphia. It criticised the duplication of the functions of the Commission. Mr. Prouty doubts much whether the same body can properly discharge both the executive function of enforcing the provisions of the Act and its judicial functions. He says, " in the end it will either become remiss in its executive duties or will in zeal for these become unfit for the dispassionate performance of its judicial functions. Whatever may have been true in the past, the time has come when the Commission should be relieved of all duties except the hearing and deciding of complaints." We regret that owing to lack of space we have found it impossible to print this address in full in this issue.

Monday afternoon was held the first meeting of the Association of American Law Schools. As usual this was of lively interest. Professor Kales of the Law School of Northwestern University read a paper advocating the preparation of systems of case books which will give all possible emphasis to the law of particular states. While in form a discussion of defects in the present system of case books, it was in its essence a return to the old contention of the desirability of law schools devoted chiefly to the law of the particular state for which most of its students are to prepare.

The meetings of the Bar Association on Tuesday were devoted to reports of committees and discussion thereon. The first in order was the report of the committee on insurance. It took the entire morning. The representatives of the legal department of the New York insurance companies were present in force, and since the recommendations of the committee, which for once showed remarkable unanimity, related rather to questions of policy than to questions of law, the gentlemen from New York had a decided advantage in the debate. Resolutions condemning the distribution of insurance commissionerships as political prizes, recommending the requirement of a deposit by all foreign companies in at least one state before transacting business in any other states, the repeal of the valued policy laws and the creation of a fire marshal in each state were adopted. The recommendation to forbid the use of the mails to fraudulent insurance companies was opposed as confirming an unfortunate precedent and

was finally rejected. Most of the discussion centered about the resolution recommending "the contingent distribution of the deferred dividend surplus on existing life insurance policies of all companies as a condition precedent to the transaction of business outside of the home states of the several companies." After extended debate this was laid upon the table.

In the evening the report of the committee on professional ethics was taken up. It had been expected that this committee would have ready for discussion at this meeting a draft of a code, but they had wisely concluded to await opportunity for further and fuller discussion and the report prepared by the secretary, Mr. Alexander, consisted of an elaborate collation of codes of ethics heretofore adopted by state Bar Associations which furnishes full material for the consideration of the subject by all who are interested. The recommendations of the committee for its continuance and enlargement were adopted, and it was instructed to correspond with the members of the association and with state Bar Associations for suggestions with reference to its draft of a code and to have copies of the proposed code transmitted to each member of the association and to the state Bar Associations, requesting suggestions and criticisms, on or before May 1, 1908, the final report of the committee to be ready for submission at the 1908 meeting. We recommend that all attorneys interested in this subject obtain a copy of the committee's report from the secretary. The report of the committee on legal education was then read and was followed by an elaborate written argument over an hour in length which had been prepared by the chairman of the committee. A dissenting report in writing was filed but not read. The report related chiefly to the regulations for admission to the Bar. Consideration of the report was postponed to the next session.

One of the most important reports was that of the committee on patent and copyright laws. Its chief recommendation was for the appointment of a court of patent appeals to be made up of judges, temporarily assigned from the present circuit courts, to sit for a limited period in the central court of appeals, thus insuring uniformity of decision on this important subject, which, owing to the fact that most of this litigation now ends in the circuit courts of appeals, differs widely in the different circuits. There was extended discussion and much criticism of the method recommended for the selection of judges, but the resolution favored was finally adopted by a large majority. The committee on judicial administration and remedial procedure, to which was referred the subject of the address of Prof. Roscoe Pound at St. Paul, last year, on "Causes of Popular Dissatisfaction with the Administration of Justice," summarized his paper and in the main agreed with his contention that there is dissatisfaction and that the evils complained of are real evils and that an attempt to remedy them is an appropriate undertaking for the American Bar Association. The committee, however, felt that it was not justified in making specific suggestions and recommended the creation of a special committee to consider carefully the evils, suggest remedies and propose laws, and when so authorized by the Association, procure the enactment of such laws, continuing their work from year to year until some wise and comprehensive scheme of judicial procedure shall be adopted by the federal government and by the states, from which shall be eliminated, as far as may be, every element that causes delay in litigation or unnecessary cost. The report of this committee together with that on professional ethics will doubtless be the important matters to come before the meeting next year.

On Tuesday afternoon were held the meetings of the sections on patent and copyright law and on legal education. At the latter was read by Professor Pound his paper which we publish in this issue.

On Wednesday morning the hall was crowded with members and friends, as well as with people of Portland, to listen to the address of Ambassador Bryce, which we publish in full in this number. In spite of the modesty with which the Ambassador referred to his official position the enthusiasm of his welcome, it was very evident that the demonstration was a tribute to his personality, and to his sympathetic comprehension of America and Americans. At the close of the address Mr. Bryce was unanimously elected an honorary

member of the Association. We believe that this is the first occasion upon which an honorary member has been elected. The officers for the ensuing year were then elected, the important change being the election of a new president, Hon. Jacob M. Dickinson of Chicago. Several special committees then briefly reported, including the committee on the proposed copyright bill, which recommended the continuance of the committee to aid in the passage of the new copyright law, which in slightly different forms is now pending in both the national senate and the national house. Another important resolution was that adopting the recommendation of the committee on comparative law for the establishment of a section on comparative law, similar to those now devoted to legal education and patent and copyright law, for the purpose of preparing the best in European law for the use of the American Bar and affording a proper education in the law. In the afternoon this section was organized by the election of Judge Simeon E. Baldwin of Connecticut as chairman, William W. Smithers of Philadelphia as secretary, and Eugene E. Massey of Richmond, as treasurer.

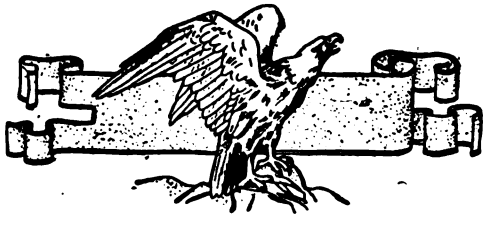
At the close of the morning session resolutions of appreciation of the generous hospitality of Portland and the Cumberland Bar were enthusiastically adopted. The arrangements for such a convention devolve exhausting duties upon the lawyers of the city which entertains, and in recent years precedents have been established that will be hard to equal, but it was the unanimous verdict of those present that Portland had surpassed them all, in spite of the difficulties of social intercourse due to the scattering of members through many hotels at considerable distance from headquarters. Through the good offices of the Cumberland Club the Portland Bar dispensed a most generous hospitality, in full conformity with the laws of Maine, and here, as well as upon the trip on Thursday afternoon, by steamboat among the islands of Casco Bay, ending with a New England clam bake, the serious part of the program was forgotten. A loving cup is to be presented to the Cumberland Club by some who enjoyed its privileges.

Wednesday evening the annual banquet was held at the headquarters at the Hotel Falmouth and was the largest ever given by the Association, far exceeding the expectations of the officers of the Association and causing consternation to the hotel management. After an inevitable delay, however, accomodations for all were provided, the members from Maine being requested to wait until all visitors had been seated. The speakers of the evening were Ambassador Bryce, Lord Justice Kennedy, Sir Kenelm Digby of London, Dr. Louis J. Lorenger of Montreal, Mr. Justice Moody, Colonel Meldrim of Georgia, Colonel Baker of Maine and the incoming president, Judge Dickinson. We have already referred to the most important part of Judge Moody's first public utterance since his appointment to the bench, which aroused keen interest from its suggestion of his attitude toward constitutional interpretation. One practical suggestion should not be forgotten. He recommends oral argument in cases before the Supreme Court because the increasing volume of printed records and briefs has made it physically impossible for all of the court to carefully read each one. The standard of the speaking was high. Colonel Meldrim's address was a gem of brief eloquence, and Colonel Baker's reminiscences of the glories of the Bar of Maine were more interesting than is usual in such addresses. Very late in the evening there was a call for Mr. Robert C. Smith of Montreal who delighted the association two years ago at Narragansett Pier, but he felt obliged to make his remarks very brief.

The reflection always impressed upon one who has attended these meetings is the difficulty of accomplishing valuable results by discussions participated in by such large numbers and amid so many temptations to indulge in recreation. The most serious obstacle, however, is the insistence of incompetent and ill-informed speakers on occupying the time of the Association for their own gratification. A certain amount of this is doubtless inevitable, though it is unfortunate that the Association was forced to listen to such insanity as was submitted by one gentleman from Boston. On the whole the Association and its presiding officers showed

remarkable skill in checking such ineffective discussion and in devoting its time when reports were not too long to a discussion of subjects of importance. In comparison with the debates of the Association of American Law Schools and of the Commissioners on Uniform State Laws, however, those of the Association seemed ineffective. The former are conducted by men fully informed on the subjects and genuinely interested in the result of the discussion. Too often the debates of the Association are upon subjects upon which the members have made no effort to inform themselves. These conditions have resulted in the creation of small sections of those interested in specific subjects where more careful consideration can be given than in general meeting, and the influence of their recommendations tends to minimize idle criticism.

By two other means it seems that conditions might be improved. If the committees of the Association could overcome the legal habit of procrastination and get their reports ready in suitable time for distribution to members the fault of ignorance at least could not be laid to their door. Valuable time might also be saved by confining discussion to subjects upon which we, as lawyers, are competent to speak from experience. Just why should the American Bar Association consider the advisability of excluding fraudulent insurance contracts from the mails under the guise of a discussion upon insurance law any more than it should debate, upon a codification of the law of sales, the propriety of prohibiting express companies from shipping liquor to temperance towns; and why should lawyers pass resolutions with reference to the policy of division of surplus of insurance companies merely because such action involves an effect upon contracts, rather than about other topics of public importance, upon which we may have decided opinions and scant information? There are pressing questions with reference to the organization of the profession and the reform of legal procedure which should more properly occupy the attention of the Bar, and the new committee appointed to consider these problems should furnish the chief material for discussion at future meetings.



CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

With the law school reviews still taking their summer vacation and the quarterlies from across the Altantic digested in last month's GREEN BAG the material for this department is exceptionally scanty. Nor can it be said that the articles are of exceptional importance. Brief mention only is given, therefore, in nearly every instance.

ADMINISTRATIVE LAW. "Conclusiveness of Administrative Determinations in the Federal Government," by Thomas Reed Powell, August *American Political Science Review* (V. 1, p. 583).

BANKRUPTCY. "The Bankruptcy (Scotland) Bill, 1907," by "W. W," *Scottish Law Review* (V. 23, p. 248).

BIOGRAPHY. In the September *Home Magazine* (V. 22, p. 14) is an illustrated account of "American Women Lawyers," by Stella Reid Crothers.

BIOGRAPHY (Choate). In the September *Putnam's* (V. ii, p. 734) is an appreciative sketch of "Joseph Hodges Choate: Jurist and Statesman" by William A. Purrington. It is full of delightful examples of brilliant repartee, quoted from the speeches of the subject of this sketch.

BIOGRAPHY. "John Jay and the Treaty of 1794," by Gerry W. Hazleton, August *American Lawyer* (V. xv, p. 365).

BIOGRAPHY (Taft). In the September *World's Work* (V. xiv, p. 9349), Eugene P. Lyle, Jr., continues his account of "Taft: A Career of Big Tasks." This article described the work of Judge Taft on the Bench, and contains attractive illustrations.

CARRIERS. "Bills of Lading in Interstate Commerce," by Thomas B. Paton, August *American Lawyer* (V. xv, p. 373). The author who is counsel for the bill of lading committee of the American Bankers' Association, expounds at length the difficulties in lending money on bills of lading in the present chaos of state laws. The carriers by alteration of the forms can do much to make such loans safer, but the matter calls for legislative regulation, preferably by Congress is the writer's opinion. The article closes with a résumé of the bill introduced to Congress last year at the instance of the bankers' committee.

CONSTITUTIONAL LAW. "The Powers of the States of the Union and the Necessity of Preserving and Exerting them," by the late Senator J. T. Morgan, *North American Review* (V. clxxxvi, p. 34).

CONSTITUTIONAL LAW. "The North Carolina Imbroglio," by Joseph Culberson Clayton, August *American Lawyer* (V. xv, p. 371). Condemning the attitude of Governor Glenn.

CONSTITUTIONAL LAW. "On the Implied Power to Exclude 'Obscene' Ideas from the Mails," by Theodore Schroeder, *Central Law Journal* (V. lxv, p. 177). Arguing that Congress has no implied power to enact the present postal laws against "obscene" literature, although as the author says:

"Three thousand lawyers have been employed by the defendants in as many cases, and none of these have thought it worth while to question the existence of such a power."

Congress has power "to establish post-offices and post-roads" and "to make all laws necessary and proper" to their establishment.

"It has never been claimed nor even imagined or dreamed, that the postal regulation against 'obscene' literature is of the remotest consequence as a means to the maintenance of post-roads, or that such regulation is of even the remotest conceivable use to the postal system as such. On the contrary, both judicially and otherwise, it has been stated, again and again, that the only purpose of that regulation was to control the

psycho-sexual states of postal patrons, as a means of restraining their sexual activities. But this is an end, the accomplishment of which is not entrusted to the Congress of the United States. Confessedly then, we have here a case where Congress, under the pretext of executing its powers, to establish post-offices and post-roads has passed a law for the accomplishment of objects not entrusted to the United States government, and this is exactly what Chief Justice Marshall said could not become the law of the land."

CONSTITUTIONAL LAW (Power to License Sale of Liquor). The decision of Judge Samuel R. Artman of Indiana, that it is unconstitutional to license the sale of intoxicating liquor, is adversely criticised in two articles in the *Central Law Journal* (V. lxv): "Is the Licensing of Dramshop Keepers Unconstitutional?" by D. C. Allen (p. 138), and "Young *v.* Soltau — A Criticism of Judge Artman's Decision," by H. V. Olliphant (p. 141).

CONSTITUTIONAL LAW (Corporations in Federal Courts). The following suggestion for dealing with trusts is made by R. M. Benjamin in an article entitled "Corporate Citizenship a Legal Fiction," in the *Central Law Journal* (V. lxv, p. 157).

"If Congress can (as it now does) constitutionally withhold from the natural citizen of the state, the aid of the federal courts in enforcing his claims against citizens and corporations of the other states, unless 'the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars,' why may not Congress constitutionally withhold from corporate judge-made citizens of the state, the aid of the Federal Courts in enforcing their claims against citizens and corporations of the other states unless they comply with such requirements and restrictions as to publicity and aggregations of corporate wealth as may be prescribed by federal law?"

CORPORATIONS (See Constitutional Law).

CRIMINAL LAW. "Accomplice," by S. N. Ray, *Bombay Law Reporter* (V. ix, p. 209).

CRIMINAL LAW (Trial of the Insane). "The Trial of the Insane for Crime," by James Hendric Lloyd. Reprinted from *American Journal of Insanity* (V. lxiv, p. 35). A short history of "the very gradual growth of the right of an insane man, on trial for his life in an English court, to be represented by counsel, and even to have his witnesses called and sworn."

CRIMINAL LAW. An account of the practice of Judge Cleland of the Municipal Court of Chicago which has attracted much attention appears in the September *Reader* (V. x, p. 387) entitled "The New Justice," by Jean Cowgill. Judge Cleland has attempted an extension of the probation system for minor offenders by interesting the responsible citizens of his district in looking out for convicts released on parol.

CRIMINAL LAW. "Making a New Start," by Bailey Millard in the *Saturday Evening Post* of August 17 (V. clxxx, p. 12), discusses the difficulties encountered by a discharged convict in obtaining business opportunities.

CRIMINAL LAW. Thomas Speed Mosby, pardon attorney for the governor of Missouri, writes in the September *Arena* (V. xxxviii, p. 259) on "The Anomaly of Capital Punishment." This is a brief summary of the principal arguments against it.

EQUITY. A Treatise on Suits in Chancery, Second Edition, by Henry R. Gibson, Gaut-Ogden Co., Knoxville, Tennessee, 1907. This is a book on Tennessee Equity Practice.

EVIDENCE (Trustworthiness of Sight). An interesting article in *Law Notes* (V. xi, p. 106) on "Light and Sight," by Charles C. Moore, cited number of cases in which atmospheric conditions have been considered in weighing the value of testimony of eye witnesses as to what they saw.

HISTORY. "Select Essays in Anglo-American Legal History," by various authors, — Little, Brown & Company, Boston, 1907. Three volumes, price $12, net.

This important series, compiled and edited by a committee of the Association of American Law Schools, consisting of Professors Freund, Mikell and Wigmore, comprises essays, most of which have been previously published, relating to the history of the common law. Its purpose is to collect in convenient scope valuable materials now widely scattered, which may some day furnish a basis for a complete history of English law. The first volume, now ready, is entitled "General Surveys," and contains twenty-one articles of varying length, covering the general history of common law from the earliest times to its

most recent development in England and America. The two succeeding volumes will be devoted to the history of particular departments of the law. The authors represented in the first volume comprise such men as Maitland, Holdsworth, Dillon, Bryce, Beale, and Bowen. A large part of it is devoted to a series of articles entitled "A Century of English Judicature," by Van Vechten Veeder, previously published in the GREEN BAG. It is impossible in small compass to thoroughly review the many different authors represented in this volume, but as each has been taken at his best and after an examination of many thousand publications, it will be readily realized that the material included is of the highest value to a student of legal history. It is to be hoped that it will accomplish the purpose of the editors by stimulating real interest in this neglected subject.

HISTORY. In the September *Harper's* (V. cxv, p. 538), Frederick Trevor Hill presents another of his accounts of the decisive battles of the law, entitled, "A Fight for Freedom of the Press." This is an account of the case of United States *v.* Callendar, tried in the United States Circuit Court for the District of Virginia in the early days of the Republic, by the notorious Judge Chase, under the unpopular sedition law. The story is well told and worthy of the telling.

HISTORY (Australia). History of the ship "Melville Island." Case by J. B. Castrean, Paul & Hewitt, Melbourne, 1906.

INTERNATIONAL LAW. "The State in Constitutional and International Law," by Robert Treat Crane, one of the John Hopkins University Studies, John Hopkins Press, Omaha, 1907.

A discussion of the systems of classifications and terminology in which the word state is used in different senses by the two systems of law.

INTERNATIONAL LAW. "De La Protection Diplomatique des Nationaux A L'Etranger," by Gaston de Leval, Bruxelles, 1907. A valuable discussion of principles under which citizens are protected abroad.

JURISPRUDENCE. "Customs and Customary Law," by Ashutosh Mukerjee, *Bombay Law Reporter* (V. XIV, p. 225).

JUVENILE COURTS. "Hon. John A. Caldwell and the Juvenile Court of Cincinnati," by Eliza Spruhan Painter, *Ohio Law Bulletin* (V. lii, p. 490).

JUVENILE COURTS. Ernest K. Coulter, deputy clerk of the Children's Court in New York, contributes to the September *Circle* (V. ii, p. 133) an article on an extension of the probation system in New York, entitled "The Big Brothers and the Children's Court."

LIBEL AND SLANDER (Nature of "Fair Comment"). "Fair Comment and Qualified Privilege," by Norman de H. Rowland, *The Commonwealth Law Review* (V. iv, p. 202). Upholding the view that the defense of fair comment is a branch of qualified privilege.

LEGISLATION. "Recent Legislation on the Mississipi River," by Robert Marshall Brown, September *Popular Science Monthly* (V. lxxi, p. 131).

LITERATURE. "Recollections of a Practitioner," by John S. Wilkes, judge of the Supreme Court of Tennessee. *Law Notes* (V. xi, p. 109). Interesting incidents of Tennessee practice.

LITERATURE. Another entertaining article is the address by Samuel Kalisch before the New Jersey State Bar Association entitled, "Military Tactics of Trial by Jury," published in the *New Jersey Law Journal* (V. xxx, p. 232).

LITERATURE. In the August *New Jersey Law Journal* (V. xxx, p. 228) is an entertaining account of a libel case in the court of Queen's Bench at Dublin entitled, "Scene in an Irish Court Room," by A. D. V. Honeyman.

MUNICIPAL CORPORATIONS. "Competitive Bidding in Letting Municipal Contracts for Street Paving when Patented, or Monopolized Articles or Materials are Involved as a phase of the Case of the Will of the Law *v.* the Will of the Judge," by Eugene McQuillin, *Central Law Journal* (V. lxv, p. 198).

NEGOTIABLE INSTRUMENTS LAW. "Effect of Negotiable Instruments Law on Liability of the Surety," by "T. A. S.", September *Law Notes* (V. xi, p. 105). Adverse criticisms of the recent case in Oregon, of Cellare *v.* Meachem, 89 Pac. Rep. 426, where it was held that a person who signs his name to a note as accommodation maker, adding the word "surety" to his signature, is not

released by the subsequent act of the payee in making a binding agreement with the principal for an extension of time to the principal.

PRACTICE. A criticism of the practice in Virginia of limiting judges in their charge to a declaration of the rules of law applying to any state of facts, which may be found on the evidence, appears in the September *Virginia Law Register* (V. xii, p. 337) in an address by Hon. Richard E. Byrd before the State Bar Association, entitled "The Province of the Court in Jury Trial." Apparently Virginia practice restricts the power of the court in this respect more than in most other jusisdictions. The author also advocates the power to direct a verdict at the end of the plaintiff's case. The author says, "A transition state is now in progress. The courts find themselves compelled to develop gradually the province of the court in the direction which is now prevalent in most states, and yet they are hampered by the inhospitality of the common law to the suggestions of common sense." "I consider that we have too many reversals of righteous verdicts for immaterial causes; and the greatest source of reversals is because the instruction dead line is shifting and uncertain and the refinement of criticism which seems to be a necessary incident to the system in vogue too often results in practical hardship and injustice."

PRACTICE (New York). "Examination before Trial Since the Goldmarch Case," by Raymond D. Thurber, August *Bench and Bar* (V. x, p. 52). Citing and analyzing New York cases on the subject.

PRACTICE. "Who may be an arbitrator," by Durga Charan Banerjee, *Allhabad Law Journal* (V. iv, p. 255).

PRACTICE. "The Law of Certiorari in the Province of Manitoba," by M. G. Macneil, *Canadian Law Review* (V. vi, p. 285).

PRACTICE. "Representation of Minor in Suits," by S. Vaidyantha Iyer, *Bombay Law Reporter* (V. ix, p. 194).

PUBLIC POLICY (Possible Trust Remedies). A discussion of the holding corporation and possible restraints on it by Edward B. Whitney appearing in the *Yale Review* (V. xiii, p. 3) under the title, "Anti-Trust Remedies under the Northern Securities Decision."

"It is a necessary implication of the Northern Securities case, if there ever could have been any dispute about the point, that any other State may, by appropriate legislation, keep the New Jersey corporation out of its territory. By action of the several States the holding corporation may be extinguished as rapidly as it arose. Any State may enact that no corporation can hold in the future more than a given proportion of the stock of one of its own corporations. A reasonable time must be given those already existing to dispose of their stock and wind up. This is all the shrift that they can require. Whether the several States will — whether they dare — avail themselves of this power is more doubtful. Each legislature is subject to corporate influence; and each will be threatened with an emigration of capital to the territory of a rival. For reasons such as these, there has been a demand for an amendment to the United States Constitution, giving to the nation the control of the whole subject. If the Federal Constitution is not amended, and the States do not act, there is no power to stop the further growth by this effective means of the 'industrial' trust pure and simple; for under the present Constitution Congress has no direct power to regulate an agricultural, mining or manufacturing industry. I shall, therefore, pass to the consideration of the corporations which Congress does have the power under the Northern Securities decision to control.

"These may be divided into two classes: first, the transportation companies pure and simple, such as railroads and steamboat lines; and, second, those aggregations which combine the work of production with that of transportation.

"If the nation desires to break up these combinations . . . it can provide that (after a reasonable time to unload present holdings) no company engaged in transportation shall engage in any agricultural, mining or manufacturing industry, or directly or indirectly hold any of the stock of any corporation engaged in such industry. It can exact that (after the lapse of a similar period) no corporation can hold directly or indirectly, more than a given proportion of the stock of any corporation engaged in interstate or foreign transportation."

Without touching on the question of limiting aggregation of capital in itself, Mr. Whitney believes that "the holding corporation" organized "for control" is contrary to the public interest. He draws a vivid picture of its evils.

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.)

BANKRUPTCY. (Alien as Trustee.) U. S. D. C., S. D. N. Y. — An alien is, in *In re Coe*, 154 Fed. Rep. 162, considered to be competent as a trustee in bankruptcy. By Bankruptcy Act, the term "officer" is defined as including, among others, trustee. Since, as a general proposition, no alien can be an officer, it was contended that an alien cannot be a trustee. But, in the first place, the court says that a trustee in bankruptcy does not occupy an office in the sense in which the term is used in the law prohibiting an alien from being a public officer and, in the second place, the section of the Bankruptcy Act prescribing the qualifications of trustees does not expressly prohibit aliens from acting. By such act either individuals or corporations may be trustees. "Individual" is a very broad term and of course includes aliens, and the court does not see why any individual who is a citizen of any other state or country should not be permitted to act as trustee if he is otherwise competent.

BANKRUPTCY. (Assets Passing to Trustee — Damages.) Mass. — A claim for personal injuries does not pass to the trustee in bankruptcy so as to debar the bankrupt from prosecuting an action thereon, according to Sibley *v.* Nason, 81 N. E. Rep. 887. The court says that the claim was not a property right until reduced to judgment, could not be reached by trustee process, nor in equity by a creditor's bill. In this case also the court holds that plaintiff was not precluded from recovering for reasonable charges for nursing and physician's services because he had included such claim in his bankruptcy schedules and had been discharged from legal liability therefor. The discharge did not prevent plaintiff from treating such obligations as debts of honor, and it was through no virtue of the defendant that plaintiff could interpose any defense to the payment of such charges.

CARRIERS. (Interstate Commerce.) U. S. D. C., W. D. N. Y. — A recent case construing the Interstate Commerce Act is United States *v.* New York Central and Hudson River Railroad Company, 153 Fed. Rep. 630, decided by Judge Hazel. In this case the New York Central and Hudson River Railroad Company was indicted for failure to file with the Interstate Commerce Commission its tariff of rates and charges for conveying petroleum from Rochester to Norwood in the State of New York, which it had established under a common arrangement with the Pennsylvania Railroad Co., the Central Vermont Railway Co,, and the Rutland Railroad Co. for a continuous carriage from Olean, New York to Burlington, Vermont, in violation of the Elkin's Act. Demurrer was interposed on the ground that the shipments complained of were intrastate and therefore the provisions of the Interstate Commerce Act, relating to publishing and filing tariffs, did not apply. The court, however, holds that inasmuch as the defendant had entered into an arrangement with other railroad companies for the continuous interstate carriage of oil, it was bound to comply with the Interstate Commerce Act, even though the line operated by defendant was wholly within the State of New York. The court notes that the Interstate Commerce Act has received a similar construction in Consolidated Forwarding Co. *v.* Southern Pac. Co., 9 Interstate Commerce Report 205, and United States *v.* Wood 145 Fed. 405.

CARRIERS. (Interstate Commerce.) U. S. C. C., S. D. N. Y. — In United States *v.* Delaware, Lackawanna and Western Railroad Company (C. C.), 152 Fed. 269, it was contended that a shipment from New York City to Buffalo by way of New Jersey and Pennsylvania was not interstate commerce and hence that the giving of rebates on such shipment did not violate the Elkin's Law. The court, however, is of the opinion that the authorities, though not entirely consistent, support the contrary contention of the government that the shipment referred to was interstate commerce. As supporting authorities

are cited Hanley *v.* Kansas, etc., R. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333; Lord *v.* Steamship Co., 102 U. S. 541, 26 L. Ed. 224; Pacific Coast Steamship Co. *v.* Railroad Commissioners (C. C.), 9 Sawy. 253, 18 Fed. 10. The court says that the case of Lehigh Valley R. Co. *v.* Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, upon the authority of which the case of United States *ex rel.* Kellogg *v.* Lehigh Valley R. Co. (D. C.), 115 Fed. 373, and similar cases have been decided, was a case of a tax imposed by the state upon the receipts in the proportion of the amount of the transportation within the state, and observes that the United States Supreme Court in the Hanley case distinguishes it upon this ground and holds that those cases, which out of deference to the Lehigh Valley case have held that transportation of merchandise from one point in a state through other states to another point in the same state was not interstate commerce, carried its conclusions too far. Aside from the authorities cited, the court is of the opinion that on principle the shipment was interstate commerce. To fortify this position, the court says: "The defendant's road passes through New Jersey, Pennsylvania, and New York. Neither of those states alone could regulate the transportation of merchandise over any part of the line except that which was situated within that state. Transportation upon such a road, therefore, cannot be efficiently regulated at all unless it is regulated by the United States. It is true that if the United States government has authority to regulate the transportation of merchandise between New York and Buffalo on the Lackawanna, the Erie, and the Lehigh Valley roads, and not upon the New York Central there is a possibility that the New York Central road might obtain undue advantages in competition with the other three roads mentioned. On the other hand, if the government has not the power to regulate such transportation on the three roads first mentioned, and the state of New York should regulate transportation on the New York Central, between points in the state of New York, it would be possible for the three roads mentioned to obtain undue advantage over the Central to a still greater extent. There is a possibility of some discrimination under any theory, but I think that the simplest theory is that as soon as merchandise is carried from one state to another it becomes interstate commerce."

At one time it seemed to be decided that a carriage from one terminus within a state through another state to a terminus within the same state did not constitute interstate commerce since there was no interchange of commodities between states involved. But since the Hanley case *supra* it has been regarded as settled, that interstate commerce is found wherever there is carriage across state boundaries. As an original question it may be that the former view was the sounder, but it is not well to litigate the matter any longer, but to accept the present plan. B. W.

CARRIERS. (Interstate Commerce.) U. S., S. C. — In Adams Express Company *v.* Commonwealth of Kentucky 27 Sup. Ct. Rep. 606, the United States Supreme Court takes the position that an agreement by a local agent of an express company to hold for a few days a C. O. D. interstate shipment of intoxicating liquors, to suit the convenience of the consignee in paying for such liquors and taking it away, does not destroy the character of the transaction as interstate commerce, so as to render the express company amenable to prosecution for violating a state local option law. This decision is based on the recent case of Heymann *v.* Southern R. Co., 203 U. S. 270, 27 Sup. Ct. 104, and by it the Supreme Court reverses the decision of the Kentucky Court of Appeals to the contrary in 27 Ky. Law, Rep. 1096, 87 S. W. 1111.

CARRIERS. (Reasonableness of Rates.) U. S. Sup. Ct. — In determining the reasonableness of railroad rates, expenditures for permanent improvements and equipment should not be charged to the current or operating expenses of a single year, according to the recent decision of the United States Supreme Court in Illinois Central Railroad Company *v.* Interstate Commerce Commission, 27 Sup. Ct. Rep. 700, 51 Lawyers' Edition 3. The court is of the opinion that such expenditures should be reimbursed by all of the traffic they accomodate during the period of their duration and not by the revenue of a single year. In this connection, the court distinguishes the case of Union Pacific R. Co. *v.* United States, 99 U. S. 402, 25 L. Ed. 274. That case was concerned with the construction of the words "net earnings" in an act of Congress under which five per cent of the net earnings of the Union Pacific were to be applied annually to the loan by the government to the railroad. For the ultimate payment of the loan it was to the advantage of the United States to have the earnings of the company applied to permanent improvements and equipment. The debt to the government had to be paid and the value of the railroad property was enhanced by the permanent improvements. Along with that, the general security of the government for the ultimate payment of the debt was also proportionately increased.

A clear decision such as this is upon a fundamental point marks distinct advance in the grow-

ing law governing rate regulation. It is, of course, indispensable to weighing the reasonableness of a schedule of rates to analyze the returns of receipts and expenditures given out by the corporation in question. Not every receipt is income property, still less is every disbursement an annual charge. It is plain as the case states, that permanent improvements should not be charged solely against the traffic of the year they are constructed. And it is well that the law should be made clearer by pointing out the special character of Union Pacific Case *supra*. **B. W.**

CONSTITUTIONAL LAW. (Equal Protection of Laws — Peonage.) U. S. D. C., S. C. — South Carolina has a law providing that any laborer working for a share of the crop or for wages in money or other valuable consideration under a contract for labor on farm land, who shall receive advances either in money or supplies, and thereafter willfully and without just cause fail to perform the reasonable service required of him by the terms of the contract, shall be liable to prosecution for misdemeanor and punishment by imprisonment. This law was enacted as a weapon to compel especially negro farm laborers to perform the service required by their contracts of employment on pain of being sent to jail or being made members of the chain gang. The constitutionality of this law was attacked in *ex parte* Drayton 153 Fed. Rep. 986. The court held that the act could not be justified as within the police power of the state; that as it was intended to cover agricultural laborers only it violated the equality clause of the 14th amendment of the Constitution of the United States, and that as it authorized the creation of a system of peonage or involuntary servitude it violated the 13th amendment.

CONSTITUTIONAL LAW. (Police Power — Labor Law.) N. Y. — The validity of the New York law prohibiting the employment of females, regardless of age, in factories between nine o'clock P.M. and six o'clock A.M. came up for final determination by the state courts in People *v.* Williams, 81 N. E. Rep. 778. The Court of Special Sessions of the First Division of the City of New York (100 N. Y. S. 337) held the law unconstitutional as infringing the constitutional right to contract. This decision was affirmed by the Appellate Division by a divided court (101 N. Y. S. 562, 116 App. Div. 379). The Court of Appeals now affirms the decision of the court below and holds the law unconstitutional on the same grounds as the Court of Special Sessions. The court says that the courts have gone very far in upholding legislative enactments framed clearly for the welfare, comfort and health of the community. But when it is sought, as here, arbitrarily to prevent an adult female citizen from working at any time of the day that suits her, it is time to call a halt. Such a law arbitrarily deprives citizens of their right to contract with each other. It behooves the courts, firmly and fearlessly, to interpose the barriers of their judgment to the growing tendency of the legislatures to interfere with the lawful pursuits of citizens. As an analogous case the court cites the decision of the United States Supreme Court in Lochner *v.* State of New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, wherein the court held as unconstitutional a law restricting the hours of labor for the employees of bakers.

It is to be noticed that in this case the court took particular occasion to remark that it found "nothing in the language of the section which suggests the purpose of promoting health except as it might be inferred that for a woman to work during the forbidden hours would be unhealthful. If" the court said, "the inhibition of the section had been framed to prevent the ten hours of work from being performed at night or to prolong them beyond nine o'clock in the evening it might more readily be appreciated that the health of women was the matter of legislative concern." In short the opinion does not in any way hold that no distinction can be made between man and woman in matters of police regulation, nor that the legislatures may not recognize the undoubted fact that the woman is the mother of the future citizen, that a debilitated mother means a debilitated offspring, that the majority of factory operatives are either already married or afterwards marry, and that women are not capable of enduring, without injury, long hours of labor or arduous toil. The fact seems also to have been entirely overlooked by the court — perhaps was not argued by counsel, that the real motive and purpose of the legislative enactment was not so much to preserve health as to preserve morals. For there can be no doubt, that the measure was urged by the most intelligent of its advocates because they thought it necessary to take some steps to save the young women employed in the factories from the temptations, insults and exposure which accompany the traveling upon the public streets late at night or in the early hours of the morning.
ANDREW A. BRUCE.

CONSTITUTIONAL LAW. (Taxation.) U. S. S. C. — A perplexing question relating to the taxing power of a state was decided in Buck *v.* Beach, 27 Sup. Ct. Rep. 712. In this case, it appears that a resident of New York had made

loans to residents of Ohio on notes given and payable in Ohio and secured by mortgages on land in the latter state. The payee of the notes had an agent in Ohio to look after his interests there and another in Indiana to take charge of his investments in that state. For some reason it appears that the notes given and payable in Ohio were for a considerable length of time kept in the possession of the Indiana agent. While the notes were in the possession of this agent, the Indiana authorities assessed them for taxation and attempted to collect taxes thereon, principally on the ground, as it appears, that the notes were transferred from the Ohio agency to the Indiana agency in order to escape taxation in Ohio. The court holds that an attempt to escape taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which lies outside, beyond the jurisdiction of that state. The jurisdiction of Indiana to tax the notes was not conferred or strengthened by reason of the motive which might have promoted the payee to send into Indiana the evidences of debts owing him by residents of Ohio. Furthermore, the court is of the opinion that the debt was taxable in the state in which the creditor was domiciled or possibly in the state in which the evidences of the indebtedness alone were held. A dissenting opinion, however, is filed by Justice Day, in which he points out that bills and notes have been recognized as having the character of tangible property. They are tangible things, capable of delivery, passing from hand to hand, and for many purposes may be regarded as of the value of the debt which they evidence. In view of this the fact that municipal bonds or other securities may be taxed where held, Justice Day is of the opinion that there is no constitutional objection to the localization of the notes for taxation and that hence they may be taxed where held.

CONTEMPT. (Absence of Attorney from Court.) St. Louis Ct. of App. — The absence of an attorney from the court in which he has business and when he should be there to attend to it and when his absence delays or impedes the court's business is, in *In re* Clark, 103 S. W. Rep. 1105, held to constitute contempt of court. An attorney at law is an officer of the court, and it is as much incumbent on him to attend the sittings of the court when a case in which he is of counsel is on trial, and which trial cannot proceed in his absence, as it is for the sheriff or the clerk of the court to be present. The absence of an attorney in certain circumstances unavoidably causes delay in the administration of justice, which is a criminal contempt; if not a contempt, then the administration of justice in the courts of the state would be at the mercy of attorneys, and they, instead of being aids to the court in the administration of justice, might become an insufferable obstruction to its administration by merely remaining away from court when it was their duty to be in attendance

CONTRACTS. (Legality — Contract not to make a Will.) Ill. — The doctrine that an owner of property may make a valid enforceable contract binding himself not to dispose of his property by will and to permit his possessions to descend according to the law of intestacy, is affirmed in the recent case of Jones *v.* Abbott, 81 Northeastern Reporter, 791 on authority of Wallace *v.* Rappleye, 103 Ill. 229, and Taylor *v.* Mitchell, 87 Pa. 518, 30 Am. Rep. 383.

COURTS. (Original Jurisdiction of United States Supreme Court.) U. S. S. C. — The United States Supreme Court in Virginia *v.* West Virginia, 27 Sup. Ct. Rep. 732, held that its original jurisdiction extends to a suit by the Commonwealth of Virginia against the state of West Virginia to determine the amount due to the former by the latter as the equitable portion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state. This decision was rendered on demurrer to the bill. Consideration of the objections of multifariousness, misjoinder of parties and of causes of action the court holds may properly be postponed until final hearing.

EMINENT DOMAIN. (Interurban Railroads.) Ind. — The extensive development of interurban railroads is gradually narrowing the distinction between the rights of commercial railroads, or so-called steam railroads, and street railroads proper, as interurban roads in many instances partake of the nature of both. In Kinsey *v.* Union Traction Co., 81 N. E. Rep. 922, one of the main contentions was whether or not interurban cars operated on the streets of a city with its permission, for the carriage of passengers, express and light freight, by a corporation unorganized under the street railway laws, constituted an additional servitude on the streets so as to entitle abutting owners to additional compensation for the use of the streets. Three of the judges, Hadley, Gillett and Mounts, were of the opinion that the operation of the cars did not constitute an additional servitude, while two judges, Jordan and Montgomery, held the contrary.

EQUITY. (Cancellation of Birth Certificate.) N. J. — In Vanderbilt *v.* Mitchell, 67 At. Rep. 97, it appears that a birth certificate was made by the physician present at the birth of a child. This certificate set forth among other things as required by law, as far as the facts could be ascertained,

the time, the date and place of the birth of the child, the name of each of the parents, the maiden name of the mother and the name of the child. It appears that in making the certificate the physician was imposed upon by false statements of the mother as to the paternity of the child and certified contrary to the fact that complainant in this suit was the father of the child. This suit was brought to obtain the cancellation of defendant's fraudulent record and the destruction of its evidential character as to the paternity of the infant. The court held that a court of equity has jurisdiction, first, to cancel such certificate or so much thereof as relates to and charges upon the complainant the paternity of the child; second, to require the medical superintendent of the bureau of vital statistics to indorse the fact of the cancellation on the record; third, to enjoin the use of the original certificate or copies thereof, as evidence; and fourth, to enjoin the mother and the child from claiming for said child, by virtue of said certificate, the status of a lawfully begotten child of the complainant. The court, however, points out that the decree in this case does not preclude a trial of the question of paternity of the child but the effect of the decree is to give notice to the world that the record is a fraudulent one and is not entitled to be received in evidence in a court of the state to prove the facts therein contained, nor entitled to full faith and credit in other states under the Federal Constitution. The court states that the case presented is novel in incident, though not in principle, but says that the absence of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity. As precedents, the court cites Callender *v.* Callender, 53 How. Pract. (N. Y.) 364, and refers to Meldrum *v.* Meldrum, 11 L. R. A. 65, 15 cols. 478, 24 Pac. 1083.

The opinion of Dill, J., in this case contains an interesting dictum adverse to the doctrine that equity is without jurisdiction except for the protection of property rights. On this subject see note to Chappell *v.* Stewart, 37 L. R. A. 783, and the comments of the writer in 16 Cyc 120. F. J.

EVIDENCE. (Judgment.) Tex. Ct. of Crim. App. — A nice point as to the admissibility of evidence is presented in Busby *v.* State, 103 S. W. Rep. 638. This was a prosecution for embezzlement of state funds by an employee of the state. Prior to the trial of the criminal case, the state had obtained a judgment in a civil action by it against accused and his bondsmen. This judgment was admitted in evidence against accused in the criminal case. On the original hearing the court held that the judgment was admissible, but on rehearing the court comes to a different conclusion, Judge Brooks, however, dissenting. As principal authorities for the decision on rehearing, the court cites, Queen *v.* Moreau, Levin A. and E. 128; Britton *v.* State, 77 Ala. 202.

When evidence of a judgment is offered to establish some fact that was decided by that judgment, there is always the preliminary question concerning the admissibility of the evidence offered to prove the judgment. This preliminary question usually raises no difficulties as a properly certified copy of the record of the judgment is offered and this is admissible under the hearsay exception admitting public documents. Wigmore, Evidence, §1681: Black, Judgments, §604. But granting that it is offered to establish the judgment by competent evidence, the question remains whether the fact of the judgment is one proper to be proven. It may be provable either (1) because it is a fact in issue, or (2) because it is evidence of some fact in issue. When the judgment is to be used as making some fact involved in the present case *res judicata* then the judgment is in issue. The judgment is not evidence of such a fact: it makes the truth or falsity of that fact unimportant. The fact of the judgment is substituted as the issue for the fact which it adjudicated. The law determining whether the judgment is to have that effect and become the fact in issue is the law of judgments, not the law of evidence. Wigmore, Evidence, §1347. The final opinion of the Texas court on this point in the law of judgments was no doubt right. The success of the state in the civil action where a preponderance of the evidence would give it the verdict should not adjudicate the fact of defalcation for the purposes of a criminal action in which the state must establish the fact beyond a reasonable doubt.

Some related questions are interesting. Suppose the accused had won in the prior civil action, would not the fact of his innocence be adjudicated for all subsequent actions whether civil or criminal? If the state could not prove his guilt by a preponderance of the evidence, how can it hope to prove it beyond a reasonable doubt? It seems that the fact should be considered *res judicata* though the court states that such is not the law. 103 Southwestern Rep. 650. The only ground for such an opinion seems to be the statement, generally true, that unless the fact will be *res judicata* no matter which way it is decided it will not be *res judicata* at all. Black, Judgments, §548. It may be questioned whether the principle underlying that statement applies to the case we are discussing. The case of People *v.* Kenyon, 93 Mich. 19, is clearly distinguishable on grounds given by the court.

The cases relied on by the Texas Court for its original, but discarded opinion, hold that if in a prior criminal prosecution the defendant wins, that adjudicates all facts as between him and the state even for the purpose of a subsequent civil suit. This is rather hard to support on principle. That the defendant was able to raise a reasonable doubt as to such facts should hardly conclude the state in a subsequent civil action where the defendant to get a verdict must do much more than raise such a doubt. The Supreme Court of the United States, however, refused to follow this reasoning and held that the adjudication was final. Coffey *v.* U. S. 116 U. S., 436, 443.

A word as to the possibility of using the judgment in the second way suggested above: namely as evidence of the disputed fact. That cannot be done where the judgment has not made the fact *res judicata*. Black, Judgments, §505: Dowel *v.* State, 83 Ind. 357. A judgment generally is either conclusive or of no effect. Why? Simply because it is merely the hearsay opinion of the court that gave it. As between the parties the court is adjudicating the matter: but as to third parties the court's judgment is merely its expression of opinion, not based on personal knowledge, not substituted to the tests of oath, confrontation, and cross-examination. It is inadmissible both because it is opinion evidence and because it is hearsay evidence. The courts suggestion, therefore, at page 643, that the judgment though not conclusive should have the effect of *prima facie* evidence seems improper. C. B. Whittier.

HUSBAND AND WIFE. (Alienation of Husband's Affections.) Ore. — Oregon, like many other states, has a statute removing all disabilities on a wife which are not imposed or recognized as existing on the husband. Under this statute the court in Keen *v.* Keen, 90 Pac. 147, holds that a wife may maintain an action for an alienation of her husband's affections. As supporting authorities the court cites Postelwaite *v.* Postelwaite, 1 Ind. App. 473, 28 N. E. 99; Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46; 43 L. R. A. 114; 72 Am. St. Rep. 98. As to the state of the authorities on this proposition the court says, " In a few of the states it has been ruled by the courts of last resort that such an action cannot be maintained; but where modern legislation recognizes the doctrine that the wife has rights which the court should respect, reason and a great weight of authority uphold the principle that for the loss of consortium, which includes the husband's society, love and assistance, the law now affords her an adequate remedy."

INSURANCE. (Jurisdiction of Suits by Policy Holders.) Mass. — In Peters *v.* Equitable Life Assurance Society, 81 N. E. Rep. 964, the court holds that it has jurisdiction of a suit by a life policy holder against a foreign stock company to enforce the policy holder's contract rights in surplus profits. However inconsiderable the amount of the capital stock may be in comparison with its other assets, it is nevertheless a stock company and the relation between it and its policy holder is that of debtor and creditor and not that of a member of a mutual company and the company itself, especially in view of the fact that the company's directors are elected by its stockholders and not by the policy holders. In such a suit the court holds that the inconvenience to which the company will be subjected by reason of the multiplicity of the books and complexity of the accounts involved may not be taken into account by the court in assuming jurisdiction.

MONOPOLIES. (Contracts, Illegality.) N. Y. Sup. Ct. — New York has a law prohibiting an arrangement or combination whereby a monopoly in the production or sale of any article in common use is or may be created, or whereby competition may be restrained or prevented. This law, it was contended in Brooklyn Distilling Co. *v.* Standard Distilling and Distributing Co., 105 N. Y. S., 264, invalidated a lease of a distillery to a corporation organized to create a monoply in the manufacture and sale of alcoholic and spirituous liquors, especially in view of the fact that the lessor knew the motive of the lessee in taking the lease was to create a monoply. The court takes the ground that the statute does not prevent one selling or leasing property, nor does it prevent one buying or leasing property, to prevent competition. It cites in support thereof, Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. State Rep. 475. The fact that the lessor knew the lessee's motive in leasing the distillery, the court did not regard as of any moment. The controlling point for the court was that the lessor did not in any way become a party to the illegal combination or participate to any extent in the scheme to avoid the statute. In view of these circumstances, the court held that the lease was valid.

PRACTICE. (Evidence, Appeal and Error.) N. J. — The New Jersey law which provides that if it appears from the record in a criminal case that plaintiff in error on the trial below suffered manifest wrong or injury either in the admission or rejection of testimony, whether objection was made thereto or not, the appellate court shall order a new trial receives construction in State *v.* Hummer, 67 Atl. Rep. 294. It was contended that under this statute the plaintiff in error was

entitled to a reversal for the refusal of the trial court to strike out testimony elicited by a question, though no objection was made to such question. But the court takes the position that the phrase "admission or rejection of testimony" imports judicial action;] that inasmuch as there can be no rejection of testimony until the court has acted on the offer there can be no admission of evidence unless there has been some action taken by the court in admission of the evidence, either on objection or on its own motion.

PRACTICE. (**Substituted Service.**) **U. S. C. C. A., 6th Circuit.** — A vexatious question often arises as to when the United States Circuit Court may obtain jurisdiction of nonresident defendants by substituted service. Those desiring light on this question we refer to an exhaustive note appended to the case of Jones *v.* Gould, as reported in 80 United States Circuit Courts of Appeals, Reports 1. In this case, it was held that a suit by a member of a syndicate, which was in effect a partnership, to wind up its affairs and for the appointment of a receiver on the ground of the mismanagement by the manager, was not a suit in which jurisdiction could be obtained by substituted service, especially since the only allegation in the bill with respect to property within the district of the court was that the syndicate was the owner of stock in certain railroad companies therein.

STATUTES. (**Repeal — Elkin's Law.**) **U. S. D. C., Ill.** — In the March issue of the current volume, we reviewed the decision of Judge Landis of Chicago in the case of United States *v.* Standard Oil Company, 148 Fed. 719, wherein he held that the Hepburn Act (Act June 29, 1906, c. 3591, §10, 34 Stat. p. 584) did not repeal the Elkin's Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]) in so far as related to an indictable offense incurred under the Elkin's Act., even though prosecution was not commenced until after the passage of the Hepburn Act. The same conclusion was also reached by Judge Morris in the case of United States *v.* Chicago, etc., R. Co. (D. C.), 151 Fed. 84, decided shortly after the Standard Oil Company case. The principal ground on which it was contended that prosecutions commenced subsequent to the passage of the Hepburn law for offenses incurred under the Elkin's law were barred was, that inasmuch as the Hepburn law contained a clause saving prosecutions then pending the general saving statute (Rev. St., § 13 [U. S. Comp. St. 1901, p. 6]) did not apply. In arriving at the conclusion that the general saving statute did apply, both Judge Landis and Judge Morris placed great reliance on the case of Lange *v.* United States, 133 Fed. 201, 66 C. C. A. 255. In that case Judge Barker held that section 13 applied, notwithstanding a saving clause similar to the one found in the Hepburn Act was found in the statute then under consideration. Judge Grosscup concurred with Judge Barker in his decision, but upon different grounds, while Judge Jenkins dissented. In the Chicago, etc., Ry. Co. case, Judge Lochran, who sat with Judge Morris, at the hearing on demurrer, but took no part in the decision, expressed a view contrary to that of Judge Morris. The decisions of Judges Landis and Morris are now further fortified by similar decisions by Judge Holt of the Southern District of New York in United States *v.* Deleware, L. & W. R. Co. (C.C.) 152 Fed. 269, and Judge Hazel of the Western District of New York in United States *v* New York Central & H. R.R. Co., 153 Fed. 630. Though there is some divergence of views among the federal judges, the decided weight of authority holds section 13 as saving prosecutions for offenses incurred under the Elkin's Act. Until there is a contrary ruling by the United States Supreme Court, this may well be considered settled law in so far as decisions of the federal court of one district are regarded as authority in another district.

WILLS. (**Testamentary Capacity — Evidence.**) **Mich.** — O'Dell *v.* Goff, 112 N. W. Rep. 736, was a will contest case involving the testamentary capacity of a spiritualist. The mere belief in spiritualism the court holds was not evidence of insanity, but, on the other hand, one who thinks so persistently on the subject as to become a monomaniac, incapable of reasoning, does not possess testamentary capacity, and where a believer in spiritualism has such confidence in spiritualistic communications through mediums or otherwise that he is compelled to follow them blindly his free agency is destroyed and a will made under such circumstances cannot be admitted to probate, whether such conclusion be based on incapacity or undue influence. In this case, the court held that it was proper for the trial judge to exclude testimony tending to prove the truth of spiritualism and improper to admit testimony tending to prove it untrue, as the truth or falsity of the spiritualistic faith was not at issue in the suit. For the same reason it was improper for contestants' counsel to suggest during the taking of the testimony and to argue at the conclusion of the testimony that spiritualism was untrue. Neither should witnesses have been permitted to testify that testator was a monomaniac merely because he believed in spiritualism.

THE LIGHTER SIDE

Premonitory Damages.— Not long ago two cars of a passenger train left the rails while entering one of the local stations, and gave the occupants a great shock and a big scare. Before the report of the accident had reached the officials, a man rushed into the office of the claim agent and excitedly shouted that he wished to file notice that he intended to bring action for damages; that he had been hurt internally by a car leaving the tracks, and that while he was not suffering much at the time, yet he had a premonition that he was going to be laid up for some weeks.

Got What They Wanted. — Over in the mosquito country an old farmer died. He was reputed to be rich. After his death, however, it was found that he died penniless. His will was very brief. It ran as follows:

"In the name of God, Amen. There's only one thing I leave. I leave the earth. My relatives have always wanted that. They can have it." — *Lippincott's.*

Justice Deaf as Well as Blind. — A member of the Philadelphia bar tells of a queer old character in Altoona who for a long time was the judge of a police court in that town.

On one occasion during a session of his court there was such an amount of conversation and laughter in the court room that his Honor became very angry and confused. Suddenly, in great wrath, he shouted:

"Silence here! We have decided above a dozen cases this morning and I haven't heard a word of one of them!" — *Harper's Weekly.*

In Missouri. — A St. Louis judge the other day tried the English method of interfering in the examination and must have been somewhat discomfited when former Chief Justice Shepard Barclay made him overrule one of his own questions.

By the Court (addressing the witness): Do you know how Mr. Sutherland is to be paid for his services in the case?

A. No, sir, I do not.

Q. Do I understand that you never heard —

A. (Interrupting.) No, sir.

Q. (Continuing.) — of Mr. Sutherland being connected with this case?

A. No, sir.

Q. In any way at all?

A. No, sir.

Q. Until you went to his office this morning?

A. That is all.

Q. That is the first time you ever knew of his being connected with the case?

A. Yes, sir.

Q. Has your husband ever told you anything about Mr. Sutherland being connected with this case?

Mr. Barclay: We object to that.

The Court: On what grounds?

Mr. Barclay: On the ground it calls for a confidential communication between herself and her husband.

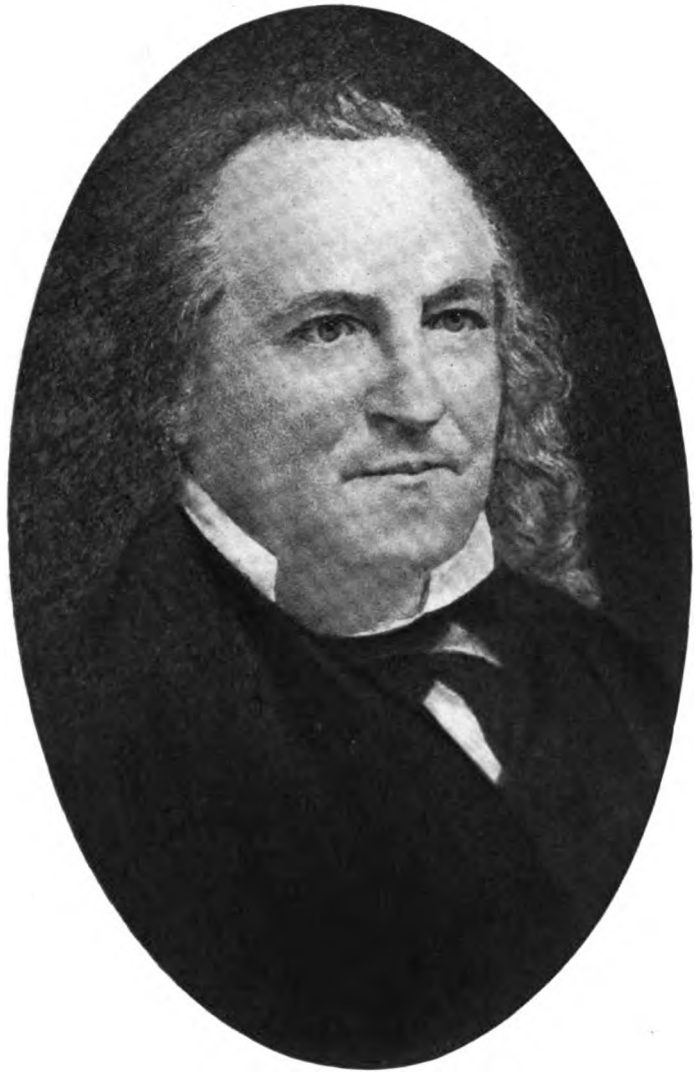
The Court: The objection is sustained. (Bil. Exc., pp. 178-9.)

Where They were Best. — In the course of a recent case before Mr. Justice Darling the Judge declined to make a requested ruling, saying that if he did so the Court of Appeals would say he was wrong. Counsel having expressed disagreement with this view, the Judge said: "Well, you know the Court of Appeals as well as I do, perhaps better, for you see them at work, while I only meet them at luncheon." To which the barrister dryly replied: "Your Lordship sees them at their best." — *Law Notes.*

Not Law. — In a jury trial in New York recently the attorney for the defendant started in to read to the jury from a certain volume of the Supreme Courts reports. He was interrupted by the Court, who said:

"Colonel ——, it is not admissible, you know, to read law to the jury."

"Yes, I understand, your Honor; I am only reading to the jury a decision of the Supreme Court." — *Philadelphia Ledger.*



Jos. Henry Lumpkin

The Green Bag

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JOSEPH HENRY LUMPKIN

First Chief Justice of Georgia

By The Late Chief Justice Logan E. Bleckley

JUDGE LUMPKIN was a native of Oglethorpe County, and was born December 23, 1799. His collegiate education begun at the University of Georgia, was concluded at Princeton, N. J., where he graduated with honor in 1819. He studied law under the tuition of Judge Thomas W. Cobb, at Lexington, Ga., and was admitted to practice in 1820. For two years (1824, 1825) he represented his native county in the Legislature. He was one of the three commissioners who framed the Penal Code of 1833. His career at the bar was successful from the beginning, and was continued with wide and brilliant reputation up to 1844, when failing health induced a voyage to Europe and a sojourn there for one year. He has been heard to say that what he most enjoyed while abroad was a visit to the tomb of Virgil. His own classic taste and culture had filled him with affectionate reverence for the illustrious Roman bard. With restored health he returned home, but he never resumed practice, for in December, 1845, the legislature enacted a law to organize the Supreme Court, and elected him to a place on the bench, and with him Warner and Nisbet. His first judicial service was at Cassville in March, 1846, and his last at Milledgeville in December, 1866. He delivered the first opinion in the first volume, and the last in the thirty-fifth volume of the Georgia Reports.

He was long a trustee of the University of Georgia, and in 1846 was elected to the chair of rhetoric and oratory in that institution, but declined it. Afterwards, the university having opened a law department under the name of the Lumpkin Law School, he lectured and taught as law professor until the war came and the students exchanged books for guns.

In 1865 the President of the United States tendered him a seat on the Federal bench as one of the judges of the Court of Claims. He declined this offer because he preferred to remain in the judicial service of Georgia. For the same reason he declined an election as Chancellor of the University in 1860. The acceptance of that onerous and responsible position would have necessitated his retirement from the Supreme Bench. While still in office as Chief Justice, he died at his home in Athens, in the 4th day of June, 1867. He obtained judicial station without seeking it, and retained it continuously for over twenty-one years without competition.

It would be difficult to imagine a finer specimen of physical, intellectual and moral manhood than was Joseph Henry Lumpkin. To form and finish him, there was a rare and happy concurrence of nature, education and divine grace. He had a musical individuality, a melody of character. His voice blending strength with sweetness, symbolized the man. His expressive face was a poem in vigorous and harmonious prose. It suggested truth and beauty consecrated to goodness. Of these traits which broaden and elevate humanity, not one was wanting. His religion was Calvinistic, but softened by a spirit of universal benevolence. Could he have controlled election by his human sympathy, every soul would have been a candidate for immortal bliss, and every candidate would have been elected. Of all the forces

that swayed him, religion, the double impulse of duty and devotion, was the strongest. First, and before all else, he rendered to God obedience and affection. His work as philanthropist, as lawyer, as magistrate, was colored and dominated by religious feeling. At the bar and on the bench he was the priest engaged in expounding or in administering law. To him law and gospel were inseparable; the new legal testament was a necessary supplement to the old.

He won eminent distinction in both fields of professional service, first in that of advocate and next in that of judge. To portray him as an advocate, I borrow from the vivid delineation which Judge Harris, his friend and associate, has left us in the thirty-sixth volume of the Georgia Reports.

"In early manhood he was distinguished by manly beauty. The contour of the face was highly intellectual, the forehead high, broad and fully exposed. He had dark gray eyes, restless and constantly varying in expression, and a quivering lip. A physiognomist would have been delighted to meet with a subject, in whom the ideal of the personnel of the orator would be so nearly realized. His voice was clear and melodious—a rich baritone—obedient to his will and modulated with consummate art, so that it continued to charm by its cadence so long as he spoke, and at no time exhibited strain or inequality. This control over it was doubtless owing very much to the distinctness of his articulation of each syllable of a word, and marked emphasis. He used little gesture, but it was graceful and expressive; his attitude was adapted with care to the theme and occasion. Add to these personal, and I might with propriety call them external, qualifications, his large encyclopedic knowledge, gathered from libraries of law and literature, and we can begin to make some estimate of the resources with which his oratory was supplied. Indeed, it may be said without exaggeration, that learning waited on him as a handmaid, presenting at all times for his choice and use all that antiquity had not lost—all that a prolific press has disseminated. With a vivid imagination quick to body forth the creations of the mind, his speeches at the bar abounded in imagery; but it was not sought for or culled from a commonplace book to dazzle or adorn. It sprung up spontaneously from the exuberance of a mind heated with thought; his tropes were the corruscations of the glowing axle in rapid motion, shedding a brilliant light over the pathway of reason. . . . His imagery was drawn from the remembered bright and golden thoughts of Shakespeare and Milton, from the sacred poetry of Job and David, the wisdom of Solomon, and of the son of Sirach, and from the prophetic inspirations of Ezekiel and Isaiah—in a word, from the whole Bible. Most aptly were his illustrations culled from such a garner, and woven into the fabric of his speeches. It required a person of his precise mental constitution, of unaffected and humble piety and cultivated taste, to employ this high poetic thought and wisdom without irreverence; and this was done with such marvelous skill that even hypercriticism did not venture to condemn."

As a judge, he is the seer of the Georgia bench. He discovered, organized, and developed those gems of our law which have inherent vitality, and which require no artificial aid to enable them to live. He devoted himself to the labor of stripping off shucks or shell or whatever might conceal the core of natural justice which he was sure lies in the true law when not cankered by technicality or by harmful legislation. In this work he was the leader and conductor, though it is not to be denied that he was greatly aided by his able but more conservative associates. One or both of them stood by him in nearly every instance. He delivered but one dissenting opinion in the first twenty volumes of the reports, and none at all in the first nineteen volumes. From the start, the court as a whole was liberal and progressive.

Judge Lumpkin's judicial career was the

consistent outcome of his mental and moral characteristics. By nature he was a reformer, and he had all the zeal and daring of his convictions. He saw evil and abuses with the clear eye of inspiration, and was for sweeping them away with the besom of destruction. No man had more veneration, but he would not squander it on antiquated trifles. He could not venerate the trivial merely because it was hoary with age; on the contrary, his contempt for it was the greater because it had presumed to exist so long. He was indignant that anything which was unworthy to be law should hesitate to give up the ghost.

From Judge Lumpkin we have, I should say in a rough estimate, about two thousand published opinions. Many of them are worthy of his fame; they are clear, strong, forcible and full of legal meat. But quite a large proportion were hastily and carelessly written, and afford no just ideal of his wonderful gifts. Even the best are inferior to the oral opinions which he delivered from the bench, in everything but the citation and discussion of authorities. His literary power was in vocal utterance. In the spoken word he was a literary genius far surpassing any other Georgian, living or dead, I have ever known. Indeed, from no other mortal lips have I heard such harmonious and sweet sounding sentences as came from his. Those who never saw and heard him cannot be made to realize what a great master he was.

He so blended gentleness with justice, that since he has joined the immortals, he may be idealized as our Judicial Bishop enthroned in Georgia skies.

ATLANTA, GA., February, 1892.

A CONSTITUTIONAL QUESTION SUGGESTED BY THE TRIAL OF WILLIAM D. HAYWOOD

By Charles P. McCarthy

LONG before the trial of William D. Haywood actually began, the attention of the entire country had been attracted by the questions involved in his appeal to the Supreme Court of the United States, relating to the manner in which he was arrested in the state of Colorado and brought within the jurisdiction of the state of Idaho. From the standpoint of both lawyer and layman, these questions are among the most interesting and important raised by the case.

The cases of Pettibone *v.* Nichols, Moyer *v.* Nichols, and Haywood *v.* Nichols presented the same facts and questions of law, and the decision of the Supreme Court in the first named case, reported in Volume 27 of the *Supreme Court Reporter* at page 3, governs in all three. The principle, that a person forcibly abducted from one state, and brought to another, by parties acting without warrant or authority of law, and held for a criminal offense in the latter state under valid process issuing from its courts, is not entitled, under the Constitution and laws of the United States, to release from detention by reason of such forcible and unlawful abduction, has long been too well settled to to merit any discussion. Mahon *v.* Justice, 127 U. S. 700, 32 L. Ed. 283, 8 Sup. Ct. Rep. 1204, Ker *v.* Illinois, 119 U. S. 436, 30 L. Ed. 421, 7 Sup. Ct. Rep. 225. In Cook *v.* Hart, 146 U. S. 183, 36 L. Ed. 934, the Supreme Court uses the following language: "The distinction between cases of kidnapping by violence of unauthorized persons without the semblance of legal action, and those wherein the extradition is conducted under the forms of law, but the governor of the surrendering state has mistaken his duty, and delivered up one who was not in fact a fugitive from justice, is one which we do not deem it necessary to consider at this time."

In his answer to the return of the sheriff, in the Circuit Court of the United States for Idaho, the petitioner Haywood raised practically the same question suggested by the words above quoted. He stated in substance that the governors of Idaho and Colorado and the respective officers and agents of those states, conspired together to have him taken from Colorado to Idaho, under such circumstances and in such way as would deprive him, while in Colorado, of the privilege of invoking the jurisdiction of the courts there for protection against wrongful deportation from the state; also that he was not present in the state of Idaho on the date the alleged crime was said to have been committed, nor for months prior thereto, nor thereafter, and was therefore not a fugitive from justice, and that these facts were all known to the governor and other officials of the demanding state. Pettibone *v.* Nichols, *supra*, at page 113.

The fact that the petitioner was given no opportunity to invoke the jurisdiction of the courts in Colorado is disposed of by the Supreme Court as follows: "No obligation was imposed by the constitution or laws of the United States upon the agent of the state of Idaho, to so time the arrest of the prisoner and so conduct his deportation from Colorado as to afford him a convenient opportunity, before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and, as such, liable, under the act of Congress, to be conveyed to Idaho for trial there." This same point had been raised in Ker *v.* Illinois, *supra*, but was not specifically passed on by the court in that case.

The important question remains: Is there a legal distinction, so far as the constitutional rights of the accused are con-

cerned, between the cases where he is abducted by private individuals and the case where he is abducted by the officers of the state under the forms of law? In either case he will be released on *habeas corpus* if he succeeds in invoking the jurisdiction of the courts prior to the time he is brought within the jurisdiction of the demanding state. Once within the jurisdiction of that state and held under legal process issuing from its courts, he cannot, in the former case, base any right under the Constitution and laws of the United States, upon the method of his abduction; can he do so in the latter case? In Pettibone *v.* Nichols the court holds on page 119, that the difference in fact between the two cases is of no consequence as to the principle involved; that the method by which the accused man was brought within the jurisdiction is immaterial. Mr. Justice McKenna dissents upon this point, holding that the difference in fact above set forth brings the case outside the doctrine of Mahon *v.* Justice, and Ker *v.* Illinois. He states on page 120 that the difference is not merely one of circumstances in the manner of the abduction. Again on page 121 he says: "I submit that the facts in this case are different in kind and transcend in consequences those in the cases of Ker *v.* Illinois and Mahon *v.* Justice, and differ from and transcend them as the power of a state transcends the power of an individual. No individual or individuals could have accomplished what the power of the two states accomplished; no individual or individuals could have commanded the means and success; could have made two arrests of prominent citizens by invading their homes; could have commanded the resources of jails, armed guards, and special trains; could have successfully timed all acts to prevent inquiry and judicial interference." Therefore, from his own statement of the case, the conclusion seems irresistible that the difference is merely one in the circumstances of the abduction. It is difficult to see how such a difference of itself can create a right under the Constitution and laws of the United States. The justice says that the distinction is recognized by the court in Mahon *v.* Justice, *supra*. He probably refers to the sentence in the opinion in which the court says that the state of Kentucky did not authorize the unlawful abduction of the prisoner from West Virginia, 32 L. Ed. at page 286. The context, in the light of which this sentence must be read, shows that the court is here considering whether or not the abduction was brought about by any statute of the state of Kentucky which violates the Fourteenth Amendment of the Constitution of the United States, and finds that such is not the case. The reasoning certainly does not establish the distinction in question. In making and defining a distinction between civil and criminal cases, some courts have said that, in a civil case, a party guilty of fraud or violence in bringing the defendant within the jurisdiction, cannot take advantage of his own wrong; whereas in a criminal case, the state, that is the people, is guilty of no wrong. State *v.* Ross, 21 Iowa 467. Possibly these expressions throw light on the theory of Mr. Justice McKenna. His idea seems to be that the state is barred by its own wrong, consisting of the wrongful acts of its officers, a doctrine somewhat analogous perhaps to that of estoppel. Possibly, in a civil action, the state may be estopped by the erroneous or wrongful acts of its officials, if such acts are clearly within the scope of their authority as fixed by law. Salem Improvement Company *v.* McCourt, Oregon, 41 Pac. Rep. 1105. The writer has been unable to find any case in which the doctrine of estoppel, or any bar after the analogy of an estoppel based upon the unlawful acts of officials, has been raised to defeat the state in a criminal prosecution. It is clear that the Supreme Court did not evolve a new rule of law for the cases of Moyer, Haywood, and Pettibone, but applied to them an old and well established doctrine.

A consideration of the case of Pettibone *v.*

Nichols brings to mind most forcibly the fact that there is a great weakness in the provisions of the Constitution and Statutes of the United States relating to interstate rendition of fugitives from justice. This matter has been discussed by text-writers and courts in the past, but is surely of sufficient importance to warrant further discussion. The second paragraph of Section 2 of Article IV of the Constitution reads as follows: "A person charged in any state with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another state, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Section 5278 of the Revised Statutes of the United States, passed pursuant to the above named provision of the Constitution, provides that "whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from which the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. . . ." The Supreme Court of the United States in Hyatt *v.* New York, 188 U. S. 691, 47 L. Ed. 657, holds that one who was not within the state when the crime in question was committed, cannot be deemed a fugitive from justice within the meaning of the section of the Revised Statutes above quoted, because if not within the demanding state at that time, he cannot be said to have fled from it. The writer realizes that the question of jurisdiction, where a person, while without the boundaries of a state, commits acts which result in a crime within its boundaries, is by no means simple, but on the contrary raises many intricate problems in conflict of laws. It is not necessary for the purpose of this article to go deeply into the intricacies of this subject. It will suffice to refer to certain well established and universally accepted principles. It is the general rule both at common law and by universal statute law that when a person puts into operation a force, which, without the aid of any intervening agency, produces a result within the limits of a state, which constitutes a crime under its laws, he is liable to prosecution and punishment at the hands of that state, if jurisdiction can be obtained of his person, although he was not within its boundaries when the force was put into operation or the result accomplished; this is also true when the force is carried out and the result accomplished by means of an innocent agent within the state. To this effect see the cases cited in an article by the well known text-writers, H. C. Underhill and W. L. Clark, in Volume XII of the "Cyclopedia of Law and Procedure," at page 208, notes 96 and 97. For instance, suppose that a person, X, makes certain false pretenses in state A, by means of which, through the medium of the mail or of an innocent agent, he obtains money or property in state B, there is no question but that the jurisdiction to try him for the crime of obtaining money or property by false pretenses is in state B; Adams *v.* The People, 1 New York 173, and other cases cited in the article just above mentioned, at page 211, note 18. Yet state B cannot get custody of X under the statute relating to interstate rendition, because he was not physically present within the state at the time the crime was committed. In order to be a fugitive from justice within the meaning of the statute

he must have fled from the demanding state, and in order to have so fled, he must have been physically present within that state at the time the crime was committed; constructive presence will not suffice; Hyatt *v.* New York, *supra*. Again suppose that X, standing in state A, fires a shot across the boundary at Y standing in state B, which results in the death of Y. It certainly cannot be denied that the jurisdiction to try A for homicide is in state B, both at common law and under prevailing statute law; State *v.* Hall, 114 North Carolina 909, 28 L.R.A. 59, and other cases cited in the note to the last named report of the above case. Yet state B cannot get custody of X under the statute, for the reason above stated; State *v.* Hall, 115 North Carolina 811, 28 L.R.A. 289; Hyatt *v.* New York, *supra*. Further instances readily come to mind, but the above are surely sufficient to show that there is an inexcusable weakness in the law. It seems evident that the defect cannot be remedied by an amendment of the statute, for the reason that the same defect is inherent in the Constitution itself. The use of the words "on demand of the executive authority of the state from which he fled," in the constitutional provision makes it clear that it is subject to the same construction as the statute, and contemplates only persons who were physically present within the demanding state, and fled in the physical sense.

In view of the difficulty of securing an amendment to the Constitution of the United States, the question naturally arises: Can the defect be regulated by state legislation? It may be noted at the start that such legislation could not be entirely effective. Suppose that the state of Maine had a statute empowering the governor to surrender fugitives from justice upon demand of other states, that the Governor of California demanded the surrender of a person as a fugitive, and that such person was delivered up in accordance with the Maine statute to the agent of the state of California. The moment that the agent left the state of Maine with his charge, his authority to hold the latter would cease. This difficulty would be met in every state traversed on the journey back to California. If all the states traversed had similar statutes, the agent could legally hold his prisoner only upon complying with the statute of each state as he entered it. If any one of them had no such statute, it is clear that he could not legally hold his charge within that state. State legislation would be absolutely effective only in a case where the demanding and surrendering states immediately adjoined each other. This difficulty is pointed out and enlarged upon in a note to the case of *In re* Robb, reported in 9 Sawyer at page 560. Aside from its practical significance it may possibly have some bearing on the question of the constitutionality of such legislation, and in this connection it will be noticed later.

The constitutional question involved may be put as follows: In view of the fact that the Constitution of the United States makes it obligatory upon a state to surrender as a fugitive from justice a person who is charged with a crime in the demanding state, and who has fled from that state in a physical sense, has a state the power to pass a law providing for the surrender of a person so charged, irrespective of the question whether or not he has fled from the demanding state? To begin with it is clear that such a law would not be objectionable on the ground that it invaded the constitutional rights of the person surrendered, for the Supreme Court has held, in Mahon *v.* Justice, *supra*, and in Lascelles *v.* Georgia, 148 U. S. 537, 37 L. Ed. 549, that a person accused of crime in one state has no right to an asylum in another state under the Constitution and laws of the United States. If it were objectionable, it would be on the ground that under the Constitution the power to pass laws

concerning interstate rendition is exclusively granted to Congress and impliedly prohibited to the states. Would it be objectionable on the latter ground?

It will undoubtedly be conceded that the power to surrender fugitives from justice existed in the several states prior to the adoption of the Constitution, as an attribute of sovereignty. To this effect is "*In re* William Fetter," 23 New Jersey Law 311, also State *v.* Hall, 115 N. C. 811, 28 L. R.A. 289. In Prigg *v.* Commonwealth of Pennsylvania, 16 Peters 535, 10 L. Ed. 1060, at page 1092, Mr. Justice Story states that the right to surrender fugitive slaves as a matter of comity existed in the several states before the adoption of the Constitution; and the power to surrender fugitives from justice is clearly analogous in this respect. It is probably true, as stated by Chief Justice Taney and Mr. Justice Daniel in the last named case that, subsequent to the adoption of the Constitution, the right of a state to surrender either a fugitive slave or a fugitive from justice could not be logically based upon the police power of the state. But, if the power existed before, as an attribute of sovereignty, then it subsisted after, the adoption of the Constitution, upon the same ground, unless it was surrendered by the states. Whether or not it was so surrendered is the important question. Of course in this connection the writer is speaking of the power to deliver up a fugitive as a matter of comity, and not the power to demand such delivery. The latter power is not an attribute of sovereignty, and never existed in the states until it was created by the provision of the federal Constitution.

There is some authority to the effect that a state has the power to provide for the surrender of a person charged with crime in another state. In State *v.* Hall, *supra*, the court says, at page 292, "But in the exercise of its reserved sovereign powers, the state may, as an act of comity to a sister state, provide by statute, for the surrender, upon requisition, of persons who, like the prisoners, are indictable for murder in another state, though they have never fled from justice. If it shall be proved that the prisoners were in fact in North Carolina and the deceased in Tennessee when the fatal wound was inflicted, a law may still be enacted giving the Governor the authority to issue his warrant and deliver them on requisition." Mr. Spear, in his work on Extradition and Interstate Rendition, at page 316, speaking of the case where a person is charged with a crime in a state from which he has not fled, says: "The Constitution may be amended, and then the laws of the United States may be amended so as to cover such cases; or state laws may be enacted to furnish a remedy which is not now supplied by either. Either method is possible, and there certainly should be some method for awarding justice in this class of cases."

"Prigg *v.* Commonwealth of Pennsylvania," *supra*, bears upon the question. The court holds that a statute of Pennsylvania in regard to fugitive slaves is unconstitutional, for the reason that it impedes the absolute right of the owner to recapture his slave, and is thus in conflict with the provisions of Section 2 of Article IV of the Constitution. Mr. Justice Story declares that the states have no power to legislate in regard to the surrender of fugitive slaves, that the Constitution confers such power exclusively upon Congress and prohibits it by implication to the states. His declaration to this effect is *dictum*, as shown by Taney, Chief Justice, and Daniel, Justice, in their separate opinions. Mr. Justice Story classes legislation concerning fugitives from justice with that concerning fugitive slaves, and concludes that the former kind of legislation is also prohibited to the states. On this point it is very clear that his opinion is *dictum*. He holds that the power to legislate upon these subjects is exclusive in Congress for two reasons: First, because the right to retake slaves, (or

obtain custody of fugitives from justice), and the duty to deliver them in any part of the United States, derive their whole validity and obligation exclusively from the Constitution of the United States; second, because the nature of the subjects requires that they should be controlled by one and the same will, and act, uniformly by the same system of regulations, throughout the Union. Taney, Chief Justice, Thompson, Baldwin, and Daniel, Justices, dissent from Story's views as to the exclusive power of Congress. The first reason assigned by him does not seem valid. It is admitted that a state cannot force other states of its own power to deliver up fugitives from justice; this power resides exclusively in the national government. But this fact of itself constitutes no reason in logic or necessity why the states should not be allowed to act voluntarily on ground of comity so long as they do not conflict with the express right and duty prescribed by the Constitution. With reference to the second reason assigned by Story, Mr. Justice Thompson remarks that the mere fact that congressional legislation might be the more appropriate remedy does not render state legislation unconstitutional; to have that effect the case must be so strong that state action is absolutely inappropriate. The strength of this second reason, as applied to the particular kind of legislation treated in this article, will be further considered a little later. Taney, Chief Justice, uses the following language: "Moreover the clause of the Constitution of which we are speaking does not purport to be a distribution of the rights of sovereignty, by which certain enumerated powers of government and legislation are exclusively confided to the United States. It does not deal with that subject. It provides merely for the rights of individual citizens of different states, and places them under the protection of the general government, in order more effectually to guard them from invasion by the states. There are other clauses in the Constitution by which other individual rights are provided for and secured in like manner; and it has never been suggested that the states could not uphold and maintain them, because they were guarantied by the Constitution of the United States." These remarks may be applied with equal force to the provision of the Constitution concerning interstate rendition of fugitives from justice; the only difference being that this provision confers certain rights upon states instead of individuals.

In United States *v.* McClay, 26 Fed. Cas. 1051; *In re* Robb, 19 Feb. 26; *Ex parte* McKean, 16 Feb. Cas. 186; and Degant *v.* Michael, 2 Ind. 396, there are expressions, *arguendo*, or by way of *dictum* to the effect that the power of legislation over interstate rendition of fugitives from justice is exclusive in Congress, the court in each case relying upon the *dictum* of Mr. Justice Story. On the other hand many states have passed statutes auxiliary to the federal statute, providing for the manner of arrest and detention of fugitives and other matters of detail. These statutes have been held constitutional by the courts of last resort in those states, contrary to the views of that judge. For cases on this point see Com. *v.* Tracy, 5 Metc. 536; *Ex parte* Rosenblatt, 51 Cal. 285; Kurtz *v.* State, 22 Fla. 41, 1 Am. St. Rep. 175. In Moore *v.* People of the state of Illinois, 14 How. 13, 14 L. Ed. 306, the Supreme Court, through Mr. Justice Grier, states that the court merely held in Prigg *v.* Com., that any state law which interrupts or impedes the right of the owner to the immediate possession of his slave is void, and makes no mention of the views expressed in that case by way of *dictum*. It seems not unlikely that those views would not receive the sanction of the courts in our day, in the light of this tendency to ignore them.

So far we have assumed for the sake of argument that the provisions of the Constitution and of the state legislation under discussion cover the same ground and

might come into conflict. As a matter of fact this is not true. The Constitution limits congressional legislation to the cases of persons who have fled from the demanding state. It seems clear that Congress could not, in the face of this limitation, pass a statute touching persons charged with crime in a state, from which they have not fled. If it were true that Congress had power to pass such a statute, then the argument of Mr. Justice Story to the effect that the subject is one peculiarly for federal legislation, and the added fact that state laws must be subject to the defect before mentioned in this article, might constitute a formidable objection to state action. But, if, as it seems, Congress has no power to act, then there is no force in that objection. If Congress has not the power, then the fact that Congressional action would be an apt remedy, and that state laws are subject to an inherent weakness, however serious, is entirely immaterial.

In speaking of a case where Congress, in pursuance of powers conferred upon it by the Constitution, has passed certain statutes, Mr. Justice Story says: "In such a case the legislation of Congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it." Without expressing any opinion as to the correctness of the specific rule above stated, the writer suggests that, in order to hold the state legislation in question unconstitutional, the rule would have to be extended somewhat as follows: "Since the Constitution treats as fugitives from justice only persons who have fled from the demanding state, therefore it manifestly indicates the intention that all legislation concerning the interstate rendition of persons charged with crime shall be confined to persons of that class." The above argument certainly does apply to limit the legislative power of Congress. It cannot apply to limit the power of the states. Such a doctrine of implied prohibition would surely be in conflict with the rule that the states retain all powers not delegated to the federal government, as laid down in Gibbons *v.* Ogden and a long line of famous cases; it would practically wipe out the doctrine of reserved powers, in violation of the provisions of Articles IX and X of the Amendments to the Constitution of the United States.

Section 1 of Article IV of the Constitution of the United States provides "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the effect thereof." Congress has passed a statute to this end. Many of the states have passed statutes requiring less by way of certification or other proof, than is required by the Act of Congress. The constitutionality of these statutes has never been questioned, for they do not impair the constitutional obligation. The Supreme Court of the United States has held that a judgment in an action *in personam*, based upon service by publication, need not be given due faith and credit under the Constitution. Haddock *v.* Haddock, 50 L. Ed. 857, and other cases there cited. But while so holding the court says that it intimates no doubt as to the power of a state to give a judgment of that character "such efficacy as it may be entitled to in view of the public policy of that state." 50 L. Ed. at 884. If a state may act outside of the mandate of the Constitution in regard to the judicial proceedings of a sister state, so long as it does not violate its constitutional obligation, why may it not so act in regard to rendition of fugitives from justice?

In closing, the writer desires to notice two cases which have sometimes been said to

be the strongest authorities against the constitutionality of state legislation. The first is People *v.* Hyatt, 172 N. Y. 176, 60 L.R. A. 774. In that case the only question before the court was whether or not a man could be held as a fugitive from justice under the federal statute, when he was not within the State of New York at the time the crime was committed. A determination of this question simply required an examination of the statute and the Constitution, and, upon such examination, the court holds that the case does not come within the statute. For some unknown reason, the court goes out of its way to say: "No person can or should be extradited from one state to another unless the case falls within the constitutional provision, and the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states." There was no claim or argument made that the prisoner was held by virtue of any power inherent in the state of New York; in fact it does not appear that there was any statute under which the right to so hold him could be claimed, and, in the absence of a statute, it is elementary that the power could not be exercised; State *v.* Hall, 28 L.R.A. 289, Cyclopedia of Law and Procedure, Volume XIX, page 53, note 3. The court denies to the state a right which was not raised or involved in the case. The reason assigned is that where a prisoner has been surrendered under the constitutional provision and brought within the jurisdiction of the demanding state, the surrendering state cannot procure his release as a matter of right, even though its process has been abused in the proceedings; Mahon *v.* Justice, *supra*; and Lascelles *v.* Georgia, 37 L. Ed. 549. But all this proves is that the states do not act on the ground of comity in cases arising under the statute of the United States. This is freely conceded; it needs no further proof than the mere wording of the constitutional provision. The question still remains: Have the states relinquished all power to legislate concerning interstate rendition, simply because they have made it obligatory upon themselves to deliver up persons as fugitives in certain cases? The question whether the rule of Mahon *v.* Justice and Georgia *v.* Lascelles would apply in a case where a state delivered up a person as a fugitive on the ground of comity, does not concern us here. It might well be that a different rule would be applied, and that the complaint of the surrendering state that its process had been abused would prevail in the demanding state, as a matter of comity. If so, there would be no conflict with the provisions of the Constitution of the United States, for the Constitution would not be involved in the slightest degree. It is conceded that the states act under obligation, and not as a matter of comity, in cases arising under the Constitution; to say that for this reason the states have surrendered all power to act, in cases not covered by the Constitution, seems to be begging the question. The court cites in support of its contention Lascelles *v.* Georgia, *supra*. In that case also a person was delivered up as a fugitive under the statute of the United States. It was argued on behalf of the prisoner that he could not be tried in the demanding state on any charge except the one designated in the rendition proceedings, and, as premises for this conclusion, it was stated that this was the rule in cases of extradition from foreign countries, and that the relations between the states in such matters were similar to those between independent nations. The court holds that the second premise is false, and that for this reason the analogy does not hold. The only relations before the court for consideration are those existing between the states with reference to the delivery of fugitives from justice under the Constitution. The decision is that these relations are not like those between independent nations. This is manifestly true. But it does not answer the question whether

the states have a reserved power to act concerning fugitives from justice, in cases entirely outside the scope of the constitutional provision. Whether, in case of rendition under state legislation, the rule concerning the charges on which the prisoner may be tried would be the same as in cases of interstate rendition under the federal Constitution and statute, or the same as in cases of extradition from foreign countries, is not material. If the rule were different from that applied under the federal statute, there would be no conflict with that statute or the Constitution, for neither would have any bearing on the case. In both the last named cases, nothing is considered but the obligation of states to deliver up fugitives under the Constitution, and their relationship in the light of such obligation. It is submitted that the opinion of the court on these matters throws no light upon the question of the right of a state to act in a case entirely outside the obligation imposed by the Constitution.

In the absence of much direct authority upon the constitutional question here treated, the matter must necessarily be argued from analogy. The examination here given is of course but slight and cursory, in view of the vast field from which such arguments may be drawn. It would appear that the only complete remedy for the defect discussed is an amendment to the Constitution of the United States. Since this remedy is so difficult to apply, the proposed remedy by state legislation should be carefully considered.

BOISE, IDAHO, October, 1907.

CIRCUIT RIDING IN THE PHILIPPINES

By James H. Blount

"I have written these tales of our life
"For a sheltered people's mirth,
"In jesting guise — but ye are wise
"And ye know what the jest is worth."

FOR a visiting attorney to spend a morning within the cool, secluded, and stately precincts of the Bar Association building of New York City, with the great dead, whose work is already done, looking down at you benignly from the walls, and the strenuous living, whose work is not yet done, sprinkled about the great hall, poring raptly over the guesses of their predecessors at the true law, is indeed an affirmative pleasure, and a privilege. Especially is this the case when your visitor, fleeing the heat of his native heath in the far South for a midsummer's holiday with New England friends, stops over in New York, en route, and, wandering from his near by club, into this scholarly environment, the home of the legal profession of the great metropolis, finds that time and place concur to prompt the immediate fulfillment of an oft deferred task, viz., the writing of an article, long since promised to the editor of the Green Bag, on circuit riding in the Philippines in the pioneer days.

What is here and now set down is largely a reproduction of things heretofore told verbally to our genial friend just referred to, and concerns problems of transportation, not of law, questions of how to get from one place of holding court to another, rather than of what happened after you got there.

The Act of the United States Philippine Commission of 1901, creating the present judicial system, commonly called the Judiciary Act, divided the Archipelago into fourteen judicial districts (exclusive of the City of Manila, which constituted a district itself, or at least a juridical unit). These districts, numbered respectively from one to fourteen, beginning with the northernmost, contained usually three or four provinces, — Americans would call them counties — and at the capital of each province, the county seat, court was required by the law aforesaid to be held twice a year. At the time of the passage of this Act there were many of the provinces grouped by it into judicial districts which the lawmaking body had never seen. They had worked like beavers ever since their arrival at Manila in June, 1900, and had gotten around personally to a number of the provinces, but many of them, especially the remoter ones, they had not as yet been able to visit. Consequently, some of the judicial districts were simply marked off on a map with a pencil, without any knowledge of how the land lay, or of what available means of communication existed between the capitals of the several provinces composing it. For example, the district to which I was assigned, when the Civil Government was founded on July 4, 1901, was the First Judicial District. It was the northernmost district of the Archipelago, the nearest of all to Hong Kong and the mainland of Asia. Of its four provinces, the two most northerly, Ilocos Norte, on the China Sea side, and Cagayan, on the Pacific Ocean side, looked adjacent enough on the map. Court was only required to be held at the provincial capitals, and the capital of Ilocos Norte was but about eighty miles (on the map, measured by the scale) from the capital of Cagayan. But, as a matter of fact, there was a precipitous and almost pathless range of mountains between the two provinces, infested in the rainy sea-

son by intermittent sloughs of despondent-looking mud in lieu of a trail, and at all seasons by head-hunting savages. No American that I ever heard of, except my esteemed friend, Colonel Robert L. Howze, then Lieutenant-Colonel of the Thirty-fourth Volunteer Infantry, now Commandant at West Point, ever got across that Caraballa North Range. Colonel Howze had succeeded in doing so because: (1) He was trying to hammer into pieces the last remnants of Aguinaldo's organized forces — which he did; (2) He was trying to rescue Lieut. Gilmore of the navy, as to whose possible ultimate fate the American President and people were gravely apprehensive — which he did; (3) He was, and is, possessed of as much restless, exuberant physical energy as anybody you are likely to meet in a day's journey (except the present Chief Magistrate of the nation.) The only way to travel from the capital of Ilocos Norte to the capital of Cagayan, except by following in the footsteps of Colonel Howze, was to go by sea, thirty miles due north, to the northwestern corner of the Island of Luzon, thence east sixty miles to the mouth of a river, the Rio Grande de Cagayan, and thence south seventy miles up this Cagayan River. Of course, in due time after the degree of *practical* adjacency sustained by these two provinces to one another became familiar to the Department of Justice at Manila, a law was finally passed re-districting them, and also other provinces which had originally been grouped unadvisedly. But that is another story. Just at present we are to confront and solve transportation problems more difficult than travelling ninety miles by sea on a government launch, and seventy miles up a river on a merchant steamer.

In the last half of 1901, the First Judicial District of the Philippine Islands consisted of four provinces, to wit, the two already named and two others, Isabela and Neuva Viscaya. The Civil Government had been inaugurated July 4, 1901. Pursuant to the Judiciary Act, I had opened court in the Province of Ilocos Norte in July and had kept busy there until time to depart for Cagayan, to open the fall term of court there on the date fixed by law, which if I recollect aright was the first Monday in September. Cagayan Court duly opened and kept grinding until time to adjourn in order to open in Isabela province on the statutory date, which, if I mistake not, was the first Monday in October. The trip from the capital of Cagayan Province to that of Isabela Province was interesting. At the outset, before we started, a moral question arose. The rainy season was in full swing, the roads were impassable, and the river was swollen. No native boat could travel up that stream forty miles This river, the Rio Grande de Cagayan, — there are numerous "Rio Grandes," in all Spanish countries, each being named after the territory it drains — watered a wonderfully fertile valley, down which it ran due north some hundred and fifty miles or more to the north end of Luzon, and into the China Sea. The Cagayan Valley is the great tobacco country of the Philippines. The tobacco industry there is controlled very largely by a corporation called "The General Tobacco Company of the Philippines." It has been there a great many years, and is fairly well equipped with most of the essentials, including river boats. Seeing my emergency, they offered me a small steam launch. She was big enough to hold the *padrone* (man in charge of her), Mr. Brower (my stenographer), and myself, little enough to get through the shallow places, and strong enough to swim up stream. She was the one thing that made possible that year a session of the Court of First Instance of the Province of Isabela at the time and place prescribed by law. I decided that the travel contemplated was necessary for the public service and accepted the offer. If the Tobacco Company, had had any case of importance pending in Isabela province, I knew the chances were ten to one that I

would have already heard about it during the five or six weeks' session just held in Cagayan Province, where their headquarters was situated. As it turned out they had no case of any kind pending. They were simply and genuinely anxious to comfort their stockholders in Paris and Madrid by helping to restore public order and the regular administration of justice. Nor was financial anxiety the only reason for their courtesy. The company's agents were nearly all Europeans, with families. They were interested in reducing to a minimum the danger to themselves and their families from assassination and arson. "In the days of the Empire," as the period of military regime in the Philippines is fondly called by those who were there then, I could, as a military officer, simply have sent for the Tobacco Company's Agent, borrowed his boat for as long as might be necessary and given him a certificate afterwards specifying the boat and how long it had been used. The next Quartermaster coming that way with funds would pay the bill. But alas, those halcyon days were gone forever! You could no longer be a benevolent despot, and say "*Lex regis voluntas*," or "this is *pro bono publico* and 'goes,' whether you like it or not." You had to be benevolent along prescribed lines according to the *Lex Scripta*. Wherefore, great was my joy at the proffer of the launch. It seemed a substantial point to be gained, if the courts of the newly inaugurated government could open, from the very beginning, at the time fixed by law, and continue to do so thereafter in each province, twice a year.

We had but one adventure on this trip, though it took some three days to go the forty miles. At a sharp bend in the river the current proved too swift for the steam strength of our little launch. She was caught in the grip of it and carried whirling round and round some hundred of yards down stream, until we finally succeeded in pulling her into the bank by catching hold of overhanging limbs, tugging with boat hooks, and the like. At this junction the *padrone* very sensibly remarked that even if he could manage to get up a little more steam pressure than before, still, further attempts would be unwise, because if the same thing should again happen, driftwood and other things might get mixed up in the propeller and break it; and they could not get another propeller anywhere nearer than Hong Kong. It was a wonder some such catastrophe had not already happened. However, there was a tobacco hacienda, near the river, managed by a fine, hale, and hearty old Englishman, famed for his hospitality in all the region round about. Thither we were conducted. Our host and his son between them managed to provide us with dry garments until our own could be dried. (The main baggage had been left behind to come up on a freight boat.) Then we had a bountiful supper, including wild duck and venison, killed that day in the neighborhood. At its conclusion the wife of mine host, a Portugese lady, together with her two daughters, discoursed sweet music on piano and violin until about ten or eleven o'clock, when everybody turned in for the night. Next morning bright and early — I mean early, not bright, for it was still raining as no one in America ever saw rain come down — we started to finish the rest of our trip to the Capital of Isabela province, a town called Ilagan, on horseback. This we did without further accident or incident.

Having now travelled as it were, gentle reader, from the Ilocos Norte Court House to that of Cagayan, and thence to Isabela, the third provinces of the First District, you may say, with heartless nonchalance, "Oh, it could have been worse." But after a glimpse at the journey from Ilagan to my fourth provincial Capital, Bayombong, in the province of Nueva Viscaya, during the rainy season, it is confidently hoped that you will not repeat the remark just quoted.

From Ilagan to Bayombong is about ninety miles. The first third of the way you are swimming rivers, mostly. After that

you ascend gradually for some twenty miles or more, from the low country toward the mountains. Then comes about twenty-five miles of mountain trail, such as would delight the heart of any true member of the Alpine Club, or the Ararat Society, except that there dwell among the fastnesses through which this trail winds a lot of savages — "half devil and half child" — who till the soil as well as hunt game, and who entertain a belief that if at the season when a certain red flower blooms they go abroad in the land and cut off the heads of wayfarers and stick them about over their fields at the end of long poles, the crops sown in such fields will prosper beyond compare. If you get safely through this twenty-five miles and don't get drowned in the river just beyond, your troubles are over, and during the rest of the journey you feel as complacent as Sergeant Mulvaney did after the taking of Lung-tung-pen.

As the time approaches to adjourn the October term of the Court of First Instance of Isabela Province in order that said court might open its first regular semi-annual session in the adjoining province of Nueva Viscaya in the month of November, the presiding judge of the court, and the stenographer, began to gather information and compare notes, with a view of getting ready for the next change of venue. The 16th United States Infantry was garrisoning that part of my district which lay in the Cagayan Valley, and Captain Chrisman of that regiment, commanding the United States forces at Ilagan, at whose house I stopped during the term of court held in Isabela Province, advised me not to undertake the trip to Bayombong without a strong escort. This he offered to furnish, and did furnish. The escort consisted of some six or eight soldiers of the 16th Infantry, mounted, and armed with carbines and revolvers, and some American packers, to look after the pack mules. The packers had revolvers. This made about ten beside Brower and myself, who also had revolvers — twelve armed Americans, all told. In addition to the foregoing, a constabulary officer turned up at the last moment, bound from Ilagan for Bayombong also. He was to carry over a lot of money, and supplies, and was taking along a guard of native constabulary just about equal, in numbers, to our own party. So that we were, altogether, near twenty-five. This made us practically safe in the day time against the head-hunters, because they had no firearms, and we could avoid camping in their country over night by crossing it in one day — rising early, travelling briskly, and not stopping for a midday meal.

To appreciate the apparently insoluble difficulty which confronted us at the very threshold of the Ilagan houses from which we emerged in the wet grey dawn of the morning after our last night there, you should know, roughly, how the land lay. Imagine a capital Y inverted thus, ⅄, north lying in the direction of the top of this page. The two arms of the inverted letter represent two rivers, one coming from the southeast, the other from the southwest. Where the two arms meet to form the main stem of the letter, is where the two rivers meet to form the main stem of the Rio Grande de Cagayan, which flows due north to the sea. At the junction of the two rivers lies the town of Ilagan. Our destination, Bayombong, being southwest of the starting point, we had an uphill journey, *i.e.* up the slant of the water shed which meant (that far up the river — in the rainy season) that we must travel all the way by land. To go southwest we must get out of town by crossing the left or west fork. The point of land on which the town lay was nothing less than a bluff, and a high one at that — possibly forty feet above the ordinary low water. On this particular morning the river was risen about half way to the top of the bluff.

But before we start upon our journey, the *mise-en-scène* would be incomplete without mention of the tpyewriting machine. Prior to our departure from Manila, I had suc-

ceeded, by dint of much effort, in getting one. My service in the army had taught me to beware of all such answers of Quartermasters and the like as, "Go ahead, we'll get it up to you a little later." This machine was a delight to the eye. It was a brand new Remington with 70 spaces. It represented a rate of progress in taking down testimony in court at least double that of the inexorably accurate and skillful, but hopelessly slow, escribientes — penmen — left over from the Spanish regime. Moreover, as the Spanish law, still in force, required the original record to be sent up to the court of last resort in case of appeal, this machine represented also the making of two copies at once, the carbon copy to be retained in case of appeal as against loss of the original in transit.

Brower, the Remington and the undersigned crossed safely in a canoe without being swept down to where the two rivers meet, by adopting the very simple expedient of starting a prudent distance above the forks of the river. Then we put the oilskin over Mr. Remington and watched the circus. How those twenty odd men got their twenty odd horses and half dozen mules across that boiling torrent I hardly know to this day. I have heard of General Shafter's skill in taking cavalry across the Rio Grande in the early part of his career. I have also heard imputed to him the frequent use, in conversation, of expletives not suitable for publication. There must be some connection between the two. These packers actually seemed to neutralize the terror which the roar of the river instilled into the swimming stock by the roar of the stream of their profanity. Finally, after about two hours of much floundering and several narrow escapes, both of men and beasts, from drowning, we found ourselves on the farther shore, all present and accounted for — soldiers, packers, constabulary, and stock; also baggage, including the typewriter. Another twenty minutes for the packers to perform their wonderful feats of loading and cinching the aparejos (pack saddles), and we're off.

That day we made about eleven miles, if I remember correctly. Only one indelible incident occurred during the course of it. We came to a small stream. How deep it was no one knew. It seemed hardly fair to require anyone else to take a chance I was unwilling to take myself. So I rode in. The horse waded nearly halfway across, then a bit of swimming, then bottom again, then shore. However, he manifested some fright for which I could not account, on the way over. I was afterwards informed by a soldier that about that time the rest of them had noticed a crocodile on the other bank, a little bit down stream from the point my horse was making for, and, curiously enough, that the creature instead of darting for us had run down stream on the bank a little way and then plunged in headed in the same direction, that is, away from myself and horse. I assume he was not hungry. The next day late in the afternoon, we crossed another swollen river, in canoes, swimming the stock alongside, leading them with halters. Though not specially superstitious, I have always disliked a grey mare mule, and since that ninth day of November, 1901, I consider them positively uncanny. This particular one was old and vicious, — not merely nervous, but beyond a reasonable doubt, vicious. She meddled with and annoyed the other swimming animals until about mid stream, where it was swiftest, and there she put one of her front feet into the canoe and turned it over. Of course we had all to swim for our lives, for the river was not only far beyond our depth, but was swift and had some ugly eddies. However, nothing was lost except a revolver and cartridge belt Captain Chrisman had loaned me, which I had fortunately unbuckled and laid in the bottom of the canoe before we pushed off. A 44-Colt's and a belt full of cartridges buckled about a swimmer make a very material difference in the time he can hold his own against a

boisterous river. If these articles had not gone to the bottom as indicated, their custodian probably would have.

The next day we reached a river where, ordinarily, a ferry was maintained by the provincial authorities. It had, however, been swept away by an avalanche of water several days before. It began to look as if I would have to do what I had seen no less a person than General Lawton do two years before, when we were hot on Aguinaldo's trail, viz., stop and wait for the river to go down. But no. The everlasting resourcefulness of the American soldier came to the rescue. (Our men had learned something of native customs since General Lawton crossed the Agno in '99.) One of Captain Chrisman's men espied an "hombre"[1] by the river side, with a caribao.[2]

The soldier pressed the hombre into service, made him take his bolo[3] and make a raft by cutting down some half dozen bamboo poles about six inches in diameter and tying them together at both ends with rattan. The raft once completed, a scene ensued which I have always poignantly regretted not having been able to kodak, all negligible baggage having of necessity been left behind. It was the spectacle of my acutely modern 70-space keyboard Remington crossing that river by a method of transportation at least as primitive as that which was customary in the days of Abraham. Brower and I surveyed the raft and held a consultation. Under no circumstances must his typewriter get wet. While these bamboo rafts cannot sink, they can get submerged several inches or more, according to the weight superimposed.

Accordingly, before starting across, Brower places his machine on the raft, as carefully as Daniel Boone would have placed his rifle, then takes his stand astraddle of it — Colossus-of-Rhodes-like — with one hand on the handle ready to lift the typewriter, in case the frail craft should, under stress of cargo, settle below the water line. Passenger and freight being now aboard and ready, the hombre squats down in phlegmatic comfort at the front end of the raft, catches hold of the caribao's tail, and says something to him which being interpreted into the dialect of his happier brother-peasant of the Georgia cotton fields would be; "Git up, mule!" The caribao strikes out, as comfortably as a mule plowing, and as unhesitatingly as a tug towing a lumber schooner, and tows the raft and contents across without mishap, his tail acting as the tow rope. This first load deposited, everything else is ferried over likewise in due time, horses led across, swimming.

Nothing of note happened along the mountain trail through the region where the head hunters live, except this; late in the afternoon of the last day of the journey, we were climbing a steep ascent, single file of course, every man dismounted, and leading his horse to save his strength. Brower and I were at the rear of the column. He was the very last man and I next. We two stopped to take a shot at a deer. While we tarried our escort and pack train, following the trail, turned a sharp curve far up the mountain and were lost to view and hearing. I fired. Whether I hit the deer or not will never be known. Interested in watching the shot, Brower had thrown the reins over his horse's head, so as not to be disturbed by the animal's eager nibbling at the scant vegetation peeping here and there about the path. As the report of the gun rang out, the horse became frightened, wheeled about, and started at a trot down the perilously

[1] Pronounced in soldier-Spanish *umbry*—accent on first syllable. It means an adult male native.

[2] Water buffalo, the plow-animal and general-utility beast of burden of the Philippines. This creature on account of his great web-looking hoofs can plow in a rice paddy where a mule would sink up to his belly, and can swim indefinitely without fatigue.

[3] A short sword, or machete, or whatever one may wish to liken it to, worn hung to a belt at the left hip by all Filipino peasants and used for every thing from chopping down sugar cane or trees, to decapitating one's enemy, and from opening a standard oil can, to assassination.

narrow trail — a cliff wall on one side and a ravine on the other — apparently bound for Ilagan, his place of residence. Brower went back after him, and I by agreement pressed on, to try and overtake our alleged "escort." After an hour vainly spent in such endeavor, I concluded to stop and wait for my companion. If the head hunters rush a lone traveller, one of their number can strike from behind while he is pumping lead into those in front. But two well-armed men, back to back, have some showing to drive them off. At last Brower came up, on foot, having despaired of the recapture of his absconding steed. He climbed up behind me in the gloomy, boggy depths of a forest-shrouded swamp — a jungle, Kipling would call it — and we proceeded as briskly as a tired horse, carrying double, can be urged to go, mentally, indeed even audibly, denouncing the mutton-headedness of our "escort," in leaving their charges to a tragic and sanguinary fate. At last on one hilltop we sighted them far ahead on another, and made them hear. They halted and waited, and the tension was over. That night we crossed our last swollen river, without mishap, notwithstanding the stream was swift and it was already dark — inky dark. Upon this occasion I beheld for the first time the wonderful skill of these ex-cow-punching packers in manipulating an *aparejo* and its load. They unloaded each animal *in the dark*, ferried the things and led the mules across, and reloaded in the dark, on the far side of the river; and every girth was cinched properly, and each aparejo so loaded that the mule could trot without loosening either the saddle or cargo. Having crossed the last river we came in a few moments to a town, where the Presidente (Mayor) who had been advised in advance of our coming, dried, and fed us and housed us comfortably for the night. Next morning he drove us in carriages, under a series of "triumphal" arches — they weren't exactly *arcs de triomphe*, but they were small bamboo suggestions of the one on the Champs-Elysées, or that at the entrance to Prospect Park, Brooklyn — over the few remaining miles that lay between us and our destination. Just about high noon we entered in state the limits of the fourth and last of the Provincial Capitals of the First Judicial District, the pueblo of Bayombong.

New York, N. Y., August, 1907.

AN INTERNATIONAL PRIZE COURT

By Amos S. Hershey

THE extreme desirability, if not the absolute need for an International Prize Court has long been admitted on all sides. After a very thorough study of this question, the Institute of International Law at its Heidelberg session in 1887, adopted a project for the organization and procedure of such a court.[1]

This need was demonstrated anew during the Russo-Japanese war when Russian prize courts condemned and confiscated a number of neutral cargoes (including the vessels, in a few instances), on wholly insufficient or illegal grounds. It is true that the Russian High Admiralty Court at St. Petersburg reversed most of these decisions, either in whole or in part (*e.g.*, in the cases of the *Allanton*, the *Arabia*, the *Calchas*, and the *Knight Commander*); but this was only after long delays and repeated protests on the part of Great Britain and the United States.

The Second Peace Conference which met at the Hague on June 15, 1907, had not been in session more than ten days before two projects [2] — one German and the other British — for the establishment of an International Prize Court had been submitted to the second sub-committee of the First Commission on Arbitration, presided over by M. Bourgeois. At the first meeting of this committee on June 25, M. Renault (France), Sir Edward Fry (Great Britian), and Professor Kriege (Germany), were appointed as a *comité d' examen* to study and report upon these proposals.

The British plan provided that each of the Signatory Powers whose merchant marine surpasses a total of 800,000 tons should appoint a jurist and a substitute judge of recognized competence in questions of maritime international law within three months after the ratification of the agreement. The right of appeal was confined to *neutral states* and an appeal was only allowed after a national prize court of last instance had given its decision. The president of the court, whose term was limited to one year, was to be chosen in alphabetical order by such powers as had the right to appoint judges.

The German project, which was largely based on the plan suggested by the Institute of International Law referred to above, provided that the court was to consist of five members, two of whom were to be admirals representing the belligerents. The three remaining judges were to be selected from the list of members of the Hague Tribunal of Arbitration in a somewhat complicated manner by three neutral powers, and the court was only to be instituted after the outbreak of war between two or more states. The right of appeal was to belong to *neutral and belligerent individuals* as well as to neutral states, and might be made from the decision of a national prize court of first instance. The president was to be elected by the court itself from among those of its members who belonged to the Hague Tribunal, and liberal provision was made for the payment of the judges.

The advocates of the German plan claimed that its advantages over the British scheme were at least twofold. In the first place, it provided for a direct appeal from national prize courts of the first instance by injured belligerent and neutral individuals instead of merely by neutral states. Secondly, it created a court *ad hoc*, composed partly of admirals, in which belligerents would probably place greater confidence than in a permanent body of international jurists.

[1] For the text of this project, see *Tableau Général de l' Institut de Droit Int.*, pp. 217–219, sections 100–109 of the *Reglement International des Prises*.

[2] The texts of both projects were published in *Le Courier de la Conference*, for June 28, 1907.

Theoretically, it might seem very desirable to establish an International Prize Court wholly composed of neutrals, but in practice it seemed wise not to attempt too wide a departure from present methods of adjudication. The transition from purely belligerent to purely neutral prize courts had perhaps better be made gradually.[1]

The partizans of the British project maintained that its advantages were threefold: "First, the court would consist (solely) of expert juris-consults; secondly, it would be established on an eminently neutral basis; thirdly, it would be established in time of peace and be secure from the influences of passions and prejudices so easily [2] and widely excited in time of war."

The discussions in committee which followed revolved about the following points were put in the form of a series of questions: (1) Should an International Prize Court of Appeal for the adjudication of maritime prizes be instituted? (2) Should the jurisdiction of the court be confined to cases arising between the belligerent state making the capture and the state claiming that its subjects had been injured by capture, or should it extend directly to individuals claiming to have been injured? (3) Should this jurisdiction extend to all matters relating to prizes or merely to captures in which governments or neutral individuals are interested? (4) When shall the role of international jurisdiction begin? Should it commence as soon as the national tribunals of first instance shall have rendered their decision upon the validity of the capture or should it be deferred until a final sentence shall have been obtained in the state of the captor? (5) Should the court be permanent or should it be instituted *ad hoc* upon the outbreak of war? Other questions (6, 7, and 8) framed by the *comité d' examen* related to the composition of the court, principles of international law to be applied, and the nature of the proof required in behalf of the claimant.

It was unanimously agreed that an International Prize Court of Appeal was necessary, although Mr. Tsudzuki, the first Japanese delegate, expressed the hope that before such a court be instituted, the Conference would reach an agreement on the codification of rules affecting prize cases.

In answer to the second and third questions, Baron Marshall von Bieberstein and Professor Kriege of Germany urged that the right of appeal should belong to individuals rather than to states, inasmuch as the action of the latter might be influenced by political considerations. Moreover, before championing the cause of its nationals, a state should examine their claims in fact as well as in law — a work which it is often very difficult, if not impossible to accomplish. It would seem preferable that individuals themselves be required to prove the validity of their claims before the International Court. War being a conflict between states and not between individuals, the subjects of belligerent states are entitled to the same protection as are those of neutral states. The majority of the members of the committee seemed to agree with the German attitude on these questions, even Sir Edward Fry failing to advance any arguments in favor of his contention that neutral states alone should have the right of appeal.

In answer to the fourth question the German delegates argued that the appeal should lie from a national court of first instance on the ground that an appeal from the highest national court might lead to friction and loss of respect for the court in case its verdict were quashed. It was also urged that such a procedure would be long and very onerous. But Sir Edward Fry maintained that all national instances should be exhausted before having recourse to the International Court.

Respecting the permanency and composi-

[1] See writer's letter from The Hague to the New York *Evening Post* for July 20, 1907.

[2] *London Times* (weekly) for June 28, 1907, p. 405.

tion of the court, opinions were very much divided. Professor Kriege, although admitting that permanence would give to the court a more stable and judicial aspect, argued that practical considerations were opposed to it. Peace and not war is the ordinary condition of humanity, and why establish a permanent tribunal which during long intervals would have nothing to do? But M. Ruy Barbosa of Brazil observed that permanence was necessary in order to secure good judges. Temporary judges are wanting in experience, impartiality, and independence. He suggested that they might devote their years of peace and enforced leisure to the study of maritime law.

Professors Kriege and de Martens favored the admission of two admirals representing the opposing belligerent powers in order to afford necessary information. They would tend to neutralize each other and the preponderance would in any case be on the side of the jurists selected from the Hague Tribunal. Mr Choate declared in favor of the presence of two admirals acting in a purely advisory capacity.

M. Barbosa was strongly opposed to the British idea of limiting the right of appointment of judges to states having a merchant marine of over 800,000 tons. This, he declared, would be to submit the weak to the justice of the strong and would substitute another principle (adjudication?) for that of arbitration. He suggested a grouping of the smaller states in such a manner that each group might possess the required amount of tonnage.

M. Tcharikoff held the seventh question to be most important and declared that Russia reserved her opinion upon the scheme as a whole until it had been decided what principles of international law should be applied by the court. It was generally agreed that in the absence of conventions, the ordinary rules of international law would serve as a juristic base in the decision of cases. Several delegates expressed the hope that the conference itself would succeed in establishing such rules in addition to those that already existed, and that these might serve as a basis of further development by judicial decision.

In the meantime, the third and fourth commissions of the conference addressed themselves seriously to the work of formulating rules of maritime law; but the task proved to be too great and intricate for their combined wisdom, and the results of their labors seem meagre enough. Beyond certain rules relating to "days of grace," the transformation of merchantmen into warships, the inviolability of mail matter at sea, the exemption of coast fishing vessels, etc., very little has thus far been accomplished in the direction of formulating an authoritative code of maritime law which might serve as a juridical basis for the decisions of an International Prize Court. Especially has there been a total failure to agree upon definitions of contraband and blockade, to prohibit the sinking of neutral merchantmen, and to abolish the right of the capture of private enemy property at sea.

But in spite of these failures, partly through private negotiation and partly as a result of further discussion in committee, a project for the establishment of an International Prize Court was finally agreed upon and submitted to the conference at its sixth plenary session on September 21, 1907. It was presented as a joint proposition from the delegations of Germany, the United States, France, and Great Britain, and was accompanied by a lucid and able report read by M. Renault in the name of the *comité d'examen* of the second sub-committee of the First Commission on Arbitration.

In submitting this project, M. Renault explained why an International Prize Court was necessary:

"The seizure of a neutral ship implies a real or pretended violation of neutrality. Adjudication seems in this case to be a necessity instead of a concession as in the case of the capture of enemy property. To

whom shall this jurisdiction belong? In fact, it is exercised by the captor.

"Rationally, the captor should play the role of claimant in order to validate the seizure and secure confiscation, whether of the ship or cargo. But it is generally otherwise — the one whose goods have been seized is claimant and he must prove the illegality of the capture.

"In fact, if one goes to the bottom of things, one finds that the prize courts are national tribunals which decide international questions. They must apply the laws of their country without inquiring whether these laws do or do not conform to international law. That is to say, a state may regulate as it wishes international relations by its own laws or regulations. It is responsible however, to other states for every violation of the principles of the law of nations, whether such violation be the result of a defective legislation or jurisprudence, or of arbitrary acts on the part of the government or its agents."

This report goes on to say that "under such circumstances, one should not be astonished that the decisions of prize courts have often given rise to well-founded complaints." If the government to which individuals make these complaints is strong, it presents diplomatic claims which may lead to international controversies.

In answer to the important question, "What rules of law shall the new prize court apply?" M. Renault said:

"If the law of maritime warfare were codified, it would be easy to say that the International Prize Court, like the national tribunals, should apply international law, but this is far from being the case. Upon very many points of which some are of great importance, the law of maritime warfare is still uncertain, and each state formulates it in accordance with its own ideas and interests. In spite of the efforts made at the present conference to diminish these incertitudes, it is impossible to conceal the fact that very many uncertainties still remain. Hence there arises a serious difficulty.

"It goes without saying that even in the absence of a formal convention, we may have a customary rule which is recognized as the tacit expression of the will of states. But what will happen if the positive law, written or customary, is silent? The solution indicated by strict principles of judicial reasoning do not appear doubtful. In default of an international regulation firmly established, international adjudication will apply the law of the captor.

"It is doubtless easy to object and say that we shall thus have a law which is very changeable, often very arbitrary and even crude, and that certain belligerents will abuse the latitude left them by the positive law. This will be a reason for hastening its codification in order to get rid of the gaps and uncertainties of which complaint is made.

"Nevertheless, after ripe reflection, we believe that we should propose a solution which is doubtless bold, but of a nature seriously to ameliorate the practice of international law. '*If rules generally recognized do not exist, the court will decide in accordance with the principles of justice and equity.*'[1] It will thus be called upon to *make law* and to take account of other principles than those applied by the national prize courts whose decisions are challenged before the International Court. We have the confidence that the magistrates chosen by the Powers will realize their high mission, and that they will act with moderation and firmness. They will modify the practice in the spirit of justice without overthrowing it.

"Let us then accept a court composed of magistrates charged with supplying the deficiencies of positive law until the codification of international law, effected by the governments, simplifies their task."[2]

[1] Sec. 2 of Art. VII.

[2] For a digest or summary of M. Renault's report, see *Le Courier de la Conference* for Sept. 10,

Let us now examine the text[1] of the "Project for a Convention for the Establishment of an International Prize Court."

Titre I consists of nine articles, and contains "general provisions" relating to the conditions under which, and the states and individuals by whom, an appeal may be made, and the kind of law which shall be applied by the court.

Art. 3 provides that an appeal may be made to the International Court from the decisions of national tribunals: (1) When these concern the property of neutral Powers or of neutral individuals; (2) When they concern enemy property in cases (*a*) of merchandise conveyed upon a neutral ship; (*b*) of an enemy ship captured in the territorial waters of a neutral Power, provided the neutral Power has not made this capture the subject of a diplomatic claim; and (*c*) in case of a claim founded upon the allegation that the capture has been effected in violation of a provision of a convention in force between the belligerent Power or of a legal regulation issued by the belligerent captor. An appeal against the decision of a national tribunal may be based upon the allegation that this decision is not justified either in fact or in law.[2]

Art. 4 provides that the right of appeal may be exercised under prescribed conditions: (1) By a neutral Power; (2) by a neutral individual; (3) by an individual dependent upon an enemy Power.

Art. 6 declares that the right of jurisdiction of national tribunals cannot be exercised in more than two instances. "The legislation of the belligerent captor shall determine whether appeal is open after a decision has been given by a Court of Appeal or the Supreme Court. In case the national tribunals have failed to give a final decision within two years from the date of capture, the Court may be directly seized of the case."

Art. 7 provides that in the absence of conventions or national legislation, the court shall apply the rules of international law. *If generally recognized rules do not exist, the Court shall decide in accordance with the general principles of justice and equity.*" Justice and equity shall even be applied in cases where the rules of proceedure enacted by the belligerent captor is defective.

According to Art. 9, "the Signatory Powers agree to submit in good faith to the decisions of the International Prize Court and to execute them with as little delay as possible."

Titre II deals with the organization of the court in seventeen articles. The Signatory Powers agree within six months after the date of ratification of the Convention, to appoint judges and substitutes for these judges who shall be "juris-consults of recognized competence in questions of international maritime law." The term of appointment for both classes is for six years and they may be reappointed. The judges are equal and enjoy diplomatic privileges, but shall rank in accordance with the dates

1907. There seems to be a contradiction between the statement that "in default of an international regulation firmly established, International Jurisdiction will apply the law of the captor," and the assertion that "if rules generally recognized do not exist, the court will decide in accordance with the general principles of justice and equity." They may perhaps be reconciled by a comparison with Sections 2 and 4–5 of Art. VII of the Convention. Secs. 4 and 5 of Art. VII read as follows: "If, in conformity with Sec. 2c of Art. III, recourse is founded upon a violation of a legal provision ordained by the belligerent captor, the court shall apply this provision.

"The court cannot take into consideration the defects in the procedure enacted by the legislation of its belligerent captor in cases in which it is of the opinion that the consequences would be the contrary to justice and equity."

[1] See the *Courier de la Conference* for Sept. 22, Sept. 24, and Oct. 2, 1907.

[2] It thus appears that the right of appeal of a belligerent is limited, whereas that of a neutral is unlimited. As M. Renault remarks, a belligerent can never ground an appeal on a "violation of a rule of customary law or of a general principle of the law of nations."

at which their appointments are notified to the Administrative Council at The Hague. In case this date is the same for several judges, seniority of age shall determine precedence. The titulary judges shall take precedence over the substitutes. (Arts. 10–14.)

The court shall consist of fifteen judges of whom nine shall constitute a quorum. If a judge is absent, he shall be replaced by his substitute. Art. 15 provides that the following eight Great Powers shall always be entitled to a seat in the Tribunal: Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia. "The judges and substitutes shall be appointed by the other Powers in rotation in accordance with the list[1] annexed to the present Convention. Their functions may be exercised by the same person. The same judge may be appointed by several of the said Powers."

"If a belligerent Power, according to the system of rotation, has no judge sitting in the court, it may require that the judge which it has appointed shall participate in the trial of all cases arising out of the war. In this case it shall be decided by lot which of the judges whose turn it is to sit shall withdraw. But the judge appointed by the other belligerent shall not be excluded." (Art. 16.)

No one can sit as judge who has in any way taken part in the decision of the case or who has been counsel or advocate for one of the parties in the national courts; and no judge may act as agent or advocate before the International Court during his term of office. (Art. 17.)

Art. 18 embodies in modified form certain features of the original German project referred to in the first part of this article. "The belligerent captor has the right of appointing a naval officer of high rank who shall sit in the character of an assessor with advisory functions. The same right belongs to the neutral Power, which is a party to the litigation or to the Power whose nationals are parties to the dispute. If, in accordance with this latter provision, there are several interested Powers, they should agree, if necessary by lot, upon the officer to be appointed.

"Every three years the court shall elect its president and vice-president by an absolute majority of votes. After the second ballot the election shall be by relative majority. In case of an equal division of votes, the selection shall be made by lot." (Art. 19.)

Art. 20 provides for the payment of the judges. They shall receive though the International Bureau at the Hague one hundred florins per *diem* during the exercise of their functions, together with an indemnity for their travelling expenses. As members of the court they are not to receive any remuneration from their own government or from any other Power. They shall sit at The Hague and can only sit elsewhere, unless forced to do so, with the assent of the belligerent parties. (Art. 21.)

Arts. 22 and 23 relate to the duties of the Administrative Council and International Bureau at The Hague, the latter of which is to keep the archives and serve as a record-office. The court shall decide which language or languages may be used; but "in all cases, the official language of the national tribunals which have taken cognizance of the case, may be used before the court." (Art. 24.)

Titre III deals in twenty-two articles with the procedure of the court. Most of these are comparatively unimportant except to the interested parties and may be omitted here. The most interesting and important is perhaps Art. 43, which prescribes that the deliberations of the court shall be secret, although "the discussions are public unless a litigant Power asks for secrecy." (Art. 39.)

[1] This list has unfortunately not as yet been published in accessible form. The principle of rotation will be applied to the smaller states, *i. e.*, the judge of one state will, at the end of a specified time, be succeeded by a judge representing another state.

"All decisions shall be by a majority of the judges present. If an even number of judges is sitting and the votes are equally divided, the vote of the last of the judges in the order of precedence (see Sec. 1 of Art. 12) is not to be counted." (Art. 43.) The verdict of the court must be pronounced in public and be accompanied by a statement of reasons; it must mention the names of the judges who have participated in the decision, and be signed by the president and the clerk of the court. (Arts. 44 and 45.)

Each party defrays the costs of its counsel. The losing party has also to pay the cost of the proceedings; and, in addition, to turn over one-hundredth of the value of the object of litigation as a contribution to the general expenses of the court. A deposit is required as a guarantee from a private individual. (Art. 46.)

The general expenses of the court will be borne by the Signatory Powers in proportion to their participation in its action as contemplated by Article 15 and the annexed list (Art. 47.)

When the court is not in session its functions will be exercised by a committee of three judges designated by the Court. (Art. 48.)

This project was adopted by the Conference on September 12, 1907, by a vote of thirty-seven votes against one, with six abstentions. The only state directly voting in the negative was Brazil who was dissatisfied with her share in the appointment of the judges. The abstaining states were Japan, Russia, Turkey, Siam, San Domingo, and Venezuela. Japan and Russia appear to think that the establishment of an International Prize Court should be preceded by a codification of maritime law — an opinion which seems to be shared by a large and influential section of the British public.[1] Indeed, it is very doubtful whether public opinion in England, which is extremely jealous of belligerent rights and British naval supremacy, will ever permit the ratification of the Convention.

Ten Powers — China, Chile, Columbia, Cuba, Equador, Guatamela, Haiti, Persia, San Salvador, and Uruguay — entered reservations concerning Article 15, which provides for the nomination of judges and a scheme of rotation for the smaller states.

It will thus be seen that this project lacks that unanimity or even general consensus which is supposed to be necessary (or at least desirable) in support of principles or usages of international law. Two important Powers — Japan and Russia — have withheld their assent, and a considerable number of the smaller states seriously object to the way in which the court is constituted. It is doubtful whether the British House of Lords will consent to enact the legislation which is needed to carry the Convention into effect, or whether the American Senate can be induced to ratify it. Whatever our prepossessions in favor of such a court may be, the fact must be faced that the majority of its members will be jurists who have been trained in the continental school of international jurisprudence, and that they are not likely to treat Anglo-American views and decisions on maritime law with that respect and veneration which we have been taught to think they deserve.

BLOOMINGTON, IND., October, 1907.

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[1] See, *e.g.* letter of Professor Holland to the London *Times*, republished by the *Courier de la Conference* on Sept. 24, 1907; editorial entitled "*Pas de code naval, pas de Cour des Prises* in the *Courier* for Sept. 7, 1907; a very remarkable editorial in the London *Times* for Sept. 30, 1907, and editorial in the London *Spectator* for Oct. 5, 1907.

COTTON MATHER IN THE PROBATE COURT

By Eugene Tappan

SOME trouble came to good Cotton Mather in his lifetime, and to his estate after his death, in consequence of his accepting the administration of the estate of Nathan Howell, a Boston merchant. This was in 1716. In a letter to Judge Samuel Sewall, widow Katherine Howell writes that she has "prevailed with my honoured Father-in-Law, Dr. Mather, to accept the administration." The bond was in the sum of £8000, and the sureties were Timothy Thornton, shipwright, and Giles Fifield, mariner.

The Howell estate was a difficult one to adjust. The inventory amounted to £7609, 9*s*. 5*d*., but this was by no means cash or quick assets. Fully four-fifths were "sundry debts" and "ship bills" owing to the deceased merchant, while more than £4000 were due from the estate. The reverend doctor was chargeable with the full inventory, and was expected to make as much of it as possible good. Wisely enough he employed some managers or attorneys to collect the debts, and they rendered their accounts to the court charging for their services £735. The accounts, after being audited, came before Judge Sewall, October 17, 1720, who allowed them, according to the report of the auditors, as to all matters except the charges, "considering also," the decree reads, "that the inventory is somewhat extraordinary being much if not mostly composed of debts due to the estate by mortgage bonds or books, and not of estate received by the said attorneys or any other related to the said estate. But the attorneys' charge of seven hundred thirty-five pounds for their charges and trouble appears to me both unreasonable and excessive, and I deny to determine anything concerning it."

A letter on file in the probate papers written by Dr. Mather to the judge a few weeks later shows the distress of the divine and his anxiety to be rid of the incubus of the estate.

"*To the Hon^ble^ Sam^l^ Sewall, Esq., Judge of the Probate:*

My proceedings in the administration on the estate of Nathan Howell deceased having been laid before your Honour and your Honour being able to release me from the bonds of proceeding any farther under that Unhappiness, and apprized of my Weighty Reasons to desire it, I humbly petition for the Grant of y^t^ Justice & favour to

Your honour's Most hum^l^ Serv^t^,
Cotton Mather."

*Nov^r^* 8, 1720.

At the foot of this letter is the following memorandum of the court's decision, "As I denied to determine the Recompense of Dr. Mather's Attorneys; so I am of opinion it is inconvenient for me to judge in Removing the Administration, and therefore deny it.

Samuel Sewall, *J. probt.*"

*Novemb^r^* 8, 1720, P.M.

The Massachusetts Historical Collections, vol. 2 of 4th series, page 122, contain a letter supposed to have been dictated by Cotton Mather addressed to Judge Sewall. It opens with a request to burn it after reading, and tells of the sorrows of Dr. Mather on account of the burden of his position as administrator. "Old Mrs. Fyfield keeps worrying about y^e^ ruin that her Estate must suffer because of her husband's suretyship." The letter states that the doctor fears to answer the knock at the door lest an officer is standing there to arrest him, and his mind is not in a proper frame to write his next Thursday lecture upon the Jews. The letter was received April 13, 1720. Mr. James Savage, in commenting upon the anonymous com-

munication, declares his belief that Dr. Mather wrote it. Very likely the sentiments therein expressed corresponded well with his feelings.

The woman referred to was Mrs. Elizabeth Fifield whose husband, Giles Fifield, was a surety on Cotton Mather's bond, but was now deceased. Whether Mrs. Fifield ceased to molest the calm mind of the clergyman until his death (February 13, 1728) may not appear; but after his death she pressed her grievance against his estate, to which we now turn our attention. The records show that "Rev. Samuel Mather offered an instrument or writing, bearing date April 21st, 1727, under the hand of his Father, the Revd Dr. Cotton Mather, lately deceased, praying administration *cum testamento annexo* may be granted to him."

The judge took a fortnight to consider, when Mr. Samuel Mather prayed that his motion might be withdrawn. No reason is given for this action, and the will itself is not on file.

Next, Mrs. Elizabeth Fifield applies for administration as she, the widow of Giles Fifield, is "one of the Principal Creditors of the Estate of Dr. Cotton Mather;" but her request was not granted.

She appealed to Lieut. Gov. Dummer and Council, alleging as one reason, "That your petitioner may be saved harmless and Indemnified agst the bond Given by Giles Fyfield, late husband of your petitioner, for ye faithful administration of ye sd Dr. Cotton Mather on ye Estate of Nathan Howell decd: Whereby your petr is greatly indangered."

She did not prevail, however, and Mrs. Lydia Mather, the "relict widow," having declined to act, letters of administration were granted, July 22, 1728, to Nathaniel Goodwin, shopkeeper, on the estate of Rev. Dr. Cotton Mather.

Mr. Goodwin's inventory is a surprise to us, and was a disappointment to Mrs. Fifield. He did not err, as perhaps was done in the Howell case, by putting too much in the schedules. From them it would seem that Dr. Cotton Mather left no property, except household goods valued at £235, 10*s*. 10*d*., and some waste land in Hampshire County valued at £36. The chief item was 147 ounces of silver plate consisting of a tankard, two servers, a pair of candlesticks, snuffers and stand-dish, a teapot, several broken spoons, a spout cup, a sugar dish and two porringers. Another item is 114 pounds of pewter, viz., 18 dishes, a pasty plate, "pye plate," cheese plate and "some broken puter." There are mentioned 63 chairs, flag, leather, Turkey worked and cane chairs. But there is nothing to show that he was a collector of books or a profuse author, not a Bible or a Magnalia.

To obtain a more complete inventory, the guardians of two Fifield children filed their petition May 9, 1729, complaining of the "very imperfect" inventory. "Things of the greatest value being entirely left out, as may appear by the particular list hereto annexed, and as your petitioners are Gurdians to Jonathan Armitage Fyfield & John Fyfield, minors, whose Interest very much depends on said Estate being made the most of." They pray that the administrator may be cited to show cause why those particulars ought not to be added to his schedules. The guardians were Jonathan Armitage and Samuel Adams and the wards were the young children of John Fifield, also a mariner, now deceased. The court ordered the administrator "to appear on Munday next at 11 o'clock."

The list of particulars referred to is not now among the papers on file. The next day the appraisers filed a list of three articles only, "some thing omited in the Inventory of Dr. Cotton Mather's Estate now taken by us," an iron back, something pertaining to the chimney, and "an old touren mape of the land of Canaan," £3 14*s*. in all. Nathaniel Goodwin, the admin istrator, also filed a written answer to the petition, which "Sheweth, That he has Inventored all that has been shewed to him

to belong to the Estate of the Rev^{d} Dr. Cotton Mather Dec^{d}, and the Reason he gives why the particulars mentioned in a list annexed to their petition ought not to be added is because thay have not been shewn to him to belong to the said Deceaceds Estate."

It would seem that Cotton Mather must have conveyed away the bulk of his property in his lifetime; and the point was made against the administrator that he ought to include such property in his inventory, because the bill of sale was without consideration and so a fraud in respect to his creditors, and that the administrator was concealing assets of the estate. The answer was that he was concealing nothing, and that even if the bill of sale was void as against creditors it was good otherwise, and especially that no proved creditors had appeared before the court.

The original briefs of the lawyers on each side are preserved with the papers in the case, and are interesting reading as showing the ability of the attorneys of that time and their skill in attack and repartee. John Read for the supposed creditors, and Robert Auchmuty for the administrator were leading Boston attorneys. Their briefs are here given in full.

GOODWIN ADMR'S. CASE.

Some partys concerned as Creditors pray that Nath^{ll} Goodwin, admr. of y^{e} Rev^{d} Dr. C. Mather, may shew cause why severalls mentioned may not be added to perfect y^{e} Inventory. he is Cited accordingly and answers y^{t} he is not obliged to Inventory such things as y^{e} Intestate by Deed of Gift alienated in his life time, but don't say y^{e} Intest ever so alienated any of those particulars. Whereupon I say if that be any answer, then I have forgot all my Logick now, as long since I had y^{e} most part of it.

But to Inforce their prayer they [the creditors] may urge, That every fraudulent Conveyance is void by y^{e} Comon Law agst. a prior Crr. [creditor] 3 Co. 83 a. A Gift by y^{e} father, who is indebted, to his son shal be presumed to be made to defeat his creditor, is fraudulent, & shal be void. 3 Salk. 174.2; 3 Co. 81 a, b. & more especially w^{r} y^{e} Gift is secret, y^{e} Donor holds & useth y^{e} goods as necessarys some years, nay, till his death. Ibid. & y^{s} is y^{e} Law that the Deft. saith he knows nothing of.

And the Province Law p. 142, last Impression, provides y^{t} if a credr. [creditor] complains of any person concealing any part of y^{e} Estate, they shall discover it upon oath or go to Goal til they conform. So this admr. shôd be treated, & y^{t} is y^{e} Opinion of

JN^{o} READ.

May 28, 1729.
To Mr. Armitage & Adams.

THE REPLY OF NATHANIEL GOODWIN TO ANSWER OF JN. READ, ESQ^{r}.

And first, your admr. closes with y^{e} Respon^{t} & admitts to be true y^{t} y^{e} Respondent has fergott his Logick and wilfully fergetts the facts & circumstances of y^{e} Case.

First, for y^{t} neither the sd. Respon^{t} or any other person appears as y^{e} Imediate Cred^{r} of y^{e} Intestate. & forasmuch as y^{e} sd. Intestate in his lifetime made a Bill of Sale of w^{t} y^{e} Respond^{t} would have inventoried, the sd. admr. Conceives by Law he is not oblidged to Inventory y^{e} Same, admitting y^{e} sd. Bill of Sale was fraudulent as Insinuated; for 3 Co. 83, by y^{e} Comon Law an Estate made by fraud shall be avoided only by him who hath a former Right, Title, Interest, Debt or Demand, which is not y^{e} Case of y^{e} Respond^{t} or his Clyents. & It was agreed by all y^{e} Justices of y^{e} Comon pleas y^{t} a fraudulent Conveyance is not made Void agst. all, even by y^{e} statute, but remains good agst. y^{e} Donor & his heirs, &c. Cro. Eliz. 445: therefore y^{e} Bill of Sale is Good agst. y^{e} Donor & his representatives, & at y^{e} Instance of Strangers

y^e admr. is nowise oblidged to Enter into y^e Law; neither has he Estate of y^e Intestate to pay Cost of Courts if Cast [defeated], as by y^e Province Law he must, & no Law oblidges him to subject his own private Estate.

Secondly, by y^e Oath prescribed in y^e Act of 22 & 23 Car. 2, cap^t y^e 10^th, y^e admn^r is not oblidged to Inventory y^t w^ch y^e Intestate Conveyed in his life time. vid: y^e forme of y^e Oath.

Thirdly, should y^e adm^r at y^e request of Strangers be prevailed upon to Inventory w^t is now desired, tho y^e adm^r sees a plain Bill of Sale which transferrs y^e property, y^e consequence is y^t y^e Law would Conster [construe?] Everything in y^t Inventory assetts in y^e adm^rs hands. vid. Shelly's Case, 1 Salk: 296: therefore y^e admr. knows better.

Fourthly, y^e Province Law, p. 142, is quoted by y^e Respond^t but how applicable to y^e case of y^e admr. is Submitted, for y^e admr. neither has nor dos Conceal any of y^e Intés: Estate.

If y^e Respond^t Supposes young Mr. Mather dos, he may easily have him before y^e Judge of Probate to purge himself as y^e Law Directs.

R. AUCHMUTY for ADM^r.

1729, *June* 13^th filed

Pr. I. Boydell, Reg.

The result of this attack on the administrator was not unfavorable to him, for no further inventory was filed, nor were any further assets needed in the settlement of the estate. The first and final account of administration, which was allowed by the Judge of Probate May 4, 1730, asks for allowance of the small sum of £3, 9*s.* 11*d.* paid, and shows a balance of £245, 5*s.* 10*d.* remaining for distribution to the widow and children. The order of distribution is dated May 25, 1730, and gives one-third to Lydia Mather, the widow, "two single shares or fourth parts of the remaining two-thirds" to Samuel Mather, clerk, only surviving son of Cotton Mather; " and the rest of his children, namely, Abigail Willard, Deceased, wife of Daniel Willard, also Deceased, their Children or Legall representatives, and Hannah Mather, Spinster, are, by Law Intituled to a single share of their said Father's Estate." The widow and son joined in a release of all their rights to the daughter, who is described, in the language of the time, "Mrs. Hannah Mather, of Boston aforesaid, spinster;" and so ended their probate troubles.

BOSTON, MASS., October, 1907.

THE JUDGE AS A POLITICAL FACTOR

By Andrew Alexander Bruce

By far the greater part of the law of both England and America is, and of necessity must be, judge and not legislature made. Paradoxical though it may seem, we are and must in the main be governed by our courts and not by our legislatures. The judge in the history of legal development antedated the legislature. The father despotically settled the quarrels of his children, the chief of his followers, the king of his subjects, and the judgments which they rendered and the customs which they recognized were crystalized into law, long before there was any organized system of legislation. The province of the legislature, indeed, is and always has been to supplement and to change, rather than to originate. The activities of the English parliament and of the American legislatures have of necessity been much more in the direction of correcting and modifying and expanding the already judge-made body of law than of building up any legal structures of their own. While through the many centuries of the growth of the English and American jurisprudence the legislatures and parliaments have met only for limited periods and at irregular intervals, the courts have been in almost continuous session and have been constantly called upon to lay down rules of practice and of conduct in matters concerning which the legislatures have not spoken. Not only this, but they have possessed the great prerogatives of construction and enforcement. Even in England, where parliament is supreme, a legislative body and a constitutional convention in one, and where the necessity of conforming to the requirements of a written constitution is not present, the legislative power which these prerogatives confer is fully recognized. "And be it finally enacted" protested a parliament of Henry the VIII,[1] "that the present act and every clause, article and sentence comprised in the same, shall be taken and accepted according to the plain words and sentences therein contained, and shall not be interpreted nor expounded by color of any pretense or cause or by any subtle argument or invention or reason to the hinderance, disturbance or derrogation of this act or any part thereof." But it was within the power of the courts of that time and it is within that of the courts of to-day to sneer even at so plain a statutory provision, for without judicial sanction and enforcement an act of parliament is a nullity. In the United States the legislative power of the judiciary is even greater than it is in England. Our constitutions indeed, as construed by the courts, have made the American governments, both state and national, pre-eminently governments by the judiciaries, and this not only in matters which are political and governmental but in those which are social and industrial. When asked to set aside or to refuse to enforce an act of the Chamber of Deputies, the French judge will shrug his shoulders, "Qu'il faut," he will say, "does not the Chamber of Deputies understand the Constitution as well as we, and is it not equally bound to respect it? Shall we judges put ourselves above the legislature, above the representatives of the people?" And it would have certainly been within the power of the American judges to have yielded to this legislative discretion, and to have refrained from entering in any large degree into the industrial conflict. But Anglo Saxons are not Frenchmen. It is not an Anglo Saxon trait to hesitate at wielding the power with which one finds himself possessed nor to stretch out to gain more. Instead of refusing to interfere, the American courts, both state and national, have so construed the words "property" and "liberty" and the term "due process of law" which are found in the 14th Amendment to the

[1] 28 Henry VIII, ch. 7, Sec. 28.

Federal Constitution and in the constitutions of the several states as to subject not only the commercial and governmental but the entire industrial and social systems to their regulation and control. "Property" they maintain, in "its broader sense is not merely the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it, and the right of property guaranteed by the Constitution is the right not only to possess and enjoy it but also acquire it in any lawful mode or by following any lawful industrial pursuit which the citizen in the exercise of the liberty guaranteed him chooses to adopt." The term "liberty" as used in the Constitution they say, means not only freedom of the citizen from servitude and restraint but the right to be free in the use of his powers and intellect and to adopt and pursue such vocations and callings as he may choose, subject only to the restraints necessary to secure the common welfare."[1] And above all they insist that it is for the courts and not for the legislatures to determine and to decide what restraints are necessary to secure this public welfare and what are not. The exigency for any measure they say is for the legislature to pass upon but the necessity therefor and the reasonableness is for the courts. They in short assume to themselves the right to decide where collectivism shall begin and where individualism shall end, and to control and direct the great social and political movements of the time.

Even the Supreme Court of the United States, though for a time evidencing an intention to yield to the discretion of the state legislatures and of the state courts in matters of local, industrial, and personal concern,[2] has recently shown a determination to itself supervise the police legislation of the states and to broadly interpret the 14th Amendment for that purpose. The State of New York, for instance, recently passed a statute limiting the hours of labor of employees in public bakeries and the courts of the state sustained the statute on grounds of public welfare and on the theory that long hours of labor at the baker's oven were injurious to the health of the employee and to the body politic of which he was but a unit and a part. The Supreme Court of the nation, however, superimposed the opinion of its nine judges, or rather of the five who constituted its majority, upon that of the New York Courts and of the New York legislature and declared the law unconstitutional and an interference with individual liberty which was unreasonable and not justified on grounds of public health.[1] So, too, the desire seems present and the popular support forthcoming to follow the course advocated by Judge Amidon in his recent address[2] before the American Bar Association and to extend more and more the control of the Federal Government over commercial transactions and agencies of all kinds without regard to the precedents of the past and the restraints of its history and logic or the express terms of the Constitution. The intention is present in short to adopt an elastic construction of the Constitution, a construction which construes not in the light of the intention of the framers of the instrument in the past, but in the light of the exigencies of the present, and which, since the past and the written does not even in logic control, places the ultimate determination of all great national questions both social and industrial in the hands of the federal judiciary unrestrained by legal logic or by precedent. Everywhere in America indeed is to be found a government by the judiciary in matters which are social and industrial as well as in those which are political and governmental. The policies in short of the nation and of the several states are really dictated and are coming more and more to be dictated not by the social and political

[1] Ritchie *v.* People, 135 Ill. 98.

[2] Holden *v.* Hardy, 169 U. S. 366; Powell *v.* Pennsylvania, 127 U. S. 678; Atkin *v.* Kansas, 191 U. S. 207.

[1] Lochner *v.* New York, 198 U. S. 45.

[2] See Green Bag, October, 1907.

views of the members of our legislature but by the social and political views of the judges who sit upon the wool-sack. These facts the warring forces in the industrial struggle of to-day have come to recognize and the result has been a new movement in the political world. There is now to be noticed a determination by one party to place and keep the judiciary elective, in politics, and immediately responsive; by the other, as national appointive and if possible possessed of a life tenure. "Let the jury and the people decide" is the motto of one party; "the court must decide" is the motto of the other. The line has been drawn, the gage of battle has been thrown, and among the most significant of all the modern industrial movements, and there have been many which have been significant, is the open entrance of organized labor into the political field and its reliance upon the suggestion made by Mr. Herbert Spencer over half a century ago that the great political battles of the future will be industrial battles and that the granting of the right to the ballot to the laboring classes has given to that majority the ultimate victory. The challenge on behalf of those who favor a life term for the judiciary of the states as well as of the nation was issued in 1893 by no less a person than Mr. Justice Brewer in an address before the New York State Bar Association. The response was the beginning by Mr. William Jennings Bryan of his agitation for an elective federal judiciary and the entrance of the labor unions of the country generally and of Chicago in particular into the political arena for the avowed purpose of removing from the bench those judges whom they branded as "Unfair" and whose decisions and actions appear inimical to their interests.

On the side which is opposed to a life term judiciary is to be found not merely organized labor, but the more radical wing of the Democratic party and perhaps that of the Republican. On the other are to be found the vested interests, the conservatives of both the Republican and Democratic organizations, the ordinary business man, and, above all, that educated and respectable body of citizens, the college or professorial class, which Jack London characterizes as "noble, but not alive."

The interests of organized labor in the personnel of the courts and its appreciation of the political importance of the judiciary is modern in its origin and is the result of a logical growth. The doctrine that in a democracy such as ours every wrong can be righted at the polls and that where this remedy exists there is no excuse for anarchy and no justification for a resort to violence, has for a long time been taught in America and for a long time has served as a check to violence and insurrection. Like many others of its kind, however, it at first meant nothing, in so far as what is known as the labor movement was concerned, and could be safely urged even by those who were most inimical to the interest of the American working man. Until quite recently, indeed, the great conservative farmer class has everywhere controlled our elections. This body of small employers of labor has, except perhaps in the sole case of railroad ownership and control, been a body of confirmed individualists. The immediate interests of its members have lain in small wages and in long hours of toil. Its habit has always been to exaggerate the purchasing value of the wages paid in cities. It has known nothing of the injurious effects of the routine and mechanical toil incidental to the factory employments and to labor in the mines. It has, therefore, never looked with favor on the demands of the city laboring man nor of the wage-earner generally, and has been bitterly opposed to all labor unions and combinations, whether of capital or of labor. Since the growth of our large cities, however, and the organization of the armies of the working men who are now centered in the mining districts and who work upon the railroads, a change has come. Although the farmer is still in the majority, he no

longer everywhere possesses the balance of power. The Chicago delegation in the state of Illinois and the delegations from the manufacturing centers of the state of New York have for some time possessed a controlling influence not merely in the state legislatures, but in the national conventions, and the members of these delegations have found it necessary to consider and even to pander to the labor vote within their several districts if, indeed, they cared to retain their seats at all.

The immediate result of this change and this recognition of the strength of the labor vote was the passage in every state of the Union and in the National Congress itself of a number of statutes which limited the hours of labor in factories and in mines, forbade the payment of wages in commodities or by means of orders on companies' stores, which regulated the method of weighing and screening coal, where the wages paid were dependent upon the amount of coal mined, which forbade the refusal of work to men or the discharge of men because of their membership of labor unions and which sought to determine by legislative enactment and in favor of the working man, the main questions in controversy in the great and ever present conflict between organized capital and organized labor.

These statutes were vigorously championed by the labor unions and were the result of their newly aroused belief in the value of the ballot and of their realization of their strength and political power. They were however with but few exceptions set aside by the courts as an unnecessary and unconstitutional interference with individual liberty and the individual right to property. The appeal to the ballot, so long looked upon as a laboring man's richest heritage, was found to be an illusion. The laboring man had found it possible to secure the legislation he desired, but only to discover an impassable barrier to the fruition of his desires in the conservatism and individualism of the judiciary. He, too, has in recent years found the judiciary yielding more and more to the demands of the mercantile interests and of the professional classes, and by the writ of injunction and proceedings for contempt of court, taking from him the weapon furnished by the srike and the boycott and even going so far as to declare the peaceable picket a criminal conspiracy and the closed shop unlawful.

The consequence has been a distrust on the part of organized labor of the American judiciary and a determination to control it. There is now everywhere apparent a determination to use the power of the ballot as a weapon against "the unfair judge" as well as against "the unfair" legislator. A bitter and relentless opposition is now to be found to the idea of a life term judiciary which is now so frequently put forth and to the demand for the abolition of the jury, now so often urged. In its criticisms of the judiciary, as now constituted, and of the rules and decisions above referred to, organized labor does not perhaps always impute corruption, but it constantly argues prejudice; it constantly asserts that in the courts of law the laboring man and the labor union have no standing; that no matter what the working man may do the courts will decide against him; no matter what statutes may be passed in his favor, the courts will declare them invalid. It frequently declares that the 14th Amendment to the Federal Constitution, which was adopted for the pur pose of guaranteeing freedom to the negro, has been so construed by the courts as to enslave free labor; that the anti-pooling and anti-trust measures which were passed to control capital have been so construed as to control men. It argues that the judge, even though not so when first elected, soon becomes far removed from the common people; that he takes up his residence in an exclusive district; that his wife and children move in an exclusive society; that he has as a rule been a corporation lawyer before his elevation to the bench, especially if in the first place he has been appointed and not

elected; that he knows but little of, and consequently comes to care but little for, the upward struggle of the great masses of men. It argues that the longer and more stable his term of office, the more aristocratic will he become. It lays down as a cardinal principle the doctrine that in a democracy such as ours, in which the judge can set aside legislative enactments and determine great social governmental and industrial politics, he should understand, sympathize with, and be responsive to the great social and industrial movement and ideals of the day, and should above all be made to feel that he owes his position to the ballots of the people.

The answer to this contention has been made by no less person than Mr. Justice Brewer of the Supreme Court of the United States. "There are to-day ten thousand millions of dollars invested in railroad property whose owners in this country number less than two million persons," said that jurist in an address before the New York Bar Association. "Can it be that whether this immense sum shall earn a dollar or bring the slightest recompense to those who have invested perhaps their all in that business and are thus aiding in the development of the country, depends wholly upon the whim and greed of the great majority of sixty millions who do not own a dollar? I say that so long as constitutional guarantees lift on American soil their buttresses and bulwarks against wrong, and so long as the American judiciary breathes the free air of courage it cannot. . . . What then is to be done? My reply is, strengthen the judiciary. How? Permanent tenure of office accomplishes this. . . . Judges are but human. If one must soon go before the people for re-election, how loath to rule squarely against public sentiment. . . . To stay the wave of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he has, demands a tribunal as strong as is consistent with the freedom of human action, and as free from all influences and suggestions, other than are compassed in the thought of justice, as can be created out of the infirmities of human nature. . . . The black flag of anarchism flaunting destruction to property, and therefore relapse of society to barbarism; the red flag of socialism inviting a redistribution of property, which in order to secure the vaunted equality must be repeated again and again, at constantly decreasing intervals, and that colorless piece of baby cloth which suggests that the state take all property and direct all the work and life of individuals, as if they were little children, may seem to fill the air with flutter. But as against these schemes or any other plot or vagary of fiend, fool or fanatic, the eager and earnest cry and protest of the Anglo-Saxon is for individual freedom and absolute protection of all his rights of person and property. . . . And to help strengthen that good time we shall see in every state an independent judiciary, made as independent of all outside influences as possible, and to that end given a permanent tenure of office and an unchangeable salary."

The balance of power in this great struggle however and the controlling vote belongs neither to capital nor to organized labor, but to the so-called middle class. The members of this class are swayed by many conflicting interests and considerations. They have no general sympathy for organized labor nor for its grievances. The idea of a permanent judiciary appeals to them. They are to be found continually criticizing the jury system, especially in criminal cases and the dead level of intelligence which it presents. They frequently refer with approval to the ease with which convictions are obtained in the Federal and in the English courts where the judge is such an important factor. But they are nevertheless almost as skeptical of the courts as even organized labor itself. They are constantly thinking

of the monoply and of the trust, and the social power of the trust magnate over the judge is as much feared by them as is the social power of the employing classes by the laboring man. When Mr. Thomas Lawson in one of his articles included in a list of precepts supposed by him to guide the conduct of the Standard Oil Company one "Never to forget that our legal department is paid by the year and our land is full of courts and judges," he voiced a sentiment which unfortunately is only too prevalent. Equally prevalent too is the sentiment expressed in the unrestrained remarks of the lawyer iconoclast of Chicago, when in a recent address he said; "Decisions are made and bound in sheepskin. We lawyers burrow in dust to find out what some fool judge said a thousand years ago . . . and then we have the law . . . Take a poor man with a poor lawyer . . . a case argued with a giant on one side and a pygmy on the other, and the judge hearing the case whose associations have been with the rich. What show has the poor fellow got? Nobody is crooked or dishonest; it is just the natural course of evolution that has made the law of to-day. You can't get into court for nothing. Even if you could, you couldn't get along by yourself. You must have a lawyer. You can have any kind of a lawyer you can pay for. But you can't try your own case. You don't know how. The judge won't help you. He sits there to umpire the game and nothing else; it's all a lottery. If your case is just, that counts nothing. It depends upon a dozen things which make dice shaking a certainty compared with your game of chance. There is only one true thing about it, you always get a run for your money, as long as you have got any there is another court. There is no effort in the courts to get at abstract Justice. It's merely a method that has been evolved through the ages for keeping society as it is." Even among the trading and professional classes, indeed, there is everywhere to be found the conviction that our lawyers and our judges are behind the age; that they fail to recognize the basic needs of a growing civilization; that they are shrouded in a formalism; that the letter of the law killeth and that it is the bench and the bar who are responsible for this letter. The rash and incautious statements of men of note have added to this feeling. When the chief executive of the nation openly criticizes a Federal judge on account of a decision rendered by him on a technical point of law, what confidence in the judiciary can be expected of the great masses of the people?

Unfortunately, English precedents are of but little value to us. The English judge interprets no constitution. He merely construes and applies the statutes. In England parliament is a legislative body and a constitutional convention in one, and its mandates are final. The English parliament controls the English courts and not the English courts the English parliament. If it were true in America as it is in England, that our judges did not have imposed upon them or had not assumed to themselves the decision of all of our great political questions and economic and industrial policies, the case would be very different. As long, however, as the contrary is the case, that is to say as long as our written constitutions are looked upon as the fundamental law of the land, their amendment is so difficult as to be almost impracticable, and their interpretation is entrusted to our judiciary, the judicial office must of necessity be more or less political, and permanence of tenure and appointment as opposed to election will be vigorously assailed by a large portion of the American people. Longer terms of office and larger salaries will no doubt be soon generally conceded in the several states, but life term state judiciaries will, it is believed only be acquiesced in when the judges by constitutional amendments are deprived of the power to exercise or by their own volition cease to exercise the political and legislative powers which they assume to-day.

GRAND FORKS, NORTH DAKOTA, October, 1907.

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, facetiæ, and anecdotes.

THE MEASURE OF PUNISHMENT.

One of the most striking articles in recent periodical literature is a contribution by Roland B. Molineux, twice tried for murder, entitled "The Court of Rehabilitation," in *Charities and the Commons* for September 28th. The author in impressive phrase recites the customary criticisms of modern criminal punishment, which he summarizes as follows: "Vengeance, entirely, and example, largely have been abandoned as motives for imprisonment. The more modern attempt to make it protective of society is a failure. The present indeterminate sentence is farcial because it is indeterminate in name only and even aside from the failure of all punishment as such it is wrong because it is humanly impossible to determine what is just punishment." "In truth" the author says "it is as impossible to punish crime as to reward harmony. Crime is intangible as is sunlight or fragrance. We attempt to punish an abstract quality whereas only the individuality of the prisoner should be considered." The author believes that present prison methods tend to confirm evil habits, and that the work of reformers and prison visitors is wholly misdirected. The information that they get from prisoners is almost always colored by the hope of obtaining favors. The author insists that the only question that the courts of law should determine is guilt or innocence, that the universal sentence should be banishment, by which the author means imprisonment, that while in prison all efforts should be directed to education and development of the prisoner; that is, release should be possible only upon the decision of a court to which he must apply and in which he has the burden of proof of showing that he has made himself fit to live again among his fellow men. This he must prove not merely by the ordinary "good conduct" of the prisoner but by definite accomplishments, by the way in which he has availed himself of opportunities, for assistance to other prisoners, evidence of thrift and capacity to be self-supporting, proof that he has made all possible restitution. Upon release then he would be certain of an opportunity to start again free from the old temptations and he would have every reason to avoid return to prison even for minor offences because he would realize that it would be almost impossible to convince the court a second time of his fitness to return to society. The author waves aside the problem of possible release of the hardened criminal by asserting that he would soon again be incarcerated and unable to secure a second rehabilitation. He believes that the court would rarely release a murderer who had plotted and calculated to kill, but would show more liberality in cases of great provocation. The author ignores, however, the most serious objection to any system of this sort, namely, the danger of outside influence in inducing release, especially in cases of criminals of wealth and social position. We have not heard, however, that our present so-called indeterminate sentences have resulted in an abuse of this nature and perhaps the author is justified in assuming that the court of which he conceives would be of as high a standing as our present criminal courts and as free from undue influence. Certainly it is conceivable that it might be more free from improper pressure than is the present pardoning power.

THE CONVENTION OF PUBLIC PROSECUTORS

In St. Louis on September 30th and October 1st attorneys general from various states of the Union gathered at the invitation of Attorney General Hadley of Missouri, to consider plans for uniform action by state prosecuting officers, especially in their relations to the federal executive and judicial departments. Several papers were read, that by Attorney General Edward T. Young of Minnesota on "The Conflict Between State and Federal Courts" precipitating most discussion. Twenty delegates representing the legal depart-

ment of fourteen states, were present, and a permanent organization was effected, under the name of The National Association of Attorney Generals of the United States, and provision made for annual and special meetings. A committee was appointed to draft a uniform anti-trust law to be introduced in the several state legislatures. The work of the conference may be best summed up in the following unanimous resolution.

"*Whereas*, The efficient administration, as well as the preservation of our dual system of government, requires that each sovereignty be permitted to exercise its functions, as defined by the Federal Constitution, unhampered by the other; therefore,

Be it resolved by the convention of attorney generals of the several states here assembled, That we earnestly recommend to the favorable consideration of the President and the Congress of the United States the enactment of a federal law providing that no Circuit Court of the United States or any judge exercising the powers of such circuit judge shall have the jurisdiction in any case brought to restrain any officer of a state or any administrative board of a state from instituting in a state court any suit or any other appropriate pro ceedings to enforce the laws of such state or to enforce any order made by such administrative board; but allowing any person or corporation asserting in any such action in a state court any right arising under the Constitution or any law of the United States to have the decision of the highest court of the state reviewed by the Supreme Court of the United States, as now provided by law. We also recommend that suits in federal courts instituted by persons interested in corporations to restrain such corporations from obeying the law of the state in which they are doing business be prohibited."

It is interesting also to note that within the last month a convention of State Railroad Commissioners has been held for mutual advice and uniform action by their respective departments in the different states. Whatever we may think of the constitutionality or the advisability of the enactment of specific legislation, it is an encouraging sign of the times that the state executive officers at least are awakening to their opportunities, and that the rebuke administered last year by Secretary Root to the opponents of national regulation by calling to their attention their persistent neglect of their own opportunities is also bearing fruit. Once public sentiment demands of the several states uniform treatment of the economic problems which our rapidly increasing wealth has brought, the tendency to centralization which alarms the conservatives, and to-day furnishes the important motive of constitutional discussion, will again subside, until new conditions recall it to the front.

ENGLISH JUDGES.

The veracious press has told recently of a party of St. Louis lawyers who are touring England to study its judicial methods and machinery. One of these learned brothers is reported to have announced the result of his researches as follows:

"The judges were too advanced in age and were apparently not men of the world. They seemed insufficiently experienced in every-day life and every-day business. They simply sit in judgment and lay down the law just as it was administered hundreds of years ago. A judge elected to the Bench in America is invariably a man of the world, with wide human knowledge, a man of modern life. Altogether, British legal machinery impressed one as insufficiently up to date."

The New York *Nation* took the story seriously enough to be inspired to this sarcastic editorial: "It is obvious that these criticisms are well founded. English judges are still under the impression that a prisoner brought up for trial should be either condemned, or acquitted, instead of being allowed to die of the gout in jail while awaiting his fifth trial. The judges across the water are hundreds of years behind in their attitude towards triumphant science, for it is on record that they will actually interrupt an expert in the witness-chair even while he is engaged in making an ass of himself. With an utter lack of worldiness, English judges do not take a leading part in gigantic clambakes, beefsteak dinners, or potato races for fat men. And, worse than all, they are not up even on the rudiments of the Law of the Previous Fist, sometimes known as the unwritten law."

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

Although the continued absence of the law school reviews still keeps this department at summer proportions the grade of the articles reviewed this month is good. The most important is probably Mr. Byles' account of the prospects of an international code for bills of exchange. Constitutional law occupies its usual prominent place. Next month this department will resume its regular proportions.

BILLS AND NOTES. "The New Negotiable Instruments Act," by Louis M. Greeley, *Illinois Law Review* (V. ii, p. 145).

BILLS OF EXCHANGE (International Codification). In *The Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 112), W. J. Barnard Byles writes on "Bills of Exchange and International Codification." Preparing an international code has long been a favorite occupation of international legal congresses. Dr. Meyer of the Prussian Court of Appeal has recently collected several of these draft codes. His collection and comments furnish the occasion of Mr. Byles' article.

There are at present four groups of national codes on this subject: the German, the French, the Anglo-American and one intermediate between the German and the French. The German is an easy first in the race for supremacy, with, taking the world as a whole, the Anglo-American in second place. Not only is German law, whose marked characteristic is excessive formalism, "predominant at the present day, but it would appear to be continually increasing its influence, as witness the most recent, and certainly not the least important, of European exchange laws, the Russian exchange law of May, 1902. Anglo-American law, though it cannot be regarded as stationary, has scarcely made any appreciable advance outside Anglo-Saxon countries, while French law would appear to be actually retrograding before the advance of German principles.

"That this predominance of German law constitutes, from the Anglo-Saxon point of view, a considerable difficulty in drafting any bill of exchange law for international use, can hardly be gainsaid. Our law may not represent absolutely the last word on the subject, but it undoubtedly is the law best suited to the English trading community, evolved as it is from the actual practice of traders themselves, and not, as one has some suspicion is the case with German law, evolved from what is considered officially to be the proper practice for traders to adopt. It is difficult to point to more than three subjects as regards which English law may be considered to be at a disadvantage as compared with German and foreign law generally. These three are the retention of days of grace, the existence of the doctrine of reasonable time in reference to the presentment of bills payable at or a certain time after sight, and the absence of any means of guaranteeing payment of a bill equivalent to the 'aval' of foreign law."

Points of difference, however, exist on which Mr. Byles thinks there is no probability of Anglo-American law giving way. These are the questions of protest which we require only in the case of foreign bills; the limitation of actions which we treat as in no way exceptional, while in German law there are many complications and variations; and the question of dishonor by non-acceptance, which only two laws outside of our group treat as equivalent to the refusal to pay a bill. In the others the only result of refusal to accept a bill is to entitle the holder to demand not payment but security of the drawer and other parties that the bill will be met at maturity.

"A study of these draft codes forces one to the conclusion that an international exchange law has yet to be drafted which can have any

chance of universal acceptance. It is impossible to suggest for a moment that the trading community in England or America would agree to provisions such as are to be found in the code of the Institut de Droit International or in the Antwerp or Brussels codes. The two latter codes are alike too much permeated with Franco-Belgian principles to be accepted in Germany, let alone in England. . . . There seems little doubt that the commercial classes both in Germany and other countries would welcome a general exchange law as the most practical method of abating, if not actually abolishing, the excessive formalism of most foreign law. The English trader labours under no such disadvantage, and can therefore regard the situation more or less with indifference. The process may require time, but it seems inevitable that sooner or later foreign exchange law, impelled thereto by the trader, will have to adopt many of those Anglo-American principles which it has hitherto somewhat ostentatiously ignored, and when that day comes it will be but an easy step to a general law. At present such ideas are as yet but in the air; still, pamphlets such as Dr. Meyer's tend to show the existence of a spirit of discontent with the present order of things. The English trader has nothing to gain but everything to lose from any premature general codification. The English law might benefit considerably if some of the alterations or additions already referred to were adopted, but the benefit accruing from any changes of this sort would be more than counterbalanced if they were accompanied by the introduction of other provisions of too alien a character. The principle of *laisser-aller* may not be one involving high ideals, but there is much to be said for its practice in this case."

BIOGRAPHY. "George Sharswood — Teacher and Friend," by Samuel Dickson. *The American Law Register* (V. lv, p. 401). Sketch of the career of the "real founder" of the University of Pennsylvania Law School, with special reference to his ideas on and service to legal education.

BIOGRAPHY. "Thomas Hobbie," by J. E. G. de Montmorency in *The Journal of the Society of Comparative Legislation* (N. S. V. vii, p. 51). Sixth in a series of articles on "Great Jurists of the World."

BIOGRAPHY. "Vico (1668–1744). Part I," by Michael H. Rafferty. *The Journal of the Society of Comparative Legislation* (N. S. V. vii, p. 71). Seventh article in a series on "Great Jurists of the World."

BIOGRAPHY. "Lord Chancellor Erskine," by Hon. R. Erskine, *Albany Law Journal* (V. lxix, p. 275).

BIOGRAPHY. In the October *Human Life* (V. vi, p. 5) Alfred Henry Lewis gives an entertaining account of "Judge Landis" of Chicago.

BIOGRAPHY. In the October *Appleton's Magazine* (V. x, p. 418) is an account of Judge Kenesaw Mountain Landis, by John T. McCutcheon which is rather flippantly illustrated.

BIOGRAPHY. In the October *World's Work* (V. xiv, p. 9434) Eugene P. Lyle, Jr., continues his series of articles on "Taft: A Career of Big Tasks." This article is devoted to his work in the Philippines.

CONSTITUTIONAL LAW. "The True Constitution," by Joseph Culbertson Clayton, *Albany Law Journal* (V. lxix, p. 271).

CONSTITUTIONAL LAW. "The Significance of the term 'Contract' in Article 1, Section 10, of the Constitution," by William Underhill Moore, *Kansas Lawyer* (V. xiv, p. 3).

COMMERCIAL LAW. In the October *System*, (V. xii, p. 425), R. A. Bosworth contributes a brief article of interest to business men, entitled "Securing a Prompt Settlement of Claims." It explains "a practical system of handling freight claims by which a business concern may follow up railroads to bring about an adjustment of difficulties without needless delay."

CONSTITUTIONAL LAW. "The Police Power—Its Importance and Development," by Hon. Philo Hall, *American Lawyer* (V. xv, p. 436).

CONSTITUTIONAL LAW. "Corporations and the Commerce Clause," by Smith W. Bennett, *Central Law Journal* (V. lxv, p. 217).

CONSTITUTIONAL LAW (Judicial Power of the United States). "The Newest Neologium of the Supreme Court," by William

Trickett, *American Law Review* (V. xli, p. 729). In the opinion on Kansas *v.* Colorado, 27 Supreme Court Reporter, June 15, 1907, Justice Brewer used the following language:

"These considerations lead to the proposition that when a legislative power is claimed for the national government, the question is whether that power is one of those granted by the Constitution either in terms or by necessary implication; whereas, in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power."

Professor Trickett declares this idea of general national judicial power to be an entirely new one, combining to the language and intent of the Constitution and to the previous decisions of the Supreme Court, and utters this warning:

"If the new doctrine of general national judicial power is allowed to get a footing, little by little jurisdictions will be assumed that hitherto would have been pronounced usurpations. A principle is laid down which by subtle and adroit manipulation may in time yield grandiose results. Those who would like to witness these results, who minify the states and magnify the Federal State, who would be pleased to see the latter swallow up the former, will observe the laying down of the revolutionary doctrine of Kansas *v.* Colorado (a doctrine by the way, which was gratuitously lugged into the opinion), at least with equanimity, unless indeed their dislike of unhistoric assertion and inconsequent reasonings be greater than their lust for political change. Those who desire that the plan of government laid down by the men of 1787 should be perpetuated, may well invoke unless it be too late the admonition, *obsta principiis*."

CONSTITUTIONAL LAW (Colonies and the Constitution). "'Is Colonization a Crime?' Better Stated: Does the Constitution Follow the Flag?", by E. H. Randle, *American Law Review* (V. xli, p. 705). An argument that the Constitution prevails in our colonies, in reply to one by Hannis Taylor upholding the opposite view.

CONSTITUTIONAL LAW. "The Irreconcilable Conflict," by Robert G. Street, *American Law Review* (V. xli, p. 686). Our unique doctrine of the power of the judiciary to bind the other departments of the government by its decisions on constitutional questions, the rule of *stare decisis* and the fact that the rules which must govern in all cases of construction of the Constitution have been clearly announced by the Supreme Court after the most earnest controversy, seem to Judge Street to result in an "irreconcilable conflict" with a growing feeling that complexity and expansion of modern conditions require more liberal construction of the powers of the national government. Laws and institutions have a constant tendency to conform to social needs.

"New conditions have developed the social need of the extension of national powers; but this development is restrained in consequence of the doctrine of judicial supremacy. If the social need must assert itself, would it not have been better that it should have been permitted to do so through judicially unimpeded congressional legislation than by the destruction of confidence in the courts that must follow their abandonment of the landmarks they have themselves erected?"

COPYRIGHT. "International Copyright," by Alex. Gibson, *Commonwealth Law Review* (V. iv, p. 255).

CORPORATIONS. "Corporate Citizenship a Legal Fiction," by Hon. R. M. Benjamin, *Albany Law Journal* (V. lxix, p. 263).

CORPORATIONS. "Recognition of Foreign Companies," by W. F. Hamilton, *Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 129). Brief examination of the requirements in several countries and text of the international code approved by the International Law Association Conference at Berlin in 1906.

CRIMINAL LAW. "Accomplice," by S. Ray, *Allahabad Law Journal* (V. iv, p. 269).

CRIMINAL LAW. "The King's Pardon," by W. L. Stuart, *Commonwealth Law Review* (V. iv, p. 241).

CRIMINAL LAW. "The Indeterminate Sentence," by Hon. C. G. Saunders, *Law Register* (V. xxvii, p. 736).

CRIMINAL LAW. "The Autobiography of Harry Orchard" is continued in the October *McClure's* (V. xxix, p. 658).

CRIMINAL PROCEDURE (England). "Criminal Appeal in England," by W. F. Croies, *The Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 93). Expounding the present provisions of the law of England in regard to criminal appeal and the new bill which is considered as likely to pass. The author criticises as follows:

"The draftsman of the bill, in combining the system of review by appeal and review on reference, indicates the weak point of the bill. The new court is to be on the one hand an ordinary court of justice and on the other a sort of judicial committee to advise the Crown on petitions to admit appeals for clemency. In exercising the prerogative of mercy, the Crown may refuse to avail itself of the consequences of conviction by verdict, but where a court of justice is called on to take up the position of the Crown on a criminal appeal, it is invited to depart from its proper sphere. Under the bill it is empowered, nay required, to take upon itself the final appreciation of the facts of a criminal case upon a perusal of the shorthand notes taken at the trial, and upon evidence never submitted to a jury and which might produce upon that lay tribunal a very different impression from that produced on the judicial mind. Experience and the precedents already given point to the conclusion that, if criminal appeal in the modern sense is to be allowed, it would be better to allow it on precisely the same lines as in civil cases, *i.e.*, substantially on the grounds on which it is now allowed in criminal cases in the King's Bench Division, but subject to the rule, now applied in civil cases, that no new trial is to be ordered except for a substantial miscarriage of justice. Under the new bill the judges will either be too shy of interfering with the jury, which will cause further appeals to the Home Office, or too ready to interfere, which will impair the position of the jury in criminal trials."

DAMAGES. "Allowance of Special Damages in Actions for Wrongful Dismissal of Servants," by C. B. Labalt, *Canada Law Journal* (V. xliii, p. 593).

DIVORCE. "Foreign Divorce Decrees in New York," by Raymond D. Thurber, *Bench and Bar* (V. x, p. 81).

EDUCATION. "The Dwight Method of Legal Instruction," by Prof. George Clark, *American Lawyer* (V. xv, p. 419).

EDUCATION. "The Lawyer's Education," by Prof. Lester J. Tompkins, *American Lawyer* (V. xv, p. 423).

EDUCATION. "The Preliminary Education of the Law Student, by E. A. Gilmore, *American Lawyer* (V. xv, p. 428).

EQUITY. "Injunctions Against Strikes, Boycotts, and Similar Unlawful Acts," by F. C. Donnell, *Central Law Journal* (V. 65, p. 273).

EVIDENCE. "The Alienists in the Courts of Law," by R. W. Shufelt, *Albany Law Journal* (V. lxix, p. 277).

EVIDENCE. "Dying Declarations" by Wilbur Larremore. *American Law Review* (V. xli, p. 660). A plea "for the passage of statutes entirely precluding the admission of dying declarations, and, until this radical reform be accomplished, for a strict application of existing law by the courts, to the end that the exception be narrowed, or at least held stationary, in scope."

Mr. Larremore thinks the guaranties of veracity insufficient to overcome the objections to hearsay testimony.

"As a matter of fact the preponderating and overshadowing justification of the admission of dying declarations was the assumption of a practically universal belief in a system of rewards and punishments to follow mortal dissolution. Whether this justification ever was adequate it is unnecessary to inquire; certainly since the great awakening and permeation of scientific thought during the latter half of the nineteenth century this obligation to veracity has lost most of whatever strength it had.

* * * * *

"It is of course true that thousands of persons—principally of the uneducated class—still accept theological dogma literally, even believing in a physical hell. But nowadays people of devout faith are very moral people; they are not the stuff of which criminals are made. It would be impossible now for any church to stand for theology or religion, except as blended with high ideals of conduct.

The Roman Catholic clergy unquestionably exercise a rigid censorship over the morals of their flocks, with the effect of virtually driving out of the church vicious persons who will not confess, repent and strive to reform. Surrounded by a general atmosphere of agnosticism such incorrigibles, even though not technically excommunicated, very readily drift into theological indifference.

"Vicious propensities draw them away from a church whose requirement of personal righteousness is imperative and uncompromising. How much terrorizing restraint can be expected from the tradition of a Hell which the newspapers they read treat only as a subject of jest and which they cannot help realizing is discredited by the thinking classes? It is believed that the dim recollection of a theological belief in childhood is insufficient as a guaranty that one will cast off the influence of his habits of life and feel constrained to speak the truth because confronted by death."

HEBREW LAW. "A Thousand Years of Hebrew Law," by Hugh Evander Willis. *American Law Review* (V. xli, p. 711). A brief review of the development from the time of Moses to the return of the captives from Babylon.

HISTORY. "The Bench and Bar in the Silver Age of the Common Law," by John Maxcy Zane, *Illinois Law Review* (V. ii, p. 162).

INTERNATIONAL LAW. "The Papacy as an International Power," by Hannis Taylor, *American Law Review* (V. xli, p. 720). A short review, concluding as follows:

"There is a very large body of non-sectarian Christians — statesmen, philosophers, jurists, men of letters — who are anxious to see all possible moral support given to the most ancient of Christian organizations, confronting the common enemy under the only spiritual chief clothed with any real authority. To that chief should be restored something of his ancient territorial independence, within limits large enough to insure the exercise of his high functions free from local governmental interference. But more important still, the pope should be invited to coöperate as of old, as an arbitrating factor, in the family of nations. A great mistake was made when he was not invited to appear by his representatives in the First Hague Conference. As that mistake becomes more manifest, as time goes on, let us hope that it will be corrected."

INTERNATIONAL LAW. "Problems of International Practice and Diplomacy," by Sir Thomas Barclay. Boston Book Company.

This is a particularly timely and interesting work. The author attempts to discover rules which, if adopted, will improve the law-regulating intercourse between nations. The aim is therefore to set forth what should be the law, rather than to tell what it is. While the latter would be a most difficult undertaking, the former is even more difficult. But notwithstanding the hopelessness of successfully solving the problem, the attempt is interesting.

The chapter on "Extension of the Scope of Arbitration Treaties and the Jurisdiction of the Hague Court" discusses in a practical way the possibilities of progress in the most promising direction for the advance of the interests of universal peace. In his judgment, a treaty of arbitration should be "at the same time general, obligatory and automatic." The author is not correct in saying that "though States seem no longer reluctant to resort to The Hague Court, and public opinion has come to view it with increasing favor, and several important cases have already been submitted to it, no progress has been made towards compulsory arbitration as a pacific means of settling questions of vital interest as between any great powers." Because voluntary arbitration has not yet been superseded by compulsory arbitration, it does not follow that no progress has been made toward compulsory arbitration. The growth of public opinion in favor of the peaceful settlement of international disputes, which growth has been fostered by voluntary arbitration, constitutes substantial progress towards making possible the introduction and successful working of a scheme of compulsory arbitration. It is perhaps a little early to attempt any extended scheme of modifications in the procedure of the Hague Court as the Court has not yet been in operation long enough to furnish us a basis of experience for determining what changes in procedure can be advantageously made. The chapter dealing with this subject is therefore open to the objection

that it rests mainly on theory rather than practice. There is little new in the chapter on "Declaration of War," but the one on "Floating Mines and Mine Fields" is a very sensible discussion of a live topic. In the discussion of "Immunity of Private Property at Sea from Capture" he betrays the characteristic British leaning against the American contention. The reasons submitted in support of his view do not appear to us conclusive. One of the most practical chapters is that on the "Limitation of the Area of Visit and Search." His views upon Contraband are colored considerably by those held by the political branch of his government. On the other hand, he gives us a very judicial discussion of the "Employment of Arms for Enforcement of Contractual Obligations."

It is a very difficult matter to review within reasonable space a work covering as large a variety of subjects as this one, but I trust that the above is, in so far as it goes, a just criticism

EDWIN MAXEY.

JURISPRUDENCE. "The Ideals of Our Common Law and How Far they are Realized," by Clarence DeWitt Rogers, *Albany Law Journal* (V. lxix, p. 226).

JURISPRUDENCE. "The Law on Expansive Science," by John C. Mahon, *American Law Review* (V. xli, p. 673). Enumerating many instances in which the law has progressed from harshness and injustice to a higher standard.

JURISPRUDENCE. "The Province of Law," by Armstead Brown, *American Lawyer* (V. xv, p. 430).

JURISPRUDENCE. "Customs and Customary Law," by Ashutosh Mukerjee, *Bombay Law Reporter* (V. ix, p. 241).

JURISPRUDENCE. "Primitive Laws and their Investigation: A Suggestion," by Sir John Macdonnell, *The Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 104). Giving two elaborate *questionnaires* of value in collecting thorough and faithful accounts of customs and laws of primitive or undeveloped communities.

MASTER AND SERVANT. "The Doctrine of Common Employment in England and Canada," by J. P. Mac Gregor, *Canadian Law Review* (V. vi, p. 324).

MONOPOLIES. "Liability of Trusts for Private Wrongs," by Judge W. M. Holland, *Law Register* (V. xxvii, p. 752).

MUNICIPAL GOVERNMENT (Austria). "The Municipality—I. Austria: The Commune System," by Prof. Dr. Joseph Redlich of Vienna, in the *Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 12) is an analysis of the organization and function of the Austrian commune, which has a great field of action almost entirely independent of the national government.

NATURALIZATION (British). "The Colonial Conference and Naturalization" by E. L. de Hart, *Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 135). At present a person naturalized in a British possession ceases to be a British subject the moment he quits its territory. To do away with the obvious inconveniences of this a system of imperial naturalization has been recommended and was presented to the recent colonial conference. Its reception was encouraging to its advocates, the most serious objection being that it would give persons of non-European races naturalized in one colony or in the United Kingdom the status of British subjects in other colonies where they are disqualified from obtaining naturalization. Several methods of meeting this are suggested. The author favors an enactment in general terms that in such a case naturalization secured elsewhere shall not give the status of a British subject in that colony.

NEGLIGENCE. "The Doctrine of Error of Judgment in the Law of Negligence," by O. H. Myrick, *Central Law Journal* (V. 65, p. 238).

OTTOMAN LAW. "Modern Ottoman Law," by Sir Roland K. Wilson, *Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 41). Examination of provisions to the Ottoman land, civil and penal codes of interest to students of comparative jurisprudence.

PHILOSOPHY. "A German System of Legal and Economic Philosophy," by L. Oppenheim, *Journal of the Society of Comparative Legislation* (N. S., V. vii, p. 124).

Commenting upon Dr. Fritz Berolzheimer's recently completed five volume *System der Rechts- und Wirtschaftsphilosophie.*

PRACTICE. "The Illegality of the Action of the Circuit Court of the United States in Enjoining the Virginia State Corporation Commission from Enforcing a Two Cent Rate Affecting the Intra-State Business of Railroads," by E. Hilton Jackson, *Virginia Law Register* (V. xiii, p. 417).

PRACTICE. In the *World's Work* for October (V. xiv, p. 9486) is a brief article entitled "When to Use a Lawyer" which gives wise counsel to the layman.

PROPERTY. "Possession," by A. Inglis Clark, *Commonwealth Law Review* (V. iv, p. 245).

RAILROADS. "The President's Proposal for a Federal Railroad System," by Edward L. Andrews, *Albany Law Journal* (V. lxix, p. 266).

RAILROAD REGULATION (Common Law Adequate). "The Courts and the Railroad Question," by George W. Freerks, *American Law Review* (V. xli, p. 696). Arguing that the judges are responsible for railroad abuses by their failure to enforce the common law which is adequate to secure just treatment of the public. The author thinks a renovation of the justiciary of the states "would be more efficacious than a remodeling of the commerce laws."

SURETYSHIP. "Liability of Estates of Deceased Co-surities to Contribute to a Surety who has been Compelled to pay the Obligation," by John Hipp, *Central Law Journal* (V. 65, p. 256).

WILLS. "Charitable Bequests Void for Uncertainty of Contract," by Padmaubba Chari, *Allahabad Law Journal* (V. iv, p. 287).

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.)

CONSTITUTIONAL LAW. (Equal Protection of Laws.) Ark. — The Arkansas law requiring railroad companies to keep separate waiting rooms in depots for the accommodation of passengers, open day and night, except in certain cases, and requiring that such waiting rooms shall at all proper times be comfortably heated, and at all times supplied with drinking water and kept in a sanitary manner, and providing for a penalty for any neglect to comply with the law, is, in State *v.* St. Louis & S. F. R. Co., 103 S. W. Rep. 623, held not to violate the provisions of the fourteenth amendment to the United States Constitution. In this connection it may be mentioned that the Texas Court of Civil Appeals, in State *v.* Texas & N. O. R. Co., 103 S. W. Rep. 653, holds, on authority of M., K. & T. Ry. Co. *v.* State, 100 S. W. Rep. 766, 17 Tex. Ct. Rep. 936, that a statute imposing a penalty for the failure of railroad companies to maintain water-closets at stations, is unconstitutional as a deprivation of property without due process of law, and also as an *ex post facto* law.

CONTRACTS. (Illegality — Monopolies.) U. S. C. C. A., Sixth Circuit. — The United States Circuit Court of Appeals for the Sixth Circuit has rendered a very important opinion on the question of contracts in restraint of trade, in which it declines to follow the lead of the federal courts in the east, in which contracts to sell patent medicines at a stipulated price to be controlled by the manufacturer have been upheld. In John D. Park & Sons Co. *v.* Hartman, 153 Fed. Rep. 24, Judge Lurton, speaking for the court, holds that the sole manufacturer of a medicine made in accordance with a secret formula but unpatented, who sells the same to wholesale dealers only, at a uniform price, under a system of contracts by which the wholesale dealers bind themselves to sell at a certain price and only to certain designated retail dealers, who in turn, in consideration of being so designated, bind themselves to sell to consumers only, and at a certain price, violates the federal anti-trust act of July 2, 1900, as the purpose and effect of such sales and contracts is to prevent competition between purchasers of the product, both at wholesale and retail. In the absence of allegations of facts showing these contracts to be necessary for the protection of the manufacturer's business, a court of equity will not aid in their enforcement by granting an injunction to prevent one not a party to the contract from buying the medicine from parties to the contract and reselling at any price he saw fit. The court also holds that the fact that the medicine is manufactured after a secret or private formula does not make the manufacturer immune from the laws forbidding monopolies and unreasonable restraints in trade. Some of the cases which are expressly disapproved by the court and in which such contracts have been upheld, are Dr. Miles Medical Co. *v.* Goldthwaite, 133 Fed. 794; Dr. Miles Medical Co. *v.* Jaynes Drug Co., 149 Fed. 838; Dr. Miles Medical Co. *v.* Platt, 142 Fed. 606 and Wells & Richardson *v.* Abraham, 146 Fed. 190.

CONTRACTS. (Interpretation — Automobiles.) Sup. Ct. N. Y., Trial Term. — The charter of a toll bridge company was construed in Mallory *v.* Saratoga Lake Bridge Co., 104 N. Y. S. 1025. By its charter the bridge company was authorized to maintain a toll bridge across a lake and to collect tolls for the passage of certain vehicles and animals. Automobiles were not enumerated among such vehicles and consequently the court, construing the charter strictly, holds that the company cannot collect tolls for the passage of automobiles over the bridge. The court says: "The fact that automobiles were not known at the time of the passage of the act can make no difference, for the reason that defendants, by accepting the franchise in consideration for the right to collect the tolls stipulated for, assumed the duty and responsibility of building and maintaining a bridge that would meet the reasonable requirements of all travelers on the public highways, including vehicles and animals then in common use by travelers, and also such as might thereafter come into common use.

Its power to collect toll is derived from the provisions of the franchise. It stipulated for no other or further right, and may not exact toll except as therein provided."

The franchise in this instance was very definite and precise in its terms. The toll provided for is so much for a vehicle drawn by one beast, and so much more for a vehicle drawn by two or more beasts. Nowhere is any charge mentioned for vehicles per se. The court cites authorities for the general doctrine that a legislative grant of this sort must be strictly construed, and holds that automobiles, not being drawn by beasts, do not come within the provisions of the statute and are not subject to toll.

Upon practically identical reasoning, it was held in a number of cases that a bicycle was not subject to toll under very similar statutes. Simson *v.* Teignmouth and S. Bridge Co., (1901) 85 Law T. 726; Gloucester Turnpike Co. *v.* Leppe, (1898) 62 N. J. L. 92; String *v.* C. & B. Turnpike Co., (1898) 40 Atl. 774; Murfin *v.* Detroit and E. Plank Road Co., (1897) 113 Mich. 675; Note, 47 L. R. A. 303. Contra, Geiger *v.* P. & R. Turnpike Road Co., (1895) 167 Pa. St. 582.

It would seem that an automobile or motor cycle is no more a vehicle drawn by one or more beasts within the wording of these statutes than is the ordinary bicycle when propelled by human power. And yet in Murfin *v.* Detroit and E. Plank Road Co., (supra) we find the court making a distinction between these vehicles according to their motive power. The court said, "The bicycle is not subject to the payment of toll by the strict letter of the act. Neither is the motor cycle. Yet we incline to the opinion that payment of toll by the driver of the latter is within the spirit, while such payment by the user of the former is not, because of the apparent intention to confine the payment of toll to those who do not depend upon their own powers of locomotion for the propulsion of the vehicle used." This no doubt reaches a desirable result in charging the fast and heavy machines that seriously wear the roadbed, and materially interfere with other traffic, but it also seems to be a bald effort to read in a legislative intention that is not actually expressed in the statute. As was said in Simson *v.* Teignmouth and S. Bridge Co. (supra) there must be some limit to the adaptation of the old statutes to modern circumstances. It is impossible that they can be stretched so as to meet everything that invention may produce in modern days. The remedy is amended legislation.

The principal case would seem to be undoubtedly correct, but it is merely the decision of a single judge at Trial Term, and it is to be hoped that the question may be passed upon by the higher courts.

F. T. C.

CRIMINAL LAW. (**Conspiracy — Statute of Limitations.**) **U. S. C. C. A., 8th Cir.** — One of the main points at issue in Ware *v.* United States, 154 Fed. Rep. 577, was whether or not a conspirator may be prosecuted where the period of limitations has run from the time the conspiracy was formed, but overt acts in the execution of the conspiracy have been committed within the period of limitations. Judge Sanborn, writing the opinion for the majority, says that the question is answered in the negative in United States *v.* Owen (D. C.) 32 Fed. 534; U. S. *v.* McCord (D. C.) 72 Fed. 159, 165, and in *Ex parte* Black (D. C.) 147 Fed. 832, 841. It is answered in the affirmative in U. S. *v.* Greene (D. C.) 115 Fed. 343, 347, 349, 350; U. S. *v.* Greene (D. C.) 146 Fed. 803, 889; Lorenz *v.* U. S., 24 App. Cas. Dist. of Columbia, 337, 387; U. S. *v.* Bradford (C. C.) 148 Fed. 413, 416, 419; U. S. *v.* Brace (D. C.) 149 Fed. 874, 876; Commonwealth *v.* Bartilson, 85 Pa. 482, 488; People *v.* Mather, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122; American Fire Ins. Co. *v.* State, 75 Miss. 24, 35, 22 South. 99, 102, and Ochs *v.* People, 25 Ill. App. 379, 414. He says that after a careful reading and consideration of these and other authorities, the conclusions of the majority of the court are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within the three years, are indispensable to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. From this conclusion Judge Philips dissents on the ground that the gist of the offense is the conspiracy. Overt acts done subsequently in furtherance thereof constitute, if referable to one and the same conspiracy, not several conspiracies, but one and the same conspiracy. In order that subsequent acts should take the conspiracy out of the statute of limitations there must be a new agreement, and overt acts in furtherance of such agreement.

CRIMINAL LAW. (**Federal Buildings — Jurisdiction.**) **U. S. C. C. West. Dist. Ga. So. Div.** — In United States *v.* Battle, 154 Fed. 540, Judge Speer holds that a crime committed on ground acquired by the United States and ceded to it by the state of Georgia for the purpose of a federal building, is within the exclusive jurisdiction of the United States Court. He holds that the state has authority to cede the ground to the United States, and where it does so, the only power which can exercise jurisdiction over such territory to punish any crime is the United States, even though the state has retained the right to exercise its process thereon. This reservation is made for the reason that the state does not want a federal public building to be a refuge for criminals.

CUSTOMS DUTIES. (Smuggling.) **U. S. D.C., S. D. N. Y.** — A person may be guilty of smuggling even before he has passed the customs lines on the docks of an incoming steamer, according to the decision in United States *v.* 218 1-2 Carats Loose Emeralds, 153 Fed. Rep. 643. In this case, it appeared that a person arriving in the United States omitted in his declaration made to the customs officials on shipboard any mention of a package of emeralds contained in his clothing. Furthermore, he falsely stated to the customs officers at the time of the examination of his baggage on the dock that he had no precious stones in his possession. The emeralds were then seized under the federal statute providing for the forfeiture of smuggled goods. It was maintained that as he had not passed the customs lines established on the dock when the emeralds were seized, he was not guilty of smuggling, but the court is of the opinion that when the proper officer of the customs examined the incoming passenger's baggage and put to him the question whether he had any personal property which he had not declared, or any precious stones upon his person or in his pockets, he was obliged to state the truth, and that when the examination was finished, and he still had these emeralds in his possession, without having admitted it, the act of smuggling was complete.

EVIDENCE. (Carbon Copies.) **Minn.** — In International Harvester Company *v.* Elfstrom, 112 N. W. Rep. 252, the Supreme Court of Minnesota holds that the different numbers or impressions produced by placing carbon paper between sheets of paper and writing upon the exposed surface, are duplicate originals, and either may be introduced in evidence without accounting for the non-production of the other. The court says there exists a distinction between letter-press copies and carbon copies. A carbon copy is produced at the same time as the original, and is identical with it; a letter-press copy is produced by an act distinct from and subsequent to the consummation of the legal act of executing the original; such copy is ordinarily produced by the labor of clerks and other employes. If the carbon reproduction is complete, the court says there is no practical reason why all the products of the single act of writing the contract and affixing a signature thereto should not be regarded as of equal and equivalent value. As a case supporting this decision the Court cites Chesapeake, etc. Ry. Co. *v.* Stock, 51 S. E. 161, 104 Va. 97, and State *v.* Teasdale, 97 S. W. 995, 120 Mo. App. 692. Another case in point is Cole *v.* Elwood Power Co. (Pa.), 65 Atl., 678, recently reported in these columns.

This opinion, by Elliott, J., collecting the few prior authorities, is the best on the subject, and makes for the first time the important distinction between carbon copies and blotter-press copies. It also emphasizes the important distinction between consummating the legal act in duplicate form and merely copying a transaction already consummated. This decision comes in season to set a good model for the courts which have not yet passed upon the numerous questions arising from the rapid spread of the use of typewritten documents.

J. H. W.

EXTRADITION. (Subsequent Offense.) **Cal.** — A habeas corpus case dealing with questions as to the rights of persons extradited from a foreign government, which is of particular interest, is the recent case of *Ex Parte* Collins, 90 Pac. Rep. 827. In this case Collins sought to obtain his release on habeas corpus on the ground that the crime for which he was convicted was another than that for which he was extradited from Canada, but inasmuch as the crime was committed by Collins after his extradition and after his return to the state of California, the Supreme Court held that he was not entitled to be released, even though he had been given no opportunity to return to Canada before trial. The court observes that the leading case of United States *v.* Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425, establishes the principle that a person who has been brought within the jurisdiction of the court by virtue of proceeding under the extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until reasonable time and opportunity have been given him after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings. But the court notes that in the Rauscher case as well as in every other case that had been called to its attention, the crime for which it was sought to try the extradited prisoner was one alleged to have been committed prior to his extradition, therefore such cases are not regarded as authority in the case at bar. The court finds support for its position in the Rauscher Case itself, wherein the United States Supreme Court in speaking of the right of the accused, says: "That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up; and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his

extradition," and in another place in the same opinion the court refers to the immunity from arrest prior to conviction of a crime "not enumerated in the extradition treaty and committed before his removal." These extracts from the opinion of the Rauscher Case indicate that the United States Supreme Court did not intend to hold that a person extradited from a foreign country was immune from trial and conviction of a crime committed after his extradition.

MASTER AND SERVANTS. (Torts.) **Ga.** — If the conductor of a street car while engaged in the prosecution, and within the scope of his business in collecting fares fails and refuses to give a passenger correct change, and, upon request therefor, draws a pistol and fires at the passenger, but the ball misses the passenger and strikes a woman passing on the public street through which the car is running, causing her death, the street car company is liable, according to the recent case of Savannah Electric Co. *v.* Wheeler, 58 S. E. Rep. 38. The court says that the expressions used in some reports and text-books that a master is bound by the acts of his agent or servant within the scope of his agency and in furtherance of the master's business, or when the servant is acting for the benefit of the master, do not mean that the agent's act must be beneficial to the master or the latter is not bound. A master is liable for the willful torts of his servant, committed in the course of the servant's employment, just as though the master had himself committed them.

These two rulings, apparently inconsistent, illustrate the inherent difficulty of application of the general rule to unlawful acts done by an employee in protecting the employer's interests where a certain measure of effort was certainly authorized though not the specific means. These two cases might well have been decided precisely to the contrary of the actual ruling. Recent illustrations of the same problem are found in Lipscomb *v.* R. Co., Tex., 64 S. *W.* 923, Holler *v.* Ross, N. J. L., 53 Atl. 472.

J. H. W.

MASTER AND SERVANT. (Torts.) **Penn.** — In Shay *v.* American Iron & Steel Mfg. Co., 67 At. Rep. 54, it is held that a corporation is not liable for damages to a house and injuries to the owner by the negligent shooting by men employed to take the place of strikers, where the shooting was directed from defendant's premises against a mob, and was not authorized by defendant, and not within the scope of the employment of the persons doing it. The decision is based on the theory that a master is liable only for injuries resulting from the willful conduct of his servants, if inflicted within the scope of their authority or employment. Furthermore, the court holds that the acts of the employes complained of amounting to criminal offenses could not subsequently be ratified by the master. In support of this proposition is cited Building & Loan Association *v.* Walton, 181 Pa. 201, 37 Atl. 261; Shisler *v.* Vandike, 92 Pa. 447, 37 Am. Rep. 702.

This case was made clearer by a somewhat fuller statement of the facts: The corporation had imported a car load of colored men to take the places left vacant by the strikers. The car was taken from the railway station to the defendant's works, followed by a crowd of men and boys, who jumped upon the platform of the car, opened the door and called the inmates vile names. When the colored men left the car and went inside the enclosure, the persons congregated on the outside threw stones and other missiles into the enclosure. Shots were fired from both the inside and the outside of the enclosure, one of which caused the injury complained of. An attempt was made by the plaintiff to prove that the colored men were armed by the defendant or by its direction, but the attempt failed. The plaintiff's own evidence also showed that those of the men who had revolvers had them without the knowledge of the defendant; that what shooting they did was done against the protests of the person who had them in charge; that they had not been hired to protect the works or the property of the defendant, but simply to perform labor for it. No point was made that the defendant ought to have foreseen such a difficulty and guarded against it. The question, then, became in substance this: Where a servant, not armed by the master or known by him to be armed, not charged with any duty of protecting the master's works or property, is assailed by a tresspasser, and in resisting the assault, fires shots which injure a third person, can that injury be deemed to be committed by the servant while acting within the scope of his employment? There would seem to be very little difficulty in answering this question in the negative.

With respect to the question of ratification, the cases cited were cases involving the ratification of a forgery, concerning which the authorities are in conflict. There can be no doubt, however, that there are many cases wherein the principal might be held liable on the ground of ratification, even though the act was one for which the agent might be punished criminally. **Floyd R. Mechem.**

MUNICIPAL CORPORATION. (Use of Streets for Removal of Building.) **S. C. N. Y., App. Div.** — In Hinman *v.* Clarke, 105 N. Y. S. 725, it is held that in the absence of a general legislative restric-

tion by ordinance or otherwise, an owner of a building in a city has a common law right to the reasonable use of the city streets for the purpose of moving such building from one location to another. But the court says, that the common council, having control of the streets of a city, has the right reasonably to regulate their use in moving buildings upon them, and the court is not prepared to say this power of control may not also include the right to prohibit the use of the streets for the moving of buildings, provided always that the prohibition be under the circumstances reasonable. However, the council in its exercise of this legislative function must act by ordinance, duly adopted and promulgated according to the provisions of the city's charter.

PLEADING. (Variance.) Ala. — A count based on negligence in an action by an administrator to recover damages for the death of his intestate, is not supported by proof of a willful and wanton wrong resulting in the death of plaintiff's intestate according to Louisville & N. R. Co. *v.* Perkins, 44 So. Rep. 602. In this case it appeared that plaintiff's intestate, a man over eighty years of age, was a passenger on one of defendant's trains, with a ticket to Geneva. He did not alight at Georgianna, where it was necessary for him to change cars, but was found next morning some distance therefrom in a frozen condition from the effects of which he died. A witness testified to seeing two white men in the uniform of defendant railroad company come onto the rear platform of the rear car of the train, on which decedent was riding, and push him, while the train was running, from the platform at a point near where he was found, where the ground was rough and uneven. These facts the court held to establish a cause of action for willful injury, and therefore insufficient to sustain a count based on negligence.

There are two classes of cases which are often confused. In the first class the count alleges facts constituting a certain cause of action while the evidence offered tends to prove another cause of action consisting at least in part of facts not alleged at all. In the second class the count was intended to allege a certain cause of action but it contains allegations sufficient to make out another cause of action, and the evidence offered tends to prove the allegations constituting this second cause of action. In the first class of cases there is a clear variance. Truesdell *v.* Bourke, 145 N. Y. 612; Cole *v.* Armour, 154 Mo. 333, 351; Wilson *v.* Co. 153 U. S. 39, 47; 22 Ency. of Pl. & Pr. 527. In the second class of cases there is no variance from the allegations made but the attempt is to recover on a cause of action different from that which the pleader evidently intended to set forth in his count. This is spoken of as departing from the theory of the pleading. Whether this is allowable is a question concerning which the authorities are in conflict. That it is permissible, see Conaughty *v.* Nichols, 42 N. Y. 83; Faulkner *v.* Bank. 62 Pac. Rep. 463 (Calif); Pindall *v.* Trevor, 30 Ark. 249,60. That it is not permissible, see Ross *v.* Mather, 51 N. Y. 108; Supervisors *v.* Decker, 30 Wis. 624; City *v.* Uhl. 99 Ind. 531, 9. The Alabama court no doubt considered the present case as one of the first class. Whether that was right or not could only be determined by a reading of the count in question, which is not given in the report of the case.

C. B. W.

SALES. (Fraud.) Pa. — Where a purchaser is induced to enter into a contract of purchase by a fraudulent representation that a combination or trust is about to be formed for the purpose of controlling the sale of articles of the nature of those purchased, and that such trust will increase the price of such articles after a given time, this is sufficient to prevent a recovery for the purchaser's refusal to take the articles contracted for, according to Standard Interlock Elevator Co. *v.* Wilson, 67 At. Rep. 463. In this case, which was an action to recover for the breach of a contract to purchase safety devices for elevators, the court held that an affidavit of defense of the above nature was sufficient. In support of this decision the court cites Williams *v.* Kerr, 152 Pennsylvania, 560, 25 Atlantic 618, wherein it was held that owners of land are entitled to a reconveyance where it appears that they were induced to sell it by false representations of the vendee that certain improvements would be made on the property which would greatly enhance the value of the owner's remaining land; and Sutton *v.* Morgan, 158 Pennsylvania, 204, 27 Atlantic 894, 38 Am. St. Rep. 841, wherein the court held that a sale of land will be rescinded where it appears that the vendee was induced to purchase the land at twice its value by false representations of the vendor's agents as to the demand for building lots, and that railroad shops were about to be built in the neighborhood. The court concedes it to be true that false statements to be deemed fraudulent in law, must relate to something represented as an existing fact, but quotes Benjamin on Sales, (§ 449 *et seq.*) to the effect that a statement apparently only of intention, purpose or opinion, may amount to a statement of fact, as where a person fraudulently misrepresents his intention in doing a particular act to the damage of another.

TORTS. (Right to Privacy.) N. J. — A noted inventor, is, in Edison *v.* Edison Polyform Mfg. Co., 67 At. Rep., 392, granted an injunction

to prevent the unauthorized use of his name by another as a part of its corporate title, or, in connection with its business or advertisements, his picture and his pretended certificate endorsing a remedy which such other is engaged in manufacturing, compounded according to the formula devised by Mr. Edison, though he is not a business competitor. The court notes that in two English cases, Clark *v.* Freeman, 11 Beav. 112, and Dockrell *v.* Douglas, 78 L. T. Rep. 848, injunctions were refused to restrain the unauthorized use of complainant's name or recommendation, on the ground that complainant was not a business competitor of defendant, but the court observes that the Clark case is virtually disapproved in Maxwell *v.* Hogg, L. R. 2 Ch. 307, and in *In re* Rivere's Trade-Mark, 26 Ch. Div. 48. Furthermore, the complainant's contention in this case is supported by the leading case of Routh *v.* Webster, 10 Beav. 561. There the provisional directors of a joint stock company had, without plaintiff's authority, published a prospectus stating that he was a trustee. Lord Langdale granted an injunction on the ground that the company was representing the plaintiff as responsible in their speculations in a way calculated to involve him in all sorts of liabilities. As a late English case entirely supporting this holding, the Vice-Chancellor cites Walter *v.* Ashton (1902) 2 Ch. 282. The court further reviews Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828, wherein the Court of Appeals, by a bare majority, overruled the decision of the Appellate Division of the Supreme Court, and held that a young lady was not entitled to an injunction to restrain a flour company from putting her likeness upon prints advertising its flour. This case, the Vice-Chancellor says, cannot be sustained on principle, and has been disapproved by the Supreme Court of Georgia in Pavesich *v.* New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, and by the New Jersey Court of Appeals in Vanderbilt *v.* Mitchell, 67 Atl. 97, 103. The Vanderbilt case was recently reported in these columns and it is on authority of the same that the Vice-Chancellor grants Mr. Edison the relief demanded.

The result in this case is plainly sound. Interesting questions of theory are raised by this type of wrong,— questions as to its place in the system of torts. The opinion of Stevens, V. C., examines the "privacy" cases as though they were germane. We believe, however, that they form a separate species. So, too, do the libel cases and the trade-name cases. Of the few precedents of the precise class in question, the opinion makes a full collection; the only one omitted appears to be the the celebrated application of Lord Byron to restrain the publication of spurious poems under his name. (Byron *v.* Johnston, 2 Mer. 29). J. H. W.

TORTS. (**Strikes — Picketing.**) **S. C. N. Y., Sp. Term.** — The right of an employer to enjoin picketing by members of a labor union, is upheld in New York Central Iron Works Co. *v.* Brennan, 105 N. Y. S. 865. It was urged by counsel for the union that there is no authority in New York to enjoin the members of the union from picketing, but the court says: "If there is no law in this state to authorize a court to interfere and prevent people through such conspiracy and combinations from interfering with a party who wishes to conduct his business in a lawful way, then it is high time there was such authority, and this appears to be a good case in which to follow the numerous authorities of other states, which have uniformly held that injunctions similar to the one sought to be dissolved here can be issued, upheld and enforced." *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Casey *v.* Cincinnati, etc., 45 Fed. 135, 12 L. R. A. 193; Geo. Jonas Glass Co. *v.* Glass Bottle Blowers' Ass'n, 66 Atl. 953. In the case at Bar the evidence pointed unmistakably to the fact that the purpose of the labor union was not by peaceful persuasion to endeavor to prevent men from entering the employment of the plaintiff. On the other hand, it appeared that the union took the course it did, and used the means complained of, to compel the employer to accede to its demands or else destroy the employer's business. In doing so, the court maintains, the strikers exceeded their rights under the decisions of New York, citing Coons *v.* Chrystie, 24 Misc. Rep. 296, 53 N. Y. Supp. 668; Matthews *v.* Shankland, 25 Misc. Rep. 604, 56 N. Y. Supp. 123; Davis *v.* Engineers, etc., 28 App. Div. 396, 51 N. Y. Supp. 180; Sun Printing Association *v.* Delaney, 48 App. Div. 623, 62 N. Y. Supp. 750; Davis *v.* Zimmerman, 91 Hun. 489, 36 N. Y. Supp. 303. Such actions, the court held, it had abundant authority, under the decisions in its immediate locality, to restrain by injunction. As a case in point the court cites Davis Machine Co. *v.* Robinson, 41 Misc. Rep. 329, 84 N. Y. Supp. 837.

TORTS. (see **Master and Servant.**)

THE LIGHTER SIDE

A Will from the Provinces. — Preston, Nova Scotia, is the home of quite a body of the colored race. Their frequent litigations have made them so keen on the law that they even try their hands at will drawing. The following is one of the most famous examples in the Halifax probate office:

IN THE NAME OF GOD; AMEN:

I, Alexander Taylor, in Preston do declare this to be my last will and testament. First, I do hereby bequeath my body to the dust and my spirit to God who gave it.

Secondly I do hereby to my son John Taylor, Blacksmith in Halifax and his heirs forever my land joining on the east side of Salmon River, Preston, containing 280 acres with house and out houses to the aforesaid John Taylor forever.

And the land must be sold as soon as possible for to maintain me and my wife Margaret Taylor.

I have appointed James Lawlor in Dartmouth to sell the land and give what money it brings to the aforesaid John Taylor and him to collect and pay off what debt is upon the place and the remainder is for to maintain me and my wife as long as God is pleased to let us live in this world.

18 day of July, 1866. Alexander Taylor (L.S.)

Refresher Needed. — Secretary Elihu Root is said to have been one of the best paid attorneys in the United States. General Corbin, who used frequently to accompany him upon horseback excursions, was embarrassed by his fruitless efforts to engage Root in conversation. Becoming desperate from his repeated failures, Corbin, n speaking of the dilemma, said: "Why, the man is so accustomed to being paid for talking that I'll be hanged if I believe he will talk unless he is paid for it. I'll have to pay him a stiff fee to hear the sound of his voice." — *Argonaut.*

Pleasantries. — The second day drew to its close with the twelfth juryman still unconvinced. "Well, gentlemen," said the court officer, entering quietly, "shall I, as usual, order twelve dinners?" "Make it," said the foreman, "eleven dinners and a bale of hay." — *New York Press.*

His Occupation. — Magistrate (to prisoner) — What is your occupation? Prisoner — I am a locksmith, your worship. Magistrate — And how came you to be found in a gambling house? What were you doing when the police appeared? Prisoner — Making a bolt for the door. — *London Mail.*

An Apt Comparison. — When Ab del Hakk was poor he was one day travelling across a weary plain, says the author of "Life in Morocco," and was very hungry. So he came to the house of the Widow Zaidah, who was also poor; but when he made known his want she set before him two hard-boiled eggs, all the food there was in her house.

Later, when Ab del Hakk lived in Marakesh and was very rich, Meludi, the lawyer, disliking him, persuaded the Widow Zaidah to sue him for the eggs; but not for the eggs alone, for they would have become two chickens, which in time would have so multiplied that the whole fortune of Ab del Hakk would not now pay for them. When the case came to trial the rich man was not in court.

"Why is the defendant not here?" demanded the judge.

"My lord," said his attorney, "he is gone to sow boiled beans."

"Boiled beans?"

"Boiled beans, my lord."

"Is he mad?"

"He is very wise, my lord."

"Thou mockest!"

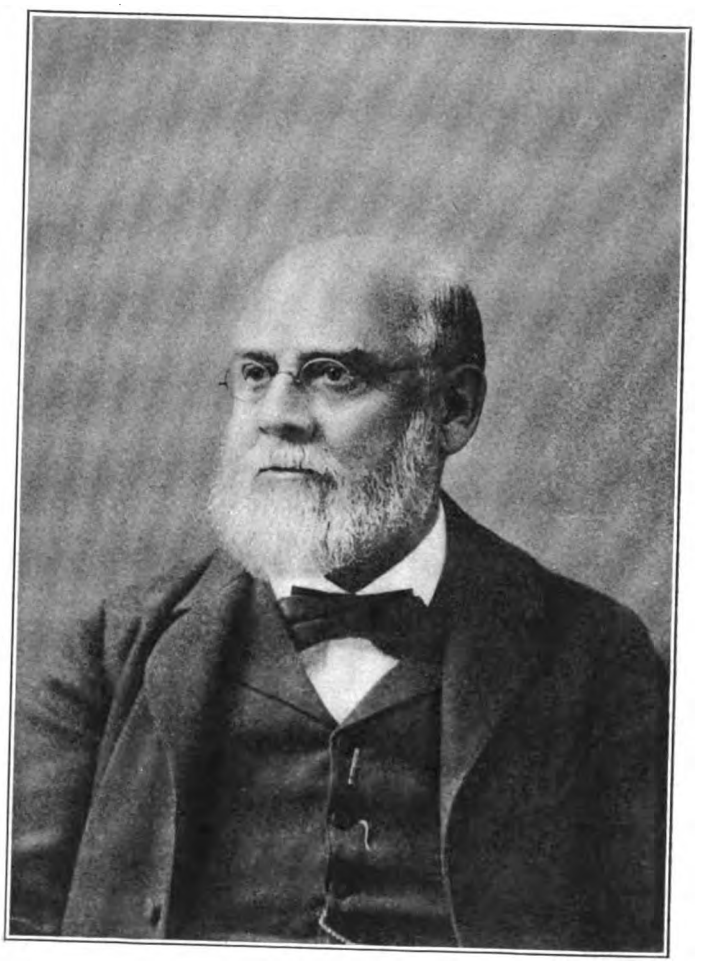
"Surely, my lord, if hard-boiled eggs can be hatched, boiled beans will grow."

The suit was promptly dismissed, with costs to the plaintiff.

German Lawyers are So Slow. — Chauncey Depew paid $31.75 because his motor car frightened a team in Germany. The remarkable thing is that of this the $1.75 and not the $30 was the lawyer's fee. — *Kansas City Times.*

An Eye to Business. — *Lawyer*: I can get you a divorce without publicity for about a hundred pounds.

Society Woman: How much more will it cost with publicity? — *Illustrated Bits.*



Geo. Hoadly

The Green Bag

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GEORGE HOADLY

By George Hoadly (Jr.)

THE history of the state of Ohio in the nineteenth century, and particularly the last half of it, might be written in the biographies of the members of the bar of the state. Of these the subject of this sketch was one for more than fifty years, and an outline of his career may perhaps prove of interest to the bar of other states as well as that of Ohio where those who knew him are daily becoming fewer.

George Hoadly was born in New Haven, Connecticut, July 31, 1826. On the father's side he came of a family of sturdy New England farmers. His grandfather had served as a captain in the Connecticut militia during the Saratoga campaign, while his father, also George Hoadly, was a lawyer and banker in New Haven and mayor of that city. On the mother's side he was descended from Jonathan Edwards and from Timothy Dwight, president of Yale College, and he was a nephew of President Woolsey, also of Yale.

In 1830 his parents removed to Cleveland, Ohio, where he was educated until prepared for college. In those days boys were prepared for college younger than now, and while schools and teachers in Cleveland may not have been equal to what they are to-day, still they had the advantage of greater concentration of study, so that he was prepared for college at fourteen and in 1840 entered Western Reserve College, then at Hudson, Ohio, in the class of 1844. In this case, however, as in many others, the influences that formed the man were not so much the school and college as the home, and, above all other things, the influence of his father, a graduate and former tutor in Yale College, and a scholar and gentleman in the true sense of that much abused word.

After graduating from college he spent a year at the Harvard Law School. At that time that school was directed by Joseph Story and Simon Greenleaf, and those two great men had made a school which, without the elaborate apparatus of modern schools, still inspired and formed many great lawyers. Among the students in the school during the year Mr. Hoadly spent there were Rutherford B. Hayes, afterward President of the United States, and John Lowell, for many years United States Judge for the district of Massachusetts.

After leaving the law school he entered the office of Charles Converse of Janesville where he spent a year, and in 1846 he entered, as a student, the office of Chase and Ball in Cincinnati. In that office, as student, clerk and finally, in 1849, as junior partner he fomed a friendship with the head of the firm, Salmon Portland Chase, afterward Chief Justice, which ended only with that great man's life. To be the friend and associate of Salmon P. Chase meant to be in the thick of the irrepressible conflict. To us, living more than forty years after the close of the Civil War, this conflict is but a chapter of history happily closed, but to the men of that time, to Salmon P. Chase, to George Hoadly and to many others, some few of whom are still living, it was a matter of life and death. The sacrifices which such men as Chase made for their convictions are described by George Hoadly in his memorial address delivered at Cinncinati in 1886 on the occasion of the removal of the remains

of the Chief Justice to that city, as follows:

"When, forty years ago, I entered his office as student of the law, he was the most unpopular man in Cincinnati. True, his domestic sorrows had made him grave and reserved — had withdrawn him for the time from social intercourse and pleasures. This does not account for his isolation. He was a candidate that autumn for Congress, but received only five hundred votes. Cincinnati, which had welcomed him at first with open arms, petted and praised him, encouraged the brilliant young lawyer, conferred on him civic honors, brought work to his office, trusting business to his eager and willing care, now averted her face, having become an angry stepmother.

"Nine years later, after he had served a term in the Senate, at the election of 1855, when he was chosen Governor by 15,000 majority in the state, the first candidate of a new party, a fullblooded, zealous, intensely hopeful party, he was, in his own home, where he had then lived for twenty-five years, not first, nor even second in the list, but was beaten by the democrat, Medill, by 10,000, by the Know Nothing, or American, Trimble, 2,000. His name came from the ballot boxes of Hamilton county with a beggarly tale of 4,500 votes. A single sentence explains the mystery: He was an Abolitionist, and Cincinnati a suburb of the South."

Into such a community came in 1846 this young man born in New England, trained to a belief as a self evident truth "that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." Happy was it for him that he came into close association with a great man of like views; still happier that of that great man it could be said in the same address:

"What helped him, yes, made him, was this: He walked with God. The predominant element in his life, that which gave tone and color to his thoughts and determined the direction of all he did was striving after righteousness.

Mr. Hoadly entered the office of Chase and Ball as a student in 1846. On his admission to the bar in 1847 he became clerk for the firm, and as Mr. Chase's political activity removed him to a considerable extent from active practice while the business of the firm was large, he became a partner in 1849, the firm then becoming Chase, Ball and Hoadly.

Mr. Chase's political activity encouraged his junior partner to take a part in politics, such a part as an antislavery man who believed in political methods and works could take in a proslavery community. While the city in which he lived was proslavery, the state was not, and in 1851 the legislature elected him Judge of the Superior Court of Cincinnati for the rest of the term to which the constitutional convention had limited the existence of the court. After winding up the business of that court he returned to the practice of his profession, was city solicitor of Cincinnati in 1855–6, in 1856 was a delegate to the first National Convention of the Republican party at which John C. Fremont was nominated for the presidency, and in 1859 was elected one of the judges of the Superior Court of Cincinnati.

The other judges of the court at the time were Bellamy Storer and Oliver Spencer, and the court had a reputation which the abilities and learning of the many distinguished lawyers who have since sat on its bench have long maintained. At that time there were only occasional reports of the decisions of courts inferior to the Supreme Court, and the only report containing any decisions of the Superior Court of Cincinnati during Judge Hoadly's term is the second volume of Disney's reports. The only reported decision of Judge Hoadly having any general interest is the decision in Farrelly *v.* Cincinnati, 2 Disney, 516, which is still a leading case in Ohio with reference

to the right of action for damages caused by a public nuisance.

In 1864, on the expiration of the term for which he was elected, Judge Hoadly was re-elected; but in 1866 he resigned to resume the practice of his profession and formed the firm of Hoadly, Jackson & Johnson, by which he entered into a professional and personal association with Edgar M. Johnson which lasted until Mr. Johnson's death in 1894.

At about the same time he became a professor in the Cincinnati Law School and in that capacity labored zealously for over twenty years to discharge the debt which he felt he owed to his profession. The best evidence of his success in discharging this debt is to be found in the large number of lawyers in Ohio and the neighboring states who gladly acknowledge that a great measure of their success is due to the training they received in the Cincinnati Law School.

Professionally the twenty years following were marked by an advance from a local to a national reputation. We may be allowed briefly to trace a few of the steps of this advance.

In 1869 the Board of Education of Cincinnati passed a resolution forbidding religious instruction or the reading of religious books, including the Holy Bible, in the schools, and repealing the regulation which had been in force from the year 1852 requiring the opening exercises to commence by reading a portion of the Holy Bible and appropriate singing. A number of zealous tax payers at once brought suit in the Superior Court of Cincinnati to enjoin the putting in operation or the enforcing of this resolution. In effect this was a suit for a mandatory injunction to compel the reading of the Bible according to the authorized, or King James, version, with the singing of hymns as the opening exercise of every school in Cincinnati and, as a result, in Ohio. The case was reserved to be argued in the general term where it was argued for the plaintiffs by William M. Ramsey, George R. Sage, afterward for many years United States District Judge, and Rufus King, and for the defendants, the Board of Education by J. B. Stallo, afterward minister to Italy, George Hoadly and Stanley Matthews, afterward one of the justices of the Supreme Court of the United States. In few cases in Ohio has such an array of counsel been heard, and the argument was worthy of the cause and of the counsel. Mr. Hoadly in his argument for the defendants, after discussing at some length the proposition that the Board of Education in its management of the schools was vested with a discretion, that what they had done was within the scope of that discretion and that no court has jurisdiction to control the discretionary acts of such a board, by injunction or otherwise, devoted the larger part of his argument to a defence of the action of the Board as based upon sound principles, and to showing that such relief as was prayed by the plaintiffs could only be had on the view that evangelical protestantism was the established religion of Ohio.

The majority of the court, Judges Storer and Hagans, decided the cause in favor of the plaintiffs, but Alfonso Taft, the honored father of the present Secretary of War, dissented, and no act of his life more became him.

Surely, Minor *v.* Board of Education deserves a place among the "Decisive Battles of the Law" as the battle for religious freedom. It is much to be regretted that the volume containing the record, the oral arguments of counsel and the opinions of the judges of the Superior Court is extremely rare.

The case was taken to the Supreme Court by petition in error, and the case is there reported under the name of Board of Education *v.* Minor, 23 O. S. 211. The Supreme Court unanimously reversed the judgment of the Superior Court and held that what the Board of Education had done

was within its power, and that the courts could not control its discretion, and in the opinion, delivered by Judge Welch, will be found a further vindication of the action of the Board as in the interest of true religious freedom.

In 1872 Judge Hoadly took an active part in the movement which led to the calling of the Cincinnati convention of that year, but on the nomination of Mr. Greeley, feeling that, by temper and opinion alike, the candidate selected was unfitted to be the leader of the movement for financial and tariff reform, which he with many others had hoped to see the outcome of that convention, he was reluctantly led to support General Grant for re-election.

In the constitutional Convention of 1873–4, in which he was chairman of the committee on municipal corporations, he gave much time and labor to perfecting the constitution drawn by that body, and in particular to the provision of safeguards against municipal extravagance.

Although the constitution drawn by that convention was defeated at the polls, a large part of the changes which it made in the constitution of 1851 have since been adopted, in the form of separate amendments to that instrument.

In 1876 he was an earnest supporter of the candidacy of Governor Tilden for the presidency, and was one of the counsel before the electoral commission on behalf of the democratic candidates. The questions argued by him were those presented by the contests in Florida and Oregon. Space will not permit the quotation of these arguments, and neither an abridgment nor a selection of extracts would do justice to them.

In 1879 and 1880 he was employed with Charles O'Connor as counsel for the holders of the railroad bonds of the state of Tennessee in an effort to collect these bonds by foreclosure on behalf of the bondholders of a lien reserved by that state on the railroads which had received state aid. The attempt failed of success for the reasons given by the Supreme Court in the "Tennessee Bond Cases," 114 U. S. 663.

In 1880 he was temporary chairman of the Democratic Convention which nominated General Hancock for the presidency. In 1883 he became the candidate of the democratic party for the governorship, and was elected by a plurality of about thirteen thousand. At that time the powers of the Governor of Ohio were more restricted than they are at present, as the Governor then did not have the veto power, so that the office was rather one of honor than of authority, except in emergencies. During his two years of incumbency there were but few emergencies, the most important, and that of most interest from a legal standpoint, being the riot in Cincinnati, due to the unsatisfactory condition of the administration of justice, on March 28 and 29, 1884, which resulted in the burning of the court house, the destruction of a large part of the records of Hamilton county, and the killing and wounding of a large number of people by the fire of the troops.

When a candidate for re-election in 1885, he was defeated by Governor Foraker, whom he had defeated two years before.

In 1884 at the sixtieth anniversary of the foundation of the Yale Law School, he was invited to deliver an address before the graduating class. He selected as his subject "Codification in the United States," a subject in which he had for many years felt a profound interest, his voice and pen being used on every appropriate occasion in favor of the codification of the common law. On this occasion that University honored him with the degree of L.L.D.

In 1887, in company with his friend and partner, Edgar M. Johnson, Governor Hoadly removed to New York City, forming with Edward Lauterbach the firm of Hoadly, Lauterbach and Johnson. With this removal ended his active connection with the Bar of Ohio which had lasted forty years, and his further occasional appearances in

the courts of Ohio were as an honored visitor and no longer as an active member of the Bar.

In 1888 he was selected to deliver the annual address at the meeting of the American Bar Association. In closing this address he said: "If we must confess that the bar of today is not equal to that of Justinian's age, not equal to Tribonian and his associates, that Mr. Field's work is premature or inadequate, and that to another generation must be committed the task of securing us against the dangers of "inherent sovereignity in public law, and the unwritten in private law, let us devote ourselves to the task of improving the education of our legal successors. Upon this we can all agree."

"There is no excuse for admitting to the practice of the law any man not adequately prepared for the work. Let law schools abound, and private preceptors be treated as adjuncts. Require competent knowledge not only of our own tongue, but also of the language that forms its basis; require competent knowledge of the laws and systems of the great Empire, in which that language was in daily use; require competent knowledge of the history of that empire, the development of its civilizations, as well as of the nations speaking the English tongue whose children we are. Widen the horizon of legal vision. Give to the lawyer before he becomes so pushed by the affairs of clients, as to be debarred by the exigencies of life from study of all except the cases which happen to come to him — give to the legal student the amplest and fullest opportunities to survey, not merely the historical data which precede our age and are the basis of our system, but others which constitute the foundations of other civilizations worthy of being considered with our own. Wage implacable war against ignorance; forgive no man who attempts to come to the bar without an adequate equipment, derived not merely from study of the statutes and the laws of his own country, but from a general survey, at least of those of other lands. Lift up the standard, increase the term of study and be steadfast in exacting from the student the bestowal of time and labor in study. Four things are required of all generations of American lawyers: integrity, industry, learning, faculty."

"The first and second of these are at the command of all; industry will bring learning, but God only can give power, faculty, genius. This seems to be allotted to every people and generation, according, at least, to their deserts. We may, therefore, await the future in serene confidence, that if by honest labor we do our part, He who giveth the increase will not withhold from us and successors that vital spark which shall animate our and their corporate work, and make it productive of blessings to generations."

The wide extent and great success of his practice in New York is well known, but the details of such a practice are not of general interest. There was, however, during that time one employment of public interest. In 1894 he was employed by the Attorney General as special counsel for the United States in the financial difficulties which the Union Pacific Railway was in, and as a result of his labors the United States collected the full amount advanced to the Union Pacific Railway with interest.

The last few years of his life he was compelled, owing to blindness and failing health, to spend in retirement.

George Hoadly died at Watkins, New York, August 26, 1902, having just completed his seventy sixth year.

CINCINNATI, OHIO, November, 1907.

THE PROPAGANDA OF EVARISTO PANGANIBAN

By J. H. Blount.

AMERICANS who know nothing else about the Philippine Islands have heard of the city called Manila. As "Paris is France," so Manila is the Philippines. In other words, Manila is at once the seat of government, the commercial metropolis, and the social Mecca. There is, therefore, reasonable ground for hope that the word Luzon may be remembered, in the absence of any other aid to memory, as being the name of the island on which Manila is situated.

Besides being of primary importance for this reason, Luzon is the largest and most populous island of the Archipelago. Its area is about 48,000 square miles, which is about the area of Virginia; and as the area of the whole Archipelago is only about 115,000 square miles, the island of Luzon, it will be seen, includes far more than a third of all the dry land out there, in fact nearer one half of it.

Concerning the people of some of the poorer and more sparsely settled mountain counties of north Georgia, the rest of the state used to say, "Why, some of those people up there don't know the war is over," and in fact, it is surprising how the physical features of a country will often bring about complete insulation of some of its inhabitants from contact with the rest, so that instead of keeping alert and abreast of the times and catching the cadence of the general progress, they constitute a tiny sample of what the sociologists call "a backward people."

In the heart of the mountains of central Luzon there lies an oval shaped valley, extending some twenty-five miles in length from northeast to southwest, with an average width of six or seven miles. This valley, together with the mountains which lock it in, constitutes the province of Nueva Viscaya. The valley itself contains some 18,000 civilized people, more or less; the sides of the mountains which hem it in roundabout are supposed to contain about 40,000 Igorrotes. These are the non-Christian head-hunting hill tribes, upon whom the priests of the church of Rome, with all their infinite tact and patience, and devotion to duty, have never been able to make any impression. At certain seasons of the year, when a certain red flower blooms, these "unfaithfuls" — "infideles" is the Spanish name for the non-Christian — swoop down from their mountain fastnesses, upon an unguarded village or rancheria of the lowlands, cut off a few heads, and, pursuant to a tribal superstition that such ornaments set on a pole in their fields will improve and mascot growing crops, rush back to their jungle-bounded mountain eyres, before they can be apprehended and brought to justice. You ask how dare we leave these 18,000 civilized people of the lowlands at the mercy of the 40,000 savages in the surrounding hills. We answer that the Highlanders have no organization as a whole, in fact no unit of organization whatsoever more comprehensive than the family or neighborhood group, and therefore we fear no general concerted movement by them against the people of the lowlands. The six or eight Americans among whom the executive, financial, judicial and other responsibility for the province is partitioned move in and out day by day among the people of the valley, demonstrating certainly beyond question their faith that the hill-tribes will not descend in a body. However, these Igorrotes manage in many cases to make themselves a very appreciable nuisance. They have a way of lying in wait for the unwary traveller as he crosses the mountain trails leading into the Province.

Shortly before the episode about to be told, a sufficient number of these desultory

depredations had been perpetrated by the Igorrotes to move a reasonably prudent wayfarer, starting over the southwest trail for Nueva Viscaya to accept a strong and well armed escort if offered. This province of Nueva Viscaya is really one of the most remote things I know of. It is as far thither from Manila by mail as Manila is from San Francisco. Strategically, it had no connection with the Americans in the province adjoining it on the south. For the pass at the southwestern end of the oval valley was a tortuous and precipitous gorge or canyon, hardly possible to get through in the wet season, and almost inaccessible for supply trains. Hence, for help in the event of trouble, the governor of Nueva Viscaya looked always to the northeastern pass, which led over the Cork-Screw Mountain into the great rich and well garrisoned valley of the Rio Grande de Cagayan. The military centre for that part of the Cagayan valley was the town of Ilagan, capital of the province in which Aguinaldo's capture occurred, and to this Ilagan it was a far cry over the hills from the capital of the mountain-locked province.

In fact it was ninety long and weary miles, along which the Igorrotes — the so-called "unfaithfuls" — continually lay in wait for the so-called faithful, attacking them if weak, or unwary. Besides, the only garrison in Nueva Viscaya consisted of native troops, lately organized, armed and equipped as an infantry company of rural police.

These troops, the constabulary, being natives of the province, except the officers, had of course been recruited from people who had but recently served in the insurgent army. So that when, during the last days of April, of the year 1902, telegrams from Bayombong began coming into Ilagan, indicating that the constabulary officer over there was having very considerable friction with the civilized people of the lowlands, that bad blood was beginning to be stirred, and that a general uprising was a culmination momentarily likely, of course it was not an inviting prospect to leave the cheerful and eminently respectable light that glistens from the bayonets of a battalion of regular infantry, charged with the preservation of law and order, and go over a series of mountains, ninety miles, into the outer darkness of the hatchet and the bolo, where judicial decrees might have no more weight than a child's pop-gun, and where the Court itself might at any moment have to cast aside benevolent assimilation and shoulder a gun.

After the dimensions of an apparent tempest have dwindled to the capacity of a tea-pot, the storm-centre is contemplated in retrospect much more imperturbably than it was contemplated in prospect. Hence these dramatic touches, by way of anticipation, to a *denouement* that was not only bloodless, but full of genuine humor. The cause of all the trouble was what has since been known and will long be remembered in that locality, as "The propaganda of Evaristo Panganiban." Evaristo was an agitator. For ways that were dark, and for ways out of them that were ingenious, he could discount a labor agitator from the anthracite region of Pennsylvania. He had written a letter to the Mayor of the town, full of that withering sarcasm customarily employed even in the land of the free by a man who wants an office against his rival who has it. Among others things, he had told the Mayor something to this effect; "I wish I were Mayor of this town. If I were Mayor, I too would have a barn built for my live-stock by the poor and humble people of the neighborhood without money and without price, I too would send *casadores* to the mountains to kill deer for my table, and *pesacdores* to the rivers to catch fish for my family's use, and otherwise get my subsisttence without expense to myself. I too would use the *carabaos* of my humbler neighbors to plough my rice-paddies and tobacco fields. I too would &c &c."

This letter of the Junius of Central Luzon concluded: "All these are of course mere generalities. If the Mayor desires me to be more specific, he has only to let me know."

[Signed] EVARISTO PANGANIBAN.

Under the Spanish law, contempt of any constituted authority, executive, legislative, municipal or what not, is like contempt of court with us. No matter how righteous the contempt may be, the truth of the insulting matter is no defense. So Evaristo had been tried in the Mayor's Court, convicted of *desacato*, or contempt of authority and placed in durance vile, pending appeal to the next term of the Circuit Court. Incidentally, he had scribbled all over the proceedings in the Mayor's Court words which in a manner more forcible than elegant demonstrated his total lack of respect for that tribunal.

Once in jail, he began, through friends who came to sympathize with and console him, to issue manifestos, written addresses to the people of the province, for which the Spanish word is *propaganda*.

In these addresses he explained to the people what a martyr he was; how there was no more "*prestacion personal*" — enforced personal service — since the flag of haughty Spain had been forever lowered from those blue mountain sides where he was born; how Nueva Viscaya was very far from Manila, but how her darkest corners now stood illuminated by the rays from the torch of the American Goddess of Liberty, the patron saint of the great Western Republic; and how the Mayor was going to come to grief for invading the majesty of personal liberty and encroaching upon the individual right of each of their noble selves to life, liberty and the pursuit of happiness.

The point of this story is that about that time the chief constabulary officer of the province, an American, was trying to get men to work for him, and trying to hire a lot of horses. The work he had laid out was of great importance to the welfare of the province and he was ready and willing to pay good American gold for labor and hire of live-stock. But, alas, the leaven of Panganiban's progaganda had leavened the whole population of the valley. The day of freedom had come, the high noon of the sacredness of individual liberty.

Panganiban certainly would not dare to be saying these things if they were not true. A man who did not care to work could rest, and the American Goddess of Liberty would look at him benevolently and say Rest, my child, if you wish; pursue happiness, yea, to the centre of the cock-pit and the depths of bankruptcy. Lie on the floor of your shack, and smoke cigarettes, if you want, until you pass off into smoke and become a thing that was — while your wife, scarce emerged from the pains of child-bearing, consoles herself with the joy of nursing, in the intervals of domestic drudgery.

Such was the state of affairs that Panganiban's propaganda had brought about. It was almost another epoch of bounties such as the forty-acres-and-a-mule period of reconstruction days in the South.

The people had been struck blind by the light of American liberty, as it came from the heaven of demagoguery, through the lens of Evaristo's oratory. The Constabulary officer had $20,000, in coin down in Manila, which he wanted to get up there on ponies, to be spent for the improvement of the province, besides large quantities of supplies for the schools and various branches of the Government. But he could not get ponies or men for love or money. There was no more *prestacion personal*, you see. People didn't have to work if they didn't want to. The Constabulary would go about in the *Barrios* and *Rancherios*, but whenever he hove in sight and hearing of a house, the owner would rope up his ponies and scamper off to the woods.

Sometimes the Constabulary would suspect that the apparent owner was unlaw-

fully in possession, and so would send a bullet over his head — "a shell across his bow," as our naval friends would say. But that, far from stopping him increased his terror, his speed, and his determination not to be obliging. The province was in a perfect stew. The situation, to anyone who knows those people, was really a very ugly one.

I tried Evaristo for disrespect to the Mayor's Court and fined him an amount which he paid. The profane and obscene language with which his facile pen had deliberately disfigured the proceedings of the Mayor's Court, could hardly be overlooked, but the punishment sought to fit itself to the enormity of the crime. The other specific charge, based on the propaganda, was of course sedition, stirring up the people. Apropos of this, I elaborated for the benefit of my American friend, the provincial chief of constabulary, on the mischief defendant had succeeded in working up, and the actual harm his utterances had done the province; stripped his performance of the self sacrifice which he sought to impart to it, expressed a pained, and fraternal regret that defendant was in reality more of a demagogue than of a martyr, and otherwise sought to take the wind out of his sails.

During the setting forth of these considerations, Evaristo looked the old familiar look of docile and filial penitence, as if he saw the door of the penitentiary yawning to receive him, but bowed in contrite consciousness of error, to a higher power. But after the last note of the judicial diatribe had sounded, there came an adversative clause, a "However" clause, in virtue whereof defendant's alleged seditious intent was given the benefit of a reasonable doubt.

The Constitution of the United States, with which, like most of his enlightened and educated fellow-countrymen, defendant was familiar, guaranteed to all the people freedom of speech and of the press.

By reason of this guarantee, it had long been customary in the United States for the political *pillos* (rascals) newspaper men and others, members of the party not in power, to abuse without limit the leading public men of the party in power, not excepting our Chief Magistrate himself, but that the Philippine people were too young yet as a people, to indulge themselves in our national vice of yellow journalism.

Defendant had probably been misled as to the extent of the liberty of speech and public utterance by the lamentable abuse of it by his prototypes beyond seas, but in the future must take notice.

Both Evaristo and his enemies were somewhat disappointed by the decision, — for different reasons — but since then no more ugly telegrams have come over the mountains from Nueva Viscaya, and the constabulary are having no more trouble about horses or men for the public service.

Such is the story of *The Propaganda of Evaristo Panganiban*, the village Hampden of the mountains of Central Luzon.

MACON, GA., November, 1907.

INDUSTRIAL PEACE LEGISLATION IN CANADA

By John King, K. C.

ONE of the most important legislative measures passed during the last session of the Parliament of Canada was "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Coal Mines and Industries connected with Public Utilities," better known as "The Industrial Disputes Investigation Act, 1907." The measure originated with the Labour Department of the Government, and received the royal assent and became law on the 23rd of March. It is a natural sequence of the Conciliation Act of 1900, and the Railway Labour Disputes Act of 1903, both which are now incorporated in the Conciliation and Labour Act, Chapter 96 of the Revised Statutes of Canada, 1906. The legislation embodied in the statute was to a large extent the outcome of the serious dispute in connection with the coal mines at Lethbridge in Western Canada. The Lethbridge dispute kept the mines closed for a period of nine months, with all the attendant ills of industrial war, and contributed to bring about a fuel famine in the new provinces of Saskatchewan and Alberta during the most inclement season of the year. The experience of a conflict so painful and widespread in its effects impressed the Government and Parliament with the necessity for some legislation which would provide machinery for the adjustment of industrial disputes that affected the public welfare so disastrously, and that should, if possible, prevent a recurrence of strikes and lockouts in connection with mines and public utility industries until at least such an adjustment had been attempted. Careful examination into the causes of these disputes had shown good ground for believing that, if the parties to a difference could only be brought together and have a frank and amicable discussion of the matters in question face to face, an agreement would as a rule be arrived at. The object was to legislate in such a way as to secure this conference and discussion before a suspension of work instead of afterwards, to avoid, in so doing, encroachment on the recognized rights of employers and employees, and to permit, where necessary, an enforcement of the new law by penalizing its deliberate and open violation. Obviously the interests of all concerned in such industries, — all of whom suffer in the event of hostilities — lie in the settlement of such disputes in their initial stages, and before they have assumed so serious a form as a strike or a lockout. What, therefore, the new Act seeks to do, and what, as we shall see, it has been fairly successful in accomplishing, is the maintenance of industrial peace in all public utilities such as mining, transport, street railways, telephony and telegraphy, by the reasonable requirement that, in the event of a dispute arising in any such utility, it shall be illegal to resort to a strike or a lockout (which would involve loss to employers and employed, and grave inconvenience and possibly serious distress to the public at large), until the dispute has been made the subject of enquiry before a Board of Conciliation and Investigation to be established by the Minister of Labour. This is, in effect, a compulsory investigation, but it has the special merit and advantage of bringing the contending parties together at the very outset of their differences, and of affording a thorough interchange of views and opinions, which experience has proved are conducive to a settlement, without a suspension of industrial operations, and without, at the same time, depriving either party of his remedy, should the judgment of the Board be unsatisfactory.

These are the prominent features of the new Act. It will be interesting, however,

to examine more closely the machinery by means of which the investigation is secured.

The vital features of the Act are contained in section 5, namely:

"Wherever any dispute exists between an employer and any of his employees, and the parties thereto are unable to adjust it, either of the parties to the dispute may make application to the Minister for the appointment of a Board of Conciliation and Investigation, to which Board the dispute may be referred under the provisions of this Act; Provided, however, that, in the case of a dispute between a railway company and its employees, such dispute may be referred, for the purpose of conciliation and investigation, under the provisions concerning railway disputes in the Conciliation and Labour Act."

and in section 56 (in part):

"It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on a strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act: Provided, etc."

With respect to a dispute between a railway company and its employees referred to in section 5, *supra*, it should be explained, that the parties to such a dispute were formerly enabled to refer their differences for conciliation and arbitration under the Railway Labour Disputes Act, 1903. A preference for this measure instead of the new one having been expressed by some organizations of railway employees (although the reasons therefore were not regarded as satisfactory), section 5 of the present Act has, as will be seen, made it optional with the parties to a dispute affecting railway employees to have a reference under either Act; but, in either case, the reference must be made before a lockout or a strike can be legally declared, the parties to such a dispute being expressly included in the provisions of section 56.

Assuming, then, that a dispute has arisen in any coal mining or other industry connected with a public utility, and that either of the parties desires to take advantage of the new Act, such party forwards to an official at Ottawa, known as the Registrar of Boards of Conciliation and Investigation, an application for the appointment of such a Board. The Registrar, who is appointed by order-in-council, and who, since the inception of the Act, has been the Deputy Minister of Labour, at once brings the application to the attention of the Minister of Labour. The manner in which, and the persons by whom, an application for the appointment of a Board is to be made, are very fully set forth in the Act. Application forms are supplied by the Registrar, and the application, when forwarded to him, must be accompanied by a statement setting forth (1) the parties to the dispute; (2) the nature and cause of the dispute, including all claims or demands made by either party upon the other to which exception is taken; (3) an approximate estimate of the number of persons affected (because ten employees must be affected by the dispute in order to give the Board jurisdiction); and (4) the efforts made by the parties themselves to adjust the dispute. The application must also be accompanied by a statutory declaration that, failing an adjustment of the dispute, or a reference thereof by the Minister to a Board of Conciliation and Investigation under the Act, a lockout or a strike, as the case may be, will, to the best of the knowledge and belief of the declarant, be declared, and that the necessary authority for that purpose has been obtained. In order that both parties to the dispute may be made acquainted with the proceedings taken under the Act at the earliest possible moment, and that all unnecessary delay may be prevented, the applicant for the appointment of a Board is required to send to the other party to the

dispute a copy of the application at the same time that he transmits the application to the Registrar, and the other party must in turn prepare a statement in reply and forward the same to the Registrar and to the party making the application.

Upon receipt of the application and upon being satisfied that the Act applies, the Minister establishes the Board under his hand and seal of office. This must be done within fifteen days from the date at which the application has been received. The Board consists of three members appointed by the Minister, one on the recommendation of the employer concerned in the dispute, one on the recommendation of the employees, and the third on the recommendation of the other two. The applicant for the Board may make his recommendation simultaneously with his application, but both parties must make their respective recommendations within five days after being required to do so by the Minister, or within such further time as he may grant, failing which the Minister may select and appoint representatives who shall be deemed to be appointed on the recommendation of the parties. Similarly, if the two representatives of the parties have not, at the end of five days after their appointment, or within such further time as the Minister may grant, recommended a third member, the Minister may select and appoint such third member, who shall be deemed to be appointed by the other two, and who shall be the chairman of the Board. The members of the Board take an oath of office before entering on their duties, and are thereafter equipped by the Department with whatever clerical assistance may be necessary.

When constituted the Board is invested with all the ordinary powers of a court of justice. It may summon and enforce the attendance of witnesses, require the production of books and documents, take evidence under oath, and do and cause to be done whatever else may be necessary to a full investigation of the matters in controversy; but the documentary evidence is not to be made public except in so far as the board deems expedient. This is to prevent unnecessary injury or prejudice to the parties concerned. Provision is also made for the payment of witnesses and for penalties or punishment for contempts of the orders and other process of the board. Power is given to enter, or to authorize others to enter, upon any lands or premises or works associated with the dispute, and there, if necessary, to conduct the investigation. The proceedings are to be public or private as may be deemed expedient, regard being had to the wishes of the parties. Any party to a reference may be represented by three or less than three persons, or by counsel with the consent of the Board. The members of the Board are allowed their travelling expenses, and may be paid for their services, but they are debarred, under a heavy penalty, from accepting any perquisite or gratuity apart from their remuneration by the Government. Competent experts or assessors may be engaged, with the Minister's consent, to examine the books or official reports of either party, and to advise upon any technical or other matter material to the investigation. During the course of the reference the Board may do whatever it deems proper to induce a settlement; but it may dismiss any matter referred to it which it considers frivolous or trivial. If a settlement is effected, a memorandum of the terms is drawn up by the Board and signed by the parties, and shall, if so agreed, be binding as if made a recommendation of the Board under the Act. A copy of the memorandum with a report is then forwarded to the Minister. If a settlement is not effected, the Board shall report fully to the Minister, setting forth all the proceedings (which are not to be invalidated by defects of form or technical irregularities), the items of dispute, the findings thereon, the recommendations of settlement according to the merits and substantial justice of the case, and, where

deemed expedient, the date from which the settlement should commence, and the period of its duration. The rulings, findings and recommendations of the majority shall be those of the Board, but any dissenting member may make a minority report. Although the findings of the Board are not binding *per se*, and leave the parties to take such action as they choose, yet, by mutual agreement, the award or recommendation may be made a rule of court and binding as if made pursuant to a reference to arbitration on the order of a court of record.

Further important provisions of the Act are those requiring employers and employees to give at least thirty days' notice of any intended change affecting conditions of employment with respect to wages or hours, and that, pending proceedings before a Board, the relation to each other of the parties to the dispute shall remain unchanged, and neither party shall do anything tending to promote a lockout or a strike.

Penalties are provided for infringement of the act by employer or employed, and for inciting, encouraging, or aiding, a lockout or a strike contrary to the provisions of the statute. The Act, however, does not contemplate the Department of Labour, or any department of the Government, instituting a prosecution. Any person may lay an information for that purpose, in which case the proceedings shall be the same as those prescribed by the criminal code for enforcing penalties under the summary jurisdiction of justices of the peace. The penal clauses of the statute have been twice invoked, first, against certain miners employed by the Texada Steel Company in the copper mines at Marble Bay, Texada Island, B. C., where the coming together of the parties in court resulted in an agreement; and secondly, against the president of the miners' union and others for inciting a strike, and going on strike, at Cobalt, Ontario. Proceedings in these cases are now pending on an appeal to the High Court against a conviction of one of the defendants.

The first Board to be established under the new Act was in connection with the dispute between the Western Coal Operators' Association, seven or eight companies operating mines in British Columbia and Alberta, the largest of these being the Crows' Nest Pass Coal Company. The total number of employees concerned was between three and four thousand. In this instance both parties invoked the statute to secure an adjustment of their differences. The Act having heen recently adopted, was not unnaturally misunderstood on both sides, and work had been suspended before the establishment of a Board could be effected. Sir William Mulock, one of the Chief Justices of the High Court of Justice of Ontario, was appointed chairman of the Board, and finally, by the efforts of the Board and the active intervention of the Deputy Minister of Labour, a settlement was reached effective for two years.

A more complete test of the efficacy of the Act is found in the case of the dispute between the Grand Trunk Railway Company and its machinists. This application was received by the Department in April. The machinists had invoked the measure to secure the settlement of a long list of grievances between themselves and the company, involving terms of overtime, apprenticeship, night work, general wages, and numerous questions of a highly technical and intricate character, including the reinstatement of men who had been on strike for nearly two years, and an adjustment of whose grievances had been hitherto impossible. In this case, the two members of the Board first appointed having been unable to agree on a third member of the Board, the Minister of Labour appointed Professor Adam Shortt of Queen's University, Kingston. It was well understood that, should the enquiry before the Board not result in a settlement, a strike would take place which would throw the whole

system of the Grand Trunk Railway into disorder entailing great loss and disaster to the country. The Board was in session for three days, and during that period succeeded in adjusting all matters in dispute. The chief officers of the Company were present throughout the enquiry and evinced the keenest interest in the proceedings. The enquiry ended in an agreement for a year signed by representatives of both parties, and Mr. Charles M. Hays, General Manager of the Railway, in congratulating Professor Shortt on the result, said it but confirmed the opinion he had always held, that if those who were concerned in industrial differences would only come together and calmly talk over the situation, the chances were altogether in favour of an amicable agreement being reached. The employees were represented throughout the dispute by Mr. A. H. Champion, Vice-President of the International Association of Machinists, and other officers of the union. The other members of the Board were Mr. Wallace Nesbitt, K. C., nominated by the company, and Mr. J. G. O'Donoghue, nominated by the employees. It was understood that the success achieved in this particular case was due in a large measure to the tact, perseverance, and broad sympathies of the chairman of the Board.

A Board, of which the Hon. Mr. Justice Graham of the Supreme Court of Nova Scotia was chairman, was shortly afterwards established for the adjustment of differences between the Cumberland Railway and Coal Company of Springhill, N. S., and its employees. In this case there were two points of difference of a technical character. The Board, after considerable investigation involving the examination of a number of witnesses, decided favourably to the men on one of the points in dispute, and favourably to the company on the second point. This decision was not acceptable to both parties and resulted in a strike beginning on August 1. A second Board was established at the request of the men with Judge Patterson as chairman. After some efforts to conciliate the parties without an investigation, the second Board was reconvened and proceeded with the enquiry, subject to objection by the Company on the ground that the strike was still on. The report on this enquiry was regarded by the Minister as of an interim nature only, the investigation being admittedly inadquate. It having been thought that the decision of the first Board had been misinterpreted by the men, their representatives were persuaded to meet Mr. Justice Graham, who furnished them with a written interpretation of the award of his Board. The men returned to work on October 31st, apparently inclined to refer to a new Board further matters in dispute between the company and themselves. This is the present position of the matter, which is believed to be in a fair way of settlement.

In the month of May, a Board was established for the adjustment of differences between the longshoremen of Montreal and the Shipping Federation and Canadian Pacific Railway. In this instance, the dispute had resulted in a strike before any application had been received by the department. An official of the department visited Montreal and urged the men to return to work, and submit the matters in dispute for adjustment before a Board of Conciliation and Investigation, and, at the end of a week, this course was adopted by the longshoremen. The chairman of the Board was Archbishop Bruchesi. A unanimous judgment was reached, and, although this was not formally accepted by the longshoremen's union, it was accepted individually, as the event proved, by the vast majority of the longshoremen of the port. Of these not less than eighteen hundred signed a contract with the shipping companies on the basis of the findings of the Board, so that further dispute or trouble for the season was prevented.

Shortly after the longshoremen's dispute at Montreal, the longshoremen of Halifax

went on strike, and, while a Board was being established for the investigation of the differences, a settlement was effected through the instrumentality of an officer of the Department. A somewhat similar result followed the application for a Board preferred by the employees of the Railway and Irrigation Company at Lethbridge, Alberta. It was at the mines located at this point that the dispute of last year occurred, resulting in the prolonged strike already referred to, which conduced in a large measure to the enactment of the statute now under review. The employees in this instance sought to secure the adjustment of numerous differences between themselves and the company, and a Board was in process of establishment for this purpose when the Department was advised by the employees that all matters in dispute had been satisfactorily settled, and that this fortunate result was wholly due to the influence of the new Act.

During the month of July, a dispute occurred between the Intercolonial Railway and the freight handlers in its employ at Halifax. The men had ceased work, but on learning that their case came within the scope of the Industrial Disputes Investigation Act, they returned to their labours and agreed to have the dispute referred for adjustment by conciliation. It being a case in which railway employees were concerned, they had the right, as we have seen in the first part of this article, to a reference either under the Industrial Disputes Investigation Act, or under the former Conciliation and Labour Act. They preferred the procedure of the earlier Act, the only instance, by the way, in which that preference has been made. In the several railway disputes which have arisen since the passage of the new legislation, the employees have invariably selected the procedure provided by the new Act. The chairman of the Board established in this case was Professor Walter Murray, of Halifax, and, after an enquiry extending over several days, an agreement was reached which was accepted by both parties, and the terms of which were applied not only to the freight handlers of Halifax but also to those of St. John, N. B.

The next Board established had relation to differences between the Grand Trunk Railway Company and the great body of its locomotive engineers. Here, again, a strike was threatened which, if carried out, would have tied up the whole of that important railway system, and have caused incalculable loss and damage to the carrying trade of the country. Professor Shortt was again chairman of the Board, having been a second time selected and appointed by the Minister, and the labours of the Board were again successful, an agreement being concluded good for three years and duly signed by representatives of both parties.

During the month of August there occurred a dispute relating to a class of industries not directly within the scope of the Act. Between two and three thousand employees of the cotton mills at Valleyfield in the province of Quebec, which were operated by the Montreal Cotton Company, had gone on strike, and a long and strenuous struggle was imminent involving great hardship to the workmen and serious injury to the business interests of the town itself and the district dependent on its industries. An officer of the Department, who was visiting Valleyfield, succeeded in inducing the disputants to accept a reference under the Industrial Disputes Investigation Act. This was in accordance with section 63 of the statute, which provides for the procedure being applied to any dispute whether coming directly under the operation of the Act or not, if the parties to the dispute so agree. The employees returned to work immediately upon arriving at this decision, and a Board was established under the chairmanship of Mr. Justice Fortin. The proceedings resulted, in the course of a few days, in an amicable settlement of every matter contained in the reference. In connection with this particular dispute, it

may be added, that a valuable precedent was created by the establishment, by agreement before the Board of the parties concerned, of a permanent committee of conciliation for the adjustment of any further disputes that might arise between the company, and its employees, with the exception only of such as might relate to a general increase or decrease of wages. The committee consists of a director of the company on the one side, and a president of the local union of cotton spinners on the other, the third member of the committee being the mayor, or, in his absence or inability to act, the curé of Valleyfield. Provision is also made for the appointment of a third member by the Minister of Labour should either of the gentlemen named be unable or unwilling to act. What was done in this case, under the elastic provisions of the statute, is worth noting, inasmuch as it points the way to a satisfactory solution of minor differences that may arise between employer and employed, if the parties to the dispute will only approach each other in a reasonable spirit of trust and confidence. The settlement is also significant from the fact, that the industry concerned was brought within the Act by the mutual agreement of the parties themselves, the successful results achieved affording good ground for the hope that the scope of the Act may be so widened by the voluntary consent of those affected as to gradually embrace all classes of labour disputes.

In the month of September, a Board was established for an enquiry into the differences between the Canadian Pacific Railway Company and the railroad telegraphers in its employment. This dispute, it is hardly necessary to observe, affected vitally the interests of a great railway corporation trans-continental in its service, and upon whose efficiency in every department the whole dominion is in a large measure dependent. The Board established in this case was identical with that for the adjustment of the dispute between the Grand Trunk Railway Company and its machinists, Professor Shortt being this time chosen as chairman by his former colleagues. The matters in dispute were numerous and important, including not only the question of rates of pay over the whole system, but such points as the classes of employees to be included in the schedule of rules and rates of pay applying to telegraphers, the character of the services to be performed, the hours of work, the conditions for overtime and Sunday work, the commission to be allowed on commercial messages, and the question of payment while on leave of absence. The sittings of the Board were held off and on for a fortnight, partly in Montreal and partly in Toronto. The Board reported complete success in its efforts for a settlement, and set forth the terms of an agreement effected between the company and its employees. "Notwithstanding," it was said, "the difficulty and trying nature of many points in dispute, harmony and good feeling prevailed throughout the negotiations."

There are three other disputes which, for the time being, call only for a brief reference, namely (1) between the Canadian Consolidated Mining and Smelting Company and their employees at Moyie, B.C.; (2) between the owners of the Hosmer Mines, B.C., and their employees; and (3) between the Hillcrest Coal and Coke Company and their employees at Hillcrest, B.C. The first of these disputes is still before the Board. In the second case the parties have accepted as an agreement the unanimous recommendations of the Board. In the third case two reports have been presented, one of these being a minority report by the official representative of the men. No agreement appears as yet to have been reached, and the ultimate result is at present uncertain.

The results of this legislation are perhaps best seen in the statement that, although the Act has been in force only a little over seven months, no less than twenty-three applications have been received for Boards of Con-

ciliation and Investigation, while at least fourteen Boards have been constituted, and four or five others are in course of establishment. The applications have affected many thousands of workers and many millions of capital. At the date of writing, eleven of the disputes for the adjustment of which the Act was invoked, have been satisfactorily disposed of, and in only one case has the procedure, when applied, failed to secure an understanding between the parties. In the case of the other Boards the proceedings are not yet concluded. Of five applications in connection with which Boards were not established, three related to disputes which were settled either under the terms, or by reason of the influence, of the Act, and two concerned disputes in industries that do not come directly within its scope. On the whole this must be admitted to be a very fair record for the new statute, bearing in mind its brief existence. It is not of course to be expected that this legislation will work without jar or friction, but it is believed to be a long step in advance of all preceding measures that have touched the vexed and difficult problem of the relations of capital and labour in Canada. It differs materially from the labour legislation enacted in any other country where such questions have been seriously considered, but there is reason to believe that such variations from the beaten paths will be found helpful in the solution of the problem indicated, which is surely one of the most tremendous confronting the twentieth century.

TORONTO, CANADA, November, 1907.

THE BARS OF UNITED STATES AND ENGLAND

By Edward S. Cox-Sinclair.

THE present ambassador of England to the United States at the Annual Meeting of the American Bar Association, Portland, Maine, in the present year of grace pointed out that "one hundred and thirty-one years have now passed since the majestic current of the Common Law became divided into two streams, which have ever since flowed in distinct channels. Water is naturally affected by the rock over, or the soil through which it flows, but these two streams, separated in 1776, have hitherto preserved almost the same tint and almost the same flavour." It must, however, be conceded that however much this may be so in the case of the substantive principles of the law, it is not and can scarcely be expected to be the case in matters adjective which must of necessity be largely influenced by the environment in which the system of law is applied. Now I propose for a brief space to dwell upon some of the most singular of the divergencies between the development of the legal profession in England and that of the legal profession in the United States, prefacing what I have to say with two observations; first, that although I can claim an intimate knowledge of the system of this side of the Atlantic, I can only claim what may be called a pleasant acquaintanceship, which has largely been contributed to by my friend Mr. Cephas Brainerd of the New York Bar, with the system, analogous, in the United States; secondly, that the differences, whatever they may be, are noted without adjudgment of superiority, because it is obvious that in such a matter the superiority depends wholly upon suitability to environment, and that it is idle surmise to anticipate the effect of the transplanting of systems of professional practice since a system of professional practice is solely a thing of value, in so far as it accords with the needs of the community served by the profession.

At the time of the separation of the United States of America from Great Britain the form of the orders representing the legal profession in England had been completely established. There was in the first place the Bar of England, and in the second place, the body of attorneys or solicitors. Of counsel or members of the Bar, there were two distinct degrees in order of professional seniority; the barristers-at-law (or as they were called in the old style the apprentices to the law) and the sergeants-at-law. The latter were, according to Fortescue, of sixteen years standing, and were what we should now call the leaders of the profession. They were bound by a solemn oath to do their duty to their clients, and as Blackstone points out, they were so venerable in their order that by custom the judges of Westminster were always admitted thereto before they were advanced to the Bench; it being supposed that the origin of that practice was to qualify the puisné barons of the Exchequer to become justices of assize according to the exigencies of the statute of 14 Edward 3. c. 16. So far as the general body of the Bar was concerned, it consisted of a considerable number of advocates equally qualified to practice their profession in every Court of the Realm, and yet owing both their forensic creation and their domestic and disciplinary allegiance not to the state or to the Courts, but each to one of four distinct, ancient, insulated and agnated corporations termed the Inns of Court, namely, Gray's Inn, the Middle Temple, the Inner Temple, and Lincoln's Inn. Perhaps the best description of their qualification is that found in a mediæval work of some authority that an advocate (or countor) ought to be "a person receivable in feof-

ment, no heretic, excommunicate person, nor criminal, nor a man of religion, nor a woman, nor a beneficed clerk with cure of souls, nor a judge in the same cause, nor attainted of falsity against the right of his office." The right to audience before the Judges of the Courts of England was absolute but it was derived from and conferred by his Inn of Court and the consideration of his professional conduct was a matter of the domestic control of the Inn from which he sprang, the association between the Judges and the Inns of Court lying only in this that the Judges had a right of visitation to the Inn, and in some cases a jurisdiction of appeal from the decision of the government of the Inn, termed its Bench of Masters. Thus as we have seen the advocate was not an officer of state or an official of the Royal Courts of Justice, but merely a trained and selected person to whom the Courts on the recommendation of his Inn of Court gave audience for the purpose of being informed by him in the course of his representation of his clients. Above all it was clear that the relationship between the advocate and his client was in no sense a contractual relationship. He was in no way able to be directly approached by his client, the actual litigant, but he received his instructions from the attorney for that client to whom he looked for the payment of his remuneration. This remuneration was a pure *honorarium* "which a counsellor cannot demand without doing wrong to his reputation." He had the compensating advantage of being free from any obligation in the way of legal responsibility for negligence in the carrying out of his instructions.

It may be well here to sum up the position of the advocate in England by the statement that throughout the whole course of history (with the single exception of a statute with an isolated provision passed in the reign of Edward I (1275), the rights and duties of the advocate in the English courts have not been the subject of statutory declaration or enforcement. A canon of the church, however, protected ecclesiastical advocates. Professional conduct therefore is entirely subject and subject only to the public opinion of the profession itself together with the disciplinary jurisdiction of his Inn of Court. There were no local Bars but side by side with the system of itinerant judges dating from Henry II, had sprung up Circuit Messes, loosely constituted associations of barristers following the judge on a particular circuit formed for good-fellowship and for the purpose of maintaining in the confraternity a certain measure of discipline. From the whole body of barristers by the winnowing processes of favour, fortune, and fighting-force the judges of the crown were selected.

Side by side with this structure, based on the four pillars of the Inns of Court, existed a totally different body of men, veritably officers of the Court, answerable to the Court for their conduct and admitted by one of the judges (the Master of the Rolls) after assurance of their fitness. So early as the statute IV. Henry IV, c. 18, it was enacted that attorneys should be examined by the judges and none admitted but such as were virtuous, learned and sworn to do their duty. Upon proof of misconduct they were struck off the Roll or register by order of the judges. Blackstone, after he has traced the evolution of the body through the Roman Law down to his own day proceeds, "By divers ancient statutes, whereof the first is statute Westminister II. c. 10. attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps. They are admitted into the execution of their office by the Superior Courts of Westminister Hall and are in all points officers of the respective courts to which they are admitted and as they have many privileges on account of their attendance there so they are peculiarly subject to the censure and animad-

version of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court; an attorney of the Court of Kings Bench cannot practice in the Court of Common Pleas nor *vice versa*." To practice in the Court of Chancery it was necessary that he should be admitted therein and thenceforward termed a solicitor. No person could act as an attorney even at a Court of Quarter Sessions, but such as had been regularly admitted in some Superior Court of Record. Unable to appear forensically they were charged with the preparation of the cause for presentment, gradually in addition assuming many important functions, outside litigation, connected with advice, administration and finance. At the time of the separation between Great Britain and the United States of America attorneys had very little corporate cohesion. Unlike the members of the Bar their employment by the client was one of contractual relation. Their remuneration was a matter of scale modified by agreement and subject to the supervision in case of excessive claiming of the proper officer of the Courts. Naturally their power to recover their remuneration at law brought with it a collateral liability to answer in damages for any negligence in the conduct of the business of their client. It will be obvious from the foregoing statement that at the time of the coming into existence of the United States of America the division between the two branches of the legal profession in England was as clearly marked as it well could be.

Now during the hundred years which elapsed between the Independence of the United States and the Judicature Act of 1873, the changes in the system of the legal profession were very few. The formal changes in fact, up to the present day, which have taken place in regard to the barrister-at-law, can be summed up as follows. (1) The abolition of the degree of Sergeant-at-Law, leaving all barristers of one designation, with the exception of the select few appointed King's Counsel. (2) The abolition of a few special offices of an advocate, survivals of the day when the lines of division between the Courts were sharp. For instance certain persons in the Court of Exchequer who had priorities in motions, called from their places in the Court the Tub-man and the Post-man, were no longer so distinguished. Certain advocates belonging to special bars, such as a trusted member practising in the Mayor's Court in the City of London ceased to have the privilege of limitation and (3) The abolition of a certain grade called the special pleaders, whose designation conveys their functions. (4) The imposition of a more stringent system of examination administered by the Council of Legal Education.

The formal changes which have taken place amongst solicitors may be summed up as follows: (1) The abolition of distinctions as between solicitors and attorneys, according to the Court of practice; (2) the imposition of a system of examination under the Incorporated Law Society and (3) in connection with that Society an increasing stringency of corporate discipline.

So far as the relations between the two branches of the profession are concerned, and the relation of the members of each with the general public, practically no change has taken place. The social distance between the two branches has practicaly vanished, the privilege of the advocate being in effect balanced by the substantiality of the solicitor. The facilities of passing from one branch to the other have been greatly extended. Solicitors have been granted audience in many inferior courts of increasing jurisdiction and therefore tend to invade the presence of the Bar by a system of peaceful penetration. In all the essential points, however, of the traditional distinction between the two branches no change is apparent and the etiquette of the Bar maintains itself in a wondrous way, bearing in mind the disintegrating influences of a

complete change in the structure of every stratum of English society.

In the United States, on the other hand, from the very commencement there has been a fusion of the functions of the two branches of the profession, however much for purposes of practical convenience there may be an actual division by individual agreement into two spheres of labour. Perhaps the extent of this fusion can best be seen from the oath of office imposed in the State of Michigan, which conjoins together "the duties of the office of attorney and counselor-at-law and solicitor and counselor in chancery." It is obvious that conditions of wide geography, sparse populations, state divisions, busy progress, the converging of different races, were foreign to specialisation, to traditional exclusions, to barriers on professional activity and usefulness, to stately methods and to old-world habits, and there was consequently an obligation towards the union of many functions. It was found in the United States in the course of its rapid and tremendous expansion that there was no advantage in recourse to ancient divisions and no advantage in the evolution of a distinct class of advocates invested with attributes of privilege. Noticeable in mere externality is the obligation in England, the absence in the United States, of rigid forensic costume. Absent in England, at any rate for centuries, present in the United States, is the imposition upon the advocate of that splendid exposition of forensic duty, the oath, which can be best realized by a consideration of the terms of that enjoined in the State of Washington. I do not instance the latter as an innovation in the sense of being without historic precedent, because not only are the terms of that majestic declaration drawn from the provisions of the oath for advocates prescribed by the laws of the Swiss Canton of Geneva, but each of its provisions finds its historical parallel in the ordinances imposed by the early kings of France upon the noble order of advocates of the Bar of Paris. I only mention it by way of comparison with the Bar of England, where with the single exception of the sergeants-at-law, who were a very special class of advocates, the obligation of an oath was never enjoined on the barrister although it was always insistent upon the attorney branch of the profession. Again the contractual relationship existing in England between the attorney and his client has formed the basis of the system in the United States, while in England that relationship has always been alien to the legal conception of an advocate. The relationship in the United States being a contractual one there is the consequent placing of remuneration on a contractual, although I do not say a commercial basis. There is in the United States the collateral obligation of responsibility for negligence in the carrying out of instructions. For all these reasons it is obvious that in the United States not only has there been one type of the professional lawyer instead of two, but that that type has been from the English point of view the attorney, and not the advocate. There is in England a large, and I think, an increasing opinion in the direction of breaking down the division between the two branches of the profession, and it is indeed to be hoped that if that project be brought about there may contemporaneously be brought and set before us in England for universal adoption a comprehensive code of ethics, such as that to be placed before the next Congress of the American Bar Association.

That leads me to remark upon another aspect of the development of the profession in the United States, which can never be arrived at in England. From the beginning there has been in the United States, not one Bar, but numerous State Bars, each one having not only state recognition, but also more or less internal control from the body of legal opinion resident in the particular state. The evolution of the American Bar Association with projects of scrutiny and standardization seems to prom-

ise a powerful instrument for the raising of the whole profession. There has grown up in England during the last few years, a system by which a body is annually elected by the Bar itself, called the General Council of the Bar which exercises functions not in lieu of but collateral to the ancient Inns of Court not unlike in some respects the American Bar Association. The nearest analogy in England is the Annual Congress of the solicitors connected with the Incorporated Law Society.

Now I must premise my brief comparisons of the rules of professional conduct obtaining in England and set forth in the specimen codes placed before the American Bar Association at Portland with these observations. First, I think the consideration divides itself under two heads, that of rules of advocacy, and that of rules of general professional conduct, although I take them in the order of the projected code. Secondly, I note only divergencies and must in other respects be taken to accept the substance of the rules as common to both countries, and Thirdly, I premise that there does not exist in England anything like so complete a statement of canons of professional conduct as that projected for the United States, either in topics included or in the fulness of dealing with those topics since in England all the rules (with the exception of the provision of the statute of Edward 1,) which are reduced to writing, are in the nature of *Responsa Prudentum* and have no higher formal sanction.

Turning now to the codes under examination the rules relating to duties of attorneys to courts and judicial officers might be accepted in either country as those fortified by constant usage. and the same observation may be made regarding the bulk of the rules enunciating the duties of attorneys to each other, to clients and the public, save in so far as concern the special rules applicable in England to relations between the two branches of the profession. The rule, however (which is No. 18 in the projected code), that "newspaper advertisements, circulars and business cards tendering professional services to the general puplic are proper" is precisely contrary to that in England. I am bound, however, to recognize that though the rule in England is not in accord with the pronouncement of the United States code, that the expanse of the spheres of professional activity are so wide in the United States, compared with the restricted areas in England. that similar rules could scarcely be enjoined.

Regarding Rule 21 the advocate in England never gives evidence on behalf of his client because from time immemorial his mere statement regarding anything which happens in the course of his forensic employment is accepted by the Court.

Regarding Rule 52 of the projected code which recommends "an explicit understanding as to compensation for professional services at the outset" this from an English point of view has to be considered in two aspects; the client who instructs his solicitor, rarely makes any agreement as to compensation which in conveyancing matters is a question of *ad valorem* scale, and in matters of litigation or other matters outside the scale is a question of items for actual work upon a fixed basis, subject to adjustment on taxation by the proper officer of the Court, who is called the taxing master; so far as the barrister is concerned the solicitor who instructs him and through whom alone the barrister receives his instructions marks on the brief or instructions the proper fee and the brief or instructions are then accepted or rejected by the barrister without bargain.

Rule 53 of the projected code regarding suing a client for a fee may in England as we have said only be applicable to a solicitor who may recover in an action the proper amount of his charge, the barrister in no case suing for his fees, which are strictly in the nature of pure *honoraria*. I have pointed out the effect of this upon a

claim for damages for negligence of the advocate.

Regarding Rule 57 of the projected code to the effect that contingent fees may be contracted for, from what has been said before, it will be seen that no such rule obtains or can obtain in England.

The provisions of Rule 11 of the projected code setting forth the limits of the action of the attorney in the support of his client's cause may not be inappropriately compared with the provisions of the Memoir des Justices (temp Edward 2.) that every pleader be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge, but will fight (guerra) for his client to the utmost of his ability.

I do not know how far the mysterious practice of "devilling" obtains in the United States. In England the system may be described as the process by which an advocate of business aptitude, instructed by a client in any particular case, hands over to another advocate the conduct of that case whilst himself retaining the remuneration. It is traditional, it is not wholly satisfactory, but it is regulated by very precise rules which form a not inconsiderable portion of the etiquette of the profession.

I omit the consideration of the series of elaborate, though largely unwritten rules which obtain in England regarding the relations between the two branches of the profession which *ex concessis* have no place in the American Forum. Its stringency in England may be judged from this extreme case "that counsel is not entitled to accept a dock defence at police courts (which means a remuneration to counsel of a single guinea) without the intervention of a solicitor."

I have said that there are many matters on the other hand where the rule in the United States is more stringent than in England. There are two instances of rules of collateral matters contained in the projected code which I venture to commend, "that newspaper reports should be taken from the records and papers on file in the court," is a salutary counsel of perfection of *Wisconsin* which England would welcome. "That money or other trust money coming into the possession of the attorney should be promptly reported and never commingled with his private property or used by him except with his client's knowledge and consent," is a provision in the Alabama code which would be valuable in England. I need scarcely add that in England it would affect only that branch of the profession which has entrusted to it the care of other people's money since the advocate pure and simple engaged in jurisconsultation or forensic presentment esteems himself fortunate to be entrusted with his own in keeping and never holds anything of any tangible value belonging to his client save for the temporary purposes of inspection and demonstration. I may add that in England, the recent corporate public action of the solicitors is in the direction of a self denying ordinance to the effect of this most wise provision.

Such are some of the salient points which I deem myself at liberty, within the space of this article, to bring together for the purpose of affording some comparison between the two systems of professional practice which have been evolved in the two channels of national development. Admiration cannot be withheld from the searching and high-minded standard which the Bar in the old country maintains by tradition, and which the Bar in the new country has evolved in the course of its great history; a history which no Bar in the civilized world can approach, and to which only the ancient Bar of Republican Rome affords a parallel, in the close association with the state, not only as an order, but with eminent personal interventions in public events and in the constant and invaluable services rendered, in the throes of the making, and in the stress of the advance, of a great nation.

LONDON, ENG., October, 1907.

A CLOSED CHAPTER IN AERITIME LAW

Being a Paper read before the Bar Association on March 16, 1975

By E. H. A.

THE subject of this paper concerns a branch of aeritime law that offers no inducement for investigation save to the student of the development of the law. The practicing lawyer of today is not confronted with any of the propositions here discussed. It is a closed chapter of our law and as far removed from the domain of the courts today as the question of wager by battle. But although this branch of aeritime law has become obsolete this class of litigation for the space of ten or twelve years consumed much of the attention of the courts and lawyers of this country.

It is proposed to discuss the liability of an operator of aerial machines, airships or aircraft of any sort to the property owners over and above whose land he navigates.

The earliest case on the subject is the case of Burns *v.* New York Aerial Navigation Company, which was decided in 1936 and is reported in 521 N. Y. 689.

The case arose upon demurrer to the petition which alleges that the plaintiff was the owner of a tract of land located in the county of Kings, New York, and the defendant was the proprietor and owner of an airship which he willfully caused to traverse over and above the land of the plaintiff to the plaintiff's damage in the sum of $10. The trial court sustained the demurrer, but the court of appeals reversed the judgment. In the course of the opinion the court said: —

"It is elementary that the owner of real property owns the space above the surface and has the same right to its free and uninterrupted use as to the land below. Blackstone (Book 2 p. 18) says 'Land has also in its legal signification an indefinite extent upwards as well as downwards. The word *land* includes not only the face of the earth but everything under it or over it.' Consequently, as any physical contact, no matter how slight, with the surface of the earth owned by another would be a trespass; it follows that physical contact with the air above the surface is likewise a trespass.

"The defendant has submitted no authorities but has strongly urged that the old notion that the ownership of the soil carried with it ownership of the air above the soil is a fiction which must give way before considerations of common sense. It has also insisted that this is a case in which by its very nature actual damage is an impossibility and the courts should not open their doors to a line of litigation that would accomplish nothing. This question while never finally passed upon, has agitated the minds of learned judges for almost two centuries. The authorities are discussed in an old text book entitled Pollock on Torts (Am. Ed.) page 423, where it is said:

"'It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in a balloon, or to cause a material object, as shot fired from a gun, to pass over it. Lord Ellenborough thought it was not in itself a trespass to interfere with the column of air superincumbent on the close and that the remedy would be by an action on the case for any actual damage; though he had no difficulty in holding that a man is a trespasser who fires a gun on his own land so that the shot fall on his neighbor's land. Pickering *v.* Rudd, 4 Camp. 219. Fifty years later Lord Blackburn inclined to think differently (Kenyon, *v.* Hart, 6 B. S. 249, 252), and his opinion seems the better. Clearly there can be a wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern

books. It does not seem possible on the principles of the common law to assign any reason why an entry at any height above the surface should not also be a trespass. The improbability of actual damage may be an excellent practical reason for not suing a man who sails over one's land in a balloon; but this appears irrelevant to the pure legal theory. Trespasses clearly devoid of legal excuse are committed every day on the surface itself and yet are of so harmless a kind that no reasonable occupier would or does take any notice of them. Then one can hardly doubt that it might be a nuisance apart from any definite damage to keep a balloon hovering over another man's land, but if it is not a trespass in law to have the balloon there at all, one does not see how a continuing trespass is to be committed by keeping it there. Again it would be strange if we could object to shots fired across our land only in the event of actual injury being caused and the passage of the foreign body in the air above our soil being thus a mere incident in a distinct trespass to person or property.' We have examined the early cases cited by the learned author and find that in the case of Pickering *v.* Rudd, *supra*, Lord Ellenborough said: 'Would trespass lie for passing through the air in a balloon over the land of another?' This question was not answered and so the case is no authority. But in Kenyon *v.* Hart we find the question answered affirmatively by Lord Blackburn in this language: 'That case raised the old query of Lord Ellenborough as to a mere passing over the land of another in a balloon; he doubted whether an action of trespass could lie for it. I understand the good sense of the doubt though not the legal reason of it.' The last sentence has given rise to much discussion and has been, we believe, justly criticised, for if legal reason does not support the learned Lord's opinion how can good sense figure in it? Consequently, the dictum of Lord Blackburn is a distinct authority for the maintenance of an action such as the present one. From this examination of authorities it is apparent that an action of trespass should lie under the circumstances of this case. We believe we are concluded by the legal maxim *cujus est solum ejus est usque ad coelum*. The ownership of the column of air is vested in the proprietor of the subsoil. And if this action be not allowed, what is to prevent the owner of an airship from permanently anchoring his machine on my land? If one machine, why not hundreds? And then eventually he may acquire ownership by adverse possession and I will no longer own *usque ad coelum*. It is necessary to sustain the plaintiff's right of action in order to retain that principle upon which all title to real property is founded. The trifling nature of the damage is of no importance, for courts protect property rights no matter how insignificant and the maxim *de minimis non curat lex* has no application; see Butler *v.* Telephone Co., 109 N. Y. App. Div. 217, where the owner of land was allowed to recover six cents in damages in an action of ejectment for injury to his land by a wire stretched over it. Also Murphy *v.* Bodger, 60 Vt. 723. The court erred in sustaining the demurrer and the judgment is reversed."

In the case of Dyer *v.* St. Louis & New York Rapid Transit Co., 528 N. Y. 30, the same court decided that it is a defense to the action to show that the airship was driven out of its route and across the plaintiff's land by a gale, since trespass necessarily meant a wilful act. The court found abundant authority for the decision in the early case of Smith *v.* Stone, decided by the King's Bench Michaelmas Term, reported in Style 67, as follows: "Smith brought an action of trespass against Stone, *pedibus ambulando*. The defendant pleads this special plea in justification, viz., that he was carried upon the land of the plaintiff by force and violence of others and was not there voluntarily, which is the same trespass for which plaintiff brings action. The

plaintiff demurs to this plea. In this case Roll J. said that it is the trespass of the party that carried the defendants upon the land and not the trespass of the defendant; as he that drives my cattle into another man's land is the trespasser against him, and not I, who own the cattle."

The effect of the decision in the Burns case, allowing the owner of the land an action for trespass, was widespread. With remarkable unanimity it was followed and approved in every jurisdiction. There was a perfect flood of airships litigation. Suits became so numerous that in 1939 a special division of the Circuit Court in St. Louis, known as the "Air Division" was created for the purpose of trying nothing but this class of cases. Since necessarily only nominal damages could be obtained, one might well wonder why so many suits should be brought on account of an infringement of a right that was purely technical and which could not result in material gain to the plaintiff. The answer must be sought in the history of aircraft.

Although extensively used for passenger traffic for 15 years previous, it was only in 1934 that freight transportation by aircraft became general, and then it was that the bitterest and most destructive conflict in the history of the economic world began. On the one side were ranged the railroads of the country with their tremendous investments, their control of the channels of commerce and of the financial institutions of the country together with all the political and legislative influence they had built up through decades. Against this aggregation of wealth, power and prestige the airship companies had nothing to pit save their superior practicability and the reduced cost of transportation. But the importance of this latter consideration will appear when it is noted that when the fight was at its height, the air craft companies were able, without loss, to transport freight and passengers at rates that were about half the actual cost to the railroads. Every device known to the courts of law was invoked by the railroads, every aid that could be wrung from the cupidity of legislators was brought into play. So effective and so costly was their fight that it is doubtful whether the aircraft companies would have won in the struggle in spite of their ability to transport at much lower rates than the railroads, had not the people been active in their favor. Public sentiment and public sympathy expressed in many different ways were all allied against the railroads. The smaller railroads yielded first and went into bankruptcy and receiver's hands, receiverships from which unlike those of former years they did not emerge. One after another the railroads became abandoned hulks of commerce and rotting ties and deserted stations dotted the country from one end to the other.

In 1942 the great Atlantic and Pacific Railroad alone remained. It formed a continuous route from New York to Seattle and was organized in 1909. The final crash came in 1942 when the Atlantic and Pacific Railroad went into the hands of a receiver. Its subsequent sale did not realize enough to pay its floating indebtedness. The collapse of the Atlantic and Pacific Railway marked the passing of the railroads as instruments of commerce; although in some localities electrical roads were still used for many years as a means of transportation for short distances and also for switching purposes, it being at first impracticable for the aircraft companies to load and unload freely in closely built cities. Today when railroads belong to the antiquated and superseded inventions of mankind and airships literally darken the heavens, when the journey from New York to San Francisco is made between the rising and setting of the sun, when commodities are transported from one locality to another at such slight cost and with such rapidity as to make distances from the points of production practically no item in the ultimate cost; when travel by steamship

across the ocean is as far superseded as the ox cart was seventy-five years ago for travel across the prairies; when the war airships have so completely supplanted the old battleship as the gatling gun has superseded the bow and arrow, we can hardly realize that this tremendous transformation, penetrating every department of civilized life, has taken place within the last fifty years. In the bitter struggle which raged between the railroads and the aircraft companies from 1934 to 1940 and even down to 1942 when the great A. & P. Rwy. went out of existence every attack that ingenuity could devise was resorted to by both sides. The decision in the Burnes case came in 1936 when the fight between the railroads and the airship companies was at its height and suggested a weapon that was eagerly seized and viciously used. The railroads were the inspiration of practically every suit of trespass that was brought, and whenever a property owner friendly to the railroad interests was found over whose land a line of aircraft operated he was made a plaintiff in an action of trespass. There was no limit to the number of actions that land owners could bring, since each passage of the airship constituted a separate trespass. At first the only result to be gained by the railroad was the purely negative one of impairing the finances of the airship companies by making them pay the costs of the almost inexhaustible supply of litigation. The effect of this can be estimated when in the city of St. Louis alone something over 7000 judgments were given against airship companies in the year 1939 and the costs in each case averaged about $50.

But this litigation although successful was found to be slow in effecting the ultimate result aimed at and accordingly we find the railroad attorneys looking around for some other line of legal procedure that would more effectually and speedily hamper the operations of the air companies. They hit upon the design of resorting to equity and securing an injunction in behalf of property owners against the operations of air craft over their land.

The leading case on this subject is Penn. Railroad Co. *v.* U. S. & Mexico Airobile Company, 635 U. S. 42, a case arising in the eastern district of Illinois. In the course of an elaborate opinion the Supreme Court said: "In this case a perpetual injunction was granted restraining the defendant company from operating its air machines over and across the land of the plaintiff company. The evidence conclusively showed that the defendant company operated an air craft for the transportation of persons and freight between the city of St. Louis and the city of Mexico and that its machines to the number of 20 per day passed continuously over the land of the plaintiff. Under the long line of authorities beginning with Burns *v.* St. Louis and Chicago Airship Co. it is clear that defendant is a trespasser. It further appears that the trespass has been and is likely to be continuous. A court of equity will prevent the invasion of the legal rights of another, when it is shown that such right has been repeatedly invaded and is continuously threatened. In No. 4 Pomeroy Eq. Jurisprudence 1357, it is said that injunction is granted to prevent the commission of a tort in such cases because being continuous and repeated the full compensation for the entire wrong cannot be obtained in one action at law for damages and many decisions are cited by the learned author in support of this statement of the law. In the Debs case, *In re* Debs, 158 U. S. 564, this court went so far as to prevent by injunction the commission not of a civil tort but of a crime. We are therefore of the opinion that both upon reason and authority the action of the lower court in awarding the injunction was proper and should be affirmed.

The decision did not meet with universal approval, and in some of the state courts a different result was reached. Among such decisions are O'Brien *v.* San Francisco and Boston Airoplane Co. 924 Mo. 265, Addicks

v. Transatlantic & Pacific Airship Co., 24 South Texas 63, Kanmore *v.* U. S. & Philippine Aerial Ass. 76 Honolulu 25.

However, as in most instances, the U. S. courts had jurisdiction because the air companies were foreign corporations, these decisions of the state courts offered no difficulty, and we find that in the spring of 1939 practically every aircraft line of importance was tied up by injunction and in many instances its officers and employees were confined in federal jails for contempt. It looked for a time as if the air companies would have to go out of business or make terms with the railroad. But the air companies saw relief in sight if the power of eminent domain was conferred upon them. The battle was transferred to the legislatures, public sentiment being with the aircraft companies forced the governors of each state to call the legislature in extra session, and in less than two months after the decision was announced the legislatures of 66 states had promptly passed acts granting to air lines the right of eminent domain.

This relief was at once utilized and whenever an injunction was in force to prevent the operation of airships condemnation proceedings were resorted to and of course the injunction became inoperative.

The value of the property right taken was in most cases found to be nominal. The procedure was not so costly to the aerial companies as their defense to the actions of trespass since one suit forever disposed of a land owner and effectually put a *quietus* upon litigation either by trespass or injunction, while there was practically no limit to the number of actions of trespass a land owner might bring. Nevertheless costs in condemnation suits under the common form of assessment of damages by commissioners with an appeal to a jury in every case the costs of which had to be borne by the condemning company, proved burdensome. To avoid this expensive procedure, the air companies induced Congress to pass in 1940, what was known as the Corbin Composite Condemnation Act. Briefly this law provided that any company operating aerial craft and engaged in interstate commerce could file in any United States Circuit Court a proposed route not more than ten miles in width, giving the name of all the underlying property owners and upon paying into court the sum of one cent on account of the damage to each of said property owners the right to use said route would at once vest in the company and all actions legal or equitable by the property owner should be forever barred. The effect of this law would have been to put an end to all legal and equitable proceedings against the aerial companies and relieve them from the necessity of exercising the right of eminent domain against each property owner. Its constitutionality, however, was vigorously attacked in the courts. The test case was Thompson *v.* National Fast Air Line, 832 U. S. 512, in which it was finally held by a divided court of twelve to eleven that the Corbin Act was unconstitutional, since it deprived a property owner of his property without due process of law. This decision, however, was not handed down until 1944, and as at that time the railroads had gone out of existence its practical effect was *nil.* With the collapse of the railroads, suits by property owners ceased. There no longer was any inducement to engage in expensive litigation to protect theoretical rights and to recover nominal damages. We find a few cases reported as late as 1949, but none after that year, and I have not been able to find a single decision of any of the questions here discussed during the last 25 years. It is truly a closed chapter of aeritime law, a chapter of the greatest importance to the lawyer of the thirty-five years ago, and interesting to-day to the student of the common law because it presents a situation in which the protection of a merely theoretical legal right was resorted to as the means of destroying the practical value of the greatest invention in the history of the world.

St. Louis, Mo., November, 1907.

THE EFFECT OF PRESUMPTION OF DEATH UPON MARKETABILITY OF TITLE TO REAL ESTATE

By W. F. Meier.

IT is practically a universal rule of law, both under the common law and statute, that when a person has been absent from his home or residence, and has not been heard from by his friends and relatives for a period of seven years and more, there arises a presumption of death,[1] except in the case of children of tender age, incapable of absenting themselves of their own volition, but whose movements are governed by others.[2] But that presumption has generally been recognized as rebuttable,[3] and only where there are no circumstances to rebut the presumption, is it obligatory upon the court or jury to sustain it.[4] It is the purpose of this discussion to point out the effect of this presumption upon the marketability of title to real estate, and, incidentally, to note the opinion of courts upon the question as to a presumption of such a person dying unmarried and without issue. Suits involving these questions arise generally in cases where the vendor or purchaser under contract creates a breach of that contract.

And first, as to cases in which the court says that title to real estate is not marketable, in spite of there being a long and continuous absence of a party supposed to have an interest in the property. The case of Vought *v.* Williams,[1] was one for specific performance. In March, 1853, one Giles B. Richardson died intestate, seized of the property in question, leaving his widow and two children. In 1863, one child, then 23 years of age, left home, and had not been heard from up to 1875, when the mother and remaining child conveyed the property to plaintiff's grantors, the deed reciting that they were the sole heirs at law of Giles B. Richardson. Plaintiff sold the property under contract to the defendant, agreeing to give "first class" title. The defendant refused to accept the plaintiff's title, whereupon this suit was instituted. After pointing out that the term "first class" as applied to the title, meant marketable, the court goes on to define what a marketable title is, in these words:

"A marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some facts appearing in the course of its deduction, and the doubt must be such as affects the value of the land, or will interfere with its sale. A purchaser is not to be compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value." [2]

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[1] Am. and Eng. Ency. of Law (2nd Ed.) 1245, and many cases there cited.

[2] Manley *v.* Pattison, 73 Miss. 417, 55 Am. St. Rep. 543; Keller *v.* Stuck, 4 Redf. (N. Y.) 294.

[3] Scott *v.* McNeal, 154 U. S. 34; Smith *v.* Smith, 49 Ala. 156; Adams *v.* Jones, 39 Ga. 479; Seeds *v.* Grand Lodge, 93 Iowa 175; Flynn *v.* Coffee, 12 Allen (Mass.) 133; Dickens *v.* Miller, 12 Mo. App. 408; Wambaugh *v.* Schenck, 2 N. J. L. 214; Young *v.* Heffner, 36 Ohio St., 232; Keech *v.* Rinehart, 10 Pa. St. 240.

[4] Biegler *v.* Supreme Council, 57 Mo. App. 419; Osborn *v.* Allen, 26 N. J. L. 388; Hoyt *v.* Newbold, 45 N. J. L. 219, 46 Am. Rep. 757.

[1] 120 N. Y. 253, 24 N. E. 195.

[2] Citing: Commissioners *v.* Armstrong, 45 N. Y. 234; Shriver *v.* Shriver, 86 N. Y. 575; Hellreigel *v.* Manning, 97 N. Y. 56; Fleming *v.* Burnham, 100 N. Y. 1, 2 N. E. 905; Ferry *v.* Sampson, 112 N. Y. 415, 20 N. E. 387; Moore *v.* Williams, 115 N. Y. 586, 22 N. E. 233; Swayne *v.* Lyon, 67 Pa. St., 436; Dobbs *v.* Norcross, 24 N. J. Eq. 327.

Judge Brown, who writes the opinion, while saying that if the man were alive he probably would have long ago returned to claim his property, yet concludes:

"But I am not prepared to decide that a purchaser of real estate should be compelled to take title when there is an outstanding right in a man who, if living, would be only 47 years of age, and of whose death there is no evidence except the presumption arising from an absence from his friends of 24 years, and his failure to communicate with them and to claim property which he left behind him upon his departure from home. It is very probable that the man is dead. The chances are very largely in favor of that conclusion. But his death is not proven, and the plaintiff's title to the real estate, and which necessarily depends upon his death, cannot be said to be free from a reasonable doubt. Why should we compel the purchaser to take all the risk involved in that doubt?"

In the case of Trimmer *v.* Gorman,[1] the plaintiff in contracting for the sale of land to the defendant, represented that he was a single man. It subsequently developed that he had been married, but his wife had left him, and he had not heard from her for more than seven years. The court in refusing to force the title upon the defendant said:

"The absence of plaintiff's wife only creates a presumption that she is dead. This is a presumption of fact that may be rebutted, and defendant's title rendered imperfect." [2]

The case of Dworsky *v.* Arndtstein [3] came before the New York court, it being an action to cancel a contract of purchase entered into September 10, 1895, and for the recovery of payments made thereunder. It appears from the facts set forth in the opinion that in 1887, one Henry Wisendanger died testate, leaving his estate to his consort and his four illegitimate children. The will was admitted to probate, and the property sold by a referee in an action of partition. The defendant in this action derived title from the grantee at that sale. It subsequently developed that the wife of Henry Wisendanger was still living, and that he also had a brother who was alive in 1865, and neither of these had been cited to appear at the time the will was admitted to probate. The defendant contended that as to the brother of Henry Wisendanger, a presumption of his death had arisen by reason of his long absence. As to this the court said:

"But it is said that there is no presumption that Rudolph Wisendanger was alive. That is clearly erroneous. He was living in 1865. No proof whatever has been given of his death since that time, and certainly there can be no presumption, either of law or of fact, that a person who was alive in 1865 was dead in 1895. For aught that appears, he may have been a young man at that time. No effort has been made to find him on the part of the defendant. No account is given of his whereabouts, and, while it is quite possible that he may have died, the presumption, if there is any presumption, is clearly the other way."

In another New York case, that of Fowler *v.* Manheimer,[1] the facts were substantially as follows: The owner of certain land died in 1865 leaving a widow, who stated in her petition for letters of administration, that his only next of kin was a sister who resided in Scotland when last heard from, about 14 years previously. The plaintiff in this action, a trustee under certain trusts subsequently created by the widow, sought to enforce a contract of sale by an action for specific performance. One of the objections made by the defendant, as to the title, was,

[1] 129 N. C. 161, 39 S. E. 804.

[2] Citing: Dowd *v.* Watson, 105 N. C. 476, 11 S. E. 589, 18 Am. St. Rep. 920; Springer *v.* Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708.

[3] 51 N. Y. S. 597.

[1] 75 N. Y. S. 17.

that the sister in Scotland had an interest in the property. In answer to the plaintiff's contention that there was a presumption of her death, the court said:

"It cannot be presumed, in the absence of evidence bearing upon the subject, that, because the sister had not been heard of for 14 years, she was dead, any more than it can be presumed that she was at the time of the death of John an alien, or did not have children who could inherit. . . . So, here, we think the plaintiff failed to show the title he tendered was marketable, inasmuch as he failed to negative the possibility that John Ferguson left heirs at law capable of inheriting."

An interesting Maryland case is that of Chew *v.* Tome,[1] in which a presumption of death arising from an absence of 35 years was relied upon. In its discussion of this presumption and its effect upon the title to the property involved, the court said:

"To establish the title claimed by him as heir of John P. Marshall, an essential fact to be known is that the latter died intestate, and leaving no children. It appears from the record that the death of John P. Marshall is not a known or ascertained fact. It has not been made a matter of adjudication by any tribunal whose province it was to ascertain and adjudge it, and it is not established by any direct evidence. The only evidence to establish his death is the presumption that he is dead because of absence from the state for more than seven years without having been heard from. It is admitted that he left the state of Maryland about the year 1862, unmarried, and entered the Confederate army. . . . The presumption relied upon as proof of the death is a presumption of law from the fact of absence appearing from the testimony alluded to.[2] But it arises from facts which had to be proved by witnesses having the requisite knowledge of them. There is nowhere any definite, conclusive judgment upon these facts so as to make them binding upon anybody. Nor can the presumption be adjudicated and rendered conclusive in this proceeding against any one not a party thereto. At best it is here only matter of evidence affording prima facie proof of death. If adjudged against appellant, the decision will bind him, but it will not protect him. Such judgment would not bar John P. Marshall, if alive, nor his children, if he died leaving children, from recovering the land. . . . Now, as has been seen, the title which the appellant agreed to purchase was "a good record title." A good record title is conclusive against everybody. What the appellant is now offered is a prima facie title as the proof stands here. Further than this, assuming that the death of John P. Marshall is a fact, there is no legal presumption that he died without issue. . . . The only fact in the record from which any such presumption could be made is that about 1862 he was unmarried. With this single fact as evidence to negative the existence of issue, what assurance could the appellant feel, if he took the land in question, that . . . he could successfully prosecute ejectment for it if circumstances should arise to make it necessary? Would not considerations of this character be likely to affect the marketable value of the property in question, and be calculated to raise doubts in the mind of an intending purchaser? Would they not, therefore, be such as might well, in the language of this court in the case of Gill *v.* Wells, *supra*,[1] 'induce a prudent man to pause and hesitate?' And can they be regarded as mere 'captious, frivolous, and astute niceties?'"

So, then, from the foregoing cases it will be seen that there is considerable of a hesitancy to indulge the presumption of death or death without issue, when it is to affect the title to real property, even in case of an absence during a period of thirty-five years, as in the case last quoted from.

[1] 93 Md. 244, 48 Atl. 701.

[2] Citing: Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

[1] 59 Md. 492.

Now as to decisions holding that the presumption of death was strong enough as not to render title unmarketable, and first, the very interesting case of Ferry *v.* Sampson.[1] In that case objection to title had been made "on the ground that Robert Waite Armstrong, the devisee of the premises under the will of his father, was not shown to be dead, or if dead that it was not shown that he died intestate, or leaving no widow or issue surviving." In 1842, and nine years after proof of the will of his father, Robert Waite Armstrong, being then unmarried, and about 20 or 21 years of age, left his home in New York City. He returned the same year for a visit, and went away again, and in 1846 wrote his mother from Missouri, that he was on his way home via New Orleans. Nothing was heard from him subsequently. Fruitless attempts to locate him were made, and it was generally believed by his relatives and friends that he was dead. This action was brought forty-one years after his disappearance. As to this matter the court said:

"The presumption of the death of Robert Waite Armstrong, intestate and without leaving a widow or children surviving, is, upon the facts disclosed, very strong, amounting to scarcely less than certainty. It cannot be doubted that he knew of the devise to him in his father's will. He was a necessary party to the probate. In 1842 he was, as one witness testifies, about 25 years of age, and when here at that time it is extremely improbable that he did not learn of the provisions in his father's will, if he did not know of them before. The presumption of his death does not depend simply upon the lapse of time. It is enforced by the fact that he had a valuable interest in property which, if living, he would, according to common experience, have long since asserted and claimed. But for forty years it has been in the undisputed possession of his mother and his collateral kindred, claiming by descent from him. Meanwhile, neither Robert Waite Armstrong, nor any one claiming to be his widow or issue, has given the least sign. It is scarcely conceivable that, if he had wife or children, he would not have informed them of this inheritance. . . .

"We think the circumstances in this case point unequivocally to the death of Robert Waite Armstrong long before the sale in partition, leaving no widow or children surviving, and that it is beyond reasonable doubt that his title passed by his death to his mother, and his brothers and sisters, and their descendants. Judge Denio had occasion to consider a somewhat similar question in *Re Protestant School*, 31 N. Y. 587, 588; and Chancellor Kent, in *McComb v. Wright*, 5 Johns. Ch. 263, enforced specific performance of a contract for the sale of land on the presumption of death without issue of John Ogilvie, an absentee for 'over forty years.' On the whole, we think the objection of the purchaser was untenable, and that, according to the rules of equity applied in such cases, he ought not to have been released from his purchase."

An earlier New York case, and one referred to in the above quotation, is that of McComb *v.* Wright.[1] The facts in that case were as follows: One Alexander Ogilvie, by his will, dated January 21, 1748, devised all his property to his wife for her life and then to his five children, naming them, as joint heirs. Two of them, subsequently, by deed, which recited the death of a sister, conveyed their interest to a fourth. In 1815 the grantee died, and his executor sold the land in question in January, 1819, to the defendant, who refused to take the title offered because of the outstanding interest of the fifth child, and also of the one alleged to have died. An action for specific performance was brought. It was shown that those long acquainted with the family had never heard of the child alleged to have died. As to the fifth, it was shown that he had gone

[1] 112 N. Y. 415, 20 N. E. 387.

[1] 5 Johns Ch. (N. Y.) 263.

to England a short time before the revolutionary war, at the age of twenty-two, unmarried, and had not been heard of since the commencement of the war. He had threatened to drown himself, and it was thought by his acquaintances that he had drowned himself in the Thames. The Chancellor held, "that the lapse of time, and family ignorance of Catherine or John, for upwards of forty years before the sale in question, and the other circumstances, were sufficient to warrant this Court, or to warrant a jury, in a Court of law, and to render it the duty of either, to raise the presumption of death, without issue. That the title under the will of the plaintiff's testator was, therefore, to be deemed good."

A recent case is that of Demarest *v.* Friedman.[1] In that case a presumption of death was allowed to control under this statement of facts: In 1860, one Albert Demarest, the owner of an interest in land, embarked upon a whaling voyage of uncertain duration. From time to time his sister received letters from him. In 1865 she received information from the vice consul of the United States at Callao, Peru, of the death of one Albert Demarest, the letter conveying the information being addressed to Albert A. Demarest, father of the deceased. Nothing more was ever heard of him though a period of thirty-seven years had elapsed. The court in holding that the title was not unmarketable by reason of any outstanding claim of Albert Demarest, said:

"On these facts, we have no doubt whatever that Albert Demarest, the son of Albert A. Demarest, and the brother of these plaintiffs died in December, 1864. The proof upon that subject is convincing, and authorizes us to conclude that he died unmarried and without issue. . . . That event occurred over thirty-seven years ago. No one has ever come forward to assert a claim to the interest which he derived in the real estate under his father's will. The mere possibility that while he was on this whaling voyage in the Pacific, being attached to the ship from 1860 to November, 1864 . . . he might have married at some port and might have had issue, is so remote and unreasonable a conjecture that it should not be allowed as an objection to title to real estate. If the existence of an alleged fact is a possibility merely, or a supposed outstanding right depends upon a very improbable and remote contingency, the court has the discretion to compel a purchaser to complete his purchase.[1] This case is free from reasonable doubt, and we are of the opinion that the discretion, if it is a matter of discretion, should be exercised to compel the purchaser to take title."

The case of Day *v.* Kingsland[2] was an action for specific performance, the vendee having refused to accept the title to land because of the possible claim of certain heirs of a former owner. The record showed that two of the heirs had, more than thirty years previous, departed, and had not since been heard from, and that a third had gone away more than fifty years before. These matters had been set up in a petition for a partition of the property but the three heirs were not made parties. In decreeing specific performance, the court said:

"No proof whatever has been offered in this cause showing the existence of either of these three children of Hannah, or of any heirs of any of them at the time of the partition proceedings; and, in the absence of any evidence in this suit rendering it probable that they or their heirs were then in existence, and should have been made parties, the vendee cannot set up the failure to make them parties in order to avoid the contract. The mere possibility of the existence of these heirs, or persons

[1] 70 N. Y. S. 816.

[1] Citing: Ferry *v.* Sampson, *supra*.

[2] 57 N. J. Eq. 134, 41 Atl. 99.

claiming under them, based on suspicion or conjecture, and without the production of any evidence to support the conjecture, is not sufficient to relieve the vendee."

In the case of Burton *v.* Perry,[1] there was involved the validity of a default decree against the unknown heirs of one who had not been heard of for more than twenty years. The proceeding in which that decree had been rendered was one under a special statute of Illinois which declared that interested persons whose names were unknown might be made parties to suits in equity "by the name and description of unknown owners, or unknown heirs, or devisees of any deceased person." The court held that a decree rendered in such a proceeding was void if the person supposed to be dead, was, in fact, alive. The court, however, in the proceeding against the unknown heirs having indulged the presumption of death, and no evidence having been introduced in the present proceeding to overcome that presumption, it was held that the decree must stand as being in accord with the facts.

The Court of Error and Appeals of New Jersey, in the recent case of Meyer *v.* Madreperla,[2] upheld a title by indulging the presumption of death. The owner of lands died testate in 1885. One of his children, a son, who was a common sailor, unmarried, and who resided with his father, left his home in 1879, and had never been heard of since that time, a period considerably over seven years. The court gives a very thorough discussion of the whole question relative to the presumption of death, and, among other things, says:

"As Patrick, when he went away, was unmarried, his status as a single person is presumed to have continued, no contrary proof being adduced; and his presumptive death is accompanied by the presumption that he left no lawful issue."

[1] 34 N. E. 60 (Ill.)
[2] 53 Atl. 477 (N. J. L.)

And then, discussing the general doctrine that a purchaser will not be compelled to take a doubtful title, the court continues:

"A conveyance in the chain of title, and necessary to its completeness, though appearing to be properly witnessed and acknowledged, and therefore capable of being proved by its production, or by its record under the statute, may afterward be shown to have been a forgery. A marriage, essential to the descent of the land in the chain of title, may afterward be shown to have been a meretricious union, and its issue illegitimate. Proof that Patrick embarked in 1879 on a vessel which was wrecked on a dangerous coast, and had not appeared or been heard of since that time, would raise a presumption of death without the statute, yet there would be a possibility that he escaped, and was yet alive. It may be well questioned whether any of such possibilities should deter a court of equity from enforcing the contract of purchase."

The New York court, in the case of Cambreleng *v.* Purton,[1] found it a comparatively easy matter to hold that an absence of seventeen years was sufficient to clear the title. The person disappearing, however, had certain organic diseases, induced by frequent and protracted sprees, and which, according to the testimony of the physician put upon the stand, would result fatally within a very short time. In enforcing specific performance in this case, the court said:

"A purchaser will not be compelled to take title where a doubtful question of fact relating to an outstanding right is not concluded by the judgment under which the sale was made.[2] But this rule will not operate in every case to bar the enforcement of the sale. If the existence of the alleged fact which is claimed or supposed to constitute a defect in, or a cloud upon, the title

[1] 125 N. Y. 610, 26 N. E. 907.
[2] Citing: Fleming *v.* Burnham, *supra.*

is a mere possibility, or the alleged outstanding right is but a mere improbable or remote contingency, which according to ordinary experience, has no probable basis, the court may, in the exercise of a sound discretion, compel the purchaser to complete his purchase. It has been well said that this discretionary power is to be carefully and guardedly exercised, and applied only in cases free from all reasonable doubt.[1] But we think, from the undisputed evidence in this case, that the fact claimed to constitute the only defect in the title is such a very remote and improbable contingency and is such a slender possibility only, that it is a proper case for the application of the principle, and that the courts below were right in refusing to relieve the purchaser from the obligations to perform his contract. The fact that John Colville disappeared 17 years ago, and has not since been seen or heard from, would not alone be sufficient to obviate the objection to the title. But he disappeared in such a condition of health and mind, induced by a long course of dissipation, and under such circumstances, that his death in a very short time is the inevitable conclusion. . . . Under these circumstances the outstanding right upon which the purchaser rests his refusal to perform has no probable basis, and cannot be said to constitute any real defect in the title."

From the foregoing cases, which are illustrative of practically every principle involved in cases that have been before the courts touching upon the effect of the presumption of death upon the marketability of title to real estate, the following may be deduced:

1. Mere absence from home without tidings, and with no other circumstance to substantiate the presumption of death, is not sufficient to render marketable the title to property in which the absent one, or his lawful issue, may have an interest.

2. Absence for a long period of years, upwards of the number of years fixed by statute after which the presumption of death is indulged, coupled with corroborative evidence pointing to a strong probability of actual death, will remove the cloud sufficiently to allow the enforcement of specific performance.

3. The disappearance and absence of a person, unmarried, under such circumstances as to warrant a finding for specific performance, will also raise a presumption of death without marriage, and without lawful issue.

SPOKANE, WASH., November, 1907.

[1] Citing: Ferry *v.* Sampson, *supra*; Moore *v.* Williams, *supra*; Insurance Co. *v.* Wood, 121 N. Y. 302, 24 N. E. 602

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, facetiæ, and anecdotes.

PSYCHOLOGY AND THE "THIRD DEGREE"

Professor Munsterberg in the October *McClure's* (V. xxix, p. 614) publishes another of his suggestive articles on the relation of modern psychology to the ascertainment of truth in courts of law. In previous articles which appeared last spring in the *Times Magazine* he called attention to modern methods of testing the accuracy of memory In this article he contends that the scientific methods of studying the association of ideas afford a means of eliciting information that a person desires to conceal more effective than the ordinary cross-examination by counsel and far more humane than the "third degree" of the metropolitan police. In some of his previous writings he has shown how persons of weak or defective intellect are frequently driven into untrue confessions by psychological effects of the police methods of examination of which the police are entirely ignorant. We are all conscious of the repulsion caused by the thought of the application of these methods though most who have had to do with detection of crime are convinced that such methods are necessary and in the long run not unfair to the criminal. We must remember, however, the real criminal is usually of abnormal mental development and peculiarly likely to be subject to subtle influences with which police are unfamiliar. The method which is here explained seems at first too simple to be uniformly effective. The examiner prepares a list of several hundred words, most of them of commonplace significance, but some of them referring to incidents or scenes supposed to be connected with the event concerning which it is supposed that information is concealed. The suspect is then told that these words will be repeated for the purpose of ascertaining what matters they call to his mind and he will be required in reply to name as rapidly as possible after each word put to him some other word which occurs to his mind. He, therefore, understands the whole object of the process and is put on his guard. If he has anything to conceal he will naturally endeavor when the dangerous words are pronounced to name in reply some word having no apparent connection with the information which he knows is desired. If he has nothing to conceal he will give no thought to the process but will give his replies as they occur to him with uniform rapidity. It is evident, however, that if he gives thought to his answer the mental process must be slightly longer than if he answers without precaution. These differences in time may be very minute and not appreciable by the subject himself. They are said to occur with such uniformity, however, as to afford a certain test for distinguishing the words which cause embarrassment and by means of delicately adjusted electrical apparatus the relative time for reply can be accurately gauged and recorded. In the course of a long examination, moreover, a real criminal would inevitably find betraying thoughts rushing upon him for expression and a word would slip out which would cause him embarrassment and entirely disarrange the rapidity of his answers. Long experience with many instances has enabled the psychologist to deduce simple rules of detection from time variations which will put him upon the track of the matters to which the person examined is sensitive, and by repetitions of the words which are found effective a confession is frequently elicited. It was this system of experiment among many others which was tried by the author upon Orchard during the trial of Haywood last summer concerning which exaggerated rumors appeared in the press, and the article is especially interesting as recording the effect of such an examination upon so unusual a mental type as this professional criminal.

Most of us will be disposed at first to doubt the possibility of uniformly accurate results

from so simple a method and the author himself does not believe that his processes have sufficiently developed to justify their official use at present. He submits, however, that the method he uses is correct, and that only the certainty of frequent experiment is needed to make the detections so accurate as to warrant displacing our present cruder system. As we have previously called especial attention to these striking articles we feel that the present one deserves thoughtful consideration. We hope to be able to publish hereafter some of the further articles which the author is preparing upon other branches of his studies.

In the October Law Notes appears an article by Mr. Charles C. Moore under the title "Yellow Psychology," which is a sarcastic criticism of Prof. Munsterberg's article, to which the learned professor very effectively replies in the November issue. He regrets that if the judges and lawyers have known so much more about this subject than the experimental psychologists they have not relieved him of the labor of his exhaustive experiments.

INTERNATIONAL PRACTICE.

At the recent conference of American Republics it was proposed that admission to the bar in one country should be the equivalent of educational requirements imposed as a condition upon admission to the bar in another country. It was not, however, intended to eliminate an examination for admission if required of its own citizens by such country. Our representatives called attention to the difficulty of thus binding our several states and the results of the discussion are not as yet sufficiently definite to warrant extended comment, but the fact that lawyers of the different American jurisdictions are considering the possibility of greater freedom of intercourse is an interesting sign of the times. It emphasizes the growing importance of litigation arising out of our increased trade with our southern neighbors.

THE UNWRITTEN LAW.

The following editorial from the London *Law Journal* is interesting in view of the approaching second trial of Thaw.

"We have heard a great deal of late from America of the 'unwritten law'; but the theory has been very much in the air. Now it has received actual recognition in the acquittal of ex-Judge Loring by a Californian jury. Put briefly, the case comes to this: that a father who believes, rightly or wrongly, that his daughter has been violated is justified in killing the supposed violator. This is the particular application of the 'law.' The general principle is wider, and seems to be that in certain classes of wrongs — those touching personal or family honour — the aggrieved party may, if he deems the reparation given by the law inadequate, take the redress of his grievance into his own hands. The same idea has undoubtedly had a place in the history of our own law. A husband who takes the adulterer *flagrante delicto* might — perhaps may — lawfully slay him, and, though our law in theory condemned duelling, the man who did not vindicate his honour or that of his family by sending or accepting a challenge had to suffer social excommunication. What is important to note, however, is that these sentiments were survivals — survivals from a primitive state of society. What we to-day call crimes — theft, assault, robbery, rape — were originally, as Sir H. Maine has shown, regarded merely as private wrongs, which it was the business of the individual or his family or his clan to revenge. This law-licensed right of revenge was in time waived for a composition. Afterwards the state compelled acceptance of the composition, and fixed a regular tariff, and later on a code of punishment, for injuries; but some wrongs rankled so deeply that the sufferer still held to the old rule of revenge, and society tolerated his doing so. So strong and widespread is the sympathy with *crimes passionelles* even to-day among the Latin races, that it goes far to defeat the efficacy of trial by jury. 'Extenuating circumstances' are with us the equivalent of this sympathy. Something, no doubt, must be conceded to human nature, but the object of law is, and always has been, to curb the primitive instinct of revenge; without such a curb the world would, as Sidney Smith said, be a 'wild waste of passion.' Whatever gives a sanction to this 'wild justice,' though under the guise of honour, must be regarded as a 'throwing back' to the ages of barbarism."

CURRENT LEGAL LITERATURE

This department is designed to call attention to the articles in all the leading legal periodicals of the preceding month and to new law books sent us for review.

Conducted by WILLIAM C. GRAY, of Fall River, Mass.

The law school reviews having resumed publication the material for this department recovers its normal proportions. The articles reviewed cover a wide range, no one subject occupying a commanding position as sometimes happens, nor does any one article stand out as the great article of the month, but it can safely be said that a high average of attainment has been reached, and there are many articles noticed which will well repay reading in their entirety.

ADMIRALTY (Action for Death on the High Seas). "Enforcement of a Right of Action Acquired under Foreign Law for Death upon the High Seas," by G. Philip Wardner, *Harvard Law Review* (V. xxi, p. 1). The object of this article is to question the correctness of the decision of the Circuit Court of Appeals reported in 100 Fed. 655, which dismissed the libel *in personam* brought by the administrator of a passenger against the French steamship company that owned the lost steamer *La Bourgoyne*. Although our common law and general maritime law give no right of action for death caused by a wrongful or negligent act, Mr. Wardner maintains that " where a right of action for death upon the high seas is given by the general maritime law of a foreign state, it should certainly be enforced under proper conditions by admiralty courts of the United States, in favor of citizens of the United States, and should on principle also be enforced even as against citizens of the United States." The doctrine on which this is based is the familiar one that rights accruing under foreign law will be enforced, whether the law of the forum gives a similar right or not. The article is to be continued.

AGENCY (Broker's Commission). "Letting and Subsequent Sale, Estate Agents' Commissions," by J. F. K. Cleave, *Law Magazine and Review* (V. xxxiii, p. 48). Short examination of the English decisions on the puzzling and litigation-producing cases where a broker, empowered to sell, succeeds in getting a lessee who afterwards buys, raising the question whether the broker is entitled to a commission on the purchase price.

BIOGRAPHY. "Dr. A. A. Stockton," by David Russell Jack, *Canadian Law Review* (V. vi, p. 359).

CARRIERS (England). " Railway Passengers' Personal Luggage," by G. Addison Smith, *The Law Magazine and Review* (V. xxxiii, p. 13). Collecting and commenting on decisions under the English Carriers Act as to railway liability for loss of or damage to luggage.

CARRIERS (Limiting Liability). "Agreed Valuation as Affecting the Liability of Common Carriers for Negligence," by Henry Wolf Biklé, *Harvard Law Review* (V. xxi, p. 32). An examination of the cases on this point leads the author to say:

" The law will develop, we believe, into a recognition of the importance of the carrier's knowledge or ignorance of the real value of the goods carried, for the policy of the rule forbidding the limitation by common carriers of their liability for negligence is, under present conditions of transportation in this country, so generally accepted that its modification is not probable."

CONFLICT OF LAWS (see Admiralty).

CONSTITUTIONAL LAW (Australia). "The Privy Council and the Australian Constitution," by W. Harrison Moore, *Law Quarterly Review* (V xxiii, p. 373). The recent case of Webb *v.* Outrim, the Commonwealth of Australia intervening ([1907] A.C. 81) is the first in which the Privy Council has been called on to determine the constitutional relation between the Australian Commonwealth and its states. The actual decision was that the salaries of federal officials are not exempt from assessment for state income tax. Mr Moore's article approves this, but criticises

severely the manner in which the judges reached the decision. American lawyers are especially interested in the prominent place given in the discussion to the constitutional decisions of supreme court of the United States, especially the doctrine of the "immunity of instrumentalities," laid down in McCulloch *v.* Maryland. In an earlier case the High Court of Australia had declared this principle applicable to the relation of commonwealth and state both because of its inherent reasonableness, and because looking to the history of the commonwealth constitution and the knowledge of the interpretation which like provisions had received in the United States, it was proper to infer an intention that the commonwealth constitution should receive like interpretation.

Before the High Court was instituted the Supreme Court of Victoria had expressly rejected the applicability of McCulloch *v.* Maryland to Australia, having regard to the different history of the two countries, the particular provisions of the commonwealth constitution as to conflict of power, and finally (and in the opinion of the Chief Justice, principally) because the doctrine of implied restraints which might be justified as a matter of political expediency when there was no supervising and controlling authority capable of preventing abuses of power by either government, was not necessary in a constitution where both governments are subject to the power of a common authority, the Crown, expressly vested by the constitutions of commonwealth and state with the power of disallowing legislation. The court also considered that the Privy Council had in Bank of Toronto *v.* Lambe, 1887, 12 App. Cas. 575, rejected the doctrine of McCulloch *v.* Maryland in the case of the constitution of Canada upon grounds which would involve its rejection in Australia.

The Privy Council has now overruled the doctrine of the High Court as to the implied restraints on the power of a state parliament, basing its decision or differences between the constitution of Australia and the United States. The limits of this department forbid giving Mr. Moore's strictures on the decision and an abstract would not do them justice. Students of constitutional law will find his discussion of great interest.

CONSTITUTIONAL LAW (Common Law of the United States). "The Common Law Jurisdiction of the United States Courts," by Alton B. Parker, *Yale Law Journal* (V. xvii, p. 1). Arguing with much force Judge Parker's well-known opinion that there is a federal common law, and that it was entirely competent to correct the abuses of interstate commerce had the federal law officers attempted to enforce it.

"But the campaign against the governmental plan of the Fathers is on and has been for several years. It has for its leader the most accomplished politician of our history. Behind him and backing him stand these great corporations of the country which are engaged in interstate commerce and insurance. The reason is that it is easier to deal with one government than with many. It is not their purpose to submit proposed amendments of the constitution to the people as the constitution provides — a procedure with which no one could find fault, as it offers an opportunity for discussion before the people prior to their action. Rather it is their scheme to accomplish the centralization of power by unconstitutional, and therefore dishonest methods. These include: (1) Congressional legislation assuming powers not granted, but expressly retained either to the states or the people; (2) Executive exercise of powers not granted, and the seizure in one form or another of powers belonging to other departments of government; and (3) The substitution of statutes for common law.

"Statutes are inflexible and cannot be expanded by judicial decisions. Legislators and executives, therefore, who are filled with the desire to control and regulate men and affairs, find in a statute the ideal method of accomplishing their wishes. The objection to an over-abundance of legislation by those who desire justice, rather than personal control, is that the men who draft the statutes cannot forsee the cases that will arise which do not come within the letter of the statute. It is for the opposite reason that the common law is so dear to the hearts of all students of it. It is flexible. It cau be made applicable to every new condition which may arise and in every instance can be worked out according to the eternal principles of justice.

"Herein we find a reason for the action on the part of those interested in the scheme to centralize power in the federal government. It was their theory that so long as congress omitted to legislate with reference to interstate commerce, there was no law to protect those who were wronged by those engaged in interstate commerce. But as we have seen, the Supreme Court decided that they were mistaken; that the common law did apply and would continue to apply until congress should by legislation supersede some or any portion of it by its statutes.

"Thus it happens that in both state and national governments, whenever there arise controversies which are not within the purview of statutes, they are still governed by law. And that law is the common law."

CONSTITUTIONAL LAW (Judicial Power). "The Function of the Judiciary II," by Percy Bordwell, *Columbia Law Review* (V. vii, p. 520). The first installment of this article was noticed at length in the June GREEN BAG. This final one discusses the remaining propositions of Juieliard *v.* Greenman — "that subject to the prohibition of the Constitution the powers granted in the United States Constitution are to be interpreted in the light of the practice of civilized nations," and "that political questions should be left for the political departments." So the court in the famous Insular cases held that the United States can hold colonies, although no such power is expressly granted in the Constitution. And that these colonies would be without many of the rights which are the very spirit of our institutions was held a question for the political departments. Such separation from political questions seems to Mr. Bordwell absolutely essential if our judges are to have the length of tenure requisite for the proper development of the law.

CONSTITUTIONAL LAW (Protection of Treaty Rights). "Federal Treaties and State Laws," by Charles Noble Gregory, *Michigan Law Review* (V. vi, p. 25). This paper was read at the annual meeting of the American Society of International Law in April. At the International Law Association meeting in Portland the author in the debate supported the views here expressed. He believes "that the power to make any engagement or regulation of a character customarily deemed within the scope of a treaty, except as the Constitution expressly bestows the control of certain matters on congress, the judiciary or some other branch of the government, is granted to the federal treaty-making power. That such treaty is made by the Constitution paramount to any state constitution or statute and necessarily to any ordinance or regulation of any of the subdivisions or agencies of the state.

"Since the treaty-making power of the states is absolutely and wholly eradicated by the Constitution, since the treaty-making power is wholly, absolutely and without any express limitation delegated to the appointed federal authority which is given express power to override any state law or constitution, since treaties made pursuant to such power were expressly made paramount to any state constitution or statute, it seems impossible to find any limit to the dominion of treaties over state laws, except the discretion of the constitutional treaty making power. Our highest federal court has so far found no other limitation, although there are various expressions intimating that one exists in the nature of a treaty and the form of our government.

"Our laws seem defective only in failing to provide by federal statute that the violation of treaty rights shall be a crime to be prosecuted by the United States government in the United States courts. Our federal courts have no common law jurisdiction in criminal matters, but exactly as a federal statute provides a procedure which is upheld for enforcing treaty rights as to runaway foreign sailors, so it might provide for direct enforcement of other treaty rights or for punishment in case of their breach.

"Since the treaty is a part of the federal law it becomes the duty of the chief executive to enforce it, and no reason is apparent why, by the law officers of the government, it may not be enforced through the courts."

It is suggested that in the absence of statute making violation of treaty rights criminal they may be protected by mandatory injunction sought by the government in its own name, or supporting an individual's suit.

CONSTITUTIONAL LAW. "State Interference with Interstate Commerce," by H. P. Burnett, *Virginia Law Register* (V. xiii, p. 497).

CONSTITUTIONAL LAW. "Railroad Rate Regulation," by Herbert S. Hadley, *The Brief* (V. vii, p. 175).

CONSTITUTIONAL LAW. "Has the State of California the Right to Exclude Japanese Subjects from the Public Schools?" by Warren Tubbs, *The Brief* (V. vii, p. 196).

CONSTITUTIONAL LAW. "Levy of Attachment upon Rolling Stock of a Railroad Company Doing Interstate Business — Is it a Regulation of, or an Infringement Upon, the freedom of Interstate Commerce?", by W. F. Meier, *Central Law Journal* (V. ixv, p. 351).

CONSTITUTIONAL LAW. "The Segregation of Hawaiian Lepers by Administrative Process," by W. F. Meier, *Central Law Journal* (V. lxv, p. 314).

CONTEMPT. "Statements by Attorneys in Arguments, Pleadings, and Briefs pertaining to Rulings and Decisions, as Contempt of Court," by Sumner Kenner, *Central Law Journal* (V. lxv, p. 331).

CONTRACTS. "The Right of Recovery for Partial Performance of Entire Contracts," by Graham B. Smedley, *Central Law Journal* (V. lxv, p. 292).

CONVENTIONS. "The International Law Association at Portland," by T. Baty, *Law Magazine and Review* (V. xxxiii, p. 75). Reviewing and commenting upon the work of the meeting.

CORPORATIONS. "Liability of Corporate Directors," by Frederick Dwight, *Yale Law Journal* (V. xvii, p. 33). Arguing for a more vigorous insistence on actual oversight of affairs and criticising the tenderness of courts toward directors who do not direct, but are not personally concerned in wrong-doing.

CRIMINAL LAW. "The Trial of the Insane for Crime," by James Hendrie Lloyd, *Albany Law Journal* (V. lxix, p. 306).

CRIMINAL PROCEDURE (Scotland). "The Criminal Procedure and Summary Jurisdiction (Scotland) Bill," by Henry H. Brown, *Law Magazine and Review* (V. xxxiii, p. 60). Analyzing and commenting on a proposed bill simplifying criminal procedure.

DIGEST. *N. Y. Appeals Reports* (V. clxiv-clxxxv). Colin P. Campbell, L.L.M., Matthew Bender & Co. A single line digest with references to No. E. Rep., an index to notes contained in the Annotated Rev. Ed. of N. Y. Reports and a table of cases in which no opinion was filed.

EMPLOYERS' LIABILITY. Employers' Liability Act of New York, Alger & Slater (2 ed.), Matthew Bender & Co. The author has made this second edition much more valuable as he has been enabled to treat his subject in the light of numerous recent decisions by the courts of New York and other states, thus construing quite fully and authoritatively all provisions of the act.

EQUITY-CONTRACTS. In the November *Illinois Law Review* (V. ii, p. 217) is a careful analysis of the English cases involving, "The Word 'Not' as a Test of Equity Jurisdiction to Enjoin a Breach of Contract," by Henry Schofield. The article is inspired by two recent Illinois cases, which applied the test formerly adopted in England, but never widely accepted in this country.

ETHICS. "Legal Ethics," by John C. Harris, *Albany Law Journal* (V. lxix, p. 300).

EVIDENCE. Handbook of the Law of Evidence, by John Jay McKelvey, West Pub. Co., St. Paul, 1907, 2d ed., price $3.75 delivered.

Like all clear treatises on this subject in recent times this book is frankly based on the teaching of the late Professor Thayer who did not live to complete his own work. Mr. McKelvey's book is intended chiefly for students of principles and is not a digest for searchers of precedents. In this new edition its statements are admirably clear and accurate. Recent cases are frequently cited by way of illustration of new tendencies of the courts and give evidence of a sifting of many decisions. Portions of the text have been largely rewritten. Occasional lapses in proof reading cause regret.

HISTORY (England). "The Trial of Peers" by L. Owen Pike, *The Law Quarterly Review* (V. xxiii, p. 442). An examination of Mr.

Vernon Harcourt's recent assertion that a report in the Year Books was forged by Henry VII or his minions to create a precedent for the trial of the Earl of Warwick. Mr. Pike reaches the conclusion that the charge must at least be held not proven.

HISTORY (England.) "The Profession of the Law in the Fourteenth and Fifteenth Centuries," by W. S. Holdsworth, *The Law Quarterly Review* (V. xxiii, p. 448). This interesting account of the early organization of the legal profession tells "The Serjeants and the Judges" and "The Apprentices of the Law and the Inns of Court." Another installment will describe "The Relation of the Inns of Court to the Serjeants and Judges" and "The Legal Profession and the Law."

HISTORY (England.) "The Barristers' Roll," by W. C. Bolland, *The Law Quarterly Review* (V. xxiii, p. 438). A short account of its origin and development in England.

HISTORY. "The Descendants of the Curia Regis," by George Burton Adams, *American Historical Review* (V. xiii, p. 11).

HISTORY. "The Mecklenburg Declaration: The Present Status of the Question," by A. S. Salley, Jr., *American Historical Review* (V. xiii, p. 16).

HISTORY. "The Records of the Federal Convention," by Max Farraud, *American Historical Review* (V. xiii, p. 44).

INTEREST. "Law of Interest — Expectant Heirs," by K. B. Dastur, *Bombay Law Reporter* (V. ix, p. 273).

INTERNATIONAL LAW (Eminent Domain). "Expropriation by International Arbitration," by Charles Noble Gregory, *Harvard Law Review* (V. xxi, p. 23). A suggestive article on the need of some international principle similar to the municipal right of eminent domain.

"The right of eminent domain within a nation's boundaries, formerly rarely exercised, and then by the highest sovereign authority of the state, is now easily and constantly invoked and exercised at the suit of public service companies under statutory provisions, largely supervised by the courts. With the growth of international interdependence instead of independent isolation, we may begin to hope for like useful functions and powers under international arbitration."

INTERNATIONAL LAW (Factors in Making It). "Equality Between Nations and International Conventions," by Simeon E. Baldwin, *Yale Law Journal* (V. xvii, p. 21). Judge Baldwin regards the equality of nations and the holding of conventions as of the highest importance to the advancement of international law. The public opinion of the world is the final tribunal and it will in the long run give fair consideration to the merits of a proposition regardless of the importance of the one suggesting it.

INTERNATIONAL LAW (Most-favored-Nation Clause). "Effect of 'Most-favored-nation Clause in Commercial Treaties," by Sir Thomas Barclay, *Yale Law Review* (V. xvii, p. 26). This is a paper read at the International Law Association conference at Portland. Such clauses provide that the contracting state shall enjoy all privileges which may be granted to another. But suppose they are granted in return for some concession on the part of the state to which they are granted? Can the contracting state claim to enjoy the privileges so conceded to its sister state without making the corresponding concession which the latter has made? It may have already made it. What is the position in such a case? Must it concede something else as an equivalent? And if so, what? Sir Thomas Barclay traced the United States doctrine as far back as 1831, and pointed out that all treaty concessions are motived by some consideration. The results of the admission of the United States doctrine would be, that no privilege could be claimed under the most-favored-nation clause, unless it were granted in the first instance as a purely spontaneous favor. After discussing the cases of Bartram *v.* Robertson, and Whitney *v.* Same (124 U. S. 190), he concluded that the American interpretation could not logically be supported, and recommended that the Hague tribunal should be given unlimited jurisdiction in such matters.

JURISPRUDENCE (Common Law or Codes). "A Century of 'Judge-Made' Law," by William B. Hornblower, *Columbia Law Review* (V. vii, p. 453). This address, delivered at the Columbia Law School in June, reviews thoroughly and clearly the arguments of the friends

of the common law and of the advocates of codes, taking strong ground in favor of the common law. " Judge-made " law is objected to as difficult of ascertainment and subject to change according to varying views of judges, but Mr. Hornblower maintains that code law is even more uncertain and therefore productive of litigation. The argument that " judge-made " law is *ex post facto* and that one is held by a law he could not possibly have known, is declared more specious than real, as the great majority of cases simply call for the application of well-settled principles. The layman, says Mr. Hornblower, more often goes astray as to the statute law than as to the unwritten law. The facility of amendment is a further serious objection to codes.

" A striking example of how a section of a code can be amended without any sufficient reason for the amendment and without exciting the attention of the public or of the bar is afforded by an instance which occurred recently. I venture to say that not one lawyer in a thousand in this state knows that in 1904 the Code of Civil Procedure was amended so as to change the requirements with regard to the contents of a complaint in an action. Section 481 of the Code of Civil Procedure, as it stood prior to 1904, and as I believe the corresponding section stood in the former Code of Procedure of this State, and as it had existed for more than a generation, provided that the complaint should contain:

" ' 2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition.'

" In 1904 the Legislature, precisely why nobody seems to know, amended subdivision 2 of this section so as to read as follows:

" ' 2. A clear, precise and unequivocal statement of the facts constituting each cause of action.' Laws of 1904, Chapter 500.

" Just what the legal effect of this amendment was no human being could tell, and only the Court of Appeals at the end of a litigation could settle. Why the provisions of the code as to a complaint should be amended so as to strike out the clause ' without unnecessary repetition,' or so as to change the word ' concise ' to ' precise,' or so as to change the word ' plain ' to the phrase ' clear, precise and unequivocal ' is hard to understand. Some lawyers discovered, during the year 1904, that this amendment had been made, and by Chapter 431 of the Laws of 1905, Section 481 of the code was put back into its former shape by restoring the phrase ' a plain and concise statement of the facts constituting each cause of action without unnecessary repetition.' This is certainly a curiosity in legislation. *Quære*, whether in the meantime ' unnecessary repetition ' in a complaint was allowable?"

In practice codes here and abroad are declared not to have met the expectations of their advocates, while the unwritten law has shown itself able to develop so as adequately to deal with the complex conditions of society caused by inventions in the last hundred years.

JURISPRUDENCE. " Roman Law and Mohammedan Jurisprudence," by Theodore P. Ion, *Michigan Law Review* (V. vi, p. 44). This first installment of an article intended to show the close analogy of the two systems of jurisprudence and the influence the laws of Rome exercised in the development of the Islamic legislation is devoted to the exposition of historical facts which account for the Roman influence.

JURISPRUDENCE (The Jury). " Le Jury à Rome et en Angleterre," by H. Speyer in *Law Quarterly Review* (V. xxiii, p. 420). An article in French pointing out great similarities and some differences of the jury system in Roman and English law.

JURISPRUDENCE. " The Law of Moses," by Lex, *The Law Magazine and Review* (V. xxxiii, p. 1). An analysis of the Mosaic law, comparing it with modern law. In the following passage the anonymous author upsets an idea generally held:

" Persistent breaches of the fifth commandment were punishable by death, but only in case both parents claimed the infliction of the penalty. No duty was imposed on any one else with regard to the prosecution or infliction, and even with the parents it was not a duty but a power. This power, I may remark, explains some passages in the proverbs of Solomon on which the advocates of flogging young people lay great stress. Solomon writes, ' Withhold not correction from the child: for if thou beat him with the rod *he shall not die*. Thou shalt beat him with the rod, and shalt deliver his soul *from the grave* ' (see marginal reading); and again, ' Chasten thy son, seeing there is hope, and *set not thy heart on causing him to die* ' (I again adopt the marginal reading of the R. V.). Beat your son, says Solomon, instead of bringing him before the elders of the city and asking to have him stoned. Solomon could not interfere with the law of Moses, but he urges parents not to avail themselves of the stringency of its provisions as regards disobedient children."

LEGISLATION (England). "The Public Trustee Act, 1906," by J. Andrew Strahan, *Law Magazine and Review* (V. xxxiii, p. 68). The English Public Trustee Act 1906 which goes into operation January 1, 1908, creates a permanent government department charged with the duty of watching, and, where necessary or convenient, of undertaking the administration, not merely of express trusts, but of the estates of deceased persons. That department is embodied in an official called the public trustee, who is created a corporation sole with perpetual succession and an official seal. The public trustee has conferred on him extensive powers which he can delegate to subordinate officers. He has the duties and liabilities of a private trustee, subject to this limitation, that he is not responsible for any such liability which an ordinary trustee might incur, to which he has not in any way contributed, and which he could not by the exercise of reasonable diligence have averted. The Consolidated Fund is answerable for his liabilities. Several provisions of this act are criticised by Mr. Strahan, one with special severity as giving a most arbitrary and dangerous power to a public official. Where it is proved to the satisfaction of the public trustee that the gross capital value of an estate is less than £1,000, and where it appears to him the persons entitled are persons of small means, he shall (unless he sees good reason to the contrary) take over the administration of such estate on the application to him to do so of any person who, to his opinion, would be entitled to apply to the court for an order for administration. This applies not only to ordinary trust estates, but also to the estates of deceased persons.

"Practically, the section gives the public trustee power to take over (and charge the estate with fees for) the administration of every small estate. It is true that he cannot do so except on the application of a person who, 'in his opinion,' would be entitled to apply for an order of administration. Unless the experience of all chancery lawyers is at fault, he will not have long to wait for such an application. That experience is that, but for the healthy fear that the applicant to the court might find himself saddled with the costs of administration, three out of four small estates would be thrown into chancery. And when any beneficiary was entitled as of course to an order of administration, even that consideration was not sufficient to restrain this practice, and it was found necessary by the rules of the supreme court to give the court a discretion to refuse orders. It may be said that the public trustee has the same discretion, and that under sect. 10 there is an appeal against any decision of his to the court. But it is well to remember three things. In the first place, the public trustee is under a temptation to make his office a success by keeping it full of work. In the second, he has no power to order an applicant to pay the costs of administration where, after he has taken over the administration, he finds there were no sufficient grounds for his doing so. And lastly, the likelihood of an appeal against his decision is small when the gross value of the estate is less than £1,000, and the persons entitled are of small means, and the success of an appeal is improbable when he is entitled to take over the administration where 'he is of opinion' the court would order administration.

"Undoubtedly if the public trustee exercises rigorously his discretion to refuse to interfere in the administration of small estates, the powers here given him will do no harm, and may in many cases prevent the robbery of the poor. If he does not, private disappointment and private malice may lead to the squandering of many small heritages.

"The administration of estates by public officials is in this country always honest, but seldom efficient and never cheap. The history of bankruptcy proceedings is enough to prove that. It is to be hoped that a new era of two-and-sixpence in the pound dividends on legacies is not dawning upon us."

MISTAKE. "Error of Law," by Corry Montague Stadden, *Columbia Law Review* (V. vii, p. 476). This article of forty-three pages is best commented on by giving the note by the author.

"In the discussion of the respective rights of parties to a contract entered into under a mistaken apprehension as to its legal effect, under the English, French and German law. the author has confined himself to 'error of law' rather than to 'error of fact.' His investigations have been directed toward the depth of the subject rather than toward breadth and superficiality. The question of error of law most frequently arises in actions for the recovery of money, though not infrequently for setting aside deeds and wills or determining rights under them. As the subject, considered in the light of the law of England, has been greatly confused and misunderstood because of the various rules of pleading, relief having been given, or asked for in 'assumpsit,' 'money had and received,' and by bill in equity to redeem or refund, no attempt has been made to indicate the proper forum in which to seek a remedy, or form of action that would prove most efficacious in any particular case. Whether a contract is voidable, or void on account of such error in France and Germany is to be determined by the civil code obtaining in each country. In reference to the law of England, where pre-

cedents have such tremendous importance, after an analysis of the cases it is deemed sufficient to point out a rule, broad and equitable, which in the author's humble opinion is supported by a preponderance of authority."

The conclusion that in spite of the confusion that has arisen modern English law does by the great weight of authority, give relief in case of error of law is reached after a most painstaking analysis of the decisions.

MONOPOLY. "The Case of the Monopolies," by Sidney P. Miller, *Michigan Law Review* (V. vi, p. 1). Beginning with the famous *Case of the Monopolics*, reported in xi Coke, p. 85, which denied the power of the English crown to grant monopolies this article, gives a valuable summary of the English and American decision and statutes against monopoly.

"From the foregoing laws, whether in the shape of constitutions or statutes, we may conclude that a wave of popular feeling in this country is rapidly reaching the height which in England in 1602 resulted in the decision of the Case of the Monopolies.

"Taking these statutes and decisions together we may conclude that to-day the American test of the lawfulness or unlawfulness of the combinations of persons or forces (as being of a monopolistic character) is whether or not they tend to control prices. That a concern lowers prices is no defense or shield. . . .

"It is somewhat difficult to reconcile some 'trade-union' decisions with the rule of law governing combinations, but it seems fair to assume that the law will soon be shaped by American intelligence so that it will provide for the proper control of these bodies. Agreements or combinations which undertake the absolute control of the labor market should be as unlawful as any trust or monopolies: agreements which provide for a living wage should be legalized, both for labor and capital. The line of demarcation is hard to find, but we are nearing it with each swing of the pendulum.

To summarize may we not say that some of the results of "The Case of the Monopolies" have been (*a*) the clear establishment of the idea that sole control of a product is against public policy and consequently against fundamental law, — (*b*) the giving a firm base and good outline for our states to start from in their law-making and their courts. One of its suggestions, too, that we need to-day is that the monopolistic idea is against the grain of English thought, and that therefore we should have little real trouble in framing an understanding with all English-speaking lands as to an interchange of corporate restriction.

NATURALIZATION. "A Treatise on the Law of Naturalization of the United States," by Frederick Van Dyne, L.L.M. This work is especially designed to meet the needs of judges and clerks having jurisdiction of naturalization matters, of United States Attorneys and of diplomatic and consular officers. The work treats of the various methods of naturalization, as by formal paper, naturalization of parent, naturalization by marriage, collective naturalization and the related subjects of expatriation, passports, and the attitude of foreign governments towards their citizens naturalized in the United States.

NEGOTIABLE INSTRUMENTS (Duty of Drawee of Check). "Young *v.* Grote," by Thomas Beven in *The Law Quarterly Review* (V. xxiii, p. 390), is a re-examination of that famous case which the author considers to have decided that a customer in drawing checks owes a duty to his banker not to give facilities for fraudulent alteration. The negligence of the customer was the ground of the decision. The recent Privy Council judgment in Colonial Bank of Australasia *v.* Marshall, [1906] A. C. 559, held no duty of care existed and took the case from the jury. Many cases in which the doctrine of Young *v.* Grote has been approved are quoted by Mr. Beven, who considers the later case as contrary to "the mere common sense of the matter," as well as to established law.

PRACTICE (Egypt). "Administration of Justice in Egypt," by H. Goudy, *The Law Quarterly Review* (V. xxiii, p. 409). Account of the highly complicated system of Egyptian courts.

PRACTICE (England). "The Liability of Justices of the Peace," by W. W. Lucas, *Law Magazine and Review* (V. xxxiii, p. 22). The justice of the peace has in Great Britain many and varied duties. This article discusses at

length the rules of their liability for their official acts and the manner of enforcing it.

PRACTICE. "Examination of Witnesses," by Amos C. Miller is the latest contribution to the "Legal Tactics Series," of addresses before the students of the Law School of Northwestern University, *Illinois Law Review* (V. ii, p. 244). It contains exceptionally effective suggestions on a subject much discussed of late. Though most lawyers fully appreciate the principles of good cross-examination, there are few who have the wit to apply them successfully in practice. Repetition of these suggestions is a great help.

PRACTICE. "Organization of a Legal Business," by Reginald V. Harris, *Canadian Law Review* (V. vi, p. 355).

PRACTICE. "Identity of Issues on Appeal from Justice's Courts," by Charles Sumner Lobingier, *Central Law Journal* (V. lxv, p. 369).

PRACTICE. "Preferences," by George I. Woolley, *Bench and Bar* (V. xi, p. 15).

PROPERTY (Covenants running with Land). "Contractual Obligations Attaching to Land," by W. Strachan, *Law Quarterly Review* (V. xxiii, p. 432). A short but illuminating discussion of the principles governing this important branch of real property law.

TRUSTS. "A Trustee's Handbook," by Augustus Peabody Loring, Little, Brown & Co., Boston, 1907, 3rd. ed. Price $1.50 net.

Though intended for the conveniences of trustees, rather than the instruction of lawyers, this manual, by a lawyer of keen business instinct, has proved a most suggestive reference book for practioners upon a subject of increasing importance and complexity in this time of accumulation of wealth. Without attempting exhaustive citation of cases it collects important modern authorities on all points likely to arise in ordinary trusteeships. This new edition has added over three hundred citations. Illuminating discussions of some problems recently conspicuous, such as application of stock dividends and interstate law, have been substituted for former text. The style, as in former editions, is a model of clearness and conciseness.

TRUSTS (See Legislation).

TORTS. The Law of Torts. By Melville Madison Bigelow, Ph.D. Eighth ed. Boston. Little, Brown, and Company, 1907. Buckram.

The task of the reviewer of a new edition of a book so well and favorably known as Bigelow on Torts is ordinarily a simple one, and consists merely in briefly pointing out any general changes in arrangement and method of treatment. This last edition of Dr. Bigelow's book, however, is something more than the ordinary new edition, with cases brought down to date. While substantially all the material used in the seventh edition has been preserved, the arrangement of the book has been materially changed, and very important fundamental propositions clearly expounded. The opening chapter on "Theory and Doctrine of Tort," has been in large part rewritten and has been developed into a carefully reasoned, philosophical exposition of the nature of legal rights and duties, with special reference to changes occurring in the law of torts as evidenced in the decisions dealing with the conflicts between labor and capital. Dr. Bigelow has already given an able and forceful presentation in his "Centralization and the Law," of the idea that law is but the expression of dominant social force, — the resultant of the conflict of social forces in the state, less the conservatism of courts and legislatures. This idea he has embodied in the present edition, making it the occasion for considerable new matter and for a fundamental rearrangement of his entire treatise. Legal right broadly is, he says, what the dominant force in society, deflected more or less by opposition, requires or authorizes. Legal right in general is based upon the idea of freedom to do whatever is reasonable. What is reasonable must in the specific case be answered by the judges. But judges are not permitted to decide arbitrarily. Aside from influences of a personal or sub-legal nature, such as the judge's own views of political economy, politics, ethics, or the pressure of public opinion, the real determining influence in deciding upon legal rights is to be found in particular economic movements of society as they gain ascendancy in the state; in the prevailing social standard or predominating energy of the

time. Legal rights are said to be of two orders: Full legal rights, available ordinarily as a general ground of action or defense, and privileges or merely permissions, usually available only as defenses. Legal rights being thus divided and classified, the author discusses the effect of intent and motive in determining liability where the actor, in the pursuit of a legal right, has, without using any wrongful means, caused another damage, and states that according to the logic of the common law of the nineteenth century and to the weight of authority at present, such conduct does not create any liability, irrespective of whether the motive of the actor be good or bad. While according to the more general ground of the common law, at present, malice or bad motive in the actor will not overturn a full legal right, even though in the pursuit of this right damage be intentionally done, there is reason to believe, in view of recent decisions in the labor disputes, that common and gradual influences are already at work towards the opposite result. Further evidence of the tendency is to be found in the recent cases denying the right of a property owner to use his property in a spirit of spite or malice toward his neighbor. In the field of permissive rights, however, as in the tort of malicious prosecution or slander and libel, malice as an evil motive has even in the present law of torts a proper place and will create liability.

Pursuant to this line of thought, Dr. Bigelow divides his subject into two parts; one in which the liability turns upon a culpable state of mind, and the other in which the state of mind is an irrelevant fact, — liability from an inculpable mind. The first part accordingly includes a discussion of the torts in which fraud, negligence, or malice is an essential ingredient. The second part is concerned with torts involving acts in themselves illegal, such as the absolute torts of assault and battery, false imprisonment, etc., and acts done at peril. In this second part is also included the chapter on " Procuring Refusal to Contract," which has been rewritten. One would expect, according to the author's theory, that this chapter might properly fall in the first part, but as the law stands at present, its treatment in part two is no doubt justified. The discussion in this chapter as well as in Chapter I of the troublesome word " malice " is exceedingly clarifying and helpful.

The present edition preserves the terse and lucid style of its predecessors, and is a further valuable contribution in one of the great fields of law.

TORTS (see **Admiralty**).

WILLS. " Practical Suggestions for Drawing Wills," by John Marshall Gest, *American Law Register* (V. lv, p. 465). Prepared especially for students expecting to practice in Pennsylvania, but justifying the editor's belief " that the legal reader in whatever jurisdiction he may happen to be, will find profit and amusement in the author's treatment of the subject."

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.)

CARRIERS (State Regulation of Rates). U. S. Cir. Ct., D. of Minn. — In an oral decision in the case entitled Perkins *et al v.* Northern Pacific Ry. Company, *et al*, reported in 155 Fed. Rep. 445, Judge Lochren passed on the question of restraining enforcement of certain railroad rate regulations of the state of Minnesota. Three different classes of rates are discussed in the opinion; one fixed by the Railroad and Warehouse Commission known as the "Merchandise Rate"; one fixed by the legislature known as the "Passenger Rate Law" and the other also fixed by the legislature, known as the "Commodity Rate Law." Questions as to the conflict of power between Congress and the states relative to regulations of commerce are passed upon. Reference is also made as to the authority of federal courts to enforce provisions of the United States Constitution but the point principally discussed is as to whether these regulations reduced the compensation of railroads affected to such an extent as to be confiscatory and amount to the deprivation of property without due process of law. Preliminary injunction was refused so far as related to the rate fixed by the Railroad and Warehouse Commission and the 'Passenger Rate," both of which were already in operation, but was granted as against the "Commodity Rate Law" which had not yet gone into effect. Referring to portions of the legislation providing severe penalties for disobedience by railroads and their employes, the court vigorously condemns it; characterizing it as vicious and "almost a disgrace to the civilization of the age and a reproach upon the intelligence and sense of justice of any legislature which could enact provisions of that kind."

CONFLICT OF LAWS (Damages — Mental Suffering). N. C. — Another addition to the case law on the subject of recovery for mental suffering and non-delivery of a telegraph message as dependent on the *lex loci* or *lex fori* is that of Johnson *v.* Western Union Telegraph Co., 57 S. E. Rep. 122. The telegram involved in this case was sent from a point in Virginia to one in North Carolina. It seems that under the laws of the former state, such damages are not ground for recovery though allowed in the latter. The question then to be determined was whether the action was to be governed by the law of the place where the contract was made and the telegram started or that where it was received and the failure to make proper delivery took place. The court gave the matter a somewhat elaborate discussion, referring to a number of text-writers and decisions from several states. It eventually arrived at the conclusion that the law of the place where the contract was made, and in which a part of it was performed, should govern, and denied recovery.

This is an unfortunate decision, opposed to such authority as there is on the question, and to sound principle. The law of the place of contracting should doubtless govern the obligation of the contract; but the obligation to pay damages is not part of the obligation of the contract, but is a new right which arises upon the breach, according to the law of the place of breach, that is, the place of performance. Meyer v. Estes, 164 Mass., 457. So the rate of interest payable by way of damages is determined by the law of the place of payment. Gibbs v. Fremont, 9 Ex., 25; Fanning v. Consequa, 17 Johns. 511. The same principle is applied in causes of action for tort. Louisville, etc. R.R. v. Whitlow (Ky.), 43 S. W. 711; Northern Pac. R.R. v. Babcock, 154 U. S. 100. The North Carolina and Texas cases which are followed in the principal case appear to proceed upon a confusion between the obligation of a contract and a right of action for its breach. J. H. B.

CONSTITUTIONAL LAW (Carriers — Discrimination). Ky. Ct. of App. — In Chiles *v.* Chesapeake & O. Ry. Co., 101 S. W. Rep. 386, 30 Ky. Law Rep. 1332. The point in issue as stated by the court being as follows: —

"Has a railroad company within this state, independent of any statute, the right to adopt an enforce rules and regulations requiring colored passengers, although they may be interstate, and because of their color and race, to occupy coaches or compartments in coaches separate and distinct from those occupied by white persons?" The court discusses at considerable length the existing

racial distinctions and antipathies and the rights of carriers as affected thereby. West Chester & Philadelphia Ry. Co. *v.* Miles, 55 Pa. 209, 93 Am. Dec. 744, is referred to as a leading case. Chicago & Northwestern Ry. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641; Hall *v.* De Cuir, 95 U. S. 505, 24 L. Ed. 547; Plessy *v.* Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, and other cases are also cited. The court came to the conclusion that where substantially equal accommodations for both races are furnished, that the colored person has no ground of complaint by reason of not being allowed to ride with white persons.

CORPORATIONS (Foreign Jurisdiction). U. S. Sup. Ct. — The question of what constitutes doing business by a foreign corporation so as to subject itself to service of process recently came up again in the Supreme Court in Green *v.* Chicago, Burlington, and Quincy Railway Company, 27 Sup. Ct. Rep. 595, 205 U. S. 530, 51 L. Ed. 916. The action was originally brought in the Circuit Court for the Eastern District of Pennsylvania. It was shown that defendant was a railroad company, the Eastern terminus of whose road was at Chicago, but that it maintained an office in Philadelphia for the purpose of soliciting freight and passenger traffic. The court declined to formulate any general rule as to what constitutes "doing business" within the law regulating service of process but held the facts here shown to be insufficient: citing Maxwell *v.* Atchison, T. & S. F. R. Co., (C. C.) 34 Fed. 286; N. K. Fairbank & Co. *v.* Cincinnati, N. O. & T. P. R. Co., 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420, 38 L. R. A. 271; Union Associated Press *v.* Times-Star Co., (C. C.) 84 Fed. 419; Earle *v.* Chesapeake & O. Ry. Co., (C. C.) 127 Fed. 235.

CORPORATIONS (Liability of Directors for Wrongful Payment of Dividends). N. J. Err. & App. — In Siegman *v.* Electric Vehicle Company, 65 Atl. Rep. 910, the bill was filed by plaintiff against the defendant company and one Kissel, who had formerly been one of the corporation's directors at a time when certain dividends were declared and paid out of the capital of the company. It was alleged that Kissel had voted for the declaration of these illegal dividends and it was here sought to recover them for the benefit of the corporation and stockholders. The plea of defendant did not deny these allegations but alleged that plaintiff had heretofore tried to persuade the company and its directors to institute similar proceedings; that a committee had been appointed to investigate the matter and had reported advising against action on the ground that it would be unfair and detrimental to the best interest of the company; that plaintiff's demand for the institution of suit had thereupon been denied unless it should be ordered by a majority in interest of the stockholders other than the former directors. There were further allegations that a stockholders' meeting had been called on request of complainant; that by a large majority it was voted to not institute the proceedings. The court held the plea insufficient as stating no defense. It quoted the New Jersey statute governing declaration of dividends and liability of corporate officers and said that the violation of these laws affected not only the rights of stockholders but those of creditors also; that it reduced the actual corporate assets while apparently indicating an actual increase; that, so far as the rights of the stockholders were concerned, it could be sanctioned only by unanimous vote and that even this could not take away the right of the public to be not misled as to the actual corporate assets.

CRIMINAL LAW (Jurisdiction). Ga. — The Georgia Supreme Court has decided that there is one class of criminals immune from prosecution under the existing laws of that state. Certain persons were accused of the offense of receiving stolen goods. It appeared that they were the fruits of a burglary committed in the state of South Carolina and subsequently brought into Georgia and there purchased by defendants. The law of Georgia provides no punishment for bringing stolen goods into the state, and the statute relating to receiving stolen goods makes the recipient an accomplice to the larceny and subject to the same punishment as the thief. The court said that they had no authority to punish for a theft committed in a foreign state and as the punishment of the recipient of the goods was prescribed as being the same as that of the thief, they could not punish him either. Golden *v.* State, 58 S. E. Rep. 557.

CRIMINAL LAW (Military Law). U. S. D. C., So. Dist., Fla. — To Judge Locke of the United States District Court has been submitted the perplexing question of the right of a municipality to punish an enlisted soldier for violation of an ordinance. The case came up in the form of *habeas corpus* proceedings and is reported under the title: *Ex parte* Schlaffer, 154 Fed. Rep. 921. Schlaffer, a United States soldier, was convicted of violation of a municipal ordinance, fined the sum of $25, and, upon default in the payment, sentenced to imprisonment for 60 days. His commanding officer instituted *habeas corpus* proceedings to secure his release. The 59th Article of War provides that soldiers shall be delivered up to civil authorities only when their acts have resulted in injury to person or property. There was no contention in this case that there had been any such injury. Judge Locke comments on the deplorable

consequences resulting from overzealousness of both the civil and military authorities in striving to uphold their respective rights and counsels moderation on the part of both. The decision in the case at bar was that the writ should issue and that Schlaffer should be turned over to his commanding officer.

EVIDENCE (Criminal Law). Tex. Cr. App. — In Weatherford *v.* State, 103 S. W. Rep. 632, defendant was a doctor, prosecuted for giving illegal prescriptions for liquor in local option territory. Evidence was admitted showing that he had a license to practice medicine but that the only prescriptions he ever issued were those for liquor to be filled at a certain bar. Different persons applied for prescriptions for different ailments; some for fever and some for chills; but the prescription in each case was the same. The state was allowed to show a number of these prescriptions other than that on which the information was based on the theory that it showed system or intent.

FEDERAL COURTS (Jurisdiction). U. S. Cir. Ct. W. D. of N. C. — The decision of Judge Pritchard in the North Carolina passenger rate case is reported under the title *Ex parte* Wood, in 155 Fed. Rep. 190. This was a *habeas corpus* proceeding, in which petitioner sought release from imprisonment by state authorities of North Carolina for violation of the maximum passenger rate law of that commonwealth. Some time prior thereto, suit had been instituted in the Federal Court by several railroad companies to restrain certain of the state officers from putting the law in operation, on the ground that it was in conflict with the Constitution of the United States. Preliminary injunctions were issued pending inquiry as to the constitutionality of the statute. In order to preserve the rights of the traveling public, the court ordered that during the continuance of the injunctions, railroads should issue to purchasers of tickets, coupons showing the amount to which they should be entitled as a refund in case the rate law should be held valid, and directed that ample bond should be given by the railroad companies as security. Notwithstanding these proceedings, the governor of the state issued directions to state officers to proceed with the prosecution of persons violating the law in controversy, and in accordance therewith the petitioner was arrested, convicted, and sentenced to a term of imprisonment. He then sought release by *habeas corpus*. The judge refers to the dangers involved in controversies between state and federal authorities and disavows the imputation of any improper motives to the state officials, but at the same time holds that the proceedings taken were within the jurisdiction of the court, and that a proper respect for its mandates requires that they should be enforced. It is held, also, that the section of the statute relating to penalties, if enforced, would make it utterly impossible for the company to carry on business while contesting the validity of the rate fixed, and is therefore void. The order of the court directed that petitioner be discharged.

FIRE INSURANCE. (Notice-Premium). Eng. Equitable Fire, etc., Office *v.* The Ching Wo Hong. English Privy Council, 1907, Appeal Cases 96. In this appeal from the English Supreme Court of China, action was brought upon policies of insurance, issued by the defendant company, which denied liability on the ground that the policies had become null and void because the plaintiff had omitted to give the company notice of an additional insurance effected by him in the Western Assurance Company, without the consent of the defendant company, on the same goods. The plaintiff denied that there was, at the date of the fire, or ever had been, any effective insurance with the Western Assurance Company. The policies sued on contained a clause: "No additional insurance on the property hereby covered is allowed except by the consent of this company endorsed hereon. Breach of this condition will render this policy null and void." A further condition endorsed on the policies provided that the insured must at the time of effecting the insurance, give notice of any insurance on the property made elsewhere, and on effecting any insurance during the currency of the policy elsewhere the insured must give notice thereof to the company, and unless such notice be given, the insured will not be entitled to any benefit under the policies. Before the fire, which was the subject of the claim on the policies, occurred, the plaintiff took out a policy on the same property in the Western Assurance Company. This latter policy was found in the plaintiff's safe after the fire. By this policy it was witnessed that the insured had paid the premium required, and that if the property described therein should be destroyed or damaged by fire the company would pay the sum agreed as insurance. But a further clause recited that the insurance would not be in force until the premium had been actually paid. The premium was not in fact paid, and the question was whether the policy executed by the Western Company ever became effective. The defendant company relying upon Roberts *v.* Security Company (1897 1 Q.B. 111), claimed that the Western Company were liable upon the policy, as they had delivered the policy and given credit for the premium, and therefore, an insurance having been effected, of which no notice had been given, the plaintiffs

could not recover on the policies sued on. The Supreme Court of China found that "no premium was paid on the Western Company policy, the plaintiff and the Western Company have treated it as non-existing and no claim had been made under it," and gave judgment for the plaintiff. The defendant company appealed to the Privy Council, where the judgment of the court below is now affirmed, the Privy Council holding that the words in the Western Company policy as to the insured "having paid" the premium, are common form words or words of style for expressing the consideration for the company's engagement to insure, but that the premium not having in fact been paid, the company would not be estopped by their recital to the contrary if they were sued upon the policy in case of loss. The fact of the executed policy having been handed to the plaintiff cannot be treated as a waiver of the condition requiring payment of the premium. What was handed to the plaintiff was the instrument with this clause in it, and that was notice to him, and made it part of the contract, that there would be no liability until the premium was paid. It is not a question of conditional execution, but of the construction of what was executed.

INSURANCE (Conditions). Mass. — The rights and duties of the mortgages of insured property as to conditions of the policy relative to proofs of loss and request for arbitration were considered in Union Institution for Savings *v.* Phoenix Insurance Company, 81 N. E. Rep. 994. The policy was issued to the mortgagor and contained a clause for payment of loss to the mortgagee as its interest might appear. There were also provisions requiring notice of loss forthwith and providing for arbitration. The court held that the primary duty under these stipulations rested upon the mortgagor but that on his failure to take action the mortgagee might proceed to do so; that no recovery could be had until compliance with these conditions by one or the other of the parties in interest, except that the clause providing for action "forthwith" did not apply to the mortgagee.

INSURANCE (Criminal Law). Ga. — A new and novel question in the law of insurance is considered in Supreme Lodge Knights of Pythias *v.* Crenshaw, 58 S. E. Rep. 628. Insured was alleged to have been shot and killed by the husband of his paramour while engaged in an attempt at adultery, or just after the commission of the offense. The policy provided that if death was "caused or superinduced at the hands of justice" the full amount of the policy could not be recovered. The Georgia Code provides that "death by suicide or by the hands of justice, either punitive or preventive, releases the insurer."

It was claimed that the law justifies the act of the husband in killing his wife's paramour under the circumstances here alleged, and that such a killing is in the administration of preventive justice. The court, however, declined to take that view of the matter, and said that the words "preventive justice" as used in the Code should be considered to cover only the taking of human life by an officer or some one having the rights of an officer.

LOTTERIES (Guessing Contest). U. S. C. C. A., 6th Cir. — Whether a guessing contest as to the number of votes to be cast at a presidential election is a lottery was passed upon by in Waite *v.* Press Pub. Ass'n, 155 Fed. Rep. 58. The court comments on the decision of the United States Supreme Court in Clearing House *v.* Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, and several decisions of the state and federal courts, together with the rulings of three attorney-generals of the United States, and comes to the conclusion that the scheme involves such an element of chance as to be properly classed as a lottery. It says that "in so great a vote the necessary margin of chance would be so large that no element of skill or experience could operate to predict the result. While one skilled in national politics and conversant with existing conditions might make a closer estimate than one wholly ignorant, yet, after all, the successful persons in such a contest would be but makers of lucky guesses in which skill and judgment could play no effective part."

RECEIVERS. Pa. — The question of the liabilities of bank officers assigning notes to the bank in lieu of bad debts, under an agreement for payment out of the profits of the business, was considered in State Bank of Pittsburg *v.* Kirk, 65 Atl. Rep. 932. Instead of profits being realized sufficient for payment of the obligations, the bank went into the hands of a receiver, who brought action thereon. Defendants set up want of consideration as between themselves and the bank, and that the receiver had only the same right to maintain action as the bank had. The court said it was the first time the question had come up in that state, but that similar cases had arisen in New York, citing Hurd *v.* Kelly, 78 N. Y. 588, 34 Am. Rep. 567; Best *v.* Thiel, 79 N. Y. 15; Hun *v.* Salter, 92 N. Y. 651; Rector, etc., *v.* Teed, 120 N. Y. 583, 24 N. E. 1014; Sickles *v.* Herold, 149 N. Y. 332, 43 N. E. 852; that in Pennsylvania a receiver represented not only the insolvent corporation, but also the creditors, and that defendants could not now escape liability on the ground that there

was no consideration for the notes at their inception.

SALES (Implied Warranty on Sale of Food). N. J. Sup. Ct. — The much discussed question of the liability of the manufacturer of food products for injuries to a remote vendee, was again considered in Tomlinson *v.* Armour & Co., 65 Atl. Rep. 883. The action was brought for injuries from ptomaine poisoning, caused by eating ham put up by defendant, who sold it to a retail dealer, from whom it was purchased by plaintiff. The court referred to some of the seeming discrepancies in statements of legal writers as to the early English law on the subject, and came to the conclusion that plaintiff could have no greater rights than had the dealer of whom the purchase was made, and that as there was no implied warranty in sales to dealers, no recovery could be had.

TRADE-NAMES (Illegal use of One's Own Name). N. J. Ct. Err. & App. — In International Silver Co. *v.* Rogers, 67 Atl. Rep. 105, the New Jersey Court of Errors and Appeals is asked to determine the right to the use of the name " W. H. Rogers," on silver plated ware. Complainants were the successors in interest of several companies that had been engaged in the manufacture of ware of this description, all deriving their title from three brothers of the name of Rogers. Defendant, whose name was William H. Rogers, had been the president of a corporation bearing his name. Complainants had, in a prior suit, obtained an injunction against the carrying on of the business as done by that corporation. Defendant subsequently bought up all outstanding stock and began to manufacture in his own name, placing upon his wares the name " W. H. Rogers, of Plainfield, N. J." The court held this did not sufficiently distinguish them from those manufactured by complainants, and notwithstanding he was using his own name, awarded an injunction, unless the defendant should hereafter stamp on his goods, " not the original Rogers," or " not connected with the original Rogers."

TRUSTS (Capital and Income — Stock Dividend). Conn. — An interesting question as to what constitutes a cash or stock dividend came up in Green *v.* Bissell, 65 Atl. Rep. 1056, 8 L. R. A. (N. S.) 1011. Green was trustee under the will of Samuel Bissell, who had left an estate consisting partly of certain shares in a joint stock corporation. Some time during the trusteeship, the corporation having in its treasury certain shares of its own stock, received in payment of a debt, divided them pro rata among the stockholders. The Bissell estate received its proportionate number and the question then arose as to whether the stock so received should be considered as a part of the *corpus* of the estate or as a portion of the income. The court stated the general rule to be that cash dividends should go to the life tenant and stock dividends to the remainderman; that the declaration of a stock dividend involves the creation and issue of new shares of stock. The basis of the issue, in so far as payment into the corporation is not required of the recipient, is surplus assets which thus become converted into strict capital with all which that implies. From the process there results an increase of both the number of outstanding shares and the amount of the corporate assets which have had that peculiar dedication to the corporate uses which, as explained in Smith *v.* Dana, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51, entitle them to the name of capital, strictly speaking. It held that in the case at Bar, there being no new issue increasing the number of outstanding shares or the amount of the corporate capital, the distribution should be considered as a cash dividend to be considered as income, notwithstanding that in the votes of the stockholders the distribution was designated as one " by way of a stock dividend."

TRUSTS (Religious Societies). Ga. — Religious organizations throughout the country, will be especially interested in the decision of the Supreme Court of Georgia in Mack *v.* Kime, reported in 58 S. E. Rep. 184. The case involves a history of the union of the Cumberland Presbyterian Church and the Northern Presbyterian Church. Injunctive relief was sought against transfer of the property belonging to one of the churches in Atlanta and interference with its use by defendants; plaintiffs claiming to be loyal members of the Cumberland Presbyterian Church. The trial judge granted the relief prayed and said that " the action of one of the General Assembly of the Cumberland Presbyterian Church seeking to effect such union, was without constitutional authority and in conflict with the express provisions of their constitution." The Supreme Court, however, arrived at a different conclusion and held that notwithstanding property rights were involved, they where dependent, upon questions of faith and religious tenets, a decision of which by the highest tribunal of the ecclesiastical body, would be held conclusive; that where property acquired by a religious organization is devoted by express terms to the support of specific religious doctrines, a court will inquire in a particular case, as to whether there is an entire diversion from the purpose intended but that when property has been acquired in ordinary means by a gift or sale, no inquiry will be made as to the specific religious beliefs of those holding it in legitimate order of succcssion.

THE LIGHTER SIDE

The Centenary of an Opinion. — The following interesting example of an old time legal opinion, the original of which is in the possession of Lee M. Friedman, Esq., of Boston, is of particular interest since it is this year one hundred years old. It is an interesting commentary on the contrast between modern practice and that in the time of Judge Story, for while the letter is dated September 7th the postmark shows that it was mailed from Salem on September 12th.

"*Salem, Sept.* 7, 1807.

Sirs: I have submitted to my clients Messrs. Ropes & Morgan your last under the date of 11th ult. I now in their behalf would communicate their determination — Had Mr. Jacob Bliss agreed originally to the proposition by him last made, I presume, that it might have been acceded to; but many circumstances and particularly the delay and the probability of some future difficulty as it respects the finishing of the work, would contrary to the interest of all parties make it ineligible at the present moment. The expense also of transportation of the arms would not be inconsiderable and certainly ought not to be borne by Messrs. Ropes & Morgan.

On the whole therefore their determination is now to accede to the last proposal; but to adhere to that of arbitration. They are willing to submit the whole controversy to referees who are impartial and they wish only for such a decision as the facts and justice of the case shall warrant in the opinion of men beyond all suspicion of prejudice or attachment. Whoever the referees may be, it will be necessary for them to sit in Salem in order to inspect the arms, etc., and if your client thinks proper to join in a reference, it is our desire to that it may be done as soon as possible.

I understand this to be the ultimatum of my clients, and that however unpleasant, a refusal will be succeeded by legal process.

You will do me the justice to believe that I wish for an amicable adjustment and that I am

Very respectfully
Your very obed. serv.
JOSEPH STORY."

HON. GEORGE BLISS.

Poetic Justice. — The following decision (Georgia Appeals Report, V. i, p. 656), and the argument of Mr. Stevens deserves immortality.

Logan Versus Irvin.

This case is controlled by an issue of fact, as to which the defendant in error has in his favor the finding of the jury and the approval of the trial court.

Trover, from city court of Washington — Judge Hardeman, Feb. 2, 1907. Argued March 28th, Decided April 25th, 1907. William Wynne, *Alexander W. Stephens*, for plaintiff in error. I. T. Irvin, Jr., F. H. Colley, W. D. Thomson, contra Powell, J. Although there have been argued to us in this case many questions of law, and the briefs are full of both rhyme and reason, yet, after a careful study of the record, we find nothing but a bare issue of fact, already decided adversely to the plaintiff in error by the trial court and jury. The argument of the plaintiff in error is unique, being presented in verse. However, when we compare the poetic argument with the record, we find that Shakespeare was correct in saying: "The poet's eye, in a fine frenzy rolling, doth glance from heaven to earth, from earth to heaven, and, as imagination bodies forth the forms of things unknown, the poet's pen turns them to shapes, and gives to airy nothing a local habitation and a name," and that Pope is not to be trusted in saying that "Truth shines the brighter clad in verse." The "thoughts that breathe and words that burn" must not be allowed to override the merciless logic of the law, which dictates that appellate courts must not disturb a verdict supported by the evidences and approved by the trial judge.

Judgment affirmed.

American Dementia in 1611. — The following quotation, discovered by Henry G. Robertson, of Franklin, N. C., ought to have been in Delmas' argument.

"The Maid's Tragedy" was written by Beaumont and Fletcher at some date prior to 1611, and in Scene 1, Act. III, Amintor is made to to say "Yet, should I murder you, I might

before the World take the excuse of madness; for compare my injuries and they will appear too sad a weight for reason to endure."

An Oath's Value. — Clarence S. Darrow, the well-known lawyer and essayist, discussing the Haywood trial, in which he played so prominent a part, said the other day:

"Some of the evidence in that trial was so transparently false that it reminds me of a case that came off in Alabama a few years back.

"One of the witnesses in this case was an extremely ignorant man. As his testimony progressed his ignorance became so shockingly evident that the judge looking sternly down at him, said:

"'Look here, sir, are you acquainted with the value of an oath?'

"The witness answered anxiously:

"'Jedge, I hope I am. That thar lawyer on yer left hand gimme six dollars to sw'ar agin the other side. That's the correck value of an oath, ain't it, jedge?'"

Rhapsody of a Young Lawyer. — Here at my roll-top desk I sit and bend me o'er a legal tome and have a pleasant sense, to wit, that I am really quite at home. The peace we cannot understand has claimed my spirit more and more: I yield at last to its demand — I like the interesting law. The steady drone of city streets floats gently through my window-pane: if I look out, my vision meets the sunshine and blue sky again. I much prefer these heavy books. Hark, — some one enters at my door, — a lovely lady, by her looks, — I like the pretty, fluffy law.

"Ah, pardon me," the lady says. "A legal question bothers me." But all this time she does not raise her heavy veil the least degree. Imagination takes me fast through fame, romance, and fees galore — ambition realized at last! ! ! I like the fragrant, juicy law.

She adds, "I've just got my divorce from Bill and now I want to know when can I marry Jack? Of course you understand how these things go."

"To-day," sigh I.

Says she, "Your fee?"

"One dollar."

"Here, — I'm glad I saw your sign. Good-day."

Thus exit She

I like the dreary, heavy law.

JIM FIELD.

Frost-bitten. — The sailing of Sir Frederick Pollock, Bart., Thursday from New York to Liverpool on the White Star steamer Cymric, after a short visit to this country, during which he attended the meetings in Portland of the International Bar Association, held a week or two ago, has brought to light the interesting story of the adventures of two of the younger members of the Penobscot Bar, who attended the meetings of the association, says the *Bangor Commercial*.

Sir Frederick, who is one of the most distinguished jurists of his time and the author of a famous work on Torts, which is to be found in every well ordered library, came to the United States solely to attend the meetings in Portland, and sailed for home at this early date, the purpose of his trip being accomplished.

The two young members of the legal fraternity in Penobscot County, wishing to avail themselves of the extraordinary opportunity offered by the meetings of the association to come in contact with the most famous men of the profession, sought introductions, whenever possible, to the distinguished personages present and made themselves as agreeable as might be.

It was on an excursion down Casco Bay in a steamer, so the story goes, that one of the pair of lion hunters compassed an introduction to James Bryce, the British ambassador to the United States and author of the "American Commonwealth." The young barrister with natural tact made himself useful, pointing out the places of interest along the steamer's course, and enthusing over the beauties of the bay and the White Mountains, where the venerable diplomat was spending the summer.

The second embryo chief justice viewed with envy his companion's success and the apparent ease with which he made the ambassador's acquaintance. He decided that it was time for him, too, to possess as friend and companion a distinguished personage, to whom he might be polite and exploit the scenery.

In the midst of these thoughts who should heave in view but Sir Frederick Pollock, known by sight to the legal luminary of the Penobscot. Sir Frederick is a small, sharp-featured, elderly man, who wears thick, near-sighted glasses and a rather dyspeptic and querulous expression.

Great men, however, are apt to have distinctive personalities, so Sir Frederick's in nowise discouraged the eager hunter of big game.

Feeling in his pocket, to make sure that he had an extra cigar to offer when the time came, the legal light pulled down his cuffs, settled his tie and with his most genial and winning smile, stepped forward. Sir Frederick had been pacing gloomily up and down the deck, squinting over the steamer's side, with no apparent interest in his fellows or in the passing view.

With a polite bow the Maine attorney stopped the eminent Englishman and pointing to the insignia of the association in his buttonhole, that the great lawyer might be sure there was no bunco game afoot, addressed him.

" Sir Frederick," he said, " my name is — Blank — of the Penobscot Bar. I do not suppose you are familiar with the many points of interest we are passing and, if I may take the liberty, I should be happy to point out and explain to you the various features of the scenery."

Nearly winded, the Penobscot legal light stopped for breath. There was an appreciable pause, during which Sir Frederick squinted hard through his thick glasses at the figure before him. After he had taken in all the points of the waiting applicant for the position of friend, philosopher and guide, he spoke.

" Er — aw — really?" he said, and at once resumed his discontented walk, peering glumly over the side. — *Portland Press.*

An Asinine Argument. — Argument of Alex. W. Stephens, Counsel for plaintiff in error — March 28, 1907. Filed by request of the court.

The argument which I shall here present
I have reduced to rhyme;
And, being about a Georgia mule,
'Tis decidedly *asinine.*

'Twas about a mule the parties fought —
An animal quite contrary —
Which, 'though a seeming paradox,
Bore the gentle name of Mary.

Irvin obtained a money-verdict,
Suing for this mule in trover;
Logan, the defendant, lost and
Wants the case tried over.

The judge below — he " took the studs "
When he passed upon our motion;
We ask this Court to turn him 'round,
And start him in the right direction.

Plaintiff claimed that the mule was his —
That 'twas bought with plaintiff's money —
That he endorsed a note for one Peter Ware —
As shown by the testimony;

And with the money thus obtained
Ware went to a man named Turner,
Paid him part cash and gave his note,
And bought the old " hay-burner."

The note Ware gave was not endorsed
By plaintiff as security —
And was promptly paid when it fell due
And settled at maturity.

Ware took the mule which he had bought,
Obtaining *full possession;*
And when defendant came along
Sold *him* the mule in question.

Upon no kind of title can the
Plaintiff here prevail,
For he never had *possession* nor
Showed a bill of sale.

He cannot claim a title through
Ware as his trustee,
For defendant had no notice
Of a secret equity; —

And this rule is universal — it
Is followed everywhere —
See our briefs submitted and
Authorities cited there.

Nor was this *borrowed*-money to be
Held by Ware in trust,
For he was plaintiff's debtor; and
It's not considered just

To make him doubly liable where
The obligation's one,
And make a *debtor* liable as
A trustee for a fund.

And in a court of law the
Plaintiff isn't able
To recover on a title that is
Purely equitable;

So, in a City Court, to recover
There, he must
Proceed upon the theory of
An executed trust;

And never in the plaintiff could
The legal title vest,
Merging with the interest he
Claimed to have possessed,

Which was title to secure the
Indebtedness from Ware,
With no equitable interest in
The plaintiff anywhere.

Nor was Ware the plaintiff's agent when
He carried through the trade;
Ware didn't act for plaintiff when
The Turner deal was made,

For he took the money borrowed, which
Was in truth *his own*,
And bought the mule he wanted, as
We think was clearly shown.

From an inspection of the record it
Can readily be seen
That, if plaintiff had any title, 'twas a
Purchase-money lien;

And, in order to avail him, from
Whatever source it came,
Should be written and *recorded* to be
Notice of his claim;

And defendant is protected in the
Title he has here,
Because he had *no notice* when he
Bought the mule from Ware;

And when defendant spent his money in
The purchase of his mule,
He acquired *perfect title* by
This well accepted rule

Which was made for the protection of
Those in defendant's fix —
See Code — two-double-seven-seven and
Two double-seven-six.

This point is of importance, and
Let me here repeat —
Defendant had *no notice* when
He bought the mule from Pete;

And there is a clear presumption that
This defendant made
A bona fide purchase when
He carried through the trade;

And on our briefs submitted
Authorities are cited
Showing how in our favor this
Point has been decided.

If the plaintiff claimed a title as
Coming out of Ware
There is no notice shown to
Defendant anywhere.

Plaintiff never had possession — nor
Showed a bill of sale;
He therefore proved no title, and
Defendant *must* prevail.

No possession in *defendant* was
Ever shown at all;
Though plaintiff *had a title* the
Case he brought must fall.

Some evidence was admitted which
We think was immaterial;
And on that ground alone we
Should have another trial.

A verdict for defendant we
Think the proof demanded;
And therefore think in justice it's
A case to be remanded.

March 30th, 1907.