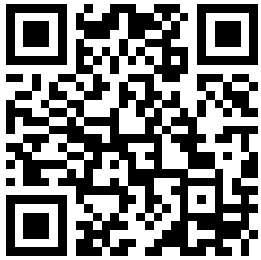

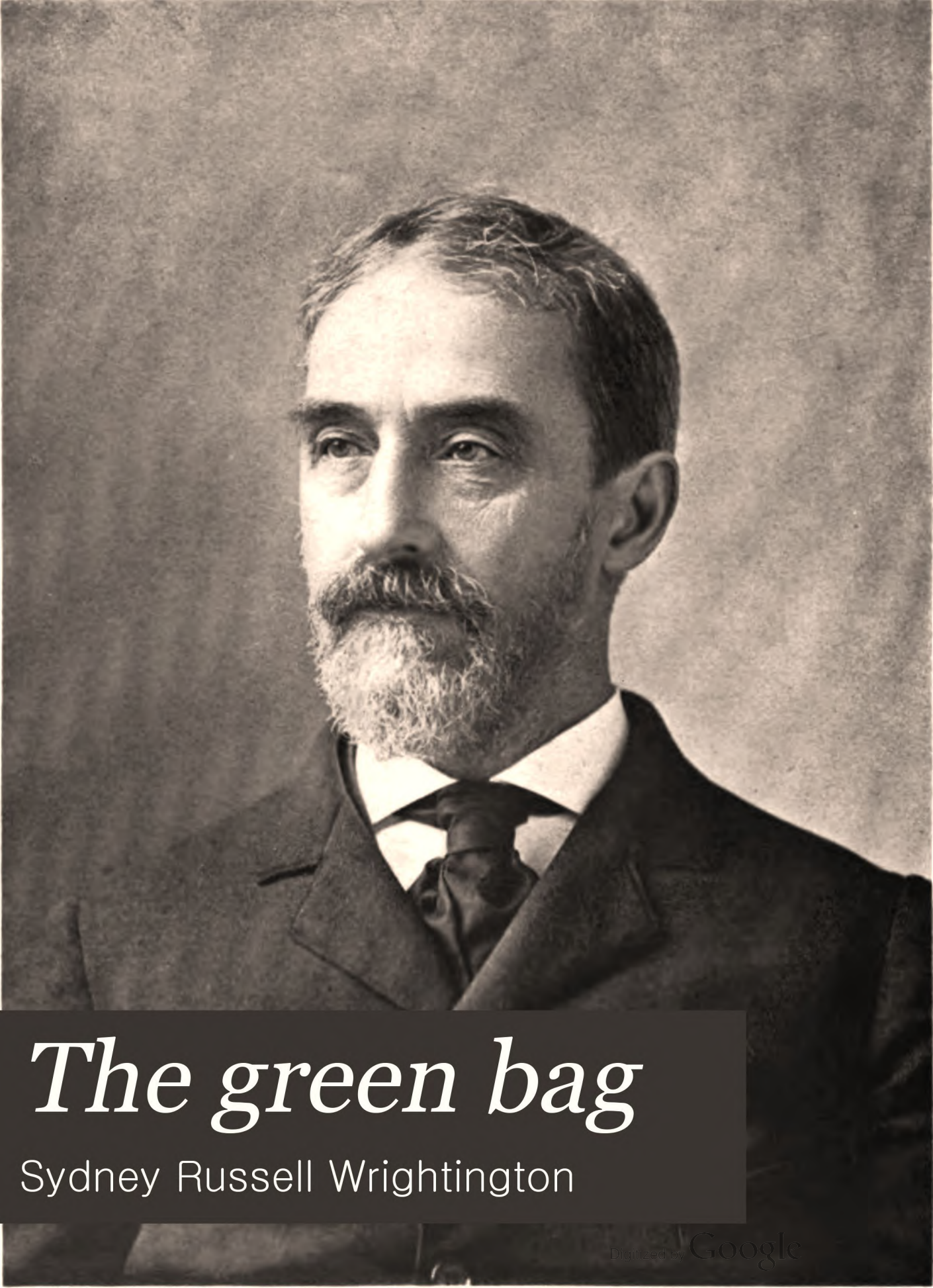

The green bag

Sydney Russell Wrightington

Vol. XX, No. 1 JANUARY, 1908

THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

S. R. WRIGHTINGTON: Editor
WALTER F. WYMAN: Manager

CONTENTS

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THE GREEN BAG

A Monthly Illustrated Magazine
Covering the Higher and
the Lighter Literature
of the Law

SYDNEY R. WRIGHTINGTON - Editor
WALTER F. WYMAN - Manager

Volume XX

Covering the year

1908

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INDEX VOL. XX GREEN BAG

LIST OF PORTRAITS

LIST OF ILLUSTRATIONS

AUTHORS' INDEX

SUBJECT DIGEST

References in Bold-face are to Leading Articles; in Plain Type to Current Legal Articles; and in Italics to Notes of Recent Cases.

References in Bold-face are to Leading Articles; in Plain Type to Current Legal Articles; and in Italics to Notes of Recent Cases.

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The publishers congratulate themselves upon being able to retain the services of the present editor. The present policy will continue, and the present departments retained. The publishers are well satisfied with the conduct of these features. The magazine is now international in its character, but we hope to make it even more so by securing contributions to its columns from able writers in Australia, South Africa and other English speaking countries, on subjects of common interest to the legal profession.

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The purpose of this department is twofold.

First: — To boom this magazine.

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Second: — To get into closer touch with the present customers of The Boston Book Company, and to make new customers.

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It will be our aim to make these pages readable and interesting, but our object is to have you send us your dollars, though we bind ourselves to return value received.

We will in this department advise you from time to time of the publication of the new books we are interested in, our own publications or importations. From time to time we purchase large libraries outright, and on such occasions can offer decided bargains. We have correspondents in every English speaking country, who from time to time are able to send us consignments of rare and choice books. We are regular attendants at the large book auctions held throughout the United States and Canada, and usually are large buyers thereat. Whenever we have stock of this kind we will publish lists, with prices that we trust will prove attractive.

We will also give from time to time, bibliographical notes, that we believe will prove interesting, and, whenever we can do so, news of the profession and the trades, that could not well be published in the body of the magazine.

Look at this department **every mouth, read** the **advertisements** connected with it, and **send** us your **orders.**

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If you wish to secure copies of the first impression, it will be necessary to get your order in promptly as the advance sale has been far in excess of our expectations.

Our Contributors.

RUSSELL W. TAFT, the son of former Chief Justice Taft of Vermont, who has prepared our sketch of Judge Tyler for this issue, is in practice in Burlington, Vermont. He has for some time been one of our regular contributors.

T. DABNEY MARSHALL is a graduate of the University of Mississippi in practice in Vicksburg. He has been a member of the Mississippi legislature and was a member of the Code and Judiciary Committees which largely established the Mississippi annotated code of 1892. He has had editorial experience, and has published a number of short stories and some verses, and has contributed to other legal periodicals.

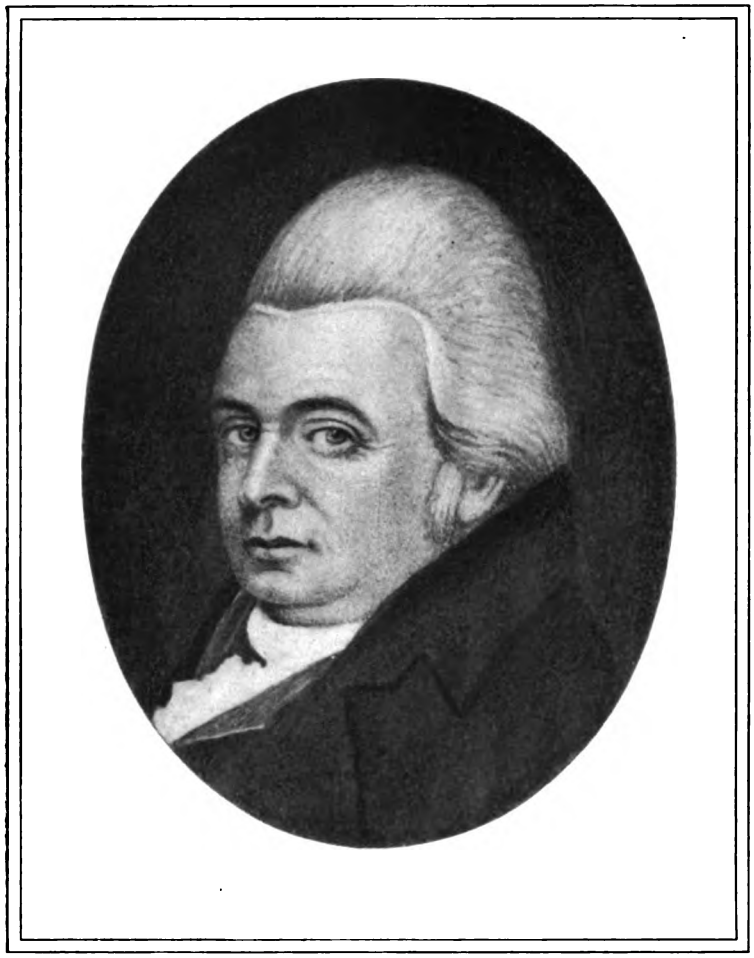
ALBION W. TOURGEE was born at Williamsfield, Ohio, in 1838. He entered Rochester University but left to enlist with the first call for troops. He received several severe wounds during the course of the war from the effects of which he never entirely recovered. He studied law in the office of Judge Sherman at Ashtabula, Ohio, and at the close of the war practiced in Guilford County, North Carolina, where he was elected a judge of the Superior Court. He was a member of the constitutional convention under the reconstruction acts. After retiring from the bench he built up a profitable practice, but the success of his novels led him to remove to New York and devote himself to literary pursuits. He was appointed United States Consul at Bordeaux, France, and died there in 1905 from the effects of the wounds from which he had suffered forty-four years. The manuscript which we publish in this number was found among his papers after his death and was revised for publication by his wife.

ERNEST BRUNCKEN is chief of the sociological department of the State Library of California at Sacramento. He has previously been a contributor to our magazine.

We present in this number the third of JUDGE BLOUNT'S series of articles on the Philippines. This one is in a more serious vein than its predecessors, but we trust it will be no less interesting.

W. F. DODD has for three years been connected with the law division of the Library of Congress. He is a student of political science and public law, and has devoted some attention to legal history.

ROBERT C. SMITH, K. C., of the firm of Smith, Markey and Skinner, is one of the leading advocates of Canada, whose practice is largely before the Privy Council in London. He is a famous wit and story teller and a favorite at the banquets of our Bar associations. For the material for the article in this number he is indebted to Hon. Elbert Clements Killam, chairman of the commission. Mr. Killam, before occupying his present position, was a judge of the Supreme Court of Canada and is regarded as one of the best jurists Canada has produced.



Royall Tyler

The Green Bag

Vol. XX. No. 1 BOSTON January, 1908

ROYALL TYLER

By Russell W. Taft

LATE in the year 1790 Royall Tyler, the subject of this sketch, removed from Boston to Guilford, the next to the easterly of the southernmost tier of towns in Vermont, and bounded on the south by Massachusetts. Vermont was then, and had been for some twelve years prior thereto, operating as a strictly "non-union" commonwealth; she was not admitted to the Union until 1791. The subject of our sketch was christened William Clarke Tyler, but, at the request of his mother, he had his name changed, by act of the General Court of Massachusetts, to Royall, the name borne by his father, then deceased. The latter was a man of some importance in Colonial times; he was a graduate of Harvard, held many positions of responsibility and trust, and was a member of the King's Council from 1765 until his death in 1771. Royall, his second son, was born near the site of Faneuil Hall market, in Boston, on July 18, 1757. He entered Harvard at the age of fourteen, graduating as valedictorian in 1776, and at the same time Yale College paid him the unusual compliment of conferring upon him a like degree *in honorarium*. Among his classmates were Christopher Gore, Governor and United States senator from Massachusetts, and Chief Justices Sewall and Thacher. He at once began the study of the law with Francis Dana of Cambridge, but his studies were interrupted by a campaign of active service in the war as aide-de-camp on the staff of General Sullivan, during the latter's Rhode Island operations in 1778.

In 1779 Tyler was admitted to the Bar and opened an office in Falmouth (now Portland) Maine, business in Boston being at a standstill by reason of British occupation. In a sketch of the early Bar of Maine it is said of him, "He was a fine scholar and an accomplished man." He returned to Boston in 1781 and resided for two years in Braintree, now Quincy, thence removing to the city, where he practised for several years.

During Shays' rebellion, in 1786–7, Tyler served as aide-de-camp on the staff of General Benjamin Lincoln, and in this capacity was sent by Governor Bowdoin of Massachusetts to Vermont, to make arrangements for the apprehension and delivery of certain of Shays' fugitive adherents who had fled to that jurisdiction. Minot's *History of the Insurrection* (Boston, 1810), thus touches upon the matter:

"With respect to that Government (Vermont), the Legislature had been officially informed, that on the 13th of February, (1787), General Lincoln dispatched Royall Tyler, Esq., one of his Aides-de-Camp, to request their assistance in apprehending the rebel ring-leaders: That, upon his communicating his instructions and request in writing, the subject of them was put in Committee, and a report made for requesting the Governor, (Thomas Chittenden,) to issue his proclamation, enjoining it upon their citizens not to harbor the leaders or abettors of the rebels: That this report was accepted by their lower House, and sent up to their Council, where there also appeared eight or nine assistants (councillors,) in favor of it: That it would of course have passed there, but for the Governor's objections, which were at first founded upon his

not having given the subject a proper consideration, but were afterwards bottomed upon more serious principles: These were said to have been raised, from the impolicy of issuing a proclamation which might impede the emigration of subjects from other states into that; and the imprudence of opposing the sense of their people, who began to assemble in arms in a neighborng town, and who might create an insurrection, and surround the Legislature, unless the report were dismissed: There being no prospect of Mr. Tyler's effecting the object of his request, he departed, with strong apprehensions that the bulk of the people in that state were for affording protection to the rebels, and that no immediate or effectual aid would be granted."

A more illuminating light is shed upon the result of Tyler's mission by the following excerpt from a manuscript in Tyler's handwriting among the collections of the Vermont Historical Society, which seems to be a copy of his report to his superior: — "The Governor, (Thomas Chittenden,) in my presence said that whenever people were oppressed they will mob and that the people who fought the Bennington action are now under guard, giving his opinion plumply against our cause, and that it would not do for this State to have any concern with Massachusetts quarrels. In the company of last evening I heard numbers of respectable men, to appearance, requesting him not to have anything to do with those just persons who have fled into this State for shelter, and further the Governor said he did not conceive the nature of their offence to be such that it was the duty of this State to be aiding in sending them away to the halter. General Ethan Allen in my presence said that those who hold the reins of the government in Massachusetts were a pack of damned rascals, and that there was no virtue among them, and that he did not think it worth anybody's while to try to prevent them who had fled into this State for shelter from cutting down our maple trees; and the common people flocked around him as though he had a sight to show. The commonality aver that they will shelter anybody who applies to any of their houses for shelter, and it is generally said that our quarrel will be ten thousand pounds advantage to this State."

The feeling in Vermont was so intense against giving up any of the Shays' refugees that Tyler felt some fears for his own safety, as is shown by the following extract from a letter from General Lincoln to him, dated February 21, 1787, at Pittsfield, Mass.: — "As soon as you find your person in danger, or that your services cannot avail, pray return; you have done a great deal; we cannot command success; to deserve it has the same merit." Despite the meagre results of his negotiations with the Vermont leaders, Tyler was later sent on a similar mission to New York.

In the summer of 1790 Tyler again visited Vermont. He had become acquainted with the leading men of that independent commonwealth, and saw fit to cast his fortune with them. He settled in Guilford, then the largest place in the state, the following winter, and there remained until the spring of 1801 when he removed to Brattleboro, having been previously elected by the legislature judge of the Supreme Court of the state. His ten years of practice were active, for his reputation as a lawyer and a man of learning was widespread; he soon numbered among his friends most of the able and distinguished men of his adopted state, and for many years he served as states' attorney of Windham county.

Until his election as judge, Mr. Tyler had acted with the Federalist party, and was a Federalist at the time of his election, but many of the considerations that were telling against that party seemed to him well founded, and although he could not take any active part in politics while on the Bench, his views gradually changed and he became in sentiment a Republican; so that, when in 1807 the Republicans made a "clean sweep" in the state, he was advanced to chief judge,

with Theophilus Harrington and Jonas Galusha as assistants, and continued as chief judge until 1813, when all the judges were chosen from the Federal party. During the latter part of his term of service Judge Tyler's health was very poor, and this, with party complications, prevented his re-election; he resumed active practice at the Bar, which was pecuniarily more profitable than his services to the state, and served for a time as register of probate in his district, but after 1820 he gradually retired from practice. He suffered for many years from a cancer on the face, and died in Brattleboro, August 16, 1826, at the age of 69 years.

Judge Tyler's personal and judicial memorabilia are meagre enough, after the lapse of a century, and the following excerpt from a letter written by his son, Rev. Thomas P. Tyler, D.D., hints at the same difficulty in 1877: — "Fifty years have elapsed since my father's death. His contemporaries have long since passed away. The materials for biography are of course mainly letters and other manuscript, or printed, documents. It is singular, but true, that the department wherein information is most important to be obtained, (that of the law), is just where it is most meagre and unsatisfactory. There were, as you are aware, several trials during his service on the Supreme Bench, in which the violence, heat and animosities of politics, the virulence of which passes all our experience, arrayed the people as partisans on either side. Such was especially the case in the embargo war times. In the Black Snake affair there were several trials, some of which I learn from father's letters were prepared by himself for publication, but my most diligent efforts have failed to find one of them. I do find, from the letters of Senator Robinson and other of his friends, that in their judgment his charges to the juries, and other official acts in the conduct of the trials, contributed much to allay partisan feeling and bring the people back to sentiments of justice and patriotism." The Black Snake affair alluded to above grew out of the capture, at Joy's landing on the Winooski river in what is now the city of Burlington, of a smuggling boat, called the "Black Snake," which, under the embargo act of 1807, did a large smuggling business on Lake Champlain, and in the capture of which several lives were lost. The crew of the boat were tried for murder and several of them convicted, though the only one executed was Cyrus Dean, who was hung October 28, 1808, at Burlington, in the presence, it is said, of some 10,000 people. This is probably an exaggeration, the population of Burlington being but 815 in 1800.

The following estimate of Judge Tyler by a late writer seems to briefly summarize his personal and judicial qualities: —"Judge Tyler was social in disposition, with a mind well stored with information derived both from books and their prototypes, men. He was the delight of all who knew him, and was the leading spirit on those occasions when the witty, learned and wise were assembled. To high mental ability, there was joined in his character an uncommonly benevolent and friendly disposition, which gained him the love and respect of many attached friends. As a judge he was conscientious, clear minded and just, both by a natural sense of right and an extensive knowledge of precedents. His instructions to juries were often published, and were specimens of elegant composition and evidences of his great professional knowledge. His humanity, though naturally unbounded, was so guided as to produce the most beneficial results. As a citizen he was public spirited and liberal; as a neighbor, social and unobtrusive; as a husband, kind and attentive."

In 1809–10 appeared from the press of I. Riley, New York, two volumes of *Reports of Cases* argued and determined in the Vermont Supreme Court, and reported by Judge Tyler. The period covered was 1800–1803 and the reports are mainly of jury trials. While it is said by Wallace (*The Reporters*,

4th Ed. p. 589), that Tyler's reports are not considered good authority, even in his own state, this is hardly a just criticism. The cases reported were jury trials, for the most part, and contained the substance of the law as stated to the jury. While the opinions are necessarily not as complete and thorough as in well considered cases of a later date, they contain much that is valuable, and must at the time have been a great aid to the profession and to the courts as statements of what was then the law of the land.

In literature Judge Tyler made quite a little commotion, at a time when American Letters were hardly so far advanced as to justify so dignified a title. He was author of the first American play acted on a regular stage by an established company of comedians, *The Contrast*, a comedy in five acts, said also to have been the first stage production in which the Yankee dialect and story telling, since popularized by Hackett, Hill and others, were employed. According to Duyckinck (*Cyclopædia of American Literature*, Vol. 1), it was first staged at the old John Street theatre, New York, under the management of Hallam and Henry, April 16, 1786. Duyckinck drew upon *Dunlap's History of the American Stage* for his misinformation, for Judge Tyler's son positively asserts that *The Contrast* was written in the winter of 1788–89, in three weeks' time, and brought out April 16, 1789, at the Park Street theatre, New York, and avers that Duyckinck, Dunlap and their followers are mistaken. It certainly could not have been produced in April, 1786, if Duyckinck is correct in his statement that the comedy was written during Tyler's military servce and produced while he was in New York on his mission from the government of Massachusetts, for Shays' rebellion did not break out until December, 1786, and Tyler went from his Vermont mission to New York in the late winter, or early spring, of 1787. Gilman's *Vermont Bibliography* lists, but makes no further mention of, "*May Day, or New York in an Uproar, A Comedy*, 1787," by Tyler, and it is possible that this play was the prior production; in that case it might have been produced in April, 1786, and at the John Street theatre. At all events, *The Contrast* is rather of historical than literary importance, if we are to rely on Professor Beers, who, in commenting upon it, after mentioning Godfrey's *Prince of Parthia*, refers to the one as very high tragedy, and to the other as very low comedy. In 1797 Judge Tyler wrote a comedy in three acts, which was repeatedly and successfully produced in Boston, entitled *The Georgia Spec*, or *The Land in the Moon*, which ridiculed speculation in wild Yazoo lands. In the same year appeared, in two volumes, *The Algerine Captive*, or *The Adventures of Doctor Updike Underhill*, from the press of David Carlisle, at Walpole, N. H. A second edition was printed at Hartford in 1816. This is said to have been the first American work of fiction reprinted in England, having appeared in two volumes in London, in 1802. In 1799 he wrote a *Fourth of July Ode* for the Independence day celebration of that year at Windsor, Vt. Mention is also made by Gilman of *The Original of Evil*, 1793, but we are left in the dark as to what it might have been.

Judge Tyler gained a great reputation by his fugitive contributions of verse and prose to that newspaper and miscellany, one of the best of its kind ever published, *The Farmer's Weekly Museum and Lay Preacher's Gazette*, printed at Walpole, N. H., by Isaiah Thomas and David Carlisle. He contributed a series of agreeable and humorous articles, purporting to be "From the Shop of Messrs. Colon & Spondee," which were quite varied in their character. French democracy, Della Criscan literature, Federal politics, and the lighter frivolities of the day being among the subjects that claimed attention. The prose paragraphs show the author's wit and general taste in

literature, while the poetical efforts exhibit considerable command of versification and facility in numbers. A liberal collection of these fugitive writings is embraced in a volume published at Walpole, in 1801, by Thomas & Thomas, entitled *The Spirit of the Farmer's Museum and Lay Preacher's Gazette*. Judge Tyler also published a series of papers entitled *An Author's Evenings* in the *Port Folio* of 1801, and subsequently published in Philadelphia by Joseph Dennie, formerly of Walpole. In 1806 he was a contributor to Buckingham's monthly periodical, *The Polyanthus*, of the papers entitled *Trash*, and a number of poetical pieces, and again on the revival of the publication, in 1812. In 1809 he printed *The Yankee in London*, purporting to be a series of letters written by an American youth in London. The author never crossed the Atlantic, his descriptions of London scenes being purely imaginary. Some of Judge Tyler's latest productions appeared in the *New England Galaxy*.

The ubiquitous Duyckinck has this to say of Judge Tyler: "He was a wit, a poet, and a Chief Justice. His life certainly deserves to be narrated with more particularity than it has yet received. His writings, too, should be collected and placed in an accessible form. American literature cannot be charged with poverty while it has such valuables uninvested in its forgotten repositories." Subjoined is a specimen of Judge Tyler's briefer poetical efforts.

LOVE AND LIBERTY.

In briery dell or thicket brown,
On mountain high, in lowly vale,
Or where the thistle sheds its down,
And sweet-fern scents the passing gale,
There hop the birds from bush to tree;
Love fills their throats,
Love swells their notes,
Their song is love and liberty.

No parent birds their love direct;
Each seeks his fair in plumy throng,
Caught by the lustre of her neck,
Or kindred softness of her song;
They sing and bill from bush to tree;
Love fills their throats,
Love swells their notes,
Their song is love and liberty.

Some airy songster's feathered shape
O! could my love and I assume—
The ring-dove's glossy neck he take,
And I the modest turtle's plume—
O! Then we'd sing from bush to tree;
Love fill our throats,
Love swell our notes,
Our song be love and liberty.

BURLINGTON, VT., December, 1907.

LAW

By T. Dabney Marshall

FOR you to-day our gates we open wide
And loving hands in greeting now extend.
In you is symbolized the Law, the shield
Which blunts the sword which ruthless might
Would lift against the weak,—the Law, which makes
Of men no more a savage blood-red horde, where each
Unchecked doth seek his own, but slowly builds
Of them a nation proud and free, which naught
But justice rules, which naught but right obeys.

The Power that shaped the varied earth, and lit
The fire of all the stars, and then evoked
Unconscious dust to sensate life and gave
To clay a soul, doth rule by law, whose leash
Not even titan stars may loose. Each sun that wheels
An isle of flame across the sea of space,
Each bloom that from its heart a perfume pants,
Alike doth own the sway of all-pervading law,
And as it guides, they move to ends and goals
To them unknown. For, man, of all, alone,
Seems free to choose his act and shape his life.
The law, that Power ordained, exists, and marks
The path that leads to life; but he is free
To walk therein, or go astray; he breaks
This law by impulse wild, or else he errs,
Because he knows it not, and goes to dooms
The lawless meet, or walk the way this law
Decrees shall lead unto the larger life
And destinies the race at last shall reach,
And thus his end fulfills.

This law is hidden in the heart of things,
Unseen, unknown, but ever dimly dreamed
And felt. 'Tis slowly brought to light by thought
That broods and weighs, by deeds that test and prove,
The acts this all-pervading law ordains
We name the right, and this the thinker finds,
Or thinks he finds, and with persuasive voice
Proclaims. Enacted into law, you make this right
Prevail, and test the dream by proving deed,
And by the fruitage of the dream make known
Its worth and truth. It is the sages' task
The right to find, and yours to make the right
Observed, and thus you twain do help to build
The over-man and lift the race from blind
Impulsive deeds of wayward passion born
Unto the ways which reason rules, and, ruling, thrones
Its servitors as earth's unquestioned lords.
You are as priests, who in Law's temples serve,
And thus are they whom Fate doth call to serve
Man best, for more than all is law to man.
All things else save the law do minister
To passing needs, or pour sweet anodynes
For transient hurts, or lift swift drained cups
To swiftly dying joys which by their swiftness mock
The hearts they thrill. But law abides and shapes
The whole of life, and makes us what we are.
As are its laws, the nation is. It stands a dream
Of right incarnate made. It takes and binds
The scattered might of weakling men to powers
That topple down a tyrant's throne, and makes
The babe, with justice armed, a Cæsar's peer.
Before man breathes the Law has heard his cry,
And for his toddling feet provision made,
And like the Lord it slumbers not, nor sleeps,
But holds us all in its protecting arms,
And dead, it guards man's dust, and pours the gold
The dumb blue hand no more may hold or keep
Into the laps of those our hearts in life
Have loved.

But, ever as the years unroll, they shape
A newer world, and that which yesterday
Was right to-morrow stands a thing outworn,
Nor checks the newer foe, forever born.
So like the Power, which, creating, gropes
And feels its way through myriad forms and climbs
From dust to lowly bloom and mindless beast,
Until at last it has achieved the man,
So law has sought its goal in many ways,
And slowly seeks at last to build the state,
Where all the powers that in us latent lie
Shall come to golden bloom and men as angels be.
As on the earth the old imperfect life
Lives often on and clogs the larger life
And yet at last goes down, in that fell fight
Forever waged, where good to better yields,
So in the fane of law old idols stand,
Yet one by one they fall, and ever law
To slow perfection strides.

Not priests alone
Are you, but soldiers who to call of Truth's
Triumphant trumpets march adown the years
Across the world, and strive to usher in
The golden year that with its gleam forelights
Your brows. The dawn of God must break,
Wherein no blind and bandaged Justice rules
With scales which all-unswerving weigh, with sword
Which all-unpitying smites. Let Justice be
With softer virtues ringed and haloed round.
Once in Law's marmoreal halls she ruled
Alone, but is companioned now. O let

Pale Pity's passioned plea with Justice' voice
One mingled music make, and Charity
Let fall her lilied blooms beneath the bare
And bleeding feet that went astray, and Love
Hold out arresting hands to him who falls.

We should not ask alone, if man has erred,
And then exact the doom prescribed by men,
Whose cold and clammy blood has never felt
Sweet temptation's over-mastering might, that lures
The struggling soul on to its crime. O, let
Us weigh not naked deed alone, but track
Each interlacing cause that gave the deed
Its birth, and then accord the doom we mete,
Not with law alone, but with excusing love
As well! For vengeance in our holy hall
Should have no home. No deed that man may do
Can make him less than man, no guilt can make
Him aught but brother. Nay, the more he errs
The more he needs a brother's love.

Around you sweep the hills where blood was poured
In holy cause, and blooms blow sweet o'er graves
Of men, who dead, have never died, for they
Did die with death in honor's holy cause.
Then let their spirits fill your breast to-day,
And may your session here by noble thoughts
Expressed and plans for man's advancement
Made prove their blood undimmed is in your veins,
And like the Roman matron old our Southland find
Her jewels in her sons.

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THE UNWRITTEN LAW AND WHY IT REMAINS UNWRITTEN

By The Late Albion W. Tourgée

THE babe that first sees the light within the domain of the English common law may well smile in its dreams. Above its cradle hovers a presence unmatched among human institutions for benignity and power. Already, before the breath of life had visited his nostrils, it had taken note of his existence and tenderly provided for his welfare and his rights. With the dawn of consciousness, it draws nearer to him. It hears his first inarticulate wail and provides for his proper nurture. It lays its behests on parent, guardian and nurse; protects him from neglect as well as malice, and even before he can speak himself, provides a friend who shall speak for him. As he grows in strength it puts into his hand a shield potent for his defence against all enemies. It makes the judge his servant to define his rights, and puts between him and the sovereign power the insurmountable presumption of incapacity. It will not hear his words, even of admission or self accusation, but puts in his baby hand the scepter and declares that "the king can do no wrong." Through childhood and youth it tenderly watches over his footsteps, clears the obstacles from his pathway and sees to it that he does not dash his foot against a stone. Little by little as he grows in power and discretion, it removes the barriers that restrict his action. It listens to his voice, trusts the testimony of his eyes, enlarges his capacity, enhances his responsibility, and prepares him by easy and successive steps for the more serious task and heavier burdens of manhood. It gives the power of the realm to enforce his rights, and demands concurrence of twelve of his peers before it will listen to any imputation of wrong doing against him.

In the battle of life it is with him. In the ancient mythology the "Queen of Heaven" watched over her favorite in the fierce onslaught of battle, warding off dangers which he did not see or was unable to prevent. Such a presence is the English Common Law to every champion in the arena of life. It clothes him in armor of proof; guards against surprise or ambush; bids him go boldly forward heedful only of his own footsteps and mindful of his own rectitude and watchfulness. It protects him from conspiracy and fraud, but refuses to shield him from the consequences of his own wrong, and requires him to come with clean hands to invoke its aid.

It guards him in slumber, but deserts him in sloth. In return for its faithfulness it demands vigilance, and of him to whom it grants relief it demands that he shall first do equity. While a reasonable doubt remains, the presumption of innocence is for him an impenetrable breastplate, warding off even the sting of imputation.

It puts a guardian angel at the threshold of the home, whose ever naked sword guards its holy mysteries against intrusion or inquisition. It protects the maiden in her love and the mother in her holiest right. It trudges with the child to school, gives the teacher authority and restrains his passion. Around the husband and the wife it folds the mantle of silence which none may penetrate, and which they themselves are powerless to lift. It protects the sanctuary but leaves the worshipper free. As many Mahometans as Christians enjoy its benefits and more believers in Brahma than Mahometans and Christians both. One-sixth of the habitable globe and one-third of its population acknowledges its sway. Twelve million square miles and four hundred million people constitute its empire. One-half the wealth of the world is in its keeping. It is the re-

lentless foe of oppression and the sleepless guardian of individual right. Made the instrument of bondage, it serves unwillingly and with constant protest; as the nurse of liberty it is unfailing in assiduity. Tyrants hate its name; freemen bless its beneficence, and the world wonders at its mysterious potency.

Whence and what is this Common Law which is the distinguishing feature of Anglo-Saxon civilization the world over? Is it a peculiar system of rules, a specific part of the great field of jurisprudence which the English people have discovered and of which the rest of the world is ignorant? Such a presumption, though it is not lacking the authority of great names, is in the highest degree absurd. There is no striking difference in the so-called principles of the Common Law and the jurisprudence of other lands. The simple truth is, that legal principles are not a monopoly of any race or people — they belong to mankind. Almost every principle of the Common Law may be paralleled in the laws of other nations.

It is not a system of laws, but a method of applying law. Its distinctiveness does not arise from the excellence of its formulas or the eminence of its judges, but from the fact that it is linked in foundation and application with the common life. It is the impulse to self-judging which has made it so distinct. Born in the heart of the Visigoth on the rugged shores of the Caspian, it joined the functions of the judge and the legislator and devolved both upon the commune. The chief was president-judge and the whole tribe the court. In the Visigothic bund was the kernel of the American Republic.

Borne in barbaric triumph through the forests of central Europe, untouched by Roman faith and uncorrupted by Roman thought, it reached the shores of the North Sea. Pausing here awhile to gather strength, it poured over into Britain, from which it swept away every trace of Roman civilization and Celtic barbarism. Taking root upon the moors and under the greenwood trees of old England, nourished by Saxon frankness and made strong by Celtic stubbornness, holding its wittenagemote upon the village green and defending the common right against foes from without and usurpers from within; learning subtlety from the Roman and boldness from the Northman; guarded by the four seas that rage and foam about its white-walled home; softened by the light that shines from Calvary and strengthened by the echoes of the great Lawgiver's voice that comes to its ears across the slumbering centuries from the valley of curses and blessings; hidden in the heart of the Puritan; strengthened by the solitude and primeval grandeur of the New World's unsubdued expanse; blessing with unequaled prosperity those who proclaimed equality to all, the mainspring of English civilization is the Common Law we inherit, and which we have extended, harmonized, and replenished with unnumbered examples of its wisdom, beauty and beneficence. For this Common Law is no longer the Common Law of England, but the heritage and glory of Anglo-Saxon civilization.

But what are its limits? Of what is it composed? Where may its tenets be found? How may the Common Law be distinguished from that great mass of conventional regulation of human relations which constitutes the vast field of jurisprudence?

To no question which is met in preparation for the Bar is it so difficult to present a satisfactory and easily comprehended reply, unless it be that ever-to-remain unanswered query, "What is Equity?"

As to this latter question it is quite safe to say that nobody has been able to find a definition which would serve the subtlest legal practitioner under any other system, in determining where, in English law, Equity begins and where it ends. As a matter of fact its boundaries are as irregular as the line of a Virginia worm fence, and as unaccountable as the vagaries of the Mississippi on its winding way to the sea. Not only that, its boundaries are as shifting as the

wave-lines on an ocean beach, and what constitutes a distinct and clearly defined equitable landmark to-day, by the course of legislation or decision disappears in the ocean of Common Law to-morrow. The nearest approach to a competent definition of this familiar legal term is the despairing conclusion of the father of American Equity-Jurisprudence, that "Equity is that portion of the law (he should have said the Common Law) which is cognizable only by a Court of Equity." In truth, Equity in a technical sense is simply a part of the Common Law which accident at first separated from the rest of its domain, and which a curious and unfounded fear of change has served to keep distinct in form in some jurisdictions, only in name in others, while in others still both form and name have been abandoned, and the law so divided in its functions has come at length to administer justice in the same form of action and by the same instrumentalities, no matter what the character of the relief sought.

In truth, Equity is best defined to be that portion of the Common Law which ignorance, stupidity and empiricism separated centuries ago from the body of legal principles and which it is one of the highest triumphs of modern learning under the lead of Bentham and Austin and their co-adjutors and disciples in England, and Livingstone, Field, and their co-workers in America, to have restored to proper relations with its long estranged kindred.

But what *is* this Common Law, of which the practitioner speaks so glibly, and very often, it is to be feared, very loosely, is still the question which constantly recurs to the puzzled student's thought?

It used to be said by the pilots on the great rivers of the West that one is never competent to take the wheel and be responsible for boat and passengers and cargo, until he could "put the river together," — that is, begin at its source and give every landmark, its distance and bearing from any other to its mouth, or beginning at any point could go either way — in other words, to see the river from end to end. It is said, too, that no man can acquire this knowledge by the study of charts, but must gather it by constant observation, and has and can have no intimation of the progress he is making. After long experience and repeated failures, all at once, perhaps when walking the streets, lying in his bed or sometimes in a dream it flashes upon him, he "puts the river together" — the picture is complete — he sees the course and landmarks back and forth, up and down, and is ready for examination and license as a pilot.

There is some analogy between "putting the river together" and an adequate comprehension of what constitutes the Common Law.

There is probably no experienced practitioner who reads my words who does not remember the mist of uncertainty which hung over his early years of study, which no application to the text-books of the profession, no hint of any instructor, seemed able to penetrate. The Common Law was an incubus that hung over his consciousness, unsettled his conclusions, disappointed his hopes. He found himself baffled in every attempt to discover its nature, define its boundaries or assign it to its proper place in the science of judicature. Perhaps he even grew incredulous in regard to its existence, and came to regard it as a myth by which the elders of the profession consoled themselves for the existence of conditions for which they could not account. It is possible that — like an eminent practitioner who has pictured that period in unmistakable colors in a fancied life, they came to think of the "Common Law as a scientific term for unscientific nonsense."

Probably every practitioner recognizes the fact that a time came — he may not know how nor be able to specify time and place — when he thought and spoke of the Common Law with a certainty and comprehension he had never felt before,

when he perceived, felt, knew, that it was a real factor of juridical thought and knowledge. All at once the pages of the reports were enlightened with it. He no longer felt surprised and confused by the opinions of the judges. He began to see the true significance of the maxim, "The law is what the judges judge it to be." He approved their reasonings with satisfaction, or controverted them with confidence. He *knew* the Common Law. He might not be able to define its limits, but found he had what he thought an instinctive knowledge of what it is and what it is not.

Under these circumstances it will not be expected that an absolutely exact definition of the Common Law will be attempted, though I by no means concur with those eminent jurists who believe such a definition impossible. I shall seek only to indicate some of the ordinary reasons for uncertainty, and consider some phases which I trust may enable the young practitioner more clearly and readily to apprehend the scope and character of our Common Law and understand how, without differing materially in the principles it enunciates, its effect upon the character of the peoples subjected to its influence are so remarkable as to justify the declaration that it is the keystone of Anglo-Saxon civilization.

And first I note as one of the reasons for this indistinctness of apprehension, the fact that the terms used in explanation or as synonymous equivalents, have been affected with a like indefiniteness. Leaving out of consideration that use of the term which makes the Common Law the equivalent of all English or American law, which is in fact only a synecdoche by which the distinguishing feature of Anglo-Saxon law is used to signify the whole, and that other use which applies the term to the general jurisprudence of any country, as well as that specific significance which is used to express the technical distinction between legal and equitable jurisdiction by designating the former as Common Law Courts, we find one term used almost universally in explanation of this most important factor of our jurisprudence, which is, if anything, a little more confusing than the term it is employed to explain. This term which I doubt not is on the lips of every professional hearer even before I utter it, is the *lex non scripta*. The Common Law we say first of all to the student, is the unwritten law of England.

One cannot but sympathize with the wondering incredulity with which the student listens to the astounding statement that the Common Law is that body of laws, principles, customs and traditions which have never been, and can never be reduced to writing, which yet may be found in the volumes of reports and which he is expected to glean from the works of elementary writers upon law. The idea of sending a man to search for unwritten law between the lids of a printed book is absurd enough to justify any sort of objurgation on the part of the student or the intelligent layman who would like to obtain, without a lifetime of application, some knowledge at least of the character, if not the extent, of the Common Law. Such a bit of self-contradictory explanation is small help to the learner, and it seems to be quite time that a profession boasting of its scientific character began to use definitions that really define. Yet, properly understood, the explanation throws not a little light upon the question under consideration. The unwritten portion of Anglo-Saxon judicature is indeed to be learned from books, yet those books do not declare the law. This unwritten law embraces, as every tyro knows, an immense proportion of our law. It is usually said to embrace all that has not been expressly formulated by some authorized law-making, or rather statute-prescribing, power.

But even this broad definition is too restricted. A very considerable portion of this *lex non scripta* is composed of the opinions of the courts construing specific statutes.

A very high authority has added materially to the complexity of the subject by declaring that the "*lex non scripta*" is law not written by the authority of law. Could confusion itself be worse confounding? If we keep on improving our definitions in this manner — and this is by a noted American judge — we shall soon have some conceited legal sensationalist asserting that the Common Law is unlawful law. The truth is that no law can be formulated except by authority of law. Common Law — the *lex non scripta* — is actually and truly unwritten still, just as much as it was when the opinions of the judges were perpetuated only by oral tradition, or in the case-book of the practitioner. But the volumes of the reports are not law. Neither are they, as has been sometimes declared, the evidence of what the law is. A paper-writing is *ipso facto*, evidence of a contract. The record of a court is evidence of what the court has done. But the volumes of reports are *not* evidence of what the unwritten law is, they are only evidence of what certain experts, at particular times and under certain conditions, believed the unwritten law to be.

The judge, so far as the construction of statutes or the formulation of non-statutory principles of law is concerned, is simply an authorized expert, while the text-writer is simply a voluntary or unauthorized expert. The process of development in the Common Law — the evolution of what we call Common Law principles — is of the simplest and most natural character. A decides that under certain conditions the law is thus and so: B endorses his opinion in a similar case, C in another and so on it may be for years, it may be for centuries, until there is established a line of decisions from which a general principle is deducible. This is said to be the law; yet it loses the character of law as soon as the conditions on which it rests are changed or its underpinning of logic fails. Such formulations are properly termed "opinions" — the opinions of experts. They hold good in the cases determined and are what we term authority in certain others, but their foundations are always open to assault.

By keeping this fundamental fact in view you will perceive that the whole field of equitable jurisdiction is a part of the *lex non scripta*, a part of that Common Law which distinguishes English judicature from all other systems, and which, though it may be gathered from books, has never been written and never can be written — meaning by the term "written" finally and authoritatively formulated.

But is nothing then ever settled at the Common Law? Theoretically, never: practically, a long line of decisions is much more difficult to flex or modify than a statute. A judge who would not hesitate to construe a statute out of all resemblance to what he may well know to be the legislative intent, upon the ground that the law-making power must have intended to act *justly* — knowing all the time that they really meant to act unjustly — would shrink back appalled from an attempt to overthrow a strong line of decided cases, though he might see clearly enough that the logic on which they rested, if it was ever good, had ceased to be conclusive.

As pertinent examples of this fact may be cited the Common Law forms of action. They were nearly always within the control of the court which administered them — always in England and usually in the United States. Every judge knew that they were harsh, unnecessary, unjust and oppressive. He knew that he was violating the highest function of the judge when he kicked a suiter out of court and made him pay costs for his attorney's error in declaring in covenant when he ought to have sued in assumpsit. He knew, too, that Equity was only another name for injustice when it required law to be asserted by piecemeal and the judge and chancellor played at shuttlecock with the suitor's rights, and the lawyer pocketed an equal

fee for good or bad advice. If these forms had been newly prescribed by statute the court would unhesitatingly have pronounced them barbarous and intolerable outrages against the right of the citizen. But the fact that generations of judges had sanctioned this wrong lulled the voice of conscience, and permitted the ever-growing company of black-robed banditti. It is this fact which has made the administration of justice in almost all Anglo-Saxon nations more costly and burdensome than in any other land. The statement has recently been made, and I do not doubt its correctness, that the administration of justice in any leading city of the United States costs the people more than in the whole of France. The Common Law is a terrible enemy to the man whose rights are of small value and whose opponent has a long bank account. The corrupt judge is happily almost unknown to the Common Law, but its machinery must be lubricated with gold — its pinions like those of fine watches run smoothly only when pivoted on diamonds. And this defect the Code has in many cases increased rather than diminished by substituting for a half dozen forms of action, an infinity of inconclusive motions.

But a still more confusing element is that idea so easily obtained and so hard to be eradicated, that it is a body of usages and customs derived from days "to which the memory of man runneth not to the contrary," and deriving force and validity from the fact of ancientness. Indeed, the presumption of universal concurrence based on their contiguity is cited by almost every one who has written upon the subject, as the real basis of authority for the Common Law element of our jurisprudence.

Even a cursory examination of the present state of the law is sufficient to show neither of these presumptions is correct. Aside from ordinary principles of universal justice common to all systems of jurisprudence, there is but very little of the Common Law which derives any especial sanction from antiquity.

What was the Common Law of ancient times has gradually crystallized into statutes, been negatived by express enactment, or rejected by the more enlightened judgment of modern times. Indeed it may be doubted if this familiar view of the source, character, and reason of the Common Law was ever anything more than a mythical theory intended to account for a system so unique that no juridical writer of any other land has been able to comprehend its character or operation. To the mind of the continental jurist, the Common Law is without sense or reason. He listens to the explanation of its beauties with a pitying smile. To the claim that the chiefest excellence of the Common Law lies in the fact that its rules are flexible, he responds with the unanswerable query, "What is the use of flexibility in a rule?" The idea is at variance not only with his notions of scientific accuracy, but also with ideas of law regarded as a rule or standard. What would one say of an elastic yardstick — one that gave sometimes a yard and sometimes an ell? Indeed, the Common Law itself regarded such variable yardsticks with such abhorrence that when used in traffic their employment became a crime.

The truth is that Common Law has no "rules" in the sense of fixed standards — the only sense, by the way, in which the term is properly used in judicature. It is on this fact that its distinctiveness depends.

Instead of employing fixed rules, it applies theoretically the universal principles of justice to every question coming within its scope, according to the conscience and wisdom of the judge, applied to specific conditions — this conscience being not a simple uniform, unmodulated impulse, but a judgment enlightened and informed by the actions of those under circumstances and conditions more or less analogous. In some cases analogies are so nearly identical that a continuous line of harmonious decisions

result and we have what is termed a rule of the Common Law. By and by a new element is injected, a new condition arises which is inconsistent with the former determination, and the so-called rule disappears by the same process which called it forth.

Instead of being a finished product of a remote past, therefore, we see that the Common law is a constantly growing and constantly changing increment of all Anglo-Saxon law. What was the Common Law yesterday is not the Common Law to-day, and what is so accepted to-day, to-morrow's conditions may reverse. The flexibility of the Common Law is not then a flexibility of rule, but an inexhaustible adaptability of its machinery to the formulation of new rules to fit the ever-varying conditions of life. It is this fact that makes the Common Law not always the guarantor of liberty or the instrument of beneficent results, but a most efficient agent of oppression and the bulwark against which the tide of human progress not unfrequently breaks for long periods with unavailing force.

The Common Law is not a system of principles or maxims, but a peculiar system by which legal principles are formulated and applied. It is this fact which makes judicial power in any Anglo-Saxon society — in any English-descended community — so much more an important and notable element than in any other.

The judge has been the constant creator of law. About every constitution, ordinance, statute, has grown up a little system of law based upon continuous, conflicting, and perhaps finally settled adjudication. New social and scientific conditions have overthrown conclusions apparently the most securely fixed. The law-making power has been held in check by the fact that the power to construe rests in the hands through which alone its edicts can be enforced, and that justice, vague, intangible, undefined as it may be, controlling the mind of the judge, forbids it to do evil. It makes the judge also the reflection of the thought and manhood of his age and of the moral tone of his environment, which he in turn makes part and parcel of the Common Law he creates in the daily performance of his duties. The Common Law is not a specific, definable portion of English jurisprudence as so many commentators have sought to regard it, but is that over-ruling spirit, that genius of Anglo-Saxon individuality which subjects formulated law to restrictional and enabling construction, and creates or adapts whatever may be found needful to meet new conditions or supply the deficiencies of the enactments of the law-making power. It created Equity Jurisprudence; it formulated and has adapted popular government to all social conditions. It is the supplement — apparently a necessary and indispensable supplement — of parliamentary legislation and government by the people. It is a growth, not a creation — a continuing force, not a perfected science.

It is possible that this view of that distinguishing element of Anglo-Saxon civilization which we call the Common Law, may seem so new and incongruous with preconceived ideas to some, that a few illustrations of its continuing operation may be desirable to fix the truth more firmly in the mind. The volumes of the reports are so full of testimony upon this point that even the tyro could hardly go amiss in the search for them.

A hundred years or more ago a group of English colonists, having cut loose from the mother-country undertook the hazardous task, not merely of founding a new nationality, but of establishing one upon a new plan — to invent, indeed, a new form of government. They named the result the United States of America. Our government has sometimes been said to have been modelled on the constitution of Great Britain. English arrogance and American sycophancy have repeated this so often that there was actually danger of its being accepted as a fact had not one Englishman of wider views and truer knowledge shown its absurdity.

Really, except the system of Common Law as a constructive, adaptive and harmonizing force, we derive very little of our governmental system from any source except the two centuries of experience of the American colonies. The most important feature and the one in which our government differs from all other systems, is that it put the judicial power above all others and authorized it to mark out and define the limits of executive and legislative power and distinguish between State and National authority. For twelve years that most august tribunal which the world has ever known — the Supreme Court of the United States — groped its way weakly and uncertainly along the path of its new duties. Eminent and able men sat upon its bench. The greatest negotiator of our revolutionary epoch, John Jay, and the brightest and most practical legal mind of the convention, James Wilson, were among its first judges. In four years it decided five causes. After ten years it had learned almost nothing of its own powers and duties. Twelve years after its organization a man of great brain, great will, and invincible integrity, John Marshall, was put at its head. The duty of defining State and National authority early claimed his attention and he enunciated this rule: "The Constitution of the United States must be strictly construed as regards the grant of power, but liberally construed as to the means by which such power may be exercised." Around this principle the government of the United States has crystallized. What was it? Simply a new principle of the Common Law — an application of the principle of justice to absolutely new conditions.

A decade and a half afterward the same great mind, dominated perhaps in some degree by the overwhelming personality of Webster, forged a chain which is fast growing to be shackle, in the definition of the relation of a private corporation to the State authority and applying to it without restriction or modification the inhibition of the National constitution in regard to the inviolability of contracts.

Around the Dartmouth College case has grown up a mass of Common Law adjudications having no other basis, which would of themselves probably fill a score of volumes, and whose influence on the business of the world during the last half century is simply incalculable.

The mass of Common Law decisions based on this opinion is hardly to be excelled in the history of English jurisprudence, except by that unwritten mercantile law which Mansfield half a century before had half borrowed and half invented to meet the exigencies of British commerce, then just devoloping into the leading interest of the British realm.

Another phase of our history offers a curious illustration of the continuing adaptability of the Common Law, not by the flexibility of its rules but by the adaptability of its organic character to the formulation of new ones. Slavery two centuries ago became, and until within a few years remained, the most important economical, social, and political factor of a large portion of the Union. In some of the Northern states it was, almost from the adoption of the Constitution, so restricted, antagonized, and subordinated by other interests, that its effect upon their legal devolopment is hardly traceable. At the South, however, it left a peculiar impress, not more upon its statutory than on its unwritten law. Up to 1800 it had been, for some centuries at least, an accepted part of the unwritten Common Law that the presumption of freedom existed in favor of every man. The judges of the South in the due and proper exercise of the functions of the Anglo-Saxon jurist, because of the supreme importance of the institution of slavery and because of the fact that the slave was usually a person having a visible admixture of colored blood, reversed this rule as to such, and declared that the presumption as to them was that they were bondmen and the

onus of proving that they were entitled to be free devolved upon them. In like manner the rule as to self-defence and provocation in case of assault were modified, impertinent language from a colored man, although he might be free, being held to afford and to be the same excuse for an assault, as a blow from a white man.

On these and other adjudications of similar character was built up the Common Law of slavery, the influence of which is to-day the most dangerous sentiment which yet remains to threaten the power of the Republic.

Another instance of like character, remarkable for its boldness yet accepted because of its justice and propriety, was the assertion by a distinguished judge of a Common Law admiralty jurisdiction over the commerce of the great lakes without any statutory authority.

It is but a few years since the new conditions of railroad transportation of passengers required the Supreme Court of the United States to reverse the former rule of the Common Law and make a new one. "The carrier of passengers by the dangerous instrumentality of steam," said the Court, "must be held to the highest degree of diligence consistent with existing and practicable safeguards." This has now become the Common Law of all English-speaking peoples.

In the arid regions of the West where questions affecting the distribution and supply of water are frequent, the courts by common consent apparently, have recognized and accepted the legal rules governing such transactions in India, where systems of irrigation have been in operation for thousands of years. But in daily practice the practitioner sees these rules reversed, modified, or new ones substituted in these days of scientific progress with a frequency that ought long ago to have shown the most unobservant that the Common Law was not a specific system of legal rules, but a universal method of formulating and applying legal principles adapted to infinitely varying conditions as seen by men of varying inheritance or acquired impulses.

A *ni si prius* judge in New Jersey decided that a bequest to Henry George to enable him to extend the knowledge of his Single Tax system was contrary to Common Law as tending to the subversion of good government. A hundred years ago this same principle was held to defeat the action of one of the most distinguished English scholars seeking to recover for the destruction of books and manuscripts by a mob. Fortunately, in the latter case, the appellate court had advanced far enough to declare that the Common Law needed a new rule, and that it was lawful always to advocate a change of political methods.

Thousands of such instances might be cited from the volumes of American reports showing clearly that this Common Law of which we boast is not a mere system of rules, but a method of formulating legal rules to which English jurisprudence owes the whole volume of its equity, and which is still enlarging, enriching, modifying, restricting and adapting the unwritten law to the swiftly changing conditions of modern life, is as stable as the human conscience and alert as the eye of science. As is always true of judicature it is at once a cause and consequence. Having its root in the peculiar individuality of the Visigoth, it both strengthened and was strengthened by British insularity. It nourished the colonizing spirit that sent continuous swarms from the parent hive, each having in it the strange instinctive germ of independent organization and self-directing power. The Common Law which was derived from the mother country has already received its fullest development in that newer England which rose out of the sea to protest against violation and debasement. What its future will be depends upon the character of those who administer it and the sentiment of the peoples whose servant it becomes. It is the mainspring of Anglo-Saxon progress and liberty, not because of any peculiar and in-

herent excellence, but because it offers a free and untrammeled opportunity for the expression of the popular will and conscience in the construction of laws and the adjustment of individual rights to new conditions.

Thus far it has proved an insurmountable obstacle to eminence in our jurisprudence of men of alien birth. The Old World has sent us many brilliant minds which have deservedly taken the highest rank in other callings and professions, but hardly one has been able to surmount the obstacles which the Common Law jealously puts in the path of those who seek to approach her shrine without comprehending the spirit it represents. At every point where it has touched other systems of jurisprudence it has maintained its own distinctive character, but has drained them dry of every adaptable quality. On the plains of India it has assimilated the customs of a hundred peoples and the wisdom of a thousand ages. At the Cape of Good Hope it has ensnared the Dutchman in its toils and applied the law of Holland to the arid holding of the Boer. In Canada it has overcome the tenacious grip of French custom and tradition. Louisiana has become the land of its re-birth in that code which had its beginning in America in the brain of Livingstone, the young New Yorker toiling in his dingy office in the Crescent City.

It is worth something to be enlisted in the service of such a power, and it is well to remember that while one may be a fair practitioner and from a business point of view a successful one with but scant comprehension of the scope and glory of the Common Law, yet he can never become eminent at any English bar, or worthily administer the law in any tribunal of English-speaking people until the unwritten law is written in his heart, and the Common Law rises instinctively in his mind when he hears the tale of injustice or misfortune.

It is not the facts of the Common Law that have made it a priceless boon to humanity and the beacon light of civilization, but its spirit. It adopts the truth whether it be found in palace or hovel. It bows submissively to the verdict of the twelve — it matters not how humble, but bids defiance to the fiat of the king.

A noted American jurist when asked near the close of a long and honorable career what facts connected with it afforded him the most gratifaction, replied: "I have corrected one error which crept into the Common Law more than a century ago, which had received the endorsement of all English courts during that time — and that correction has now been accepted at Westminister." It may not be the privilege of every practitioner to heal so ancient an error, but it is within the power of the humblest to strengthen and confirm some beneficent tendency of that spirit which is a guardian angel to the brave and free and a malign influence only to the sluggard, the craven and the slave.

MAYVILLE, NEW YORK.

THE ELASTICITY OF THE CONSTITUTION

By Ernest Bruncken.

THE question, suddenly so widely discussed, whether the constitution of the United States has and ought to have to us of the present day precisely the same meaning it had to its framers, or whether its provisions are general enough to permit the growth of new legal and political conceptions without breaking the framework, invites a re-examination of the principles according to which written constitutions should be interpreted. I do not propose, within the limits of a magazine article, to attack so great a problem in its entirety, but merely to suggest a single phase of it.

The interpretation of legal documents is inextricably bound up with the part played in our system by precedents. To the rule that "a solemn decision upon a point of law, arising in any given case, becomes an authority in a like case" (1 Kent's Comm. 476) we owe an amount of stability in our legal principles, not enjoyed to the same extent under systems recognizing precedents as advisory only. But almost as long as the rule has prevailed, the voices of the best lawyers have been heard to warn against the common misconception, that a decision once given, even though it be palpably erroneous, cannot thereafter be rectified but must forever leave the law floundering in the morass. "Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it." (Kent's Comm, 477.) But it is not alone where a series of decisions has been plainly unreasonable, that an overruling of precedents is quite permissible within the spirit of our system. "Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time." (Kent's Comm. 479.)

The force of opinion, which in the words of the great Chancellor controls the practice of the courts, has played a very important part in the interpretation of the constitution. For while the courts rarely find it expedient to set forth in so many words their fundamental ideas regarding the nature and purpose of government or the relation of the individual to the state, it is evident that what a judge thinks on these fundamental subjects must affect his reasoning on the true meaning of the constitution. Now it seems to me that it is entirely within the true scope of the rule of *stare decisis*, and compatible with the greatest reverence for precedents, if we set aside as obsolete interpretations based on such fundamental opinions, whenever these have ceased to be the opinions generally held by and influencing the conduct of the people who are ruled by the constitution. Such departure from obsolete precedents is in no sense a stretching of the plain words of the constitution. It is simply a continuation of the process by which the common law has been developed from the first crude beginnings, by which the concept of a corporation as a juridical person has been introduced, or the modern law of contracts been fashioned.

I can more easily make my meaning plain by considering a concrete instance. In the recent case of People *v.* Williams (81 Northeastern Rep., 778) the New York Court of Appeals have held that a statute prohibiting night work of adult women in

factories is such an interference with the liberty of these women that it comes within the condemnation of the fourteenth amendment, guaranteeing to all persons the enjoyment of life, liberty and property. In criticising this case, I wish to leave out of the question the contention that the statute might have been upheld as a proper exercise of the police power for the protection of the public health and morals, a proposition expressly repudiated by the court. The conception of liberty on which this decision was based is the outgrowth of certain fundamental opinions regarding the nature of government. If, as I believe to be the case, these opinions are not at the present time held either by political scholars, investigators and philosophers, or by the great body of the people, then the decision based thereon should not be considered a binding rule in future cases.

It is matter of common knowledge among educated persons that for the better part of a century the American people accepted with substantial unanimity a body of doctrines often connected with the name of Thomas Jefferson, although it had been advocated and developed for some two hundred years by a series of writers and thinkers, some of the most eminent among whom were Althusius, Hugo Grotius, John Locke and Rousseau. It is, of course, impossible to define these doctrines in a single sentence. But for our present purpose it may be permissible to express their essential idea as the belief that the true function of government is merely to prevent citizens from interfering with the rights of each other. All the work of the world ought to be done by the voluntary activity of individuals, according to the manner which seems best to each of them. There can be no doubt that substantially these views were in the minds of the statesmen who framed and the people who, through their representatives, ratified the fourteenth amendment to the constitution of the United States. When they inserted in that amendment a provision prohibiting the states from depriving any person of liberty without due process of law, they meant by liberty the right to employ one's faculties in any way one choose. That includes the right to make a contract to labor at any time one sees fit. The Supreme Court of the United States so interpreted the word "liberty" (Allgeyer *v.* Louisiana, 165 U. S. 578), and a long series of federal and state cases have approved that construction. Consequently the New York Court of Appeals was following undoubted precedents when it declared the women's night work act unconstitutional. In the spirit of the framers of the fourteenth amendment, it protected the liberty of the citizen from the oppression of a tyrannical legislature.

Yet one need but state it in this form to impress the reader with the thought that there must be a flaw in the reasoning. To any person living in the world of men and not in the cloistered seclusion of judicial chambers, it is quite clear that the legislature did not intend an attack upon liberty when it passed that act. Rather, it meant to protect such liberty by removing conditions that hampered the full enjoyment of the right to the "pursuit of happiness."

The women of New York did not clamor for the right to toil at night in factories. Rather, they and their friends had urged the passage of that act, because they thought it would protect them against a social condition which compelled them, through the force of competition, to consent to so unnatural and harmful a mode of life. When the decision was rendered, those whom the court professed to protect felt themselves most aggrieved.

The truth is that a large and growing, possibly the greater, number of people in America no longer accept as true the doctrines on which the judicial construction of the word liberty, as used in the constitution, is based. That conception itself is by no means of ancient lineage in the law. In older English statutes, from Magna Charta

down, and in the writings of the old English lawyers, liberty denotes nothing more than absence of personal restraint. (See on this point Shattuck, The true meaning of the term liberty, etc., 4 Harv. Law Rev., 365.) It is altogether probable that to most people of the present time it connotes ideas different from both these older ones.

A fundamental and undisputed rule of interpretation is that words must be understood in their ordinary meaning unless it clearly appears that they are used in some special, unusual sense. If it should appear that the word liberty is not ordinarily used, by the people of to-day, in the sense attributed to it by the courts, would there by any warrant for continuing to so interpret it? It is no answer to say, that at the time when the fourteenth amendment was adopted, people did use it in that sense. Fifty years ago the word "write" meant exclusively writing with the pen, pencil or stylus. Would that be a reason for holding that typewriting could not be included in the word "writing" as used in a statute passed years ago?

I have been unable to discover a case in which it was held, that where the meaning of a word used in a statute or constitution has become modified in the popular mind, the courts must nevertheless adhere to the obsolete sense. Common reason would, teach one differently, with the exception, perhaps, of a possible case where an acceptation of the modified sense would work an absurdity. Such is evidently not the case here. On the contrary, in the opinion of, probably, a majority of modern people, the sense given to the word liberty, by the precedents, works a palpable absurdity when applied to measures adopted for the protection of the people against some of the evils of industrial competition.

In the words of Lord Ellenborough: "*Communis opinio* is evidence of what the law is." (Isherwood *v.* Oldknow, 3 Maule & Sel., 396.)

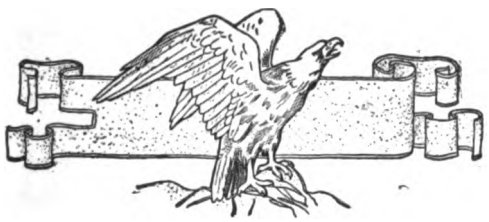
Nor is this a case for applying the rule that a series of precedents should be adhered to, though the decision was originally erroneous, because it is better to abide by a faulty law than have a law unstable and changing. That rule is very properly followed where the precedents have become a guide by which the people have arranged their affairs, so that a reversal would throw the business of the community into confusion. But here we do not have a rule of property; it is rather a rule of public policy, a rule of legislation, as a similar question of interpretation has been called. (Greencastle Turnpike Co. *v.* State, 28 Ind. 382; see also Willis *v.* Owen, 43 Tex. 41.)

So it appears that our law is very well able to purge itself of doctrines regarding the interpretation of the Constitution, when such doctrines are no longer in accord with the prevailing conceptions of the community regarding the nature of government. We may formulate the rule in this way: Whenever a series of precedents is based on conceptions not inherent in the law itself, but growing out of philosophical opinions regarding society and the state, and it appears that such philosophical opinions are no longer commonly accepted, the construction of constitutional provisions should be modified, even in the face of a long line of precedents, so as to harmonize the Constitution with the views commonly entertained in the community.

Such a rule would evidently enable the courts to make the present Constitution acceptable to the people, even if the popular deviation from the social theories of a hundred years ago should progress much farther than it has done as yet, without throwing us back upon the difficult and in many respects unsatisfactory process of constitutional amendment. The proposed rule does not call for any new and radical departure from established practice. It merely attempts to express a rational and explicit basis for what the courts have done again and again. They have upset doctrines well-established by precedents, not only because the underly-

ing philosophy no longer recommended itself to a changed world, but even because mere modes of thought had become modified. Thus, to mention but one instance, the narrow, formal logic, on which the old rule was based that an accord and satisfaction made between a creditor and a third party would not avail the debtor as a defense in an action on the original debt, no longer commended itself to a sense of justice emancipated from scholasticism, and has been abandoned or at least much modified. (Leavitt *v.* Morrow, 6 Ohio St. 71; see also Wellington *v.* Kelly, 84 N. Y. 543, 547.) It would be easy to find many more examples of a similar order. In all probability, a majority of judges now occupying seats in our various courts of last resort are still imbued with the doctrine of individualism and the allied notions that were all but universal a generation ago. Ours is a cautious and conservative profession, and rightfully glories in that fact, but reluctance to except new teachings may be carried to excess. Sir Henry Maine's "Ancient Law" has presumably been read by every law student during the last twenty-five years. But from the bench, we still hear about the "social contract," as if that figment of philosophical imagination were a self-evident truth. (Nunnemacher *v.* State, 129 Wis. 190.) As younger men succeed to the bench, however, it is reasonably certain that the more modern ideas will come in with them, and have their influence upon the future development of the law. Even at the present day, Mr. Justice Holmes is able to declare that "the fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics." (Lochner *v.* New York, 198 U. S. 45, dissenting opinion.) I have tried to show in the above paragraphs that a modification of our interpretation of the Constitution in accordance with modern beliefs is possible without any violent deviation from accepted principles of construction. The recent alarm about a threatened stretching and perverting of that venerable instrument is a baseless fear, as regards other features as well as the particular instance exhibited in this article.

SACRAMENTO, CAL., December, 1907.



SOME LEGAL ASPECTS OF THE PHILIPPINES

By James H. Blount

WHERE one has gone to the other side of the world with an army, taken a part — however small — in the subjugation of a distant and alien people, seen a new government set up on the earth and had an opportunity to watch that government work out, through a series of years, the experience is intensely interesting, especially to a lawyer.

It is this circumstance that caused our good friend the editor of the Green Bag to be kind enough to announce in last November's number that he has persuaded me to write a series of articles of reminiscence concerning the Philippines with a view of entertaining his readers, and at the same time of giving them "some light upon the development of law in our possessions" in the Orient.

Less than a hundred words as to our hundred days' war with Spain will bring us logically to the subject of the present paper.

On April 20, 1898, the Congress of the United States passed the resolution declaring war against Spain, concluding thus:

"That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island (of Cuba) except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people."

On May 1, 1898, Admiral Dewey sank the Spanish fleet at Manila.

On July 3, the squadron under command of Admiral Sampson destroyed the Spanish fleet off Santiago harbor, and on July 17 the City of Santiago de Cuba capitulated to our army.

These were the main events of the Spanish-American War. It lasted actively but little more than three months. And yet how far-reaching have been its consequences!

The peace protocol was signed at Washington on August 12, 1898, by Judge Day for us, and Mr. Cambon, the French Ambassador, acting for Spain. News of the protocol did not reach Manila until August 16, and on the morrow after the signing of the Washington protocol, *i.e.*, on August 13, 1898, the Spanish intrenchments about the City of Manila were bombarded by our navy and stormed and carried by our troops, the city capitulated, the colors of Spain were lowered, and the American flag was hoisted in the City Hall square, amid the dramatic weeping of Spanish señoritas and the muttered curses of Spanish cavaliers.

Then came the first work of the legal department of the army the reduction to writing of the terms of the capitulation. This was done jointly by representatives from the Spanish Judge-Advocate's Corps and our own. The articles of capitulation concluded with these words:

"This city, its inhabitants, its churches and religious worship, its educational establishments, and its private property of all descriptions, are placed under the special safeguard of the faith and honor of the American Army."

This clause was put in because the Spaniards stood in mortal terror of the pent-up hatred of Aguinaldo's exultant army, which had taken part in the general advance.

The next official document dealing with the legal status of the new territory was a proclamation of General Merritt's, issued, I believe, on August 14, 1898, pursuant to a letter from President McKinley to the Secretary of War for the General's guidance, prepared after Dewey's naval victory occurred and the consequent necessity arose to send troops to the Philippine Islands.

The part of this now famous state paper of the late lamented President which deals with the law of nations as to the legal status of a

country just conquered, is interesting, not only for the stately purity of its diction, but because its reproduction is a necessary step in this effort briefly to present the present status of the Philippine *corpus juris*.

The part of it referred to is as follows:

"Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion."

. . . Article 8 of the Treaty of Paris signed December 10, 1898, provided, with regard to our taking over the Philippines from Spain, that "the . . . cession . . .can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of (*i.e.*, belonging to) . . . public or private establishments, ecclesiastical . . . bodies or . . . private individuals."

There you have a complete guarantee on our part of all vested rights existing when the treaty was concluded. It is as necessary for a lawyer in the Philippines to acquaint himself with the whole body of the Spanish Law, *i.e.*, with what we may for the moment call the Common Law of Spain as it stood prior to December 10, 1898, as it is for an American law student to read Blackstone.

It will be observed that in the President's above-quoted instruction to the General commanding the first expedition to the Philippines, permission is impliedly given to make changes in the old law where there are defects in it not "compatible with the new order of things," the specific clause now alluded to being this:

"The municipal laws such as affect private rights . . . and provide for . . . the punishment of crime are considered as continuing in force *so far as they are compatible with the new order of things.*"

After a year or more of experience with the native courts, it became evident that the Spanish criminal procedure was entirely incompatible with American ideas of administering justice. For instance, its red tape was so interminable as to amount practically to a denial of justice. Again, evidence would be presented in court against absent persons, the testimony would be reduced to writing, slowly from day to day, and when enough was accumulated to convict, the man would be seized and imprisoned, informed that he was guilty of such and such a crime, and, if he denied it, told that he must prove his innocence.

Without further specific instances, it will at once become apparent that under President McKinley's instructions aforesaid, it was both permissible and advisable, to put in force legislation containing the Bill of Rights and other fundamentals of our law, including the right to a writ of *Habeas Corpus*, so that a man should always enjoy the presumption of innocence until proven guilty, the right to be confronted by and to cross-examine the witnesses against him, to have counsel and a copy of the charges, etc.

To meet this need, on April 23, 1900, there was published what has since been known, continuously down to the present time, as General Orders 58, Office of United States Military Governor, Series of 1900.

It was simply a piece of legislation, a code of criminal procedure, drawn principally by Maj. R. W. Young, a lawyer of Salt Lake City, a volunteer officer of the Utah Battery, who before the war had been Chairman of the Utah Code Commission.[1]

[1] Under a misapprehension, the writer has heretofore stated publicly (in a paper read before the

This gentleman little suspected, in all probability, what a splendid and enduring piece of work he was doing. After the Civil Commission of five members, headed by Governor Taft, came out to the Islands to take charge in June, 1900, some friction, not, however, of a serious nature, arose from time to time between them and the military authorities, the latter considering the three eminent lawyers among the new comers, Messrs. Taft, Wright, and Ide, as mere high-toned theorists, and the two professors, Messrs. Moses and Worcester as mere lucky carpet-baggers. As the time passed and the situation grew less and less harmonious, the disposition of the Taft Commission to consider the military authorities as unskilled in the law grew apace, and having the power to do so from the President, the common chief of all, they undid a good deal of what the military had done. But never did they find fault with this General Order 58. It stands upon the statute books of the Philippine Islands today with a few minor amendments, a monument, largely to Major Young.

It has been translated into Spanish, and the native dialects, and every lawyer in the Archipelago, be he Filipino, Spaniard, or American, is familiar with it. In an article which appeared in the American Monthly *Review of Reviews* for September, 1905, my successor in office as judge of the twelfth judicial district of the Philippine Islands, Hon. Charles S. Lobingier, of Nebraska, speaks of General Order 58 as "a precise and yet elaborate, humane, and up-to-date code of criminal procedure." Judge Lobingier goes on to say that the authorship of this important piece of legislation has been ascribed to Secretary Root, adding "I cannot say how authentically." I concur in the opinion he expresses that "it is certainly worthy of so distinguished a lawyer." It becomes apparent from the foregoing that, though not quite so distinguished as the Secretary, the gentleman from Utah aforesaid is efficient in drafting of laws, as well as in commanding artillery in action.

At last accounts the Spanish Code of Substantive Criminal Law was still in force, though a project to get up an American code as a substitute, and repeal the old code bodily, has been pending since the foundation of the Taft civil government on July 4, 1901. The Americans, as may be readily imagined, had originally come out to the Philippines flushed with victory, and before the passions engendered by the Spanish War had subsided; and hence were inclined to look with disfavor upon Spaniards and things Spanish in general. When Judge Taft and his colleagues of the Philippine Commission entered upon their labors at Manila in 1900, they were no exceptions to this general statement, but, on the contrary, felt as the great majority of their fellow countrymen did about the matter.

This original proposal to repeal the Spanish Penal Code emanated from the American lawyers of the Commission, who, however eminent, were not then familiar with it. The better acquainted with it we American judges became, the less imperative seemed the necessity for abolishing it entirely.

About Christmas, 1904, the American judges and the Attorney General, were all asked to read the proposed New Penal Code, and make suggestions concerning it. A committee from our number was appointed to prepare suggestions for the new code accordingly, but the general opinion with us was that there ought not to be an entirely new code at all, but only a code built upon the old one by amendment and

Georgia Bar Association) that this work was done by Lieut. Col. Enoch H. Crowder, of the Judge Advocate's Corps of the Regular Army. He was under that impression at the time, though the impression was not gotten from Colonel Crowder. It has since been corrected, some time ago, in a personal letter from Major Young to the undersigned, written at a time when neither Major Young nor myself had any special reason to suppose that the subject would ever come up again in any public way.

elimination. The preparation of this recommendation was assigned by general consent to the author of this paper:

Our recommendation closed thus:

"In conclusion, it is suggested that the gentlemen who constitute the Code Commission which prepared the present proposed code, were unable to devote all the time to it that they would have liked to devote to work so important. They did this work in addition to their regular duties, by working over time. They did it within three or four months, if we are correctly informed. The Spanish Penal Code is the product of the best legal minds in Spain, focussed upon the subject through three or four centuries or more, and from our point of view it can hardly be affirmed that it would be wise to thus undo the work of three or four centuries in as many months."

Of course, moreover, if they did not accept this recommendation, but adopted a new code *in toto*, they would throw away a wealth of precedent, decisions of the Spanish courts construing the laws, words and phrases of the old code. But both the Commission and the Judiciary were agreed about the necessity for a number of radical changes in the punishments fixed by the old Spanish Code.

For instance, the great fundamental difference between the Spanish criminal jurisprudence and our own lies in the relative severity with which crimes against life, and crimes against property, are punished. We have Americans now in the Philippine penitentiary serving sentences of nearly twenty years for embezzlement of public funds, such sentences being based upon proof which, in the United States, would probably be punishable with not more than ten years, and in many cases with one-half or one-fourth of that. On the other hand, there are two servant lads now there, sentenced by the undersigned for killing their respective masters, one of the deceased a Spanish tobacco planter, the other deceased an American miner. The maximum penalty which could be imposed upon these young murderers under the Spanish Penal Code, was seventeen years and four months, and they were given the limit. Both homicides were cold-blooded assassinations. Each of the unfortunate deceased persons was sleeping at the time the murderer crept to his bedside and stabbed him to death; but in both cases the defendant was between the ages of fifteen and eighteen years, and this mitigating circumstance prevented the imposition of the capital penalty. It will thus be seen that the Anglo-Saxon system of jurisprudence affords better protection to human life than the Spanish. At least it comes nearer to demanding a life for a life — "an eye for an eye, and a tooth for a tooth." It will also be seen that the Spanish law is unduly severe as to the unlawful taking of the property of another.

Let us now turn to the domain of Civil Procedure. The best piece of legal work done in the Philippines since the American occupation is the Code of Civil Procedure, enacted September 1, 1901, and called the "Ide Code." It was prepared by the Hon. Henry C. Ide, of Vermont, then head of the Department of Justice, and later Governor-General of the Islands. It is patterned after the Codes of Vermont, Missouri, California, Georgia, and other states of our Union known to the American pleader as Code-Pleading States.

The "Ide Code" contains 796 sections and covers 146 pages of the size and style of printing of the United States Revised Statutes, Edition of 1878. It did away with the tedious and expensive Spanish civil procedure, as Major Young's work had already done away with the old Spanish method of criminal pleading and practice, and was a great boon to the country.

Later, Judge Ide also drew up a Land Registration Law, copied mainly from that of Massachusetts. This was duly enacted, and to-day the Torrens' System of registering land titles prevails in the Philippines.

The work done by Judge Ide in improving the law of civil procedure, like that of Major Young on the criminal side, very greatly decreased the Law's delay, which under the Spanish regime had too often practically amounted to a denial of justice. But the Spanish substantive law governing property rights, like that governing personal liberty, is, as a whole, a noble and enduring piece of workmanship. Their Codes are compact, yet sufficient. Their principles had already stood the test of time when we as a nation were in our swaddling clothes. Before the Norman Conquest of England, Spain had prepared a Code called the *Siete Partidas* (seven parts), which a respectable English-speaking historian has characterized as "the most valuable monument of legislation, not merely of Spain, but of Europe, since the publication of the Roman (Justinian) Code." The writer well recalls reading a printed brief concerning certain church property litigation, prepared at Manila by the late Archbishop Chapelle, the Apostolic Delegate, one of the most learned Catholic prelates of modern times, in which his Grace referred to the *Siete Partidas* in terms of eloquent praise, as lofty in tone as some of Gibbon's references to the Code, Pandects, and Institutes of Justinian.

So much for the great body of law now in force in the Philippines governing the relations of individuals with each other, as contrasted with the public law dealing with the state and citizen.

The Philippine Government Act of July 1, 1902, extended to the Filipinos all the guarantees of the Bill of Rights of our own constitution except the right to bear arms and the right of trial by jury. Obviously, it is as yet wise to make the former exception. As to the latter well, the jury system, after all, in this enlightened country, is not an unalloyed and perfect delight.

This concludes in a general way those legal aspects of the Philippines which are legitimately entitled to interest the scholarly lawyer as such. Incidentally the hope has been entertained that should a copy of this paper hereafter fall into the hands of any young American attorney contemplating the Islands as a place to cast his fortunes, it might be helpful.

There are few lawyers, if any, in this great country who could have done our "law-giving" in the Philippines better than did Major Young, and later Governor Ide, and their respective co-laborers. It was not like the work of code-revising under a settled system of jurisprudence. The legislation they successfully worked out, taken as a whole, ought to rank in the annals of jurisprudence along with the East Indian Code prepared by Lord Macaulay and others at Calcutta in 1834–1838.

But there is one law upon the statute books of the Philippine Islands which ought to be repealed. It permits the Insular Constabulary, or Rural Police, or other civilian authorities charged with the preservation of public order, when not strong enough to effectually otherwise handle the outlaw bands which infest much of the country and prey upon the inhabitants, to corral the peaceably inclined rural population into the larger towns and keep them there indefinitely, while the peace officers are trying to cope with the bandits. The spirit of the law is to this effect, that the authorities may say to all persons living in a given country or province or territory, even though it be a territory covering many miles: "On or before a certain day you must come in and dwell, until further orders, within a given radius, (say within three miles of the center of a given town) upon penalty of being considered as public enemies and treated as such."

It will be observed that the statute in question, though it restrains people of their liberty, and necessarily causes much deprivation of property without due process of the law, contains no word looking to suspension of the writ of *habeas corpus*, or the declaring of martial law.

It run thus:

"In provinces which are *infested to such an extent with ladrones or outlaws that the lives and property of residents in the out-lying barrios*[1] *are rendered wholly insecure* by continued predatory raids, and such outlying barrios thus furnish to the ladrones or outlaws their sources of food supply, *and it is not possible with the available police forces constantly to provide protection* to such barrios, it shall be within the power of the Civil Governor, upon resolution of the Philippine Commission, to authorize the provincial governor to order that the residents of such outlying barrios be temporarily brought within stated proximity to the poblacion[2] or larger barrios of the municipality, there to remain until necessity for such order ceases to exist, etc., etc." Acts United States Philippine, Number 781, Section 6, enacted June 1, 1903.

Section 5 of the Act of Congress approved July 1, 1902, known as the Philippine Government Act, provides: "That no law shall be enacted which shall deprive any person of life, liberty or property without due process of law," and further on it also provides for suspension of the writ of *habeas corpus* "when in cases of rebellion, insurrection, or invasion, the public safety may require it."

The effect of the reconcentration law above set forth, and the practice under it, has been to deprive people, by reconcentration, of their liberty or property, or both, without due process of law. What reader of this magazine, if he were a *nisi prius* judge in the Philippines, and one of these reconcentrados brought in his court a petition for *habeas corpus*, would hesitate in the least to grant the writ, and incidentally declare this reconcentration law null and void as being in conflict with the Act of Congress?

This matter of not suspending the writ of *habeas corpus* and declaring martial law, while herding or reconcentrating innocent people together in great masses, is no mere technicality. It means that you have got to feed them through inexperienced agents, with supplies purchased and transported in a more or less crude and defective manner. The whole situation is handled by civilians, not by officers of the United States Army trained to quartermaster and commissary work, like those who so superbly handled the situation just after the San Francisco earthquake of 1906. Even in the absence of affirmative evidence, one may safely assume that if you crowd together in a limited area some thousands of ignorant peasants, with their women — still more ignorant, and more helpless — and their little children born, and to be born, and their old people tottering at the verge of the latter end, some of them are going to die of starvation during the period of reconcentration if their rations are to be conveyed to them by crude and imperfect means of transportation and distributed by inexperienced hands. If we ever have reconcentration again in the Philippines in the future — as we have had in the past — a decent respect for the opinions of mankind requires that our style of reconcentration shall bear no resemblance to that practised by Weyler in Cuba, for which we drove the Spaniards from the Western Hemisphere. When we find it necessary, let us look matters squarely in the face, and turn the situation over to the army — applying the knife to all abscesses forming in the body politic, so long as we continue to be the doctor in charge of the case.

MACON, GA., December, 1907.

[1] A barrio is a fractional part, or subdivision of a township.

[2] The poblacion is the center of population of the township — the town proper.

CRIMINAL RESPONSIBILITY OF ANIMALS[1]

By W. F. Dodd.

ONE of the most curious and interesting customs of mediæval Europe was that of holding animals criminally responsible for injury to persons or property, as if they were rational beings. Various reasons were assigned for enforcing such responsibility. In some cases it was assumed that the animals themselves acted maliciously, but more frequently it was asserted that they were possessed with devils or evil spirits, and that such evil spirits were the sufferers by the torture and execution inflicted upon the animals. These curious ideas have long ago given way before the progress of popular education in the more enlightened countries, but still persist in many catholic regions of Europe, where superstition still holds sway.

As late as 1739 a French Jesuit priest wrote in support of the view that animals are incarnations of evil spirits. His theory was that pagans and unbaptized persons were inhabited by devils, but that with the diminution of such persons by conversion and infant baptism, the evil spirits had sought refuge in animals. The same idea is used by Goethe who has Mephistopheles reveal himself to Faust as:

> "The Lord of rats and eke of mice,
> Of flies and frogs, bed-bugs and lice."

Not all devils, however, sought habitations in the bodies of animals. Some remained in living humans and others assumed the form and features of dead persons, and wandered about as ghosts and hobgoblins.

The church used this theory to good purpose by pretending to control pests of insects and of other noxious creatures. It claimed that not only human beings but also the members of the lower animal world were under its control, and pests which were considered the work of evil spirits were driven away or destroyed by religious ceremonies sanctioned by the clergy. Such ceremonies were considered to be efficacious only if all the inhabitants of the community paid the tithes due to the church. If, as in many cases, the pests were considered punishments sent as an evidence of divine wrath, the unfortunate community could only avert such wrath by prayers and payment of tithes. In either case the pecuniary interests of the church were safeguarded.

The curious feature of conduct towards offending animals was that no punishments were permitted to be imposed upon them without trial and condemnation in accordance with regular judicial procedure. Even mad dogs were in certain cases tried and sentenced before being put to death. A hangman who in Franconia in 1576 hanged a sow which had been committed to his keeping to await trial, was forced to flee from the country because of his impudent usurpation of judicial authority. Animals were usually tried by the ecclesiastical courts, but these courts did not have authority to inflict capital punishment, and offenses subject to the death penalty were tried by the civil courts.

Bartholomew Chassenée, a distinguished French lawyer of the sixteenth century, is said to have gained his reputation by the defense of some rats charged with having eaten the barley crop of the province in which he practiced. Chassenée obtained a postponement of the trial on the ground that time would be required to serve notice on his clients, inasmuch as they were dispersed over a large territory. The rats did not appear at the appointed time and he excused their absence by asserting that they could not come with safety, because of the

[1] This paper is principally a summary of a recent book by E. P. Evans on the "Criminal Prosecution and Capital Punishment of Animals." London, 1906.

vigilance of their hereditary enemies, the cats, which lay in wait for them. This plea was seriously argued and admitted. How the trial terminated is not a matter of record.

Chassenée later wrote a treatise on the excommunication of animals. He did not doubt that insects and other animals could be forced to withdraw from a place where they were doing harm, under penalty of perpetual malediction; and confined his book largely to the question of procedure. He laid especial emphasis upon the observance of legal forms. An excommunication would be void if pronounced after a trial not regular in every respect.

A local French historian records such a trial as having taken place in 1584. There was in that year a great pest of caterpillars in Dauphiné. He says: "The grand vicar of Valence cited the caterpillars to appear before him, and appointed a counsellor to defend them. The case was solemnly pleaded and they were condemned to leave the diocese. But they did not obey the order. Human justice does not have control over the instruments of divine justice. It was decided to proceed against the animals by anathema and imprecation, and, as they call it, by malediction and excommunication. But two lawyers and two theologians having been consulted, they persuaded the grand vicar to resort only to adjuration, prayer, and the sprinkling of holy water." The caterpillars disappeared, but the skeptical historian adds that "the life of these insects is short, and the devotions having continued several months were credited by the people with having exterminated the pest."[1]

In some cases the obnoxious animals were generously forewarned of threatened punishment. In Beaujeu in 1488 insects were warned to cease their depredations, and the bishop's proclamation continued, "if they do not heed this our command, we excommunicate them and smite them with our anathema."

As has been said, cases involving the death penalty were tried by the civil courts. In 1379 three sows which had killed the son of a swineherd were, after due process of law, condemned to death. The swineherd was at the time attending two herds of swine, which by their cries and actions manifested their approval of the crime of the three sows, and all the swine in the two herds were sentenced to death as accomplices in the murder, but were graciously pardoned by Philip, Duke of Burgundy.

In 1394 a pig was hanged at Montaign in France for having sacrilegiously eaten a consecrated wafer, and in another case where a pig was on trial for killing a child it was urged as an aggravation of the offence that the pig ate of the child's flesh, "although it was Friday."

There are frequent references in non-legal literature to the trial and execution of animals. Perhaps few people in reading *Les Plaideurs* have thought of the trial of the dog as more than a farce, yet if we remember that such trials were not infrequent in the France in which Racine lived, the scene may well be considered as a satire upon a grave judicial abuse. Shakespeare refers to such a practice when he has Gratiano say to Shylock:

> "thy currish spirit
> Governed a wolf, who hanged for human slaughter,
> Even from the gallows did his fell soul fleet,
> And, whilst thou lay'st in thy unhallowed dam,
> Infused itself in thee; for thy desires
> Are wolfish, bloody, starved and ravenous."

WASHINGTON, D. C., December, 1907.

[1] Chorier, "Histoire générale du Dauphiné," quoted in "Thémis on Bibliothèque du Juris consulte," I, 196.

THE WORK AND POWERS OF THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

By Robert C. Smith, K. C.

CANADA has a federal constitution under which there is a general Parliament which makes laws on certain subjects for the Dominion generally. It is divided into provinces, each having its own legislature empowered to make laws on certain subjects for the province. In the division of legislative powers between these bodies, the Parliament of Canada is empowered to make laws upon the subject of railways connecting one province with another or others of the provinces, or extending beyond the limits of any province. Also as respects such works, as, although wholly situated within one province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

Under this class of subjects, the Parliament of Canada has incorporated many railway companies for the construction and operation of railways, and has authorized such construction and operation usually by companies, but, in some instances, by the government of Canada; and it has also, in many cases, declared railways constructed under authority of provincial legislatures, to be works for the general advantage of Canada, and has thereafter assumed legislative authority over them. Provincial legislatures have authorized the construction and operation of railways within their respective provinces.

The Board of Railway Commissioners for Canada was constituted under a general act of the Parliament of Canada, which applies to all persons, companies and railways, other than government railways, within the legislative authority of the Parliament of Canada. It applies to railways, the construction or operation of which are authorized by provincial statutes, where such railways connect with or cross a railway or railways within the legislative authority of the Parliament of Canada, in certain particulars only —

(*a*) the connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;

(*b*) the through traffic upon a railway or tramway and all matters appertaining thereto;

(*c*) criminal matters, including offences and penalties; and,

(*d*) navigable waters.

Thus, government railways are not subject to the authority of the Board, and provincial railways are so subject only in respect to such of the matters just mentioned as fall within the jurisdiction of the Board.

The Board of Railway Commissioners was constituted by the Railway Act of 1903, which came into force on the first day of February, 1904. The powers and duties assigned to the Board are numerous and of varied character, including approval of plans, grade crossings, spur tracks and location of stations. Railway companies are required to report to the Board the occurrence of accidents on their lines, and the Board has officials who inquire into the causes of accidents, and it may order a railway company to suspend or dismiss any employee of the company whom it may deem to have been negligent or wilful in respect of any such accident. The Board is empowered to make general regulations dealing with many matters with which the statute has not specifically dealt, and may impose penalties for their breach. For example, limitation of speed, use of whistles, and safety devices, uniformity of rolling

stock, and operating rules, and may make orders and regulations, generally providing for the protection of property, and the protection, safety, accommodation and comfort of the public, and of the employees of the company in the running and operating of trains by the company.

Many other specific powers, too numerous to mention, are given to the Board.

The Board is authorized, by general provisions, to order a railway company to do anything required by the statute, and to forbid the doing or continuing of anything contrary to the statute. The Board is made a Court of Record, and is given full jurisdiction to hear and determine all matters, whether of law or of fact; and, as respects the enforcement of its orders and many other matters, it is given all such powers, rights and privileges as are vested in a Superior Court. The decision of the Board upon any question of fact is binding and conclusive upon all companies and persons, and in all courts. There may be an appeal from an order of the Board to the Supreme Court of Canada upon any question of law, under certain conditions. An unlimited right of appeal from the Board to the Governor General in Council is given. The Board may exercise its jurisdiction on complaint of any party interested, or it may, of its own motion, and is obliged at the request of the Minister of Railways to inquire into, hear, and determine any matter or thing which, under the Act, it might inquire into, hear, and determine upon application or complaint.

The rules of the Board require applications and complaints to be made in writing and to be signed by the applicant or his solicitor, or, in the case of a corporate body or company, by its manager, secretary, or solicitor. The application is required to contain a clear and concise statement of the facts, the grounds of the application, the section of the Act under which the same is made, and the nature of the order applied for, or the relief or remedy to which the applicant claims to be entitled. It has to be divided into paragraphs, each of which, as nearly as possible, is to be confined to a distinct portion of the subject, and the paragraphs are to be numbered consecutively. The application or complaint is to be endorsed with the name and address of the applicant, or, if there be a solicitor acting for him in the matter, with the name and address of the solicitor. In many cases it is required to be accompanied by maps, plans, etc. The applicant is to serve the application, and ten days is given for the respondent or respondents to answer it. The applicant may also reply to the answer. Any party is entitled to have a matter in which he is interested heard in open court, otherwise matters are frequently disposed of in an informal way by the Board upon correspondence.

As the Board has power to inquire into matters of its own motion, it is not strict in requiring applicants, and particularly illiterate persons, to conform to such rules, but often calls upon a railway company, upon a mere letter or informal complaint, to state its position.

Experts are appointed to advise the Board, chiefly in engineering and traffic matters.

Tariffs of tolls for passenger carriage are divided into two classes — standard passenger tariffs and special passenger tariffs. Tariffs of tolls for the carriage of goods are divided into three classes — standard freight tariffs, special freight tariffs, and competitive tariffs. All tariffs are required to be filed with the Board, and are to be published in a certain way, unless otherwise ordered by the Board. Standard freight and passenger tariffs are subject to the approval of the Board. Special tariffs and competitive tariffs do not require the express sanction of the Board, but must specify tolls lower than those in the standard tariffs. The competitive tariffs deal with the tolls to or from specified points which the Board may consider, or may have declared, to be competi-

tive points not subject to the long and short haul clause under the provisions of the Act. The Board may disallow any tariff, or any portion of it, which the Board considers to be unjust or unreasonable, or contrary to the provisions of the Act, and may require a company to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of those disallowed.

The classification of freight is subject to the approval of the Board, and it is to be made uniform throughout Canada, as far as may be, having due regard to all proper interests. A company may, with the approval of the Board, or when so directed by the Board, place any goods specified by the Board in a stated class, or remove them from any one class to any higher or lower class. Several changes have been made by the Board from time to time in the existing freight classification, and a new revised and consolidated classification has now been prepared embodying these and some other changes, and will shortly be put in force.

There are the usual provisions against discrimination between persons or localities.

Railway companies are forbidden to charge any money for any services as common carriers, except under the provisions of the Act.

There are also wide provisions regarding the providing of reasonable and proper facilities for traffic, and requiring the interchange of traffic between railways. Companies whose railways connect may be required to agree upon joint tariffs for a continuous route over both; and if they cannot agree upon the amounts of their rates and the division thereof, the Board may determine the matters of difference.

The provisions requiring railway tolls to be approved and making them subject to revision by some authority are not new. Such provisions have been found in all the railway acts of Canada from 1851 down to the present time. Before the Act of 1903 the sanction of the Governor General in Council was necessary, and tolls were subject to revision by the Governor in Council. There was a Committee of the Privy Council for Canada, known as the "Railway Committee," to which complaints and applications on many matters could be made, among which were complaints respecting tolls, discrimination, etc. A certain time was given, after the coming into force of the Act, for railway companies to present their standard tariffs for approval by the Board. Those which have been approved are practically similar to the tariffs that had previously been sanctioned by the Governor in Council. The tolls provided for by these tariffs are generally used for local traffic for short distances, but most commodities are moved at rates provided for by the special tariffs which the railway companies may increase or decrease as they see fit, so long as they keep below the rates in the standard tariffs and subject to the authority of the Board to direct change.

The Board is empowered to prescribe forms of bills of lading and the conditions on which goods shall be carried. Representatives of railway companies have laid before the Board for consideration proposed conditions of carriage, and these have been laid before the leading commercial bodies in Canada for their consideration and such objections to or observations upon them as these bodies may desire to make.

Recently the tolls of telephone and express companies have been made subject to the approval of the Board. These companies have laid their proposed new tariffs before the Board, and inquiries are being made for the purpose of enabling the Board to determine upon the propriety of approving them as presented, or of requiring changes to be made in them.

The Board was in existence for eleven months in 1904, and during that period 705 formal applications were made to the Board. In 1905, 1,197 formal applications were made, and in 1906, 2,269. In 1904, there were 304 orders issued by the Board; in 1905, 538, and in 1906, 1,544.

Among the more important traffic orders

have been the abolition of discriminatory rates,[1] discontinuance of prohibitory rates and prescription of lower rates,[2] numerous re-classification,[3] disallowance of permission to make lower rates to manufacturers than to dealers,[4] occasional authorization of exceptional rates,[5] authority to meet water competition, disallowance of excessive terminal charges,[6] an injunction to agree upon joint tariffs of through rates lower than the combination of locals, though it introduced competition into the local business of the company.[7]

MONTREAL, QUEBEC, December, 1907.

[1] Scobell *v.* Kingston & Pembroke Ry. Co., Case No. 21. Sydenham Glass Co., Case No. 42.
[2] Cooperage Stock, Case No. 43.
[3] Pea Millers' Association, Case No 46. Metallic Shingles, Case No. 126.
[4] C. T. R. Co., Case No. 124.
[5] Party of students at reduced rates.
[6] Wright & Sons, Case No. 320.
[7] Port Rico Lumber Co.

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, facetiæ, and anecdotes.

AN INTERNATIONAL TRIBUNAL.

The general disappointment at the failure of the representatives of the powers at the Hague to finally agree upon a form of permanent international court has drawn especial attention to the recent agreement of the representatives of the Central American States at Washington for the establishment within their lesser spheres of activities of a court of the sort which the larger conference failed to establish. The exact result of the work of the Hague Congress in this respect is not yet clearly understood. Technically at least something appears to have been accomplished, though dependent upon future agreements of which there seems at present little prospect. The work of our delegates, however, will serve at least as a basis for future discussion and the plan which they outlined may become a focus of public opinion, which will ultimately force governments to reconcile their conflicting interests. Indeed, it was hardly fair to expect more progress in so short a time. The difficulty the Editor has experienced in his efforts to obtain from some of the representatives of the United States at the Hague an authoritative account of the results accomplished with reference to such a court lends color to the belief that further efforts are in contemplation which they think it desirable not to embarrass by a premature announcement. A comparison of the results at the Hague with the work of the Washington conference is, of course, unprofitable for the problem presented in the latter gathering was altogether different. The states concerned were of approximately the same size and power and were already drawn together by a community of race, language, and industry, which should lay the foundation for a complete political federation. International jealousy, however, of a highly inflammable kind is to be subjected to the test of judicial fairness in this small experiment and it is not impossible that the example of success which it is hoped this court will afford may exert a moral influence in support of those who advocate the larger project.

INJUNCTIONS.

Mr. Justice Phillimore of the English High Court of Justice has recently expressed an opinion that the exercise of the power of committal for contempt had been carried too far. In this he follows the late Lord Russell of Killowen who once announced his intention of introducing legislation defining and limiting this important function. In this country criticism has taken the form of "anti-injunction" bills, one of which is pending in Congress and is to be vigorously urged during the coming session by the American Federation of Labor. The President in his message also commends the subject to the attention of Congress. It is unfortunate that the subject has become so soon a political issue between organized capital and organized labor, for conservatism and prejudice are likely to confuse the real issues. Though no one familiar with our system of jurisprudence should approve for an instant the abrogation of the preventive jurisdiction of our equity courts or of the power of summary punishment that alone makes it effective, it is a fact we cannot ignore, that through the growth of the extraordinary power of our courts over our economic development, the injunction is most conspicuous in trade disputes. It has become the visible emblem of the power of judges to limit the efforts toward economic advancement of those who believe themselves a majority. If this sociological duty could be transferred from our courts to our legislatures without depriving the former of functions necessary to the administration of justice in the domain of pure law might it not forestall an attack on the integrity of our courts, which many fear as a result of

existing conditions. Unfortunately our legislatures still fail to inspire confidence.

The hostility to injunctions has found new support however, for state officials who are seeking to regulate transportation charges, and the example of hasty and inefficient legislation presented by the recent special session of the Alabama legislature, furnishes a powerful argument in support of those who prefer to trust our law making to the courts. Under pressure from the Governor the legislature passed laws which it supposed were "injunction proof," since they provided that in case a railroad applied to a court to test their legality, penalties should be enforced which might well bankrupt the road. The United States Circuit Court promptly enjoined the enforcement of these laws before the state had a chance to collect the penalties under decisions of the Supreme Court which make it clear that such attempts to coerce citizens into an abandonment of their right to appeal to the federal courts are unconstitutional.

THE DEPARTMENT OF JUSTICE.

The Attorney-General of the United States recommends that in proceedings under the anti-trust and interstate commerce laws the process of courts trying civil cases be given the same scope in obtaining attendance of witnesses as is already permitted in the criminal cases. The present defects have resulted in formal denial of obvious and notorious facts which can be proved by the government only at great expense and after much delay. He also recommends that courts of equity be empowered to take testimony before several examiners simultaneously, and in as many different districts as the courts may deem appropriate. He asks for additional assistants and for a detective bureau. The latter request makes of especial interest a recent address of John Lord O'Brien before the National Civil Service Reform Association, printed in *Good Government* for December (V. XXIV, p. 113), entitled "Competitive Examination for Legal Positions." He calls attention to the fact that the positions in our departments of justice are among the few still exempt from the application of the civil service laws. The extraordinary development of the functions of these departments and the specialized advisory work they require make them peculiarly appropriate for the application of competitive examination. Probably the fact that few abuses of appointing power have so far occurred is the reason that this has hitherto not been brought to public attention.

UNWRITTEN LAW.

It is reported that Senator Davis of the new state of Oklahoma is drafting a bill to codify the so-called unwritten law and afford a legal justification for murder in cases in which local sentiment makes conviction impossible. It will be interesting to observe whether such a bill can become law even in a part of our country where sentiment in favor of such justification has been supposed to be most prevalent and persistent. It will be equally interesting to observe the effect upon the development of the community of such an enactment since this is one of the remedies which has been proposed as a cure for lynching. Will the new state be more or less attractive to settlers if they know that private vengeance has been authorized by law in a class of cases where fabrication of testimony is easy by those whose honor is supposed to have been insulted by the deceased and where the means of disproving testimony of revengeful or neurasthenic women may well be impossible?

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.

Articles on constitutional law appearing in several of the magazines indicate that their constituency is taking a very deep interest in that subject. Legal education also attracts attention this month, three articles dealing with various features of it. Professor Wurts' address shows that the text-book advocates do not believe they have been driven from the field by the case-book. Professor Kales, however, assumes that the merits of text-book and case-book are no longer an issue and goes on to stir up controversy over the next step in the evolution of the case-book. His article and Professor Wambaugh's adverse comment make an interesting discussion.

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. 75). Conclusion of an article begun in the previous number and noted in the December GREEN BAG.

BIOGRAPHY. "Pelatiah Webster — The, Architect of Our Federal Constitution," by Hannis Taylor, *Yale Law Journal* (V. xvii, p. 73). "All the world," says Mr. Taylor, "understands in a vague and general way that certain path-breaking principles entered into the structure of our second Federal Constitution of 1789, which differentiate it from all other systems of federal government that have preceded it. M. de Tocqueville gave formal expression to that understanding when he said: 'This constitution, which may at first be confounded with federal constitutions that have preceded it, rests in truth upon *a wholly novel theory which may be considered a great discovery in modern political science.*' "

The credit for originating this wholly novel theory Mr. Taylor claims for Pelatiah Webster, a Philadelphia merchant born at Lebanon, Conn., in 1725, and graduated at Yale College in 1746. In 1783 he published at Philadelphia, "A Dissertation on the Political Union and Constitution of the United States of North America," which is declared to contain the first expression by any one of the four novel ideas which differentiate our federal system from all which have preceded it. These ideas are: (1) a federal government operating directly on the citizen instead of upon the state as a corporation; (2) the division of the federal head into three departments, legislative, executive and judicial; (3) the division of a one-chamber federal assembly into two chambers; (4) the principle that all powers not specially delegated to the federal government are reserved to the states.

Mr. Taylor declares that the four plans presented to the convention embodying these ideas had simply taken the theory expressed by this pamphlet. A memorial embodying these facts is to be presented to Congress during the present session in order to call public attention to the achievement of the author of the pamphlet of 1783.

BIOGRAPHY. "Lord Young," by the Hon. Lord (Chas. J.) Guthrie, *The Juridical Review* (V. xix, p. 209). An appreciation of the eminent Scotch judge, who died last May.

BIOGRAPHY. "Sir George Mackenzie of Rosehaugh," by George B. Young, *The Juridical Review* (V. xix, p. 266). A short account of the able Scotch lawyer of the seventeenth century who as King's Advocate earned the title of "The Bloody Mackenzie," by his prosecution of the Covenanters.

CONFLICT OF LAWS (Nationality in Turkey.) "De l'Autorité Compétente pour Statuer en Turquiè sur les Questions Relatives à la Nationalité et des Conflits de Lois en Matière de Nationalité," by E. R. Salem, *Revue de Droit International Privé* (V. III, p. 654). Conclusion of a discussion of the proper tribunal to decide questions of nationality in Turkey and of questions of conflict of laws relating thereto.

CONFLICT OF LAWS (Renvoi). "La Theorie du Renvoi," by A. Lanié, in the *Revue de Droit International Privé* (V. III, p. 43) continues a discussion of the *renvoi* theory that is to be still further continued.

CONFLICT OF LAWS (Revision of the French Civil Code.). "Questionnaire sur de Droit International Privé soumis à la Commission de Revision du Code Civil," by André Weiss, *Revue de Droit International Privé* (V. III, p. 641). A revision of the French *Code Civil* is being considered by a commission. Professor Weiss' article is a long series of suggestions of points to be considered in regard to the private rights a foreigner in French territory may claim, what law shall govern in cases of conflict, and the effect of foreign judgments.

CONFLICT OF LAWS (Jurisdiction.). "La Des mande en Justice Envisagée dans les Rapport-de la France avec les Pays Etrangers," by Jules Valery, *Revue de Droit International Privé* (VIII, p. 699). Conclusion of an article, the first installment of which was noticed in the June GREEN BAG, discussing the present methods of bringing action in a French court against an opponent domiciled in another country or in another country's court against a person domiciled in France, and suggesting reforms in procedure to secure jurisdiction.

CONSTITUTIONAL LAW. "Constitutional Nationalism," by Hannis Taylor, *American Law Review* (V. xli, p. 892).

CONSTITUTIONAL LAW. "Federal and State Constitutional Domains," by F. L. Stow, *Commonwealth Law Review* (V. v, p. 3).

CONSTITUTIONAL LAW. "Federal Independence in Construction of State Law Likened to a Grain of Mustard Seed," by N. C. Collier, *The Law* (V. v, p. 358).

CONSTITUTIONAL LAW. "The Application of Judicial Remedies in the Regulation of Railway Rates by Public Authority," by Fred K. Nielsen, *Central Law Journal* (V. lxv, p. 385).

CONSTITUTIONAL LAW. "The Constitutionality of Employer's Liability Acts as applied to Street Railways," by G. W. Payne, *Central Law Journal* (V. lxv, p. 410).

CONSTITUTIONAL LAW. (Judicial Power.) "The Courts and the People," by John Woodward, *Columbia Law Review* (V. vii, p. 559) is an extremely well written defence of the power of the courts to declare laws unconstitutional as in theory well calculated to protect the rights of the people against encroachments of the executive and legislative branches, and as having in practice worked to that end. It is accepted as fundamental that this power is given by the constitution and recent attacks on that idea are referred to, although not by name, so as to show Judge Woodward's total disagreement with their arguments and tendencies.

CONSTITUTIONAL LAW. (Oklahoma.) "The Constitution of Oklahoma" by John A. Faulée, *Michigan Law Review* (V. vi, p. 105). A short article reviewing the salient features of the constitution of the new state.

"At the outset, one familiar with the constitution of the older states will be struck by the length of the Oklahoma document. It consists of ninety-four pages, closely printed, containing about 100,000 words, making it the longest of the state constitutions. The size of the constitution is of itself evidence that it contains much more than was considered constitutional matter in earlier days, and further examination shows that it includes a large amount of detail similar to statutory provisions; and this is indeed recognized by provisions authorizing the legislature to alter many sections of the constitution by statute.

"The length and detail of the constitution is further an evidence of its most striking characteristic, which is illustrated in many other ways, — the tendency towards the forms of direct democratic government, in contrast with the representative ideal that has hitherto prevailed. The constitution is itself a considerable code of laws enacted by popular vote; and by its elaborate provisions closely limits the sphere of action of all public officials. This tendency towards direct democratic government is also shown by the long list of elective officers, by the requirement for a mandatory direct nomination law, and, above all, by the provisions for the popular initiative and referendum on all matters of state and local legislation.

CONSTITUTIONAL LAW. (The Rate Bill.) "Constitutional Aspects of the Senatorial Debate Upon the Rate Bill," by James Wallace Bryan, *American Law Review* (V. xli, p. 801). A long and interesting review of the questions raised in the debate before the final passage of the Hepburn-Dolliver bill.

CONSTITUTIONAL LAW. (Suits Against States.) "Suability of States by Individuals in Courts of the United States," by Jacob Trieber, *American Law Review* (V. xli, p. 845). Reviewing the decisions of the Supreme Court which finally settled that a suit by a private citizen would not be sustained if a state, although not a party on the record, were the real defendant, and the decisions as to when an action is in reality against a state.

CONTRACTS. "Contracts in Restraint of Trade," by N. W. Hoyles, *Canadian Law Times* (V. xxvii, p. 673).

CORPORATIONS. "Corporations and the States," by Thomas Thacher, *Yale Law Journal* (V. xvii, p. 98). A three-page article developing the idea that if the fiction that incorporation is the creation of an artificial being is not allowed to obscure the fact that it is merely giving an association of persons the privilege of being regarded as a person distinct from its members, "it is easy to see that there need be no substantial distinction between foreign and domestic companies with respect to the power of control of each state within its bounds. If it be borne in mind that incorporation simply gives a privilege to a body of men, and that such privilege given by one state cannot operate in another, it is clear that the privilege may be made subject to conditions, including the power to regulate the enjoyment of it, in like manner, whether such body of men has elsewhere been given a like privilege or not, or, in other words, whether the corporation is foreign or domestic.

"One obvious conclusion is, that the argument that national control of corporations is necessary because a state is powerless as to corporations of other states doing business within its boundaries, rests upon a purely fictitious foundation."

CORPORATIONS. "Public Utility Corporations in General," by J. B. Whitfield, *American Law Review* (V. xli, p. 870). A condensed exposition of the position of the public service corporation in the state.

CRIMINAL LAW. "Cruel and Unusual Modes of Punishment," by R. L. McWilliams, *Law Notes* (V. xi, p. 169).

CRIMINAL LAW. "Right of an Officer to Arrest Without a Warrant," by Hon. John F. Geeting, *Law Register* (V. xxvii, p. 848).

CRIMINAL LAW. "The Unwritten Law," by "Rusticus," *Canada Law Journal* (V. xliii, p. 764).

EQUITY. "Courts in Equity — in Cases of Nuisances Committed by Riparian Owners," by F. Beecher, *Central Law Journal* (V. lxv, p. 430).

EXECUTORS. "Certain Points in Connection with the Devolution of Estates Act," by F. P. Betts, *Canada Law Journal* (V. xliii, p. 753).

FICTION. In the December *Reader*, Brand Whitlock under the title of "Fowler Brunton, Attorney at Law" (V. xi, p. 1), in the guise of a story gives a popular account of the passing of the old time general practitioner and the rise of the corporation lawyer.

HISTORY. "A Memorial in Behalf of the Architect of Our Federal Constitution, Pelatiah Webster," by Hannis Taylor.

INTERNATIONAL LAW. "The Net Result at the Hague," by David Jayne Hill, December *Review of Reviews* (V. xxxvi, p. 727).

INTERNATIONAL LAW. (The Peace Conference.) "The Second Peace Conference," by A. H Charteris in *The Juridical Review* (V. xix, p. 223) notes at some length the effect of the fourteen draft conventions which have been approved by the conference. A subsequent paper will deal with some of the reasons that led to disagreement on the other conventions proposed.

INTERSTATE COMMERCE LAW. "The Standard Oil Fine," by H. L. Wilgus, *Michigan Law Review* (V. vi, p. 118). An elaborate review of the case against the Standard Oil Company in which Judge Landis recently imposed a fine on 1,462 counts aggregating $29,240,000, and of the widely circulated pamphlet issued by the company attacking Judge Landis. Professor Wilgus upholds the action of the court. In regard to the effort

of the pamphlet to lay the blame upon a subordinate rate clerk in the railroad he says it "adds neither dignity nor credence to the claim. It will be difficult for the defendant to convince the public that there has been a general conspiracy among subordinate railroad rate clerks throughout the country for the past twenty years to persecute it by forcing upon an unwilling and innocent beneficiary having expert traffic managers, secret and discriminatory rates in its favor without its consent and connivance."

JURISPRUDENCE. "An Illustration of Legal Development — The Passing of the Doctrine of Riparian Rights," by Ralph H. Hess, *American Political Science Review* (V. ii, p. 15). Written from the standpoint of a student of institutions rather than of a lawyer, this is in an interesting article on the process by which in the arid and semi-arid West the common law doctrines of the rights of riparian proprietors to the use of water have been supplanted by the doctrine that prior appropriation of the water gives the right to continue the use.

JURISPRUDENCE. "An Introduction to the Law," by Hon. Benjamin F. Washer, *Law Register* (V. xxvii, p. 816.)

JURISPRUDENCE. "Die Kunst der Rechtsanwendung zugleich ein beitrag zur methodenlehre der geisteswissenschaften," by Dr. Jur Lorenz Brütt Gerichtsassessor in Berlin. J. Guttentag, Berlin, 1907.

JURISPRUDENCE. In the December *Van Norden* magazine (V. ii, p. 27) Professor Munroe Smith writes of "Statute and Judge Made Law" from the point of view of a professor of comparative jurisprudence. He contends that the flexible growth of law through judicial decisions slowly but surely adapting itself to change in economic and social conditions is more effective than the spasmodic and unscientific work of our legislatures.

JURISPRUDENCE. "Methods Followed in Germany by the Historical School of Law," by Rudolf Leonhard, *Columbia Law Review* (V. vii, p. 573). This address at the opening exercises of the Columbia School of Law points out as mistakes, now recognized as committed in Germany by the Historical School of Law, the subordination of law to history and philology and the conflict between Romanistic and Germanistic lawyers arising from the separation of the Roman and German legal studies. The first led to the ignoring of practical matters, the second to a misunderstanding of the real process of evolution of the modern German law.

JURISPRUDENCE. "The Relation of Judicial Decision to the Law," by Alexander Lincoln, *Harvard Law Review* (V. xxi, p. 120). To the "legal fiction that law is an existing entity which is interpreted by the courts," Mr. Lincoln applies "some of the tests of common sense and ordinary experience" with the result of producing a well written and instructive article on a much discussed theme. His conclusion is "that by the rendering of judicial decisions the courts do make law, both in so far as they declare what in a certain situation are the legal rights and duties of the parties before them, thereby promulgating the law which is applicable to the particular case, and in so far as their decisions operate as sources of law, which serve as precedents for subsequent decisions. In the latter aspect judicial decisions become laws as we have defined them, while in the former aspect they are to be viewed not as general rules of law, but rather as edicts having only a particular application.

"We must also conclude that the fiction that law is a complete existing entity which is merely interpreted by the courts, as well as the related fiction that every act at the time of its commission is governed by existing law, is not an accurate or correct expression of the truth. The law as an abstract entity is in truth nothing more than the sum of all the sources of law actually in existence, together with the potential changes and additions which may occur from future legislative enactments and judicial decisions. Those sources of law are undeniably interpreted by the courts, but at the same time the courts also make new law in the manner above described. The law governing a particular case, on the other hand, consists of the sources of law which may be applicable to it as declared by the court which decides the case. While any one may have an opinion as to how the case should be decided, the legal rights and duties are not determined, and the law, therefore, is not known until the court has passed upon it. To say, then, that the law previously existed, and therefore is not made by the courts, is entirely unsound.

"The errors which these fictions have introduced have had one important practical effect in that they have caused the Supreme Court of the United States, in the decisions to which we have before alluded, in effect to neglect the decisions of the state courts on the ground that they wrongly interpreted the law, in cases where, as a court of the United States, it was bound by the Judiciary Act of 1789 to respect the laws of those states. The tremendous mistake which the court has thereby made and its results are clearly pointed out by Mr. Justice Field in his dissenting opinion in Baltimore & Ohio R. R. Co. *v.* Baugh. The ordinary practice, however, of courts which follow the common law is otherwise, since in cases where the law of a certain jurisdiction becomes material, the decisions of its courts are held to be conclusive as an authority or source of law.

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"Instead, then, of being a complete and unchangeable body or entity law is something incomplete and imperfect, but containing a wonderful power for adaptability and growth. It is true that law in the abstract can be applied to every case, since every case must be decided. The conclusion is not, however, that law is already complete, but that law is made in order to decide the case. The system is complete because of the fact that judges can and do make law, and so the system can be applied to all possible new circumstances. Judges do not enact laws as a legislature does, nor do they act arbitrarily, but they do make laws indirectly in the course of giving their decisions, and since they must decide a case in one way or the other, they cannot avoid so doing."

LEGAL EDUCATION. "Systems in Legal Education," by John Wurts, *Yale Law Journal* (V. xvii, p. 86). This address by one of the Yale Law School professors, expresses the speaker's preference for the text-books schools' modern "concentric system."

"In the first stage, under this system, the law student is put through a course of elementary law which covers practically the whole range of municipal law, both substantive and adjective. . . . The second stage is a repetition of the first, but in a circle of much greater radius. The student takes up the application of the rules of law in all but the most difficult branches. Text-books are the basis of the work done and these are supplemented by discussion in the class-room and by the study of leading cases which have been carefully selected, not with a view to inductive study, but for the purpose of illustrating the propositions of the text with authoritative decisions of what the law now is.

"And the work of the third stage is in still larger concentric circle. Except in some non-technical subjects, the work is now mainly carried on by means of cases, and the inductive system is applied in all its rigor.

"The supposed merits of this system of instruction, which, in the minds of its advocates, give it superiority over the case system, are that the interest of the student is aroused sooner and he finds himself more promptly in receipt of dividends from his investment. The method of study is far less intensive and in some of its phases the work is more evenly divided between the student and the instructor. This not only allows the addition of technical subjects to the curriculum, permitting a broader field to be covered, but leaves the time and the strength for advanced courses in comparative jurisprudence, Roman law, international law, diplomacy, and economics, with all their mellowing and harmonizing effects. What the student has lost in acuteness of mental vision, which the case system would have given him, he has gained in the actual amount of law that he knows and breadth of view."

LEGAL EDUCATION. (Suggested Change in Case Books.) "The Next Step in the Evolution of the Case-Book," by Albert M. Kales, *Harvard Law Review* (V. xxi, p. 92). "This article assumes that the comparative merits of the case-book and the text-book methods of teaching law are no longer an issue in legal education. It assumes, also, that the case-books, as represented by those in use at the Harvard Law School, have driven the text-book pretty much out of existence as a means of instruction. . . . What, then, is to be the next radical step in their evolution? It is the purpose of this article to maintain that in the older and more important jurisdictions of the United States there is a legitimate and increasing demand for instruction in first-class law schools by case-books arranged, so far as topics are concerned, upon the lines of the present Harvard Law School case-books, but composed as far as practicable of cases from the particular jurisdiction, with the end to present an accurate exposition of the law in force at the present day in that jurisdiction. Such a demand will, it is believed, dictate the next radical step in the evolution of the case-book itself." Professor Kales vigorously is advancing his idea, which is essentially an advocacy of the desirability of law schools devoted chiefly to the law of particular states.

Professor Eugene Wambaugh, in a note appended, takes issue with Professor Kales, points out that the lawyers of the country are not really inefficient, and, whether educated by case-book or text-book, have been trained on the theory that American law is really one science and that the peculiarities of local decisions are not to be emphasized for students. Further the differences of local courts are declared not to be so great as Professor Kales estimates,— in fact a gap to be bridged for students' purposes, by a very few pages, — and this gap is likely to be narrowed by the desire for uniformity and the growing knowledge of outside decisions. Moreover the student cannot really predict where he will spend his professional life, and he knows if he has appreciable success he will deal with business in all parts of the United States.

"There are other practical reasons opposed to Professor Kales' suggestions that local law should be made the basis of the law school's regular work; but by this time it ought to be apparent that the real difficulty is the conflict of Professor Kales' suggestion with the history of law and with its probable future. Nor does Professor Kales' suggestion gain weight from his conception that, as all other persons concede the necessity of gaining acquaintance with local law, his plan differs in emphasis only. In his presentation of the educational value of local law he goes to such an extreme that he has no common ground, even by way of compromise, with those who hold the usual belief that, though local law should not be wholly ignored, the ordinary instruction, in the law school should be based upon general law, and that the student's systematic work with local statutes and local decisions should be undertaken merely by way of a supplement upon completing each subject, or by way of a comprehensive review of the whole law just before or just after admission to the bar."

LEGAL EDUCATION. (Law Degrees.) "American Law School Degrees," by James Parker Hall, *Michigan Law Review* (V. vi, p. 136).

"Last August, at the annual meeting of the American Bar Association, the committee on legal education made a report proposing that the Association should recommend to the various state legislatures the adoption of certain rules suggested by the committee to secure uniformity in law degrees. These rules provided that an L. B. should be conferred by law schools maintaining a two years course; an LL.B. for three years of legal study; an LL.M. for four years, of which one should be post-graduate; and a D.C.L. or J.D. for five years, of which two should be post-graduate. None of these degrees was to be conferred upon other terms than those specified. A minority of the committee dissented from the report. Consideration of it was postponed by the Association. The year before, this committee had made a substantially different report upon the same subject.

In the main, this latest report appears to be governed by the principle that substantial distinctions in legal education should be marked by appropriate distinctions in law degrees. Granting the excellence of this principle, it seems to the writer that the committee has departed from it in failing to approve the use of J.D. as a first degree in law by those schools that regularly require a college education for admission. The distinctions recognized in the report are all based upon the length of time spent in legal study. Another distinction, based upon the extent of preparation for legal study, is at present even more important than some of those recognized by the committee, and this the majority ignores."

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"If the committee on legal education renews its suggestions for uniform law degrees next year, it is to be hoped that it will recognize the useful possibilities of the J.D. degree in indicating a college preparation for legal study, and that it will adopt a more liberal attitude toward a practice that at least may claim toleration as a promising experiment. Only thus are advances made in both the form and substance of educational methods. Failing this, the Bar Association should certainly refuse to recommend legislation upon a matter relatively so unimportant and concerning which such disagreement exists among those chiefly interested. It is hardly likely that any state legislature would enact such a prohibition as is suggested, against the vigorous protest of even a single reputable law school within its borders, and the Association may wisely reserve its influence for measures promising more real benefit as well as greater prospects of success."

LEGISLATION. New York State Library Year-book of Legislation, 1906, edited by Robert H. Whitten, Sociology Librarian, State Education Department, Albany, 1907.

MORTGAGES. "Clogging the Equity of Redemption," by N. S. Natesan, *Allahabad Law Journal* (V. iv, p. 301).

NORTHERN SECURITIES DECISION. "The Present Status of the Northern Securities Decision," by David Walter Brown, *Columbia Law Review* (V. vii, p. 582). The Northern Securities decision and later ones interpreting it make the following propositions law under the Sherman Anti-Trust Act:

"(1) Any restraint upon interstate trade and commerce, whether reasonable or not, is obnoxious to the act.

"(2) Any degree of monopoly in such trade or commerce, whether complete or not, is obnoxious to the act.

"(3) The mere unification in a single ownership of control over several active competing agencies of such trade and commerce, of itself, and without any positive act of restraint upon competition, is obnoxious to the act.

"When these principles are applied to business, little room is left for that initative which was once the boast of the American. They tightly fetter the development of modern trade; whether wisely or unwisely is not here the question. Attention is directed only to the contrast between these principles and the freer conditions under which the United States grew. To the thoughtful student of American history, therefore, the decision in the *Northern Securities Case* seems to be the judicial declaration of a great change in the environment of American democracy. It seems to be the definite announcement that the period of development of a new land, during which the freest exercise of individual sagacity was needed and applauded, is over; that in its stead has come the period of conservation, of crowded competition between individuals upon a land already so occupied, that there is no longer room for the large exercise of individual powers; that the capacities of an individual are no longer to be measured by their results upon the development of the land, but by the obstacles they seem to oppose to the well being of other men also in the land. According to most political philosophy, the earlier condition was that in which democracy might thrive, the latter that in which it has never yet existed long."

PATENT LAW. "Patent Law," by Edmund Wetmore, *Yale Law Journal* (V. xvii, p. 101). A short general article on patent law, calling attention to the need of reducing the expense of infringement suits and of establishing a national court of patent appeal.

PRACTICE. In the *Saturday Evening Post* of October 26 (V. clxxx, p. 12), is a very sensible and unusually specific account by an anonymous author of the financial problems a young lawyer faces while trying to build up a practice, entitled, "The Young Lawyer." A second article on lawyer's fees is to follow.

PRACTICE. "Oral Argument," by Orrin N. Carter, *Illinois Law Review* (V. ii, p. 138).

PRACTICE. "Preferences," by George I. Wooley, *Bench and Bar* (V. xi, p. 53).

PRACTICE (Scotland). "The Sheriff Courts' (Scotland) Act, 1907," by J. M. Lees, *The Juridical Review* (V. xix, p. 258).

PROPERTY. "Vendor and Purchaser," Anon., *Canadian Law Times* (V. xxvii, p. 725).

PROPERTY. "The Registration of Land Titles under the Torrens System," by W. F. Meier, *Central Law Journal* (V. lxv, p. 449).

PROPERTY. "Vested and Contingent Future Interests in Illinois," by Albert Martin Kales, *Illinois Law Review* (V. ii, p. 301).

PROPERTY. (Execution of Power.) "Gifts of Life-rent under Powers of Appointment," by John S. Mackay, *The Juridical Review* (V. xix, p. 245). A discussion of the principle and of the Scotch cases where, funds having been placed in trust for a parent in life-rent and his children in fee with power in the parent to divide the fund among the children, the parent attempts to give a child a life-rent of a share and the fee to the child's issue. The gift of the fee to the issue is *ultra vires* clearly, because the issue are not objects of the power. The cases are conflicting as to whether the gift of life-rent is valid. On principle the author thinks it is valid, and that it is immaterial whether the fee has been validly appointed or left to go as in default of appointment or given to persons who are not objects of the power.

PROPERTY (New York). "Powers of Sale as Affecting Restraints on Alienation," by Frederick Dwight, *Columbia Law Review*

(V. vii, p. 589). A discussion of New York cases interpreting the state statute limiting restraints on alienation.

PUBLIC POLICY. "Assailing the Judiciary," by H. Gerald Chapin, *American Lawyer* (V. xv, p. 523).

PUBLIC POLICY. "State Regulation of Public Utilities," by William S. Jackson, *Law Register* (V. xxvii, p. 832).

RAILROADS. "A Fundamental Defect in the Art to Regulate Interstate Commerce," by Charles A. Prouty, *American Lawyer* (V. xv, p. 515).

SURETYSHIP. "A Hand Book of the Law of Suretyship and Guaranty," by Frank Hall Childs, West Publishing Company, St. Paul, 1907. Price, $3.75 net. This is a valuable addition to the well-known Hornbook Series thoroughly indexed, carefully annotated and intelligently condensed. The last quality deserves especial commendation in a time of unnecessary and expensive distention of standard text books. This work does not purport to give an exhaustive citation of cases but affords a clear statement of principles for the preparation of students and the guidance of practitioners on a highly technical and difficult subject.

TAXATION. In the November *Quarterly Journal of Economics* (V. xxii, p. 128); is a summary of the "Massachusetts Inheritance Tax of 1907," by Professor F. W. Taussig.

TORTS. (**Spanish System.**) "The Position of the Law of Torts in the Spanish System," by Clyde A. De Witt, *Michigan Law Review* (V. vi, p. 136). Our government's policy of interfering as little as possible with the local laws and institutions of Porto Rico and the Philippines has made it necessary for lawyers practicing in those jurisdictions to familiarize themselves with both our and the Spanish systems. In cases which have recently arisen involving the question as to the extent to which the civil courts of Spain compel the redress of private wrongs the most divergent opinions have been expressed, varying from the extreme of holding that, properly speaking, there is no Spanish tort law, to the opposite extreme of maintaining that the civil courts of Spain have as complete jurisdiction in matters of private wrong as have the civil courts of our own country and England.

The author gives some examples of the different views. His own conclusions (for which he gives reasons) are:

"(1) The Spanish system recognizes private wrongs arising independently of contract.

"(2) It divides these wrongs into two classes, viz.:

"(A) Those in which the author is criminally responsible, and (B) those in which he is not.

"(A) Of those in which the author incurs criminal responsibility.

"(1) The injured party may and usually does rely on the prosecutor to recover his damages for him, it being the prosecutor's duty to do so in the absence of express waiver or renunciation by the party injured.

"(2) The injured party, in the absence of a pending criminal action, may institute a civil action himself in the civil court, and this action can be prosecuted to judgment and execution can be issued thereon without any conviction of the offender.

"(3) If a penal action is begun after the civil action has thus been instituted, the civil action is suspended until the criminal action is terminated by final sentence.

"(4) The injured person may himself institute the penal action, and in such cases he may and is presumed to bring the civil action with it, but he may renounce it or expressly reserve the right to bring it afterwards, if the penal action results in conviction.

"(B) Of those in which the author is not criminally responsible, the civil courts take exclusive jurisdiction and in the award of damages include elements of as indefinite and intangible a nature as are included by our own courts."

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. (Discharge of Debts Created in Fiduciary Capacity.) N. J. Ct. of Ch. — Whether a debt is created in fiduciary capacity so as to be affected by a discharge of the debtor in bankruptcy is a question frequently arising in bankruptcy cases. One of the recent decisions on this subject is Haggerty *v.* Babkin, 66 Atl. Rep. 420. Plaintiff's intestate and defendant had entered into an agreement to form a partnership, plaintiff's intestate to put in $500 as capital and defendant to furnish the experience for the business. Almost immediately after the $500 was turned over to defendant and before the written partnership agreement was signed, plaintiff's intestate fell sick and died. Subsequently defendant went into bankruptcy and obtained a discharge, which he set up in bar to the claim of complainant. The court gives an elaborate discussion of what constitutes a fiduciary capacity under the bankruptcy law and cites numerous decisions from text book writers. Money is said to be "received or detained by one from another in a fiduciary capacity when in the mind of the person handing the money to the other, as such mind is known to that other, it does not become the absolute money and property of that other to do with as he chooses as his own money, but is received by him for a particular purpose in which a person or persons other than the person receiving it is or are interested." It was held in this case that the debt created was not discharged by the bankruptcy proceedings.

BANKRUPTCY. (Replevin.) Mass. — May replevin be maintained against a bankrupt after the adjudication to recover property belonging to a third person where nothing has been done to obtain possession under the bankruptcy proceedings? This question was answered in the affirmative in the case of Ayers *v.* Farwell, 82 N. E. Rep. 35. The action was brought by vendors of goods purchased by the bankrupts; plaintiffs claiming that defendants entered into the contract with the fraudulent intention of obtaining the goods without paying for them. While recovery was denied in this instance on the ground that no fraud was shown, the court ruled that the simple fact of adjudication in bankruptcy would not bar the action where nothing had yet been done by the trustee or any one acting under authority of the Federal Court toward obtaining custody of the property.

When a Court, State or Federal, has once taken into its jurisdiction property, no Court except one having supervisory control has a right to interfere with or change such possession. Therefore, if the trustee in Bankruptcy once has taken into his possession property, no creditor may maintain an action of replevin in a State Court to recover such property except with the consent of the Bankruptcy Court. This was laid down in a well considered case by the Supreme Judicial Court of Maine, Crosby v. Spear, 98 Me. 542, although, previously, the opposite doctrine was laid down by the Supreme Court of New Jersey in Cook v. Scovel, 68 N. J. L. 484. In this case the Court sustained the Jurisdiction of a State Court in an action of replevin against a trustee in bankruptcy who had the goods in his possession. There are several decisions in the United States Courts in agreement with the Maine decision. See: Re Russell & Birkett, 101 Fed. 248; Matter of Grissler 136 Fed. 754; White v. C. H. Loerb, 178 U. S. 542.

If the trustee in bankruptcy, however, upon demand of an adverse claim, refuses to deliver property in his possession to such claimant the claimant may sue the trustee in bankruptcy in an action of trover in a State Court to recover the value of the property converted. In Re Kanter & Cohen, 121 Fed. 984. In Re Spitzer, 130 Fed. 879. In Re Merten, 147 Fed. 182.

Lee M. Friedman

CARRIERS. (Validity of Conditions in Passenger Tickets.) U. S. Cir. Ct. E. D. of Va. — The provision of the Interstate Commerce Law requiring publication by carriers of schedules of rates and statements of "all privileges or facilities granted or allowed" was considered by Judge Waddill in the case of B. & O. R. Co. *v.* Hamburger, 155 Fed. Rep. 849, with reference to its application to restrictions in tickets making them non-transferable. Bills in equity were brought by plaintiff railroad

companies to restrain defendants from dealing in tickets issued for passage to and from the Jamestown Exposition. Defendants set up as a defense that the non-transferable clause was invalid because not referred to in the published schedule and statement relative to rates. The court held the defense good and as against the contention of complainants that defendants being purchasers with knowledge of the limitations, were not in position to avail themselves of any illegality in the tickets, said that " defendants are not seeking any relief at the hands of the court and the complainants cannot escape the consequences of weakness in their own case by relying on any disability that may or may not attach to the defendants."

CARRIERS. (False Representation of Shipper.) N. Y. Sup. Ct. — In Hanna *v.* Pitt & Scott, 106 N. Y. Supp. 145, the court passes on a question of the liability of a shipper of goods for which it was unable to find any precedent. The complaint alleged that defendant had delivered to complainant's assignor for shipment, a piece of machinery which together with the packing weighed more than nineteen thousand pounds, under representation that the entire weight would not exceed nine thousand pounds; that owing to defendant's misrepresentation as to weight, plaintiff's assignor, a steamship company, attempted the unloading with machinery inadequate to stand the strain of such an enormous weight and in consequence thereof, broke and injured a stevedore to whom the steamship company was obliged to pay damages. The present action was instituted against the shipper for the recovery of the sum paid.

The court referred to some cases in which the principle is announced that a shipper is bound to notify the carrier of any inherent dangerous qualities in goods shipped, but said that in this instance, the bulk and weight of the shipment was as open and obvious and as easy to determine by the carrier as by the shipper and denied recovery.

CARRIERS. (Validity of Rate Laws.) U. S. C. C. — Beginning with the litigation leading up to the decision by Judge McPherson in the Circuit Court for the Western District of Missouri in St. Louis & S. F. R. Co. *v.* Hadley, 155 Fed. Rep. 220, a series of attacks has been made in the Federal Courts on the railroad rate legislation of Missouri, Iowa, North Carolina, Alabama and Minnesota.

In the case referred to above, an injunction was asked restraining enforcement of the state law. Defendants contested the jurisdiction of the Federal Court, but their contention was not sustained. The court referred to the numerous and intricate questions involved, and refused an injunction, on the ground that the law should be enforced for a time in order to test whether the rates prescribed would yield a reasonable compensation.

The validity of the Iowa law came before Judge McPherson also. His decision is reported in 155 Fed. Rep. 226, under the title Poor *v.* Iowa Cent. Ry. Co. In that case the bill was filed by stockholders against the railroad companies to restrain putting the rates into effect, and the court held that under the showing made it did not sufficiently appear that proper demand had been made upon the corporate officers prior to institution of the suit, as required by Equity Rule 94.

The North Carolina law was the bone of contention in the *habeas corpus* proceeding before Judge Pritchard, in Ex Parte Wood, 155 Fed. Rep. 190. Petitioner was convicted in the state court of violating the rate law and sentenced to imprisonment. He then applied to the Federal Court for release. It appears from the opinion that some time prior thereto suits had been instituted in the Federal Court to restrain the enforcement of the rates prescribed, on the ground that they were confiscatory. A restraining order had been issued and was still in force when petitioner was convicted. Judge Pritchard discharges the petitioner, vigorously defends the jurisdiction of his court, and states his intention to use all power at hand to see that its mandates are obeyed. The law provides a penalty of $500 for each violation and for imprisonment of agents and employees found guilty. Passing to consideration of the merits, it was held that one section was invalid as a denial of equal protection of laws by imposition of such extreme penalties as to practically close the courts against plaintiff in case it desired to contest the validity of the statute.

A short time after the above decision was rendered, the injunction suit referred to came up on the question of continuing until final hearing the restraining order issued at the time of instituting the proceeding, and the question of the jurisdiction of the Federal Court was again discussed, it being contended that the suit was in reality one against the state rather than against state officers charged with enforcement of the law. The opinion of Judge Pritchard, on this and other questions, is found in Southern Ry. Co. *v.* McNeill, 155 Fed. Rep. 756. Numerous authorities are cited and the conclusion reached that the suit is against the state officers, and not within the constitutional prohibition forbidding suits against states. The injunction was ordered continued until final hearing, protection to the public being provided by requiring bonds of the railroad company to satisfy any recovery had against it by reason of enforcement of the former higher rates in case the new law should be held valid.

In a note published at the end of the opinion, it appears that subsequent to awarding the injunctional relief, complainants appeared and asked for a modification granting them the privilege of putting the new passenger rate into effect, stating that at the instigation of the governor, the state authorities were so harassing the company's agents and employees and threatening revocation of privileges granted that it was deemed better to at once put the rate into effect than to rely on the protection afforded by the injunction. The court reasserts the correctness of its former decision and its ability to afford relief, but says that as complainant itself has asked for the withdrawal of protection, nothing can be done except to grant the modification requested.

The Alabama law was considered by Judge Jones in Seaboard Air Line Ry. Co. *v.* Railroad Commission, 155 Fed. Rep. 792, on application for temporary injunction against its enforcement.

The claim that the suit was in reality against the state was interposed, but the court reached the same conclusion as Judge Pritchard had on the same point in the North Carolina case. The section of the statute providing for forfeiture of the right of foreign corporations to do business in the state as a penalty for instituting proceedings in the Federal Court was considered, and held to violate the clause of the state constitution providing that "all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons," and repugnant to the Federal Constitution as impairing the obligation of contracts, denying equal protection of the law, and depriving the railroads of due process of law.

As to the suggestion that the rates be put into effect and tried, the court says that owing to the scant earnings and probable deficiencies, it is not a case for experiment, and "would be as reckless as for a physician to deny a sufficient amount of nourishment to a man in order to ascertain whether it would harm his health." Preliminary injunction was awarded on bond for payment of damages, excess rates, costs, etc.

Some of the questions involved in passing on the Minnesota law in Perkins *v.* Northern Pacific Ry. Co., 155 Fed. Rep. 445, were similar to those noted in the preceding cases, and a similar conclusion reached on the issue as to whether the suit was against the state or the state officers. In this case, as in that of Poor *v.* Iowa Cent. Ry. Co., *supra*, the action was brought by stockholders, and not by the railroad companies themselves. The officials of the roads had refused to invoke the aid of the court and had indicated an intention to comply with the law, on the ground that they ran too great a personal risk of being subjected to severe punishments for disobedience. This suit is distinguishable from the Poor case by reason of the stockholders having prior to the institution of the proceedings made demand on the railroad officials to take action. The court held that having done this, and their request being refused, they had a right to maintain the suit. In the course of his opinion, Judge Lochren takes occasion to speak of the manifold benefits the railroads have brought to the people of the Northwest, and characterizes certain portions of the legislation as "a reproach upon the intelligence and sense of justice of any legislature which could enact provisions of that kind." A preliminary injunction was awarded against enforcement of what is known as the "commodity rate" and denied as to the rest of the law, though it is said that the question as to whether the rates prescribed by it are compensatory may be determined on final hearing.

CRIMINAL LAW. (Former Jeopardy.) Ga. Ct. of App. — The question of former jeopardy as a bar in a criminal prosecution, comes up in rather a novel way in two cases recently decided by the Court of Appeals of Georgia. Fews *v.* State, 58 S. E. Rep. 64; Burnam *v.* State Ib. 683. In these cases, the court applies what it terms the "same transaction test." In the first case, defendant was accused of shooting two different persons who had made no joint attack upon him and notwithstanding the shooting of one immediately followed the attack upon the other, the court said that two distinct crimes were committed and a conviction for one was no bar to a prosecution for the other. In the decision in the Burnam prosecution, the court sets out a hypothetical case in which it says that "if the defendant shot at A. intending to kill him and by reason of bad marksmanship struck and killed B. whom he did not intend to kill, the transactions, the assault with intent to murder A. and the actual murder of B. are legally the same. As intimated by this court in the Fews Case, if by separate shots, the defendant wounded two persons, the transaction would be single if the shooting was done in repelling a joint assault of these two persons."

CRIMINAL LAW. (Negligence.) N. Y. Sup. Ct. — The sufficiency of the indictment of the general manager of the New York Central and Hudson River Railroad Company for manslaughter, for which he was alleged to be responsible, by reason of failure to properly perform the duties devolving upon him, was considered in People *v.* Smith, 105 N. Y. Supp. 1082. It was alleged that he had put an incompetent and untrained engineer

in charge of a train and had failed to take proper precautions to learn the rate of speed at which it was safe to run on a curve on the road; that owing to such negligence the train was wrecked, causing the death of one of the passengers. It was claimed that in the operation of a large railroad system it was impossible for the manager to personally inspect all the operating appliances and road-bed and to know the experience and carefulness of employees; also that if the negligence of any one was the proximate cause of the death, it was that of the engineer and not of the general manager. The court overruled the demurrer to the indictment and held it sufficient.

CORPORATIONS. (Monopolies.) U. S. Cir. Ct. W. D. Mich. — A number of questions relative to rights of stockholders as against control of coporate affairs by a competing corporation are decided in Bigelow *v.* Calumet & Hecla Mining Co., *et al.*, 155 Fed. Rep. 869. It appeared that defendant and the Osceola Company of which complainant was president and a stockholder, were large producers of Michigan copper commercially known as "lake copper" and that shortly prior to the time set for the annual election of officers by the stockholders of the Osceola Company, defendant purchased a large number of shares of stock in the Osceola Company and secured proxies from the holders of a considerable amount of other stock and by letter to complainant stated that it expected to obtain control of the corporate management of its rival at the election and requested that no contract should be entered into extending beyond the term of the then incumbents in corporate offices. Complainant filed his bill asking an injunction against the voting of any of the stock held by defendant either in its own name or under proxy; alleging that the threatened action was in violation of the common law, of the Michigan statute relating to trusts, and of the Sherman Anti-Trust Act. To this defendant set up several defenses. First, it claimed that under a Michigan statute giving mining companies authority to purchase stock in other mining companies, it was simply exercising a right granted by the legislature. Second, that a bill for injunctive relief could not be maintained under the Federal Anti-Trust Act at the instance of a private party. Third, that if there was any right of action whatever, it belonged to the corporation and not to any officer or stockholder. Fourth, that there was no threatened injury to complainant beyond that which would be suffered by the general public.

All of the points were decided against defendant. In answer to the first, the court said that the statute relating to the purchase of shares in competing companies was not intended to override the law prohibiting monopolies. As against defendant's second contention, it was held that while no right to injunctive relief to private persons was given by the Sherman Act, it might be awarded by the court in the exercise of its general equity jurisdiction. In answer to the third claim, it was held that the grievance complained of might result in an injury for which an action might be maintained by the individual stockholder and that the Osceola Company was not a necessary party. The fourth ground of defense was met by referring to the probable ousting of complainant from an office for which he received a substantial salary, the proposed revolutionizing of operation of the company's affairs and the likelihood of depreciation in value of complainant's stock.

HIGHWAYS. (Abutter's Rights.) Mass. — In King *v.* Norcross, 82 N. E. Rep. 17 was determined the liability of a person setting out fire, which spread to wood piled in a highway. It was contended on behalf of defendant that plaintiffs were making an improper use of the highway which should prevent recovery. The court held that an abutting owner had the right to use a highway in any reasonable mannner not interfering with the rights of the public and that this privilege might be exercised by a third person under agreement with the abutting owner. Such use being held lawful, it followed as matter of course that it would be no bar to plaintiff's right of recovery.

INSURANCE. (Contract Construction.) Eng. English Privy Council, 1907, Appeal Cases 59. In Home Insurance Company of New York *v.* Victoria-Montreal Fire Insurance Company, in a contract of reinsurance, which was engrafted on an original printed form of fire insurance policy, and incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire. The Supreme Court of Canada held that effect should be given to this clause. Lord Macnaughten on an appeal being taken to the Privy Council, said that having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to reinsurance, the above clause must also be regarded as inapplicable. A clause prescribing legal proceedings after a limited period is a reasonable provision in a policy of insurance against direct loss to specific property. In such case the insured is master of the situation. He can bring his action immediately. In a case of reinsurance against liability the insured is helpless. He can-

not move until the direct loss is ascertained between parties over whom he has no control and in proceedings in which he cannot intervene. According to the true construction of the policy sued upon the condition in question is not to be regarded as applying to the contract of reinsurance. To hold otherwise would be to adhere to the letter, without paying due attention to the spirit and intention, of the contract. The question does not seem to have been raised before this in Canada. In the United States, though, the point has not been brought before the Supreme Court, the universally accepted doctrine appears to be that a clause such as that in question in this case is not applicable to a reinsurance policy. The appeal was therefore allowed.

The policy of insurance in this case was in the regular New York Standard form with the ordinary reinsurance rider attached, so that it is of practical as well as academic interest in this country. There is very little authority upon the point here involved, but the few text writers and decisions that have considered the point are in accord with the principal case. Joyce, section 126: Clement, vol. i, page 338; Cooley, vol. iv. page 3696; Faneuil Hall Insurance Company v. Liverpool & London & Globe Insurance Company, 153 Mass. 69, 10 L. R. A. 482; Jackson v. St. Paul F. & M. Company, 99 N. Y. 124; Alker v. Rhoads, 73 App. Div. (N. Y.) 158. **F. T. C.**

INSURANCE. (Marine) Eng. English Commercial Court. — Maritime Insurance Co. *v.* Alianza Insurance Co., 1907, 2 K. B., 660. By a policy of marine insurance for £1,000 at 6 per cent and a second policy of even date for £500 at a premium of 7 per cent, the Plaintiffs insured the *Dumfriesshire*, valued at £7,000, against perils of the sea and other usual perils at and from a port in New Zealand to Nehoue, New Caledonia, and while there, and thence to Grangemouth. By a subsequent policy of reinsurance for £500 at a premium of 6/8d. per cent, the defendants reinsured the plaintiffs in the following terms: "at and from July 1st, 1904, until August 31st, 1904, both days inclusive, or as original, whilst at port or ports, place or places in New Caledonia, . . . being a reinsurance applying to policy . . . effected with the Maritime Insurance Company subject to the same clauses and conditions and to pay as may be paid thereon." These terms were accompanied by certain marginal voyage clauses in print, and a written clause "risk to commence same time as original," and the policy itself was in the printed form of a voyage policy. On July 3, 1904, the *Dumfriesshire* while en route for Nehoue was making for Gazelle Passage. After reaching Gazelle Passage, which is in New Caledonia, and while passing through it, she struck on a reef, and certain general and particular average losses were incurred. The plaintiffs paid their proportion of such losses under their policies, and now sued the defendants on the reinsuring policy. Mr. Justice Walton gave judgment for the defendants, holding that the words "port or ports" and "place or places," mean place or places at which the vessel arrives in the course of her voyage for the purpose of loading, discharging, coaling, repairing or even taking shelter, or to which she has come for some purpose and with some object other than that of merely passing through without stopping at some other point. In his opinion the place where the loss occurred was not a place in New Caledonia within the meaning of the policy.

INSURANCE. (Suicide by Insured.) Mass. — As to whether recovery may be had under an insurance policy for death by suicide is an ever recurring question. One of the recent decisions in which it is involved is that of Davis *v.* Supreme Council Royal Arcanum, 81 N. E. Rep. 294. An attempt was made in this case to draw a distinction between the rights of a beneficiary and those of the personal representatives of insured. It was claimed that whatever might be the rights of an executor or administrator, the insured could not deprive the beneficiary of his rights by misconduct subsequent to the taking out of the insurance certificate. The court could not be led to see matters in that light and denied recovery saying that the original contract impliedly excepted suicide as a cause of loss notwithstanding no mention of it was made in the certificate.

LANDLORD AND TENANT. (Trespass by Co-Tenant.) Me. — Interesting questions as to the rights and liabilities of co-tenants toward each other are discussed in Davis *v.* Poland, 66 Atl. Rep. 380. Plaintiff was in the possession and occupancy of certain premises in which the evidence showed that she was owner of a two-third interest, defendant owning the other third interest. Defendant entered on the property and removed doors and windows with the apparent object of making the house uninhabitable. Plaintiff remained in possession at considerable discomfort and brought trespass against her co-tenant. While recognizing the general rule that one cannot sue his co-tenant for trespass on the common property, the court says there are exceptions and comes to the conclusion that one of these is found in the present case. Plaintiff was allowed to recover to the extent of two-thirds the value of the property removed and two-thirds of any other damage to the house, and whatever other damages

she suffered aside from such as might have been avoided by reasonable diligence on her part.

NEGLIGENCE. (Beneficiary Associations.) N. Y. Ct. of App. — The Supreme Tent of Maccabees of the World, a corporation organized under the laws of Michigan and doing business in the State of New York, was recently sued for personal injuries caused in the course of initiation of one of its members. Plaintiff recovered judgment in the trial court, which was reversed by the appellate division. He then appealed to the New York Court of Appeals. Its decision is found in Thompson *v.* Supreme Tent Knights of Maccabees of the World, 82 N. E. Rep. 141.

While standing in line with others waiting for initiation, plaintiff was suddenly seized by the shoulders by a member of the order who had been selected for that purpose and his body bent backward in such a manner as to cause a fall resulting in the injuries complained of. The Supreme Tent of the order was authorized to make laws, rules, and regulations for the government of the associations and prescribed the ritual under which the initiation took place. The camps and tents were shown to be unincorporated associations subject to the control of the Supreme Tent. It was contended on the part of defendant that if there was any liability whatever for plaintiff's injuries, it was that of the officers and members of the local tent, but the court held that as the members and local officers were simply carrying out the ritual prescribed by the Supreme Tent and were under its jurisdiction and directions, it was liable for their acts.

NEGLIGENCE. (Maintenance of Places Attractive to Children.) Pa. Sup. Ct. — Another one of the multitude of so-called "Turn-Table Cases" was decided a short time ago by the Pennsylvania Supreme Court. It is of especial importance because of apparently overruling prior decisions of that court and on account of the very forcible dissenting opinion by Judge Mestrezat. The case is reported in 67 Atl. Rep. 768, the title being Thompson *v.* Baltimore & O. R. Co. Plaintiffs maintained a switching yard and turntable in close proximity to a thickly settled portion of the city of Philadelphia. A fence had once been built around it but was partially broken down and the yard was frequented as a playground by children living nearby. Plaintiff, a little boy eight years old, was struck by some part of the machinery projecting from the turntable and hurled into the pit where he was injured. The action was brought on the theory that the grounds and appliances of defendant being peculiarly attractive to children should have been guarded in some way for their protection. A great number of cases are cited by the court which held the defendant not liable and reversed judgment in favor of plaintiff. In the majority opinion it is stated that: "The fact that the person injured was a child makes no difference unless there was negligence. . . . He was where he had no right to be, on the property of defendant, which it was using in a lawful manner for a lawful purpose in the conduct of its business. It owed him the duty not to injure him intentionally but it was under no duty actively to take care of him either by keeping him out of the yard or by protecting him after he had entered it, from his own acts or the acts of others, who, like him, had entered without permission." In the dissenting opinion, after referring to the importance of the case, it is said: "Especially is the doctrine announced far reaching and important to the multitude of people who live in the congested districts of the cities of the commonwealth. It takes from them a protection which has heretofore been accorded in all jurisdictions where the life of a child is of greater importance than any commercial interest. It completely destroys the maxim, '*Sic utere tuo ut alienum non laedas*,' which for centuries has protected the weak against the strong."

PUBLIC SERVICE CORPORATIONS. (Service to Competing Company). U. S. C. C. Mont. — Under the constitution and laws of Montana one telephone company may compel a rival or competing company to give connections for long distance service, Billings Mutual Telephone Co. *v.* Rocky Mountain Bell Telephone Co., 155 Fed. Rep. 207. Complainant having made an attempt to come to some agreement with defendant relative to connections for long distance service, and failing, applied to the court to compel the granting of such right. The Montana constitution provides that telephone companies shall have the right to connect with other lines and the statutes of the state provide means for carrying the constitution into effect. The court held that the right to "connect" must also include the right use and that defendant should be compelled to receive and transmit messages from its competitor in much the same manner as from its own patrons, and granted the prayer of complainant for proceedings to compel allowance of connection and assessment of compensation. It is specifically stated in the opinion that this relief could not, perhaps, be granted if it were not for the constitutional and statutory provisions referred to.

THE LIGHTER SIDE

Full Faith and Credit. — The Census Taker: "Your name, mum?"

"I don't know."

"Beg pardon, mum?"

"I've been divorced. At present my name is Mrs. Jones in this State. In several States it is Miss Smith, my maiden name, and in three States it is Mrs. Brown, my first husband's name."

"This your residence, mum?"

"I eat and sleep here, but I have a trunk in a neighboring State, where I am getting a divorce from my present husband."

"Then you're married at present?"

"I'm married in Texas, New York, and Massachusetts; divorced in South Dakota, Missouri, Alaska, Oklahoma, and California; a bigamist in three other States, and a single one in eight others." — *Chicago Law Journal.*

His Own Interest. — A Richmond lawyer was consulted not long since by a colored man who complained that another negro owed him three dollars, a debt which he absolutely refused to discharge. The creditor had dunned and dunned him, but all to no purpose. He had finally come to the lawyer in the hope that he could give him some good advice.

"What reason does he give for refusing to pay you?" asked the legal man.

"Why, boss," said the darky, "he said he done owed me dat money for so long dat de interest had et it all up, an' he didn't owe me a cent." — *Harper's Weekly.*

A Good Witness. — Buzfuz: "Now, be careful Mr. Gibbins. You were, I believe, an old friend of the prisoner. Did you ever notice that he behaved strangely when he was alone."

Gibbins: "Well, sir, you see sir, I wern't never wid him when he was alone sir."

In Practice. — Admiring Friend: I see that you are now practicing law.

Frank Fledgling: No sir, I appear to be practicing law, but I am really practicing economy.

How Lawyer Gray Startled the Judges. — A. D. Gray, the Preston lawyer, popularly known as Archie Gray, of the Republican state central committee, startled the sedate judges of the state supreme court this morning when, in arguing a damage case arising from interference with a water-course, he tragically exclaimed:

"God Almighty removed this barrier!"

And then he added:

"And he went on the stand and admitted it."

The court was unable to find that this was proven by the record, however though another witness had admitted it. — *St. Paul Daily News.*

Canada's Supreme Court has fixed a maximum of three hours for counsel's addresses, which decree has recalled some tales of overlong speeches. The story is told of a counsel who pressed his argument for a long time with frequent repetition.

"Mr. ———," said the judge, "you have said that before."

"Have I, my lord?" replied counsel, apologetically. "I am very sorry; I forgot it."

"Don't apologize," was the judicial response, "it was so very long ago."

An American lawyer, who seemed unable to arrive at the end of a prolonged speech, at last ventured to express a fear that he was taking up too much time.

"Oh, never mind time," observed the judge, "but for goodness sake, do not trench upon eternity." — *Buffalo Commercial.*

Good Intentions. — "The question is as to the intent of the law."

"That's easy; the intent of the law is to make business for the lawyers. — *Syracuse Herald.*

Wouldn't like Witnesses Either. — Little Ella: I'm never going to Holland when I grow up.

Governess: Why not?

Little Ella: 'Cause our geography says it's a low, lying country. — *Life.*

He Practiced Law by Ear. — When Grover Cleveland was practicing law in Buffalo one of his friends was a lazy young lawyer who was forever pestering him with questions about legal points that he could just as well have looked up for himself. Even Cleveland's patience had an end. One day as his friend entered he remarked:

"There are my books. Help yourself to them. You can look up your own case."

The lazy lawyer stared at him in amazement.

"See here, Grover Cleveland," he said, indignantly, "I want you to understand that you and your old books can go to thunder. You know very well that I don't read law. I practice entirely by ear."

Judicial Humor. — The reports of law cases have recently been so liberally punctuated with judicial witticisms, followed by "laughter" or "loud laughter," that one cannot resist the conclusion that some of our judges have missed their vocation, and that they might have made equally large incomes in a very different calling.

Yet much of this humor which proves so side-splitting in the rather dreary atmosphere of a court of law seems rather poor stuff when read in the cold medium of print; and one seldom nowadays encounters anything half so funny as some of the sayings of judges of past generations, says *Tit-Bits*.

Chief Baron O'Grady was, for instance, a humorist of the first water, as the following stories will prove. One day a brother judge, who owed his promotion rather to interest than to brains, was boasting to O'Grady of the summary way in which he disposed of matters in his court.

"I say to the fellows who are bothering me with foolish arguments that there's no use in wasting my time and their breath, for that all their talk only just goes in at one ear and out at the other."

"And no wonder," quietly answered O'Grady, "seeing that there's so little in between to stop it!"

On another occasion, when a legal friend was taking the chief baron over his house and showing with pride a very secluded study which he had had built, where he could be absolutely free from any disturbance:

"Capital!" exclaimed O'Grady, in admiration. "You surely can, my dear fellow, read and study here from morning till night and no human being be one bit the wiser."

A very smart retort is credited to Lord Mansfield, an old-time judge. One day a counsel, more famed for his rudeness than for his legal knowledge, was arguing before him a case which involved a question of manorial custom.

"Let me illustrate my point, my lord," he said, "by an example. Now, I have two little manors — "

"That, Mr. ———," Lord Mansfield interjected, with a smile, "is a matter of common knowledge."

This story, by the way, recalls a somewhat similar one of recent years, where an overbearing judge angrily said to a counsel, who had ventured to disagree with him: "I can't teach you manners, Mr. ———."

"That's so, m'lud," placidly answered the barrister, amid the titters of the court, as he proceeded with his argument.

It was an American judge who scored over an unpopular counsel thus. The advocate, seeing that there was no longer any use in denying certain charges against his client, suddenly changed his tactics and tried another plan of battle.

"Well," said he, "be it so. My client, we will admit, is a scoundrel and the greatest liar in the world."

"Brother B——," promptly interrupted the judge, "are you not forgetting yourself?"

However, things were equalized later, when the same judge, after a wearisome summing up in a nuisance case, said to the jury: "And now, I will retire while you are deliberating on your verdict, and I hope you understand the various points I have submitted to you."

"Oh, yes, my lord," said the foreman; "we are all agreed that we never knew what a nuisance was until we heard your lordship's summing up."

Some years ago, when Judge Addison was hearing county court cases in conjunction with Judge Bacon, a woman, whom the former had had occasion to lecture rather severely, took an egg out of her handbag and hurled it at him. Luckily, the egg missed the mark, whereupon Addison turned with a smile to the bar and said: "I really think that egg must have been intended for my brother Bacon."

It was another judge, whose name has not been handed down with this story, who was hearing a case in which a sum of £10 was claimed by the plaintiff for commission.

"My client," said his counsel, "has no wish to be hard on the defendant, but, naturally, having rendered him a valuable service, he requires a little *quid pro quo*."

"Quite so," said the judge; "it is not the 'quid' that the defendant objects to, I presume, but the ten quid."

Sir Joseph Jekyll was a born wit, of whom many amusing stories are told. Once when an attorney called Else, of small stature and poor reputation, addressed him thus in court: "My lord, I understand that you have called me a pettifogging scoundrel. Is that so?"

"Sir," answered Jekyll sternly, "I am not aware that I have ever called you a scoundrel or a pettifogger, but I may have said that you are little Else."

And to give but one more example of his wit. On another occasion a maiden lady of sour visage was being examined before him with the object of proving that she had made a tender of a certain sum of money, when Jekyll jotted down this couplet and handed it to the examining counsel:

Garrow, submit — that tough old jade
Will never prove a tender maid.

Proclamation of the Crier. —

The court is set. The learned clerk looks wise.
The sheriff nods, and now the crier cries:
All persons who bring business here today,
May hence depart, with all the speed they may.
Let wit and laughter, quip and prank, and gird
Come into presence, and they shall be heard!
The court has ruled; in high contempt are we
If aught be spoke of motion, brief, or plea.
This court will try cases more pleasing, far,
Equity session, now, for Bench and Bar.
The issue, now, is definite and clear,
Penobscot bar versus these tables here,
But ere we bend us to this royal sport,
Leave being granted, we address the court.
Our declaration: friendship, warm, sincere.
Our plea: that you would make your dwelling here,
Move to dismiss the care that business lends,
But keep the count that counts us all your friends
The jurisdiction of the court — attest
One word, a word not spoke in jest,
That bench where Appleton made justice — law,
That bench where Peters spoke without a flaw.
That robe that Wiswell honored first of all,
And noble Woodard let untimely, fall,
We, jealous, guard; the readier, Cornish, we
To see that bench, that robe, adorned by thee!
We would amend, had we the words of art,
Our halting brief, yet speaks it from the heart!
Then, brothers, stand! The court: A toast! A cheer!
Do all in love, and keep the record clear!

By Bartlett Brooks, Esq. *Read at dinner to Justice Leslie C. Cornish, Niben Club*, Oct. 31, 1907.

Fixing the Time. — In a murder trial in Cincinnati a negro hotel porter was called as a witness. "How many shots were fired?" he was asked.

"Two shots, suh," he answered.

"Close together?"

"Des laik dat, suh," he said, slapping his hands sharply as quick as he could.

"Where were you when the first was fired?"

"I was in de basemen' of de hotel, suh, shinin' a gemman's shoes."

"And when the second shot was fired where were you?"

"At dat time, suh, I was passin' de Big Fo' depot."

Contempt. — Tudor Jenks, the author of many bits of humorous verse and prose, has always had difficulty on first meeting people in getting them to accept his name as his own. They insist on regarding it as a rather odd pseudonym. Recently the matter has grown worse and he has experienced difficulty in establishing its right in articulate speech. The other day, in front of the Fifth Avenue Hotel, Mr. Jenks was an involuntary witness to a fight between two cab drivers. The men were promptly arrested and Mr. Jenks was haled to court with them to tell what he had seen. The police magistrate was elderly, gruff and short-tempered.

"What is your name?" asked the lawyer.

"Tudor Jenks."

"Once more, please."

"Tudor Jenks."

A sharp rap from the Court, and this, explosively:

"Witness will stop making a funny noise and give his name!" — *Saturday Herald.*

COLUMBIA LAW REVIEW

CONTENTS

DECEMBER, 1907

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COLUMBIA UNIVERSITY
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CONTENTS

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Our Contributors.

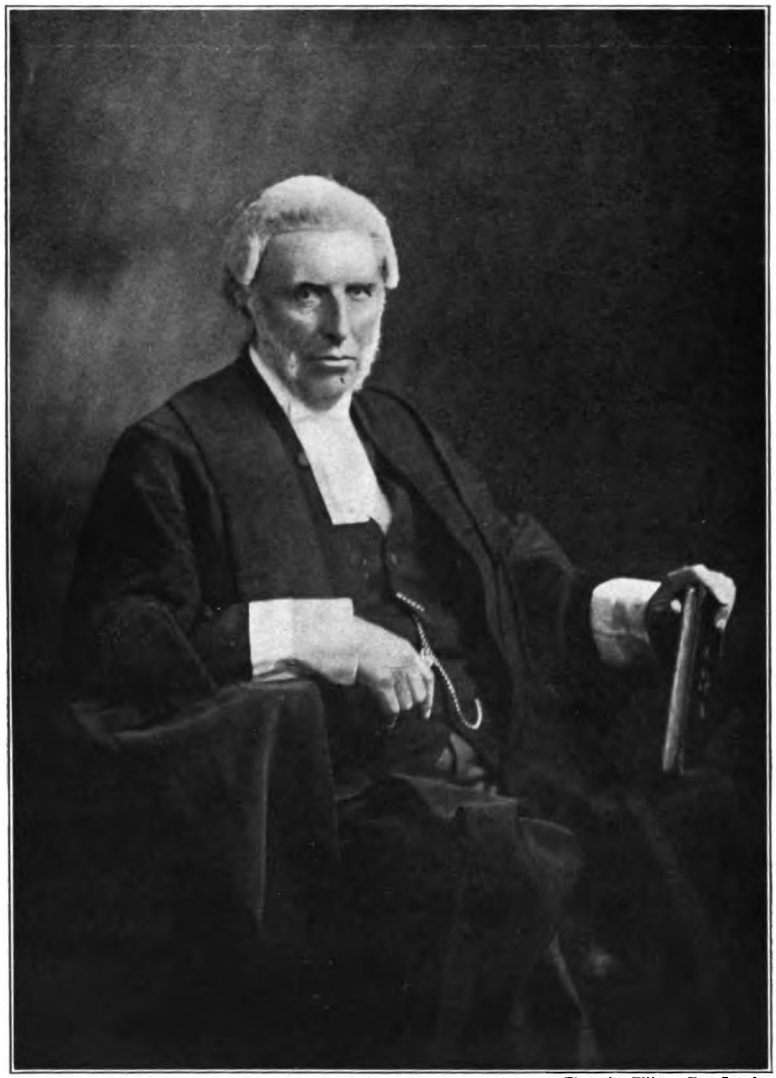
The author of the manuscript suggested by the death of Mr. Justice Kekewich, which we publish in this number, is a lawyer who has practiced extensively in London for many years, and whose views upon English judicial appointments are entitled to great weight. While he feels it his duty to call to the attention of the profession the possibility of abuse attending upon their system, for obvious reasons he prefers not to disclose his identity.

GEORGE P. COSTIGAN, JR., is Dean of the Law School of the University of Nebraska and has previously contributed articles upon a variety of topics of interest to the profession. His early experience in active practice gives added force to his views upon the proposed code of legal ethics.

JUDGE BLOUNT has contributed to this issue the fourth of his series of articles on "Circuit Riding in the Philippines." We believe that in this number he shows exceptional ability as a writer of short stories.

The brief narrative on Lincoln, which we include in this number, is based upon an interview by Mr. Wright with Mr. Somers, who felt himself unable to prepare the anecdotes for publication.

PERCY N. BOOTH is a graduate of Harvard College and the Harvard Law School, who, since his graduation, has been in practice in Louisville. He has shown his public spirit by taking an active interest in all local movements for civic betterment and was one of the counsel employed by the Citizens' Association to contest the elections which he so graphically describes.



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THE LATE MR. JUSTICE KEKEWICH

The Green Bag

Vol. XX. No. 2 BOSTON February, 1908

THE LATE MR. JUSTICE KEKEWICH, WITH SOME REMARKS CONCERNING PROMOTION TO THE BENCH IN ENGLAND

By A Practicing Lawyer.

An American Senator wrote to Lord Erskine that he had made a wager that most of his (Erskine's) decrees had been reversed. The greatest of English advocates replied — "To save you from spending your money upon bets you are sure to lose, remember that no man can be a great advocate who is no lawyer. The thing is impossible." Lord Erskine here explains in a sentence why the system of political appointments to the judicial Bench (with very rare exceptions) works to the advantage of the public. A great advocate naturally gravitates to public life, and the prizes of the legal profession are given mainly to successful public men. But the public does not suffer, because for a great advocate to be no lawyer is a thing "impossible." It must also be remembered that a judge has the assistance of counsel. This is especially the case in Courts of Chancery where questions of law rather than questions of fact have to be decided. Boston in the United States has given the English nation one of its most brilliant chancellors since the death of Francis Bacon, in the person of John Singleton Copley. If it had not been for the generous assistance of Mr. Gardiner Greene, a merchant of Boston, Copley could not have remained at the Bar, but ultimately success came, and Copley (born in the United States in 1772) lived to become Lord Lyndhurst and to be four times Lord Chancellor of England. Copley (unlike Eldon) had never practiced in a Court of Equity, and yet when he came to preside there, his decisions gave universal satisfaction. We will only mention his judgment in Dearle *v.* Hall on an equitable assignment of a chose in action — a question with which as a common law lawyer he must have been quite unfamiliar. Indeed Lord Lyndhurst's career illustrates the best features in our system of judicial appointment. He was appointed Lord Chief Baron of the Court of Exchequer by his political opponents, just as the present Master of the Rolls (then a Liberal M. P.) was raised to the Bench by Lord Halsbury. Lord Grey's appointment of Copley was peculiarly creditable, because the emoluments of the office (£7,000 per annum) were at that time of moment to him. We are proud of our members of Parliament being unpaid, but our system of judicial appointments has in the past been a system of deferred payment for past political services. Promotion to the Bench is not now so entirely a matter political as it was when Eldon and Brougham sat on the Woolsack. To-day we have a Court of Chancery, which, for learning and character, has never been surpassed in our judicial annals. We have six Judges of the First Instance of the Chancery Division of the High Court of Justice, who are all accomplished Equity lawyers. Three of them were appointed by the late, and three by the present Lord Chancellor, so that political honors are easy.

When John Scott (afterwards Lord Chancellor Eldon) was called to the Bar, the

number of Counsel practicing in Chancery is said not to have exceeded twelve or fifteen. Lord Campbell says their proceedings were not noticed in the newspapers. John Scott, who was as full of ambition as an egg is of meat, began his career on the Common Law side. Besides the Lord Chancellor, there was then (1779) only one Chancery Judge — the Master of the Rolls. Lord Eldon had been on the Woolsack for seven years in his second term of office, when he passed a bill providing for the appointment of a third judge in the Court of Chancery (1813). The first Vice Chancellor of England was Sir Thomas Plumer, the then Tory Attorney General. No wonder that great reformer, Sir Samuel Romilly, wrote — "a worse appointment could hardly have been made. He (Plumer) knows nothing of the law of real property, nothing of the law of bankruptcy, and nothing of the doctrines peculiar to the Courts of Equity." And yet another Whig, Lord Campbell, tells us that Plumer's "judgments are now read by the student with much profit, and are considered of high authority." On Plumer's promotion to the post of Master of the Rolls, Sir John Leach succeeded him, first as Vice Chancellor and subsequently as Master of the Rolls. Leach was the first Chancery Judge who had confined himself while at the Bar to the Equity Courts, and yet he was far from an improvement on his Common Law predecessor except in the brevity of his judgments. The Chancery Court under Lord Eldon was called the Court of Oyer sans Terminer, and the Vice Chancellor Leach's Court, the Court of Terminer sans Oyer. Leach was succeeded by Sir Anthony Hart, who for 26 years had devoted himself to Equity work, and subsequently proved himself one of the best Lord Chancellors that Ireland ever had. Sir Anthony was succeeded by Sir Lancelot Shadwell, the last Vice Chancellor of England. Shadwell was appointed in 1827 and died in office in 1850.

Our object in bringing our brief review down to the time of Sir Lancelot Shadwell is because that judge's career illustrates a peculiarity of the Courts of Chancery which is not to be met with in the Courts of Common Law. We refer to the system of Chancery Leaders. In the Courts of Common Law the King's Counsel[1] are not attached to any court, but go into any court for which they are briefed. There are advantages as well as disadvantages in the practice. It has led to popular counsel being briefed in more cases than they can possibly attend to. On the other hand the fact of the Common Law Courts being open to all counsel has rendered them peculiarly subject to the control of public opinion. It has been impossible for any counsel, however eloquent and however masterful, to obtain a controlling influence over any Common Law Judge. In the Chancery Division of the High Court of Justice a king's counsel attaches himself to a particular judge and does not practice before any other Chancery Judge of First Instance unless he is paid a special fee of fifty guineas (in addition to his ordinary brief fees). At present there are six Chancery Courts of First Instance, and to each of these courts certain leaders attach themselves. The consequences of this system are most advantageous to the public, because solicitors are thus assured that the counsel whom they have briefed will be present to argue their case — a certainty which they can never enjoy in briefing leading king's counsel at the Common Law Bar. The first counsel of eminence who appears to have thus restricted his practice to one Court of Chancery was Lancelot Shadwell. The words in which he laid down his own view of the duties of an advocate are worthy of being quoted *in extenso*.

"I cannot induce myself to think that it is consistent with justice, much less with honor, to undertake to lead a cause, and

[1] When a Queen is sovereign of the United Kingdom, the Counsel called "within the bar" are called "Queen's Counsel"; when a King, "King's Counsel."

either forsake it altgoether, or give it an imperfect, hasty and divided attention — consequences that inevitably result from the attempt to conduct causes before two judges sitting at the same time in different places. I have therefore resolved to refuse any business which may tend to prevent me from giving my undivided attention in court to matters that may be heard before the Lord Chancellor."[1]

Sir Lancelot Shadwell was a man of remarkable physique and at an advanced age bathed all through the winter in the Thames. His home, Barn Elms, famous in the days of James I for its duels, stands on the banks of the river. One vacation he is said to have granted an injunction while pursuing his favorite pastime. Unfortunately the fashion which he had set of a Chancery Leader restricting himself to one court and which in his case was entirely beneficial, degenerated in his own court into a system in which counsel and judge seemed to have exchanged places. The tail wagged the dog.

Richard Bethell was called to the Bar in 1823. He and Sugden (Lord St. Leonards) were the first Lord Chancellors who practiced in the Equity Courts from the date of their call. In 1841 Bethell took silk[2] and became the leader in the Court of Vice Chancellor Shadwell. The influence which he exercised over the Vice Chancellor was distinctly prejudicial to the cause of justice. True words are often spoken in jest. "Why," asked the jester of those days, "is Vice Chancellor Shadwell like Rehoboam?" "Because he sets up an idol in Bethel." Lord Westbury in the judgment of most lawyers is only second to Lord Cairns among the Victorian Chancellors. He was not only a profound lawyer and eloquent judge, but he was also a zealous and wise law reformer. Lord Westbury clothed his judgment in classical English. It is difficult to decide whether the reasoning or the style excite our admiration most. Had Bethell devoted himself to literature instead of to law he would have proved a rival of Macaulay and Matthew Arnold. If Bethell escaped in this life punishment for "the fantastic tricks" he played in the Vice Chancellor's Court, his reputation after death has severely suffered for them. This fearless and independent judge is now remembered by laymen mainly as the author of bitter and ill-natured remarks. Possessing one of the most complex of characters and lacking in hardly any intellectual gift, this "Keeper of the Queen's Conscience" is now regarded as a man who owed his rise to irony and insolence. Assuredly the last Vice Chancellor of England has not been unavenged.

The Court of Chancery has recently lost its oldest Judge in Mr. Justice Kekewich. Sir Arthur Kekewich had much in common with Sir Lancelot Shadwell. Both were educated at Eton, which means starting in life under a cloudless sky and with favouring breezes. Both were gifted with bright intellects which ensured them first success at the University and subsequently at the Bar. Both were essentially gentlemen and lovers of sport. Sir Lancelot entered Parliament; Sir Arthur failed though he tried twice. None the less his appointment to the Bench was a political one. The best side of the late judge's character was shown in Chambers. An immense amount of important business dealing with large sums of money and complex interests under Wills and Settlements is transacted in Chancery Chambers. Mr. Justice Kekewhich used to master all his papers (often very voluminous), was never over technical in his decisions, and was patient and courteous to those practicing before him. The well known *mot* about the late Judge was quite untrue, when he sat in Chambers. There he was quick and rarely wrong. In Chambers he seemed to have taken Lord Westbury as his model. That brilliant ex-Lord Chancellor devoted the last year of his laborious life to his duties as

[1] *Gentleman's Magazine*, Vol. 34, p. 545.

[2] Taking silk is the phrase used when a Junior becomes a King's Counsel: henceforward he wears a silk gown and not a stuff one.

Arbitrator in the winding up of the affairs of the European Assurance Company. Never did Lord Westbury appear to greater advantage and never did Mr. Justice Kekewich reveal his grasp of legal principles more clearly than when dealing with a humdrum, but (to the parties) important question in Chambers.

There was another side to the late Mr. Justice Kekewich. In court a change for the worse came over his character. He was quick, and too often wrong in his decisions. Himself a kind-hearted man, he would have been surprised had anyone told him that he had closed his ears to arguments which (had he listened to them) would have led him to give a different decision.

The growth of appeals in the last twenty years has been alarming. This is a sign of the times which all thoughtful lawyers regret. This increase in the number of appeals is greatly due (on the Chancery side) to the judgments of Mr. Justice Kekewich. The *Times* aptly said that the growth of appeals has introduced the "gambling element" into litigation. It has rendered it almost impossible for an honorable Solicitor to give any estimate as to the time within which the litigation he is conducting will end, or as to its probable cost. The late Mr. Justice Kekewich possessed keen intelligence which should have placed him among the great judges of England, but there was something wanting. He made up his mind, but in the opinion of many he made it up too quickly. The result was that even when he was right in his law, the litigant he decided against was dissatisfied and went to the Court of Appeal. A great judge, a Mansfield or a John Marshall, is one who convinces both sides that his decision is just and according to precedent. In the judgments of a great lawyer, who is also a great man, there is always to be found a note of finality.

On Friday, November 15th, 1907, the late Judge announced his intention of not sitting till the following Wednesday, in honor of his having been twenty one years on the Bench. He never sat again. On the following Tuesday he played his favorite game of golf; on the Friday he sank, after an operation for appendicitis. He will be greatly missed, for he was a man of keen intelligence, kindly disposition, and untiring industry. He died in harness, and with his death the last link with the legal system of Eldon seems to have snapped.

LONDON, ENG., January, 1908.

THE PROPOSED AMERICAN CODE OF LEGAL ETHICS

By George P. Costigan, Jr.

THE American Bar Association's Committee on Code of Professional Ethics has reported to the Association in favor of the adoption of a code by that Bar Association, and during the coming winter the committee will be engaged in framing such a code. In the meantime it prints the provisions of the various State Bar Association codes, namely, those of Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, West Virginia and Wisconsin, and invites "opinions and suggestions in the matter of the proposed canons of ethics."[1] In view of that invitation, it may be well to call the attention of the bar and of the public to some of the leading provisions of the codes already adopted in the various states.

It is desirable to notice at the start the changed condition which confronts the bar of today as contrasted with that which faced the lawyers of even a generation or two ago. Through the enormous increase in the number of practicing lawyers, fully, and more than fully, keeping pace with our material development and enlarged population, and through the growing tendency of the newer lawyers to regard their calling either as a money-getting trade or as a stepping stone to politics rather than as in itself a noble and inspiring calling to which money getting is merely an incident, the unwritten code of ethics which the lawyer of the past felt bound by is proving wholly inadequate. We are getting into the profession a far larger number of men whose home influences and other early surroundings too often do not permit them to have the same, nor anywhere near the same, high ideals of legal conduct as actuated the old-school lawyer with generations of professional ancestors to furnish him with moral inspiration. The writer would not be understood as decrying what may well be called the democratization of the bar, but certain it is that such democratization has made it inevitable that the unwritten common law of professional etiquette and of professional moral action which governed generations of lawyers in the past shall be replaced by written rules of professional etiquette and a written ethical code. It is startling to read in the report of the American Bar Association's committee on Code of Professional Ethics for 1906, quoted with approval in the report for 1907, "that many men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of the ethical requirements of the situation,"[1] but when we remember the widely varied walks in life from which the members of our profession are drawn, who can doubt that such may well be the case? The very fact that the charge is made by able lawyers and cannot be disproved makes it indeed desirable that a written code with which every lawyer is compelled to make acquaintance at the very outset of his career should be adopted. As the committee above referred to said in 1906: "The 'thus it is written' of an American Bar Association code of ethics should prove a beacon light on the mountain of high resolve to lead the young practitioner safely through the snares and pitfalls of his early practice up to and along the straight and narrow path of high and honorable professional achievement."[2] And if, as is hoped, the courts will ultimately require all candidates for the bar

[1] Page 5 of Report of August, 1907, to American Bar Association.

[1] Page 9 of Report of August, 1907.
[2] Page 9 of Report of August, 1907,

to subscribe to the code as a condition precedent to admission and will then, through suspension or disbarment, require those admitted to live up to the code, much good will no doubt result. In any event, as the committee report of 1907 points out, "Your committee are of opinion that the adoption of canons of professional ethics by the American Bar Association is destined to have a powerful and far-reaching influence upon the development of our profession, indeed to so great an extent that it will be difficult to overestimate the importance of the event." [1]

It is hard to mark the point where manners give way to morals, and all codes of legal ethics confuse the two. Perhaps it is as well that no attempt is made to separate them in such a code, and the writer will certainly not attempt to do so here. The important thing is to encourage right conduct, whether that conduct constitutes good manners merely or good morals.

In order to see what the codes of legal ethics treat of, and to bring in an orderly way before the non-professional reader the problems to be dealt with, let us take up the various phases of a lawyer's life from his admission to the bar on.

When the young lawyer is admitted to the bar, he either serves some older lawyer as a clerk or else opens an office of some kind for himself. In either event he engages in cases, either for his employer or for himself.

If he is employed by a lawyer he owes the general duties owed by all employees to their employers, all of which merge in the one general duty to devote his best efforts to furthering the interests of his employer. The duties which an employee owes to his employer are subject, however, to the higher claims of truth and conscience upon the employee. Now that the class of salaried law clerks is rapidly growing in our large cities, there is genuine need of a legal code provision condemning any lawyer who will encourage any clerk of his to do, or allow him to do, anything in the course of his employment which would be immoral or unprofessional if done by the employer. Beyond calling for some such provision, nothing need be said of the situation of the lawyer and his law clerk, and we may now devote our attention to the lawyer who takes cases for himself. We may add, however, that the above rule suggested for the lawyer employer should be broadened to make the lawyer responsible for the culpable practices of his partner or partners.

The first question that comes before a lawyer who takes cases for himself is the one of legitimate advertising. The code provisions vary in regard to that question, but the traditional and conservative stand is represented in the following combination of the Alabama and Michigan code provisions, viz.: "The insertion of business cards in newspapers, tendering professional services to the general public, or announcing business changes, is proper; but a special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they are conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is of evil tendency and wholly unprofessional." [1]

It should be noted that on this question of advertising there is growing dissent. The professional feeling against the solicitation of business seems to have arisen from the distinction in England between attorneys and counsellors on the one hand, and barristers on the other. "The latter were to be sought only because of their learning and skill, it being undignified to seek employment in any manner." [2] Being employed

[1] Page 3 of Report of August, 1907.

[1] Alabama code, sec. 16; Michigan code, sec. 51. See sec. 18 of Report of August, 1907, p. 21.

[2] Kinkead's Jurisprudence Law and Ethics, p. 316.

by the attorneys and counsellors, the barristers did not need to advertise; and the American lawyer, who is attorney, counsellor, and barrister combined, has inherited the prejudice against advertisement which governed barristers. There is a growing feeling at the bar that in America a legitimate solicitation of business may be made by self-respecting and high-minded lawyers, but it is doubtful if that feeling will cause the American Bar Association to amplify the rule above quoted. The dangers of amplifying it are too great. The conservatism of the bar is nowhere more in evidence than in this matter of advertisement.

The attorney is now ready for his first case. Under none of the codes is he to hunt it up, for by them all the stirring up of strife and litigation is condemned. It is to be hoped that the American Bar Association's Code will be explicit on this point. It seems that in some parts of the country certain lawyers who are what is known as "ambulance chasers" or have partners who are such, and certain lawyers who have men employed to drum up business for them, are in good standing at their local bar. Such men correspond in the legal profession to the quacks of the medical, and if they are in good standing at any local bar, then that bar needs the moral awakening which the American Bar Association code is sure to bring. As that association's committee said in its report of 1906:

"With the marvelous growth and development of our country and its resources, with the ranks of our profession ever extending, its fields of activities ever widening, the lawyer's opportunities for good and evil are correspondingly enlarged, and the limits have not been reached. We cannot be blind to the fact that, however high may be the motives of some, the trend of many is away from the ideals of the past, and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood, or of personal aggrandizement. With the influx of increasing numbers, who seek admission to the profession mainly for its emoluments, have come new and changed conditions. Once possible ostracism by professional brethren was sufficient to keep from serious error the practitioner with no fixed ideals of ethical conduct; but now the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners, pursue their nefarious methods with no check save the rope of sand of moral suasion so long as they stop short of actual fraud, and violate no criminal law. These men believe themselves immune, the good or bad esteem of their colaborers is nothing to them, provided their itching fingers are not thereby stayed in their eager quest for lucre. Much as we regret to acknowledge it, we know such men are in our midst. Never having realized or grasped that indefinable ethical something which is the soul and spirt of law and justice, they not only lower the *morale* within the profession, but they debase our high calling in the eyes of the public. They hamper the administration, and even at times subvert the ends of justice. Such men are enemies of the republic; not true ministers of her courts of justice robed in the priestly garments of truth, honor, and integrity. All such are unworthy of a place upon the rolls of the great and noble profession of the law."[1]

As the lawyer's first case may be civil or may be criminal, and the two are supposed to present somewhat different problems, let us take up first the handling of a civil suit.

When the client comes with the case the attorney's first duty is to get as full a statement of the case as the client can give him in the time at their joint disposal. It may be that prompt action must be taken to get out an attachment, a writ of replevin or an injunction, to get immediate personal service of summons, or for some other reason; but as full a statement as is possible under the circumstances should be obtained in order that the lawyer may be in a situation to advise properly at the outset and to deal adequately with each emergency which arises. One who has not experienced the difficulty of getting an accurate and full statement of the facts of a case from a client can have no appreciation of its magnitude

[1] Quoted in Report of 1907, p. 7.

The duty of the attorney to get such a statement is fundamental. The codes of legal ethics nearly all so provide, and urge in addition that the controversy be adjusted without litigation if practicable. They also declare that "the miscarriages to which justice is subject and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain." [1]

If during the client's statement of the case it becomes apparent that the attorney has obligations to or relations with the opposite parties which "will hinder or seriously embarrass the full and fearless discharge of all his duties" [2] he must decline to appear in the cause, and in any event "an attorney is in honor bound to disclose to his client at the time of retainer all the circumstances of his relation to the parties, or interest in, or connection with the controversy, which might justly influence the client in the selection of his attorney," [3] and "can never represent conflicting interests in the same suit or transaction, except by express consent of all so concerned, with full knowledge of the facts." [4]

The next question for an attorney who has obtained as full a knowledge as possible of his client's cause and who has no ties which prevent his being retained is to determine whether it is the right kind of a case to take. The various state legal codes take advanced ground in that matter. Take for instance section 10 of the Colorado code which is as follows:

"Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belongs to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

"An attorney 'owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,' to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or lessen the duty of obedience to law, and the obligation to his neighbor, and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery for the clients sake."

Unfortunately, there are still many lawyers who think that an attorney should not concern himself with the question of the right or wrong of his client's cause. That notion persists for the very reason that lawyers, more than other men, realize that while an Omniscient Being can see only one side to every question, there are from our finite point of view two sides to the vast majority of disputes. Taught by hard experience that the right or the wrong of a given legal dispute may be as much in doubt after the best trained legal minds have conscientiously endeavored to give it the right disposition as it was at the start, the lawyer hesitates to believe, and rightly hesitates to believe, that his client is in the wrong. It is his business to give the client the benefit of every reasonable doubt. If he does not know that the civil action's prosecution or defense which he is asked to undertake is unjust, and by "know" is meant be satisfied beyond a reasonable doubt, then he can with a clear conscience take the case. He must not shut his eyes to the facts, and he must resolve his strong suspicions, for, as all the state legal codes

[1] Sec. 35 of Report of August, 1907, p. 28.
[2] Sec. 37 of Report of August, 1907, p. 28.
[3] *Ibid.*
[4] Sec. 28 of Report of August, 1907, p. 25

insist, "an attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong."[1] It is the veriest sophistry to attempt the justification which some do, that every man, be he in the right or in the wrong, has a right to be heard in court. The suitor in an unjust cause or the defender who sets up an unjust defense may have a legal right, but he certainly has no *moral* right, to be heard in court; and since a lawyer, as an officer of courts of justice, is bound to aid in securing just decisions, he has no moral right to assist in securing unjust ones. Baron Bramwell once said, to be sure:

"A man's rights are to be determined by the court; not by his attorney or counsel. It is for the want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, 'I want your advocacy, not your judgment; I prefer that of the court.'"[2]

And Lord Brougham in his famous speech in behalf of Queen Caroline also made what the Court of Appeals of New York called "the atrocious but memorable declaration"[3] that "an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other."[4] But neither of these men was considering the case of a lawyer who was absolutely convinced that his client's cause was unjust. That either of them would have advocated that a lawyer should knowingly aid a rascally client to perpetrate a swindle or carry through a blackmailing lawsuit or in any other way make dishonesty succeed is unthinkable.[1] As Chief Justice Cockburn once remarked:

"My noble and learned friend, Lord Brougham, 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 accomplish the interests of his client *per fas* and not *per nefas*."[2]

Or as Judge McCrary is reported still more tersely to have put it:

"There is, there must be, a limit beyond which the advocate cannot go. A lawyer should never be the tool of an unscrupulous client. If he is asked to aid a rascal in an effort to oppress and wrong another, he must refuse. No fee should be sufficient to hire him for such work."

Still another way of stating the matter is found in Hoffman's 14th resolution in regard to professional deportment, where he says:

"My client's conscience and my own are distinct entities; and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it; and should the principle also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day."[3]

A lawyer may take up a case which he believes in and then at some subsequent stage discover its injustice. The only general rule that can be laid down even there is that he should abandon it, if there

[1] Sec. 15, Report of August, 1907, p. 20. What is here said of a plaintiff's attorney applies equally to a defendant's.

[2] Johnson *v.* Emerson, L. R. 6, ex. 367.

[3] Turnpike Road Co. *v.* Loomis, 32 N. Y. 127, 133.

[4] *Ibid.*

[1] "Such a proposition as that of Lord Brougham shocks the moral sense." Turnpike Road Co. *v.* Loomis, 32 N. Y. 127, 133.

[2] Quoted in 15 Law Quarterly Review, 270–1.

[3] Quoted in Report of August, 1907, p. 46.

is no shadow of doubt in his own mind that it is an unjust cause. The editor of Law Notes in October, 1900, declared that "Law Notes has at various times devoted considerable space to the question of Legal Ethics, gathering the opinions of judges and other distinguished legal authorities. But it has yet to hear of any authority which justifies, or even permits, the abandonment of a case by a lawyer who has discovered that his client has no meretorious defense." A consideration of the context in which those sentences occur leads me to the opinion that what the editor of Law Notes meant by an abandonment of a case was not a withrawal from any connection with it but an unauthorized dismissal of it or, if the attorney represented the defense, the equivalent of an unauthorized consent to the entry of a judgment by the opposite party without the client being given an opportunity to substitute another attorney who believed in the client's cause. If the editor of Law Notes meant that, no quarrel can be had with his position, but we can still criticise him for using language capable of serious misconstruction even by a lawyer reader. If, however, the editor of Law Notes meant any thing short of what is above supposed to have been the sense in which he used the word "abandon" then certainly the legal profession cannot and does not endorse what he says. The New York Supreme Court has pointed out:

"So any conduct on the part of the client, during the progress of the litigation, which would tend to humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses, or any other unjustifiable means, would furnish sufficient cause" to "justify an attorney in abandoning a case in which he has been retained."[1]

[1] Tenney *v.* Berger, 93 N. Y. 524, 530. That case supports the proposition that an attorney "cannot abandon the service of his client without justifiable cause and reasonable notice" (*Ibid.* 529), but can of course do so for such cause and on such notice. See Weeks on Attorneys at Law, sec. 255; 2 Clark & Skyles on Agency, sec. 711 (c).

Whenever the circumstances of a civil case make it clear that a man of honor and conscience cannot longer be a party to its prosecution or defense without dishonor and moral degradation, it is of course his duty, paid legal advocate though he may be, to abandon the case in the popular meaning of the word, by withdrawing from from it and letting the client find, if he can, another lawyer to take the withdrawer's place. We lawyers are apt to be more cautious about asserting this in regard to criminal cases than in regard to civil cases, for reasons which we shall discuss later, and even in civil cases we are sure that a lawyer should never desert the client at a stage in the case where no other lawyer can be employed, unless the moral necessity for so doing is absolutely apparent.

It has often been urged against lawyers that they will interpose certain defenses when they know that the other party's cause is just. Among these defenses are infancy, the statute of limitations, and the statute of frauds. In the first place, it should be said that in the vast majority of cases where these pleas are made it is not known that the plaintiff's cause is just, and the lawyer putting in the defense simply selects his surest way of winning. Then again, not all lawyers would put in such pleas where justice demands that the plaintiff recover. Hoffman's 12th and 13th resolutions on professional deportment are as follows:

XII

"I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.

XIII.

"I will never plead or otherwise avail of the bar of Infancy against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defense than that it was contracted by him when under

the age of twenty-one years, he must seek for other counsel to sustain him in such a defense. And although in this, as well as in that of limitation, the law has given the defense, and contemplates, in the one case, to induce claimants to a timely prosecution of their rights, and in the other designs to protect a class of persons, who by reason of tender age are peculiarly liable to be imposed on, — yet, in both cases, I shall claim to be the sole judge (the pleas not being compulsory) of the occasions proper for their use."[1]

I cannot agree, however, that Hoffman's resolutions deserve a place in a code of legal ethics. The pleas of infancy, the Statute of Limitations, and the Statute of Frauds are perfectly good pleas in themselves, and are demanded in the majority of cases by sound public policy. If the case is fit for the attorney to take, the pleas may morally be put in if their truth can be proven. The legislature has given us the age limit, or permitted the common law age limit to continue, and it has given us the Statute of Limitations and the Statute of Frauds, all to accomplish certain ends demanded by supposed public policy, and it is upon the legislature, rather than the lawyers, that the responsibility for the pleading of such defenses must be placed. Like the exemption statutes, these defenses rest on a real or supposed public policy of which the legislature is the exclusive judge, and in the vast majority of cases the lawyer is aiding in the carrying out of that public policy by assisting his client in setting up these defenses. In the cases where injustice is plainly being done by interposing such pleas, the conscientious lawyer will of course do his best to dissuade the client from resorting to them. His full duty is done, however, when he has protested as vigorously as possible against his client's action. He can then with good conscience file the pleas or, if in the given case such action is repugnant to him, he can refuse to file them, and let the client seek another attorney.

[1] Quoted on p. 46 of Report of August, 1907.

Having determined that he can properly undertake the case for the client, the attorney's next duty is to have at the very outset a frank and explicit understanding with the client as to the amount of the attorney's compensation. The haggling over fees is the most disagreeable part of a lawyer's business. Every charge has its ethical element, for the lawyer, like the railroad, has always before him the question whether he shall charge what the traffic will bear. Unlike the railroad, however, the lawyer seldom succeeds in charging all that the traffic will bear. Some guide for the fixing of fees has to be furnished as part of every legal ethical code. Such a guide is furnished in sections 50 and 51 of the Alabama code:

"50. In fixing fees the following elements should be considered: First. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. Second. Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. Third. The customary charges of the Bar for similar services. Fourth. The real amount involved, and the benefits resulting from the services. Fifth. Whether the compensation be contingent or assured. Sixth. Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount, it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

"51. Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred."[1]

[1] Secs. 56 and 57 of Report of August, 1907, pp. 34 and 35.

And in connection with these sections should be noted section 48 of the Alabama code, viz.:

"48. Men, as a rule, overestimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in many instances, and sometimes none at all." [1]

If no bargain about compensation is made by the attorney with the client, then the attorney must make his own charge in accordance with the foregoing principles. And if, as often happens, the client is dissatisfied with the charge, the matter is one for mutual adjustment. As is said in section 47 of the Alabama code:

"47. In general, it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud." [2]

The ethical duties of lawyers by no means end with the taking of the case and the agreement as to fees. The lawyer must not borrow from his client, nor lend to him, must not commingle money or other trust property of the client's with his own, must attend promptly to all features of the case, must yield to the client's wishes in regard to additional counsel, must treat as confidential the communications and confidences of the client, must keep his agreements even if they are not in writing, and give written evidence of oral agreements if such evidence is called for, and in every way must conduct himself as a man of honor should. The various codes of legal ethics so provide.

Not the least perplexing ethical duty which confronts the lawyer in the preparation for a trial is the coaching of witnesses. We lawyers have needed no psychological expert to teach us the imperfection of observation of witnesses and their honest oversights, illusions and delusions. We have always found it highly desirable to get our witnesses together and have them rehearse again and again the events to be testified about until all unconsciously or consciously agree where at first there was disagreement. The honest and experienced lawyer can tell in the vast majority of cases whether he is expediting the cause of truth or verging on subornation of perjury in what he is doing. When a client or witness says to you, "But if I am asked so and so, what shall I say?" it does not necessarily mean that he wants you to suggest a perjured answer for him, but often means "What is the best legal way of putting my answer?" It is just there and in the drawing of affidavits, that the greatest temptation besets the lawyer; for in this day of apparently increasing perjury the lawyer is often the keeper of his client's conscience. It is sufficient to say that in general the temptation is put one side and the honest and high-minded advice is given.

After the attorney undertakes the case he incurs certain ethical obligations toward the other party and his attorney. As a rule, he must not compromise with the opposite party without notice to the latter's attorney. He must be liberal in accomodating the just requests of the opposite party and his attorney as to incidental matters of the cause. He must be fair to the opposite party's witnesses, though that rule is far too often transgressed as regards witnesses. He should avoid testifying for his client except in case of absolute necessity, and should avoid asserting his personal belief in the justice of his client's cause. As part of his fair dealing to the opposite party he should refrain from conversing with the jurors before and during the trial, and should not treat them after the trial, and he should not communicate or argue privately with the

[1] Sec. 54 of Report of August, 1907, p. 34.
[2] Sec. 53 of Report of August, 1907, p. 33.

judge as to the merits of the cause. Nor should he attempt to influence the trial of the cause by inspiring newspaper comments or discussions. As the Wisconsin code, sec. 17, declares:

"Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously. It is better that all newspaper reports be taken from the records and papers on file in the court."

But in addition to the foregoing ethical duties, the lawyer owes moral obligations to the court. He must be punctual in his attendance on the court, he must not use personal influence with the judge in favor of his client, he must not display temper because of an adverse ruling, he must defend the courts against unjust criticism and popular clamor, and he must at all times be honest with the court. Much might be said of all these topics, but time forbids. The various state legal codes are in substantial agreement about them.

So much then for civil causes. And now a word about the lawyer's ethical duties in criminal cases.

There would seem to be no question that the prosecuting attorney, occupying as he does in our legal system a quasi-judicial position, should be impartial in the presentation both of facts and of legal authorities in a criminal case. He, at least, is legally and morally bound to reveal both sides of the case, for he is to seek, not a conviction, but justice. As Gurney, B., said in a case where a prosecutor in a murder case stated facts showing that the death was probably accidental: "The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the court in the furtherance of justice and not to act as counsel for any particular person or party."[1] For the same reason, and because also it is an attempt to influence court and jury by matter not evidence in the case, a prosecuting attorney has neither legal nor moral right to state that he believes the defendant to be guilty. If he believes the accused to be innocent, it is his duty, however, to say so.

But what about the attorney for the defendant in a criminal case? Has he a moral right to defend a man whom he believes to be guilty as charged? The question arises in practical experience far less often than most people suppose, and comparatively few lawyers ever have to face it. It is unfortunately true that the public has imbibed from the newspapers the contrary notion. Comparatively few lawyers are engaged in the trial of the criminal cases, breach-of-promise suits and divorce cases which furnish such sensational reading in the daily papers, and those lawyers are very far from representing a high type, and yet the public judges all lawyers by such. The fact of the matter is that few lawyers ever have to face a doubt as to the guilt or innocence of a man charged with crime. For the vast majority of lawyers the question remains academic, yet is one that has an indirect influence on the lawyer's view of the ethical requirements of civil litigation and must be discussed.

Many lawyers regard criminal cases as on a different moral footing from civil, and a lawyer's moral right to defend a guilty man charged with crime as clear. The argument seems to be that a man's life or liberty is not to be taken away if he can prevent; that he has a right to be heard in his defense given him by the law of the land; that the latter right is worthless if no lawyer will present his defense; and that therefore any lawyer is justified in presenting the defense, even though he believes the defendant to be guilty. That argument seems to the writer to be fallacious. If the accused is indicted

[1] Gurney, B., in Reg. *v.* Thursfield, 8 c. & p., 269.

or informed against under an invalid statute, or if the indictment or information is fatally defective, or if the indictment or information is so drawn as really to charge a smaller offence than the one for which conviction is sought, any lawyer is justified in defending even a guilty man on such grounds, for what we need is justice according to law, and such defense will promote such justice. So a lawyer may properly see that a guilty man is convicted on only legal evidence, for if we are to keep our liberties we must see that no man's life, liberty, or property is taken away except on legal evidence proven in the orderly administration of justice. But when it comes to defending on the merits a man the lawyer knows to be guilty, putting on the stand witnesses the lawyer knows are committing perjury, and then arguing to the court or jury that the perjured testimony is correct, the writer can see only immorality. The writer has always insisted that a lawyer had no moral right to defend on the merits a man he knew in advance to be guilty, and has supported his position by two reasons: 1. Such action warps the lawyer's moral nature, and, 2, in so far as the lawyer does not deliberately become accessory after the fact to the crime, his knowledge of his client's guilt robs his exertions in the client's behalf of their effectiveness.

The first reason seems to the writer conclusive, but for those who believe that the guilty man has a right to have his defense vigorously presented, the second reason shows that the supposed right of the guilty man is infringed unless he is defended by a man who believes in his innocence.

But what of the case where a lawyer enters upon the trial of a criminal case in the belief that his client is innocent and in the course of the trial discovers that he is guilty? No hard and fast rule can be advocated. The answer in each individual case must depend upon the stage the case has reached, and in particular upon the possibility of the lawyer withdrawing without tacitly or otherwise making known the guilt of the client. An attorney employed to defend a man who cannot be compelled to incriminate himself or testify against himself violates the trust and confidence reposed by his client and unwarrantably takes a brief for the prosecution if he withdraws from the defense of the case at a time when such withdrawal is explainable only by the guilt of the defendant. An attorney will not be permitted to divulge, without the client's consent, any matter which has been communicated to him in professional confidence, and for a lawyer by an eleventh hour withdrawal to announce, in effect, the guilt of the defendant in a criminal case would be in the highest degree unprofessional and immoral. He must stay in the case, for he was employed to defend, not to convict, the defendant, but as was said in an English divorce case, "there is an honorable way of defending the worst of cases."[1] Since the defendant has no legal or moral right to lie to judge or jury, he has of course no legal or moral right to have his lawyer lie for him; but short of lying and of casting suspicion on innocent people the lawyer must in all honorable ways present the case of the defendant. Fortunately it falls to the lot of very few men to be confronted with such a moral problem. For most of us there are no last moment revelations of guilt in criminal cases. One such case, however, resolved in the high-minded way in which the bar as a rule meets its moral obligations, we have in the case of the English barrister, Charles Phillips. The writer is moved to dwell a little upon that case because, despite the conclusive presentation of Mr. Phillips' eminently proper action, contained in the appendix to Sharswood's little book on Professional Ethics, there still are lawyers even, and of course there still are laymen, who have never heard of his side of the question, and who, therefore, feel that he debased himself and his profession. The facts are these:

[1] Smith *v.* Smith, 7 P. D. 89.

Mr. Phillips and Mr. Clarkson were employed to defend a man named Courvoisier, a Swiss valet, against the charge of having murdered his employer. The employer, Lord William Russell, was 72 years old, deaf and infirm, and was murdered in his bed. He was a widower, and his household consisted of a woman cook, a housemaid, and the valet. While it seemed clear that someone in the house committed the crime, the prisoner's counsel went to the trial convinced that he was innocent. They cross-examined Sarah Mancer, one of the women servants, closely, to show there was as much probability that the witness or the other servant was the criminal as the prisoner, and that the police, incited by the hopes of the large rewards offered, had conspired to fasten the suspicion unjustly on the prisoner. After the cross-examination, and during the trial, some missing plate belonging to the murdered nobleman was discovered, and the person with whom it was left identified Courvoisier as the one who left it with her. Courvoisier at the time was in the prison yard, but a few minutes later, after he had returned to the court room, he confessed his guilt to his counsel, but insisted that they defend him. Immediately there was an illustration of the fact that a conscientious lawyer's knowledge of his client's guilt robs his endeavors in that client's behalf of their efficacy. At once all attempt to cast suspicion on the innocent servants was abandoned, though for a long time many believed otherwise, and the defense interposed failed. When Courvoisier's confession was published, Mr. Phillips was attacked and lied about by the newspapers, and for nine years he endured it in silence. Finally on November, 1849, nine years after the trial, he presented his side of the matter. He did that at the earnest solicitation of his friend, Charles Warren, to whom the letter from which the writer is now going to quote was written:

"Nov. 20 [1849].

"*My Dear Warren:*— Your truly kind letter induces me to break the contemptuous silence, with which for nine years I have treated the calumnies to which you allude. I am the more induced to this by the representations of some valued friends that many honorable minds begin to believe the slander because of its repetition without receiving a contradiction. It is with disgust and disdain, however, that even thus solicited I stoop to notice inventions too abominable, I had hoped, for any honest man to have believed . . .

"First, I am accused of having retained Courvoisier's brief after having heard his confession. It is right that I should relate the manner of that confession, as it has been somewhat misapprehended. Many suppose it was made to me alone, and made in the prison. I never was in the prison since I was called to the bar, and but once before, being invited to see it by the then sheriffs. So strict is this rule, that the late Mr. Fauntleroy solicited a consultation there in vain with his other counsel and myself. It was on the second morning of the trial, just before the judges entered, that Courvoisier, standing publicly in front of the dock, solicited an interview with his counsel. My excellent friend and colleague, Mr. Clarkson, and myself immediately approached him. I beg of you to mark the presence of Mr. Clarkson, as it will become very material presently. Up to this morning I believed most firmly in his innocence, and so did many others as well as myself. 'I have sent for you, gentlemen,' he said, 'to tell you that I committed the murder!' When I could speak, which was not immediately, I said, 'Of course, then you are going to plead guilty?' 'No, sir,' was the reply, 'I expect you to defend me to the utmost.' We returned to our seats. My position at this moment was, I believe, without parallel in the annals of the profession. I at once came to the resolution of abandoning the case, and so I told my colleague. He strongly and urgently remonstrated against it, but in vain. At last he suggested our obtaining the opinion of the learned judge who was not trying the cause, upon what he considered to be the professional etiquette, under circumstances so embarrassing. In this I very willingly acquiesced. We obtained an interview, and Mr. Baron Parke requested to know dis-

tinctly whether the prisoner insisted upon my defending him, and, on hearing that he did, said, I was bound to do so, and to use all fair arguments arising on the evidence.[1] I therefore retained the brief, and I contend for it, that every argument that I used was a fair commentary on the evidence, though undoubtedly as strong as I could make them. I believe there is no difference of opinion now in the profession that this course was right. It was not until after eight hours' public exertion before the jury that the prisoner confessed; and to have abandoned him then would have been virtually surrendering him to death. This is my answer to the first charge.

"I am accused, secondly, of having 'appealed to Heaven as to my belief in Courvoisier's innocence,' after he had made me acquainted with his guilt. A grievous accusation! But it is false as it is foul, and carries its own refutation on its face. . . . 'The trial terminated on Saturday evening. On Sunday I was shown in a newspaper the passage imputed to me. I took the paper to court on Monday, and, in the aldermen's room, before all assembled, after reading the paragraph aloud, I thus addressed the judges — 'I take the very first opportunity which offers, my lords, of most respectfully inquiring of you whether I ever used such an expression?' — 'You certainly did not, Phillips,' was the reply of the late lamented Lord Chief Justice, 'and I will be your vouchee whenever you choose to call me.' — 'And I,' said Mr. Baron Parke, happily still spared to us, 'had a reason, which the Lord Chief Justice did not know for watching you narrowly, and he will remember my saying to him, when you sat down, "Brother Tindal, did you observe how carefully Phillips abstained from giving any personal opinion in the case?" To this the learned chief justice instantly assented.' This is my answer to the second charge.

"Thirdly, and lastly, I am accused of having endeavored to cast upon the female servants the guilt which I knew was attributable to Courvoisier. You will observe, of course, that the gravamen of this consists in my having done so after the confession. The answer to this is obvious. Courvoisier did not confess until Friday. The cross-examination took place the day before, and so far, therefore, the accusation is disposed of. But it may be said I did so in my address to the jury. Before refuting this let me observe upon the disheartening circumstances under which that address was delivered. At the close of the, to me, most wretched day on which the confession was made, the prisoner sent me this astounding message by his solicitor — 'Tell Mr. Phillips, my counsel, that I consider he has my life in his hands.' My answer was, that as he must be present himself, he would have an opportunity of seeing whether I deserted him or not. I was to speak on the next morning. But what a night preceded it! Fevered and horror-stricken, I could find no repose. If I slumbered for a moment, the murderer's form arose before me, scaring sleep away, now muttering his awful crime, and now shrieking to me to save his life! I did try to save it. I did everything to save it, except that which is imputed to me, but that I did not, and I will prove it. I have since pondered much upon this subject, and I am satisfied that my original impression was erroneous. I had no right to throw up my brief, and turn traitor to the wretch, wretch though he was, who had confided in me. . . .

"You will ask me here whether I contend on this principle for the right of doing that of which I am accused, namely, casting the guilt upon the innocent? I do no such thing; and I deny the imputation altogether. You will still bear in mind what I have said before, that I scarcely could have dared to do so under the eye of Baron Parke and in the presence of Mr. Clarkson. To act so, I must have been insane. But to set this matter at rest, I have referred to my address as reported in the *Times* — a journal the fidelity of whose reports was never questioned. You will be amazed to hear that I not only did not do that of which I am accused, but that I did the very reverse. Fearing that, nervous and unstrung as I was, I might do any

[1] It needs to be said that Baron Parke was really one of the two judges trying the cause, but Chief Justice Tindal was to sum up to the jury. Baron Parke appears to have been much annoyed at being told of the defendant's confession, and, after giving Phillips the advice to go ahead with the defense, permitted the Chief Justice to sum up to the jury without the Chief Justice knowing of the confession. See 15 Law Quarterly Review, 277 n. When Mr. Phillips spoke of Baron Parke as the learned judge who was not trying the cause, he meant the judge who was not presiding in the cause and who was not under the duty of charging the jury.

injustice in the course of a lengthened speech, by even an ambiguous expression, I find these words reported in the *Times*: — 'Mr. Phillips said the prosecutors were bound to prove the guilt of the prisoner, not by inference, by reasoning, by such subtile and refined ingenuity as had been used, but by downright, clear, open, palpable demonstration. How did they seek to do this? What said Mr. Adolphus and his witness, Sarah Mancer? And here he would beg the jury not to suppose for a moment, in the course of the narrative with which he must trouble them, that he meant to cast the crime upon either of the female servants. It was not at all necessary to his case to do so. It was neither his interest, his duty, nor his policy, to do so. God forbid that any breath of his should send tainted into the world persons depending for their subsistence on their character.' Surely this ought to be sufficient. I cannot allude, however, to this giant of the press, whose might can make or unmake a reputation, without gratefully acknowledging that it never lent its great circulation to these libels. It had too much justice. . . . I find the *Morning Herald* reporting me as follows: — 'Mr. Adolphus called a witness named Sarah Mancer. But let me do myself justice and others justice by now stating that in the whole course of the narrative with which I must trouble you, I must beg that you will not suppose that I am in the least degree seeking to cast blame upon any of the witnesses.' Can any disclaimer be more complete? And yet, in the face of this, for nine successive years has this most unscrupulous of slanderers reiterated his charge. Not quite three weeks age he recurs to it in these terms: 'How much worse was the attempt of Mr. Phillips to throws the suspicion of the murder of Lord William Russell on the innocent female servants, in order to procure the acquittal of his client Courvoiser, of whose guilt he was cognizant! I have read with care the whole report in the *Times* of that three hours' speech and I do not find a passage to give this grave charge countenance. But surely, in the agitated state in which I was, had even an ambiguous expression dropped from me, the above broad disclaimer would have been its efficient antidote.

"Such is my answer to the last charge; and, come what will, it shall be my final answer. No envenomed reiteration, no popular delusion, no importunity of friendship, shall ever draw from me another syllable. . . . His libels and my answer are now before the world, and I leave them to the judgment of all honorable men.

C. PHILLIPS." [1]

So much for the highly interesting experience of Mr. Phillips, whose very praiseworthy conduct subjected him for the rest of his life to misrepresentation.

And now for the code provisions about criminal cases. Section 13 of the Alabama code reads:

"13. An attorney cannot reject the defense of a person accused of a criminal offense, because he knows or believes him to be guilty. It is his duty by all fair and honorable means to present such defenses as the law of the land permits, to the end that no one may be deprived of life or liberty, but by the due process of law." [2]

That provision has been adopted in Colorado and in Missouri. The other states change the words "fair and honorable means" to "fair and lawful means," while Kentucky and Wisconsin have changed the words "an attorney cannot reject the defense" to "an attorney is not bound to reject the defense." If what has above been said about the defense of criminal cases is correct, or approximately correct, the rule is incomplete. Accepting the Kentucky and Wisconsin opening words and retaining the words "honorable means," the rule is well enough as it stands if only there be added the clause:

"But even in a criminal case an attorney is not justified in bringing forward what he knows to be perjured testimony, or in arguing that such testimony is true when he knows that it is not."

Much more might be said about the ethical problems of lawyers. Our moral

[1] Quoted in Sharswood Professional Ethics, pp. 111–119 (1854 ed.).

[2] Sec. 14, Report of August, 1907, p. 20.

responsibilities for medical expert testimony, our proper attitude toward corporation retainers, our right to upset or evade whatever possible enacted laws, and many other matters, might engage our attention, but they open fields where agreement would be hopeless and most of them are very properly avoided by the various legal codes. The subject of corporation retainers, however, might well be covered by a rule framed to govern the relations of employer and employee.

Lobbying during legislative sessions may, however, be mentioned as a matter upon which the Alabama rule would probably meet the approval of most lawyers. That rule is:

"24. An attorney openly, and in his true character, may render purely professional services before committees, regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action."[1]

But while we have not time to note the manifold interests which engage a lawyer's attention to see what his moral reaction as to each one should be, we may very appropriately pause to note a rule which has been suggested as a preventive of a mild species of what to-day we call "graft." Starting in the large cities and gaining most headway in New York City, the practice of giving commissions and rebates to lawyers who loan money for their clients, examine and insure titles for them, lease property for them, or otherwise act for them, has grown to a point where the evil is being felt, and a writer in the *Harvard Law Review* has suggested the following rule to remind the lawyer "that he has pledged his judgment to the service of his client and must keep it unimpaired and in training, so to speak," namely:

"If possible, do not receive any compensation in your client's business, except from your client himself; but if circumstances compel you to break the rule, tell your client what you receive."[1]

This application of limited "publicity" the client is entitled to, while the lawyer will thus receive no money that is "tainted."

It will be seen from the foregoing sketch of a lawyer's ethical problems that good taste, gentlemanly manners, and a high sense of honor go far to solve them. Two cardinal rules may be laid down:

1. Nothing which politeness and right feeling demand of a lawyer in his dealings with others can properly be withheld by him.

2. Nothing which is morally wrong can be professionally right.

All the other rules and code provisions which we have discussed are simply applications of these two rules to special situations. In regard to these applications each lawyer must make his own conscience his guide, no matter if he differ as far as may be from the general professional opinion. As Hoffman said in his 33rd resolution:

"What is wrong is not the less so from being common. And though few dare to be singular, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude. If, therefore, there be among my brethren any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing I unhappily come in collision with what is (erroneously, I think) too often denominated the policy of the profession."[2]

But in the main, as may be this paper has shown, the policy and the performances of

[1] Sec. 27, Report of August, 1907, p. 24.

[1] Mr. Everett Abbott, 15 Harv. Law Rev. 714–724.

[2] Quoted in Report of August, 1907, p. 54.

the professions are high minded and just. Our pride is that from generation to generation the legal profession as a whole vindicates its existence by carrying on successfully its high calling of promoting justice. That it may carry on that calling even more successfully, especial emphasis should be laid on section 32 of the Missouri legal code, namely:

"32. An attorney should strive at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his professional brethren, but a high duty to the state and his fellowmen."

In closing it must be said that the state codes of legal ethics are in the main sound and show a healthy moral attitude on the part of the modern lawyer. While we have suggested the need of a rule making it unprofessional for a lawyer to ask or permit his clerk to do in the course of his employment, or his partner to do in the course of their joint business, anything for which the lawyer does not wish to assume moral responsibility, and have emphasized the need of explicit rules for the prevention of ambulance chasing, and have suggested an amendment to the state code provisions regarding the defense by a lawyer of a man whom he knows to be guilty, and have concurred in the suggestion that the new rule offered by Mr. Abbott to put an end to petty "graft" be adopted, we have to admit that the surprising thing is that so little fault can be found with these state codes. If, as it doubtless will, the American Bar Association succeeds in framing a better code than any adopted in the states, it will be only because the states have led the way. Here, as elsewhere, the states have justified their continuance in existence by services rendered as the legislative experiment stations of the nation. It remains for the nation, in its turn, to profit by the local experiments, and in the field of legal ethics the American Bar Association is going to see that it does profit by them.

LINCOLN, NEB., January, 1908.

THE MARRIAGE OF THE GOVERNOR OF ILOCOS NORTE

By James H. Blount.

OF all the legal questions which have confronted American authorities as a result of the Spanish War, those growing out of the circumstance that with us Church and State are separate, while under Spain there was a union of Church and State, are the most profoundly interesting to lawyers and publicists. For instance, perhaps no statesman ever had a more delicate and difficult task than that which confronted Secretary Taft in the matter of the Friars' lands in the Philippines, where vast tracts were occupied and cultivated by natives claiming prescriptive title, as against religious corporations claiming under written grant from the Spanish Crown. The squatters, or claimants by prescription, had in most cases attorned to the agent of the religious corporation by paying rent, which was not demanded until the squatter had cleared away the Virgin Forest and made the land an income-producing property, when the Friars would discover that such property lay within the bounds set forth in their grant from the Crown. Here was the germ of an agrarian revolution if the tenants were evicted by wholesale. Here also was the germ of a political revolution at home against the party in power if the vested rights of the Roman Catholic Church in the Philippines should be ruthlessly disregarded in obedience to native clamor. Secretary Taft settled the matter by going to Rome himself and making an arrangement with the Pope whereby the Friars sold their lands to the Philippine government, which paid for them by a bond issue and then resold them to the squatters on an installment plan as easy as the previous rent. This particular matter is here referred to only incidentally, because it is more familiar to our profession throughout the world than any other of the numerous novel legal situations created by the transition from Spanish to American Sovereignty, but the general subject has no more interesting subdivision than the changes in the laws concerning marriage which became necessary in order to render them compatible with the new order of things.

Under the instructions of the President to Major General Wesley Merritt, commanding the army of occupation in the Philippines, the municipal laws of the conquered territory affecting private rights were to be considered as continuing in force "so far as they are compatible with the new order of things." Civil marriages were never recognized in the Philippine Islands until some time after our arrival. This was done by the promulgation by the military government, of what is known as General Order 68, which did not occur until shortly before Christmas of 1899, after we had been in the Islands more than sixteen months. This order provided that marriage might be solemnized by any judge, Justice of the Peace, or Minister of the Gospel, and further that no particular form for the ceremony of marriage should be required, the essential requisite being prescribed to be that the parties must declare in the presence of the person solemnizing the marriage that they do take each other as husband and wife.

The Philippine Islands had been for so many generations a priest-ridden country that it was difficult to secure any general recognition of the validity of the new marriage law. The permission of the State to the citizen to marry without paying tribute to the Church was only a permission, and not a command. On the other hand

there was a host of spiritual terrors militating against the coming into general and frequent use of the practice of civil marriage "without the benefit of clergy." It is difficult for a person in this enlightened country and age to understand the grip upon the conscience of the native people which was possessed by the Roman Catholic Clergy in the Philippines. The writer does not intend to reflect upon the Church in question, nor upon the noble army of its priests throughout the world who have done, and are still doing, so much for progress. But the situation in the Philippines is unique. The Islands had originally been acquired under the impetus of a movement primarily missionary in character. The Spanish flag had been set up over them professedly for the glory of God and the spread of the Christian faith among the heathen. Church influence dominated the government from the beginning. Toward the last of the Spanish regime, when any Governor General of the Islands did not please the ecclesiastical authorities, his recall was procured by them through the influence of the Vatican, or of the priest at Madrid who happened to be Chaplain and Father Confessor to the King, and therefore practically custodian to the King's conscience. Through these or similar channels the Church completely dominated the State in the Philippines, not only the central government, but likewise the government of every province, pueblo, hamlet, and rural district. This naturally lead to abuses which finally culminated in revolution a year or so before the Spanish-American War. It was not so much the alleged immorality of the Spanish priests as it was their lust of power, and their abuse of it, which caused the revolution against Spain that was merely slumbering when the Spanish-American War broke out and fanned it anew into flame.

In our efforts to train the Filipinos in the art of self-government, one of the first things we did after the backbone of the insurrection had been broken, was to set up a central civil government at Manila. This was followed by the establishment of civil government in forty odd provinces of the Archipelago. The scheme of these provincial civil governments provided for election of the provincial governor by the people through representatives chosen by them. It was of course anticipated that most of these governors would be natives. In order to keep him in touch with and under supervision of the law of the land, the provincial governor was made *ex officio* sheriff of the United States District Court for the province. The writer was judge of that court in and for the province of Ilocos Norte at the time of the occurrence hereinafter described, and thus it was that he became acquainted with his late lamented friend, Don Elias Villanueva, governor of the province of Ilocos Norte, whose marriage constitutes the subject of this paper.

When the present civil government of the Philippines was inaugurated in 1901, with our present Secretary of War as the first American Governor, the Archipelago was divided, for the purposes of the administration of justice, into fifteen judicial districts, the northernmost of them being called the First Judicial District, and the rest numbered in the order in which they lay geographically, from north to south. The province of Ilocos Norte, together with three other provinces constituted the First Judicial District, just as ordinarily a judicial district of a state of the American union is composed of several counties. Under such circumstances the court, after concluding a session in one province, transfers itself to another and so on around the circuit, in the traditional itinerant fashion. This involved the absence from home of the judge and the stenographer for a very considerable portion of the year. We had elected the province of Ilocos Norte as the province of our residence pursuant to the fundamental judiciary act, which required such election. Nominally we had a home, but actually we were away

on the circuit so much that we missed many of the luxuries of life, among them the privilege of keeping posted on the local gossip of our home community. Under the Judiciary Act, two terms of court were held each year in each of the provinces of our district, those for the province of Ilocos Norte commencing on the first Tuesdays of January and July. In January of the year in question, 1902, returning from a trip around the circuit, we had had a very narrow escape from being lost at sea in traveling on board a small government steamer off a cape at the northwestern corner of the Island of Luzon called Cape Bojeador, situated just at the point where the China Sea and the Pacific Ocean meet, in consequence of which circumstance the waters there are as rough as they are off Cape Hatteras. So that in July following, returning home again from our trip around the circuit, we decided, if possible, to avoid Cape Bojeador by cutting across the northwestern corner of the island overland. This we did, and during the course of the trip were sorry we did so. We had forty miles of land travel between us and home, that is to say, between the place at which we landed and the Provincial Capital of Ilocos Norte. It rained in torrents all the way. We had floundered painfully through some twenty-five miles of mud, on native ponies not over-fed, when a halt was called in a certain village for the purpose of resting the animals. It was indeed a weary, bedraggled, and hungry party. We had fifteen miles further to go. Horses and riders were both exhausted. After a few moments of disconsolate disgust and regret that we had not preferred to risk again the perils of an angry sea, rather than undertake the discomforts of a journey by land, sounds were heard in the distance which as they came nearer proved to be the clatter of the hoofs of quite a cavalcade. It was headed by the Governor and composed of some eight or ten of his immediate friends; they had come all this distance from the Provincial Capital to meet and welcome us back to the province. In passing the lighthouse at Cape Bojeador some hours previous we had used a long-distance military telephone connecting the lighthouse with the seat of Government, to notify our servants to set the house in order against our coming. In this way the Governor had learned of it and had come out to meet us without any knowledge on our part that he was coming. He had also brought some strong fresh horses for us which were indeed a God-send. In the party which came out to meet us was a brother of the Governor who was a priest. After an interchange of cordial greetings we mounted the fresh horses and proceeded southward at a rattling pace. After passing without any stop through several villages which the King's Highway bisected, we halted in a town where in front of the town hall were standing some half dozen or more carriages. Into these our good friend, the Governor, thrust us, and away we went, traveling at last with a degree of comfort very grateful after the day's experience. Under such circumstances of course the imagination of the wayfarer dwelt in anticipation upon such things as dry clothes, a supper, and a comfortable bed. But no, no such good luck was in store. Upon reaching the last of the large pueblos that lay between us and Laoag, we found the whole place lit up in carnival fashion and were conducted to a spacious residence where evidently a *fiesta* was in progress. Here we had a most elaborate supper with speeches of welcome to which replies were necessary, and after the supper the whole night was spent in dancing and merry-making. I did manage to retire from the festal scene about three o'clock in the morning, but as the room assigned me was in the house of mirth, but little sleep was possible.

Next morning we proceeded in carriages to our destination, the Governor and the judge occupying a carriage together. En route, the Governor took his fellow official into his personal confidence. He stated

that since we had left the province he had become engaged to a young lady, and had postponed the marriage ceremony in order to have it solemnized by the Judge of the District. He said that his brother, the priest, was very anxious to perform the ceremony, and had even used moral persuasion upon him, by suggesting the possibility that a purely civil marriage might not be valid in the absence of the sanction of the Mother Church. The Governor said he proposed to show the priests of that province that he was the head of the province, the supreme authority of the province, and that he was not dependent upon ecclesiastical sanction for anything whatsoever. He wished also to make it clear to the people of the province that under the present benign government which the United States had instituted in the Islands, the people were now emancipated from priestly tyranny. He proposed to give to the people of his province an object lesson to this effect. It was hard to convince them that anything of importance could be done without the sanction of the priesthood. The solemnization of the marriage of their Chief Executive by a temporal authority would serve this end. It would show that God's blessing might rest upon this union as much so as if it had been consummated under the auspices of the spiritual authorities.

During this last stage of our journey the Governor also explained in confidence that the family of his lady love objected to the marriage, but that his intended was of full age. He was evidently very much in love with the girl, and also very conscious of the fact that he was Governor of the province. He was quite impatient at the unwillingness of the family to accede to the wish of so distinguished a person as himself, their Chief Magistrate. It seemed almost "*lese majesté*." However, he knew his beloved would be unhappy after the marriage if permanently estranged from her people, and this he wished to avoid by diplomacy.

A week or two after our return above described, one morning about 7 o'clock I emerged from my sleeping quarters into an anteroom connecting with the dining room where breakfast was waiting. In the anteroom I found the Governor and his intended. They had been waiting there since daybreak, but he did not wish to disturb the slumbers of his friend. However, after an interchange of greetings it appeared that the Governor had failed in diplomacy, and had that morning before daybreak climbed to the upper window of the home of the bride to be, by means of a ladder, and had carried her off in his arms after the fashion of the Spanish Cavaliers of the long ago. From the house they had come to my house and had been waiting there ever since, and now desired to be married forthwith. The marriage law required certain preliminary investigations by the officer performing the ceremony as to the age of the girl, the consent of her family, etc. It therefore became necessary to explain this to the applicants, and that it would hardly be possible to perform the ceremony before night time. I had entered quite thoroughly into the delightfully romantic features of the situation, but viewed from the official side, the moral effect upon the community toward emphasizing the complete separation of Church and State under our form of government would be greater if there were some pomp and ceremony connected with making these two one. Like a great many other people outside the pale of the Episcopal Church, I have always considered their form for the marriage ceremony infinitely more beautiful than any impromptu remarks of which any couple desiring to be married have ever been made victims through the garrulity of ministerial egotism. If the ceremony should be performed that evening, say as late as 8 o'clock, the Episcopal marriage ritual could be put into Spanish and the Court Room properly arranged for the ceremony. So the impatient lovers were

told that they must wait until 8 o'clock that evening.

Fearing that the girl's mother upon discovering the absence of her daughter would at once suspect the cause, find the eloping couple, and make a scene, the Govenor carried the young woman to the Government House and kept her under guard there all day. This was not to restrain her of her liberty but to hide her from her mother.

The stenographer hereinbefore referred to, whose name was Mr. Brower, and the undersigned lived in the same house. When Brower came to breakfast, I told him what had occurred. He entered with great zest into the humor and romance of the situation, and during the day had the Court House decorated and even had the temerity to borrow from the village church a very long and elegant piece of carpeting which ornamented its central aisle. He also got hold of an American soldier during the day, a musician of the Cavalry Regiment constituting the garrison of the place, and contrived to have him teach the village band Mendelssohn's Wedding March. He had also explained to the Governor our American custom of having a bride's maid and a best man. Brower and the Governor were very good friends themselves, so the Governor asked him to be best man. The bride had an American young lady friend in the town, a school mistress, whom she asked to be maid of honor.

During the day the necessary investigation was made as to the girl's age. It appearing that she was an adult, of course the consent of the mother was unnecessary. As a matter of fact the groom was a most excellent fellow, but the old lady feared he was a little too gay, upon the theory that "the more you have seen of the others, the less you can settle to one." The consent question being out of the way, there remained the work of making the proper translation of the Episcopal marriage service. Mark Twain once wrote a description of a trip up Vesuvius, and when asked how he went up he said he went up by proxy. I made a translation of the marriage service aforesaid by availing myself also of the services of others. It was a thoroughly idiomatic translation, so much so that all the Spanish-speaking people in the village were amazed and struck with admiration at my apparent linguistic skill. The real explanation of the feat was very simple. I had a copy of the Spanish Bible and also the ordinary Oxford Bible with a concordance. Most of the phraseology of the marriage service being taken from the Scripture, it was easy enough with the aid of the concordance to trace the various phrases which are so familiar, to their source in the Scripture, then turning to the corresponding place in the Spanish Bible and getting the Spanish equivalent.

At the appointed hour we all met at the Court House, a large and goodly company. All of the American officers of the local garrison were present in full regalia. Even a number of priests in their picturesque attire consented to honor the occasion with their presence, though they had doubtless in the meantime told the members of their several flocks that the Lord would never bless such a union.

All being in readiness, the marriage ceremony was duly performed, all the necessary accessories being at hand, including Mendelssohn's March, the wedding attendants, etc.

After the service we adjourned to the residence of the official who had performed it, where a wedding supper was served, followed by a dance which lasted into the wee small hours of the morning after.

During the course of the wedding supper just alluded to, the Governor took occasion in responding to a toast, to elaborate upon his views concerning the marriage service and his reason for choosing a civil marriage, and he charged his friends and hearers to explain his views to all whom it might concern, so that the masses of the people

throughout the province would become educated to the idea that the Church was not as all-powerful as it once had been, and that the people under a free government like the American, could be lawfully and happily married and enjoy the blessings of the Almighty through life even though not married by a priest.

Three weeks after that the Governor died of the cholera, and a few weeks later the judge who had performed the ceremony fell sick with tropical dysentery and was invalided to the United States desperately ill, in which condition he remained for more than six months.

Whether or not the blessings of God may rest upon a civil marriage, it is quite likely that the priests of the province of Ilocos Norte made the most of the untoward circumstance above described, and told their parishioners what happened to the Governor and the judge who ignored the laws of the Apostolic Roman Catholic Church as expounded by its constituted respresentatives.

MACON, GA., January, 1908.

A NEW LIGHT ON LINCOLN AS AN ADVOCATE

EDITED BY ALLEN HENRY WRIGHT

IN the city of San Diego, California, there lives to-day one, W. H. Somers, who, several years following 1856, was clerk of the circuit court of Champaign County, Illinois, — before which tribunal Abraham Lincoln frequently appeared as an advocate and counsel, and even, occasionally, sat on the Bench for Judge Davis, the presiding judge of the court. In his capacity as clerk Mr. Somers came to know the great Lincoln quite intimately, and hence his reminiscences have more than a passing interest. In telling of his memories of the emancipator, Mr. Somers says:

"I remember Lincoln as a tall, broad-shouldered man, slightly stooping, with a rather angular or sharp face, which had a most genial, kindly expression, and, though not handsome, was attractive and prepossessing — a face, once seen, never to be forgotten. Mr. Lincoln was a very affable man, always having a pleasant word for every one. I shall never forget the time nor his kindly act when, sitting at my desk in the capacity of clerk of the court, on opening day, with judge and lawyers taking their accustomed places preparatory to commencing the day's business, he approached me with extended hand, and, grasping mine cordially, in a few pleasant words congratulated me on my election.

"I was a young man then and, having previously been known personally to Mr. Lincoln but slightly in my capacity as deputy in the same court, I was not a little surprised at this recognition among so many acquaintances, there being at the time about two score attorneys in attendance. Considering that his life was a busy one during those days, his law practice being large and lucrative, this little act of courtesy was a key to his great popularity with all classes of people — he always had time to be friendly.

"Right here I want to disprove the silly charge made against him by his enemies, in those days, to the effect that he was only a second or third-rate lawyer — a charge that sufficed to create in the public mind, during his first candidacy for the presidency, the impression that such was the fact. Nothing was further from the truth. Among the members of his profession there were several profound lawyers and jurists, including Judge David Davis, afterwards an associate justice of the Supreme Court of the United States, and the uniform verdict of these men was that Mr. Lincoln occupied, and pre-eminently so, the leading position at the bar in that circuit, if not in the entire state of Illinois.

"Anyone who ever heard his masterly and logical arguments before court or jury will, I am sure, concur with me in the statement that no counsel more able or advocate more eloquent ever espoused a just cause. On the wrong side of a case, it is true he was weak, because he could not be forcible if he believed himself in the wrong — his head and his heart must go together. His love of justice and fair play was his predominant trait. It was not in his nature to assume, or attempt to bolster up, a false position. He would abandon his case first.

"In a case tried in my own county, after he had heard the evidence, he said to his associate: 'The man is guilty. You defend him. I cannot.' A large fee was won, but he would not take a cent. In trying a case before a jury his methods were peculiar. First, he would make as strong a showing as he could for the opposite side, seeming to be giving away his case, so much so as frequently to frighten his client, but, later, turning to his own side, he would utterly demolish his previous arguments and thus ruthlessly knock down the 'cob-house' so carefully constructed

for his adversary. This style of argument was, of course very captivating and convincing as it showed to the jury his perfect fairness. He was willing to concede to his opponent everything that justly belonged to him, and if he could not do that, and still win the case, he would not take it in the first place.

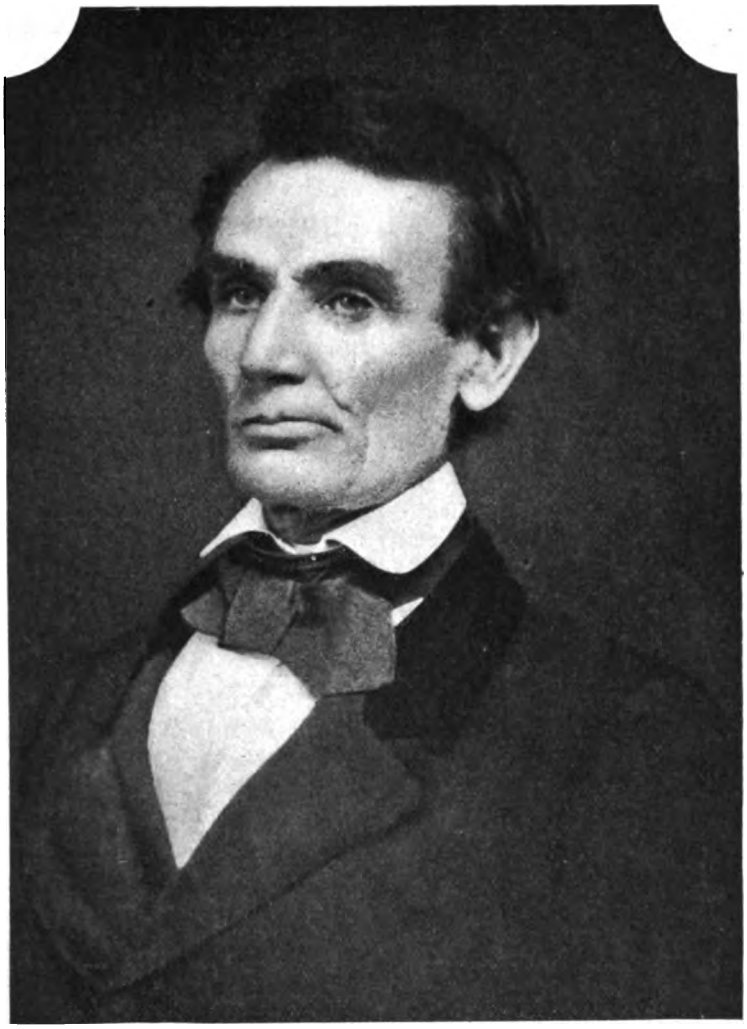

Photo from ambrotype taken at Urbana, Ill., in the fall of 1857. Copyright, W. H. Somers, 1885.

"In those days, before railroads ran to nearly every town as they do now, attorneys were accustomed to attend all the courts in the circuit, and to accompany each other on horseback. On one occasion Mr. Lincoln rode up to the tavern, where he usually put up, a day or two after the other lawyers had arrived, and on being pleasantly rallied by the landlord for his tardiness, responded, using an apt illustration, 'Well, uncle, you know as the drove of cattle are driven along the largest animals always fall behind.' When it is remembered that Mr. Lincoln was very tall, the humor of his remark can be appreciated.

"It was about this time, also, but on another journey of a similar character, that he was riding alone and came across a pig

deeply mired in the mud by the roadside. Feeling compassion for the 'porker,' his first impulse was to help the struggling animal out of its sad predicament, but, looking at the mud and then at his new suit of clothes, he reluctantly rode away, leaving it to its fate. As he rode on, however, he could not forget the pig, and the further he got away from it, the worse he felt. He finally turned around and rode back the nearly two miles, dismounted, built a passageway of old rails from dry ground to the pig, and with great difficulty extricated it, but not without soiling his clothes. Afterwards, when thinking about it, in an endeavor to analyze, as he said, the motive which prompted him to the act, he concluded that it was selfishness, and that he had to do it in order to take the pain out of his mind.

"Should Mr. Lincoln fail to put in an appearance at any term of court in the circuit of Champaign, one of the eight counties embraced in the eighth judicial circuit of the state, the entire membership of the Bar felt disappointed, for all entertained a warm friendship for him. His propensity for story telling, of course, attracted people to him, but his great ability before a jury would, when it was known that he was to make an argument, invariably fill the court room. Attorneys generally considered it a 'drawing card' to be associated with him in a trial.

"Judge Davis, the presiding judge, quite frequently called Mr. Lincoln to take his place on the Bench, when he wished to retire to give himself a needed rest from the exhausting labors of the position, for court opened promptly at 9 o'clock in the morning, every day, and was continued in session until 6 o'clock in the evening, and not infrequently a night session followed. This practice on the part of Judge Davis was for the purpose of expediting business and saving parties to the suits time and expense in attending court. Mr. Lincoln always cheerfully complied with the judge's request to take his seat, although the legality of the appointment might have been called in question. Technicalities, however, were not then taken advantage of as in these days.

"Mr. Lincoln always shunned and abhorred technicalities and would get down to the merits of the case without a very strict observance of the rules of pleading. Quite an amusing incident occurred one time, while he was thus holding court, which very forcibly illustrates this characteristic. A demurrer had been filed in a case, which the attorney who had interposed it requested the acting judge to turn to on the docket so that he might take it up. The demurrer, however, could not be found, and after a somewhat tedious search and a good deal of sparring between the opposing counsel, Mr. Lincoln asked the attorney to state the grounds of his demurrer. This having been done, and seeing that it was interposed merely for delay, he promptly overruled it in this facetious order: 'Demurrer overruled — if there ever was any,' which order was duly entered of record.

"Frequently I was invited to join the groups of attorneys at the taverns in the evenings after the day's court duties were over, and I always gladly accepted, for the opportunity of hearing and enjoying the good stories, of which they all had an ample fund.

"There was one thing I observed in these gatherings, which I wish to mention since it throws much light on the temperance habits of Mr. Lincoln. Some of the lawyers who were bibulously inclined had improvised a bar, and provided the liquors for all that wished to partake. Among these genial and happy fellows there were two who absolutely refrained from drinking. These two were Judge Davis and Mr. Lincoln.

San Diego, Cal., January, 1908.

THE LOUISVILLE CONTESTED ELECTION CASES

By Percy N. Booth

WERE it not for the judgment of the Kentucky Court of Appeals declaring void the 1905 Louisville election, it must be admitted that the record of the Louisville Contested Election Cases would go far to justify the prophesy of those who, at the institution of the American Government, predicted its early downfall. We have in this record a story of shame which is hard to believe for one who has not come face to face with the facts. The recital of deeds of violence and of official oppression read like the dispatches from Warsaw or St. Petersburg, while the trickery and fraud, supported by forgery and false swearing, indicate a degeneracy the continuance of which would be fatal to Republican government. But the courts of the land have once more justified the implicit confidence placed in them by the people and have added another honor to their splendid record.

Prior to the year 1900 there was in force in Kentucky a notorious election law which took the name of its author and was known as the "Goebel law." Of that law a leading editor and publicist, in a letter which became public, said that it "left nothing to chance."

Popular sentiment against that law was so great, when its workings had become thoroughly understood and exposed, that the Governor of Kentucky, elected under that law, in a message dated the 15th of August, 1900, called the legislature in special session to meet on August 28, 1900. In doing so he said: "I regard the occasion for the call as extraordinary, and I designate as the subject to be considered by the General Assembly when it shall meet on the date aforesaid, the modification or amendment of the existing law relating to elections in this State."

The Legislature which met pursuant to this call radically changed the law and provided by an act of October 24th, 1900, that an action in equity might be instituted by a defeated candidate on the following terms:

"In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery, or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the Circuit Court, subject to revision by appeal, or the Court of Appeals finally, may adjudge that there has been no election. In such event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify."

The new statute placed the rights of the people above the rights of the rival candidates and provided a clear statutory method for actively enforcing that section of the Kentucky Bill of Rights which provides that "all elections shall be free and equal." The Louisville Contested Election Cases were brought under this new statute.

In spite of this legislation the 1903 election in Louisville was flagrantly stolen by the Democratic machine then in power. Fourteen polling places were secretly "moved" and in four other polling places the Republican officers were excluded or ejected by force. In these eighteen precincts, having a registration of over 4000 voters, the ballot boxes were stuffed at will, but it was found impossible to prosecute or convict the election offenders. Many citizens, irrespective of party, employed two prominent, public-spirited lawyers to prosecute the election thieves, but after eighteen months' labor they made a public report under date of March 9, 1905, setting out the evidence submitted to the grand juries, and stating the impossibility of securing indictments and the refusal of the Commonwealth's Attorney to prosecute.

The report of these two lawyers, both of whom were Democrats, concluded:

"In view of these repeated failures to secure indictments for plain and aggravated breaches of law, and in view also of the position taken by the Commonwealth's Attorney, we have concluded any further efforts on our part to prosecute election offenders in this city will be useless."

To correct these intolerable conditions, citizens of all political affiliations organized the City Club, the same month that this report was made. The Club was formed to stop dishonest elections, to restore the ballot to the people, to allow the people to elect their own officers, to see that every man who had the right to vote, and who wished to exercise that right, voted, and that his vote was counted as cast. In resolutions adopted July 14th — an historic date, the fall of the Bastile — it is set forth that the Club's purpose was "to secure a fair and honest election . . . to correct and suppress the one great abuse which had been the prolific source of so many others — to put a final stop to theft of office."

The Mayor, Council, County Sheriff and nearly all the City and County officers were to be elected in November. The Republicans nominated a Fusion ticket containing both Democrats and Republicans. The City Club indorsed this ticket. It was opposed by a Democratic machine ticket nominated at a fraudulent primary. The election was held on November 7, 1905. On the face of the returns the Democratic ticket was elected by majorities ranging from 3373 to 5280.

The Louisville Contested Election Cases challenged the validity of the election. The election itself and the registration of voters that preceded it were marked by fraud and crime of appalling impudence on the part of the Democratic machine and its creatures. Brutal assaults by policemen and armed thugs on Republicans and Independents and crimes of fraud and force were so extensive and done with such insolent boldness by Democratic politicians, office holders and tools that the public was stung into indignation. Private citizens organized a "Committee of One Hundred" and raised the money necessary for a contest of the election, amounting in all to about $35,000.00. It had taken all of the summer of 1905 for the Fusionists to raise a campaign fund of $22,000.00, but the events occurring on election day so aroused the community that at a meeting on November 10, 1905, three days after the election, it only took an hour and a half to raise the $10,000.00 necessary to start the contest.

On November 23, 1905, forty-five contest suits, involving about 70 offices, were filed to annul the election under the statutory and constitutional provisions above referred to. Ten lawyers practicing at the Louisville Bar were engaged to prosecute the cases, and for three and one half months the depositions of about 1800 witnesses were taken simultaneously, and practically continuously, at three different places. This evidence was all printed in ten large volumes as fast as it was taken. On March 10, 1906, the Republican cases were completed; on April 14, 1906, the evidence closed and the cases were ready for submission, but the Chancellors of the Jefferson Circuit Court required that all the testimony (over 15,000 pages) be read aloud to them in court, and all the other court business was practically suspended. On December 5, 1906, this reading was finished. The cases were argued December 10–21, 1906, and were submitted. The Chancellors held the cases under submission for three months, and finally, on March 23, 1907, delivered a 180–page opinion in favor of the Democrats.

The judgments were immediately appealed from, and although the record in the court below was about 40,000 pages, the cases were prepared for the Appellate Court within three weeks and were argued on April 16–20, 1907, before the Court of Appeals of Kentucky.

One month later, to-wit, on May 22, 1907, the Court of Appeals, composed of five Democrats and one Republican, delivered a unanimous opinion based solely on indisputable facts, reversing the Chancellors on every point, deciding in favor of the Republicans, setting aside the entire election, and ousting every Democrat.

The opinion describes the election and shows the degraded political conditions in Louisville, the bold methods by which the Democratic machine has been stealing elections, and the criminal conduct of many of the higher city and county officials. It was a great victory for honest government.

The main proposition on which the cases turned was that through the conspiracy of the Democratic candidates, the Democratic campaign committee and many prominent Democratic city and county officials there were 6292 voters entirely disfranchised by fraud and violence. As it was impossible to tell how many of those disfranchised would have voted if they had had the opportunity, or how they would have voted, it was manifest that "no degree of certainty existed as to the fairly expressed will of the electors." Therefore, as under the statute "neither contestant nor contestee could be adjudged to have been fairly elected," it was adjudged that there was no election.

The scope and the plan of this conspiracy and this disfranchisement were thoroughly established by the evidence, and were clearly exposed in the opinion of the Court of Appeals. The evidence was obtained largely from hostile witnesses whose presence and whose testimony were secured only by compulsory process. The leading counsel for the contestants, a distinguished lawyer of wide and varied experience, says in his report to the Committee of One Hundred:

"I do not believe any case can be found in the annals of American or English jurisprudence which approaches this one in the matter of obstructions thrown in the way of investigation into the facts. I never realized how complete and strong the organization opposed to us was until I encountered it in this contest, and that we have been able to bring out as much damaging testimony, and have accomplished, as you shall presently see, such satisfactory results, is due, I think, alone to the fact that a contest was not expected (none before of this character had ever been instituted), and the frauds, violence, and unlawful expenditure of money were so flagrant that it was impossible to cover them up. Yet, notwithstanding the gross nature of these wrongs, and the apparent impossibility of covering them up, our opponents were not discouraged, and there was no shock that could be put under the wheels of progress in the investigation that was not promptly and unhesitatingly put there."

A few illustrations of the different devices used to obstruct the investigation will be of interest.

In September, a policeman went with the editor of the *Police Bulletin* to the house of a widow who had asked him to aid her to secure the release of a son of hers in the House of Refuge, and handing her a written list of four repeaters asked her to memorize them and, if anyone asked her, to say they lived at her house. Later the policeman learned that the widow had reported the facts to her friends, and he went back to get the list. The transaction was given great publicity in the papers at the time. In February, five months later, the policeman was placed on the stand by the contestants, and on the subject of the return visit testified as follows:

Q. You did call her into an adjoining room; did you not?

A. I don't recollect.

Q. What did you do when you called her back?

A. I didn't do anything only ask her if she was going to move everything out and fasten the house up.

Q. Do you say here in your deposition

that you did not call her into an adjoining room?

A. I don't recollect.

Q. I ask you to recollect though, I ask you to state whether you did or not.

A. I have forgotten.

Q. Will you say in this deposition that you did not on that day ask Mrs. Foster where that list was?

A. I don't recollect.

Q. What list were you referring to?

A. I know nothing about no list.

Q. Then why can't you recollect whether you asked her about a list or not?

A. I don't recollect.

Q. You don't recollect whether you have forgotten; is that what you mean?

A. I don't recollect.

Q. Do you mean to say that you don't recollect whether you have forgotten?

A. I have forgotten.

The editor of the *Police Bulletin*, who was also a city policeman and a Democratic precinct captain, was put on the stand by contestants with this result:

Q. Mr. McDonald, I believe you gave a certain list of names to Mrs. Foster, did you not?

A. Well, now I will tell you gentlemen, I refuse to answer any questions pertaining to that case at all, because I am afraid it will tend to incriminate me.

The witness was then asked:

"Do you not know that policeman and officers of the police force did have these names, and did arrange and systematize them, and divide them up by districts among the policemen and firemen with directions to induce the citizens located throughout the city to consent that those names might be registered from their respective houses?"

But counsel for contestees instructed witness to decline to answer and to decline to give any reason for declining, which the witness accordingly did. So frequently and continuously did witnesses "decline to answer by advice of counsel" that the expression was taken up in derisive jest by the whole community.

A city detective, who five weeks after the election was promoted to be Chief of Detectives, was put on the witness stand by contestants, and when asked whether or not he had handed a card with a name and address on it to a certain stranger, and had taken him into a saloon and urged him to register under that name, and had told him that he was "as safe as the money was good," and that he "had all the protection in the world," he answered that he could not remember — that he had no recollection of it.

The Treasurer of the Democratic Campaign Committee who held the office of city buyer admitted that the Democratic campaign fund was over $70,000.00, that it was all spent for campaign purposes, and that it was nearly all collected from city employees on a fixed scale or percentage of salaries. But when asked what it was spent for he said he had destroyed all his books and memoranda and could not remember at all, saying "after the election I took a rest and forgot everything that happened." When asked why he destroyed everything, he replied, "election business is not good stuff to have laying around at times." On the other hand the Republicans themselves took the deposition of their own Treasurer and proved how every dollar of their $22,000.00 campaign fund was spent.

A Democratic Clerk of the election, when asked whether he had not simply copied the names alphabetically from the registration books on to the ballot book and stuffed the ballots into the ballot box without anyone voting them at all, could not remember whether he had done it or not. Later, when pressed as to why he could not remember these things he replied, with the sweat streaming from his forehead: "I did not know anything like this was coming up!"

Counsel for contestees were met with such obstructions as these 1052 times in the depositions of 65 different witnesses.

I suppose we may safely assume that these witnesses never prayed, "Lord God of Hosts, be with us yet, lest we forget."

The story of the violence and the fraud practiced by the police, the city and county officials and their imported allies cannot here be told in detail, but the more conspicuous events and the character of the conspiracy may be briefly pointed out.

On registration day a 1901 Yale graduate, age 25, weight 140 pounds, a gentleman of high character and standing in the city, went to a certain polling place at the request of the City Club, and in the interest of an honest election. Saloon-keepers and policemen working for the Democratic party insisted he must remain 50 feet from the voting place. When he protested that the law provided for no 50-foot line on registration day and that its establishment would only serve as a pretext for arrest, a policeman weighing 215 pounds slipped up behind him and savagely struck him twice with his stick, rendering him unconscious. When he came to himself he was in the custody of a police-lieutenant who threatened to club him with his black jack. He was then taken to the station house and thrown in a cell with two negroes and though badly injured, an hour elapsed before he received medical attention. It was admitted that the establishment of the 50-foot line on registration day was unlawful, but the policeman who had been guilty of this assault was acquitted by the Judge of the City Court, while the man whom he had beaten up was convicted. A committee of prominent citizens appealed to the Board of Public Safety for a trial of charges against the policeman, but the Board of Safety would not give a hearing to the charges, the written charges were abstracted from the records, and the policeman was placed on duty at the same polling place on election day.

At the same place on registration day late in the afternoon and some time after this first assault both policemen disappeared around the corner. It was the first time both of them had been absent that day. Thereupon three men came from around the same corner to the polling place and assaulted with slung shots another young representative of the City Club, a member of a prominent Kentucky family, broke his nose and rendered him unconscious for half an hour. There was no pretense that he had been in any way offensive. The assailants were never found.

These two unprovoked assaults by or with the connivance of those whose duty it was to prevent and expose crime aroused the whole public, regardless of party differences, but the object of the machine was only shown when the evidence in the contest cases developed the fact that there were 51 illegal registrations in the precinct where those assaults took place. On election day 41 of this number voted.

At another precinct on registration day an old Confederate General, a personal friend of President Roosevelt and a man of national reputation, was sent for to explain to the registration officers the law as to challengers. Without any provocation he was knocked into the gutter by two repeaters who were demanding the right to vote, but the policeman at that place declined to arrest them without a warrant. Here 41 illegal registrations were proved, of whom 35 voted. Toward the end of the registration the police in this precinct left the polls, and the repeaters after registering would change their clothes on the sidewalk before re-entering the polls.

In an effort to check illegal registrations the City Club stationed men with cameras at precincts where they were expected to take snapshots of repeaters in the hope that they might thus be identified and prosecuted. In one precinct in a ward to which a number of camera men were sent five men registered six times each, and in another precinct in the same ward nineteen men registered three times each. The Chief of Police instructed his officers "to

run those fellows away from here with those cameras, and if you can't do it, knock them in the head and send them to me." The camera men were thereupon assaulted and driven from the streets and their cameras destroyed. Six responsible gentlemen filed with the Board of Public Safety charges against the Chief of Police based on these facts, but the Chairman of the Board replied in a letter approving the action of the Chief and declining to have him arraigned. The charges have since disappeared from the records of the Board of Safety.

At another precinct on registration day a Republican election officer recognized a repeater as living in Cincinnati and told him to leave. Thereupon two policemen entered the polling place, arrested the election officer and while they held him, one on each side, he was struck in the face by the repeater and knocked over. The police declined to arrest the assailant, and the Police Court Judge imposed a fine of $19.00 on the Republican officer who had been assaulted (the lowest appealable fine is $20.00), and put him under a $1000 real estate bond to "keep the peace."

On registration day a roving gang of repeaters armed with black jacks and revolvers and led by an ex-fireman, a conspicuous Democratic worker who was appointed to office soon after the election, assaulted Republican officers all over the 12th ward, unchecked by the police. The police, though constantly appealed to all over the city for protection from such assults, did not interfere with or arrest a single such assailant on either registration or election day. In fact at one precinct on election day where a certain county constable arrested an election offender under a warrant, several policemen attacked the constable, beat him up, took his prisoner from him, arrested the constable and his deputy and took them to the police court, where they were tried by one of the Democratic candidates, sitting as special Judge, and fined $30.00.

At the 12th Precinct of the 9th Ward on election day the police inaugurated a condition of riot and a reign of terror to prevent any Republican officer of election from serving. A policeman, an old and notorious election offender who had been indicted repeatedly for offences against the election laws, entered the polling place and dragged the Republican Judge out on the sidewalk where four policemen cursed and assaulted him in the presence and with the approval of both the Chairman and the Secretary of the Board of Public Safety. The first policeman then threw him into jail, slapped his face several times, and threatened to kill him if he came back to the polls. A prominent lawyer witnessed the assault and appealed to the Chairman of the Board of Public Safety to protect the man's life, and the chairman ordered the police to lock up the lawyer also, which was done. A poor cripple who had consented to take the Republican judge's place was next arrested by the police for so consenting and sent to jail and his cane thrown away. A leading business man who, when asked, simply agreed to go on the cripple's bond, was also sent to jail and put in a cell. The Republican Challenger was then assaulted with a black jack by the Democratic Challenger and by a bartender whom the police refused to arrest. The Republican clerk, a very small man, was next assaulted by a Democratic thug, and he was carried away unconscious with his jaw broken, and the new Republican Judge, a young college graduate, was attacked in the presence of the police with a black jack, and his head covered with blood. The policemen arrested the Republican Judge, but not his assailant, and also cursed and arrested two merchants of high standing, one of them the Republican Challenger, who simply inquired why the judge had been arrested. When the judge was bailed out later he was too badly beaten up to serve as election officer. Eight arrests for no cause whatever were made at this precinct before 7 A.M.

Five Republican election officers having been thus successively arrested or beaten into insensibility, the reign of terror was successfully established among the voters in the precinct. No one could be found to serve as republican officer until the cripple who had been arrested, the grandson of a Kentucky Governor and the first cousin of the then Governor of Kentucky, was bailed out and, still unafraid, returned to his post. The other republican officer's place was filled by the Democrats with an imported repeater. Twenty-one illegal registrations were proved in this precinct. The acts of the police were reported to the Mayor of the City by responsible eye-witnesses, but he refused to leave his office to visit the polls or remove the police, and smiling, said to the complainants, "You don't regard that as any important matter; did you bring me down here about that, the mere talk of a mere policeman." And on the day after the election the Mayor called the Chief to his office and complimented him on the good conduct of the policemen under him on election day.

In argument the Democrats urged that after the trouble was over and the polls opened every thing was quiet and orderly. Such quiet and order, the result, not of freedom and liberty, but of oppression and the inability to resist, bring to mind the Russian general who, after he had suppressed with mailed hand a popular uprising of the Polish patriots, sent a telegram to his home government which read, "Order reigns in Warsaw."

The fraud at the registration and the election was as extensive and extraordinary as the violence. Many thousand repeaters and phonies registered and voted fraudulently. Between registration day and election day the Fusionists published day by day, in an independent newspaper in the city, the entire registration list, containing about 48,000 names and street addresses, and called on all citizens to examine that list and report illegalities. Fraudulent registrations to the number of 1829 were specifically proved. Of these 180 occurred from the houses of policemen and firemen and 348 more from houses adjacent thereto or on the same square.

The fraud of the Democratic machine culminated in the Twelfth Ward in certain "moved" or "alphabetical" precincts, so called, and there election thieves were thickest. At midnight the night before election two old Democratic precinct captains and their employees hired a wagon and drove from the saloon of the son-in-law of the Chief of Police to the No. 4 Hook and Ladder House of the City Fire Department, where a meeting of all the ward captains had just been held, presided over by the Secretary of the Fire Department. Here they loaded on to the wagon about a dozen ballot boxes and booths belonging to the Democratic City and County Committee which had been obtained a few days before on order of the Chairman of that Committee, who was also President of the City Sinking Fund, in violation of his express promise to the County Official charged by law with the distribution of ballot boxes. From midnight until 4 A.M. these industrious citizens drove around and distributed their ballot boxes in the rear of the 12th ward saloons and other places where "fake" elections were held the next day. When election day arrived, nine Democratic clerks, having the custody of the ballots, instead of going to the legal polling places, secretly went to the places where these Democratic primary ballot-boxes had been deposited and stuffed them with ballots. The result was that in Republican precincts such obviously fraudulent returns were made as 328 to 9 and 257 to 5 and 283 to 9 in favor of the Democrats. In these nine precincts 2770 registered voters were thus entirely disfranchised.

These 12th Ward election thieves left the proofs of their own felonies behind them in their own handwriting. The registration books contain the names of all registered voters arranged alphabetically, and opposite

the name of every voter is placed the name of the political party with which he affiliates. All ballots are attached to consecutively numbered stubs, from which they are torn like checks in a check book, and the names of the voters are recorded on the stubs in the order in which they come in to vote. The law provides that these stub books must be preserved, and when the election paraphernalia came to be examined in the contest proceedings, it was discovered that all the first numbered stubs contained surnames beginning with A, the B-s next, the C-s next, and so on in the exact alphabetical order in which those names had been recorded on the registration book a month before. These election officers seemed to be oblivious of the fact that the chance of the voters coming to the polls in alphabetical order was about as great as the chance that the letters of the alphabet thrown into the air would fall into an epic poem.

When the election thieves started to stuff the ballot boxes it is evident that they simply opened the registration books, in which the names of the voters were properly recorded in alphabetical order, and began copying those names on to the stubs and stamping the ballots. Many interesting and ingenious variations of the straight alphabetical order were introduced. Sometimes the stubs showed that after they had gone down the alphabet the first time they concluded that they did not have enough ballots stuffed into the box, and they would start at the back of the book and copy on to the stubs in reverse alphabetical order more names from Z back to A which had been omitted on the down trip. Occasionally they voted only Republicans or Independents when they went down the alphabet the first time and only Democrats on the second trip.[1]

[1] As an example of latter day ballot box stuffing on the "get through quick" plan of "alphabetical" voting, a copy of the surnames on the first 101 stubs of the ballot book in the 24th Precinct of the 12th Ward is here appended:—

In another precinct in the 12th ward a police wagon full of police raided the polls before the count was completed and carried off the ballots. Although the election officers had already counted 110 straight

	No.	Name.		No.	Name.
Republicans and Independents.	1	Arnold.	*Republicans Only.*	55	Miles.
	2	Able.		56	Morris.
	3	Anter.		57	Myrick.
	4	Ackerman.		58	Magel.
	5	Ackerman.		59	Miller.
	6	Boyson.		60	Murphy.
	7	Batman.		61	Norris.
	8	Burkhark.		62	Nolting.
	9	Bartholemew.		63	Newson.
	10	Brown.		64	Payne.
	11	Brady.		65	Pitts.
	12	Barula.		66	Pogel.
	13	Baries.		67	Quill.
	14	Bush.		68	Rocke.
	15	Brown.		69	Rice.
	16	Bird.		70	Schaffer.
	17	Bland.		71	Stewart.
	18	Braitling.		72	Stites.
	19	Bauer.		73	Smith.
	20	Bird.		74	Scott.
	21	Bullock.		75	Stites.
	22	Courtney.		76	Talxel.
	23	Cicel.		77	Valentine.
	24	Cordien.		78	Valentine.
	25	Cordien.		79	Wahlington.
	26	Compton.		80	Wise.
	27	Compton		81	Young.
	28	Clever.			
	29	Cornell.			Here is where the ballot box stuffers began to run the alphabet backwards.
	30	Drer.			
	31	Disher.			
	32	Dreher.			
	33	Evens.			
	34	Elliott.		82	Ward.
	35	Edrington.		83	Woolford.
	36	Eury.		84	Vetter.
	37	Fahey.		85	Thompson.
	38	Freeman.		86	Spinner.
	39	Fort.		87	Stultz.
	40	Fort.		88	Smith.
	41	Gerrard.	*Independents Only.*	89	Schoenbechler.
	42	Greenaway.		90	Smith.
	43	Grall.		91	Smith.
	44	Grube.		92	Ruff.
	45	Herbert.		93	Roberts.
	46	Hagerman.		94	Royalty.
	47	Hicks.		95	Ruter.
	48	Hagerman.		96	Rather.
	49	Hagerman.		97	Miller.
	50	Hurn.		98	Murphy.
	51	Jacques.		99	Johantgen.
	52	Lafayette.		100	Haysley.
	53	Limeback.		101	Brickley.
	54	Malone.			

The names on the next 55 stubs were all registered as Democrats but one. The polling place which was used for this work was the rear room of a saloon belonging to the son-in-law of the Chief of Police.

Republican ballots, a certificate was returned and counted showing a vote of 202 Democrats to 15 Republicans.

In still another 12th ward precinct after the close of the polls the police and an ex-fireman, an old election-thief who was one of the leaders on the secret midnight journey, led a gang of 20 strangers into the polling place and frightened away the Republican officers. Although 100 Republican votes had already been counted, the leaders of the gang, with the Democratic election officers, some or all of them, made up a forged and fraudulent return of 233 to 10 in favor of the Democrats.

In three other precincts in the city having a registered vote of 774, the Democratic Election Clerks either stole or destroyed the ballots, and no election at all was held.

In yet another precinct, strongly Republican, a band of armed thugs with the connivance of the police raided the polls ten minutes before the closing hour, and at the pistol's point carried away the ballots in a wagon and burned them in a saloon, the proprietor of which was brother of a police captain and cousin of the Democratic candidate for constable in that district.

The false returns from these disfranchised precincts were in twelve different instances signed by "fake" election officers whom the Democrats had registered under fictitious names. They were pure myths; none of them were ever produced by the Democrats or were ever seen or heard of by any witness in the record.

The record is filled with uncontradicted evidence directly connecting thirty prominent Democrats, who all held official positions under the city administration or Democratic organization, with the commission of felonies, but not one of them dared to testify to clear himself of the charges against him.

At least nineteen of the Democratic election offenders were rewarded by appointment to or continuance in office by the Democratic beneficiaries of the crimes. They were appointed to such important offices as Gas Inspector, Assistant Wharfmaster, Official Indexer, Street Supervisor, Live Stock Inspector and Road Supervisor.

After deducting all of the false majorities and fraudulent votes from the apparent Democratic majority, that majority was reduced 2445 votes and really ranged from 960 to 2867 votes. But over against this were 6292 registered voters who had no chance to vote and the result being therefore uncertain the Court of Appeals held the election void.

The story of the outrages committed on this Black Tuesday, in November, 1905, might be continued almost indefinitely. The character of the crime and the more conspicuous incidents connected therewith have been briefly stated. The statutes of the State of Kentucky are plain that these are penitentiary offences, but as in the 1903 election not one of these election thieves has been brought to justice in the criminal courts of Kentucky. On appeal to the civil courts, however, justice has been asked and given, the ill-gotten gains of such fraud and crime have been taken from the hands of the beneficiaries, and the people have recovered the right, which must lie at the basis of all progress in government and of all reform — the right to choose their own public servants.

In a well reasoned opinion the Court of Appeals concisely stated a number of important legal principles governing contested elections which it may be interesting to repeat:

(1) "A defeated candidate may bring a suit to set aside the election upon grounds specified in the statute, even though his petition does not show that he himself was elected to the office. If the law were otherwise, there might be no way to void an election which had been carried by the grossest frauds."

(2) "The contestee's participation in or knowledge of the fraud or other wrongdoing does not have to be shown in order to set aside the election."

(3) "The contestant need not show that

he would have been elected except for the fraud; he need only show that the fraud, intimidation, bribery or violence existed to such an extent that it can not be determined *who* was elected."

(4) "Disfranchisement is not the only element that prevents an election from being 'free and equal,' for illegal votes, intimidation and violence may contribute to render an election void under the Constitution. . . . The language of the Constitution is designedly broad, made so for the purpose of covering and meeting every condition that may arise and every condition that may be invented to prevent the substantially fair and free expression of the will of the people."

By the establishment of these principles Kentucky has now vitalized its recent legislation, the object of which, as declared by its highest court, is "to so safeguard elections as to remove any obstacle that stands in the way of, or tends to prevent a full, fair and free expression of the will of the people at the polls."

The Court in its epoch-making decision cleared the road for a new standard of public service in Kentucky. In concluding their opinion they said:

"Peace officers, whose duty it was to prevent and expose crime, when called on to do so, sheltered under the rule against self-incrimination; and yet these men still wear the official uniform, still draw salaries from the public purse, and this is made possible only by the consent of those who are the apparent beneficiaries of their silence. . . .

"It is sufficient to say that every note on the gamut of election crimes was sounded on election day by those whose sworn duty it was to prevent it. . . .

"The conspiracy to steal the election in question is as plain as was the conspiracy charged in the Declaration of Independence against king and council to rob the colonies of their liberty. After setting forth the reasons against a people changing their form of government for light and transient causes, it is said in that noble instrument: 'But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security.'

"As there, so here.

"A long train of abuses and usurpations, pursuing invariably the same object, evinces a design to deprive the people of Louisville of their right to elect their own officers, and it is now our duty to overthrow this design and to declare the safeguards necessary for the future security of the rights of the people.

"We cannot feel that our duty in this case is fully performed without insisting that it is absolutely necessary for the preservation of a democratic form of government, that the right of suffrage should be free and untrammeled.

"No people can be said to govern themselves whose elections are controlled by force, fraud or fear. . . .

"No people are wholly civilized where a distinction is drawn between stealing an office and stealing a purse; no truly honest man will be satisfied with an office to which his title is not as valid as that to the homestead which shelters his family; and to him who knowingly holds an office obtained by fraud, force or chicane, will ever be applied the language of the dramatist to an usurper of old, 'Now does he feel his title hand loose about him, like a giant's robe upon a dwarfish thief.'"

This contest was made at an enormous expense of money, time and labor, but it was the consummation of a determination on the part of the people of Louisville to have honest elections in that city. They felt that the question of whether they should be allowed a voice in their own government and the selection of their own officers, or whether this entire subject should be turned over to a self-perpetuating political machine, and results manufactured by its parasites and hirelings to suit its desires, regardless of the will of the people, was directly involved in these cases. They felt that on the result of these cases depended the cause of civil liberty and republican government in the State of Kentucky. While some who contributed to the waging of this contest were abundantly able to do so, the contributions of others have been as genuine sacrifices for the love of home and country, as were ever laid upon the altar.

LOUISVILLE, KY., January, 1908.

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, facetiæ, and anecdotes.

JUDGE SHARSWOOD'S LEGAL ETHICS.

The most important, the most difficult task that American lawyers have undertaken since the formation of the American Bar Association is undoubtedly the formulation of a code of ethics upon which the committee of that Association has been working for nearly two years. It is easy to say that the fundamental principles of common honesty are simple and sufficient, but it is a fact that there is a conflict very hard to adjust between the theory that a lawyer is a public officer and the doctrine of loyalty to a client. To the lay reader these principles have long been hopelessly irreconcilable and only the legal mind accustomed to complexities and fine distinctions has been able to announce with certainty that the two are wholly harmonious. Few of the Bar, however, have agreed as to the exact manner of reconciling them or as to the legal limits for the application of each to the specific problems of practice. But every earnest effort to clearly define them is deserving of consideration, and an eminent lawyer can do little of greater benefit to his profession or to the public than to approximate a successful statement. It was the opinion of the committee of the Bar Association that the best of these essays was one written many years ago by Chief Justice Sharswood of Pennsylvania, who for nearly forty years served his state in a judicial capacity. As the book was out of print an arrangement was made with the former publishers to reprint it at cost, and through the generosity of Gen. Thomas H. Hubbard of New York this expense has been met and copies have been distributed free to all members of the Association for their examination as a preliminary to criticism of the draft of the code which is promised next spring. (An Essay on Professional Ethics by George Sharswood, L.L.D., 5th ed., T. & J. W. Johnson Co., Philadelphia, 1907, Reprinted for American Bar Association $1.50).

The book, which was first published in 1854, is in two parts. The first defines the lawyer's duty to the public, the second his duty to the court, to counsel and to client. In some important particulars the book is not applicable to modern conditions, as for example, its recommendations as to a course of study. The modern system of legal education has vastly changed the equipment of the young practitioner who now needs less of fundamental theorizing and more of concrete problems to which to apply his learning and from which to master local practice and obtain business experience. The high moral tone of the author, however, and his sympathetic but discerning eye for the temptations that beset our ideals are worthy of all praise. He would not tolerate the modern corporation lawyer who is described in somewhat sensational style by James French Dorrance in the January *Broadway Magazine* (V. xix, p. 407) in an article entitled "Great Corporation Lawyers and their Master strokes." What a contrast between this account of the work and rewards of counsel for the powerful capitalists of New York to-day and the ideals of the Pennsylvania Judge of half a century ago. Judge Sharswood believed that it would be better that the law should forbid a lawyer to sue for his fees, and that at least such a suit should be regarded as strictly unprofessional. The payment of the attorney should be rather in the nature of a grateful reward from a relieved client. He scorns as specious the argument that the toil of the lawyer is worthy of the highest reward it can command, and he holds up the model of the Roman jurisconsult to show how we might gain a standing in the community as apostles of unselfish devotion to public good and the cause of justice. He insists that it is only when the lawyer becomes a money maker that his influence diminishes, and he quotes in proof of this from Gibbon's Decline and Fall of the Empire.

"The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into the hands of freedmen and plebeians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintained the dignity of legal professors, by furnishing a rich client with subtleties to confound the plainest truth, and with arguments to color the most unjustifiable pretensions."

It is interesting to note, however, that even in the good Judge's citations of ancient fees it appears that Isocrates is supposed to have received the equivalent of eighteen thousand dollars for a single speech. Surely this must have been as large a reward for those days as even the princely rake off of a Cromwell or a Dill. Nor can we doubt that the beneficiaries of the modern manufacturer of securities share with him without repining. It is also to be observed that in the end the classic system broke down. One wonders also if it is not more for the public welfare that a lawyer should receive his reward in a business-like payment than in the gratitude of clients "from whose votes on a future occasion they might solicit a grateful return." The ideal state when men will work for joy alone has not yet come and to discard our present fee system would involve either a class of rich lawyers or compensation by the state. The former course would be wholly bad, the latter would be consistent with the theory that a lawyer is an officer of the court but wholly inconsistent with the other theory of partisan zeal.

So we see that the discussion of this problem again brings us to the conflict between these two principles of professional responsibility. This conflict is especially conspicuous in our country because we have combined the two offices of advocate and solicitor, and it is possible that the true solution of the problem may be found at last in a practical separation of the two classes of lawyers for which different standards may be prescribed. There can be no doubt of the need of the counsellor to guide the business man through the intricate relations of a highly developed civilization, and it is inevitable that the material interests of such counsel should be closely wrapped up in those of his clients and that his attitude should be purely partisan. To him can be entrusted the duty of discovering all possible grounds in support of his client's contention when litigation finally ensues. But the lawyer who assumes to aid the court by examination of witnesses and by narrowing the issues to some that are susceptible of simple solution may well be placed on a different footing and made an integral part of the machinery of justice. It has frequently been noticed that in our larger centers there is a growing tendency for Court practice to flow to lawyers who devote their time exclusively to that work. There are few of these who have had the courage to withdraw from the great financial firms and set themselves up as exclusively trial lawyers dealing only with the attorneys of litigants, but some in our larger centers have begun to make this their practice. The position of the trial lawyer in a large firm handling enormous financial interests has long been unsatisfactory, for the proportion of work he performs and the proportion of income he earns for his firm is so much smaller than that produced by the promoter of corporations that the firm inevitably comes to regard the trial lawyer as merely a useful adjunct of a more important system. He can only escape this tendency to subordination by assuming an entirely independent position and he can only avoid the commercial and financial work and confine himself to trial work (unless indeed he be one of the unfortunate triers of personal injury cases) by dealing with attorneys, and he can only obtain the patronage of other attorneys by proving that he is not a competitor and by rigidly adhering to the English method of never dealing directly with the client. There are many who believe that the tendencies we have outlined may yet overcome the traditional dislike of our democracy to a special class of advocates. Should that ensue we believe the most difficult problems of legal ethics would be easy of solution.

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 legal articles reviewed this month a prominent place may be assigned to Professor Beale's analysis of Contempt of Court, as a clear exposition of a subject which is becoming a political issue, with the usual accompaniments of party and class prejudice. Readers of corporation and constitutional law will find also reviewed some articles of more than passing interest in those specialties.

AGENCY. "The Independant Contractor Under the Law of Illinois," by Barry Gilbert, January *Illinois Law Review* (V. ii, p. 361).

AUTOBIOGRAPHY. "A Scottish Judge Ordinar," by J. Dove Wilson, *Yale Law Journal* (V. xvii, p. 170). Professor Wilson's autobiography gives many interesting sidelights on the legal profession in Scotland; it will be concluded in the February number.

BANKRUPTCY. "The Bankruptcy (Scotland) Bill, 1907," by W. Wallace, *Scottish Law Review*, (V. 23, p. 344).

BIOGRAPHY. "Some Lawyers Who May Be Candidates in the Presidential Campaign of 1908," by Richard Selden Harvey, *American Lawyer* (V. xvi, p. 11).

COMBINATIONS. In the December *Political Science Quarterly* (V. xxii, p. 11) Henry R. Seager calls attention to the fact that, "not withstanding the attention that has been given to trade unions in the United States, their legal powers are still very imperfectly defined." On the contrary litigation and legislation have evolved a fairly definite series of principles in England by which employer and employee may know their rights. The Trades Disputes Act of 1906 has effected a revolution in the attitude of the law toward combinations of labor, especially as to their responsibility in damages for the acts of their agents as decided in the famous Taff Vale case. "To the legal mind," says the writer, "there is something anomalous about associations whose existence is guaranteed by law, and yet which are relieved by the law from responsibility for the acts, injurious to others, that may be performed on their behalf."

"But the question is too important to be decided by reference merely to legal precedents and traditions. There is good ground for the widespread feeling among wage-earners that the rights of property are made too prominent in our legal system, and that at too many points persons with property enjoy advantages over those without. We must recognize that the small accumulations of wage-earners are vastly more important to them and to society, dollar for dollar, than the much greater resources of capitalist employers. Just as our common system of making light punishments, either fine *or* imprisonment, falls with far greater severity on the poor who cannot pay fines than on the well-to-do who can, so a plan of penalizing trade unions by making their funds liable in the same way that is recognized as just and proper in the case of business corporations may be both unjust and inexpedient. We must consider carefully the effect such a policy will have upon the labor movement before deciding in favor of it; and we must recognize that the protection of the property interests of employers, while an important, is by no means the most important end to be kept in view. The most important end is the protection of the personal rights of both sides and the maintenance of conditions which will advance the general welfare of the community."

CONSTITUTIONAL LAW. "Commerce Under our Dual System of Government," by Charles Nagel of St. Louis. An address before the Missouri State Bar Association, printed by J. W. Steele & Co., St. Louis, 1907. An argument in favor of the extension of national regulation "because it alone can provide uniformity of rule and action, by establishing an entire system." "There is every reason why a United States citizen should be jealous of the right to protection guaranteed him by the National Government and the State Government — each within its proper sphere. I submit that so far from

encroaching upon State sovereignty, a false and mistaken allegiance to it has led us to the adoption of a dangerous construction; has closed our eyes to the real significance, and to the tremendous simplifying force of a constitutional provision, the meaning and necessity of which were so obvious that it was adopted without objection in a convention in which scarcely another provision escaped the ordeal of fire."

CONSTITUTIONAL LAW. "Concerning Uncertainty and Due Process of Law," by Theodore Schroeder, *Central Law Journal* (V. lxvi, p. 2).

CONSTITUTIONAL LAW. "Corporations and the Commerce Clause," by Smith W. Bennett, *Albany Law Journal* (V. lxix, p. 323).

CONSTITUTIONAL LAW. Harold Harper presents in the December *Political Science Review* the results of an examination of decisions on the "Constitutionality of Civil Service Laws," which he summarizes as follows:

"This brief review of the situation tends to show, upon the whole, that the path of the civil service reformer is clearer than a recapitulation of the different grounds upon which objections have been raised would lead one to assume. Non-partisanship of the commission; tests; infringement of the doctrine of the separation of powers, either as to the executive or the judicial department; deprivation of property without due process of law; the imposition of qualifications where constitutional qualifications already exist — all these considerations create difficulties, if at all, only in finding the proper manner of introducing the merit system and the proper form of a civil-service law: they do not ultimately prevent the skilled draughtsman from securing the effects he desires. The merit system is not discountenanced by American constitutional law. It is only where the effect of civil-service regulations is so to delimit the power of appointment or removal as to appropriate to a civil-service board the function of the constitutional depositary of that power, that the national and state constitutions very properly stand in the way."

CONSTITUTIONAL LAW. "Statutory Regulation of Wages," by O. H. Myrick, *Central Law Journal* (V. lxv, p. 468).

CONSTITUTIONAL LAW. "The Constitutionality of Larceny from the Person of an Unknown Person," by Joseph M. Sullivan, *Albany Law Journal* (V. lxix, p. 332).

CONSTITUTIONAL LAW. "The Constitution and Obscenity Postal Laws," by Theodore Schroeder, *Albany Law Journal* (V. lxix, p. 334).

CONSTITUTIONAL LAW. "The Treaty Power and Police Regulation," by Hollen M. Barstow in the January *American Lawyer* (V. xvi, p. 18), renews familiar arguments arising out of the Japanese school incident.

CONSTITUTIONAL LAW. "The U. S. Supreme Court and Rate Legislation," by Leslie J. Tompkins, January *American Lawyer* (V. xvi, p. 43).

CONSTITUTIONAL LAW (Canada). "The Canadian Constitution," by John S. Ewart, *Columbia Law Review* (V. viii, p. 27). An interesting exposition of the real independence of Canada, while nominally a colony of Great Britain.

CONSTITUTIONAL LAW. "The Development of the Federal Power to Regulate Commerce," by Hon. Philander C. Knox, *Yale Law Journal* (V. xvii, p. 139). Text of Senator Knox's address to the Yale Law School graduating class in June, 1907.

CONSTITUTIONAL LAW (Rate Regulation). "Reasonableness of Maximum Rates as a Constitutional Limitation upon Rate Regulation," by Frank M. Cobb, *Harvard Law Review* (V. xxi, p. 175). "Rate regulation," says Mr. Cobb, "must be limited to the establishment of maximum rates, 'beyond which the company cannot go, but within which it is at liberty to conduct its work in such manner as may seem to it best suited for its prosperity and success.' . . . Legislation restricting the management of its business by fixing absolute, minimum, commutation, or other arbitrary rates, is unconstitutional and void."

What is the standard of reasonableness of a maximum rate? The fundamental principle is that no one can constitutionally demand a service to be rendered at less than cost or the fair value of the service. Where the regulation establishes "a schedule of rates based upon the classification of rates charged by the railroad itself, and affecting either the entire business . . . or such a well-defined class of

traffic as the passenger or freight business, the rule or test is . . . its effect upon the entire business of the company, or such freight or passenger traffic." Smyth *v.* Ames., 169 U. S., 466, lays down the rule that the company is entitled to receive its expenditures and "just compensation." Mr. Justice Harlan suggested the method of ascertaining the fair value of the property used, the gross earnings and expenses, and the probable net earnings. Comparison would determine whether the probable earnings would give just compensation, *i.e.*, a return equal to that received by capital invested in similar enterprises. This method does well enough for the case to which applied. But there are other cases possible.

"The following analysis covers the field of rate regulation in respect both to its extent and to the uniformity or diversification of the cost of service:

"1. A schedule of maximum rates for the entire business.

"2. A single maximum rate for the entire business.

"3. A single maximum rate for a portion of the business.

"The cost per unit of rendering public service may be either uniform or diversified, owing to varying conditions.

"The various combinations under the above classification will be considered separately.

"First. Where a schedule of maximum rates applies to the entire business of a company, the proper test is that employed in Smyth *v.* Ames, *i.e.*, if such a schedule is based upon the classification adopted by the railroad and consists of a horizontal reduction. If, however, the state does not base its regulation upon existing classifications and rates of the company, the situation presented is that considered under the fourth heading.

"Second. Where a single maximum rate applies to a service of which the cost per unit is uniform, the aggregate net earnings of the company reflect the measure of profit for the unit, and the reasonableness of the rate as a maximum.

"Third. Where a single maximum rate is made applicable to a certain class of service, the test of the reasonableness of such rate is the value or cost of furnishing such service.

"Fourth. Where a single maximum rate is made applicable to the entire business and the cost of service per unit is variable, the legislation cannot constitutionally ignore this variable quantity which requires a classification of the service and the proper adjustment of rates thereto. In the absence of such a classification and adjustment the propriety of the single maximum rate must be tested with respect to the cost of rendering each separate and distinct class of service which the public may demand under such regulation."

CONSTITUTIONAL LAW (Treaty-making Power). "The Treaty-making Power of the Government of the United States in its International Aspect," by Everett P. Wheeler, *Yale Law Journal* (V. xvii, p. 151). Maintaining "that a treaty when made by the President of the United States and ratified by the Senate, is binding upon every resident of the United States and every citizen of the Republic wherever he may be, and that the President and the Federal Courts are vested with power to enforce the provisions of the treaty, and that it is the duty of Congress to pass all laws which may be necessary to carry these provisions into effect."

"In the Chinese Exclusion Cases, the Supreme Court of the United States felt itself obliged to hold that however just might be the grievance to a foreign nation, even amounting, as was conceded, to a *casus belli*, yet the treaty had no greater force than an act of Congress, and, consequently, that an act of Congress could change it. This, after all, is holding that it is within the power of a nation to violate its solemn obligations. Such power exists, and must be reckoned with. But the obligation of honor and duty remains. To inculcate this obligation is a part of that campaign of education which William L. Wilson declared was, in a country of universal suffrage, a continuing duty."

CONSTITUTIONAL LAW. "Validity of Statutes conferring Executive and Legislative Powers on Courts and Judges," by W. W. Thornton, *Central Law Journal* (V. lxvi, p. 24).

CORPORATIONS (Directors' Liability). "The Liability of the Inactive Corporate Director," by H. A. Cushing, *Columbia Law Review* (V. viii, p. 18).

"Briefly stated, the really passive director has been deemed not responsible for the wrong-

doings of his associates, since his own liability arises only from his actual participation in such wrongdoing; and, further, while he may be liable for the wrongdoings of his associates, though not joining in them, if he has knowledge of such transactions and remains inactive, yet if he is ignorant of such transactions certainly liability does not rest upon him. . . .

"If, thus, the inactive director may leave undone all the things a trustee or an agent may leave undone and may take advantage of all the protection the law affords to persons acting in such other capacities, and at the same time may be under no duty to recognize any obligatory relation with respect to the conduct of his associates, it follows as a possible result, as here pointed out, or indeed as an inevitable result, that the real purposes for which directors are in fact chosen may be in large measure defeated. If, on the other hand, a directorship in itself means the assumption of any specific obligation other than the obligations one always is under with reference to one's personal conduct, then it would seem necessary that the attempt to apply to the director only such tests of propriety of conduct as are applied to the trustee and agent must fail and that there must be recognized in the position of a director some further element of responsibility which has not thus far been clearly developed. A dogma which earlier prevailed (strengthened, doubtless, by the circumstance that many corporations then were of the charitable type), and which has not yet disappeared, assumed that directors were rendering gratuitous service to stockholders, and that accordingly there should be imposed upon the position of director as few obligations or hardships as possible, in order that men of the desired character would more readily accept election. If this idea proceeded from the supposition that it was desirable for the benefit of the stockholders or the corporation to secure as directors men of a peculiar qualification or standing, the stockholders on the other hand should be allowed to rely, in some degree at least, upon the effect of the same supposition. That reliance is frequently very real and of important consequences, but if such reliance is now to be entirely disregarded in determining the responsibility of directors, then the popular notion of the corporate director is not in harmony with the legal notion; and the only real question is whether the legal or the popular conception should prevail, whether really any desirable end is to be secured by adhering to the strict and perhaps inapplicable rules developed in the course of faltering attempts to define the position and duty of a director. It may be said that this requires the substitution of a practical or ethical standard for an existing legal standard which, however fallacious, is certain; but such substitution is the normal method by which legal rules are often developed, and if in this instance the law cannot lend itself to such development it fails of its purpose. That such modification of legal theory is necessary or proper need not now be urged, as the present purpose is merely to suggest the anomaly which has been allowed to persist."

CORPORATIONS. "Why not Abolish Directors?" by Frank E. Hodgins, *Canada Law Journal* (V. xliv, p. 6).

CORPORATIONS (Stockholders' Right to Sue). "Right of a Stockholder, Suing in Behalf of a Corporation, to Complain of Misdeeds occurring Prior to his Acquisition of Stock," by Murray Seasongood, *Harvard Law Review* (V. xxi, p. 195). Arguing against the theory that as a principle of equity, a stockholder suing in the right of a corporation to redress wrongs done the company, must have owned his stock at the time the wrongs were committed or must have had his shares devolve upon him since by operation of law. This rule is contrary to the English law and the author finds no sound theory on which an arbitrary limitation like this should be placed on a right to sue when the litigation if successful redounds to the benefit of all the stockholders. Rule 94 of the United States Supreme Court makes this limitation, but this was adopted in order to stop collusive transfers made as a contrivance to confer jurisdiction on the federal court. In a number of states it is recognized that this is not a rule of equity and subsequent stockholders are allowed to sue, as in England, and in accord with Mr. Seasongood's argument.

EDUCATION. "The Two Year Course in Southern Law Schools," by Thomas A. Street, *Law Notes* (V. xi, p. 183).

EVIDENCE. "Telephonic Communications in Evidence," Anon., *Virginia Law Register* (V. xiii, p. 665).

EVIDENCE. "The Theory Upon Which Dying Declarations are admitted in Evidence," by William A. Purrington, *Bench and Bar* (V. xi, p. 91).

EVIDENCE. Professor Wigmore has solved the problem of rapid antiquation of text books by the multiplication of decisions by publishing a supplement to his exhaustive treatise in which he collects the decisions of the last three years. The matter which is mostly classified citations to be added to notes is arranged under section headings correspond-

ing to the original text. Occasional additions to text are made on subjects that have been conspicuous of late, such as the admissibility of evidence to disprove facts said to have been communicated to a party where the fact of communication alone was the object of the direct proof as in the Thaw trials and the problem presented by the immunity statutes. The notes also contain a wide range of quotations including many practical hints on the use of witnesses seldom found in a work as carefully reasoned as Professor Wigmore's. "Wigmore on Evidence," Vol. V., Little, Brown, & Co., 1908. $6.00 net.

GOVERNMENT (Election of Executive Officers). "Are Too Many Executive Officers Elective?" by Bradley M. Thompson, *Michigan Law Review* (V. vi, p. 228.) A breezy article answering the question in the affirmative very positively. It is of general interest although written specifically in regard to Michigan, the constitution of which . . .

". Provides for the election of every judicial officer from police magistrate to chief justice, and of every executive officer from pathmaster to governor. The constitution expressly prohibits the appointment of any judicial officer. The people having observed that the judge who held office by appointment never succeeded in pleasing each of the litigants and often angered both, concluded that his failure to please everybody was due primarily to the fact that he was appointed and not elected. That if the judge was elected, he would be in sympathy with the people, in touch with them, and could not, unless actuated by malice aforethought, render a decision that would not be entirely satisfactory to both sides.

. . . . . .

"What would one think of the wisdom of conducting the business of a great railroad in the same manner? If the stockholders should hold annual meetings, or meetings once in two years' and elect a general superintendent, a manager of the passenger traffic, a manager of the freight traffic, all the necessary conductors, engineers, brakemen, baggagemen, trackmen, train dispatchers, etc., assigning to each separate duties and making each independent of all the others? Just a duplicate of the plan by by which the citizens of Michigan manage and conduct state affairs. No one would ship a dead dog over that line without having taken the precaution to skin the animal and save his hide.

"Listen to the conclusion of the whole matter. Give the people an opportunity to govern the state. Amend the constitution and provide for the election of just two state executive officers, a governor and a lieutenant-governor. Give the governor power to appoint by and with the advice and consent of the senate, the other state officers now elected, with power to remove at will; such officers to constitute his counsel or cabinet. Give him power also to appoint for the same term as the governor holds office, one sheriff and one prosecuting attorney in each organized county of the state. Clothe him with all the power necessary to enable him to enforce the law and hold him responsible for the faithful performance of his duties."

HISTORY. "Wig and Gown," by Richard Selden Harvey, January *American Lawyer* (V. xvi, p. 31).

HISTORY. "Historical Lights from Judicial Decisions," by Edward Cahill, *Michigan Law Review* (V. vi, p. 215). Pointing out the value of legal decisions to the historian, as throwing light on the customs and struggles of the period.

HISTORY (Pennsylvania Courts). "The Courts of Pennsylvania Prior to 1701," by William H. Loyd, Jr., *American Law Register* (V. lv, p. 568).

INSURANCE. (History.) "The Early History of Insurance Law," by W. R. Vance, *Columbia Law Review* (V. viii, p. 1). An interesting review of the insurance law history from the beginning and through Lord Mansfield's time.

INTERNATIONAL LAW. The *American Lawyer* for January (V. xvi, p. 1) publishes "Legal Aspects of the Hague Conference," by Hayne Davis, with illustrations. An interesting outline of the work of the Congress and the plans agreed upon for the next Congress.

JURISPRUDENCE. "Roman Law and Mohammedan Jurisprudence," by Theodore P. Ion, *Michigan Law Review* (V. vi, p. 197). This second installment is a comparison of the systems of law named, is devoted to examination of the Roman *gens* and the Arabian *akila* and of the respective provisions as to citizenship and slavery. To be continued.

JURISPRUDENCE. "The German Civil Code," by J. C. A.," *Madras Law Journal* (V. xvii, p. 341).

LEGISLATION. "Uniformity of Legislation," by W. O. Hart, *Albany Law Journal* (V. lxix, p. 369).

MASTER AND SERVANT. "Proposed Changes in the Fellow Servants'. Law," by George Rice, *American Lawyer* (V. xv, p. 572).

PERSONAL INJURIES. "White's Analytical Index of Louisiana Personal Injury Cases," by H. H. White. Dameron-Pierson Co., New Orleans, 1907. Price, $7.50. Analyzing every reported personal injury case in Louisiana by giving the title, cause of action, defence, method of trial, judgment of the lower court, judgment, with reasons, of the upper court, date and citation, with a table of amounts awarded for various classes of injury, and a ready reference index.

PRACTICE. "Practice of the Learned Professions," by Edwin Maxey, *Albany Law Journal* (V. lxix, p. 375).

PRACTICE. The "Legal Tactics Series" of addresses before the students of the Law School of Northwestern University is continued in the January *Illinois Law Review* (V. ii, p. 382), by William K. Lowrey, on "The Art of Writing Briefs and Making Legal Arguments." The author, in preparation, wrote to the chief justices of the appellate courts of twenty-five or thirty states for suggestion and his address is full of sound advice. He emphasises the fact which Judge Moody reminded us of at Portland last summer, that the quantity of work thrust on our courts of appeal is so great, and records, briefs, and citations are so voluminous, that oral argument is essential in order that the vital points be brought to the attention of the court.

PRACTICE (Contempt of Court). "Contempt of Court, Civil and Criminal," by Joseph H. Beale, Jr., *Harvard Law Review* (V. xxi, p. 161).

Professor Beale distinguishes different kinds of contempt, suggesting in connection with each the proper limits of action of the court in punishing. From the most ancient times any insult to the king or his government was punishable as a contempt. Any act which interferes with the operation of the court itself while engaged in the trial of cases, or which renders the court less able, properly and with dignity, to try cases, is a contempt of court entirely similar in kind to the contempt of the king by insults offered to him. The typical case of this sort is actual disturbance made in the court itself, which interferes with the process of litigation. Any act also which directly obstructs the course of justice, though done outside the court, is equally a contempt of court. A third class of active contempts of of court consists in any interference with persons or property which are in the hands of the court. Although it has been generally assumed that all contempts of court are of the same sort, the active contempt above described is entirely different in nature and origin from the so-called contempt of court which consists in mere disobedience to an order of the court.

From the earliest time a refusal to obey an order of the king or his officer, formally and expressly directed to a subject, has been regarded as a contempt. This, doubtless, was deemed a breach of allegiance. This contempt, by mere disobedience, was often joined, or was alleged to be joined, with an act of dishonor to the lord. Thus, when the contempt consisted in disobedience to the king's writ, a contemptuous treatment of his seal was usually charged. But it had very early come to be established that the mere disobedience to a writ under the king's seal was in itself contempt. This became of increasing importance from the time the lord chancellor adopted the king's seal as the basis of his judicial power. He had no direct power over property or persons, and no control over any executive office, sheriff, constable, or bailiff. The decree of his court derived its force from the fact that it was granted by the keeper of the King's seal and was executed by means of a writ sealed with that seal. Any messenger could convey the writ to the person addressed, and a mere knowledge of the King's will compelled that person, on his allegiance, to obey without formal service. Disobedience to the order of the court which did not constitute active contempt of court could not be punished, since the order of the court, as such, had no legal effect; but disobedience to the King's seal was, as has been seen, a contempt of the King. But as this use of the King's seal

became common and process sealed with it was issued as of course, disobedience to the seal inevitably and insensibly took on a less serious form. A King's seal, which is at the service of a private party in a suit, ceases to be a dread symbol of sovereign power and becomes merely part of the machinery of a court administrating justice between party and party. So the process of contempt for the disobedience of an order in chancery ceased to have any higher significance than that of a step in civil process. Disobedience to process was still punishable as contempt of the King, but it was in fact a mere method of executing a decree of the court in favor of a successful party to a suit. The inevitable recognition and giving legal effect to this fact did not come until well on to the nineteenth century. A member of Parliament had been attached for contempt in clandestinely removing a ward of court from the custody of a person to whom she had been committed by the chancellor. He set up his privilege as a member of Parliament. Lord Brougham, then Lord chancellor, drew the distinction between the breach of an order of a personal description and actual interruption of the business of a court. Breach of a mere personal order was a civil contempt, to which it was admitted the privilege of Parliament was a protection. But a commitment for interruption of the court's business, as is the case at Bar, was criminal in the nature and the privilge no answer to it. This distinction is now well settled in England with all the resultant differences as to privilege from arrest, the form of appeal and the pardoning power of the sovereign. In this country the distinction has usually been accepted in the same form and with the same results. In the Debs case the Supreme Court recognized the established distinction, Justice Brewer saying: "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing the suitors the rights which it had adjudged them entitled to.

This difference in nature appears in the method of dealing with the contempt. Active contempt of the court, like similar contempt of the king, is a crime, and indeed may be indicted and punished as a misdemeanor. It is usually dealt with summarily by the court which causes the immediate arrest of the offender, and sentences him to a fine or imprisonment as a punishment for his wrongdoing. But where its injunction or other order or decree is violated by the person addressed, the violation is called to the attention of the court by the injured party, and the wrongdoer is submitted to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong. This is obviously not punitive but coercive, and anything in the nature of a sentence to a definite punishment, like a fine or imprisonment for a term, was entirely foreign to the process. But sometimes a person violated a decree in such a way that he could not restore the *status quo ante*, and if the other party were obdurate he might remain in prison for the rest of his life, through his inability to purge himself of contempt. Probably for this reason in recent times a sort of punishment by limited term of imprisonment or even by fine, payable to the injured party, has been substituted for the old coercive imprisonment.

These distinctions lead to the following conclusions by Professor Beale on the now vexed question of punishment for contempt, and the demand that no one be punished for it except after a trial by jury and verdict of guilty. He believes the necessity for a summary and exemplary punishment is far greater in the case of a direct contempt in the face of the court than in the case of a contempt outside court, and if contempt is to be punished *instanter* it must be done in most cases by the judge himself, who is the subject of contempt and simply on the evidence of his own senses. There seems no other course than such immediate punishment. The danger of harshness on the part of the judge is a less evil than the danger of a complete suppression of the functions of justice by permitting an up oar to continue unchecked.

When the contempt does not occur in the face of the court a more regular procedure is required. An attachment issues on affidavits, the offender is brought before the court, and has an opportunity to disprove the charges. Summary punishment is less necessary and a delay of a day or two will not necessarily prejudice the court. It will ordinarily be

possible to have a trial before some other judge than the one especially interested. The fact that a short delay is possible gives an opportunity to summon a jury, and have it pass upon the question of fact. Many states by statute require this proceeding, and the same general considerations of justice which lead to a jury trial on the charge of crime also make it desirable to have one in such cases. This is so though the argument that otherwise the person attached would be convicted of a crime without a jury is unsound. The process, in the large sense, is indeed a criminal one; but it is nevertheless not a proceeding for a technical crime. The person attached and punished for contempt may independently and thereafter be indicted and punished for the crime.

As for contempt in violating an order or decree the situation is different. Where the process has not been modified so as to be no longer coercive, merely ceasing on obedience, Professor Beale thinks trial by jury not required by general principles of law or justice, and also not practicable. If, however, the the court inflicts a definite term of imprisonment by way of punishment, regular process and trial by jury should be required.

TAXATION. "Public Purposes for Which Taxation is Justifiable," by Frederick N. Judson, *Yale Law Journal* (V. xvii, p. 162). Short review of the doctrine that taxation can only be for public purposes and examination of the decision as to what are public purposes.

"There is a new and distinct demand for a great enlargement of the scope of governmental activities through an assumption by the public of what have heretofore been distinctly private enterprises; that is, a substitution of public for private ownership. As to some of these, it must be admitted there is no distinct line of principle for determining of what shall be public and what private. Some cities in our countries have public water works, others have private. Some have public lighting, others private. Public libraries and public museums are now becoming recognized as a branch of public education, when they were practically unknown a generation ago. Thus, in Great Britain, the telegraph is owned by the public, conducted as the post-office is in this country; while in some of the continental countries the railroads are owned by the state. In some of the cities of Great Britain as well as on the continent, street railroads are owned and operated by the public. On the continent of Europe it is recognized that public support of amusements is a legitimate public function. In one or more states of this country the sale of liquor has been put under distinct public ownership and management.

"It is not within the scope of this paper to comment upon the wisdom of these extensions of governmental activities. It is sufficient to point out that there is no department of the law where its intimate association with, and its dependence upon the development of opinion are more obvious than in this question of the requirement of a public purpose of taxation. Our system of jurisprudence is based upon the doctrine of judicial precedent. Ours is a land as was our mother country where 'freedom broadens slowly down from precedent to precedent.' Our courts in drawing the line between what is public and what is private in taxation and governmental expenditure, necessarily look to what is sanctioned by time and the acquiescence of the people. Thus the supreme court of Massachusetts . . . in denying the power of legislature to authorize towns to go into the business of buying and selling fuel, looked back several generations to determine what was the limit of government activity at the time of the adoption of the Constitution. But on this subject more than on any other we must recognize that the law is a developing science. It must progress as civilization itself progresses, and the judicial view must tend to harmonize with the prevailing and controlling enlightened public opinion.

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.)

ATTORNEY AND CLIENT. (Imputation of Knowledge of Attorney to Client.) Ky. Ct. of App. — In the case of Sebald *v.* Citizens' Deposit Bank, 105 S.W. Rep. 130, the court of appeals of Kentucky was called upon to decide the question whether knowledge acquired by an attorney in his professional capacity relative to the insolvency of a client should be imputed to another client. The same attorney was employed by both the maker and payee of a note. The maker was insolvent. Of this fact, it seemed that his attorney had knowledge, and it was contended that the payee was chargeable with notice which should have been imparted to the surety, and that a failure to do this operated as a discharge. It was held, however, that for the attorney to give out such a knowledge to another client would be a violation of confidence and of legal ethics which the court would not presume.

BANKING. (Checks.) Eng. Curtice *v.* London, City & Midland Bank. Court of Appeal 23, Times Law Reports 594. This case raises questions of great interest to bankers and their customers, the main question being the right of a customer to countermand payment of a check by a telegram. It appeared that the plaintiff bought certain horses on October 31, 1906, paying for them by a check for £63 on the defendant bank. While on his way home he sent a telegram to the bank directing them not to pay the check. The telegram was sent after bank hours, and the County Court Judge found that it was put into the bank letter-box, and that it did not in fact, come into the hands of the bank officials until the morning of November 2, whereas it ought to have come to their hands on the morning of November 1. On November 1, the check was specially presented to the bank by post through another bank with a telegraph form attached, the defendant bank being desired to wire whether the check was all right. The check was in fact paid by the defendants before they had had any intimation of the attempt to stop it. They having so paid it, the plaintiff sued them to recover the amount, the form of action being for money had and received by the defendants to the use of the plaintiff. The County Court Judge gave judgment in favor of the plaintiff, holding that the telegram was put in the letter-box of the bank on October 31, and was overlooked by the cashier in clearing the box on November 1, and that defendants must be taken to have received it when they opened their letters for that day; a banker receiving a telegram purporting to stop a check disregarded it at his peril, and if defendants in fact received, or must be taken to have received, plaintiff's telegram before the check was presented for payment, they were responsible for having paid it. The Divisional Court (Mr. Justice Darling and Mr. Justice A. T. Lawrence) held that there might be a countermand of payment by telegram, but upon the question whether in this particular case there had or had not been a countermand the Court were divided in opinion. Mr. Justice A. T. Lawrence was of opinion that there was no countermand until the contents of the plaintiff's telegram came to the knowledge of the manager of the defendants' branch, and that the defendants, having paid the check according to its tenor and without, in fact, having notice of any countermand, had done nothing improper, and that an action for money had and received would not lie. Mr. Justice Darling, however, was of opinion that the countermand must be held to have been communicated to the manager on the morning of November 1, when the letters taken from the letter-box were opened, and that the defendants could not be heard to say that the countermand was not effective, as it was due to the default of their own servants that the contents of the telegram had not come to the knowledge of their manager. In these circumstances Mr. Justice Lawrence, as the junior Judge, withdrew his opinion, and the appeal was dismissed. The defendants appealed. The Appeal Court allowed the appeals and directed judgment to be entered for the defendants. In giving judg-

ment the master of the stalls said: "Countermand is really a question of fact. It means much more than a change of purpose on the part of the customer. It means, in addition, the notification of that change of purpose to the bank. There is no such thing as a constructive countermand in a commercial transaction of this kind. In my opinion, on the admitted facts of this case, the check was not countermanded in fact, although it may well be that it was due to the negligence of the bank that they did not receive notice of the customer's desire to stop the check. For such negligence the bank might be liable, but the measure of damage would be by no means the same as in an action for money had and received. I agree with the judgment of Mr. Justice Lawrence on this point, and that is sufficient to dispose of the appeal. But as we have had an argument addressed to us as to the effect upon the duty of a bank of the mere receipt of a telegram, I wish to add a few words. A telegram may reasonably and in the ordinary course of business, be acted upon by the bank, at least to the extent of postponing the honoring of the check until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a check."

BANKRUPTCY. (Tax Deed to Property of Bankrupt.) U. S. C. C. A. — The right to take title by tax deed to property of a bankrupt without permission of the Bankruptcy Court, was considered in the case of In re Eppstein, 156 Fed. Rep. 42. The property was sold for taxes prior to institution of the bankruptcy proceedings, but the title and possession remained in the bankrupt. During pendency of the bankruptcy proceedings, the purchaser at the tax sale procured a tax deed and refused to deliver it up to the trustee on tender of the taxes and penalties. Proceedings were instituted to have it set aside upon the ground that the property was in *custodia legis*, and could not be affected by a deed issued without consent of the bankruptcy court. The contention of the trustee was upheld and the deed set aside.

CARRIERS. (Effect of Hepburn Act on Penalties Accruing under Elkins Act.) — U.S. Cir. Ct. of App. — The effect of the Hepburn Act on the Elkins Act engaged the attention of the Circuit Court of Appeals in Great Northern Ry. Co. *v.* United States, 155 Fed. Rep. 945. An indictment was returned against the railroad company in November, 1906, for an offense committed in the summer of 1905. The Elkins Act was in force at the time of the offense, but the Hepburn Act went into operation prior to the time of the indict ment, and it was claimed that it repealed section 1 of the earlier enactment on which the accusation was based, but the objection was held without merit. It was said that a general repeal of all conflicting laws repeals nothing but what would be repealed by implication, and there being no conflict here, there was no such repeal. There is a special saving clause in the Hepburn Act to prevent it affecting a recovery of penalties in pending actions, but this was held to not exclude the operation of the general saving clause in section 13 of the Revised Statutes, which provides that a repeal shall not affect penalties incurred unless expressly so stated in the repealing act. Under such a construction of the law, it was, of course, held that recovery of penalties incurred was not affected by the Hepburn Act, though no action therefor was pending at the time of its enactment.

CARRIERS. (Municipal Regulation of Street Railroads.) N.J. Sup. Ct. — An important decision on the validity of municipal ordinances relating to street railroads, was recently published in 67 Atl. Rep. 1072, under the title North Jersey St. Ry. Co. *v.* Jersey City. Residents of Jersey City, like those of other centers of population, claimed they were not being furnished adequate street car facilities, and the municipal authorities in attempting to remedy conditions, enacted an ordinance providing that a sufficient number of cars should be run from two of the terminals during the rush hours of the evenings, to furnish each passenger a seat, and keep no one waiting longer than five minutes. It did not appear that the street railways ever attempted to obey the ordinance, but brought *certiorari* proceedings to test its validity. The court said it was satisfied that more cars could be run than were then in operation, and as the ordinance did not appear unreasonable on its face, the proceedings were dismissed.

CONFLICT OF LAWS. (Marriage.) Eng. — A bare statement of the facts in Ogden *v.* Ogden, heard before the Court of Appeal recently, shows the gravity of the issues involved. An English woman, resident in England contracted a marriage here with a Frenchman, temporarily residing in England. The consent of his father had not been obtained, and therefore, he being under the age of twenty-five years, the marriage was by French law voidable by the father. The latter, accordingly, obtained a decree in France, annulling it. Subsequently, the young man, who had returned to France, married again there. The English wife then sought to obtain a divorce in the English Court, asking in the alternative for a declaration that the French decree of nullity was valid; but

Sir Francis Jeune refused to entertain the suit, on the ground that if she was a lawful wife the matrimonial domicil was French, and, therefore, the English Court had no jurisdiction, and he also declined to make any declaration as to the validity of the French decree, though he said, somewhat rashly, that it was *prima facie* good. The lady afterwards contracted a second marriage in this country, which the second "husband" sought to have annulled in these proceedings. The result is an exhaustive and unanimous judgment of the Court of Appeal that the prior marriage, being valid according to the English law, was not rendered invalid by the fact that the husband had not complied with certain formalities which the law of his own country required.

This is an important case deservedly criticising and limiting Sottomayor *v.* De Barros, 3 P.D.1. It seems that Sir Gorell Barnes would, if it came within his power to do so, overrule that case; which certainly proceeded on a misapprehension of the previous decisions as to capacity and has caused much uncertainty in the English doctrine of capacity. The court also quotes with apparent approval the scathing criticism of Judge Gray in Com. *v.* Lane, 113 Mass. 458, upon Brook *v.* Brook, 9 H. L. C. 193. The decision in Ogden *v.* Ogden restores the force of Simonin *v.* Mallac. 2 Sw. & T. 67, and the earlier English cases and brings the English doctrine into accord with the best American authorities.

The decision is also important on the question of jurisdiction to declare a marriage null. In refusing effect to the French decree the court laid down the sound principle that nullity because of the invalidity of the marriage with respect to capacity can be pronounced only by the court of the sovereign whose law is alleged to have created the marriage. J. H. B. Jr.

CONSTITUTIONAL LAW. (State and Federal Jurisdiction.) N.C. — The decisions of Judge Pritchard in *Ex parte* Wood, 155 Fed. Rep. 190, and Southern Ry. Co. *v.* McNeill, 155 Fed. Rep. 756, recently noted, are criticised by the North Carolina Supreme Court in State *v.* Southern Ry. Co., 59 S. E. Rep. 570. Both cases are founded on the North Carolina rate law, and involve discussion of the powers of federal courts. The enforcement of the law was restrained by Judge Pritchard, but state officers proceeded with prosecutions for its violation in the state courts, and defendants set up the injunction as a defense. There is an extended discussion of the reported decisions relative to conflict between the federal and state jurisdiction, particular attention being paid to the decisions of the United States and North Carolina Supreme Courts. The rate law prohibited railroad companies from charging a passenger rate in excess of two and one quarter cents a mile, and imposed a penalty on a railroad company for a violation thereof, and also declared that any agent of the company violating the law should be guilty of a misdemeanor. The North Carolina court strenuously upholds the sovereignty of the state, and decides that the proceeding in the federal court restraining action by the attorney general looking to the enforcement of the law was in reality an action against the state and forbidden by the Constitution of the United States. They also strongly contend for freedom from interference with the enforcement of the criminal laws of the state, holding that under the general principle of the law of injunctions, which governs courts of equity, the latter courts are without jurisdiction to interfere by injunction with state courts in the due course of administering and enforcing the criminal laws of the state. It was also held that the operation of a statute will not be suspended on an allegation that complainant's property is about to be confiscated, or that its constitutional rights are about to be impaired, except on a full disclosure of all of the facts in complainant's possession and on the clearest showing that the threatened injury will at least probably result. It is further held (Chief Justice Clark dissenting) that the doctrine of accessory before the fact, and that all accessories in misdemeanors are principals, does not apply so as to render a railroad company under this act subject to indictment in the same manner as is its agent, and for this reason the judgment against the railroad company is arrested

CONSTITUTIONAL LAW. (Weekly Payment Law.) Vt. Sup. Ct. — The Vermont legislature, in 1906, passed a law requiring corporations engaged in certain enumerated classes of business to pay their employees in money each week. Its validity was attacked in the case of Lawrence *v.* Rutland R. Co., 67 Atl. Rep. 1091, on the grounds that it violated both the state and federal constitutions by depriving defendant of liberty and property without due process of law, by denying it equal protection of law, and as controverting certain portions of the Bill of Rights in the state constitution. Numerous decisions of the United States Supreme Court are referred to as bearing more or less on the questions involved; more attention, perhaps, being given to the case of St. Louis, Iron Mountain and Southern Ry. Co. *v.* Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, than to any other, as it involved the validity of a statute of Arkansas, which, though differing widely from that of Vermont, was objected to on similar constitutional grounds. The Vermont court holds the law of that state valid as against all objections made.

The opinion in this case is valuable for its summary and analysis of the decisions upon the subject and on account of the clear statement therein contained as to what is and what is not class legislation. It emphasizes the fact which has been so often overlooked, that classification is not necessarily discrimination and that if all persons who really belong to the same class and compete with each other are equally regulated, no one should be allowed to complain because persons outside of the class are not regulated also. In this it repudiates the absurd position which was taken by the supreme court of Illinois in the case of Richie *v.* People, 155 Ill., Hon. E 454 and in which that court held that a statute regulating the hours of employment of women in factories was class legislation and invalid since it did not also regulate the hours of cooks and housemaids and stenographers, who, it is clear, do not compete in any way with factory employees. So also it repudiates the position taken in that case and in others that the court in considering the validity of such statutes and the question of class legislation may take into consideration the fact that if the corporation is precluded from paying by the month or by checks, their employees are by that fact precluded from making a contract based on such a method of payment and to that extent are deprived of liberty and property. The restrictions of their rights the court says "is not direct but results from the restrictions of the defendant's rights, and as that restriction is good as to the defendant, the rights of its employees are not thereby infringed, for they have no right to demand greater liberty for the defendant in order that their liberty may be enlarged." On the same subject it will be remembered the Supreme Court of the United States in the case of Holden *v.* Hardy, 169 U. S. 366, 18 S. Ct. 383, intimated that the objection had never been raised by the employees, and that it would come with a good deal better grace from them than from the employer.

Generally speaking, the opinion, in the case is unsatisfactory in its attempt to reconcile and to distinguish which it does to such an extent as to obscure basic principles. It shows, perhaps as much as any recent opinion, the futility of trying to decide social and economic questions and to build an industrial structure on a foundation of legal refinement. In the particular case the statute is, it seems, really upheld on the ground that the defendant is not only a corporation whose charter the legislature has reserved the right to amend, but a quasi-public corporation which is affected with a public interest, and it is on this theory of public interest that the case is sought to be distinguished from others which hold to a different doctrine. There is in the opinion, however, a slight reference to, and an implied approval of the case of Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 S. Ct. 1, in which, even in the absence of a provision in the charter reserving the right of amendment, a similar statute of the state of Tennessee was upheld on the theory of a police regulation, and it is to be regretted that more stress was not laid on this case. It is to be regretted indeed, that the court instead of seeking to make friends with all of the decisions and often of attempting to distinguish where no real distinction existed, did not confine itself to a discussion of the principles announced in the Knoxville Iron Co. case and decide for or against the statute on the fundamental basis of its industrial and social necessity and reasonableness. The justification of the statute on the theory that the corporation affected was one which was affected with a public interest, is unsatisfactory, for even such corporations have their private sides. They are in fact, quasi-public merely, not public. It is only in dealing with those matters which are of public concern, even in the case of a corporation which is itself of a quasi-public nature, that the state can and should freely step in and regulate. The real question to be determined in all these cases is not whether the business is one which is affected with a public interest, but whether the subject matter of the regulation itself is one in which the public as a whole is interested. The case of Knoxville Iron Co. *v.* Harbison in the Supreme Court of the United States, and the case in the state court to which the writ of error was directed meets this question fairly and squarely. It takes the position that the employee is a part of the general public, that the payment of wages by means of checks or orders on "company stores" often works a fraud on the employee, and that the controversies arising over the payment of wages in the mines have become so numerous and have resulted in so much bloodshed and disorder that the state for the purpose of preserving the public peace and protecting itself is justified in interfering in the matter and establishing rules of its own for the conduct of such business. The questions involved indeed are industrial and social and not legal. They are essentially questions of fact. The life and liberty guaranteed by the Constitution do not involve an unrestrained exercise of these privileges. Whenever the unrestrained exercise thereof is injurious to the public, that exercise can be restrained. Any restriction which is not reasonably necessary, and which is not justified on considerations of public welfare, which in fact is unreasonable, is against the policy of our law and Anglo-Saxon individualism. There can be unreasonable interferences with the liberty and property of a quasi-public as well as of a private corporation or a private individual, and there is, it is believed, no warrant in the law or in the decisions for holding that a quasi-public corporation can be regulated in matters which are not in themselves of public interest merely because it is a quasi-public corporation. In the particular case the points to be considered are, whether or not the payment of wages by the week and in cash was necessary to protect the employee from fraud; whether he was so much a member of the public and so unequal in contractual ability as to justify the public in interfering in his behalf; whether,

as in the Tenessee cases, the controversies over the payment of wages had assumed such a magnitude as to endanger the public peace, and justify regulation on that score, and perhaps, whether as an economic fact, frugality and economy could be best subserved among the laboring classes by furnishing them with the money every week with which to make purchases where they chose rather than by payment at long intervals with its encouragement for seeking credit, or in orders on the "company stores" which would often give a double profit to the employer. Opinions may differ on these questions. They are, however, the fundamental questions involved, and their decision in the affirmative is necessary in order to justify legislative interference.

Andrew A. Bruce.

CONTRACTS. (Injunction.) N.Y. Sup. Ct. — What effect should be given a provision in a contract that injunction might be granted to restrain its breach, was considered by the Appellate Division of the New York Supreme Court in Dockstader *v.* Reed, 106 N. Y. Sup. 795. Plaintiff, the proprietor of a minstrel troupe, employed defendant as a traveling singer under a contract specifying that the services to be rendered were special, unique, and extraordinary, and could not be replaced; that in the event of breach, plaintiff would suffer irreparable injury, and that injunction might be issued restraining defendant from rendering services for any other person. Before expiration of the contract, defendant quit plaintiff's employ, claiming that a continuance of such service would greatly injure his health, and offering his physician's affidavit to that effect. A preliminary injunction was awarded by the special term, but the order was reversed on appeal; the court saying that "parties to an agreement cannot contract that courts will exercise their functions against or in favor of themselves; whether or not a court will so exercise its power, is for the court itself to determine." It was held that notwithstanding the estimate put upon defendant's services by himself and plaintiff, the evidence indicated that it would not be difficult to fill the position made vacant.

It seems obvious that agreement of parties can not give a court of equity jurisdiction where the law does not confer the jurisdiction. In the converse case an agreement to oust a court of its jurisdiction would be ineffective. J. H. B. Jr.

CONTRACTS. (Labor Unions.) U. S. C. C. — Judge Thompson's opinion in A. R. Barnes & Co. *v.* Berry, 156 Fed. Rep. 72, is one of the latest utterances of the courts on the right to restrain labor unions from interfering with an employer's business. Plaintiffs were members of the United Typothetæ of America, and defendants were officers of the International Printing Pressmen and Assistants' Union of North America. It appeared that a contract had been entered into between these two associations, — the latter being represented by persons who were at the time of contract, but are not now, its legal officers. The contract has not yet expired by lapse of time, but the new officers, seeming to think it too onerous, asked for its modification so as to establish an eight-hour day, and the "closed shop." On refusal of the members of the typothetæ to accede to this request, steps were alleged to have been taken to submit the question of a strike to the employees. The relief asked for was the enjoining of the officers from: "(1) Violating the contract by demanding a modification thereof, whereby the eight-hour day and the 'closed shop' may be instituted; (2) calling, instituting, or inciting strikes or otherwise hindering, interfering with, obstructing or stopping the business of the employers because of their refusal to institute the eight-hour day and the 'closed shop'; (3) arranging for a referendum vote of employees upon the subject of instituting strikes; (4) paying strike benefits."

Judge Thompson said: "The closed shop is contrary to public policy and the demand for the immediate adoption of the eight-hour day is violative of the contract," and, while recognizing fully the right of employees to quit at any time they should desire, he said that this was not a case of that kind, but one to prevent an unlawful use of influence and power by the officers of the association, and granted relief substantially as prayed for.

CORPORATIONS. (Foreign Corporations.) U. S. C. C. A. — One of the most important questions in the business world today is that involving the rights of foreign corporations; an interesting discussion of which is found in Butler Bros. Shoe Co., *v.* United States Rubber Co., 156 Fed. Rep. 1. The rubber company had its principal place of business in one of the eastern states, from which it shipped its goods to the shoe company, at Denver, under contract for sale by the latter on commission. The shoe company having defaulted in its payments, action was instituted against it in the federal court by the rubber company. The shoe company interposed as a defense that plaintiff was doing business within the state of Colorado, without having complied with the statute prohibiting any foreign corporation from doing any business in the state without filing its certificate of incorporation and paying certain license taxes and providing that failure to do so should be an absolute defense to any action brought within the limits of the state.

Judge Sanborn discusses at considerable length the cases bearing on the questions at issue and comes to the following conclusions:

"(1) Every corporation empowered to engage in interstate commerce by the state in which it is created, may carry on interstate commerce in every state in the union, free of every prohibition and condition imposed by the latter.

"(2) Every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the union without permission granted or conditions imposed by the latter.

"(3) Every corporation of each state has the absolute power to institute and maintain in the federal courts and to remove to those courts for trial and decision, its suits in every other state in the cases and on the terms prescribed by the acts of Congress."

He then passes to a consideration of the character of the contracts and decides that they are factorage agreements, the carrying out of which would not constitute "doing business in the state" within the meaning of the law.

CORPORATIONS. (Foreign Corporations.) Wis. — The questions whether a contract for furnishing text-books and instruction by a foreign correspondence school is doing business in the state within the meaning of the Foreign Corporation Law, and whether the carrying out of such agreement constitutes interstate commerce, were discussed by the Supreme Court of Wisconsin in International Text-Book Company *v.* Peterson, 113 N. W. Rep. 730. With reference to the first question, the court says the contract violates the spirit of the Foreign Corporation Law, as would also "the details of soliciting pupils, imparting instruction, and the delivery, bailment, and return of books." No case of the same character is cited, but the Court discusses the analogy between the case at bar and decisions relating to newspaper subscriptions and insurance contracts. The conclusion was reached that the acts alleged did not constitute interstate commerce.

EVIDENCE. (Conversation over Telephone.) Ky. Ct. of App. — The Kentucky Court of Appeals recently considered the admissibility in evidence of a telephone conversation. The attorney for plaintiff had looked up defendant's number in the telephone directory, called her up in the usual manner, and conversed with her. It was not shown that he knew her voice, or that he asked her name. The court held that the subject of the conversation taken in connection with the circumstance of defendants' answering the telephone at the number corresponding with her address, was sufficient identification to charge her as being the person with whom the conversation was had. The case is found in 104 S. W. Rep. 1034, under the title Holzhauer *v.* Sheeny.

INITIATIVE AND REFERENDUM. (Construction.) Ore. — Submission of legislation to the people by the method known as the Initiative and Referendum being in an experimental stage any statements on the subject by the courts are of general interest. The decisions of the Supreme Court of Oregon in Stevens *v.* Benson, 91 Pac. Rep. 577 and Palmer *v.* Benson, 91 Pac. Rep. 579, though not involving the validity of the laws putting the system into operation, state the construction to be placed upon some parts of the constitution and statutes bearing on the subject. In the first mentioned case it is held that although the constitutional provision should be construed as self-executing, legislation providing a method of procedure is valid. Also that the part of the law relating to form of petition is merely directory. In the latter case a distinction is drawn between the form of petition designated for the initiative, and that for the referendum.

MUNICIPAL CORPORATIONS. (Roller Skating on Streets.) N.J. Sup. Ct. — The use of roller skates on a city street was the cause of litigation which recently reached the Supreme Court of New Jersey. The case referred to is Billington *v.* Miller, 67 Atl. Rep. 935. The only question considered was the validity of an ordinance forbidding roller skating on certain portions of a street. It was contended that if it should be held valid it would interfere with the lawful use of roller skates as a means of travel. The court held, however, that such was evidently not the intention of the city authorities, and that whatever might be said as to the right to use a street for mere sport, it was a right which, if existing at all, was subject to reasonable municipal control. The ordinance was held valid.

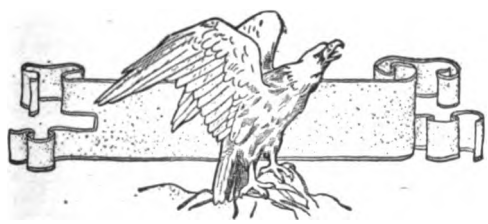
PRACTICE. (Appeals.) Col. Sup. Ct. — A peculiar state of affairs comes to light in Nicholson *v.* E. P. McGovern Undertaking Co., 92 Pac. Rep. 225. Plaintiff was injured by the sudden starting of the horses attached to a carriage from which she was alighting on her return from a funeral, conducted by defendant, who had hired the carriage from a third person. The action was dismissed by the court below, and plaintiff thereupon not only prosecuted a writ of error, but also brought a new action against the owner of the team and carriage, and obtained judgment. In

his brief in the case at bar, plaintiff's attorney called attention to the brief in the case against the owner of the carriage in which he stated that he had come to the conclusion that this case was properly dismissed below. The court thereupon affirmed the decision, saying, "Whether this conclusion is in any wise due to the fact that plaintiff was successful in recovering a judgment against the owner, or is the result entirely of a further examination of the authorities, is immaterial. It is sufficient for us to say that since the plaintiff in error and defendant in error are in accord that the decision of the trial court was right, it would not be fitting to disturb this unusual concord by reversing a judgment with which the parties themselves are satisfied."

PRACTICE. (Lis Pendens, Parties.) Ia. — In order that pendency of one action shall be a bar to another between the same parties and involving the same subject matter, is it necessary that the same parties occupy the same position in the action as plaintiffs and defendants? In Van Vleck *v.* Anderson, 113 N. W. Rep. 853, the Supreme Court of Iowa says that although the general rule is that they must, there are exceptions. The object of that suit was the construction of a certain clause of a will, which the court said would have to be construed in a prior pending suit, instituted by defendants in the latter action against one of the plaintiffs in the latter action. The court refers to two classes of exceptions, and says that a pending action for partition by one co-tenant would be ground for abatement of a similar action instituted by another, and that separate actions to construe the same will ought not to be tolerated because the latter one was brought by one who was a defendant, instead of plaintiff, in the earlier proceeding.

PRACTICE. (New Trial.) Wash. — Whether the fact that plaintiff in a personal injury case allowed herself to give way to her feelings to such an extent as to cry and tremble in the presence of the jury, is ground for new trial, was passed upon in Connell *v.* Seattle R. & S. R. Co., 92 Pac. Rep. 377. The outburst occurred near the close of the trial, during the argument of defendant's counsel, and the court said that it was not improbable that her act was unavoidable, and probably caused by her nervous condition and the criticisms made by the attorney in his argument. The judgment of the trial court denying a new trial was affirmed

STATUTES (Interpretation — Cigarettes) Wis. — Whether small cylindrical rolls consisting of cigar leaf tobacco, wrapped in other leaf tobacco are within the prohibition against the sale of cigarettes was considered in State *v.* Goodrich, 113 N. W. Rep. 388. Defendant was convicted of violating the anti-cigarette law and appealed to the Supreme Court, claiming that the articles sold were not cigarettes. The court refers to the definition of the word by leading lexicographers and its origin, application, and general use. While specifically refusing to hold that a cigarette could not possibly be produced without the use of the well known tissue paper, with tobacco rolled within, it held that the articles sold by defendant could not properly be considered as falling within the term and reversed the conviction.



THE LIGHTER SIDE

Constitutional Questions in the U. S. Supreme Court. The head-note of the case of *Mayor of New York* v. *Miln*, 9 Pet. 85, states the usage of the Court regarding this class of cases, as follows: "The Court refused to take up cases involving constitutional questions, when the Court was not full." As this rule is probably still in force, it ought not to be overlooked by parties having cases of this kind before the Court.

Butler Wanted the Brief. — While E. C. Carrigan was in Gen. B. F. Butler's law office a lady came in to ask some advice. As the general was not in, Mr. Carrigan questioned her, and told her he would submit her case to the general, which he did.

The general was to leave the next day for Washington, and told Mr. Carrigan to prepare a brief of the lady's case and show it to him the next day.

Mr. Carrigan sat up half of the night writing his brief. The next morning, about 15 minutes before Butler was to take his carriage for the train, he told Mr. Carrigan he would look at his brief and give his opinion.

Mr. Carrigan began by saying: " General, I have made a most careful study of this case. I have the points all in my head, and can state them to you in three minutes."

Let me have the brief," again said the general, somewhat sharply.

" But, General Butler," said Mr. Carrigan, " I had a brief prepared, and intended to show it to you, but I left it at home on my table. However, as I said, I have all the points of the case in my head."

" Young man," said the general, " the next time you have a brief to prepare for me bring me the brief, and leave your head at home on the table." — *Boston Herald.*

Fully Attended To. — *Merchant:* " Yes, we need a porter. Where were you last employed? "

Applicant: " In a bank, sir."

Merchant: " Did you clean it out? "

Applicant: " No sir. The cashier did that." — *Tit Bits.*

He Paid on the Train. — In Northern Michigan the fare between stations, based on a three-cent rate, as the railroads, where the distance is above even mileage, charge for one-third or two-thirds of a mile as the case may be. Between two certain stations the fare is therefore nineteen cents, and where payment of fare is made on the train the conductor usually, as the easier method of making change, charges an even twenty cents, giving back to the passenger a nickel out of a quarter. An Irishman, who travels between these stations frequently, had a cow killed on the railroad, and the Company refusing to settle, he sued for the value of the cow but was beaten on the trial. Since then he has always paid his fare to the conductor, but being prudent and close in his dealings, he always insists on getting back his six cents change, only paying nineteen cents. The conductor one evening, being unable to make change and annoyed over his persistency in demanding the one cent coming to him, said, " Why don't you buy a ticket at the office where they have change instead of annoying me all the time making one cent change for you? " To which he replied, " Well, I'll tell you why. Your railroad killed a foine cow for me and they wouldn't pay for it, and I don't mean they'll ever get another cent of my money, so I always pays it to the conductor."

Remarks. — " H'm," said the head clerk. " Got an accident to report, have you, Murphy? Well, just fill up one of these forms will you?"

" Yes, sir," said the foreman of the works. and having duly thrust out his tongue and gnawed at the penholder for some time, he handed the report to the clerk. It read:

" Date, January 6. Nature of accident, toe crushed. How caused, accidental blow from hammer. Remarks,"

" Beg pardon, sir," said the foreman, " but it was his big toe, with a corn on it, and you know what Bill is, sir. So I thought I'd better leave his remarks out." — *Dundee Advertiser.*

THE PUBLISHER'S DEPARTMENT

COMPARATIVE JURISPRUDENCE.

Colonial Laws and Courts, with a sketch of the legal systems of the world. By Alexander Wood Renton and George Grenville Phillimore. London. 1907. $4.00. [The Boston Book Company, Agents for the United States.]

This book, which also forms the introductory volume of the new edition of Burge's "Commentaries on Colonial and Foreign Laws," is issued separately, as there is likely to be a greater demand for it than the remainder of that work.

The first edition of Burge was published in 1838. The first volume contained a preliminary treatise giving an account of the several systems of jurisprudence adopted in the colonies. At that time the government of India had not passed from the East Indian Company to the British Crown. Exterritorial jurisprudence was comparatively unknown. Self-governing colonies not included in a federation, and federated self-governing colonies had not been developed. In preparing a new edition, it became evident that the development in the political and judical constitution of the colonies, in existence in 1838, and the numerous additions made to the British dominions since, required a considerable expansion of this preliminary treatise. The result is that a sketch of 79 pages has been expanded to a volume of nearly 500 pages.

This volume is divided into three parts: Part I., treating of the different systems of law underlying the jurisprudence of the legal world, the law of the Empire of India, and the Roman-Dutch law; Part II., treating of the juridical constitution of the British dominions, exclusive of the United Kingdom; Part III., treating of appeals to the Privy Council. The third part will likely prove of little interest to the profession in the United States. The first part distinguishes between the common, canon and civil law, and explains the various systems of law in use throughout the world and the development and progress of codification. The second part treats of each possession separately, giving its political history, describing the law in force and the courts, with their jurisdiction.

Probably no legal work of modern times has been prepared with greater care. The general editors have been assisted by able associates, who are specialists on the particular topics on which they write. In addition to this they have had the advice and assistance of the Bench and leaders at the Bar in the revision of the treatment of the legal systems of particular British Colonies and states.

Many of the law libraries of the United States have during the last twenty years accumulated collections of British Colonial reports, and it is necessary that the patrons of such libraries should have access to this new work in order to determine the value of such reports as precedents.

Every scholar of the law should read and study this work in order to get in touch with the development and tendencies of the modern law.

No student of the law can call his course of study complete until he has carefully read and pondered on this text-book.

In these modern times, when so many works of doubtful value and authority are thrust upon the legal profession, it is refreshing to find a treatise that will undoubtedly be regarded with greater favor, if anything, than the original edition, which was a classic.

SUPPLEMENT TO E. R. C.

A Review of Recent Cases.

The **Supplement to English Ruling Cases,** by Robert Campbell, English editor, and James T. Keen, American editor, is now in type.

The recent decisions upon most of the important cases are fully presented; and in cases where the doctrines of the subject discussed have been materially modified or changed by recent decisions, the old as well as the new theories are set forth.

Thus, in the law of **interference with contract,** cases adjudicated within the last few months have discredited decisions upon similar facts made within the past ten years. These older decisions in turn were, when made, regarded as themselves modifying still older rules of law. For example, in Massachusetts the very recent cases of Berry *v.* Donovan and Pickett *v.* Walsh seem to have discredited the slightly older cases of May *v.* Wood and Rice *v.* Albee, which, when decided, were regarded as settling the law. So in England, Allen *v.* Flood, decided in 1898, is practically nullified by Quinn *v.* Leatham, and the line of cases which follow it.

The specific tort here mentioned was, until recent times, known as malicious interference with contract. Such decisions as Walker *v.* Cronin and Carew *v.* Rutherford, leading cases in Massachusetts, make malice the gist of the action. But the more recent cases eliminate malice as an element of the tort. See Brennan *v.* United Hatters, 73 N. J. Law.

The law of **common carriers** is dealt with in great detail, and their duties to their passengers, shippers, servants, and third persons, are carefully analyzed.

Much labor has been bestowed by Prof. Keen upon questions of **pleading.** Settled questions of substantive law may be easily answered from the numerous encyclopedias and textbooks which are at the hand of every practitioner; but just what the plaintiff must allege in his declaration in order that it may be good on demurrer; just what evidence he must introduce to get to the jury; just how the plaintiff's *prima facie* case is to be met and overthrown, are questions which are in many cases not adequately answered in any other modern work.

The law of **extraordinary remedies** is dealt with minutely from the standpoint of pleading and evidence; the practice of the courts is set forth, and the various steps in the trial examined.

In short, the American notes have been designed, not only to deal with matters which may be found in any comprehensive work of similar nature, but to go beyond that and treat **questions of procedure which are unanswered in other works.**

[Price of the Supplement $5.50. (Set of **English Ruling Cases** and Supplement, 27 vols., $108.00.)

THE LAW OF AMERICAN CONSTITUTIONS.

Mr. Stimson's forthcoming work on the **Federal and State Constitutions** will include a statement of constitutional principles from Magna Charta, through all the recognized constitutional documents, down to the latest constitution — that of Oklahoma — and a historical view of important legislation embodying constitutional principles, from 1066 to the Railroad Rate Law of 1906.

It will be divided into three books. (In one volume. Cloth. $3.50.)

Book I will contain a general summary, tracing the historical principles of American Constitutional Law, with special discussion of those which remain most alive to-day, such as the right of the Federal power to regulate the private rights and liberties of the people, and the right and limits of the power of a portion of the people to control the action of others, as in Labor Unions, Trusts, and Monopolies.

Book II gives the history of legislation.

Book III presents, under the three broad principles of Rights of the Person, Rights of Property, and Rights of Law, a concise statement of all the propositions of all the American State constitutions in their latest development, including the corresponding principles of the Federal Constitution.

The volume will include also two very interesting charts, one depicting graphically Federal and State powers, the other tracing constitutional principles through all the Constitutional documents from Magna Charta to the Federal and State Bills of Rights.

Our Contributors.

FREDERICK JESUP STIMSON, although in active practice in Boston as a member of the firm of Stimson & Stockton, devotes much time to historical and literary work. He is the author of several successful novels, most of which were written under the *nom de plume* of "J. S. of Dale." He is also the author of several well known legal and historical works, and is professor of history and government in Harvard University. His new work on "American Constitutions" (a revision of his larger work on "American Statute Law") is soon to be published. Mr. Stimson was at one time Assistant Attorney General of the State and was counsel for the Industrial Commission of the United States some years ago.

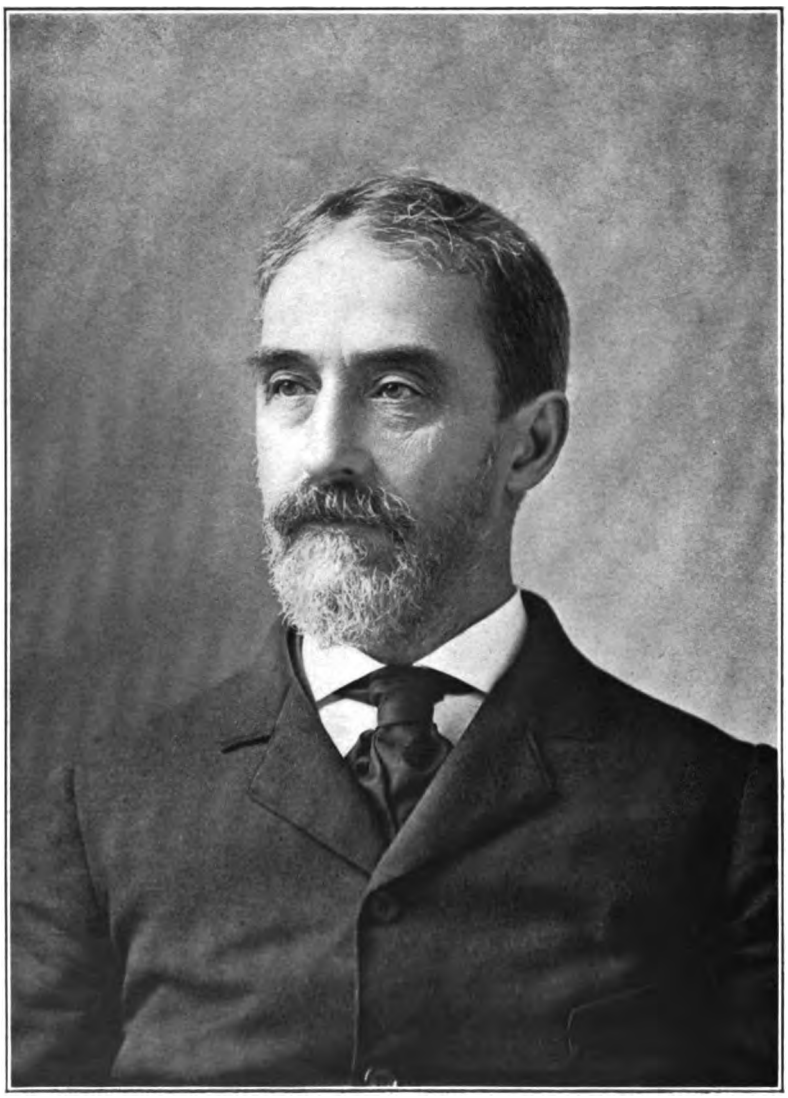
We are again fortunate in being able to publish the address delivered by Rt. Hon. James Bryce at the Annual Meeting of the New York State Bar Association, on January 28. It is most gratifying to American lawyers that the British Ambassador, amid his many and arduous duties, has found time to give us the benefit of his deep learning and long experience in legal and legislative problems.

The Essex County Court House of Newark, New Jersey, is the most recent of the artistic structures in which the courts of this country are gradually being established. We are indebted to Miss Parker for her clear description of the building, and to her, as well as to the "Newark Evening News," for the privilege of reproducing the illustrations in this number.

HARRY RANDOLPH BLYTHE is a recent graduate of Harvard College and at present a student in the Harvard Law School.

JUDGE HENRY H. INGERSOLL is Dean of the Law School of the University of Tennessee, and has for many years been a prominent member of the American Bar Association. He is a native of Ohio and a graduate of Yale College. After studying law in Cincinnati he began practice in Tennessee soon after the close of the war. He was a member of the Supreme Court Commission in 1879 and 1880, and special judge of the Supreme Court in 1884 and 1885. He has also been prominent in the Masonic order.

JUDGE BLOUNT'S "circuit riding" story, which we publish in this number, though, perhaps, not of the technical excellence of the last, will prove, we trust, an interesting addition to the series which have already attracted wide attention.



James B. Thayer

The Green Bag

Vol. XX. No. 3 BOSTON March, 1908

THAYER'S LEGAL ESSAYS

By Frederic Jesup Stimson.

THEY come to us, these last words of a departed scholar, with the earnestness of one who speaks for the last time, and not to his friends alone, but to the nation that has not many of his like to spare. The title "Legal Essays" reminds one of their modest author; really all but one are grave studies in constitutional law; some concerning issues which, well or ill, are passed, others grave with the portent of the days to come. Not many of our strenuous majority may find time to read them; yet they are full of a nationalism that more often than not arrays their author upon the progressive side. Notably his impatience of mere letter-reading of the Constitution, his caution to the courts of using too far their newly given powers over parliaments, his plea for national powers, that even arrays him against Bancroft on the legal-tender question.

It befits one of his own scholars to state the master's views, rather than put forth his own. The volume is made up, as the title indicates, of essays on various subjects; of these only four may be called constitutional, two or three others political, and the balance legal. It is not, therefore, a treatise on constitutional law; nor are the matters, except for the profound and luminous treatment of one mind, closely related. Yet this very variety tends to keep awake the reader's interest. There are two essays in the nature of reviews: on Bracton's Note Book, discovered by Professor Vinigradoff of Moscow, in the British Museum, and published for the first time in 1887, and on Dicey's Law of the English Constitution. That Mr. Thayer was no blind worshipper of precedent, is shown by his rejection of Dicey's inclusion, among "the conventions of the Constitution," the principle that a President shall not be re-elected more than once, ". . . when we get a good enough President it is probable that no talk of a 'third term' will be any serious obstacle to re-electing him repeatedly" (p. 205). Then there is an address, made before the American Bar Association, on the importance of teaching historically the Common Law at our Universities — a matter still unhappily neglected — and a short paper on "Law and Logic," as applied to our rules of evidence.

This subject was that of Professor Thayer's first teaching; the chair of Constitutional Law came later; we are not surprised therefore to find it the theme of his longest chapter. A discussion of the law of *res gestæ* fills over a hundred pages of the book. It is a common characteristic of all popular law as distinguished from Code-made law, to develop extraordinary subtlety in rules of procedure and refinements of evidence; the Icelandic saga delight in such technicalities. Standing between those who would admit all testimony and let the jury determine its probative force, if even remotely relevant, and those who stand by the occasionally arbitrary rules of the English law, Mr. Thayer taught consistently that admissibility is determined first by relevancy — an affair of logic and experience, and not at all of law; and only secondly by the law of evidence, which declares whether any given matter which

is logically probative is excluded. Through the long — but by no means dry — discussion of the ruling in Bedingfield's case, we have not space to follow him. Then there is the interesting history of the liberty accorded to all witnesses in Massachusetts; and an extraordinary chapter on "Trial by Jury of Things Supernatural."

But it is Constitutional Law, that almost new science, that is most important, if not most interesting, to us to-day. Mr. Thayer probably said the last word on that question most vexed at the birth of our Republic, whether the courts should have power to nullify the acts of the coördinate legislative branch of government. In all that he says of the need of caution and large wisdom in the exercise of so portentous a function, one must earnestly concur. But while appreciating the force, taken on a position *de novo*, of Justice Gibson's doubt; while recognizing that the power existed in no previous government, or even in any country other than ours; the great fact remains (as at the end our author recognizes) that it *is* the truth that we founded a new Republic, the like of which was never known on earth, and this, with the separation of the powers, was our own great discovery. As Mr. Thayer says elsewhere (p. 203), quoting Daniel Webster, "Though this government possesses sovereign power, it does not possess all sovereign power; and so the State governments, though sovereign in some respects, are not so in all. Nor could it be shown that the power of both, as delegated, embraces the whole range of what might be called sovereign power." For with us the People remained sovereign; delegating of their power to the Nation and the States in a written charter; and they created the Supreme Court to determine to which these powers were given, and what remained behind.

In *Advisory Opinions* we have the final criticism on that most dangerous practice of defining the law at the behest of a political body before the facts are born; and in *Legal Tender*, as we have said, the most ardent nationalist can find no fault with the author's argument of inherent national powers. So, finally, in *Our New Possessions* — the article which led President McKinley to urge Thayer's acceptance of a place on the Philippine Commission — he rises to a height of patriotism and of wisdom that is only the more striking because he so evidently deplores the reversal of the lesson we were set to teach the world. "Had we appreciated our great opportunity and been worthy of it, we might have worked out here that separate, peculiar, high destiny which our ancestors seemed to foresee for us and which . . . might have done more for mankind than anything we may hope to accomplish now by taking a leading part in the politics of the world." But he predicts the ratification of the treaty of Paris; and says "in my judgment, there is no lack of power in our nation, — of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them;" and he surprisingly foreshadows the opinion of the majority of the Supreme Court, "when a new region is acquired it does not at once and necessarily become part of what we call the 'territory' of the United States." On the other hand, "Never should we admit any extra-continental State into the Union" — and he closes with an earnest plea for a Constitutional amendment to that effect.

We come at last to the subject to which, in later years, he gave of his mind and of his heart. Would that the "century of dishonor" had ended in wisdom and fair dealing. But the Indians — the "People without Law" — remain a people without law; until, with what heritage of discouragement and rankling injustice we may not foretell — the last reservation is thrown open, and the tribal Indians become free — as our own ancestors did a thousand years ago — by the ownership, in severalty, of freehold land.

BOSTON, MASS., February, 1908.

CONDITIONS AND METHODS OF LAW MAKING

By Rt. Hon. James Bryce.

Mr. President, Ladies and Gentlemen: I feel it a pleasure as well as an honor to be asked to address such a body as the State Bar Association, and I am deeply sensible of the kindness you have shown in coming in such large numbers in such inclement weather to hear treated what I am afraid will be, at any rate to one section of the audience, a comparatively dry subject. It is at any rate a subject far removed from any of those thoughts and political excitement of the moment which at this time fill so much of the thoughts of the legal practitioner either in the rural parts of the State, or here in New York City where your financial barometer rises and falls so rapidly, and where no doubt the lawyer is often called to administer spiritual consolation to some of his clients in the part of the city where that barometer can best be watched. But I have felt that such a subject as this which connects itself with a lawyer's work, and which at the same time is not purely technical, might be perhaps a suitable one for an audience which is absorbed, not only in its professional practice, but also in watching the machinery of legislation as it is at work from year to year.

The immense increase in the volume of legislation during the last half century is one of the salient features of our time. Mr. Choate has given you some figures for this Country, but the phenomenon is not confined to this country. Various causes may be assigned for it. It may be due to the swift changes in economic and social conditions which have called forth new laws to deal with those facts. Pessimists may perhaps ascribed it to the spread of new evils or the increase of old evils which the State is always attempting by one expedient after another to repress. I suppose this is what Tacitus meant when he wrote *Corruptissima republica plurimae leges*. Or the optimist may tell us that it is an evidence of that reforming zeal which is resolved to use the power of the State and the law for extirpating ancient faults and trying to make every one happier. Which of these or of other possible explanations is the true one, I will not stop to consider. But the fact that the output of legislation has of late been incomparably greater than in any previous age — greater not only absolutely, but in proportion to the population of the civilized nations — suggests a consideration of the forms and methods of law-making as a topic well suited to be dealt with by a great professional body such as I have the honor of addressing. Lawyers and judges have to know the law, to explain the law, and to apply the law. It is of the utmost consequence that their influence should be exerted to see that the law is well made.

Here, in particular, this subject has an urgent claim upon your attention, for although there is more legislation everywhere in Western Europe, still in no country is the output so large as in the United States, where, besides Congress, forty-six State legislatures are busily at work turning out laws on all imaginable subjects, with a faith in the power of law to bless mankind which few historians or philosophers, and few experienced lawyers, will be found to share. Nevertheless, let us always remember that such faith is a testimony to the hopefulness of your people, and no one can wish that any people shall ever be less hopeful.

In modern free countries where laws are enacted by representative assemblies, where the economic and social questions to be dealt with are generally similar, and where

the masses of the people are moved, broadly speaking, by the same impulses, the problem of how to make legislation satisfactory in substance and in form is virtually the same problem everywhere. Accordingly, the light which the experience of one country affords is pretty sure to be useful to other countries. In the general observations I propose to offer to you, you will probably wish that I should dwell upon that experience, and should in particular indicate which of the experiments tried in England have proved successful, and what are the problems that remain for that country still unsolved.

First, let a word be said on the authorities whence legislation in England proceeds. A supreme legislature has many diverse kinds of rules to make; and the growth of business in the British Parliament has led to the severance from general public statutes of other kinds of work with which Parliament formerly dealt much as it deals with those statutes now.

At one time Parliament used to pass acts which, being of temporary application, and passed for special reasons, ought hardly to be deemed legislation in the proper sense, being really rather in the nature of executive orders. To-day it very rarely passes such acts. Orders of the executive kind are now made not directly by Parliament, but either by the King in Council, upon some few matters that are still left within the ancient prerogative of the Crown, or else under statutory powers entrusted by Parliament either to the King in Council or to some administrative department. I believe that in France and Germany also such orders are not made by the legislature. There is also a larger class of rules, or ordinances of a somewhat wider but not general application, which being of an administrative nature require from time to time to be varied. Such rules or ordinances are, in England, now usually made by authorities to whom power in that behalf has been specially delegated by Parliament. We have now a mass of such "Statutory Rules and Orders" as we call them, filling many volumes. Some, including those which affect the Crown colonies, are made by the Crown in Council. Some, being those which regulate legal procedure in in the Courts, are made by the Rule Committee, consisting of Judges of the Supreme Court of Judicature, and other representatives of the legal profession, chosen for the purpose. We find that a very convenient arrangement because it enables us from time to time to modify our legal procedure without the necessity of referring the matter to Parliament and requiring Parliament to enact new rules in a way which would be less convenient and prompt. The rest are made by the Departments of State, especially by the Home Office and the Local Government Board which issue an immense number of regulations for the guidance of officials and local authorities. In this way we have built up a very large number of rules which have statutory effect, because they are made under the powers of some statute, but which are made not by Parliament directly but under delegated parliamentary authority, and we publish these in volumes called "Statutory Rules and Orders." They form a collection quite distinct from that of the statutes but one which has kept down the dimensions of our statute book and very much reduced the labour of Parliament.

A third class includes enactments which, though they apply only to particular places or persons, and are thus not parts of the general law, such as railway acts, canal, gas and water, and electric lighting acts, acts giving powers to municipalities or other local authorities, etc., are passed by Parliament and have the full legal effect of a general statute. They are, however, sharply distinguished from general public acts in the method by which they are passed. They are brought in by motion of a member in the House and upon a petition by private persons. Notices have to be publicly given of them some two months

before the usual beginning of a Parliamentary session in order to call the attention of all persons possibly interested. They are advertised in the newspapers of the parts of the country which they affect in order that every person who desires to oppose them may have opportutnity of entering a notice of opposition and being heard upon it. When they are brought in they are examined by certain persons for the Examiners of Standing Orders, who see that they comply with the general rules which Parliament has prescribed, directing the conditions which these private bills must satisfy, and seeing that all the regulations with regard to notices are strictly complied with. If they pass the Examiners of Standing Orders and are shown to have complied with all the rules operating in that behalf, they are then brought up for second reading either in the House of Lords, or House of Commons as the case may be. They are as a rule unopposed. It is only where a private bill raises some large question of public interest that it is opposed upon a second reading. For instance, if it proposes to take common land which would otherwise be enjoyed by the public, it is open to any member to give notice and oppose it on second reading and to raise there the general question whether common land in which the local public are interested ought to be taken by the corporation or other persons promoting an undertaking. If it relates to such a question as to who shall supply electricity, whether it shall be supplied by the municipality or by a private company, as was the case of a most important bill that Parliament considered during two succeeding sessions, where a large private company sought power from Parliament to create an enormous power establishment to supply electricity to every part of London then again that question would be fully debated on second reading. But these are rather exceptions. It is only where a large public question is raised, that there is any discussion on second reading, otherwise the bill is sent as a matter of course to a committee and in that way of course the time of Parliament is enormously saved. When it goes to a committee it goes to one composed of four members, before which the opponents may appear to resist them or to have them modified. The Chairman is always a man of special experience in business. He is necessarily a member of the House. Of course, the Chairmen, who are taken from an appointed panel of our private bill committee become by practice generally very expert and skilful in dealing with these matters. The members of this committee make a declaration that they have no private interest in the matter dealt with by the bill, and they are required to deal with it in a judicial spirit, on the basis of the evidence presented and the arguments used by the lawyers who represent each side, just as in a Court of Justice. It is deemed improper to attempt to address private solicitations to the members of the committee with a view to influence their decision. If any private member or any one from outside should endeavor to address private arguments, or inducements to any member of the committee to vote in a particular way on the bill, he would be considered to have committed a breach of our rules and he would be severely condemned by the public opinion of his fellow members. In point of fact the thing does not happen. These private bill committees whether they decide right or wrong, because they sometimes err like other people, are always understood to be fair, impartial and honest. In that way the procedure gives general satisfaction. Neither have we any class of persons whose business it is to come down and endeavor to persuade members to vote for or against a measure. The conduct of these bills is in the hands of a body of regular practitioners who are called parliamentary agents. They are very often attorneys, but sometimes they are not. They are an organized body who are bound by a code

of rules, who are subject to discipline, and who are obliged to observe those rules just as strictly as any other kind of legal practitioner. Under this system all our railways, and such other public undertakings as require statutory sanction, have been constructed and have had their legal power from time to time increased or varied. It has worked well in every respect but one. It has been costly, for where the bill has been contested the fees paid to agents and counsel sometimes mount up to huge sums. But it has been administered not only with honesty but with seldom even a suspicion; and it has relieved the two Houses of a vast mass of troublesome work, by leaving this work to judicial committees. Moreover, it has the advantage of giving every such bill the certainty of being examined on its merits. Being outside the competition for time of public bills, and treated in a different way, the pressure of public business does not prevent a private bill (except in the rare cases where a large public issue is raised) from being sent to a committee, considered there, and, if it pass the committee, being reported to the House and passed there. The committee may reject a bill, but cannot get rid of it quietly by omitting to report. Finally, it relieves members of Parliament of having to spend time and toil in advocating or opposing bills affecting their constituencies. Having, during twenty-seven years in the House of Commons, represented two great industrial communities, I can bear witness to the enormous gain to a member in being free from local interests and local pressure. I have never yet had any solicitation whatever to trouble me from any member in regard to any of those bills. It now and then happened some constituent or body of constituents wrote to me and said such and such a bill is pending in the House of Commons, or House of Lords, we are very much interested in it. I had always an answer which was easy, and which had the further merit of being correct and true, namely, that I was not permitted by the rules of the House of Commons to endeavor to use any influence upon any member of the committee which was considering that bill. The most I could do was to tell the Chairman publicly, without any secrecy, that this was a bill of great importance in which my constituency was interested and to beg that it should have, the fullest and most careful attention from the committee. But as for trying to exert any influence either for or against its passing, I should have broken our rules had I tried to do so. Therefore, I was able to tell my constituency it was impossible for me to do so.

No one who has not been a member of the Legislature can know what a relief it is to be able to free one's self from any solicitation of that kind.

I dwell upon this point in order to explain to you how it is the British Parliament has been able to deal with the great mass of local legislation, necessarily imposed on it, by the principle that special statutory authority is required for undertakings which involve the compulsory taking of land or the creation of what is in itself a monopoly. Mr. Choate gave you figures of your acts; and those figures included, of course, both what we should call local and personal acts, but also general public acts. I have here the British figures for the year 1906. In the year 1906 we passed in the United Kingdom 58 public general statutes. These 58 public general statutes filled 350 pages large printed octavo. In 1906 and 1907, which I take for the purpose of comparison with the two years Mr. Choate gave you, we passed 114 public general acts; and those 114 public general acts filled about 700 pages, as compared I think with the 5000 which you had for those two years. We found Parliament had not quite time enough for all the legislation that was needed. We desired to pass a great deal more if we could have found time. But the discussion and passing of those 58 public general measures was quite enough work for

one year. In 1906, we began sitting in the middle of February and we sat on until the middle of December, with a holiday of only two months and a half interposed. Other details regarding these private bills must be left unnoticed, that I may pass on to the larger question of public general legislation, which is what most interests you and I as lawyers.

The quality of statute law may be considered in respect: First, of its Form; secondly, of its Substance.

As respects Form, you, as lawyers, know that a statute ought to be clear, concise, consistent. Its meaning should be evident, should be expressed in the fewest possible words, should contain nothing in which one clause contradicts another or which is repugnant to any other provision of the statute law, except such provisions as it is expressly intended to repeal.

To secure these merits two things are needed, viz: That a bill as introduced should be skillfully drafted, and that pains should be taken to see that all amendments made are also properly drafted, and that the wording is carefully revised at the last stage and before the bill is enacted. Of these objects the former is in England pretty well secured by the modern practice of having all government bills — these being the most important and the large majority of those that pass — prepared by the official draftsman, called the Parliamentary Counsel to the Treasury. Nearly all our important bills, nearly all the controverted bills that pass are bills brought in by the government of the day. A private member has now hardly any chance of passing legislation. Therefore, you may take it that all important legislation is prepared, pushed through, and passed by the government. The government has an official permanent drafting staff, consisting of two or three able and highly trained lawyers, whose business it is to put its bills in the best shape. If they are not always in the best shape, that is not the fault of the draftsman, because the best scientific shape is not necessarily the shape in which it is most easy to pass a bill through Parliament. A bill may be so prepared in point of form as to excite more or less opposition and sometimes it is just as well to take a little pains so to arrange the clauses as to give the least open front to hostile criticism, and also, to afford the fewest opposition for taking divisions in committees. It is one of our rules of Parliament that every clause has to be separately put to vote in committee, therefore the more clauses, the more divisions. Hence if you put a great deal into one clause subdividing it into subsections, and parts of subsections by numbers and letters, instead of letting each matter enacted have a clause for itself you have fewer debates on each clause and fewer divisions. That explains what you might otherwise think scientifically objectionable in the structure of recent acts. It is not possible in legislation, passed by a popular assembly, to attain that high standard of scientific perfection which could be attained by an absolute potentate like a Roman Emperor.

This question of parliamentary drafting is really an important one. We certainly have succeeded in bringing our statute law into a great deal better shape since we created our office of parliamentary draftsman. He has sometimes extremely important functions to discharge. It often happens that the minister who is preparing a bill has not completely thought out all the bill, and even if he be a lawyer may not have in his mind all the relations which the bill he desires to enact will have to various branches of a very complicated system of law. The business of the parliamentary draftsman is not only to take the ideas and plans of the minister and put them into the clearest and most concise form but also to warn the minister of all the consequences his proposition will have upon every part of the law, and to lead him to see what is the best way in which the amendment to the law he desires to effect can be effected. Thus if the parlia-

mentary draftsman is a man of real ability and power, who understands public questions, who has studied the subject he is asked to draw the bill upon, who is able to understand what the real difficulties are and how those difficulties can be met, he is able to give the most valuable assistance to the minister, and I can assure you, having from time to time to be responsible for important measures in the House of Commons, I derived the greatest possible assistance from the parliamentary draftsmen. Of the living I will not speak, but one of the former draftsmen, Sir Henry Jenkyns, was one of the very ablest, perhaps the ablest man, in the permanent Civil Service of the United Kingdom.

As respects amendments in committee and final revision, our English procedure is not satisfactory. There ought to be some means of correcting, before a measure finally passes, those inelegancies, redundancies and ambiguities which the process of amending in committee usually causes. But as Parliament has, so far, refused to allow any authority outside itself to alter the wording in the smallest point of form, all that can be done is to use the last stage of the bill to cure such blemishes as can be discovered. Doubtless the same difficulties arise here. I am not fully informed as to how they are dealt with, but have learnt with great interest of the efforts recently made in Wisconsin, under the zealous initiative of Mr. McCarthy, and in this State, also, to supply by a bureau of legislation assistance to members of the legislature in the preparation of their bills. The value of this seems to have been already recognized in both States, and I hear that there are now seven States in all where arrangements are made by State authority for such help. This shows that the legislatures are awakening to the great importance of using every device which scientific method can apply for seeing that legislation is properly conducted.

Now let us come to the Substance of legislation, and start from two propositions which every one will admit:

1. There is in all free countries a great demand for legislation on all sorts of subjects, mainly due to the changes in economic conditions and to the impatience of reformers to have all sorts of evils dealt with by law.

2. The difficulty of framing good laws is enormous, because the work is in most countries no longer the comparatively easy task of repealing old laws which hampered and constrained the citizens — destruction is simple work — but the far harder task of creating a new set of laws which shall guide and help men to attaining the ends they are bent on. Seventy years ago people thought that the great thing was to get freedom. When they had got it they were dissatisfied, and instead of simply letting everything and everybody alone to work out their own weal or woe, on individualist principles, they forthwith set to work to forbid some things which had been tolerated before and to throw upon government all sorts of new functions more difficult and delicate than those of which they had stripped it.

Whether the disposition to increase the range of governmental action is right or wrong, I am not here to discuss. The current is, at least for the moment, irresistible, as appears from the fact that it prevails alike in Western Europe, in England, in the British colonies, and in the United States. The demand for a profusion of legislation is inevitable; and the difficulty of having it good, undeniable. In what does the difficulty consist?

In three things. First, of those who demand legislation, many do not understand exactly what is the evil they desire to cure, the good they seek to attain. Secondly, when they do understand the evil they seldom know what is the proper remedy, when they seek the laudable end they seldom perceive the best means to it. Thirdly, the number of measures, remedial

and constructive, called for is so large that it is very hard to select out of them those most urgently needed. No legislature can deal with all at once. Where many are being pressed at once by different persons they jostle one another, and like people crushing one another in the narrow exits of a theater, they move more slowly than if they were made to pass along in some regular order.

It would be easy to suggest, if one were drawing a new constitution for a new community, an ideal method of securing good legislation and securing it promptly. But we have actual concrete constitutions and governments to deal with, so instead of sketching ideals, I will ask you to consider the actual machinery provided in the United States and in Britain for passing statutes. This machinery differs materially in the two countries.

The American plan starts from the principle that the Legislative department must be kept apart from the Executive. Accordingly, the administration in the National and in the State governments has neither the responsibility for preparing and proposing measures nor any legally provided means at its disposal for carrying them through Congress, though the President and the State governors can recommend them, and sometimes succeed in so using their influence as to secure a bill's passing. You rely on the zeal and wisdom of the members of Congress to think out, devise and prepare such measures as the country needs; on the committees of your assemblies to revise and amend these measures; on the general sense of the assemblies and the judgment of their presiding officers, or of a so-called "steering committee", to advance and pass those of most consequence.

We, in England, have been led by degrees to an opposite principle. The executive is with us primarily responsible for legislation and, to use a colloquial expression, "runs the whole show," the selection of topics, the preparation of bills, their piloting and their passage through Parliament.

It is a frequent practice for the government to appoint Royal Commissions or Departmental Committees to take evidence and report upon topics of importance which need legislation. Such reports are often valuable, and often lead to the passing of good measures. They would be still more valuable but for the political pressure which usually compels a government, against its better judgment, to make commissions too large, and to place upon them persons better known as representatives of particular types of opinion than as experienced and impartial masters of the subject.

When it comes to the actual introduction of a measure, the work of preparation is done by an administrative department of the government and the drafting by the government draftsman. The department supplies the matter of the bill, the latter puts it into shape. Thus both a considerable measure of practical knowledge of the subject and a high measure of professional competence for giving legal form to what is meant to be enacted are secured. Not only measures which raise large political issues, but all the more important measures of each session are brought in by the ministry on their responsibility as leaders of the majority in the House of Commons. The most important, including those likely to raise party controversy, are considered by the Cabinet, sometimes also by a Cabinet committee, and sometimes at great length.

I remember one case in which an important bill was altered and reprinted in twenty-two successive drafts, and I remember the case of another large and controversial bill which occupied the whole time of the Cabinet during six meetings of the Cabinet.

Bills brought in by private members are drafted by themselves, or by some lawyer whom they employ for the purpose. Should a private member ask a Minister or a department for assistance, it would usually be

given him, assuming that the department approved of its purpose. Nowadays, however, a private member's bill has no chance of passing, if opposed; so that legislation likely to raise any controversy has virtually passed into the hands of the Ministry.

Once the bill is launched its fate depends on the amount of intelligent care the Legislature is disposed to give it and the amount of skill the Minister in charge shows in steering the boat which carries its fortunes. He has, of course, the assistance of the official draftsman and sometimes, of one or more colleagues in preparing his own amendments and considering those proposed by others. He must try to get time enough reserved for its passage, the disposal of time resting with the government.

The practical result of our English system may be summed up by saying that it secures four things:

1. A careful study of the subject before a bill is introduced.

2. A decision by men of long political experience which out of many subjects most need to be dealt with by legislation.

3. A careful preparation of measures, putting them into the form in which they are most likely to pass. Obviously that may not be always the best form, but there is no use in offering to Parliament something too good for such a world as the world of practical politics everywhere is.

4. The fixing upon some one of responsibility for dealing with every really urgent question. Whenever an evil has to be dealt with or a want supplied by the action of the Legislature, there is never any doubt who shall do it. The Government has got not only to propose something but to put something through, the Minister to whom it belongs having it in charge through all its stages. A Government which fails to pass its bills suffers in credit; and if the matter is a specially grave one, may probably be turned out either by the House of Commons or by the voters at the next general election.

There are, however, defects in the English system. One is the fact that Parliament, in spite of all that has been done to relieve it, is still terribly overburdened by work. There is more to be done than time can be found for. Remember, that in addition to passing laws for 42,000,000 people in the United Kingdom, it has got to supervise the action of the executive in governing, or providing for the defence of, more than 400,000,000 people in various parts of the world. As you will see it requires a great deal of time for the work which belongs to it. Another is the tendency to devote attention to measures not so much in the order of their real importance as of the amount of interest which the party in power feels in certain questions, an interest which may be comparatively transitory. A third is the disposition of an Opposition in Parliament to oppose the measures of the Government because it is the Government that brings them forward. The habits of party controversy are so strong that the merits of a proposal are apt to be forgotten under the impulse of a desire to use all the means which the rules of debate provide for damaging or turning out a Ministry whose general principles or actual conduct of affairs the minority may disapprove. This is the counterpart of the advantage which the Government power of pushing forward legislation carries with it, being indeed a defect necessarily incident to that advantage. It frequently involves much needless expenditure of time, and the loss of measures in themselves desirable. Thus it happens that in England, Ministries usually get less credit than they deserve for good measures lying outside the sphere of party controversy, and the needed legislation is always in arrear. Still, whenever the people feel that something is to be done, they know whom to require to get it done, and it gets done.

The government commands the majo-

rity. The business of the majority is to support the government and the Whips have it as their duty to bring up the members to vote for every government measure in every division which the government chooses to consider a serious party division. If a member does not vote for the government in such a division, *prima facie* he is against his party, and if the matter is a really serious one, he may be called to account for it by his constituents.

In France the method of legislation stands half-way between the American and the English methods. The ministry studies a subject, often with great care, prepares a bill dealing with it, and launches the bill into the Chamber. There, the bill passes into the hands of a committee which amends and perhaps quite remolds it, then returning it to the Chamber with an elaborate report. In the Chamber it is in charge, not of the minister who proposed it, but of the committee reporter, the ministry having no more power over its fortunes than flows from the fact that they are the leaders of the majority and can speak in its support. There are also many bills brought in by private members; and these also go to the committees and have apparently a better chance than private bills in England.

Switzerland, like America, but unlike France, has no ministers as voting members of either chamber, but the Federal Council (as the members of the Administration are called) are allowed to speak and defend their policy or advocate a measure, in either the House or the Senate. The importance of the Legislature has, however, been reduced by the free use made of the popular vote or so-called Referendum.

Both these intermediate systems lose something of the momentum which the responsibility of government for legislation gives in England, but they also reduce the merely party opposition which it has to encounter, while they give to the preparation and passing of measures the advantage of the co-operation of those whose administrative experience enables them to perceive what is really wanted and to judge how it had best be attained.

Whether it is possible to establish in this country, consistently with the provisions of the Federal and the State Constitutions, any scheme by which the Executive can be rendered more helpful to the Legislature or by which Legislatures can be more completely organized for the purposes of legislation, with a more authoritative leadership, these are questions for you on which I can hazard no opinion. As in the British Constitution promptitude of action and concentration of power have been so fully attained that some critics think that stability is insufficiently secured, so your system in establishing stability by an elaborate system of checks and balances may have sacrified some of the motive power required to push legislation forward. Apart, however, from these large questions, which I indicate in passing, there may be improvements consistent with your Constitutions and with our Constitution which each country may effect. It is the experience of all civilized countries that scientific method, which has been applied to everything else, also needs to be applied more fully and sedulously to the details of constitutional and political organization than is now the case. And if one may judge from the recent action of your States there are certain changes already in progress. The sittings of Legislatures have been made less frequent and shorter; and as sessions grow shorter State Constitutions grow longer. Not only many subjects but even many minor details of legislation have been withdrawn from the Legislature by being placed in the State Constitution which the Legislature cannot change. The demand is, moreover, made by some reformers that Congress shall deal with topics which formerly were left entirely to the State. Whether this be wise or not is a matter on which I cannot venture to speak. But it is another sign of the times.

I need not say to you, Ladies and Gentlemen, that this is a subject which one might greatly enjoy discussing. But I have the honor to be not only a member of your profession, and an honorary member of the State Bar Association, but also to occupy a position in which I can emit no political opinion of any kind whatever. (Applause.)

Now let me try to illustrate how scientific method may be applied to the constructive part of legislation and the arrangements of legislatures. It may be applied to the collection of data. The facts on which law sought to be based need to be gathered, sifted, critically examined. Especially necessary is it to ascertain, not only how other countries have legislated on the subjects which occupy public attention here, but what has been the practical working of the laws they have enacted.

Take such subjects as the tariff and the law of corporations. Every civilized country has to deal with corporations and has the same task, to keep them under some control, and to prevent them from establishing oppressive monopolies, yet always without checking individual enterprise. Everyone, except the monopolist, wishes to stop monopolies, but nobody wants to substitute a meddling officialism. How to steer between these two risks is no easy problem, and needs scientific inquiry, with an examination of the laws of other countries.

Any country that has a system of customs duties meant to be protective, needs to know how each duty, whether on raw materials or on the manufactured article, operates upon the manufacturer, the dealer, the consumer; and the more complex and all embracing a tariff is, the greater this need. Now, both these subjects are beyond the knowledge and the skill of the ordinary legislator either in Europe or here. Only special study can give the comprehension of facts and mastery of principles required to make anyone competent to advise the person who has to prepare measures on either subject. The same thing holds true of railroads, of mines, of factories, of sanitation, of irrigation, of forest conservation, and many other topics of current interest. All must be approached in a scientific way, using the results of the experience of other countries.

Methods, too, have to be studied as well as facts. To devise and apply sound methods of legislation is equally a matter requiring careful study and a knowledge of the systems which have succeeded elsewhere. For instance, a distinction ought to be drawn between the work proper to a legislative body, and that which is better left to some administrative or judicial authority, making rules under a power delegated by the legislature. Administrative rules are better made in that way, and the time of the legislature is saved. Similarly, bills relating to local and personal matters ought to he distinguished from those which affect the general law. The more these local matters in which the pecuniary interests of persons or corporations are involved can be kept apart from politics, the better. They are usually fitter for a sort of investigation, judicial in its form, though not necessarily conducted by lawyers. To take them out of the ordinary business of a legislature saves legislative time, while it removes temptation. It sets the members of a legislative body free to deal with the really important general issues affecting the welfare of the people which are now crowding upon them. It helps them to appeal to the people upon those general issues rather than in respect of what each member may have done for the locality he represents.

Let me sum up in a few propositions, generally applicable to modern free countries, the views to which I have sought to direct your attention.

I. The demand for legislation has increased and is increasing both here and in all highly civilized countries.

II. The task of legislation becomes more

and more difficult, owing to the complexity of modern civilization, the vast scale of modern industry and commerce, the growth of new modes of production and distribution that need to be regulated, yet so regulated as not to interfere with the free play of individual enterprise.

III. Many of the problems which legistion now presents are too hard for the ordinary members and even for the abler members of legislative bodies, because they cannot be mastered without special knowledge. (It may be added that in the United States a further difficulty arises from the fact that legal skill is often required to avoid transgressing some provision of the Federal or a State Constitution.)

IV. The above conditions make it desirable to have some organized system for the gathering and examination of materials for legislation, and especially for collecting the laws passed in other countries on subjects of current importance.

V. To secure the pushing forward of measures needed in the public interest, there should be in every legislature arrangements by which some definite person or body of persons become responsible for the conduct of legislation.

VI. Every modern legislature has more work thrown on it than it can find time to handle properly. In order, therefore, to secure sufficient time for the consideration of measures of general and permanent applicability, such matters as those relating to the details of administration or in the nature of executive orders should be left to be dealt with by the administrative department of government, under delegated powers, possibly with a right to disapprove reserved to the legislature.

VII. Similarly, the more detailed rules of legal procedure ought to be left to the judicial department or some body commissioned by it, instead of being regulated by statute.

VIII. Bills of a local or personal nature ought to be separated from bills of general applicability and dealt with in a different and quasi-judicial way.

IX. Arrangements ought to be made, as, for instance, by the creation of a drafting department connected with a legislature or its chief committees, for the putting into proper legal form of all bills introduced.

X. Similarly, a method should be provided for rectifying in bills before they become law such errors in drafting as may have crept into them during their passage.

XI. When any bill of an experimental kind has been passed, its workings should be carefully watched and periodically reported on as respects both the extent to which it is actually enforced (or found enforcible) and the practical results of the enforcement. A department charged with the enforcement of any act would naturally be the proper authority to report.

XII. In order to enable both the legislature and the people to learn what the statute law in force actually is, and thereby to facilitate good legislation, the statute law ought to be periodically revised, and as far as possible, so consolidated as to be brought into a compact, consistent and intelligible shape.

I venture to submit these general observations because at this time one observes everywhere an unusual ferment over economic and social questions, and an unusually loud demand for all sorts of remedies, some of them crude, some useless, some few possibly pernicious. Here, in the United States, this ferment takes a form conditioned by your constitutional arrangements and your political habits. There seems to be in many quarters a belief that the State governments cannot deal with some of the large questions that interest the whole country. Yet there is also a fear to disturb the existing balance of powers and functions between the State authorities and the National government. There is a feeling that evils exist which governments ought to deal with, and for dealing with

which the existing powers of governments ought to be extended. Yet there is also a dread of officialism and of anything approaching the bureaucratic interference of continental Europe. Discontent is qualified by doubt. The reforming spirit runs with a strong current, but it is arrested by the conservative habits of a people who value their old institutions and realize how much caution is needed in modifying them. So, again, there is a disposition to criticize state governments and city governments, and to appeal to good citizens, as voicing the best public opinion, to step in and do whatever useful work those governments are failing to do. But how is public opinion to be organized, concentrated, focussed? Who are the persons to give it that definite and authoritative expression, directed to concrete remedies, which will enable it to prevail? These are some of the problems which appear to be occupying your minds, as, under different forms, they occupy us in Europe They will, doubtless, like other problems in the past which were even harder, be all solved in good time, solved all the better because there is, here in America, little of that passion which has at other times or in other countries overborne the voice of reason.

Meantime, as there is evidently a good deal of legislation before you, every improvement in the machinery of legislation and the conditions of legislation that can be made is worth making, every light that the experience of other countries can suggest, is worth receiving and using.

The great profession to which you belong has a special call to exert in this direction its influence, which has often been exerted for the benefit of the nation. You know such weak points as there may be in the existing legislative machinery. You know them as practical men who can apply practical remedies. If you see a public benefit in separating different classes of bills and treating the special, or local and personal, bills in a different way from the public ones, you can best judge how this should be done. You have daily experience of the trouble which arises from obscurities or inconsistencies in the statutes passed, of the wasteful litigation due to the uncertainty of the law, with all the expense and vexation which follow. You are, I hear on all hands, not satisfied with the criminal procedure in many of your States. These are matters within your professional knowledge. You can, with the authority of experts, recommend measures you deem good, and remonstrate against those that threaten mischief; and I understand that remonstrances proceeding from the Bar are frequently effective.

Some cynical critics have suggested that the legal profession regard with equanimity defects in the law which may increase the volume of law suits. The tiger, it is said, cannot be expected to join in clearing away the jungle. This unappreciative view finds little support in facts. Allowing for the natural conservatism which the habit of using technical rules induces, and which may sometimes make you over-cautious in judging proposals of change, lawyers have, both here and in England, borne a creditable part in the amendment of the law. It is a great mistake to think they profit by its defects. Where it is clear and definite, where legal procedure is prompt and not too costly, men are far more ready to resort to the courts for the settlement of their disputes. It is uncertainty, delay and expense that lead them to pocket up their wrongs and endure their losses. Even, therefore, on the lower ground of self-interest, the Bar has nothing to gain by a defective state of the law. But apart from this, every man who feels the dignity of his profession, who pursues it as a science, who realizes that those whose function it is thoroughly to understand and honestly to apply the law, are, if one may use the somewhat highflown phrase of a great Roman jurist, the priests of justice, — every such man will wish to see the law

made as perfect as it can be. So, too, whoever realizes, as in the practice of your profession you must do, how greatly the welfare of the people depends on the clearness, the precision, the substantial justice of the law, will gladly contribute his knowledge and his influence to furthering so excellent a work. There is no nobler calling than ours, when it is pursued in a worthy spirit.

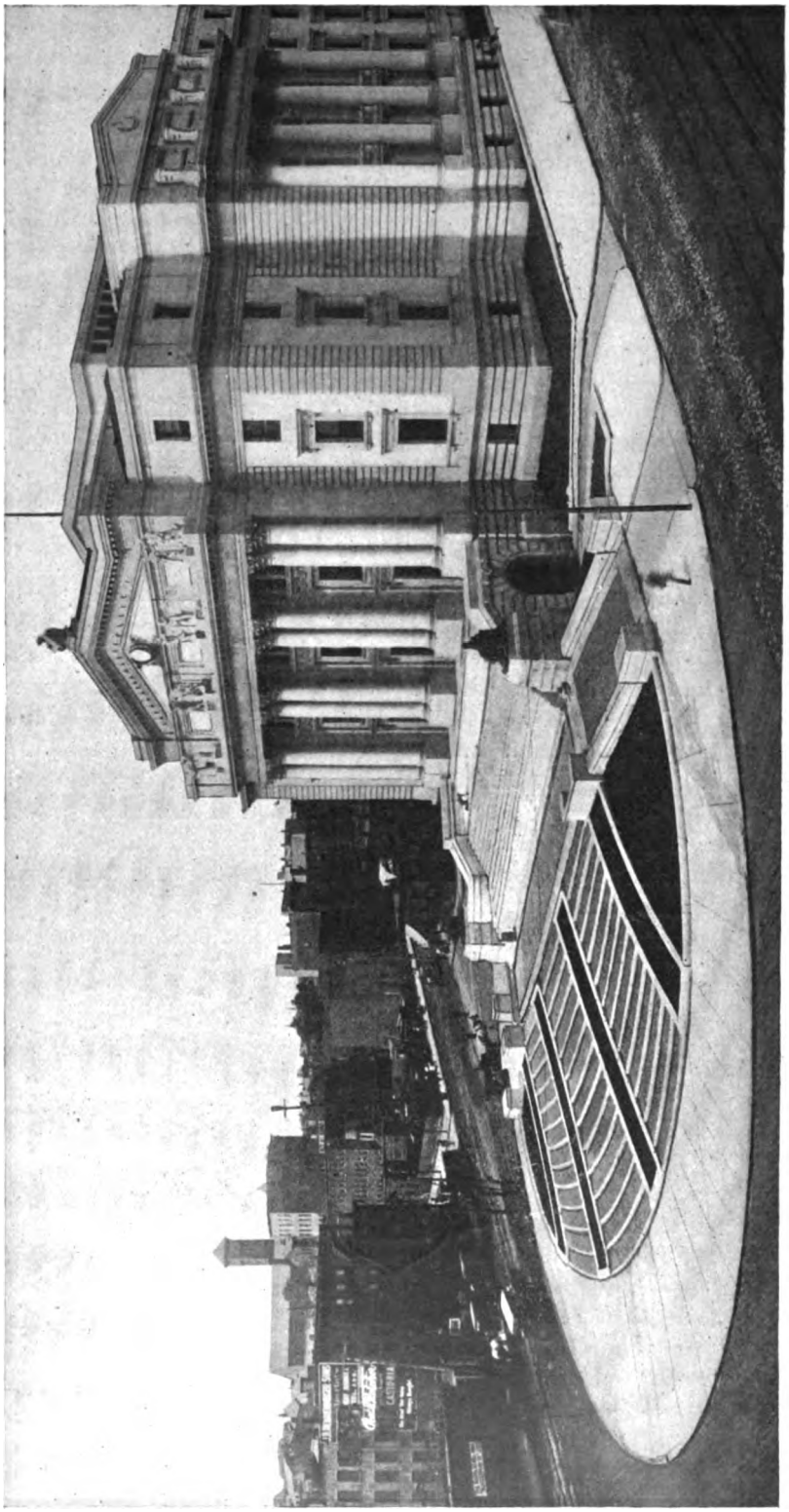
Your profession has had a great share in molding the institutions of the United States. Many of the most famous presidents and ministers and leaders in Congress have been lawyers. It must always hold a leading place in such a government as yours. You possess opportunities beyond any other section of the community for forming and guiding and enlightening the community in all that appertains to legislation. Tocqueville said seventy years ago: "The profession of the law serves as a counterpoise to democracy." We should rather say that it has given democracy its legal framework, and it keeps that framework in working order. To you, therefore, as an organized body of lawyers, one may fitly address these observations on legislative methods drawn from the experience of Europe. We live in critical times, when the best way of averting hasty or possibly even revolutionary changes is to be found in the speedy application of remedial measures. Both here and in Europe improvements in the methods of legislation will not only enable the will of the people to be more adequately expressed, but will help that will to express itself with prudence, temperance and wisdom.

What is legislation but an effort of the people to promote their common welfare? What is a Legislature but a body of men chosen to make and supervise the working of the rules framed for that purpose? No country has ever been able to fill its legislatures with its wisest men, but every country may at least enable them to apply the best methods, and provide them with the amplest materials.

The omens are favorable.

Never, I think, since the close of the Civil War, has there been among the best citizens of the United States so active a public spirit, so warm and pervasive a desire to make progress in removing all such evils as legislation can touch. Never were the best men, both in your Legislatures and in the highest executive posts, more sure of sympathy and support in their labors for the common weal. (Applause.)

WASHINGTON, D. C. January, 1908.



ESSEX COUNTY (N. J.) COURT HOUSE.

THE ESSEX COUNTY COURT HOUSE

By Elizabeth Stansbury Parker

THE citizens of Newark, New Jersey, may feel just pride when they look up Market street from Broad and see the transformation that has been wrought — truly a magic change — for where the dingy old court house, with its Egyptian façade, used to stand, there now shines a massive pile of white marble, pure and stately, making a most fitting home for the courts of justice, and an imposing addition to that part of the city.

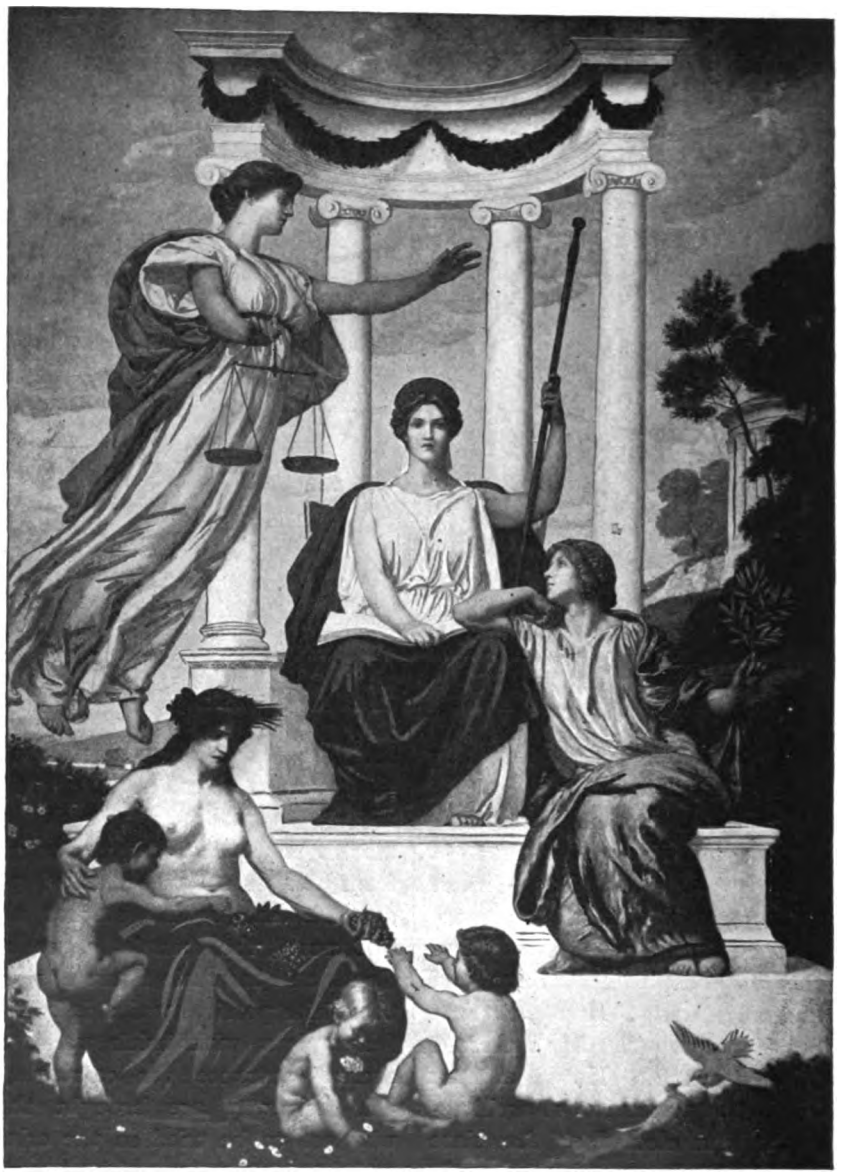
LANDING OF PHILIP CARTERET, FIRST GOVERNOR OF NEW JERSEY. Copyrighted.

This building is the new Essex County Court House, the architectural success of which was assured when Mr. Cass Gilbert was chosen to plan it. It is one more monument to the skill of this man who has built also the state capitols of Iowa and Minnesota and the Custom House in New York City, besides many other fine buildings throughout the country. He is a man of high ability in the profession of architecture and he has been elected an Associate of the National Academy of Design in recognition of the contributions he has made to art. Mr. Gilbert himself wished the Essex County Court House to be "solid, picturesque and beautiful" and it is certainly a fine example of massive solidity, fineness of proportion and purity of design. The building is of white marble and is 185 ft. long and 160 ft. wide. The conspicuous feature of the façade is the great portico with its four pairs of Corinthian columns, on the entablature of which there are 8 colossal statues, symbolizing different Phases of the law. They are the work of Mr. Andrew O'Connor, the well known sculptor, who has received Honorable Mention at the Paris Salon besides several medals of Honor. Flanking the forty marble steps that lead to the great portico from the broad tree shaded plaza below, are the fine bronze statues also by Mr. O'Connor, the female figure representing Truth and the male figure Power. Beneath the white portico, which is built on cement foundations with brick walls, there is an arched entrance for carriages, and into this driveway are brought the prisoners who are to be tried in the criminal court, and here they are safely transferred from the van behind iron doors. They are well taken care of and are kept quite separate from the rest of the building, having their own corridors and elevators.

On the first floor of the court house are

the rooms of the County Clerk, Sheriff, Registrar and Surrogate — all conveniently arranged and well adapted to their various uses. The vaults for preserving records are models of their kind, absolutely fire-proof, and in them all the necessary allowance has been made for expansion.

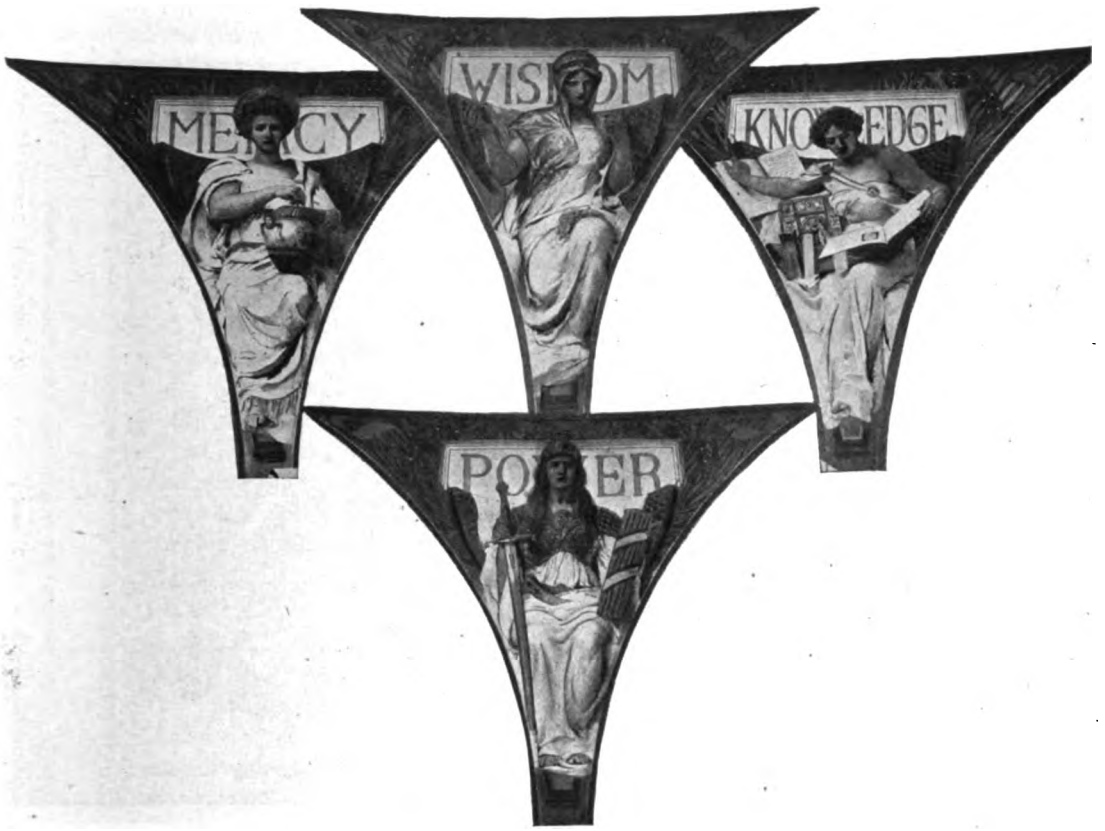
A large, open well rises to the roof of the building, giving light and air to the central halls and staircases which surround it, and to these halls open the main rooms including the various courtrooms, the rooms of the public Prosecutor, the Board of Freeholders, the Grand Jury, etc. The Jurors are carefully cared for and have both privacy and comfort, while the court rooms have been made as quiet as possible by having no windows facing on the streets.



"BENEFICENCE OF LAW." Kenyon Cox.

The law library is a large room, quiet and restful in its coloring and simple decora-

tions and inviting to those who wish to study. No book stacks are seen in the reading room but all the volumes are kept in the large, fireproof vault shut off by a heavy metal door, so that the treasures of the law library are assured against fire. Around the top of the reading room is a kind of legal hall of fame including names of Moses, Napoleon, Marshall, Irnerius, Solon, Blackstone, Jefferson and Frederick Second in impartial mixture.



FIGURES IN COURT HOUSE ROTUNDA E. H. Blashfield.

The mural paintings in the court house are by the eight well known artists, Howard Pyle, Kenyon Cox, E. H. Blashfield, H. O. Walker, Will H. Low, Geo. W. Maynard, Chas. Y. Turner and F. D. Millet and they have been universally successful in keeping in harmony with the different settings for their paintings, and have made the Essex County Court House take first rank among great public buildings, so that it compares favorably even with the Appellate Court House in New York City and the magnificent new court house in Baltimore. Mr. Blashfield's work takes the form of four pendentives over the central well and they represent Mercy, Wisdom, Knowledge and Power. They are forceful figures, very decorative in their unique position, and they are considered as being among his best works. These, like all the others in the building, are painted on canvas and fastened to the walls with white lead.

Another work full of strength is the painting by Mr. Howard Pyle in the room of the Board of Freeholders. He chose for his design the Landing of Captain Philip Carteret, the first governor of the province, at Elizabethport, N. J., in August, 1665. In the center group stand the governor and

his secretary who is reading the credentials of the governor to the colonists while his companion at his side is much interested. The fourth figure is the master of the governor's ship, the *Philip* which rides at anchor in the distance on the still waters of the bay. Behind the master are a company of buglers, soldiers and thirty immigrants from the island of Jersey. The governor is in red, wearing a large hat, though all the others have their heads uncovered.

Mr. Will H. Low has contributed two paintings, one illustrating the inscription, "From the Judicial Bench at the Dictation of Justice, the Citizen and his Family receive Assurance of Civic Rights." The other is the famous one of Diogenes coming from his tub to receive a flower from a poor child. In the first the figures are strong and simple and Mr. Low has departed from the usual custom and shows Justice with her bandage raised from her eyes. The second must charm all who see it, by its real beauty of subject and detail, and by the exquisite landscape making a background for the interesting group.

Mr. Kenyon Cox has compassed another success in his work called "The Beneficence of Law" with the descriptive sentence "Under the Rule of Law, Inspired by Justice, Peace and Prosperity Abide." It is placed in the Supreme Court room and is a picture showing the painter's best work. It has both delicacy and dignity of composition. Law is shown seated upon a marble throne in the center with crown and scepter, while Justice, for which Miss Ethel Barrymore posed, floats above, and Prosperity and Peace are seated below. Mr. Cox has succeeded in giving an effect of space together with purity of design and richness and variety of color.

MURAL PAINTING OF "DIOGONES" Will H. Low.

In the Criminal Court room is the painting by Mr. H. O. Walker, called "Beneficence and Power." The tone is fine, and

the subject spirited, representing the casting out of evil and the raising of the fallen, and the background shows the blaze of the sky at dawn.

Mr. George W. Maynard's picture represents "Justice Directing the Attention of the Government to the Laws to which it is Bound," and the other paintings are the Landing of the Milfordites by Mr. Charles Y. Turner, and in the Grand Jury room the "Foreman of the Grand Jury Rebuking the Chief Justice of New Jersey, 1772," by Mr. F. D. Millet. This is a powerful picture and the subject is most interesting.

The total cost of the art work in the building amounted to about $35,000 only, showing how strictly the artists kept within their estimates, and how honorably all details were carried out.

In the various rooms are placed many well-chosen mottoes which are in fine accord with the high principles of Law and Justice. In the Grand Jury room is seen "Truth is the Handmaid of Justice," Sidney Smith; and again, elsewhere, "Justice Renders to Every Man his Due," Cicero; "Laws are the very Bulwarks of Liberty," Holland; "Ignorance of the Law Excuses No Man," Selden; "Justice is the Idea of God, the Ideal of Man," Theodore Parker.

The County of Essex has put up a lasting monument to Law and Justice in building the new court house, and as we look back over the history of the state we find the fact recorded that the early settlers refused to take their land on the simple patent of the governor, but bought it from the Indians, showing that even 250 years ago the spirit of Justice was awake in New Jersey.

MONTCLAIR, N. J., February, 1908.

OUR JUDGES

HARRY RANDOLPH BLYTHE.

They frame their great decisions
With fine, judicial care,
And by acute revisions
All fallacies lay bare.

They bind them up, imposing,
In calf-bound volumes stout,
And always will, supposing
The calves, themselves, hold out.

CAMBRIDGE, MASS., February, 1908.

THE NEW YORK NEGRO PLOT OF 1741

By Henry H. Ingersoll

IT was more than three decades after Joan of Arc had been cruelly and horribly burned at the stake in the public square of Rouen that a new trial was granted and formally conducted, resulting in the complete acquittal and triumphant rehabilitation of the innocent Maid of Orleans. And three centuries later three years of ceaseless and chivalric struggle with the clerical power of France brought to Voltaire the noblest triumph (tho' empty it seems to us) of his long and active life — the reversal and erasure of the capital sentence of John Calas by the Parliament of Toulouse, full forty months after the body of the victim had been barbarously broken on the wheel for the alleged murder of his own son.

This French mode of administering belated justice, prevalent even to our day, as exemplified in the final acquittal of Dreyfus, finds counterpart in Anglo-Saxon countries by the appeal to history for vindication (such as Robert Emmet made), and the historical reversal of judicial sentence by a later generation or century. Often, too, without the appeal, history assumes jurisdiction and summarily reviews and reverses legal judgments pronounced after due trial and conviction by the lawfully constituted authorities.

The Salem witch persecution affords our best-known illustration of this, and the hanging of Mrs. Surratt the most recent in American history. Another one of unique interest, though rarely mentioned and not commonly known, is the great "Negro Plot" of New York of 1740–41, of which and the judicial proceedings of the time, Mr. Ellis in his "History of Our Country," pronounces the following summary judgment:

"Although there was not the slightest evidence against the negroes, a panic ensued, during which four white people and eighteen negroes were hanged, and thirteen of the latter burned to death at the stake."

Thus by a single paragraph and without the semblance of judicial proceeding this historian summarily reviews and reverses regular court judgments and acquits thirty-three convicts, black and white, one hundred and sixty years after their execution, and gives them *en bloc* and unnamed, historical status as martyrs to "popular prejudice and senseless panic." The historian's judgment may be right. *Quien sabe?* But this acquittal of the felons implies conviction of the city and its colonial tribunals of wholesale judicial murder; and makes a case of interest to twentieth century lawyers, warranting more than casual notice.

Hildreth and Roberts and Lodge had previously, though in more moderate terms and guarded phrases, expressed a like opinion of the injustice of the judgments and execution, the latter comparing it with the Salem witch-craft frenzy of fifty years earlier date; while Woodrow Wilson has more cautiously left his readers to decide for themselves the merits of the case upon a necessarily general and inadequate account of the six months of investigation and inquiry into the plot and all its details.

Mere chance has brought me a copy of a contemporary publication (393 pp.) of all the gruesome incidents of this colonial episode, from which the reader is warranted in pronouncing the judgment of Master Ellis, not only summary, but rash and reckless, for there is much evidence, circumstantial and confessional, which, if credited, abundantly supports the verdict of the juries and the "observation" of the judicial author of the volume in his "Conclusion":

"That a plot there was, and as to the

parties and bloody purpose of it, we presume there can scarce be a doubt amongst us at this time; the ruins of his majesty's house in the fort are the daily evidence and moments of it, still before our eyes; if the other frights and terrors this city was alarmed with, to their great consternation, are, as to some amongst us, so soon slipped into oblivion; yet, surely others will think we ought once a year at least, to pay our tribute of praise and thanksgiving to the Divine Being, that, through his merciful providence and infinite goodness, caused this inhuman horrible enterprize to be detected, and so many of the wicked instruments of it to be brought to justice, whereby a check has been put to the execrable malice, and bloody purposes of our foreign and domestic enemies, though we have not been able entirely to unravel the mystery of this iniquity; for it was a dark design, and the veil is in some measure still upon it!"

Notwithstanding the veil of mystery, however, the evidence upon which five persons, two negroes and three whites, were convicted and hanged for burglary and felonies receiving seems, at this distance, convincing and satisfactory according to modern rule and practice; while as to the remaining white person, "the priest Ury" and most of the negroes, the proof, tho positive, is far from removing the "reasonable doubt" of guilt required in these days, — indeed much of it would not be admitted as competent evidence. The most shocking feature of the whole proceeding is the cruelty of the legal punishment inflicted, whereby, after the fashion of those days, many human beings were burned alive, and the corpses of some of the gibbeted were hanged in chains, as if to show that there was punishment after death.

The limits of this paper will permit only a few excerpts from this quaint and curious volume of legal annals of the colonial days of the metropolis to illustrate its style and the nature of the grand inquest at this bloody assizes.

Here is a copy of the title page, inviting close inspection and analysis, as of an antique curio and rewarding it like the official head notes of court opinions:

A

JOURNAL

OF THE

PROCEEDINGS

IN

THE DETECTION OF THE CONSPIRACY

FORMED BY

Some White People, in Conjunction With Negro and other Slaves,

FOR

Burning the City of New York in America, And Murdering the Inhabitants.

Which Conspiracy was partly put in Execution, by Burning His Majesty's House in FORT GEORGE, within the said City on Wednesday the Eighteenth of March, 1741, and setting Fire to several Dwelling and other Houses there, within a few Days succeeding. And another Attempt made in Prosecution of the same infernal Scheme, by putting Fire Between two other Dwelling-Houses with in the said City, on the Fifteenth Day of February, 1742; which was accidentally and timely discovered and extinguished.

CONTAINING,

I. A NARRATIVE of the Trials, Condemnations, Executions, and Behaviour of the several Criminals, at the Gallows and Stake, with their Speeches and Confession; with Notes, Observations and Reflections occasionally interspersed throughout the Whole.

II. AN APPENDIX, wherein is set forth some additional Evidence concerning the said Conspiracy and Conspirators, which has come to Light since their trials and Executions.

III. LISTS of the several Persons (Whites and Blacks) committed on Account of the Conspiracy; and of the several Criminals executed; and of those transported, with the Places whereto.

By the Recorder of the City of NEW-YORK.

Quid facient Domini, audent cum talia Fures? Virg. Ecl.

NEW-YORK:

Printed by James Parker,
at the New Printing-Office, 1744.

This full title page is pregnant with suggestions, legal, social and historical of colonial conditions in our present great

American metropolis. In a second edition of the book published in 1810, and in the pages of the historians generally, the cause of the six months Reign of Terror narrated therein is commonly called the Negro Plot; but the phenomenon is variously characterized as "senseless panic," "bloody delusion," "disturbing occurrence," "phrenzied tragedy," and "popular madness."

"The Recorder of the City of New York" appears in the second edition as "Daniel Horsmanden, Esq.," who, during its long and exciting session of inquiry and trial, sat as "third justice" of the Supreme Court together with Frederick Philipse "second justice" and James DeLancey "chief justice," to which latter distinction he himself was promoted a few years later, and long served the colony as an honored and trusted magistrate.

"Negro and *other* slaves" cogently suggests the low social status of the "indented" white servants in the colony, of which class Mary Burton, the "star witness" of the prosecution, was a sample. The population of "the City of New York" at the date of "the conspiracy" was only ten or twelve thousand, of whom about two thousand were negroes, nearly all slaves, mostly recent importations.

The "notes, observations and reflections" suggest the coloring naturally given by a historian, who tho of judicial temperament and station, had been, *virtute officii* a leading actor in "the Proceedings," whose publication he thus justifies in his "Introduction":

"But there were two motives which weighed much; the one, that those who had not the opportunity of seeing and hearing, might judge of the justice of the proceedings, from the state of the case being laid before them; for there had been some wanton, wrong-headed persons amongst us, who took the liberty to arraign the justice of the proceedings, and set up their private opinions in superiority to the court and grand jury; though God knows (and all men of sense know) they could not be judges of such matters; but, nevertheless, they declared with no small assurance (notwithstanding what we saw with our eyes, and heard with our ears, and every one might have judged of by his intellects, that had any) that there was no plot at all! The other was that from thence, the people in general, might be persuaded of the necessity there is, for every one that has negroes, to keep a very watchful eye over them, and not to indulge them with too great liberties, which we find they make use of to the worst purposes."

By the "additional evidence" the author hopes to withstand, if not convince, those "wrong-headed persons," the doubting Thomases of his day, men "from Missouri" who must be shown everything, or they will not believe it. Suffice it to say it is merely cumulative and could serve only to confirm both sides in their existing opinions. There were fires and thefts in abundance, no doubt, of which negroes were guilty; but the "great conspiracy" of hundreds of whites and negroes to burn the city and murder its inhabitants is not proven by reliable testimony.

From the lists of names, it appears that the total number arrested was 174. Whites, 20; negroes, 154. Executed, 35: whites, 4; negroes, 31, at the dates and in the manner shown in the following table. Pardoned, 5 whites. Transported under commutation, 60 negroes, 3 to Newfoundland, the others to the West Indies and Madeiras. Discharged, 43; whites, 10; negroes, 33. Of these indicted 10 were "not found,", whites, three; negroes, 7; while 74 negroes' and two whites are reported as having confessed connection with the conspiracy.

Astonishment at the rise, course and result of this Reign of Terror may be somewhat assuaged by recalling that in 1740 the population of New York was only about 10,000 of which, say 2,000 were negroes; that reports of recent plots of arson and

LIST OF WHITE PERSONS CONVICTED.

John Hughson, Alehouse keeper,	Executed,	June 12, 1741
Sarah Hughson, his wife	"	" " "
Margaret Kerry, Harlot	"	" " "
John Ury, Priest	"	August 29, 1741

LIST OF NEGROES EXECUTED.

Negroes	Owners	Hanged
Cæsar	Vaarck	May 11, 1741
Cato	Joseph Crowley	June 16
Cato	John Shurmur	July 3
Cato or Toby	John Provoost	June 16
Fortune	J. Vanderspiegle	June 16
Fortune	Capt. Walton	July 18
Frank	Henry Ryker	July 18
Galloway	H. Rutgers	July 18
Harry	Mrs. Kipp	July 3
Othello	J. DeLancey (Chief Justice)	July 18
Prince	John Auboyneau	May 11
Prince	Anthony Duane	July 3
Quack	John Walters	July 18
Toney	John Latham	July 3
Tom	Bradt	Mar. 13, 1742
Venture	Cornelius Tiebout	July 18, 1741
Wan or Juan	Capt. Sarly	August 15
York	Peter Marschalk	July 3

Negroes	Owners	Burned
Albany	Mrs. Carpenter	June 12, 1741
Ben	Capt. Marshall	June 16
Cuffee	A. Philipse, Esq.	May 30
Curacoa Dick	Cornelius Tiebout	June 12
Cuffee	Lewis Gomez	June 9
Cæsar	Benjamin Peck	June 9
Cook	Gerardus Comfort	June 9
Francis	Joseph Bosch	June 12
Harry (Doctor)	J. Mizreal, L. I.	July 18
Quack	John Roosevelt	May 30
Quash	H. Rutgers	June 16
Robin	John Chambers	June 9
Will	Anthony Ward	July 4

Total — 35 persons executed.

murder in Carolina, Georgia and the West Indies had come to the city and received general credence; and that pending this very inquisition Hackensack, a small neighboring village in New Jersey, had been subjected to numerous incendiary fires, causing the destruction of a dozen barns all attributed to negro slaves; and lastly that less than thirty years previous New York had itself had a similar experience, the events of which are thus recounted in a foot note of the present volume:

"There was a rising of the negroes in this city, in the year 1712. On the 7th of April, about one or two o'clock in the morning, the house of Peter Van Tilburgh was set on fire by the negroes, who being armed with guns, knives, etc., killed and wounded several white people as they were coming to assist in extinguishing the flames. Notice thereof being soon carried to the fort, his excellency, Governor Hunter, ordered a cannon to be fired from the ramparts, to alarm the town, and detached a party of soldiers to the fire; at whose appearance those villains immediately fled, and made their way out of town as fast as they could, to hide themselves in the woods and swamps. In their flight they also killed and wounded several white people; but being closely pursued, some concealed themselves in barns, and others sheltered in the swamps or woods, which being surrounded and strictly guarded till the morning, many of them were then taken. Some, finding no way for their escape, shot themselves. The end of it was, that after these foolish wretches had murdered eight or ten white people, and some of the confederates had been their own executioners, nineteen more of them were apprehended, brought upon their trials for a conspiracy to murder the people, &c., and were convicted and executed; and several more that turned evidences were transported."

The grand inquest of 1740–41 was begun March 1, by magistrates and officers, to detect and punish the perpetrators of the Hogg's robbery on the night before, in which divers goods and coins and other precious metals were stolen from a store by negroes and turned over to one John Hughson, a shoe-maker and ale-house keeper. During this investigation, and in the course of about two weeks, a half dozen fires occurred in the city, all of which were suspected, and some proven to be of negro origin. This produced a contagion of dread and alarm which caused the arrest and committal of many not already in jail and a

consultation of the magistrates, one feature of which is thus reported by the author:

"The judges associated to them the several gentlemen of the law that were in town, viz: Messieurs Murray, Alexander, Smith, Chambers, Jamison, Nicholls and Lodge, in order to consult about this matter, and come to some resolution upon the emergency. The result of the meeting was, those gentlemen unanimously agreed to bear their respective shares in the fatigue of the several prosecutions, and settled among themselves the part each should take."

The accused were thus left without counsel for defense, and compelled to rely for justice upon the fairness of an excited community and prejudiced court. The regular term of court assembled in April, and the author gives this description of its business:

"The parties accused of the conspiracy were numerous; and bus ness by degrees multiplied so fast upon the grand jury, which bore the burthen of this inquiry, that there would have been an immediate necessity for others to have lent a helping hand in taking examinations from the beginning, if the judges had not found it expedient to examine the persons accused upon their first taking into custody, whereby it seemed most likely the truth would bolt out, before they had time to cool, or opportunity of discoursing in the jail with their confederates, who were before committed."

The author, in his Preface, gives the following graphic outline of this feature of the proceedings:

"All proper precautions were taken by the judges, that the criminals should be kept separate; and they were so, as much as the scanty room in the jail would admit of; and new apartments were fitted up for their reception; but more particular care was taken, that such negroes as had made confession and discovery, and were to be made use of as witnesses, should be kept apart from the rest, and as much from each other, as the accommodations would allow of, in order to prevent their caballing together; and the witnesses were always examined apart from each other first, as well upon the trials, as otherwise, and then generally confronted with the persons they accused, who were usually sent for and taken into custody upon such examinations, if they were to be met with; which was the means of bringing many others to a confession, as well such as were newly taken up, as those who had long before been committed, perhaps upon slighter grounds, and had insisted upon their innocence; for they had generally the cunning not to own their guilt till they knew their accusers."

The author's comment upon this part of the grand inquest will be appreciated by recalling that most of the negroes were recent importations from the West Indies, or from Africa. He says:

"The trouble of examining criminals in general, may be easily guessed at; but the fatigue in that of negroes, is not to be conceived, but by those that have undergone the drudgery. The difficulty of bringing and holding them to the truth, if by chance it starts through them, is not to be surmounted, but by the closest attention, many of them have a great deal of craft; their unintelligible jargon stands them in great stead, to conceal their meaning; so that an examiner must expect to encounter with much perplexity, grope through a maze of obscurity, be obliged to lay hold of broken hints, lay them carefully together, and thoroughly weigh and compare them with each other, before he can be able to see the light, or fix those creatures to any certain determinate meaning."

As proof that this method of the magistrates in pursuing their inquest did not always result in conviction but sometimes the contrary, we have the following narration and sententious reflections:

"At first Cork (English's negro) was brought by mistake instead of Patrick, and Peggy declared, he was not English's

negro which she meant; Cork was unfortunately of a countenance somewhat ill-favoured, naturally of a suspicious look, and reckoned withal to be unlucky too; his being sent for before the magistrates in such a perilous season, might be thought sufficient to alarm the most innocent of them, and occasion the appearance of their being under some terrible apprehensions; but it was much otherwise with Cork, and notwithstanding the disadvantage of his natural aspect, upon his being interrogated concerning the conspiracy, he shewed such a cheerful, open, honest smile upon his countenance (none of your fictitious hypocritical grins) that every one that was by, and observed it (and there were several in the room) jumped in the same observation and opinion, that they never saw the fellow look so handsome: Such an efficacy have truth and innocence, that they even reflect beauty upon deformity!"

How evidence of this kind, implicating other persons, was obtained may be inferred from the concluding paragraphs of the judge's sentence of the two negroes first tried:

"And as it is not in your powers to make full restitution for the many injuries you have done the public; so I advice both of you to do all that in you is to prevent further mischiefs, by discovering such persons as have been concerned with you, in designing or endeavoring to burn this city, and to destroy its inhabitants. This I am fully persuaded is in your power to do if you will; if so, and you do not make such discovery, be assured God Almighty will punish you for it, though we do not: therefore I advise you to consider this well, and I hope both of you will tell the truth.

"And now, nothing further remains for me to say, but that you Caesar, and you Prince, are to be taken to the place from whence you came, and from thence to the place of execution, and there you and each of you, are to the hanged by the neck until you be dead. And I pray the Lord to to have mercy on your souls."

These negro burglars and their white harborers had been arrested for theft, and soon after the meeting of court the negroes, Prince and Caesar, for this crime, and the three whites, Hughson and wife and their prostitute lodger, Peggy Kerry, for felonious receiving, were indicted, tried and convicted and sentenced to be hanged. The negroes were promptly executed; but the whites were held over, indicted, and tried a month later for the conspiracy to burn the city, and were convicted and sentenced to to be hanged for it and were duly executed. They protested their innocence and ignorance of any conspiracy, but confessed their guilt of receiving stolen goods, and that they deserved death for that felony.

The nature of the prosecution, not unlike that of Sir Walter Raleigh by Attorney General Bacon, may be inferred from the following extract from the speech of Mr. Attorney General Bradley:

"Gentlemen, such a monster will this Hughson appear before you, that for the sake of the plunder he expected by setting in flames the king's house, and this whole city, and by the effusion of the blood of his neighbors, he, murderous and remorseless he! counselled and encouraged the committing of all these most astonishing deeds of darkness, cruelty and inhumanity. — Infamous Hughson!

"Gentlemen, This is that Hughson! whose name and most detestable conspiracies will no doubt be had in everlasting remembrance to his eternal reproach; and stand recorded to latest posterity.— This is the man! — this that grand incendiary! — that arch rebel against God, his king, and his country! — that devil incarnate, and chief agent of the old Abaddon of the infernal pit, and regions of darkness."

What wonder that his body was hanged in chains after death!

The negroes first convicted of the con-

whites consorted in illegal association and promiscuous cohabitation, the keepers making gain out of their crime, and stimulating their mongrel patrons to repeat and extend their felonious practices. The negroes would steal and the whites receive and hide, and all would make profit which all wished to augment. Methods were discussed, and, heated with spirits unlawfully obtained, the worst of the negroes talked about arson and murder as a means to the increase of spoils. Others present may have heard them without dissent. Mary Burton, Hughson's bound girl, overheard them, but had no motive to betray the speakers, or her coarse and vicious master, till she was promised freedom and reward. Meanwhile the fires occurred, and she disclosed first the larcenies and felonious receiving, and later the negro talk about arson and murder, attributing it to the guilty parties. More fires occurred and excitement rose to fever heat; under its contagious influence. Mary gave the names of other negroes who frequented the taverns and perhaps heard and participated in the talk about burning and murder.

All this course of conduct was contrary to law, not only the larceny and receiving, and the prostitution and miscegenation, but also the assembling of the negroes in the night time, the sale or giving spirits to them, and even the harbouring of them at the taverns. Conditions more evil than these, more favorable for plot and conspiracy are hardly conceivable; and the occurrence of the fires was confirmation strong as proof of holy writ to the threatened community. Then came the confessions of both negroes and whites — obtained howsoever they might have been, they were credited. Under fear or hope of reward, each one confessing named some new victim whom Mary could remember or identify as a frequenter of the tavern at the unlawful assemblages; and she was corroborated by the tavern keeper's daughter, and by a soldier who was an occasional visitor and member of the motley gatherings. And thus, until Ury was hanged, the community was convinced of the guilt of all who were accused by these witnesses, whereas it is not probable that more than a dozen or a score all told, white and black, were participants in even the loosely conceived design of plunder concoted around the table of the alehouse. Certain it is that no more stimulating hot-bed of vice and crime can be found than public houses like Romme's and Hughson's, where members of both races and sexes consort and associate upon terms of equality and intimacy; and there is little wonder that in such houses of ill-fame the Knickerbockers believed were hatched plots for their own complete undoing by larceny, robbery, arson and murder, the first three of which were actually committed with alarming frequency in their midst.

In fine: It was not a prosecution for any imaginary crime or superstitutious offence, but for acts criminal under every code of laws, ancient and modern. It was not the exercise of mob violence but the regular and orderly course of procedure by the lawfully constituted tribunals of justice executing the harsh and cruel laws of the eighteenth century, in letter and spirit not uncommon to the era. It was not brutal tyranny of monarchy or anarchy crushing out freedom or innocence or decency; it was the resolute act of substantial and virtuous citizens in organized defence of property and life, executing law not only in reason and moderation upon the vicious and guilty, but in prejudice and passion upon some who were not proven guilty, but were victims of popular suspicion and dread, under the barbarous laws of that period.

KNOXVILLE, TENN., January, 1908.

THE CAPTAIN OF THE QUARTERMASTER'S LAUNCH

By James H. Blount.

THROUGHOUT the whole of the month of December, 1901, the Court of the First Instance for the First Judicial District of the Philippine Islands had been in extraordinary session in the town of Ilagan, in the province of Isabela, trying an old man and his three sons, natives, charged by certain Spaniards of Ilagan with having murdered an officer of the Spanish army at that place during the second phase of the last insurrection against Spain, that is to say, the uprising which occurred in 1898, as soon as the Filipino people had been informed and believed that Admiral Dewey and the American land forces about Manila were co-operating with Aguinaldo for the purpose of enabling the people of the Philippine Islands to throw off the Spanish yoke and gain their independence. Beside the necessity for concluding this trial to open court, on the China Sea coast of Luzon, two hundred miles from Ilagan, on the first Tuesday in January following, the case itself was one which any American would have been glad to be able to avoid trying, and, that being impossible, glad to finish at the earliest practicable moment. It was claimed by his countrymen, the prosecutors, that the deceased had been put to death under circumstances of revolting cruelty, but even if this were so, it seemed not unlikely that the deceased himself had under the Spanish regime perpetrated cruelties equally revolting upon kinsmen and friends of the defendants. The trial was begun, and we proceeded "full speed ahead." After disposing of great clouds of witnesses, the end was at last reached. The defendants were probably all guilty, but the evidence introduced admitted of a reasonable doubt as to the old man and one of the boys. The other two were convicted. As soon as sentence was pronounced, Mr. Brower (the court stenographer) and the undersigned hurried out of the court room down to the river landing, where a steamer was waiting for us. Our servants and baggage were already aboard, and as soon as we arrived, the ropes were hauled in, and away we went, racing against time to reach the other end of the circuit, two hundred miles away, so that court might open there on the date fixed by law. From Ilagan to our destination, Laoag, the town we called home, was one hundred and ten miles down the river to the sea, and thence ninety miles by sea. The river boat solved the problem as far as the mouth of the river. In fact, that being the rainy season, and the river being swollen and swift, we traveled those one hundred and ten miles at a most dizzy rate. We had gotten through the session of the court convened to publish the verdict in the case above mentioned by ten o'clock in the morning. So that we must have pulled out from Ilagan not later than ten fifteen. Yet before sundown we hove in sight of Aparri, the town at the mouth of the river, and before dark were tied up to the steamer's dock at that place.

In those days there was no regular system of transportation for employeés of the civil government. The only efficient means of transportation was that possessed by the military authorities. I had written to the civil authorities at Manila some time before, urging that some regular and reliable means of travel be furnished us up our way, and received a reply stating that it was their purpose to do so as soon as practicable, so that we might be independent of the military. The letter from Manila added: "In the meantime I would suggest that if you find a military boat going your way you say, in your blandest tones, 'please

sir let me go along.'" Be it understood that the military authorities were not always enthusiastic to help the civil folk. In fact they rather resented the setting up of civil government at all: First, because they thought the country was not ready for it, and second because it involved giving up power. The writer can not resist the temptation in this connection to quote the opening passage of the first report of the Taft Commission, which is permeated with the same humorous serenity that characterizes the message from Manila to the undersigned quoted above:

"The commission arrived in Manila on January 3d, last, was courteously received by Major-General Arthur MacArthur, the military governor, and *after about a month* was furnished with comfortable quarters. (The italics are the writer's.)

It is human nature to enjoy the possession of power, and difficult to enjoy giving it up.

Just as the river steamer was tying up to her wharf at Aparri, Mr. Brower, who had been scanning the harbor in the hope of seeing some army boat, or tramp steamer, or other means of sea transportation, spied a row-boat coming from a launch which lay at anchor in the middle of the stream. In the stern was a white man with a gold braided cap. As he came along side we asked him which way he was bound. As luck would have it he was going our way. His vessel was a launch belonging to the quartermaster's department of the army. He expected to leave Aparri for the same place we were going to as soon after midnight as the state of the tide would permit, probably between three and four o'clock in the morning. He was the captain of the launch, that is to say, he was an employée of the quartermaster's department and in charge of this launch. At any rate he was the master of the vessel. I stated the situation in a few words and asked if he could take us with him. He very promptly and cordially consented, adding that we were at liberty to go aboard at any time. He would be glad to have us along.

We had, among other *impedimenta*, two heavy boxes of books, to say nothing of our trunks. If we should avail ourselves of the help of the crew of the river steamer at once, before they went ashore, we would be able to get our effects aboard the launch with a minimum of inconvenience and a maximum of speed. The captain of the river boat had very kindly volunteered to have our stuff transferred to the launch. So, directing Mr. Brower to take the servants with him, and accompany our property aboard the launch, and wait for me there, I went ashore to see some friends of the 16th Infantry who like myself had served during the war in the volunteer army. Upon learning of our plan to proceed from Aparri to Laoag on the little quartermaster's launch above referred to, they rather chilled my enthusiasm about the supposed "God-send" by declaring that the boat was sadly in need of repair, and was practically unseaworthy, that it was very doubtful if she could live in the rough waters where the China Sea and the Pacific Ocean meet (off the northwestern coast of the island of Luzon). They meant off Cape Bojeador, a rocky headland some sixty miles from Aparri, which experienced seafaring men who know both places consider as dangerous as Hatteras. They urged to be allowed to send out to the launch and bring our effects ashore, so that we might wait until some safe method of transportation should turn up. I would not consent, but my peace of mind was sorely disturbed. Thereafter, in walking about the town, I met the captain of the port, who corroborated the gruesome statements of my friends of the 16th Infantry. This was almost too much. About that time the captain of the quartermaster's launch hove in sight. I went down the street to meet him. He was a perfect Mark Tapley, the sunshiniest of individuals. Upon hearing the derogatory state-

ments which had been made concerning his boat, he smiled condescendingly, as if in good-natured pity for the land-lubbers who had spoken disparagingly of his noble ship, and assured me that she was as sound and safe as anybody could wish, and that there was no danger whatever involved in the proposed journey. The fellow seemed to be so entirely certain about the seaworthiness of the launch, that my fears were dispelled as the mist before the sunshine. Certainly his life was as valuable to him as mine was to me. Besides, our baggage had already gone aboard the boat in question, and it was too much trouble to go to work and have it lugged ashore. Again, there was the prospect of being able to open court at Laoag on the date fixed by law. Fortified by these reflections I returned to my military friends and dined with them. Their jesting advice that their guest make his will before departing evoked no merriment from the object of the jest, but only a rather forced smile. The fact was that harrowing doubts had begun to arise in my mind as to the soundness of the judgment of the captain of the quartermaster's launch. However, the die was cast. Pride prevailed over prudence. The program for departure would stand as fixed. The only graceful thing to do was to "keep a stiff upper lip," and take the chances. During dinner, one of the visitor's ex-comrade-in-arms, who seemed to be the wag of the mess, in proposing the health of the guest regretted that said guest could not have died gloriously in some one of the battles of the late war, leading a charge or otherwise gracing the name and uniform of his country, instead of finding a watery and ignominious grave through accepting the advice of a quartermaster's clerk who knew nothing whatever about ships or navigation. This last suggestion was rather startling. Mr. "Mark Tapley" had not mentioned during our interview of the afternoon the circumstance that he was innocent of any knowledge of navigation. Nevertheless, it was too late to back out now. Though heartily sorry of the determination to go on that launch, I was resolved neither to admit nor betray the fact. It is all right to have "cold feet" if you had rather die than show it.

After the cigars and coffee, a young officer who had been ringleader in the bantering, drove the departing traveller in his carromata down to the water-front, where the launch's boat was waiting. He and I had been in more than one campaign together during the insurrection, so he surely would not laugh if asked to take the numbers of the checks I had with me, that they might be established in the event of accident. He did not laugh then. But afterward, he always referred to the circumstance (he had been a lawyer before going into the army) as the making of my nuncupative will. After we had exchanged good-bye, the boat pulled away into the gloom of the blackest night imaginable, in the direction of the faint and distant twinkling of the lights of the quartermaster's launch. Upon going aboard the captain of the launch and Mr. Brower were discovered in the cabin, telling each other the stories of their respective lives. It seemed that the "Captain" had at one time served a five year enlistment as a soldier in the army and after that had been with a circus. Once upon a time the parachute man of the circus got drunk at the most inopportune time possible, namely, just as a crowd was gathered, pursuant to the advertisement, to see the balloon ascension and customary subsequent descent of the balloonist with the parachute. The manager of the circus, in passing through the dressing room, hurriedly remarked the deplorable crisis to those present. The "Captain" very promptly threw himself in the breach — came to the rescue — and said: "What is the matter with me going up in the balloon?" Said the manager: "Are you game to do it?" Said the "Captain": "Sure." Whereupon, the manager took the young fellow

at his word. He then went out amongst the crowd and took up quite a collection for him, and the lad started up in the balloon according to his promise. After rising to a height sufficient to sustain the prestige of his employers, the circus owners, he cut loose the parachute and shot earthward. But the parachute, instead of opening, went shooting through the air as fast as the attraction of gravity required. He shot downward a sheer one hundred feet perhaps. At last the thing opened, and he breathed a little more easily. Asked the question how he managed to hang on between the time he cut loose from the balloon and the time the parachute opened he said: "Oh! just a little grip and a little grit." Very little time had elapsed after the opening of the parachute before there sprang up a breeze from the east. (This incident happened at Portland, Oregon.) Unless something were done, this breeze would ultimately carry him out to sea. At last he came directly above and within about sixteen feet of a slate gable roof. He could see that the house to which this roof belonged was surrounded by a soft, green lawn. Our hero decided that it was a case of now or never for him. He felt that he could drop, strike the gable roof, and carom thence to the green lawn. This he did successfully, without breaking any bones, falling in such a way as to just miss the fence, one of its spear points piercing his coat-tail.

This was the man whose judgment I was taking against the advice of an experienced navigator, to wit, the Captain of the port of Appari, and against the advice of the officers of the 16th Infantry. However, it was too late, and too much trouble, and too ridiculous to turn back now.

Next morning we weighed anchor before daylight and that afternoon sighted Cape Bojeador. About this time the wind began to freshen, then blew harder, and finally rose to a gale. The wind would lash the waves fiercely, and as the foam broke on their crest, would spit it horizontally in a white sheet, until, within a very short space of time, the sea was as angry a mass of foam as one would care to behold. The velocity of the wind increased, as did also the size of the waves. When we had sighted Bojeador, we were headed southward and stood off shore only about four miles. The wind which now held us in the hollow of its hand was from the northeast. Within a comparatively short space of time we must have been blown in a southwesterly direction some twenty miles from land. As we had what is called a "following" sea, great waves began to break over the poop-deck from time to time. Brower and I soon became too seasick to suffer much agony in the way of apprehension about whether or not the vessel would go down. We were both prone on the cushions of the cabin. To this day we can both recall the desperate throbbing of the engines of the little launch, as she bravely struggled up the slope of each successive wave she had to climb. If she fell back in the trough of the sea, of course we would be swamped. Time after time, continuously for perhaps a half hour, we would feel the quivering of each ascent, and breathe a bit easier as she reached the crest of the wave and started downward. In the midst of this trying situation, when it was of course quite uncertain as to whether or not we would come out of it, our sunshiny friend, the young man in charge of the boat, would walk in to see us from time to time, still serene, and say a pleasant word or two, actually grinning the while. At last the fury of the storm abated. As soon as his duties would permit, the "Captain" came into the cabin to chat for a few minutes. While it would be unkind, if not unjust, to say that the man did not have sense enough to be afraid, he certainly was absolutely devoid of any sense of fear. He remarked, smilingly, like a man making some slight admission about a favorite

horse; "I *will* acknowledge one thing, Judge. You recall about twenty minutes ago when those big waves were breaking over the poop? Well, the hatches were battened down, but they were not entirely water-tight. If a few more of those waves had struck us, the water would have gotten in the engine room and put out the fires, and, while we would have come through all right in the end, I'll admit that for a while we'd have been out of luck."

Think of it, kind reader! Twenty miles out at sea, off a cape as dangerous as Hatteras, in a sixty-foot launch sadly needing repair, in a heavy gale, with the fire in the engines out! And yet this young scrapegrace having the impudence to grin at us and admit that if certain additional calamities had happened, we would, for a while, have been "out of luck!"

This re-incarnation of Mark Tapley then told us that when he had gone up the coast a day or two before, he had met with much worse weather than on this trip; that during the worst of it, the native crew had abandoned their several posts and gathered around the capstan to concentrate all their energies in panic-stricken prayer. Whereupon he had picked up a belaying pin and hit one of them in the head with it, knocking him down. By this means, together with a promise of like treatment for the rest in the event of disobedience, he made them return to their several posts of duty. At the time, and until the emergency was over, he did not know or worry about whether the man he had struck was dead or not. However, it turned out that he had only been knocked senseless, and was not seriously hurt.

It is hardly necessary to add that in our travels around the circuit of the First Judicial District, we did not again avail ourselves of the hospitality of the captain of the Quartermaster's launch.

Macon, Georgia, February, 1908.

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.

JAMES BRADLEY THAYER

The publication of the collection of essays by the late Professor Thayer, which we have deemed deserving of especial notice in this issue, will recall to his many former pupils a grateful memory of that scholarly gentleman which time cannot efface, and the editor welcomes an opportunity to acknowledge his personal indebtedness to the patience and sympathy of his old instructor. Interest in this volume will be enhanced by the knowledge that its accurate annotations are the loving tribute of the author's son, Mr. Ezra R. Thayer of Boston.

A JUDICIAL ASSOCIATION

The appellate and *nisi prius* judges of Missouri have formed an association for the consideration of reforms in practice. The importance of this will hardly be realized in the smaller states where the judges come in frequent contact. It is not uncommon for a judge to express in an opinion his regret at an antiquated but well established precedent and his hope that the legislature will remedy it, but unless some ambitious officer of a local bar association assumes the duty, the suggestion usually is soon forgotten. Our overburdened legislators exhaust their strength on the manifold social nostrums urged by enthusiasts and have little time to consider reforms not forced upon their attention. The doctrine of separation of powers between the different departments of government which we carry to such extremes in this country often prevents the makers of laws from receiving the expert aid which could be afforded by those who define it. Yet executive officers recommend legislation. Why would it not be well if the judges could submit to the legislature an annual report recommending changes in the law.

ESTABLISHED LAW

The first part of Judge Sharswood's little book on Legal Ethics attempts to define the duty of the lawyer to the public and devotes much time to what should be his attitude as a legislator or as a judge. Among other topics discussed is a clear and logical argument in favor of the doctrine of *stare decisis*, which might be read with profit by those who, today, are trying to force upon our courts the most important duties of government and who urge that when our legislators fail to properly reflect progressive popular sentiment, or on the other hand progress faster than the judges deem wise, the courts should mold the law according to their views by means of a subtle refinement of precedents. Judge Sharswood insists that certainty is of the greatest importance in business dealings and that this is impossible if the determination of law is to be made after the event by the court that hears the cause. Judicial legislation, he says, is retrospective and much worse than legislative retrospection because it is "invariably the precursor of uncertainty and confusion." "A decision in conformity to established precedents is the mother of repose on that subject; but one that departs from them throws the professional mind at sea without chart or compass. The cautious counsellor will be compelled to say to his client that he cannot advise. One cause is the general uncertainty to which it leads. Men will persuade themselves easily, when it is their interest to be persuaded, that if one well-established rule has been overthrown, another, believed to be quite as wrong, and perhaps not so well fortified by time and subsequent cases, may share the same fate. Shall counsel risk advising his client not to prosecute his claim or defence, when another bolder than he, may moot the point and conduct another cause resting upon

the same question to a successful termination? The very foundations of confidence and security are shaken. The law becomes a lottery, in which every man feels disposed to try his chance. Another cause of this uncertainty is more particular. A court scarcely ever makes an open and direct overthrow of a deeply founded rule at one stroke. It requires repeated blows. It can be seen to be in danger, but not whether is is finally to fall. Hence it frequently happens that there is a sliding scale of cases; and when the final overthrow comes, it is very difficult to determine, whether any and which steps of the process remain."

The author then lays this down as the legitimate province of jurisprudence, "To maintain the ancient landmarks, to respect authority, to guard the integrity of the law as a science, that it may be a certain rule of decision, and promote that security of life, liberty and property, which, as we have seen, is the great end of human society and government. Thus industry will receive its best encouragement; thus enterprise will be most surely stimulated, thus constant additions to capital by savings will be promoted; thus the living will be content in the feeling that their earnings are safely invested; and the dying be consoled with the reflection that the widow and orphan are left under the care and protection of a government, which administers impartial justice according to established laws."

OUR CONTEMPORARIES.

The *American Law Register*, which has become in recent years one of the ablest of the monthlies, edited under the supervision of the instructors of our leading law schools, begins this year with a frank announcement of its character as a school journal, and will henceforth appear under the title of *University of Pennsylvania Law Review*. The system of undergraduate editorship will be continued.

The *Canadian Law Times* has consolidated with the *Canadian Law Review*, which will henceforth appear under the title of *The Canadian Law Times and Review*, under the editorship of Mr. Charles Elliott, who has been editor of the *Law Review* from its foundation.

Dr. Hannis Taylor is to retire from the editorship of the *American Law Review*.

AMBULANCE CHASING

Claims for damages on account of personal injuries brought against a street railway corporation have always been numerous on account of the many accidents which actually occur, and also because of the ease with which claims can be manufactured.

This factor as an expense has grown largely within recent years. In the annual report of the Philadelphia Rapid Transit Company, the president particularly refers to the amount expended for the settlement of claims, which during the year ending June 30, 1907, cost $1,217,586.85, an increase of $236,266.32 in one year. In dealing with the item of expense the president makes the following comment: —

"This part of the business presents the most serious of the problems with which your management has to deal. Ten years ago two and one half per cent to three per cent of the gross receipts took care of the accident account. To-day it is approaching seven per cent, which is equivalent to a dividend of $2 a share upon the stock.

"This increase is due largely to a new enterprise which has grown up, and which has been termed Ambulance Chasing. The slightest accident is hunted up and reported by runners in the employ of lawyers of doubtful standing, many of whom are briefless, except for this class of business, but who are most expert in preparing cases of this character in such a manner that they will meet the requirements of the law and catch the sympathy of the jury. There are many physicians in league with these lawyers, whose testimony is of such a nature as to exaggerate the injury, and to show that any trouble the claimant may be suffering from might have been caused by the accident.

"It is but a short step from an exaggeration of an injury to the manufacture of a claim, and there is no doubt that in many cases we have been forced to pay money in settlement of claims which have been absolutely unjust. This matter is receiving the most careful attention of your management. The new relations between the company and the city should go far toward correcting this evil. At the same time a determined effort will be made to break up the business of inciting and creating fraudulent claims against the company."

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 result of the Hague Conference forms the subject of leading articles in several of the legal magazines reviewed this month. All express the opinion that much solid work was done, although there is a popular tendency to depreciate it because unreasonably high expectations were not fulfilled. Among the other articles the usual wide range of subjects is treated. Although it is hard to make distinctions among those in the leading magazines, perhaps former Justice Brown's study of automobiles and Professor Bohlen's discussion of the doctrine of contributory negligence are of the most general interest.

AGENCY. "Implied Authority of Agent to Purchase Personal Property," by Floyd R. Mechem, *Yale Law Journal* (V. xvii, p. 257). Adapted from a forthcoming new edition of the writer's new treatise on agency.

AUTOMOBILES. "The Status of the Automobile," by Hon. Henry B. Brown, *Yale Law Journal* (V. xvii, p. 223). After reviewing the present law as to the rights of automobiles on the highways, the author, who is the former associate justice of the Supreme Court of the United States, makes some suggestions. The future depends principally, he thinks, upon the chauffeur and his sponsors. A faithful observance of the speed laws may be expected to gain such rights as the superior speed of the machine requires for its perfect operation.

"At the same time the safety and pleasure of the general public demand some further restriction upon the activity, not to say lawlessness, of these powerful engines. The most important are: —

"1. Their total exclusion from parks and pleasure drives of our large cities during the customary driving hours of each day. This is the rule in London, where automobiles are not allowed in Hyde Park during the afternoon and evening, with the result that the famous Rotten Row still maintains its supremacy in the world of fashion for beautiful horses and handsome equipages. On the contrary, in Paris and in Newport, they have been practically driven off the streets and drives formerly distinguished for the elegance and perfection of their turnouts . . . .

"2. In actions for personal injuries occasioned by illegal speed, the plaintiff should not be denied a recovery upon the ground of his contributory negligence, provided that such negligence may be given in evidence in reduction of damages. In view of the fact that automobiles are often, if not usually, driven at excessive speed, and that a vast majority of the injuries inflicted by them are attributable to this cause, in respect to which the injured party is helpless, a variation in the common law rule, which deprives a plaintiff altogether from a recovery in case of his own contributory negligence, appears just and reasonable. In the light of a punishment, too, it would operate as a strong restraint upon that excessive speed which seems such an irresistible attraction to the chauffeur, and causes such an enormous loss of life. The fact that plaintiff's negligence may be shown in mitigation of damages would prevent any practical injustice and in plain cases limit the recovery to a normal amount.

"3. As automobiles are usually owned by men of wealth, to whom ordinary fines are of no consequence, the fine for excessive speed should not be less than twenty-five dollars, and in case of personal injuries, imprisonment should be compulsory. . . .

"Upon the other hand the automobilist has just cause to complain of state laws which require him to obtain a new number, registration and license in every state he may chance to enter, after having been properly documented in the state of his domicile. Conceding that he is bound to comply with the speed and signal laws of each state, so

long as he is within its boundaries, the requirement of a new number and registration, though convenient for purposes of identification, imposes a burden out of all proportion to its advantages. As well might a ship be required to take out a new registry in every port she enters. There should be a provision in every state law upon the subject, exempting from registration and license automobiles which have been properly documented in their home state. There is want of uniformity in state laws in respect to almost every particular connected with automobiles, such as registration, identification, speed, day and night signals, details of mechanism, and even what shall be considered an automobile; — for instance, whether it shall include motor cycles or not. Uniformity in these particulars is much to be desired."

AUTOBIOGRAPHY. "A Scottish Judge Ordinar," by J. Dove Wilson, *Yale Law Journal* (V. xvii, p. 232). Conclusion of an interesting autobiography begun in the January number.

BIOGRAPHY. "Judah Philip Benjamin," by G. W. Wilton, *The Juridical Review* (V. xix, p. 305).

COLONIAL LAWS. Colonial Laws and Courts, under the general editorship of Alexander Wood Renton and George Grenville Phillimore, which was recently published in London, is certainly one of the best contributions on the subject of recent years. The nature of the work necessitated the coöperation of distinguished jurists of various countries, which makes it on that account more valuable. As the editors tell us the present work is the introductory volume of the new edition of Burge's "Commentaries on Colonial and Foreign Laws."

In Part I the authors, by way of introduction, after commenting upon the legal system of the world, including the English Common Law, examine in a summary manner the jurisprudence and legal system of various civilized and half civilized states and countries.

As the laws and codes of France have been the foundation upon which many nations built their juridical system, they naturally occupy a prominent place in the first chapter. On the other hand, the origins of the laws of European countries are traced to their remotest epochs, and their evolutions are sketched with remarkable accuracy. The statement, however, that the Turkish civil code is also founded on the Napoleon code does not seem to be correct, because the compilers of the Ottoman code drew nearly all their material from the Mohammedan law in force in the Orient for centuries. The authors were evidently led into error on this subject, on account of the similarity existing between the Turkish and French law of contracts, both having their origin in the Roman *corpus juris civilis*, from which the early Mohammedan jurists drew also most of their juridical principles during the Arabian conquest of the Greco-Roman provinces of the East.

In Chapter II the authors review the laws of the Indian Empire, including those in force in the "Protected States," the Hindu, the Mohammedan and Buddist laws in regard to personal status being also commented upon separately.

But what received special attention is the Roman-Dutch law in force in the British colonies. The history, therefore, of the legal system of Holland is treated lengthily in Chapter III, showing the origin and development of the Roman-Dutch law. In fact it is a short dissertation on the subject, with which the first part of the book is concluded.

In Part II the authors enter into a detailed examination of the juridical constitution of the British dominions, exclusive of the United Kingdom. In Chapter II the Mediterranean possessions such as Gibraltar, Malta, and Cyprus come under their consideration.

Chapter III deals with the so-called political tribunals of some parts of India, namely the judicial authority vested in British officers in the native or protected states under the sovereignty of Great Britain, and also with the political and judicial organization of British India proper, giving a detailed account of its laws and codes.

Under the heading of "Eastern possessions" Chapter IV, treats the judicial systems of Aden, Ceylon, Hong Kong, the Straits settlements, the Federated Malay States, Mauritius, Rodriguez and the Seychelles Islands.

In Chapter V an examination is made of the political and judicial organization of the

Dominion of Canada and its juridical system is edequately explained. The West Indies are treated in the following chapter, which is followed by an outline of the laws in force in the West African and South Atlantic colonies. In Chapter VIII the authors treat the Commonwealth of Australia, with its Federal system of government and the political and judicial organization of its colonies, and in the subsequent chapter are examined the South African colonies.

And, lastly in Chapter X, the authors examine the exterritorial jurisdiction of Great Britain, which included the British judiciary in the Indian Protected States the judicial powers of the British Consular Courts in China, Corea, (now probably abolished) Weihai-Wei, and those in the Ottoman dominions, including the Egyptian judicial organization, and the Soudan, the Consular jurisdiction in Morocco, Persia, Siam, and some other Asiatic and African countries.

The last part of the work, namely Part III, deals with appeals to the Privy Council from the various British dominions and the Consular Courts, with an explanation of the composition of that high Tribunal, i.e., the Privy Council, of which there is no parallel in any country. The work ends with an excellent table indicating the conditions of appeal to the Privy Council.

CONFLICT OF LAWS (Laws Governing Form of Wills). "La Forme du Testament Privé en Droit International — Les Lois Opposables à la Loi du Lieu de l'Acte," by A. Laine, *Revue de Droit International Privé* (V. iii, p. 833). Arguing at length that the strict application of the rule *locus regit actum* is not in accord with the principles of conflict of laws, and that a will is valid in form if made according to the law of the testator's nationality, of his domicile, or of the tribunal before which it comes.

CONFLICT OF LAWS (Marriage). "The Marriage of English Subjects Abroad," by G. Addison Smith, *The Juridical Review* (V. xix, p. 369). An examination of the English cases on this important branch of conflict of laws, including the recent case of Ogden *v.* Ogden, commented on in the Notes of Recent Cases of the February GREEN BAG.

"Mariage à l'Étranger des Déserteurs et des Insonmis," by Camille Jordan, *Revue de Deroit International Privé* (V. III, p. 905). Continuation of a discussion of the validity of the marriage abroad of deserters from the army and men totally evading required military service. This section is devoted to the treatment in Belgium of such foreigners marrying there and of Belgians, in similar cases, who marry elsewhere. To be continued.

CONSTITUTIONAL LAW. "The Constitutionality of State Legislation Requiring Telegraph Companies to transmit messages promptly and to deliver within certain limits," by George W. Payne, *Central Law Journal* (V. lxvi, p. 90).

CONSTITUTIONAL LAW. "The Constitutionality of Statutes Authorizing subservice of process upon Corporations," by W. A. Coutts, *Central Law Journal* (V. lxvi, p. 109).

CONSTITUTIONAL LAW. "The Eleventh Amendment," by Herbert S. Hadley, *Central Law Journal* (V. lxvi, p. 70).

CONSTITUTIONAL LAW. "The Acquisition of State Land by Federal Authorities," by Ackland Giles, *Commonwealth Law Review* (V. v, p. 49).

CONSTITUTIONAL LAW. "Federal Regulation of Insurance," by Arthur P. Will, *Central Law Journal* (V. lxvi, p. 49).

CONSTITUTIONAL LAW (Initiative and Referendum). "Is a Provision for the Initiative and Referendum Inconsistent with the Constitution of the United States?" by W. A. Coutts, *Michigan Law Review* (V. vi, p. 304).

"We are told to-day that the Constitution of the United States forbids the adoption of the initiative and the referendum, as these involve such purely democratic principles as to be inconsistent with the republican form of government guaranteed by the fourth section of the fourth article of the Federal Constitution. The special interests that are opposed to the initiative tell us that we must find some other cure for the evils at which it aims; that the initiative is a purely democratic principle and, as such, it is forbidden by the fourth section of the fourth article of the Federal Constitution, which guarantees a republican form of government to the states."

The United States Supreme Court has not yet been called on to determine this question; conflicting decisions have been made by three state courts. Mr. Coutts argues with force, that, in the language of the Oregon court, " the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government, or substituted another in its place. The government is still divided into legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people."

" By a ' republican form of government ' the framers of the Constitution meant a government with such forms as would insure a correct expression of the will of the people in the laws of the land; and as Hamilton declared, the guaranty of a ' republican ' form could only operate against changes to be affected by violence."

CONSTITUTIONAL LAW (Taxing Power). " May Congress Levy Money Exactions, Designated ' Taxes,' Solely for the Purpose of Destruction? " by John Barber Waite, *Michigan Law Review* (V. vi, p. 277). Arguing for a negative answer to the question propounded.

CONVEYANCING (England). " The Land Transfer Acts," by Charles Sweet, *The Law Quarterly Review* (V. xxiv, p. 26). A discussion of the present unsatisfactory state of English real property law, proposing the following plan:

" The first thing to simplify the law of real property by abolishing the antiquated and inconvenient doctrines of tenure, seisin and uses. The next thing is to make the law of real property as similar as possible to that of personal property by abolishing all legal estates except two — absolute ownership and terms of years — and making all other estates and interests take effect in equity only. The third requisite is to provide a simple method of conveyance, applicable to all cases without exception, and thus make it impossible for an owner of land to complicate the title to it."

An abstract of an Act of Parliament that would secure these results is submitted.

CRIMINOLOGY. " The Treatment of Criminals, "by Charles J. Guthrie, *The Juridical Review* (V. xix, p. 333). A plea for a system of sentences and of prison management with more emphasis on the reformation of the criminal.

CRIMINAL LAW. " The Right of Private Defence Under the Indian Criminal Law," by " J. P.," *Madras Law Times* (V. iii, p. 1).

EDUCATION. " The Study of Law in India," by N. G. Chandavarkar, *Criminal Law Journal of India* (V. vi, p. 129).

EQUITY (Uses and Trusts). " The Origin of Uses and Trusts," by James Barr Ames, *Harvard Law Review* (V. xxi, p. 261). Written with Dean Ames' customary learning, this article maintains, contrary to the contention of Mr. Holme's essay on " Early English Equity," that the doctrine of uses was the creation of the subpœna, and the embodiment of an ethical standard superior to that of the common law. The second part of the article, describing the origin of trusts, is reprinted from the GREEN BAG (V. iv, p. 81).

EVIDENCE. " The ' Shop-Book ' Rule," Anon. *Bench and Bar* (V. xii, p. 14).

HAGUE CONFERENCE (Summaries and Comments). " The Hague Conference of 1907," by T. E. Holland. *The Law Quarterly Review* (V. xxiv, p. 76), of the several papers on the Hague Conference appearing in the recent law magazines this one has the most available summary for this department.

" The total achievements of the conference, positive and negative, and they are not inconsiderable, may perhaps be provisionally summarized as follows:

" I. Certain proposals, long and persistently urged, have been with more or less finality, respectfully relegated to Clondcuckootown: viz. those for general compulsory arbitration, for proportional disarmament, for the exemption from capture of enemy private property at sea.

" II. A similar fate may be said to have befallen the startling proposal of Great Britain for the abolition of the doctrine of contraband, put forward, as it was, in a form which seemed to cut down the right of visit to the ascertain-

ment of neutral or enemy ownership; as also her attempt to persuade the powers to condemn unreservedly the sinking of a neutral prize.

"III. Honest spade-work, presenting no serious difficulty, has been done for the improvement in details of the three conventions of 1899, relating to the peaceful settlement of disputes; to war on land; and to the application to maritime warfare of the principles of Geneva. Under this heading may also be placed the new convention as to the rights and duties of neutrals in land warfare; the renewal for a limited period of the first of the Hague Declarations of 1899, relating to the use of balloons; and the accession of practically all the powers, including for the first time Great Britain, to this, as well as to the second and third of those declarations, dealing with expanding bullets and with asphyxiating gases, respectively.

"IV. Useful new matter, coupled sometimes with a codification of customary rules, is contained in conventions as to: (1) the treatment of defaulting governments (but the 'Drago doctrine' is not fully accepted); (2) the declaration of war (no provision is, however made for an interval to precede the first blow); (3) bombardment of undefended coast towns (a condemnation of the naval manœuvres of 1888); (4) certain restrictions, already more or less customary, as to captures of ships and treatment of their crews; (5) vague provisions of the same character, as to indulgence to enemy ships at the outbreak of war; (6) neutral rights and duties in a maritime war (a codification of certain widely accepted rules, much weakened by exceptions in favour of divergent national practice).

"V. Agreements are entered into as to (1) the transformation of private vessels into ships of war, and (2) submarine mines; but their utility is much impaired by the refusal of some powers to consent to certain restrictions upon their freedom of action in these matters.

"VI. A convention for the establishment of a second Hague Tribunal was drafted, but not signed, in consequence of disagreement among the powers as to the appointment of the judges of the court. It is, however, recommended for adoption, if, and when, that disagreement shall have ceased.

"VII. An elaborate convention, in fifty-seven articles, for the establishment of an International Court of Appeal in Prize cases — the credit or discredit of which must be shared between Great Britain and Germany — was voted by a majority of thirty-seven to one, with six abstentions, and some reservations, and has been claimed as the most remarkable result of the conference. The claim might be sustained were there any prospect that the convention will be ratified. As it stands, it contains within itself the seeds of mortality, in the article which provides that, where international law is silent, the court is to decide 'in accordance with the general principles of justice and equity.' On the objectionable character of such a provision, as at once ambiguous, and empowering a court, in which foreigners would be in a majority of eight to one, to adopt the continental rather than the British view on unsettled questions of prize law, the present writer does not here propose to add anything to what he has written elsewhere, both before and after the meeting of the conference.

"VIII. The delegates finally recommend that the second peace conference should be followed, at an interval of seven years or so, by a third. They insist upon the need of a carefully prepared programme of work for the new conference; and they suggest, as well they may, in view of their action in the matter of an International Prize Court, that a prominent place in that programme should be given to a codification of the laws and customs of war at sea."

"The Second Peace Conference, II," by A. H. Charteris, *The Juridical Review* (V. xix, p. 347). Conclusion of an article, the first installment of which was noticed in the January GREEN BAG.

"The Work of the Second Hague Conference," by W. F. Dodd, *Michigan Law Review* (V. vi, p. 294).

"The Development of International Law by the Second Hague Conference," by Edward G. Elliott, *Columbia Law Review* (V. viii, p. 96).

"Latin America at the Hague Conference," by A. G. de Lapradelle and Ellery C. Stowell, *Yale Law Journal* (V. xvii, p. 270).

HISTORY. "Research into Laws, Caste, and Customs," by "S," *Bombay Law Reporter* (V. ix, p. 337).

HISTORY. "James Wilson and the So-called Yazoo Frauds," by M. C. Klingelsmith, *University of Pennsylvania Law Review and American Law Register* (V. lvi, p. 1). A reply to an anonymous article in the *Independent* which declared James Wilson a "corruptionist and bribe-giver, the leader of the land sharks of 1795." The author describes this statement as a slander unsupported by the slightest evidence that Mr. Wilson was anything more than a mere stockholder in the Georgia Land Company, one of several organized to develop the western lands after the formation of the federal government. An examination of the history of these companies, which occasioned a great political struggle in Georgia, shows, to the author's satisfaction, that there is no truth in the charge that the Georgia Legislature of 1795 was bribed to make a certain contract for the sale of the "western lands."

HISTORY (England). "The Trial of Peers," by L. W. Vernon Harcourt, *The Law Quarterly Review* (V. xxiv, p. 43). A reply to a recent article by L. Owen Pike, criticising Mr. Vernon Harcourt's assertion that a report in the Year Book was forged to create a precedent for the trial of the Earl of Warwick.

HISTORY PENNSYLVANIA COURTS. "The Courts of Pennsylvania in the Eighteenth Century Prior to the Revolution," by William H. Lloyd, Jr., *University of Pennsylvania Law review and American Law Register* (V. lvi, p. 1).

INTERNATIONAL LAW (see Hague Conference).

INTERNATIONAL LAW. "Contraband of War," by the Right Hon. Lord Justice Kennedy, *The Law Quarterly Review* (V. xxiv, p. 59). A paper read at the 1907 meeting of the International Law Association.

JURISPRUDENCE. "The Need of Law Reform in China," by Charles S. Lobingier, February *Review of Reviews* (V. xxxvii, p. 218). A brief and highly interesting account of a contemporary legal development of far reaching effect.

MUNICIPAL CORPORATIONS. "Some Legal aspects of the Chicago Charter Act of 1907," by Ernst Freund, *Illinois Law Review* (V. ii, p. 427).

PRACTICE. "The Law of Contempt in India," by Sarat Chandra Lahiri, *Madras Law Journal* (V. xvii, p. 388).

PRACTICE. "The Examination of Witnesses," by Leo B. Cussen, *Commonwealth Law Review* (V. v, p. 60).

PRACTICE. "The Frequency of Perjury," by William A. Purrington, *Columbia Law Review* (V. viii, p. 67). Arguing for greater severity by Bench and Bar in punishing this crime.

PROPERTY (England). "Property in Licenses," by Ernest E. Williams, *The Law Quarterly Review* (V. xxiv, p. 49).

PROPERTY (see Conveyancing).

SALES. "The Law of Sales in the United States," by Richard Brown, *Columbia Law Review* (V. viii, p. 82). The author, a Scottish solicitor, makes interesting comparison between the English Sale of Goods Act and Professor Williston's Draft Sales Act which Commissioners on Uniform State Laws have recommended for adoption by the legislatures.

TORTS. "The Torts of Conspiracy," by Francis M. Burdick, *Columbia Law Review* (V. viii, p. 117). Briefly reviewing some recent additions to the cases and literature bearing on the controversy whether conspiracy is a substantive cause of tort action.

TORTS. "Contributory Negligence," by Francis H. Bohlen, *Harvard Law Review* (V. xxi, p. 233). A careful examination of the subject ends as follows:

"To sum up, it would appear that the defense of contributory negligence is not a mere application to the particular facts upon which a case arises of the rules governing proximity of causation, or of the right of indemnity or contribution between wrong doers, or the voluntary assumption of a known risk, but is itself a distinct and separate exhibition of the individualism of the common law, which exhibits itself in other fields in the doctrines of consent and voluntary assumption of risk. It debars from recovery, even from an admittedly negligent defendant, one whose own social misconduct has been a concurring proximate cause of his harm. In many jurisdictions there has persisted, in this one particular connection, that conception of legal as dis-

tinguished from actual cause which prevailed when the earliest cases on contributory negligence were decided, and which has become obsolete in other fields, which regarded the last actor, him whose conduct supplied the final impulse, as the sole responsible cause, and this whether the plaintiff's peril was actually known to the defendant or could have been discovered had he exercised normal care. Nor is it strange that in this one particular class of case this archaic idea continues. The very tendency toward a fuller and more complete measure of responsibility on the part of those guilty of social misconduct which led to the repudiation of the rule in Vicars *v.* Wilcocks, where it restricted liability, naturally tended to retain it where its abandonment would have restricted rather than enlarged the liability of a negligent defendant. Then, too, it was difficult in practice to distinguish between the failure to take care where the plaintiff's danger and his inability to help himself was known to the defendant, and the case where the defendant, had he been on the alert, as he should have been, could have discovered it. Since, admittedly, the defendant was liable in the one case, it was hard to deny the plaintiff relief in the other. And it is submitted that the doctrine of last clear chance goes no further than this. Where the defendant, had he discovered the plaintiff's peril, would be powerless to avert it, even though his inability to save the plaintiff is due to some prior misconduct whereby he has put it out of his power to do so, he is generally held not to be liable for the ensuing harm, nor will it matter which of the two antecedent misconducts, the plaintiff's or the defendant's, was the last in point of time, if neither, after the danger is or should be discovered, is capable of averting it."

WILLS. "Do Legacies Bear Interest in Illinois," by Albert M. Kales, *Illinois Law Review* (V. ii, p. 440).

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. (Debts Discharged.) Mass. — The question whether an assignment of wages to be earned in an existing employment, given before bankruptcy without fraud and upon sufficient consideration to secure a valid subsisting debt and duly recorded, can be enforced after discharge in bankruptcy of the assignor as to wages earned in the course of the original employment, by a creditor who has not proved his debt in bankruptcy, was passed upon by the Supreme Court of Massachusetts in Citizens' Loan Association *v.* Boston & Maine Railroad, 82 N. E. Rep., 696.

The court held that a debt is not extinguished by a discharge in bankruptcy, but only the remedy on the debt is thereby barred, and that an assignment of future earnings which may accrue under an existing employment is valid, and the assignee obtains thereby a present right, perfect in itself, requiring no further action on his part, which may be enforced either at law or in equity, and being a lien preserved by Bankruptcy Act, July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450] is unaffected by the discharge in bankruptcy.

The bankrupt having received a discharge was no longer personally liable and the question in the case relates solely to marshalling his assets, the determination of the validity of the liens on his estate and the method of enforcing them. We notice that the trustee representing the creditors did not appeal from the order of the referee allowing the property exempted and therefore no question arises as to allowing the bankrupt to hold the property thus allowed him. This referee followed § 6 of the Act as interpreted by the Supreme Court in Holden v. Stratton, 198 U. S. 202, giving full effect to the state exemption law. Under the Act of 1867 the questions raised in this case would have been decided by the Bankrupt Court, but under the present Act of 1898, Congress wisely provided that the State Court should have equal jurisdiction with the Bankrupt Court although the latter may have possession of the assets. Questions relating to titles to real estate belong peculiarly to local courts and their decisions, rendered by a full Bench, will command greater weight and give better satisfaction than those of a single judge of a United States District Court, however able and strong that judge may be. The courts in this case have given a construction to the bankrupt law, based on well recognized authorities, and find no difficulty in the fact that the note in suit was not due at the time of bringing action. They follow an unbroken line of authorities beginning with in re Garlington, 115 Fed. Rep. 999, under the present Act and reaching back to the same rule under the Act of 1867. They further, add with force and logic, that the plaintiffs have by their voluntary action [the going into bankruptcy] "estopped yourselves from having the foreclosure postponed until the debt you owe me matures by the terms of the contract for the purpose of protecting you in your equity of redemption, and have subordinated it to the right the law gives me of being admitted as a creditor of your estate for the balance of my debt, after deducting what the property brings at foreclosure sale, which must necessarily be made during the pendency of the bankruptcy proceedings on your estate."

Charles Hamlin.
University of Maine,
School of Law.

This decision is in accord with an Illinois decision on the same subject. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564. That decision squarely rests on the ground that the assignee had a lien on the future wages, which, under §67 (d) of the Bankruptcy Act, remained unaffected by the discharge. The preponderance of authority, however, is to the effect that the discharge operates to release such an assignment. In re West 1–8 Fed. 205; In re Horne Discount Co., 147 Fed. 538; Leitch v. Northern Pacific Ry. Co., 95 Minn. 35, 103 N. W. 704. A well written note discussing this conflict of authorities and disapproving of the Massachusetts decision is to be found in a recent number of the Harvard Law Review (21 H. L. R. 275).

Lee M. Friedman.

CARRIERS. (Stopping at Destination of Passenger.) **N. J. Sup. Ct.** — In Runyon *v.* Pennsylvania Railroad Company, 68 Atl. Rep., 107, it appeared that Runyon went to the ticket office of the company at its Broad Street Station in Philadelphia and inquired of the agent at what time he could get the next train through to Lower Jamesburg, and was informed that it left at 3.30. Receiving this information, he purchased a ticket for that station and after waiting for about ten minutes went to the gate and requested the gateman to direct him to the 3.30 train, at the same time showing him his ticket and informing him that it was the train for Lower Jamesburg which he wanted. The gateman pointed out the train to him and he took his seat therein and proceeded on his journey. Before reaching the city of Trenton, he was notified by the conductor of the train that it did not stop at Lower Jamesburg and that he would have to get off at Trenton. This he refused to do and when the train reached Trenton he was removed from it against his will by the conductor and another employee of the company. The contention of the plaintiff was that the purchase of the ticket, together with the representation made by the agent, constituted a contract, obliging the company to stop its train at his destination. The court denied this contention, holding that neither the agent's misrepresentation or the purchase of the ticket constituted any contract obliging the company to stop, but that it became plaintiff's duty when informed that the train did not stop at such station either to tender such fare as would entitle him to ride to some stopping point beyond or comply with the conductor's request.

CARRIERS. (Tickets.) **U. S. Sup. Ct.** — While the railroads have been stubbornly fighting the enforcement of recent rate legislation in several states, they have also been seeking the protection of the courts against scalpers dealing in non-transferable excursion tickets, and have apparently been victorious.

In the case of Bitterman *v.* Louisville & N. Ry. Company, 28 Sup. Ct. Rep., 91, the United States Supreme Court considers the question of the right to injunction. The Circuit Court of Appeals had directed the Circuit Court to enter a decree restraining defendant scalpers from dealing in certain classes of tickets previously issued and from carrying on the business of dealing in such tickets in the future. Defendants then went to the Supreme Court on writ of certiorari. It was contended that such a decree virtually constituted an usurpation of legislative power, but it was upheld by the Supreme Court which said that 'every injunction in the nature of things, contemplates the enforcement, as against the party enjoined, of a rule of conduct for the future as to the wrong to which the injunction relates."

COUNTIES. (Subscription for Entertainment of Political Convention.) **Ky. Ct. of App.** — When the city of Louisville recently tried to secure the honor of being the meeting place of the Democratic National Convention for 1908, the fiscal court voted an appropriation of ten thousand dollars to be paid to the treasurer of the citizens' committee having the matter in charge. Suit was instituted by the county attorney in the name of the county to restrain carrying the order into effect. Authority to make the expenditure was claimed under a provision of the statute giving power "to appropriate county funds to make provision to secure immigration into the county and advertise the resources of the county." The Supreme Court could not be persuaded to look on the statute in that light but said that "Camp meetings will draw, sometimes, a great many people to the community, and so will one of the large shows that travel about the country. If the fiscal court, under the power to advertise the resources of the county, may make an appropriation to secure the holding of such things in the county, then it is hard to say what the fiscal court may not do under the provisions of this act." The title of the case is Jefferson County *v.* Peter. It is published in 105 S. W. Rep., 887.

CONSTITUTIONAL LAW. (Citizenship — Action for Death.) **U. S. Sup. Ct.** — The case of Chambers *v.* Baltimore & Ohio Ry. Company, 28 Sup. Ct. Rep., 34, upholding the Ohio statute relative to wrongful death, is a very important decision on the construction of the constitutional guaranty of privileges and immunities of citizens of the different states. The statute provides for the enforcement of a right of action "whenever the death of a citizen of this state has been or may be caused by a wrongful act, negligence, or default in another state . . . for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state."

Mrs. Chambers, a citizen of Pennsylvania, sued in the Ohio court to recover for the death in the former state, of her husband, a citizen thereof, setting up her right of action under the Pennsylvania statute, alleging the right to enforce it under the law of Ohio and claiming that if construed literally so as to apply only in case deceased was a citizen of Ohio the statute of that state would be invalid as denying equal privileges and immunities to citizens of other states. The court held that as the restriction in regard to citizenship related to deceased and not to the parties suing

for his death, there was no violation of the constitutional provision and declared the law valid. Justices Harlan, White and McKenna dissented.

CONSTITUTIONAL LAW. (Taxation — Assessment without Notice.) U. S. Sup. Ct. — The tax law of Georgia provides for assessment by the comptroller general, from the best information obtainable, of property of which no return has been made and that such assessment shall be conclusive. There is also a provision for the issue of execution for the enforcement of taxes so assessed.

The validity of the statute was attacked in Central of Georgia Ry. Company *v.* Wright, 28 Sup. Ct. Rep., 47, on the ground that the assessment and enforcement of a tax being judicial in nature and no notice being required to be given to one failing to make return, it would deny due process of law to one failing to list property under an honest belief that it was not taxable. This contention was held to be well founded and the law declared invalid.

CRIMINAL LAW. (Larceny.) Ga. Ct. App. — That a party may be convicted of larceny for the stealing of his own property was the holding of the Court of Appeals of Georgia in Ayers *v.* State, 59 S. E. Rep., 924. The property had been levied upon by a constable under an attachment and the defendant, after lulling the constable into a sense of security by promising to replevy the property, had it moved across the state line into Alabama. The court held that, although the property was that of the defendant, the title to the same in the constable was sufficient to sustain a conviction of larceny for the fraudulent taking and carrying away by the defendant.

EQUITY. (Discovery — Exhumation of Corpse.) U. S. C. C. Kan. — In Mutual Life Insurance Company of New York *v.* Griesa *et al*, 156 Fed., 398, Judge McPherson holds that where an action at law is pending to recover on a life insurance policy shown to have been obtained under circumstances indicating fraud, and one of the defenses in support of which there is considerable evidence, is that the insured committed suicide by poisoning, which would avoid the policy, a court of equity has power in aid of such defense to order the body to be exhumed for examination, although the action to recover on the policy was brought by the executor of the insured, and his widow, who had the right to control the body, was not a party thereto. The court states that Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], provides only for requiring the production of books or writings in the possession of the party and does not authorize a federal court in an action at law in general to order the production or inspection of inanimate objects, and that the court has no power to order the exhumation of a dead body in an action at law to which the widow of the deceased who has the right to control the body is not a party, but that the right of discovery is not obsolete and may be directed in aid of an action then pending or immediately contemplated, so that where an action at law to recover on an insurance policy under the terms of the policy could not be long delayed and in fact was soon brought, a bill of discovery was maintainable in equity in aid of the law action.

INSURANCE. (Notice by Insured.) N. Y. Ct. of App. — A boy was injured by being knocked from a car by a truck driven by a servant of a Transfer Company, and the liability insurance company refused to defend the action brought for the injury sustained, upon the ground that the insured, a joint stock association, had not complied with the provisions of the policy requiring it to give immediate notice of the accident or claim and a judgment was obtained against the Transfer Company. In Woolverton *v.* Fidelity & Casualty Company of New York, 82 N. E. Rep., 745, an action brought by the president of the Transfer Company against the Insurance Company to recover the amount of the judgment and its expenses, the court held that the Transfer Company was not excused from giving notice of the accident merely because none of its officers or directors or any one who had the duty of adjusting differences between it and the Insurance Company, had knowledge thereof, but that while the knowledge of the driver who caused the accident was not imputable to the Transfer Company, yet if he reported it to one whose duty it was in the ordinary and natural conduct of the business to receive reports of accidents and transmit them to the general superintendent, and he failed to transmit such knowledge, the Transfer Company was chargeable for his delay and neglect.

INSURANCE. (Valued Policy Insuring Special Interest.) Wash. — A statute of Washington provides that as between insured and insurer the amount written in a policy covering realty shall be conclusive evidence of the value of the insured property if it be totally destroyed. The question arose in Bright *v.* Hanover Fire Insurance Company, 92 Pac. Rep., 779, whether this provision was applicable if insured only had a special interest in the property. An agreement for exchange of property had been entered into between the owner of the property and insured and deeds were placed in escrow to await clearing up title. While things remained in this situation insured went into possession and placed insurance

on the premises. They were subsequently totally destroyed by fire before delivery of the deeds. The court held that while the loss fell on the grantor so far as the general property right was concerned, the valued policy law was applicable to insured's special right of property in the realty and allowed full recovery therefor.

The wording of the Washington valued-policy law is considerably broader than is indicated above. If it provided merely that the amount written in the policy be conclusive evidence of the value of the destroyed property, then the court might well have considered the question of the assured's loss and the damages actually suffered by him, for it might well be, as was urged by the insurance company, that his loss and damage was very much less than the total value of the destroyed property. But the statute expressly provides that "the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of the loss and measure of damages when destroyed." The same wording is found in the valued-policy laws of Delaware, Kansas, Nebraska and Wisconsin, and a number of other states have somewhat similar provisions. Under laws so worded the court's conclusion seems inevitable.

F. T. C.

MARINE INSURANCE. (Deviation from Voyage.) U. S. Dist. Ct. W. D. Wash. — On account of bad weather, a vessel passed one of its discharging ports and went to the last one where a portion of the cargo was unloaded, and returned to the intermediate port. While going back from there to the final port of discharge, she was wrecked. The court held that this was such a deviation from the voyage that the insurers were released. — Alaska Banking & Safe Deposit Company *v.* Maritime Insurance Company, 156 Fed., 711.

MORTGAGES. (Tender after Election to Mature Entire Debt.) Miss. — Will the tender of the installment and interest actually due under a trust deed be of any avail after the creditor has exercised his right to declare the entire debt due but before sale of the property? This question is discussed in Caldwell *v.* Kimbrough, 45 So. Rep., 7, and answered in the negative. The court also passes on the necessity of the creditor declaring his election at the time of default and promptly selling the property and holds that under the facts of the case the debtor was estopped to set up any claim of lack of diligence.

MUNICIPAL CORPORATIONS. (Enactment of Ordinances.) N. J. — The validity of an ordinance passed by the Board of Aldermen of a municipality was the question for determination in Paterson & Ramapo Railroad Company *v.* Mayor, etc., of the City of Paterson, 68 Atl. Rep., 76. By the terms of the city charter, the membership of the Board of Aldermen, which was the governing board, changed on January first of each year, one-half of the members going out by expiration of term and newly elected members taking their places. It also provided that every ordinance must be read three times before final passage and not more than twice at any one meeting and must be passed by a majority of all the members. It appeared that the ordinance in question was read twice and ordered to the third reading before the board organized January 1, 1904, but was not finally passed by the board until after its reorganization on January 1, 1904, a new election having intervened involving a change in membership. The question arose as to whether or not it was the legislative intent that the board should be continuous in character for strictly legislative purposes so that the newly organized board could take up, as in this case, an unfinished act of legislation of the preceding board and finally adopt it. The court held that the restrictive words requiring each ordinance to be read three times before final passage would not permit of such an action, but that the ordinance fell with the expiration of the board of 1903 as then organized and that its attempted enactment later by the succeeding board was invalid.

PRACTICE. (New Trial.) Okla. Sup. Ct. — A novel state of affairs is shown in Butts *v.* Anderson, 91 Pac. Rep., 907. Plaintiff recovered judgment in the lower court and time was given defendant to perfect an appeal, but before this was done, the court stenographer died and no one could be found to transcribe his shorthand notes. These facts were then set up in a motion for new trial which was granted by the trial court, and plaintiff appealed. The Supreme Court reversed the decision; holding that none of the statutory grounds of new trial were shown and that there was nothing to indicate that the judgment for plaintiff was erroneous.

PRACTICE. (New Trial.) Vt. — The Supreme Court of Vermont, in State *v.* Sargood, 68 Atl. Rep., 51, decided that the testimony of a wife, divorced after her husband's conviction, was not newly discovered evidence warranting the granting of a new trial. Sargood, a married man, was tried and convicted of attempting to poison certain persons. His wife was not allowed to testify on the trial. Subsequent to the conviction the wife secured a divorce, thereby becoming a competent witness for her former husband. The defense then moved for a new

trial on the ground of newly discovered evidence consisting of the affidavit of the accused's former wife. The court held that the evidence was not newly discovered in the proper sense of the term, but merely evidence which the accused knew of but which was not available at the time of his trial, and hence did not constitute a sufficient ground for the granting of a new trial.

PROPERTY. (Tenancy in Common.) **Miss.** — In Beaman *v.* Beaman, 44 So. Rep., 987, it appeared that Alexander Beaman died intestate, leaving certain real estate incumbered by a deed of trust, and that plaintiffs and one of defendants were his children and heirs claiming as tenants in common. The property was sold under the trust deed and purchased by the wife of the defendant cotenant. Plaintiffs sued to have the deed set aside. The court held that the rule preventing a co-tenant from purchasing an outstanding title and setting it up against the other tenants also applied to a purchase by a cotenant's wife.

RECEIVERS. (Insolvency Due to Acts of Applicant.) **N. J. Ct. of Ch.** — An application for the appointment of a receiver of a corporation because of its insolvency was opposed on the ground that the misfortunes of the corporation were due to the wrongful conduct of the applicant. The question as to whether proof of this claim was sufficient to defeat the application was considered by the Court of Chancery of New Jersey in McMullin *v.* McArthur Electric Manufacturing Company, 68 Atl. Rep., 97. The court held that the application could not be so defeated; that any creditor or stockholder, however unworthy, had a statutory right to apply for a receiver, the application not being treated as one for his individual benefit. They stated further that where such an application is made the court must ascertain whether insolvency exists and whether a receivership is necessary, and whether the corporation will be able to resume its business with safety to the public and advantage to its stockholders, and only where the evidence justifies the belief that the creditors will be paid and the business of the corporation resumed if a receiver is not appointed, a receiver will not be appointed.

REPLEVIN. (Depreciation in Value of Property Replevied.) **N. Y. Sup. Ct.** — A rather novel question arose in the case of Pabst Brewing Company *v.* Rapid Safety Filter Company, 107 N. Y. Supp., 163. Plaintiff sought to replevin an automobile from defendant and secured possession, which it retained till time of trial. Judgment was rendered for defendant for possession, or, in case of failure to secure possession, for the sum of $1000. Plaintiff thereafter tendered possession and demanded satisfaction of judgment which was refused by defendant on the ground that the property had seriously depreciated in value by removal of parts and otherwise while in plaintiff's possession. There was no dispute but what it was in the same condition when tendered as at the time of trial and the court said that defendant's judgment being for return of the property should be considered as satisfied when that was done.

TORT. (Conversion — Stock.) **Tex. Sup. Ct.** — A peculiar question as to the conversion of a party's interest in a corporation, arose in San Antonio Irrigation Company *v.* Deutschman, 105 S. W. Rep., 486. It appeared that a franchise for the disposition of city sewage was granted to "R. and S. and their associates" in which plaintiff was to have a one-third interest as payment for services rendered in procuring the franchise. Subsequently, the owners formed a corporation and R. and S. transferred the franchise to it, plaintiff agreeing to take one-fourth of the stock on credit. Before the transfer was made, however, R. and S. refused to grant the stock to plaintiff unless he paid one-half the price therefor at once. Plaintiff contended that this breach of the agreement deprived him of his interest in the corporation and constituted a conversion of it. The court held that depriving plaintiff of the right to take stock in the corporation with the privilege to pay for it in a reasonable time, as had been agreed, did not constitute a conversion of his interest.

THE LIGHTER SIDE

A Unique Answer to a Bill in Equity.

Two learned attorneys and counselors of law in our town whom we shall designate as Isaac Ketchum and Uriah Cheatum and who were, and are doing business under the firm name and style of I. Ketchum and U. Cheatum, had occasion on behalf of the executors of the last will and testament of one Zebulon Heep to file a petition asking permission to sell certain real estate left by the deceased in order to carry out certain bequests and aid certain so-called charities mentioned in the will.

As the bulk of the property devised consisted of real estate and by the terms of the will was to be used in carrying out the charitable purposes above referred to, the Attorneys I. Ketchum & U. Cheatum conceived the idea that the Attorney General of the State was a necessary party. So the Attorney General was made a party. The other defendants being Mary Ann Heep, the wife of the deceased, who had been adjudged a lunatic, Neriah Todd, her conservator and *The African Methodist Church*, one of the beneficiaries under the will.

The Last Will and Testament was set out in full, also the deed by which the said Zebulon Heep conveyed the real estate in question to the trustees named in the will, for the purposes therein mentioned.

The other allegations in the petition will sufficiently appear from the answer of the Attorney General which we set out in full, as follows to wit:

After Title { Answer of Thomas S. Hickson, as Attorney General, to the Petition filed herein.

Now comes Thomas S. Hickson, as the Attorney General of the State of ———, one of the defendants herein, and answering the petition of plaintiffs filed herein on behalf of the State of ——— alleges:

I.

He admits that the instrument set out in said petition is the last will and testament of the deceased, Zebulon Heep, mentioned therein.

He admits the execution of the deed set out in said petition of the said Zebulon Heep in his life time conveying the real estate mentioned to the trustees therein named.

He admits that Mary Ann Heep, widow of the said Zebulon Heep, has been, since the death of the said Zebulon, adjudged by the County Court of Greene County, to be an insane person.

II.

As to the other matters and things set out in said complaint this defendant says that he has not and can not obtain sufficient knowledge and information upon which to base a belief.

Further answering said petition this defendant says that by the provisions of the last will and testament of the said Zebulon Heep, as set out in the petition filed herein, the estate left by him should be by the trustees named therein devoted to certain so-called charities as appears from the following extract from said last will and testament, to wit.

"The net proceeds of my estate, after paying taxes, insurance and necessary expenses, and for repairs and improvements, shall be used and applied by my said trustees and their successors, as in their judgment may be best, to most fully carry out my wishes in their behalf, and may be used or applied at such time or times as they may deem best as follows:

1. To contribute to the deserving poor, those most worthy of the City of ———.

2. To help those who have stumbled or fallen to rise again.

3. To help those to higher or more useful lives who are unable to help themselves.

4. To educate natives of foreign countries for teachers and missionaries in their own lands.

5. To raise the standard of life by giving yearly (or as often as may be deemed wise and best by my trustees) a gold medal on which shall be engraved the words: "Blessed

are the pure in heart for they shall see God," to the young man and woman who may be chosen as the best living models of useful and pure lives.

6. To keep a record of all person or persons who have ever been or may be members of *The African Methodist Church* and of *The African Methodist Episcopal Church*, its successor, that it may be known how many of these Churches will participate in the great re-union beyond the grave.

7. To contribute to and help in the support or repairs (or rebuilding if it should ever become necessary) of the said *African Methodist Church*, as in the judgment of a majority of my trustees may be thought best and needed."

The Attorney General answering says that in the benefactions mentioned in the sixth and seventh paragraphs above set out for the benefit of the *African Methodist Church*, neither the people of the State of ——— nor Thomas S. Hickson, Attorney General, their representative, has any interest.

That by the seventh paragraph it is left to the majority of the trustees to decide what repairs shall be made to said Church.

That by the sixth paragraph it is left uncertain who is to determine " How many from these churches will participate in the great re-union beyond the grave," but that neither the people of the State of ———, as such, nor their representative, the Attorney General, has any interest in the carrying out of said bequest.

As to the fourth paragraph, above set out, this defendant says that he is not interested as a representative of the State of ——— as Attorney General in how many natives of foreign countries shall be educated for teachers and missionaries in their own countries.

The Attorney General further answering says that in his representative capacity he *is* interested in carrying out the first, second, third and fifth paragraphs of said last will and testament above set forth, but that by the provisions of said will the testator has left entirely and exclusively to the trustees mentioned in said will how these provisions shall be carried out.

As to the first they, the trustees, must select the worthy poor of the City of ——— and say how much shall be contributed to each.

As to the second they, the trustees must determine who has fallen and say how much must be contributed to each to enable him or her to rise again.

As to the third they, the trustees, must determine what persons are unable to help themselves and how and to what extent they shall help each one of them.

As to the fifth they, the trustees, must choose from the young men and women the one who is the best living model of a pure and useful life and to him or her give the gold medal with the words " Blessed are the Pure in Heart, for they Shall see God " engraved thereon, and therefore this defendant alleges that the testator has provided in this his last will and testament who shall be the donees of his bounty and who shall distribute the same and that neither the State, nor he, as their legal representative, has any authority in the premises.

This defendant further avers, that were it otherwise and were he authorized by law to aid in the dispensing of this bounty in his representative capacity, the duties of the office of Attorney General are so onerous and exacting that neither he nor any successor he may have could find the time or be competent to select the most deserving from the poor of the City, from the fallen, from the helpless and from the pure.

Further answering the Plaintiff's petition this defendant says that said last will and testament of the said Zebulon Heep contains the following clause, to wit:

" Second, If my beloved wife, Mary Ann Heep, does not renounce the provisions of this, my last will and testament, but lets the same stand and accepts her rights hereunder, as I desire she *shall*, then she shall have a life estate or interest in my estate, to be paid by my trustees before any moneys whatever shall be given to any of the purposes hereinbefore specified. If she so accepts, my said trustees and their successors shall then give her a liberal support out of my estate during her life time, making her life as comfortable as it possibly can be made, with reference to her station and condition in

life, without any care or trouble on her part. to look after the same. She shall, however, make known in writing from time to time to such trustees what she desires or needs for her comfort."

And it is alleged elsewhere in said complaint:

"That at the time of the death of the said Zebulon Heep and for many years thereafter the said Mary Ann Heep was sane and that while she was sane and in her right mind she accepted the provisions of said last will and testament and declined to take any interest in the estate of her former husband, the said Zebulon Heep, as she might have done under the laws of the State of ———, but elected to take wholly and in pursuance of the provisions of said last will and testament."

Whether or not the allegations above set forth are true this defendant has not and can not obtain sufficient knowledge and information upon which to base a belief.

If the proof in this case should establish the truth of the said allegations last set forth herein, then and in that event, the said Mary Ann Heep widow of the deceased, having since become insane, this defendant the Attorney General, in his representative capacity begs leave to suggest to this Honorable Court that the Conservator of the said Mary Ann Heep, lunatic, be empowered and instructed to ascertain and make known in his answer filed herein and in writing to said trustees what amount of money will be necessary to supply the said Mary Ann Heep with the best medical attendance, the best nurses, and to supply all things necessary for her needs and comforts during her life.

Further answering this defendant says that he has not and can not obtain sufficient knowledge and information concerning the facts alleged herein to say whether the sale of the real estate mentioned herein at the price and on the terms named therein would be for the best interests of the estate or not but in the event that the proofs on the trial satisfy the Court that the best interests of the estate demand that he authorize said sale, then and in that event the Attorney General in the interests of the State of ———, so that the said Mary Ann Heep shall not become a pensioner upon the bounty of the State and a burden to the State, and in the interests of humanity, demands, that by order of Court the said trustees be required and commanded as the second clause of said will provides, 'before any money whatever shall be given to any of the purposes hereinbefore specified' to first, provide out of the moneys received from said sale for the health, comfort, support, and maintenance of the invalid widow, Mary Ann Heep, as heretofore suggested, or in some other way as may seem equitable to the Court, and then and *afterwards* they be permitted to Assist the worthy poor — to raise the fallen — to help the helpless — to educate the savage heathen of foreign countries as missionaries — to distribute to the best living models of useful and pure lives gold medals engraved with the words "Blessed are the Pure in Heart, for they shall see God" — and keep a record of the church members of the *African Methodist Church*, so that it may be known how many will partake of the joys and participate in the great re-union beyond the grave — and build churches and do such other things as will best, in their judgment carry out the wishes of the testator.

This defendant, the Attorney General therefore alleges that by reason of the premises, the State is in no sense a necessary party, that the only interest the State has in this action is in Mary Ann Heep in "making her life as comfortable as it possibly can be made with reference to her station and condition in life," and that the said conservator of said lunatic, is fully able under the direction of the court to protect her interests.

Wherefore, having fully answered he prays to go hence without day and have and recover his costs herein expended.

THOMAS S. HICKSON,
Attorney General."

Duly verified.

It is needless to inform the reader that the Court held that the charities set forth were so impracticable and indefinable as to preclude the possibility of the State being able to aid in carrying them out and so granted the prayer of the Attorney General.

GEO. D. TALBOT.

DENVER, COL.

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THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

S. R. WRIGHTINGTON: Editor
WALTER F. WYMAN: Manager

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Our Contributors.

HENRY M. HOYT is a native of Wilkesbarre, Pa., and a graduate of Yale. He received his law degree from the University of Pennsylvania in 1881, and began practice in Pittsburgh. For a number of years he was largely engaged in banking, but in 1893 resumed practice. In 1897 he became Assistant Attorney General of the United States, and upon the retirement of Solicitor General Richards he was appointed his successor. His long acquaintance with Senator Knox, and his experience in the Department of Justice, both during and since the important period which Mr. Knox instituted, makes his article of especial value.

ROBERT C. SMITH, K. C., is the head of the firm of Smith, Markey & Skinner, Advocates, of Montreal, Can., and his delightful addresses before several of our bar associations in recent years have made his name familiar to lawyers throughout the country. We are glad of an opportunity to give our readers an example of his eloquence, which has usually been presented informally without an opportunity to preserve it.

MR. BEDWELL is the Assistant Librarian of the Library of the Middle Temple, and is commended by students as exceptionally endowed for historical research. He has been a frequent and welcome contributor to the best English monthlies and quarterlies.

PAUL EDGAR LESH is a lawer in active practice in Washington, where he is associated with Messrs. Nathaniel and Clarence R. Wilson. He is in the atmosphere of agitation for revision of the Sherman Law; of the decisions under which he has made an especial study.

We regret that the modesty of the author of our Scotch verses prevents us from disclosing to our readers the name and record of the Iowa Justice who consented to their publication only upon condition of anonymity.

After a long retirement Squire Attom has again begun to hand down decisions through the editorship of Mr. Adams, formerly of Davenport, Iowa, but more recently of Indianapolis, Ind.

Philander C. Knox

The Green Bag

Vol. XX. No. 4 BOSTON April, 1908

THE LEGAL CAREER OF SENATOR KNOX

By Henry M. Hoyt

Philander Chase Knox brought to the practice of his profession, and thus ultimately to the public career which was to be the evolution of the professional career, a remarkable combination of qualities. His inheritances were of the best, — plain, strong American; that is to say, Scotch and Scotch-Irish, filtered through the generations who were yeomen and pioneers in the Cumberland Valley and along the southern tier of Pennsylvania, gradually moving on to her western counties on the Monongahela.

His father was an officer of a small country bank, of modest means and large family, faithful to all his trusts in business and at home, one of that type of country banker whose immovable integrity and fairness make him the trustee and arbitrator of an entire community. Such superior men, engaged in moderate transactions and performing their work deliberately and calmly, in contrast with the volume and hurry of present affairs, recalls Saint Gregory's fine saying, — "A little thing is a little thing, but faithfulness in little things is a very great thing."

Like his father, Senator Knox is composed and deliberate, orderly, keen, just and sensible. His mother was the beloved guide and friend of her many children, a real helpmate in a family where thrift and economy had to be learned and practiced. From her he derives his generosity and tolerance, a certain wise moderation, a lively sense of humor, with companionability and strong affections. From both parents he drew high intelligence the power of industry and the courage both to do and to endure. He was named after the devoted missionary bishop, Philander Chase, whose labors for his church in early days extended throughout Ohio and the territory to the west.

Such God-fearing and self-denying lives going on generation after generation store up virtue as a sort of reserve fund for the later generations to draw upon, — that composite virtue which includes many things of strength and beauty in mind and character.

Senator Knox's boyhood, at Brownville, on the Monongahela river, was the normal active life of American youth in such conditions; school and play, the country town, the hills and fields lying around, the river in winter and summer. The ceaseless energies and vital activities of such a boy always learning something out of books and outside books, always testing and developing his mental and moral and physical fibre, are the source from which later achievements are drawn and store up the strength on which the structure of character is founded.

Young Knox entered Mount Union College, Ohio, when he was sixteen years old, and graduated in 1872 when he was nineteen, taking the four years' course in three years, and absenting himself during one or two winter terms, as was the custom then, to earn enough to carry on his education. After graduation he was employed in a bank at home, accumulating enough to undertake his law studies, and then having entered the Albany Law School and leaving almost immediately because of an attack of typhoid fever, which nearly ended his life and from which he recovered slowly, he began the study of law in the office of United States

Attorney Henry B. Swope in Pittsburgh in the fall of 1873. Mr. Swope died in the following spring, and Knox continued his studies with Swope's successor, David Reed, and was admitted to the bar in January, 1875, when he was twenty-one years old. He became Assistant United States Attorney under Mr. Reed, and remained in that post for about a year and a half, when he resigned and entered upon private practice in partnership with James H. Reed, a nephew of his preceptor, thus establishing the well-known firm of Knox and Reed. In the practice which was thus initiated and which speedily grew to large proportions, Mr. Knox was actively engaged until he became Attorney General of the United States in President McKinley's cabinet in April, 1901.

It is a curious and interesting fact that the tonnage passing through the port of Pittsburgh is greater than that of any other American port, or was thirty years ago, although that does not mean that the admiralty business of the courts was greater. The volume of river business, however, was the final word in the development of a great inland water traffic, and consisted for the most part, then as now, of an immense tonnage of coal passing down the Ohio and Mississippi to the river towns all the way to New Orleans, and there was also a large local and through passenger business. The experience of Mr. Knox as an Assistant United States Attorney brought him frequently into the United States courts, and this fact with his acquaintance among river men and shipping interests along the Monongahela and Ohio turned the admiralty business of that region in this direction. Within a year or two after the formation of his firm he was the recognized expert of the Pittsburgh bar in admiralty and maritime matters, and transacted a large business involving collisions, contracts of marine insurance with the various liens for wages, materials and supplies. One case raised an interesting point on "deviation," that is a detour from the direct route of a voyage, and against the ordinary rule that a deviation made the vessel owner a general insurer to the shipper against all marine risks, Knox established an exception based on the custom of the Ohio and Mississippi trade to "tie up" en route and cruise back along certain reaches of the river with one barge to pick up local freight. That was held by the Supreme Court of the United States to be a necessary and reasonable custom under the circumstances, and a loss by sinking due to striking a hidden obstacle during this process was a risk of loss or damage contemplated by the shipper in his contract of shipment and was not a forbidden deviation.

The business of Mr. Knox's firm grew very rapidly, and accurately reflected the marvellous industrial and material growth of Pittsburgh. Five years after the firm began business they were among the recognized leaders of the bar. In ten years and thence on, their business was among the very largest law practices of the country. The practice which came to them was always general in its nature, and it was almost wholly local that is, concerning and representing persons and interests resident and located in Pittsburgh and actively engaged in the important affairs developing there. The work of the firm consisted of the private business of individuals and estates, matters of contract and the construction of wills, the business of manufacturing concerns, firms and limited partnerships, the business of banks and of one or two small local railroads built to enforce competition against the great systems and strong interests centering at Pittsburgh. The gradual substitution of the corporate form for the limited partnership form of the business of different clients brought some corporations into the firm's clientage, and the Carnegie Steel Company were their clients under a contract to try all of that company's cases in the Allegheny County courts.

It is never worth while to follow and deny a persistent and intentional misrepresentation. But the statement or charge that Senator Knox was a corporation lawyer is so contrary to the fact that it is almost amusing. Of course every lawyer who has force and capacity is apt to number corporations among his clients. If he does not, it is no particular tribute to either his character or intellect. The question always is, what sort of corporations are his clients, and what does he do for them? But Senator Knox's entire professional career was singularly free from corporate alliances and from the habit of advising corporations, which does indeed get to be a persistent habit and finally gives a bias — unconscious, perhaps,—to a man's entire sympathies and ideas. On the other hand, where Knox's work touched the interests it was on behalf of the aggregate rights against special claims, of the people against the interests, business or political. In one case he broke up the vicious practice of fraudulent and pretended bidding on municipal contracts, by which the work was thrown open to genuine competitive bidding and corrupt frauds on the city of Pittsburgh were stopped. In another case, by a construction of statutory language which was bold and novel but logically sound, he deprived the natural gas conpanies of a thirty years' monopoly which they claimed under the Pennsylvania law, and threw that business open to free incorporation and competition under an amended law which was clear in its terms.

The reason for Senator Knox's success at the bar are not far to seek. He is very alert minded, quick and keen in his insight, but thorough and deliberate in all his mental operations; he has a natural gift for the underlying philosophy of the law. It is because of these qualities that he is steadily developing now before the country as a great constitutional lawyer. The same qualities always stood him in good stead, and joined with rare courage, physical and moral, with great fertility of resource and boldness of execution, with sound common sense and generous judgment of others, candor and companionability, it is not strange that he attracted many clients and made devoted personal friends among his clients. He is very clear, brief and incisive as an advocate, and presents his cases with an admirable conversational method of address. He has always insisted upon the value of condensation, which is an element of success at the bar in the writing of briefs and in the presentation of them most commonly neglected. In one case involving the ownership of the Indianapolis traction system, in which distinguished counsel were associated with Mr. Knox or opposed to him, two or three days were consumed in elaborate and verbose arguments, when Mr. Knox closed the case for his side in an address of twenty or twenty-five minutes, seizing and emphasizing the main point of the case, and upon this argument and the distinction which he made the case turned and was won. The Pennsylvania reports are full of cases which he argued before the Supreme and Superior Courts of that State during the twenty years between 1880 and 1900. I pass them by without more detailed reference and come to his public career.

Mr. Knox's work as Attorney General was the national sequel and crown of his private professional career. He entered the office in the spring of 1901 pre-eminently as the personal choice and appointee of President McKinley. There was no political significance in the appointment. Mr. Knox had never taken any part in politics beyond the duties of a citizen and voter, and had never, after resigning from the Assistant United States Attorneyship, held any office except the presidency of the Pennsylvania State Bar Association in 1896. President McKinley and Mr. Knox had been warm friends since the days when McKinley was prosecuting attorney of Stark County, Ohio, and Knox as a lad at college in the county

was brought into contact with him in various ways, and a youthful attraction ripened to close friendship. Later in the midst of McKinley's political career and before and after he became President, he sought counsel and aid from Knox and the relations between the two men became intimate and cordial.

Upon his appointment Mr. Knox retired from the firm of Knox & Reed and separated himself entirely and scrupulously from all private business. Immediately upon assuming office it became evident to his assistants and associates that his sole motive was to perform his public duties energetically and conscientiously and that he regarded them from the highest point of view as a trust and an honor. He revealed qualities of leadership without self-assertion, and displayed initiative and industry with a marked executive gift for the administration of the Department. His influence upon the personnel and system of the Department was immediate and beneficial. He invited frankness and co-operation from his subordinates; he inspired confidence and a high sense of *esprit de corps*. The result was an admirable co-ordination and correlation of Department work, producing effective results and a personal devotion to a chief who stimulated pride in the work and recognized generously the services of those associated with him.

Mr. Knox possessed the gift of discovering the particular aptitudes and capacities of his different assistants and availing of these to the utmost, so that he called forth efficient service everywhere, and the diligence which he pursued himself and evoked in others resulted in an unusual volume of public work during his incumbency being dispatched with effectiveness and celerity.

His firm grasp of himself, his mastery of his duties, his accurate analysis of the various legal problems confronting him, his power of swift decision joined to sound judgment, his resoluteness in administration, his civic and moral courage as a cabinet counselor, the wisdom and moderation of his temperament associated, however, with promptness of action and boldness of execution whenever fighting qualities were demanded, his natural penetration of mind, reinforced by years of study and experience of life and books, his natural aptitude for the logic and philosophy underlying the law, — this combination of gifts and abilities made Mr. Knox an unusually able and successful Attorney General. There was in his administration a quality of steadfastness, without rashness or any hesitation or weakness which was altogether admirable; it suggested the steady operation and progression of a natural law like Goethe's "Without haste, without rest."

His official work on the legal side especially as counsel and advocate is a record spread before the country. While the anti trust discussion was still largely academic, before it had crystallized into a programme and campaign under the vigorous impulses communicated to it by President Roosevelt, Mr. Knox expressed his belief in the meaning and effectiveness of the law and the soundness of the policy which would enforce it unhesitatingly, and so he became a most effective lieutenant to the President when that campaign was actively inaugurated. On President Roosevelt's accession he immediately recommissioned Mr. Knox, who continued in the cabinet as Attorney General, and an Attorney General in particularly close, trusted and cordial relations with his chief, until he resigned his office to become United States Senator on July 1, 1904.

Mr. Knox's speech at Pittsburgh in the fall of 1902 sounded the keynote of the movement against the trusts and against corrupt corporate practices in transportation and generally within the field of interstate commerce. It was based on the view that the meaning of the anti-trust law and the interstate commerce laws had not been thoroughly explored or the effective power thereunder exhausted; that existing laws

did not exhaust the power of Congress, and that a constitutional amendment was not necessary in order to meet and correct existing evils. The speech defined the important cases then pending under the trust and commerce laws in all of which the Government was successful, that is, the first group of railroad injunction suits to destroy the monopoly produced by secret and preferential rates, the traffic pool in cotton on southern railroads, the beef trust cases involving a conspiracy to fix and maintain extortionate prices for meats, and the case of the Northern Securities Company, being the well known combination organized to merge the control of parallel and competing lines of railway and eliminate competition. When that case reached the Supreme Court Mr. Knox argued it in person and alone. His brief and his printed argument were very able documents and he presented the case against an array of eminent counsel with convincing force and clearness. The court sustained his contentions and held that Congress in the anti-trust law prescribed the rule for interstate and international commerce, that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce or destroy or restrict competition, that without indicating how far Congress may go in this direction in the exercise of the wide discretion possessed as to the means employed to execute a granted power, the power had not been exceeded in enacting this statute; that if the anti-trust act is held not to embrace that case, the plain intention of the legislature will be defeated. In thus determining that the particular device there adopted was a violation of the law, the court struck an effective blow against all forms of combination and consolidation among railways to destroy or limit competition.

The legislation of 1903, by which the interstate commerce laws were amended, the jurisdiction of the Commission and the courts enlarged, and the statutes against secret rates, rebates and all unjust discriminations in railway service strengthened, was due largely to the initiative of Attorney General Knox, called forth by specific requests for suggestions from the Judiciary Committees of the Senate and House of Representatives, an unusual mark of honor and confidence. The criminal sanctions of one of these laws (the Elkins act) were recently sustained by the Supreme Court and a still more recent decision of the court upholds those substantive provisions of that act which forbid receiving as well as giving rebates.

These activities of Mr. Knox, professional, and in the way of constructive statesmanship, which I have thus barely outlined, were publicly reviewed by the President and by Mr. Knox's distinguished colleagues in the Cabinet, Mr. Root, and his successor as Attorney General, Mr. Moody, now Justice Moody of the Supreme Court. The President said at Pittsburgh in the summer of 1902:

"We need common-sense and honesty and resolute courage. We need what Mr. Knox has shown, — a character that will refuse to be hurried into any unwise or precipitate movement by any clamor, whether hysterical or demagogic, and on the other hand, the character that will refuse to be frightened out of a movement which he thinks it right to undertake by any pressure, still less by any threat, express or implied. . . . We need honest and fearless administration of the laws as they are on the statute book, honest and fearless administration of those laws in the interest neither of the rich man as such nor of the poor man as such but in the interest if exact and equal justice to all alike, rich and poor, and such administration you will surely have while Mr. Knox remains as Attorney General in the Cabinet at Washington."

And again at Harrisburg in the fall of 1906 the President said:

"During the last few years the national Government has taken very long strides in

the direction of exercising and securing this adequate control over the great corporations, and it was under the leadership of one of the most honored public men in our country, one of Pennsylvania's most eminent sons, the present Senator and then Attorney General Knox, that the new departure was begun."

Mr. Root said in his speech at the Republican National Convention in 1904.

"The Attorney General has gone in the same practical way not to talk about the trusts but to proceed against the trusts by law for their regulation;" reviewing then the results achieved in the four types of cases to which I have referred.

And Mr. Moody in a speech of 1904, describing the work of the Department of Justice in some detail, said:

"Perhaps more important than any of the individual cases which were begun or finished by Mr. Knox was the vitalizing of the Sherman Law and the demonstration in the courts that the power of the Nation is supreme over interstate commerce in all its activities."

And in another speech in 1906, referring to Mr. Knox and his Pittsburgh speech of 1902, Mr. Moody said:

"Following these words with his acts as Attorney General in the important litigation which he began and in a large measure concluded, he made for himself a pre-eminent place in the history of the nation. However long and however well he may serve this commonwealth in the councils of the nation, he will never do aught which will add more to his enduring fame than that which he said and did as Attorney General of the United States."

Besides these professional and public achievements in this direction of the greatest current interest, the anti-trust movement, which were thus characterized on various occasions by his chief and colleagues, Mr. Knox during his administration instituted the peonage prosecutions, intervened in a private case and established the safety appliance law for the safety of the public and railway employees, obtained the very important decision of the Supreme Court that traffic in lottery tickets between States is an obnoxious traffic and within the interstate power of Congress, that the power to regulate commerce includes the power to prohibit an immoral traffic. Under him the constitutionality of the oleomargarine law was sustained; the gross postal frauds of 1904 were prosecuted and punished; and the great land fraud cases of the northwest were begun and vigorously pursued. He considered and solved the problems, domestic and international, involved in the laying of the Pacific cable, and the arrangements made with the United States for Government business and for control in various contingencies of war and peace; and the other great public work of the Panama Canal came before him in the negotiations with the Government of France and the French company and the various intricate transactions pertaining to the acquirement and passing of the title to the property, all of which he personally directed, proceeding abroad for that purpose. The case of the extradition of Gaynor and Greene was another important matter effected by his grasp of mind and capacity to deal with great legal and governmental matters. A former Solicitor General of England and one of the leaders of the British bar advised the United States Government that on the ground that the habeas corpus proceedings in the Canadian courts, resulting in the discharge of the defendants, were final, an appeal to the Privy Council would probably not lie or leave to appeal would not be granted. But Attorney General Knox, construing the Privy Council jurisdiction, as it certainly is, as one of grace with a wide and liberal advisory power over all colonial judgments within the discretion and pleasure of the Crown, pursued an appeal and was successful, the ultimate surrender of Greene and Gaynor to this Government being founded

on the judgment of the Privy Council that the release by the Canadian court was without authority of law.

Since he became a Senator of the United States, Mr. Knox has continued to direct his public career along the paths of the law as far as possible, for which his membership on the Judiciary Committee of the Senate adds to and emphasizes his opportunities. It is manifest that he steadily deepens his learning and his grasp of legal questions, especially in constitutional law. His speeches in and out of the Senate bear abundant evidences of the growth and mastery in these directions which natural inheritances and sustained industry give him. Thus his speech on the reasonableness and lawfulness of the general features of the President's rate regulation policy at Pittsburgh in November, 1905, like his exhaustive speech on railroad rate regulation in the Senate in March, 1906, were most valuable contributions to the discussion of the subject, and were reflected in the law as it ultimately passed. Of his Pittsburgh speech on this subject Senator Dolliver said in the course of the closing debates on the rate bill in the Senate:

"In drafting this bill the framers of it were guided very largely by the speech delivered at Pittsburgh by the honorable Senator from Pennsylvania, a speech which reads almost like a judgment from the Supreme bench."

And Mr. Justice Moody, who was then Attorney General, said upon the same subject in the fall of 1906 in a speech in Pennsylvania:

"For no man was more potential in the framing of that law than was the junior Senator from Pennsylvania. None stood more firmly at the back of President Roosevelt, and I wish to say now, and I consider myself honored in saying it, that on every principle of law involved in that bill there was not an iota of difference between the Senator from Pennsylvania and myself."

Senator Knox's intellectual honesty as a lawyer and his courage are well illustrated by his speech and vote on the resolution that Senator Smoot of Utah was not entitled to a seat as Senator — in spite of the importunities and demands directed against him, — on the ground that the Constitution prescribes no mental or moral qualifications and as to the qualifications actually prescribed, the Senate judges of their existence by a majority vote, and that as to matters affecting moral or mental fitness, the States are the judges in the first instance, subject however to the Senate's power to expel by a two-third vote when a status of offense extends into the Senatorial service, which question can only be made after a Senator takes his seat. On the merits Senator Knox's attitude was that if the Mormon Church teaches and encourages polygamy, the fact that Senator Smoot is a monogamist and has always set his face and lifted up his voice against polygamy relieves him from any odium attached to the church, and if, on the other hand, the church is not teaching and encouraging polygamy, the argument against Smoot wholly falls, the logic of the matter in either case leading to Senator Smoot's complete vindication.

In his address to the graduating classes of the Yale Law School last summer on the development of the Federal power to regulate commerce, Senator Knox emphasized the necessity of maintaining strictly the distinction between national power and state power in the field of commerce, laying down the propositions that the power to regulate commerce between the States does not carry the power to prohibit unless the purpose of the prohibition is to facilitate or protect legitimate commercial intercourse or is for the accomplishment of some other legitimate national purpose, and that the power to regulate interstate commerce does not permit the placing of an arbitrary embargo upon the lawful products of a State, nor give any right to defeat the policy of a State as to its own internal affairs.

And in his last speech, involving a legal discussion on "The People, the Railroads and the National Authority," recently delivered in Michigan, Senator Knox states concisely the sequence of events in the field of interstate commerce and the anti-trust law during and after 1902, and thus gives the legislative programme of 1903, all of which was enacted into law:

"The specific recommendations were these: a practical and effective law to punish the persons receiving rebates as well as those paying them; a law to empower the Federal courts to issue injunctions at the suit of the Attorney General of the United States, to prevent rebates; a law making it unlawful to transport traffic by carriers subject to the act to regulate commerce at any rate less than such carrier's published rate; a law to enable the Government to get at all the facts bearing upon the organization and practices of concerns engaged in interstate and foreign commerce; and a law to secure speedy decisions of cases under the anti-trust and interstate commerce laws."

The theme of the speech is that only unfriendly criticism could portray the results accomplished by the administration as bearing fruit merely in the disturbance of business, that the steady judicial assertion of exclusive national authority over the interstate traffic of the railroads, and the steady assertion of Congress and the executive that the authority shall be used to correct evils arising from lack of regulation have not inflicted injury or given just cause of complaint to legitimate interests; that the railroads themselves are beginning to realize the value and protection to their interests of regulation through the Interstate Commerce Commission and, citing an old instance in a law of 1866, which authorized railroads to form continuous lines of transportation and freed them from most tyrannical state aggressions, he points out that the railroads, having invoked the Federal power to be freed from onerous state restraints, cannot now justly complain if the power which helped them also regulates them in the public interest, that they must take the burden with the benefits, that they sought liberty and must remember that liberty is not license but is a freedom regulated by law.

In the present session of Congress Senator Knox is making further contributions to the legislation and the discussions on constitutional law, and always by matter and in a manner which impress force and clearness upon the subject. Thus his employers' liability bill is planted safely within the field of interstate commerce, and avoids the ambiguity on that point which destroyed the previous law when it came before the tests of the Supreme Court. And in the current movement for prohibition of the liquor traffic which is so important and widespread and is now before Congress, the point which is absorbing Senator Knox is the doubt whether, although Congress can surrender to the State laws its control of commerce after original packages of liquor have come to rest in a State and the contents are exposed for sale, or even after mere delivery to a consignee within a State, Congress can wholly delegate its power to a State as soon as a State line is reached or when a destination within a State is reached but before delivery. The immediate and extreme demand of the prohibition sentiment, valuable and most salutary as that sentiment is, is substantially that the national Government shall do the work of the State, and that where State laws merely operate upon production and sale (which the legislation of Congress has supported to the utmost), but have not yet prohibited *individual consumption and use*, that vital part of the problem shall be turned over to Congress in effect, although Congress has no power whatever regarding any such peculiarly internal concern or duty of a State. This matter, like the Smoot case, suggests the intellectual honesty and courage of Senator Knox, and it is a leading characteristic of the man that he would much rather fail in attaining

any object of personal desire, or in realizing an ambition or in enjoying public approval than depart in the least from his own convictions in matters of conscience or logic or law.

Characterizing his arguments and speeches as a whole, they are marked by luminous thought and lucidity of expression. They recall the remark made by Sainte-Beuve of Napoleon and Matthew Arnold of General Grant, that clear-cut thought is essential for the best writing.

It is perhaps contrary to the natural reserves proper to the published delineation of a public man's career and character to speak with the touch of frankness and personal feeling which animate a private friendship. But I venture to do so, and to say that while a State honors any man whom she calls into her service, it is a matter of just pride and gratification to the whole community of Senator Knox's State and to her individual citizens that a man of his intellectual fibre and moral worth is steadily deepening her standing and influence in the forum and councils of the nation. It is also true that his public service, past and present, inspired by an intense, sincere and single-minded patriotism, is of great value to the entire country. He has succeeded splendidly in his public and private professional career, and in his later career of legislator and statesman of eminent ability, because he is simple and straightforward, because he is fearless and independent, ready and steadfast, because to a capacious, acute and subtle mind — subtle in its insight and not in mere dialectic and verbal distinctions — is joined a nature which is just and generous and warm-hearted. If the future holds for him still greater honors and higher service, he is altogether fit to receive and qualified to perform.

WASHINGTON, D. C., March, 1908.

SOME MODERN TENDENCIES

By Robert C. Smith, K.C.

I CANNOT find words to express the pleasure I feel in being present with you to-day, and the pleasure I have felt in attending the meetings of the Bar Association of Nebraska. It is not always possibe to analyze one's moods and feelings so as to assign a definite cause to each of the elements in a cumulative sentiment, whether it be of satisfaction or of sorrow. If I am wrong in my history — and it will not be the first time — I am sure you, sir, will correct me, but I understand that when an illustrious general named George Washington was making great history upon a portion of this continent in a war with my national ancestors — if I may so call them — the State of Nebraska, as a State, maintained a strict neutrality, even according to the revised standards of the Hague Convention. But that is certainly not the reason of my pleasure in being here. Nor does the rapid development and present greatness of your State altogether account for my feelings. My delight is undoubtedly due in part to the fact that I am among lawyers. In Portland, a few months ago, some one said: "For once I have heard lawyers, as a class well spoken of." "And where was this?" he was asked. "At the meetings of the Bar Association," he replied. As a class, I fear we have not suffered the woe that is decreed "when all men speak well of you." Though I am among lawyers, and enjoy the spirit of confraternity that always exists among them, I am not without some embarrassment. We read that wise men came from the East. We are not told that they came to criticize and rectify everything in the West. Still it is one of a lawyer's functions of give advice. Samson shorn of his locks could not have felt more absolutely helpless than I feel, finding myself in a jurisdiction where I am not even qualified to give advice or to dispense opinions — and this without any dalliance with Delilah. If it were left to some of my learned friends, I have no doubt they would dismiss the reference to the wise men by the observation that conclusive evidence of their wisdom is found in the fact that they left the East.

Disqualified — or, perhaps more correctly unqualified — as I am in this baliwick, I still feel a certain community of spirit and community of interest with you all. Law is the distinguishing factor of civilization, and though its methods may vary in different systems, its aims are substantially the same in all. I was brought up as a civilian, and very naturally exult in the superiority of the civil law, as a philosophical system, over the common law as administered in such countries as the United States and England. Do not be alarmed. In a discursive address such as this, I shall not attempt any comparison of the systems. In a very general way I may say that the civil law begins by fixing principles in the abstract, and when the custom of citing cases crept in it was rather by way of illustrating the application of the principles, than as authority. Perhaps the original and fundamental postulate of the common law is the same, for it assumes that somewhere there exist principles appropriate to the decision of every case if the judges and lawyers only knew them, and they are sought for in the mass of previous judgments which we call jurisprudence. Those of you who were fortunate enough to attend the last meeting of the American Bar Association no doubt enjoyed the learned address of the British Ambassador upon "The Influence of Historical Environment upon the Development of the Common Law." This development of the common law has always appeared to me to be one of the most remarkable things in human

history. It is, and always has been, common ground that the judge's duties are purely judicial, and that the very foundations of society would be in danger if the Bench ventured to encroach upon the functions of the Legislative Branch. And yet the common law grows. How? By the changes in the law which case after case makes — changes which we are half reluctant to admit but which are none the less real. Very rarely is the fact as frankly stated as it was recently by one of our Canadian Judges. He handed down a judgment upon section 23 of a certain statute, and upon appeal his judgment was reversed. Another case of the same kind came before him and he had to follow authority. In his written judgment, however, he said:— "I base this upon section 23 as amended by the Court of Appeals." And the common law grows not merely by following and enlarging the scope of previous decisions, but by boldly overruling them at times. Well do I remember rising to argue one of my first cases. I had the confidence — that sublime confidence that one feels when he is able to cite a case exactly in point. The supreme moment at last arrived, and with much ostentation the case was cited. To my horror the judge received it very coldly, merely observing, "That case has been overruled." "No, my Lord," I continued, "I have gone very carefully through the reports and it has never been overrruled." "Well," said the judge, "if it hasn't been, it will be, for I'll overrule it." Now for my last hope. "But, my Lord, it happens to be one of your Lordship's own judements. "Ah!" said he, "I am glad of that. I'll have the less hesitation in overruling it;" which he promptly did. And so the common law grows by interpretation, by extension of principles, by overrruling, and by the much more refined art of distinguishing. And while in theory the pretence is that the judges do not make law, the principal argument we hear against codification is that the law thereby becomes crystallized and loses its elasticity and its adaptability to the growing needs of a progressing community.

If I venture to refer this afternoon to a few modern tendencies, or what I believe to be tendencies, you will understand that it is rather in a spirit of enquiry than of criticism. Some of them you may never have felt at all in this enlightened state.

The great body of jurisprudence of which I was speaking has grown until it has become an unwieldy mass, and I have asked myself whether the too copious citation of cases is not a growing weakness of modern advocacy. In briefs and in oral arguments the multitudes of cases referred to is becoming appalling. It is a poor proposition indeed that you cannot support by some cases. That there should be conflicting authority is inevitable, considering the number of tribunals whose decisions are quoted. We are happy, indeed, when we have authority clearly in point, and I must not be understood as objecting to the proper use of authorities. Perhaps at your bar you have not had occasion to complain of it, but the multiplication of citations, in many of which the analogy to the case in hand is very faint, if not quite illusory, imposes unnecessary labor on the Bench and tends to obfuscate rather than to elucidate. I am a believer in codification, but if this be not obtainable, forgive me if I indulge my civil law prejudices and say a word in favor of the deeper study of abstract principles. A young barrister visited the Supreme Court of the United States, and he told me he left it with some things to think over. Counsel for appellant cited and discussed a score or more of cases. Mr. Evarts, for respondent, spoke but half-an-hour and did not quote a single case, prefixing his argument by the statement that the case was one that could be dealt with upon principle. It is of course true, as we often hear, that law is not an exact science. Indeed, I read in a recent paper by a learned judge that it had been laid down that if

there be two propositions, A and B so connected logically that if A be true and B will also be true; it by no means follows that if A be true in law B will also in law be true. The law, like everything human, is imperfect; but with due respect to this authority, I venture to think the discrepancy will not be found in the logic of the law, but somewhere in the looseness and imperfection of definition. With reference to statutory law the counsel's course is clear. The law, be it right or wrong, must be given its natural effect, and it is not in this class of case that we are likely to be troubled with over citation. It is rather in the intricate and complex commercial cases arising from the incessant movement and modifications in the methods of doing business, and I suggest the enquiry whether in these we might not gain something by relying more upon fundamental principle and less upon the plethora of reported cases. The great body of general principles which have become so firmly fixed in the common law as to be no longer open to challenge, will not be found to differ materially from the principles of the civil law, and are in general in harmony with reason and justice, and the study of them will give clearness to the vision and vigour to the mind.

Happy is the man who can grow old retaining his sympathy with human nature in general and following the inevitable transition in everything around him with a not unfriendly appreciation. To such a one the passing years may mean a little more conservatism, but they will not mean incrustation. We must not mourn over change, for it will come, and no doubt will mean more convenience somewhere. Not in a spirit of senile opposition to everything new, but still in a reasonably critical spirit we should scrutinize changes as they occur, to see whether anything ought to or could be done about them. There is said to be a great gulf fixed between the final abodes of felicity and despair, but long before we approach it, we see another yawning gulf that extends back through the ages, narrowing, it is true, as science becomes more perfect, baffling the student, swallowing up for the time being, principles sound and true in themselves — the great gulf between theory and practice. The bent of some minds is theoretical — of others practical, and, as might be expected, both are well represented in our profession. Is there a tendency for the practical lawyer to increase and for the theoretical lawyer to disappear? I was dining in New York with one of the greatest of corporation lawyers, and in a very good-humoured way he said: "If I should criticize the British lawyer I should say that he approaches every question too much from the point of view of theory — of scientific exactitude, and if he can block a transaction upon objections absolutely sound in theory, he is just as happy as if he put it through. We, on this side, on the contrary, begin with the realization that it is our duty to facilitate business rather than to obstruct it." I was constrained to admit that the criticism was not altogether unjust. On the other hand, is it not possible that the pendulum may be swinging too far in the other direction. Is not the lawyer becoming too much the business manager of his client's affairs? Are not aggressiveness, adroitness, and commercial acumen, coming to be regarded as the major qualifications, and legal scholarship as one of the minor qualifications for success at the Bar? I must not try to establish a presumption in favor of mediocrity, but do we not usually find truth somewhere in the middle way? The merely practical lawyer, who does not concern himself about the reason of things, can never be called a jurist; he is generally inaccurate, and when confronted by novel conditions he can only deal with them as an empiric. The merely theoretical lawyer becomes visionary. With him, "enterprises of great pith and moment their currents turn awry and lose the name of action." He is like one, who, while the battle is even at

the gates, remains burnishing shields and whetting swords that are never to leave the armory. By all means, let us have men of action; let us know how to apply our principles, but, in a utilitarian age, let us not forget that as in some other sciences so in law, we may gain light and strength and inspiration from the study of truth in the abstract — truth under the pure light of heaven, untinged by the changeful hues of conflicting human interests and undimmed by the shadows of human fault and frailty.

From the foundation of the world a portion of the race has been afraid of development. Good old John Evelyn bewailed the fact that London had a population of 300,000, "far beyond what any City should ever have." Don't have railways, they'll kill the cattle. The departmental store will ruin the small trader. Combination in capital will oppress the consumer. Combination in labor will paralyze manufactures. We may pass our laws and here and there, to some extent, control the course of events but the world progresses very much in its own way. There are a thousand moral and social tinkers for one real reformer. What an age we live in! The marvels of yesterday are the commonplace of to-day. What will the ocean liner look like — even the new four and a half day boats — when the airships fly through space. The telegraph and the telephone are already an old story, and perchance wireless telegraphy will seem very crude indeed, when with some intellectual heliograph thought is flashed over seas and continents. Where can we set marks or bounds? Is so stable and dignified a thing as the administration of justice affected by the weird transcendentalism of the times? At Portland, a few months ago, I began to say something about sensationalism in the administration of justice, but when I realized that the hour hand was on its way around to three o'clock in the morning and that weary nature was sinking into a soporiferous if not a judicial calm, in which it would be difficult to realize that such a thing as sensationalism existed in the world at all, I abandoned the theme. If I return to it now for a moment it is only to draw your attention to a difficulty without suggesting any way out of it. If we abolish the up-to-date-sensational trial, what would the world do for entertainment? A sensational crime, a formal arrest, arraignments and postponements, first juror sworn in the springtime, last juror toward autumn, all the arts of pleading, the refinement of cleverness in examination and cross-examination, the sworn testimony of a multitude of witnesses presenting the only example in the universe of truth contradicting truth, auroral displays of reason and sentiment, of logic and rhetoric, a disagreement of the jury, or if a conviction, appeal after appeal — behold the majesty of the law of which Crabbe wrote:

> "As long as amunition can be found,
> Its lightning flashes and its thunders sound."

In speaking of sensationalism I have certainly no particular trials in mind. I am not suggesting that the Dreyfus trial was too long or too often, or that any particular trials in England or in this country should have been abbreviated, but — applying the simple but stern twentieth century test — are these great sensational trials worth what they cost? It will be said that the administration of justice is too sacred a thing to suffer the mention of cost in connection with it and that no expenditure is too great in order that right may be done. Very true, but the admixture of sensationalism with the administration of justice does not raise the tone or quality of justice; it does not elevate the standards of advocacy, nor does it enhance the general respect for law. Does it not also leave us with the uneasy reflection that the chances of the rich and the poor before the law are after all not quite so equal as we have complacently believed?

The sensational aspect of many modern trials is due in a measure to the publicity

which the smallest detail obtains. But who would think of suggesting secrecy instead of publicity — progress is toward light, not darkness. Some undesirable features might disappear if trials were by judges instead of jurors, but the innate conservatism of mankind, to which we owe so much both good and evil, brands as an iconoclast the person who dares to say a word against trial by jury, that ancient bulwark of liberty. I shall hazard a word about the jury in a moment. Some one has suggested that in order to stifle sensationalism some sort of closure should be applied. The judge sometimes applies that now, but it is a hard and a doubtful remedy, and I believe the wisest judges require to be thoroughly convinced that reasonable latitude has been exceeded before they will venture to interfere with the responsibility of counsel. If it be true that sensationalism is intruding in our courts, I imagine the only remedy will be found in the sense of personal responsibility of everyone connected with the administration of justice, and perhaps to some extent of the public press, to which civilization owes so much for the removal of abuses and the purifying of all our institutions.

And now, at the risk of my head, allow me to say a word about trial by jury. You all know what a safeguard it was against oppression by the Crown and the privileged classes, by whom the Bench was appointed and with whom it was in sympathy. Is it within the bounds of possibility that this grand old institution may become itself the medium of oppression? Co-operation is a modern tendency, and in the commercial and industrial world it usually takes the form of incorporation. I do not know how it is in the State of Nebraska, but in some other States and in some other countries it is becoming more and more difficult for a corporation to obtain fairness and justice from a jury. I should not venture to make so serious a statement, and so bluntly, were I not confident that it accords with the weight of opinion in the profession. Kipling says that the very worst thing you can do with a fact is to deny it. If this be a fact, and I frankly believe it, no good purpose is to be served by closing our eyes to it, or dismissing it with a half humorous euphemism. Are the intellect and conscience actuated by novel and occult considerations whenever individual and corporate interests compete? It is perhaps not exactly a modern tendency for sympathy to supplant reason, or for arguments not founded on pure ethics to be addressed to jurymen. Old Aristophanes in "The Wasps" makes Philocleon, the Athenian dicast, or elected juryman, tell of the arguments he was accustomed to hear. "I listen," he says, "to them uttering all their eloquence for an acquittal. Come let me see; for what piece of flattery is it not possible for a dicast to hear there? Some lament their poverty, and add ills to their real ones, until by grieving he makes his equal to mine; others tell us mythical stories: others some laughable joke of Æsop; others cut jokes, that I may laugh and lay aside my wrath. And if we should not be won by these means, forthwith he drags in his little children by the hand, his daughters and his sons, while I listen. And they bend down their heads together and bleat at the same time. And then their father, trembling, supplicates me, as a god, on their behalf to acquit him from his account." And later, when the dog Labes is being tried for stealing a Sicilian cheese and every argument has failed, his advocate exclaims: "Where are his puppies?" "Mount up O miserables and, whining, beg and entreat and weep."

I hold some opinions upon trial by jury, but I shall not attempt to develop them now further than to notice one regrettable tendency, and it is for jurymen to be influenced by considerations other than the evidence adduced — in most cases in which corporations or employers defend. It may be said that this tendency really arises from a meritorious motive, to help the weak against the strong. The ragged logic

of the thing would be amusing had it not become so serious a matter. Justice must be sacrificed that kindness may be shown, and that kindness shown only in liberality with other people's funds. An institution which in certain classes of cases habitually results in injustice surely cannot long be tolerated without change. Is it conservatism or lethargy that makes it possible for abuses to last so long? When we can wrap up any question, put it in a pigeon hole and mark it "finally settled," there is such a comfortable feeling of relief that the dust of centuries may accumulate upon it; the times may completely change, and an institution now irrational and obsolete may remain as a revered relic of a once living reform.

When some one strong enough and courageous enough arises — shall I say to *improve* a system which exacts unwilling and often burdensome service, from those having no special qualifications to perform it, some progress will be made in the administration of justice.

In speaking of notable tendencies, I could not ignore specialization, though I have little to say further than to mention it, I think we all have a sub-conscious prejudice in favour of the all-around man as he is familiarly called. He may never be particularly brilliant, but his opinions are generally reasonable and sound, and we would all be sorry to see him disappear or relegated to the background. But of all things which we should be ready to admit, none are more obvious than the limitation of human capacity, and the ever increasing volume of possible knowledge. My own young hopeful after his first week at school said: "Father, do I know now, as much as I don't know?" And he seemed much discouraged when I was unable to assure him that he had already mastered the fair half of human knowledge. In the realm of our own profession we may well stand aghast in the height and breadth and length and depth of the sphere which confronts the law student. By the mastery of principles, he may be able to do something in most branches of the law, but there remains a great mass of learning upon each question, and of this he must not be ignorant, if he wishes to rise above mediocrity. To be expert in every branch of the law has ceased to be a possibility, and specialization is the result of necessity wherever the centres of litigation are sufficiently large to permit of it. Medicine and surgery have already become almost distinct professions, with specialization in their respective branches, and it would be idle to deny that in law specialization has produced more exhaustive, if not always, more profound learning. The elder Disreali asks: "Are the original powers of genius, then, limited to a single art, and even to departments in that art? May not men of genius plume themselves with the vain glory of universality . . . . Cicero failed in poetry, Addison in oratory, Voltaire in comedy, and Johnson in tragedy . . . . . Such instances abound and demonstrate an important truth in the history of genius that we cannot, however we may incline, enlarge the natural extent of our genius any more than we can add a cubit to our stature. We may force it into variations, but in multiplying mediocrity or in doing what others can do we add nothing to genius." If there be a singleness in genius, as Disraeli calls it, how much more shall the average lawyer find his powers unequal to the task of attaining excellence in the many and diverse fields of his profession. As I said, a moment ago, it is only in the large centres of litigation that this inevitable tendency will be felt, for some time at least. Before passing from the question of specialization, may I be forgiven if I refer to a very important personage in many modern trials — the expert witness. He must be a very important person, or he would never have attracted so much attention, even provoking observation upon the positive, the comparative, and the superlative of veracity. The mother-in-law would never have headed the list of

jokes — in quantity, I mean — were she not the most important factor in the household. It is characteristic of the age we live in that the discoveries in the arts and sciences instead of being locked up in the universities and learned societies are immediately pressed into utilitarian service, become the subjects of every-day contracts and the causes of every day accidents. If it be unreasonable to expect counsel to attain to excellence in every branch of our profession, much more would it be unreasonable to expect them to master the principles and practice of all the arts, sciences and handicrafts. The expert witness is becoming more and more a necessity in a large and continually growing class of cases. But is not his present position somewhat anomalous? His scientific and technical knowledge must be utilized in some manner. He naturally testifies to the facts, or alleged facts, of the particular science in question, but his value as an expert lies in his ability to convince the tribunal that his opinion is right, and his argument is under oath. This fact does not usually "cramp his style," if I may use an up-to-date expression. I suggest for you, in your greater wisdom to ponder how we can best separate argument from testimony. Shall the judges call in experts to sit as assessors, as they do in the Admiralty Courts, or shall counsel be authorized to employ experts to argue the technical questions in a case, or shall we have to appoint special courts, composed of scientific men, to whom our judges might refer difficult questions of science or technique for decision? The present system is not quite satisfactory, and some consideration may appropriately be given to the question of its improvement, in order to deal more efficiently with this increasing class of litigation.

I must not weary you by referring to too many modern tendencies, but as we are here assembled in the secrecy of our own chamber I may summon enough courage to ask in a whisper a delicate question — Is our profession becoming too mercenary? Here at least we may discard the smug hyprocrisy that represents the lawyer as the great exponent of altruism. Speaking for myself alone, while fully endorsing the maxium that "there are nobler things than pennies," I have no great sympathy with the doctrine that the emoluments of the profession ought to be to the worthy lawyer a matter of the greatest possible indifference. Nor have I yet discovered any reason why any portion of of the community should look askance at lawyer who realizes from his profession a half respectable competence. But there are still some who view the matter as the author of "The Borough" did: —

> "One man of law in George the Second's reign
> Was all our frugal fathers would maintain;
> He, too, was kept for forms, a man of peace
> To frame a contract, or to draw a lease;
> He had a clerk with whom he used to write
> All the day long, with whom he drank at night.
> Spare was his visage, moderate his bill,
> And he so kind, men doubted of his skill.
> Who thinks of this, with some amazement sees
> For one so poor, three flourishing at ease;
> Nay, one in splendour! See that mansion tall;
> That lofty door, the far-resounding hall;
> Well furnished rooms, plate shining on the board,
> Gay liveried lads, and cellar proudly stored;
> Then say how comes it that such fortunes crown
> These sons of strife, these terrors of the town."

It goes without saying that it ought to be the ambition of a lawyer as well as of a cotton spinner to pay his debts honestly, and to give to his family the enjoyment of a fair share of life's comforts and pleasures. My message, therefore, would not be to avoid money-making as you would the plague; it would rather be to exercise the same intelligence and caution in looking after your own investments as you devote to your clients' affairs. With character, industry and average ability, there is no reason why a lawyer should not realize some degree of success in his calling, and according to every righteous principle, this ought to mean that he makes some money. He does not usually keep it. Why? Of course, I am bound to say I do

not know. Is the lawyer more speculative than the merchant? Is there anything in the practice of law calculated to make him so? Love is sometimes called a lottery, but surely no one ever dreamed of speaking so disrespectfully of law. I had a few words with a company promoter not long ago and I asked him whether he found lawyers, as a class, more speculative than other people. His reply was given in the venacular with evident sincerity: — "The man does not live who could do one of them for a five-dollar bill, but they are the easiest mark in the country for a couple of thousand each." We must enquire into this, and instead of preaching to the junior bar to be sure to make less money, let us tell them to take better care of what they do make. Having said this much, let us enquire whether there is anything in the suggestion that we are becoming too mercenary. I heard Governor Hughes, of New York, tell a story which may or may not have reached you. A young man left home for one of the law schools of Hungary filled with high hopes of returning ere long bearing the coveted dog skin — the diplomas being all written on dogskins. He diligently kept all the terms and followed the course until he graduated with distinction. But he returned home without the coveted diploma. His family and friends gathered around him and said: "It is all very well for you to say that you passed with honours. If you did, where is the diploma?" The only excuse the young man had to offer was that there were more lawyers than there were dogs in Hungary.

Our ranks are not thinning out anywhere as far as I can discover. Every year brings its new influx of aspiring barristers, each requiring a new constituency. Is there not, at least, some temptation to sink into the arts of competition; and do we not hear discussions of the question how far a lawyer may advertise? I repeat what I said a moment ago that I believe it right that a lawyer should make money, and I think the lawyer receives less monentary reward for his labor than any class save the clergy, but when young men come to the profession of the law with the primary and dominating purpose of making money, the knell will be sounded of those honorable traditions which to this day give us a right to the respect and confidence of our fellow men. If money be your object in life, do not commit the supreme folly of coming to the Bar. You'll find far more of it in railways and banks, and warehouses and factories. Law is not a money-making business. The ambition for wealth is omitted from the lawyer's oath of office. He consecrates himself to other and higher purposes. I am quite well aware that anything that might be said of the distinction between trades and professions would be regarded by many as irritating twaddle. As a basis of class distinctions there has been very much that is irritating. The strong men of commerce upon whose sagacity, enterprise and capital so much depends for the material development of a country, command our respect and admiration, and, perhaps — too often, — our envy. We must not assert a vaunting claim to superiority, but we ought to remember that there is something distinctive of the professions. Your clergyman ministers to your spiritual nature, and your respect for him is not gauged by the amount of his stipend. Your physician's skill is engaged for the lives and health of your loved ones. The world's criteria of values yield before the great experiences of life. Sit by the bedside of your only child when the gray dawn begins to reveal again the pallor of the sunken cheeks, and you will think less of the rise and fall of stocks; nor will you compare your devoted doctor with your excellent broker. You will simply say the two are quite different, and the one is not measured by any standards that are known on the exchange. So must we pause to remember in the hurry-scurry of routine, that as lawyers we are not dealing with pig iron and molasses, but with eternal principles of morals and justice, upon the

application of which depends not only the security of life, property and reputation, but even of liberty itself. Our constitutions and our laws may decree liberty, but it is only in the working out of these laws that we shall enjoy liberty, and that wrong and oppression shall cease. Let us remove not the ancient landmarks. Let us not lower the standards that concern the honor of the profession. Change must needs come in the methods and the etiquette of the profession; but let us not suffer these changes to obscure that, which for the true lawyer must always be above money-making, and above fame, the fact that his sacred obligation and his highest privilege is to assist in the administration of pure justice. Changes will come in the administration of justice, too, and the duty of the Bar will always be to see to it, by all that we hold worthy of respect and preservation, that whatever these changes may be, they shall never be suffered to corrupt its cardinal notice or to pervert its essential truth.

I have not yet referred to what is one of the most noteworthy and most welcome of the tendencies of our times, the awakening of Bench and Bar to a truer realization of the relative importance of substance and form. The development of the science of pleading is a very interesting subject. A science which Chancellor Kent could pronounce "equally curious, logical and masterly" is naturally well worth study. The despatch of legal business in an expeditious and rational mannner absolutely required and still requires that the claims of litigants should be stated with definiteness and with logical method. Everyone knows that the primary purpose of pleading was to discover with clearness the actual questions in issue between the parties, but it is equally known to all that in the intricacy and sublety of this science, that which was merely formal or incidental came to be regarded as sacramental, and it is within the recollection of some of us who cannot be truly called very old men that many a just cause was irrevocably lost, and many an unjust cause was won upon mere technicalities, without their substantial merits being ever enquired into. That such a thing was possible was no credit to the administration of justice. When our pleading in Canada was highly technical, one of our Chief Justices implored the bar to fight with the sword of the warrior and not with the dagger of the assassin. Progress is everywhere now in the direction of simplifying pleading. The old forms are one by one being discarded. Only that is retained with serves some useful purpose of convenience and fairness. The power of amendment is so extended and is so exercised that the missing dot to the "i" and the cross to the "t" is actually supplied, rather than that justice should miscarry. There is a disposition of enquire into and decide the substantial merits of each case. On the criminal side it is not so easy now to escape upon some miserable technicality. It is only right and just that an accused person should know precisely what he is charged with, but that is all he has a right to in the indictment. This all means that we are to get below the surface, to regard the substance rather than the form, to seek for the real thing and not for the mere name. We are to preserve so much form as is necessary for orderly and logical arrangement, but the form is only the means — the end is the right and the truth.

And the law's proverbial delay is receiving universal attention, and will receive much more, as there is so much to be done to remedy wrong here. It was once said that the people preferred the swift injustice of the Vice-Chancellor to the tardy justice of the Chancellor. Every member of the Bar present knows that very often justice delayed is justice denied. I believe I am right in saying that even in the last five years great progress has been in this regard and, excepting a few jurisdictions where business has increased beyond the capacity of the courts to dispatch it, the average

delay between the institution of proceedings and the trial has been considerably reduced. This has been effected by the co-operation of Bench and Bar in a sincere desire to remove the reproach that has so long been cast upon the law and its administration. The existence all over this continent of Bar associations such as this is one of the most hopeful signs of the times. Their great influence in the removal of abuses and the introduction of reforms cannot be over-estimated. In so far as I haye been able to peruse their proceedings it has appeared to me that they have discussed and are discussing the questions arising, in no narrow selfish spirit, merely to advance the peculiar interests of the profession, but in a broad spirit of statesmanship, to advance the interests of the people and the nation.

In a period when industrial conditions are such that important questions must continually arise touching the relations of capital and labour, of producer and consumer; when the voice of the demagogue is proclaiming class antagonism; when interests that should meet in a spirit of conciliation and work together harmoniously for the country's progress are too often ranged one against another in conflict and bitterness; when the law is looked to as the one and only remedy for all social and economic ills and the Legislatures are besieged with demands for the passing of this law and that, how great the importance of such associations as these of scholarly and enlightened men, who know how laws work, who are independent of popular election and of party control, who can discuss every measure freely and thoroughly, and exert upon public opinion and upon parliaments the great influence which untrammelled thought and learning and experience are entitled to exercise. I may be too sanguine, but I hope for much from this influence. The Bar in the past has neither cringed before moneyed interests nor been overborne by popular clamor. Is it too much to hope that it may do something towards solving those questions of increasing difficulty and increasing urgency — how to conserve the national energy that is wasted in class friction and how to co-ordinate the interests of classes and masses, not upon the mere shifting assumption of convenience, but upon the more enduring principles of justice and humanity. The new year is with us, and the new era is coming. We all believe in Carlyle's stalwart optimism. The false and the base may flourish for a time, but the true and the kind are eternal. We may depend upon it, things will right themselves ere long. It may be per aspera ad astra, but the way will be smoother in proportion as disinterested wisdom is devoted to removing the obstacles. The Bar Associations of America have already accomplished great things for law reform in many directions and even for the world's peace by their propaganda of international arbitration, and I doubt not they will be a potent factor in adjusting the law to the complexities of modern conditions and in preparing for the new era of greater possibilities and still wider freedom that the New Year bells, of which we heard so lately, are ready to chime in:

"Ring out the feud of rich and poor
Ring in redress to all mankind.

Ring out a slowly dying cause
And ancient forms of party strife,
Ring in the nobler modes of life,
With sweeter manners, purer laws.

Ring out the want, the care, the sin,
The faithless coldness of the times,
Ring out, ring out my mournful rhymes,
But ring the fuller minstrel in.

Ring out false pride in place and blood,
The civic slander and the spite,
Ring in the love of truth and right,
Ring in the common love of good.

Ring out old forms of foul disease,
Ring out the narrowing lust of gold,
Ring out the thousand wars of old,
Ring in the thousand years of peace.

Ring in the valiant man and free
The larger heart, the kindlier hand,
Ring out the darkness of the land,
Ring in the Christ that is to be."

Whatever is done in the interests of justice is permanent work, for the stability of society depends more upon it than upon anything else. By the reign of law and justice we maintain what is worth preserving in our civilization, and by its promise are we inspired by enterprise and progress. The masterful minds of the world have generally recognized this. Frederick the Great, in his strangely checkered but always heroic career, laid the foundation for a united Germany, but he fostered the spirit that has made that empire great, not alone by the varying fortunes of war, but by his reforms in the administration of justice and by the compilation of laws that did honour to his name. What a strange fascination there is about Frederick! Impetuous, lion-hearted, undaunted by the combination of nations, his little weaknesses contributing to the versatility of a character never quite bizarre, but to the last degree picturesque. A few months ago I wandered about Potsdam where he loved to retreat with Voltaire, and I sauntered through his palaces, but their gorgeous decoration seemed garish when compared with the simple majesty of his tomb in the little crypt of the Garrison Church.

And at "Sans Souci" I read Frederick's last will and testament, written by himself in French, in a clear hand on a single sheet of paper. His intense face looked down from many a canvas on the walls, and one could fancy his re-incarnation, for from this sheet of paper the very soul of him seemed to speak:—

"Si je meurs durant la guerre ————je veux que cet empire soit administre avec la justice, la sagesse et la force."

"If I die during the war — I will that this Empire be administered with justice, with wisdom and with force."

Last in order the force that has made his name reverberate throughout an astonished world; then wisdom, that with all his gettings he had sometimes missed; but first, justice, that was often wanting in his ambitious diplomacy, but which in his heart he worshipped, and which in the remissions from his enterprise of arms he had found time to enthrone in his civil polity.

Bonaparte said: "The grandest monument I shall ever have is the Code Napoleon." How true were his words! The booming of guns and the clash of steel at Austerlitz and Marengo, and Jena and Wagram are lost in the silence of a century, and the dazzling frame of military genius will grow fainter as the world grows wiser, but the Code Napoleon remains to-day a mighty living force not only in Europe but in parts of the New World too, for the preservation of sound principle and the progress of mankind.

It has taken the world a long time to learn the elements of justice. It seems to have progressed more easily in the direction of beauty than of righteousness, developing imagination before conscience. When classic art was at its very zenith, slave galleys ploughed the dancing waters of the blue Ægean. Venetian art with its charms of Orientalism was decorating palaces and temples with heavenly beauty while the Bridge of Sighs still echoed the groans of the victims of political persecution; and dear old Florence, with all its heritage of Etruscan art could banish a Dante to linger and die in Exile far from his native city that he loved so well. Justice and freedom have been a long time coming. If we could attain to justice in every relation of life, it would not be a very bad world. Sometimes rather hard, rather inflexible, but there would be little room for complaint. But even when we have ascended to the plane of justice we shall not have reached perfect civilization. I need not blush to say it to lawyers, there is something higher than law — and that is love. That, that Professor Drummond called "the greatest thing in the world," that good-will that was linked by the Divine Herald with peace on

earth. When we have learned justice we shall progress to love and

> " all men's good
> " Be each man's rule and universal peace
> " Lie like a shaft of light across the land,
> " And like a lane of beams athwart the sea,
> " Thro' all the circle of the Golden Year."

I shall not forget the last evening I spent at the great Paris Exposition. The ear was enchanted with music and the eye with light and color. The iridescent fountains glowed with ever changing hues — now emerald, now sapphire, now crimson, now golden, while the long serpentine lines of light culminated in the sparkling brilliance of the Trocadero. When the senses are enchanted how easy to dream! And I asked myself, Is this, realization or is it not rather prophecy —"that which man has done but earnest of the things that he shall do." Do we not hear the tongues of all nations in the surging mulititude? Have we not here the accumulated knowledge of the world? A ray of dazzling brightness fell from the tower across the dome of the palace of arts and rested on the figure of an angel, pure and white, refulgent against the blackness of the night. Was it my dreaming or was it her message: "Whether there be prophecies they shall fail; whether there be tongues they shall cease; whether there be knowledge it shall vanish away — But now abideth faith and hope and lôve — these three, but the greatest of these is love."

MONTREAL, CANADA, January, 1908.

AMERICA AND THE MIDDLE TEMPLE

By C. E. A. Bedwell

IN the heart of the Metropolis of the British Empire but so secluded as to form a haven of rest and peace from the turmoil of the thronged thoroughfare stand the three groups of buildings — Lincoln's Inn, Gray's Inn, and the Temple — in which the barristers have their Chambers. The chief of these is the Temple which is apportioned between the Societies of the Inner and Middle Temple. The history of the four Inns of Court is lost in the mists of antiquity, and in particular the date at which the lawyers succeeded the Knights Templars in the possession of the Temple Church and surrounding property is a matter of uncertainty. The records of the two Inns carry the enquirer back only for a period of four centuries, but Sir John Fortescue, writing in the middle of the fifteenth century, has left a description of the course of study at the Inns of Court. He tells us

"That knights, barons and the great nobility of the kingdom, often place their children in these Inns of Court; not so much to make the laws their study, much less to live by the profession (having large patrimonies of their own), but to form their manners and preserve them from the contagion of vice. . . . They learn singing and all kinds of music, dancing and such other accomplishments and diversions (which are called Revels) as are suitable to their equality, and such as are usually practised at Court. At other times, out of term, the greater part apply themselves to the study of the law. Upon festival days, and after the Offices of the Church are over, they employ themselves in the study of the sacred and profane history; here everything which is good and virtuous is to be learned; all vice is discouraged and banished."[1]

[1] De Laudibus Legum Angliæ, p. 172.

Towards the latter part of the sixteenth century the records are sufficiently in detail as to furnish a connected narrative of the life and members of the Inn. During that period the Middle Temple Hall was erected and still remains one of the finest specimens of Elizabethan architecture. By day the light is diffused through the stained-glass windows containing the coats of arms of distinguished members, and at night the electric lamps illumine the hammer beam roof and the fine oak screen which is a magnificent piece of Renaissance work. From that time to the present it has witnessed many memorable scenes of which one of the most notable was the admission in 1905 of Mr. Choate, then American Ambassador at the Court of St. James, to a place at the Bench table of the Society. The Benchers form the governing body of the Inn. The meeting at which they regulate its affairs is known as the Parliament. By tracing the history of the closing years of the sixteenth century it may be possible to establish an earlier connection between the Society of which Mr. Choate is a bencher and the nation of which he has been the accredited representative.

In 1555 Richard Hakluyt, cousin of the Geographer, was admitted to membership of the Inn and Chambers. Among his contemporaries was Miles Sandys, brother of Edwin Sandys, afterwards Archbishop of York. Some time before 1570 young Richard Hakluyt, then studying at Westminister School, came to visit his cousin at his Chambers in the Temple and "found lying upon his boord certeine bookes of cosmographie with an universall mappe" which aroused his curiosity. The elder Richard, no doubt glad to have a ready listener, gave him a long "discourse" which so impressed the young man as to induce him to form a resolution that he "would

by God's assistance prosecute that knowledge and kinde of literature the doores whereof (after a sorte) were so happily opened before me."[1] Thus in the Middle Temple was begun the record of the geographical enquiry which has transfigured the map and revolutionized the history of the world.

On 27 January 1574–5, was admitted Anthony Ashley, son and heir of Anthony Ashley, of Dome, Wilts, who may be identified with the clerk of the Privy Council of that name and therefore with the translator of Waghenaer's important naval work.[2] In the following month Walter Raleigh became a member and seems to have lived in the Temple for at least two years though at this trial he declared "if I ever read a word of the law and statutes before I was a prisoner in the Tower, God confound me."[3] He became a friend of Hakluyt, the elder, who resided continuously in the Temple until his death in 1591.

On April 27th 1584, Sir Walter Raleigh set forth the first expedition to colonise Virginia in "two barkes under the commande of Master Philip Amadas, and Master Arthur Barlow."[4] One Philip Amadas, son and heir of John Amadas of Plymouth, was fined by the Benchers of the Middle Temple on May 28th of that year for being absent from his studies in Lent Term, and his name does not appear again in the records. If the *Dictionary of National Biography* is right in identifying Ralph Lane, who followed soon after Amadas and, in due course, became the first Governor of Virginia, with the second son of Sir Ralph Lane of Horton, Northamptonshire, then he, too, was a Middle Templar. In the same year as Sir Walter Raleigh sent forth his expedition, his stepbrother Adrian Gilbert, also a Middle Templar, and younger brother of the more famous Sir Humphrey Gilbert, obtained a patent incorporating him with certain associates under the name of the Colleagues of the Fellowship for the discovery of the North West Passage.

Hakluyt does not appear to have practised the law by which course he would have attained to the office of Reader and probably Treasurer, but in 1585 on account of his standing and long association with the Inn he was invited to become an associate with the Bench. In the same year he published his treatise containing "inducements to the liking of the voyage intended towards Virginia in 40° and 42° degrees of latitude." His first reason was "the glory of God by planting religion among these infidels," and there is no doubt that a strong religious spirit prevailed amongst the earlier adventurers.

From 1580 to 1588 Sir John Popham who took a prominent part in the colonizing projects of the period held the highest office, the Treasurership in the Inn. He does not appear to have been present, however, when Sir Francis Drake was received in the Middle Temple Hall on August 4, 1586, upon his victorious return from the West Indies. The occasion is recorded in the minutes of Parliament of the Inn as follows:

"Die Iovis quarto die Augusti Anno D'ni 1586 annoq, Regni D'ne Elizabethe Regine 28'o Franciscus Drake Miles unus de consortio Medii Templi post navigatione anno preterito susceptam et Omnipotentis Dei beneficio prospere peractam, accessit tempore Prandii in Aulam Medii Templi ac recognovit, Ioanne Savile Armigero tunc lectori, Matheo Dale, Thome Bowyer, Henrico Agmondesham et Thome Hanham Magistris de Banco et aliis il'm presentibus, antiquam familiaritatem et amicitiam cum consortiis generosorum Medii Temple præ dict., omnibus de Consortiis in Aula presentibus, cum magno gaudio, et unanimiter, gratulantibus reditum suum fœlicem."

From the wording of the entry it would appear that Drake's visit to the Hall was

[1] The Epistle Dedicatorie to the Principal Navigations 1589.

[2] See *Dictionary of National Biography*.

[3] State Trials Vol. II. col. 16.

[4] Purchas's Pilgrimages Vol. IV, p. 1645.

not by special invitation, and the presumption is supported by the absence of the Treasurer. He seems to have called casually much in the same way that Mr. Choate did on his way to the Hague Conference and to have received the congratulations of the benchers who were present upon his safe return from his expedition.

The wording of the entry also supports the tradition that Drake had been admitted a member in earlier years though it is not possible to trace the exact date. Probably the admission was entered in the volume of the records which is missing for the years from 1524 to 1551. Attention may be drawn to the name of Thomas Hanham among the signatories. For years he occupied a chamber with Popham. In 1582 he had been Reader of the Inn and in 1589 was created serjeant at law. Hanham's second son, Thomas, also a member of the Inn, was one of the grantees of the Virginia patent of 1606.

Drake was also received at the Inner Temple, but there is no mention of any occasion similar to the admission together, on Feb. 2., 1593, of Sir Martin Frobisher, Admiral Norris and Sir Francis Vere, or of Sir John Hawkins in the following year. Hawkins, we know, was a friend of the Hakluyts and the others were not likely to have been strangers to them.

Sir John Popham was succeeded as Treasurer of the Inn by Miles Sandys, and Robert, younger brother of Anthony Ashley, became a member almost at the same time. He was keenly interested in travel and geographical study. Ashley made journeys into foreign parts from the Middle Temple, which served as headquarters, and the varied collection of books which he bequeathed to the Honorable Society "to be unto them as the foundation of a library" still testifies to his desire "to get some knowledge of foreigne countries." It is reasonable to suppose that the only set now in existence of the Molyneux Globes, published in 1592, was an item in his library and thus found a resting place in the Middle Temple. The construction of the globes was due to the munificence of William Sanderson, a wealthy merchant, who was a liberal patron of geographical exploration. The globes are 2 ft. 2 inches in diameter and were the largest that had been made up to the time of their publication. Upon the celestial as well as the terrestrial globe there is a dedication to Queen Elizabeth. The printing of them was entrusted to Hondius, the celebrated engraver and cartographer at Amsterdam.

In 1590 an expedition consisting of three ships was sent to Virginia "at the special charges of Mr. John Wattes of London, merchant."[1] On two or three occasions about that date the Benchers of the Middle Temple admitted *honoris causa* distinguished members of the Corporation, and Mr. Wattes, afterwards Knighted Lord Mayor and an active member of the Virginia Company, became a member of the Inn by that means in 1596. Another expedition, fitted out at the expense of Sir Walter Raleigh, sailed from Plymouth on March 25th, 1602, for Virginia under the command of Bartholomew Gosnold, a member of the Middle Temple. He died in Virginia on August 22nd, 1607. A contemporary record tells us that "he was honourably buried, having all the Ordnance in the Fort shot off with many vollies of small shot." Anthony Gosnold, a relative of his, went to Virginia in 1605.

Sir John Popham, afterwards Chief Justice of the King's Bench, is supposed to have prepared the first draft of the Charter of the Company in 1606, and undoubtedly took an important part in its affairs. One of the chief members of the company which sailed from England at the end of 1606 and established the settlement of Jamestown was George Percy a younger brother of the Earl of Northumberland. He had been admitted a member of the Inn

[1] Hakluyts Voyages III. 288.

on May 12, 1597, at the age of seventeen. His published accounts contain a good deal of information about the colony of which he more than once acted as Governor.

In the second party of settlers was a certain Gabriel Beadall, who with John Russell was set "to learn to make clapbord cut downe trees and ly in woods . . . making it theire delight to hear the trees thunder as they fell, but the axes so oft blistered their tender fingers that commonly every third blow had a lowd oath to drowne the echo; for remedy of which sin the President devised howe to have everie mans oathes numbered, and at night, for every oath to have a can of water poured downe his sleeve, with which every offender was so washed (himself and all) that a man should scarce heare an oathe in a weake."[1] It may be only a coincidence that about thirty years later there was a Gabriel Beadall keeping a stationer's shop at the Middle Temple as a tenant of the Inn. On the other hand it is quite possible that having gained a little money Beadall returned to his native land and set up in business under the auspices of those who had been instrumental in sending him to Virginia.

Shortly after the formation of the new colony we find a connection between the Temple and the Virginia Settlement through quite a different channel. The Rev. William Cranshaw, father of the poet, who preached the sermon in connection with the departure to Virginia of Lord Delaware on Feb. 21, 1609–10, was Reader of the Temple Church from 1605 to 1613 and is known to have been deeply interested in the infant English commonwealth. Unlike his friend, the Rev. William Symonds who had preached before the Virginia Company in Whitechapel Parish Church in the previous year, he had never been a resident in Virginia though a Mr. Raleigh Crawshaw was in the second party of settlers and is mentioned several times in Mr. Simonds's narrative. Another friend of the Reader of the Temple Church was the Rev. Alexander Whitaker, son of the Master of St. John's College, Cambridge, who ministered in the colony and was drowned there.

Richard Martin, whose erratic temperament has gained for him prominence in the history of the Inn, was also connected with the Virginia Company. In 1591 he was expelled for an assault in the Hall upon another member, but some years later was allowed to return, was called to the Bar and finally became a Reader of the Inn in 1615. Martin was an advocate of considerable force but spoilt his eloquence by indulgence in raillery and invective. In 1614 he acted as counsel for the Company in some proceedings before the House of Commons who passed a resolution of censure upon his speech which was described "as the most unfitting that was ever spoken in this house."[1]

Among the contemporaries of Robert Ashley were the sons and nephews of the Treasurer, Miles Sandys; William, Miles, Edwin, George, and Henry were the names of the five sons who were members of the Inn. His brother the Archbishop also had five sons who were members, — Samuel, Edwin, Thomas, Henry and George. Neither Mr. A. F. Pollard nor Mr. Sidney Lee who wrote the notices of Edwin and George Sandys in the *Dictionary of National Biography* appear to have been aware that there were two Edwins and two Georges, so that, in consideration of this evidence, it is probable that both biographies require considerable emendation. Edwin, son of the Treasurer, is mentioned in the Records of the Inn as a Knight in 1602, whereas Mr. Pollard states that Edwin, son of the Archbishop, was knighted on May 11, 1603. Perhaps the other Edwin was the rightful husband of one or more of the four wives whom Mr. Pollard assigns to the Arch-

[1] Proceedings of the English Colony in Virginia by W.S. 1612. p. 48.

[1] Commons Journals i. 488.

bishop's son. But for the present purpose it is not necessary to examine at length the difficulty whether the Archbishop's sons or the Treasurer's sons were the Virginia adventurers. All four were members. Either two form a strong link between the Inn and the Virginia Company. In the first party of settlers who sailed in 1606 there was a Thomas Sandys who may be identified with the fourth son of the Archbishop born in 1568 and admitted to the Inn in 1588.

To the evidence of the intimate association between the Middle Temple and two of the most prominent men in the government of the colony may be added the fact that the Ferrars, who were equally well known in the administration of the Company, had some connection with the Inn. Erasmus and William were both members and the latter was called to the bar. They are believed to have died before the date of the available records of the Company. But Thomas Collett who was nephew of Nicholas Ferrar and is generally understood to have been assistant secretary lived to be one of the "ancient" members of the Inn. He was admitted in 1619, called to the bar Nov. 24, 1626, was made a bencher Nov. 5, 1652, and an entry shows that he was alive in 1663. Richard Tomlyns, George Thorpe, and William Tracy, are names familiar in the administration of the Company and may probably be identified with contemporary Middle Templars.

Unfortunately the early records of the Company cannot be traced, but from 1619 to 1624 they are available and have been admirably edited by Miss Kingsbury under the direction of the Librarian of Congress. They furnish further evidence of the connection between the Middle Temple and the Company. With the exception of a passing reference to Lincoln's Inn no other Inn of Court receives mention in the minutes.

On Nov. 3, 1619, the Court of the Virginia Company chose for their counsel Sir Laurence Hyde and Mr. Christopher Brooke. The latter was a member of Lincoln's Inn, but the former belonged to the Middle Temple, having been Treasurer in 1616. He was admitted to the Council of the Company in 1623. Among the members of the Committee appointed in 1620 to protect the rights of the Company was Nicholas Hyde, no doubt Sir Laurence's nephew, afterwards Judge and Treasurer of the Inn. It was formerly the custom for families to show an allegiance to one Inn of Court much in the same way as they do now to a particular public shool, and the name of Hyde appears upon the registers even more often than Sandys. Lord Pagett was an active member of the Company and also a Middle Templar. Successive members of the family occupied a chamber over the Middle Temple Gate.

On July 7, 1620, the Council, upon the suggestion of Sir Edwin Sandys, appointed committees to deal with the various matters requiring attention in the government of the colony. The first committee was "for the compylinge into a bodie the politique lawes and magistracie of England necessarie or fitt for that Plantation." It consisted of Sir Thomas Roe, Mr. Christopher Brooke, Mr. Selden, Mr. Edw. Herbert and Mr. Philip Jermyn. Sir Thomas Roe was a member of the Middle Temple and had been recommended by the King for the office of Treasurer of the Company. Mr. Philip Jermyn who became a member of the Council in 1622 was a barrister of the Inn and held the office of Reader in 1629. Two Committees of the company of which he was a member were instructed to meet at his Chambers in the Temple.

Under date Nov. 14, 1621, is an entry in the records which may be transcribed:—

"Mr. Churchill Moone of the Middle Temple in London, gentleman, having eighte shares of land in Virginia allowed by the auditors did upon request passe them over with approbacion of this Court in manner following viz. he assigned 4 of them unto Mr. Charles Cratford of the Middle Temple in London Esquire, also he assigned two

to Mr. Richard Chettle. And two unto Mr. William Wheat of the Middle Temple Esquire." Mr. Richard Chettle appears from the records of the Inn to have resided in the Middle Temple but not to have been a member. On April 30th, 1623, another member of the Inn, Mr. Thomas Culpepper, became the owner of three shares of land.

The Virginia Company was dissolved in in 1624, so that throughout the whole of its history there can be traced links between the Inn and the Company and the evidence may be thought sufficient to justify the suggestion that the Society of the Middle Temple showed considerable interest in the birth of the American nation.

Mention may be made of another connection to which there is no parallel at either of the other Inns of Court between the Inn and the United States. Five signatories of the Declaration of Independence were members of the Middle Temple — Edward Rutledge, Governor of South Carolina, Thomas Hayward, Judge Thomas Lynch, Arthur Midleton and Arthur McKean, who drafted the Constitution and was first chief justice of the Supreme Court of Pennsylvania. John Rutledge, who was Chairman of the Commission appointed to draft the first Constitution of the United States and was nominated by Washington to be second chief justice, was a student for five years at the Middle Temple. John Dickinson the "Pennsylvanie Farmer," Arthur Lee of Virginia, William Livingston, one of the framers of the Constitution, and Peyton Randolph, President of the Continental Congress at Philadelphia, were also members, and the last named was called to the bar at the Middle Temple. Thus the legal knowledge acquired in the Inn made a considerable contribution to the establishment of sound government, so that besides assisting at the birth of the nation the Society of the Middle Temple may lay claim to have aided in equipping it for an independent life upon its attainment of a separate existence.

LONDON, ENG., March, 1908.

THE SHERMAN LAW AND CONTRACTS IN RESTRAINT OF TRADE

By Paul Edgar Lesh.

At common law a contract in restraint of trade is valid and enforceable if the restraint is reasonable, but invalid and unenforceable if the restraint is unreasonable. This test of reasonableness is the outgrowth of a long line of adjudications, gradually changing with changes in the conditions of trade.

It is at least historically interesting to note that in the earliest reported case upon the subject, found in Year Book, 2 Hen. V fol. 5, pl. 26, decided in the year 1415, where the obligation sought to be enforced against the defendant was that he would not use his art of a dyer's craft in the city of the plaintiff for one-half year, — an obligation which in the light of modern common law decisions might be held reasonable and valid, — the court not only held the obligation void, but added: "and by G — (*per Dieu*), if the plaintiff were here, he should go to prison till he paid a fine to the King." The spirit of this forceful, if inelegant remark, was not made into law for three hundred and seventy-five years after which interval it appeared in the enactment of the criminal clause of the Sherman Anti-Trust Act.

The case of Mitchel *v.* Reynolds, (1 P. Wms. 181), is generally conceded to be the leading case upon the point that "a bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good," but where the restraint is general, it is oppresive and void. We cannot, within the limitations of this article, follow the development of the test of reasonableness, and the effect upon the law of the changing conditions of trade. Briefly, as communication and commerce to distant markets became more and more possible and profitable, the field of trade from which a man by contract could bind himself to withdraw became larger and larger. To quote the modern doctrine from the New York Court of Appeals — "When the restraint is general, but at the same time is co-extensive only with the interest to be protected and with the benefit meant to be conferred" the contract is "as reasonable as when the interest is partial and there is a corresponding partial restraint." (Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 482.)

To the rule that the restraint at common law must be reasonable, there is this corrollary, that the covenant of restraint in a valid contract is usually if not always ancillary to and in aid of a main contract, and not the principal object of the transaction. An example of such an ancillary restraint is that placed upon the vendor of a business with its good will, binding him not to engage in a competing business. Judge Taft, in United States *v.* Addyston Pipe Co. (87 Fed. 271) says, speaking of the common law: "No conventional restraint of trade can be enforced unless the contract embodying it is merely ancillary to the main purpose of a lawful contract." Whether or not this sweeping statement is sound as to the common law, it is undeniable that almost all contracts in restraint of trade held enforceable because reasonable are ancillary to a principal lawful transaction.

These common law doctrines may be briefly summarized in this wise: that the restraint must be reasonable; that the law refuses to enforce a contract unreasonably restraining trade because of the injury to the public and of the injury to the party himself. A restraint will usually be held unreasonable when it is the principal object of the contract, for there is then nothing

to justify or excuse the restraint; a restraint will be held reasonable when ancillary to a principal contract and necessary to protect the covenantee.

The illegality imposed by the common law is merely negative, i.e., the courts will not enforce the contract; the illegality gives rise to no affirmative rights of dissolution or punishment by the Government, and to no affirmative redress for an individual injured by such a contract.

This hasty glance at the common law will help to a more intelligent study of the change wrought in this branch of the law by the enactment and enforcement of the Federal Anti-Trust laws.

The Statutes of the United States. What is a "Restraint of Trade?"

The existing anti-trust laws of the United States are embodied in the Sherman Anti-Trust Act, passed July 2, 1890, Ch. 647 (26 Stat. L. 209), as supplemented with regard to importations into the United States, by the Act of August 27, 1894 Ch. 349 (28 Stat. L. 570). Proceedings have thus far been brought under the Act of 1890, and so it is with the construction of this legislaion that we will concern ourselves.

The act is entitled — "An act to protect trade and commerce against unlawful restraints and monopolies" and provides as follows:[1]

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . . ".

Section 3 contains the same provisions with regard to the trade of the territories and the District of Columbia with each other and with the states and with foreign nations, making the provisions of the Act co-extensive in application with the power of the Federal Government in this regard.

The expression of the statute now to be considered is "every contract in restraint of trade or commerce."

The Test of Reasonableness.

It has been the vigorous contention of those who seek to limit the application of this legislation that this expression of the statute is to be construed to apply only to those restraints obnoxious to the common law. The language of the Act, it is contended, is to be construed with reference to the purpose announced in its title, to wit, the protection of trade against "*unlawful* restraints"; every restraint was not unlawful by the common law, which was in force and in the minds of Congress at the time of the passage of the act, hence Congress intended to except lawful restraints from the operation of the act. At common law (*supra*), contracts in *reasonable* restraint of trade were lawful and enforceable, those in *unreasonable* restraint were not. By this construction the statute was sought to be dwarfed to inhibit those restraints only which were unreasonable.

This question came before the Supreme Court in the United States *v.* Trans-Missouri Freight Association (166 U. S. 290), and the contention was distinctly negatived. The bill was to dissolve a combination among several railway companies for the maintenance of reasonable rates on hitherto competing lines, alleged to be void under the Act of 1890. The District Court had dismissed the bill, because, among other reasons, the contract was not in restraint of trade "in violation of the first section of the act of July 2, 1890" (53 Fed. 452) because the restraint was not such as would injure the public, in other words, because it was a *reasonable* restraint of trade. Upon appeal by the complainant, the Supreme Court reversed this decision, holding —

"that the language used in the title refers to and includes and was intended to include

[1] Other sections of the Act will be quoted *infra*, as they are discussed.

those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its test." (p. 327.)

After restating the contention we are considering, the Court continued:

"The term is not of such limited signification . . . A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. . . . When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." (p. 328.)

In this case it was argued that the agreement "for maintaining reasonable rates" was necessary to the life of the railroads, that in the absence of such reasonable restraint as that imposed by the agreement, unrestricted competition, by the peculiar nature of railroad property, spelled ruin. The court took issue with this contention, and then concluded, — "These considerations are, however, not for us. If the Act ought to read as contended for by defendants, Congress is the body to amend it." (p. 340).

This decision and the doctrines just quoted were adhered to by the Supreme Court upon motion for a rehearing and reiterated in the Joint Traffic Association case (174 U. S. 505, 573–575) in the face of most earnest and able argument and representation of the "widespread alarm with which it was received" (p. 573), yet counsel for the combinations were so slow to believe that this was not the vulnerable point of the Act of 1890, that in almost every decision under the Act the Court has found it necessary to hold that the common law test of reasonableness is not applicable.

The opinion of Mr. Justice Brewer in the Northern Securities case (193 U. S. 197, 360) may be believed, by reason of some of its broader statements, to be a yielding to this contention, but the writer prefers to regard it as merely stating the rule exepting from the Act "those minor contracts in partial restraint of trade," which the Supreme Court has since held distinctly were not *directly* in restraint of trade and hence not condemned by the Act. (*Vide infra.*)

Relation of Competition to Trade

Since it was decided that no success would reward a contention in each case that the restraint imposed on trade was reasonable, the defendors of the combinations took this bolder stand, that it was not established that there was any restraint of *trade* at all.

In the case immediately following the Trans-Missouri case in the Supreme Court, the United States *v.* Joint Traffic Association (171 U. S. 505, 558–559), the Court states this change of contention in this wise:

"It is . . . said . . . that the point therein decided . . . was simply that all contracts, whether in reasonable as well as in unreasonable restraint of trade, were included in the terms of the Act, and the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided."

The argument was well supported by Mr. Carter, for the Joint Traffic Association, as follows:

"It (the agreement), does, indeed, purport to restrain competition, although in very slight degree and on a single point. That is one of its objects, and if competition and commerce were identical, being but different names for the same thing, then indeed, in assuming to restrain competition even so far, it would be assuming in a corres-

ponding degree to restrain commerce; but surely no such identity will be pretended. Commerce is the interchange of commodities. Competition is one of its incidents only, and but an occasional incident. To identify anything with one of its occasional incidents would be an error. . . . A restraint upon competition does not of necessity restrain trade, but may even promote trade. . . ." (43 L. ed. 267.)

This contention, that a restraint of *competition* is not necessarily a restraint of *trade*, is but a corrollary to the attempt to fasten the common law test of reasonableness upon the anti-trust legislation. Under the latter contention it had been argued that a restricting agreement to abate the evils of unrestrained competition imposed but a reasonable restraint on trade, under the former it was now argued that a restraint of *competition* merely was no (or no direct) restraint of *trade*. The same (alleged) economic facts were introduced under guise of this new contention as had been under the old.

It is the theory of the writer that this change of the form of the monopolists' contention was induced, *first*, by the decisive disallowance of the test of reasonableness, and, *second*, by the intimation by the Supreme Court that the statute would not be applied unless the element of restraint of trade entered *directly* into the contract (*vide infra*). Ergo, said the monopolist, let us argue that our contract only *indirectly* restrains trade. Therefore it was, in the writer's opinion, that Mr. Carter renovated and rechristened the old argument in favor of " reasonable restraints " to meet the supposed views of the court.

The holding of the Supreme Court that this contention had necessarily been negatived by the Trans-Missouri decision is consistent with this theory. Directly answering the contention we have quoted, the Court said:

" The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent the play of competition restrains instead of promoting trade and commerce. . . . An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition. . . . " (p. 577.)

Thus it is, that however open to argument as a question of political economy may be the wisdom of unrestrained competition, the Supreme Court has made it a rule of law that any interference with the free play of competition in interstate trade, is an illegal restraint of trade under the anti-trust Act of 1890.

Another interesting phase of this question was presented in the case of United States *v.* Addyston Pipe and Steel Company (175 U. S. 211). The contract sought to be dissolved by the government divided among the six defendant corporations, manufacturers, transporters and vendors of iron pipe, the territory of the United States for the purpose of bidding for contracts, and established a system of determining among these six companies which one should be allowed to successfully bid for each contract offered. It was most ingeniously urged by the defendants that since but one contract could be awarded for the work proposed at any one place, and therefore but one person could in any event secure it by virtue of being the lowest bidder, the selection by the defendants of one of their number to make the lowest bid as among themselves could not operate as a restraint of trade, that the combination affected only the selection of the lowest bidder and did not limit the number of contracts.

Obviously, however, this argument admitted a restraint of *competition*, and the court therefore held it a restraint of trade. Said the court:

" It is the effect of the combination, in limiting and restricting the right of each of

the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. . . . It is not material that the combination did not prevent the letting of any particular contract. . . . The question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade." (p. 245.)

Other decisions are but amplifications and applications to novel facts of the doctrines deducible from the opinions already cited, and the limitations of this article forbid their further mention. We therefore conclude, that a restraint of trade within the purview of the statute is an interference, however reasonable, with the natural and free play of competition.

What Contracts Restrain Trade.

How and how much must the element of restraint of trade be involved in a contract to bring it within the purview of the anti-trust laws? The unfailing criterion for determining, in this regard, whether a contract is within the purview of the statute is by inquiring — does it directly, not incidentally or collaterally, but directly, affect trade?

Contracts Regarding Particular Businesses, Manufacture, Etc.

It was a phase of this inquiry that arose in the first case before the Supreme Court in connection with the Act of 1890, that of United States *v.* E. C. Knight Co., (156 U. S. 1). Briefly stated, the case was this: the defendant American Sugar Refining Company, already largely controlling the manufacture of refined sugar in the United States, bought up the controlling interest of the stock of four of its chief competitors, also defendants, and thus acquired a monopoly of the business. The suit was instituted by a bill filed by the Attorney General for the dissolution of the combination. It was conceded that competition was stifled and a monopoly established, but the contention was that the restraint, if any, was of manufacture and not of commerce. Upon the facts of this particular case, the Supreme Court sustained the contention, saying:

"Doubtless the power to control manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. . . . There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might incidentally be affected was not enough to entitle the complainant to a decree." (p. 12, p. 17.)

Subsequent decisions have shown that the doctrines here laid down are applicable only when the combination is, as here, solely of the manufacture, and "there is nothing in the proofs to indicate any intention to put a restraint upon trade"; and when, therefore, it can be truly said that there is no *direct* effect upon *trade*.

When the Addyston Pipe and Steel Co. case (*supra*) came before the court, it was urged upon the authority of the Knight case that the agreement among the defendant manufacturing companies was not a regulation of *commerce*. The court pointed out the limitation we have suggested to the Knight case, that in that case there was no agreement as to the future disposition of the manufactured article, and that the probable intention to dispose of it by sending it to some market in another state was held immaterial. The Court very properly held the decision, so construed, to be not controlling. As may be seen by a glance at the facts of the Addyston case (*supra*, pp. 9–10), the contract therein was for the *direct* and *immediate* regulation of the contracts of *sale* of the manufactured articles.

An almost opposite contention was that a contract regulating transportation only was not a regulaion of trade. This was first made in the Trans-Missouri case (*supra*), where it was argued that Congress did not intend to include a regulation of railroads and transportation, and also that the contention is born out by the fact that railroad regulation was embraced in a previous statute, the Interstate Commerce Act. But the answer is as simple as it is conclusive, that persons engaged in the business of transportation were, on principal and authority, engaged in commerce; therefore an agreement between them as to rates was an agreement directly and immediately affecting commerce. "Railroad companies are instruments of commerce and their business is commerce itself" (p. 312.) Since the Act of 1890 was expressly aimed at restraints of commerce, it was held immaterial that transportation companies clearly included within its terms were also affected by the previous statute. This doctrine is so briefly stated not because of minor importance but because it is so indubitably sound in principle.

Most often the question of whether or not the element of restraint of trade is so involved in a contract as to bring it within the statute arises and is discussed with the constitutional objection, that the contract does not affect *interstate* trade. Particularly was this true in Hopkins *v.* United States (171 U.S. 578), where a combination of commission merchants, dealing in live stock at Kansas City, was held not in restraint of interstate commerce, because their business was local; they performed services upon an article of interstate commerce, but were not themselves engaged therein. The court laid down this doctrine as decisive of the case — "There must be some *direct* or immediate effect upon interstate commerce in order to come within the act" (p. 592). A like conclusion was reached in Anderson *v.* United States (171 U. S. 604), upon very similar facts.

The two cases last cited are to be contrasted with that of Montague & Co. *v.* Lowry (193 U. S. 38). Leading dealers in tiles, principally in California, entered into a combination with manufacturers of these articles, without the state, by which all persons not members of the association were practically excluded from trade with members. The association had power of arbitrary refusal of applications for membership, and by its by-laws excluded the smaller dealers, of which the plaintiff was one. The plaintiff sued a member of the association for threefold damages under the Act of 1890. The Court again applied the test we have suggested, that of the *directness* of effect upon commerce, and held that by narrowing the market open to the plaintiff, "the agreement directly affected and restrained interstate commerce" (p. 48).

Upon the authority of this and other cases above discussed, the Supreme Court on the 3rd of February, 1908, held a combination of union hatters and other labor unionists to boycott a manufacturer of hats who refused to unionize his shop, to be within the condemnation of the Act. The Court were unanimous in holding that since the combination "essentially obstructs the free flow of commerce between the States, or restricts in that regard, the liberty of a trader to engage in business" it was clearly and without further demonstration made illegal by the Act. (*Loewe* v. *Lawlor*, "Danbury Hatters Case," not yet reported.) This case well exemplifies a large class of cases arising under the Act, in that the gist of the wrong complained of here was the concerted action, the "combination," rather than a contract.

Ancillary Contracts in Restraint of Trade.

Recalling the distinction at common law between ancillary contracts in restraint of trade, such as that protecting the vendee of a business with its goodwill, and those having for their chief or only purpose a

regulation of trade (*supra*, p. 3); one of the most logical of the arguments advanced to convince the courts that the Anti-trust Act was to be construed to be aimed only at reasonable restraints of trade, was this: Congress intended to pass a reasonable law; the law would be unreasonable if it made illegal and criminal such ancillary contracts in restraint of trade; therefore, Congress did not intend to include all contracts in restraint of trade within the condemnation of the Act. The supreme Court has never questioned the truth of the premises of this argument, and has negatived its conclusion only when sought to be too broadly applied. The Court has never tried to escape the conclusion that so far as ancillary or collateral contracts in restraint of trade are concerned, the Congress did intend to exclude some restraints of trade from the operation of the statute.

The exception is made in favor of this class of contracts, however, not because the restraint is held *reasonable*, but because the contract only *indirectly* regulates trade, — because the agreement is but a "part of a sale of a business and not . . . a device to control commerce." Until the term before last of the Supreme Court,[1] this rule and its reason were supported, in that court, only by dicta. The reason of the rule had been forecast in the Joint Traffic case (p. 568):

". . . the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; . . . To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts . . . because, as they assert, they all restrain trade in some *remote and indirect degree*, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

Mr. Justice Brewer's opinion in the Northern Securities case, if strictly construed, is but an indirect statement of the doctrine here suggested (193 U. S. 197, 360; *supra* pp. 6–7).

In the Cincinnatti Packet Co. *v.* Bay (200 U. S. 179), decided in January, 1906, the question came squarely before the court by a suit for an instalment of purchase money upon a contract of sale sought to be avoided because the vendee had also agreed as a part of the consideration not to compete with the vessel sold. The court said (p. 185):

". . . there has been no intimation from any one, we believe, that such a contract, make as part of the sale of a business and not as a device to control commerce would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute."

By this construction there is excluded from the operation of the statute, in its entirety, the class of contract which were the subject of practically all of the contested cases at common law.

It seems, then, that the effect of the statute is to illegalize but one class of contracts which were valid at common law; for if the contract were chiefly and directly to regulate and restrain trade, the common law would pronounce it invalid, if unreasonable, and valid, if reasonable, while the statute would invariably pronounce it illegal as directly restraining trade; and if the restraining covenant were collateral to a principal legal contract, then the common law might either pronounce it reasonable and valid, or unreasonable and invalid, but the statute does not apply at all, because it only incidentally and indirectly restrains trade. The contingency covered by the statute and not by the common law is the possible case where a contract directly and chiefly for the regulation and restraint

[1] Excepting Bement *v.* National Harrow Co., (186 U. S. 70), because it is based partly upon its peculiar facts as involving a patent, a legal monopoly.

of trade might be held at common law valid because reasonable.[1] Such holding is impossible under the statute.

The Effect of the Statute

The illegality fastened upon a restraining contract by the anti-trust laws, however, is much more serious in its consequences than that attaching to such contract by the common law. These statutory consequences are now to be discussed under our second inquiry. The major portion of this article has been devoted to an inquiry as to the scope of the Act, because the language of the Act designating the contracts to be acted upon by it is so general as to require much examination into the decisions to determine its precise meaning; whereas the language of the Act devoted to the effects of the inclusion of a contract within its terms is more specific and admits of little misconstruction. These effects will be considered in the order of their appearance in the Statute.

Illegality in General.

The Act (Secs. 1–3) declares such contracts "to be illegal." This illegality is of the same effect as a defense to a suit upon the contract of restraint as was the similar illegality at common law. Thus, in Bement *v.* National Harrow Co. (186 U. S. 70), where the plaintiff contended that the supposed illegality of the contract sued on gave rise to such rights only as were set forth in the statute, the court ruled in this wise:

"Assuming that the plaintiff is right so far as any suit brought under that Act, we are nevertheless of opinion that anyone sued upon a contract may set up as a defense that it is a violation of the Act of Congress, and, if found to be so, that fact will constitute a good defence to the action" (p. 88).

[1] Judge Taft (Harlan and Lurton, JJ. concurring) has held that such a holding at common law would be error, upon the ground that such a contract is *ipso facto* unreasonable (*supra*, p. 3).

But the invalidity of the contract of combination does not avail as a defense to suits upon collateral contracts entered into by the illegally formed combination. This question arose and was decided in Connolly *v.* Sewer Pipe Co. (184 U. S. 540); which was a suit by a member of an allegedly illegal combination to recover for pipe sold to the defendant. The court said: "The contracts . . . were collateral to the arrangement for the combination referred to . . . The combination may have been illegal, and yet the sale to the defendants was valid."

With respect to the general illegality, a contract illegal by the statute stands upon the same footing as a contract illegal by the common law.

Criminality of Contract.

The statute reads (Secs. 1 and 3):

". . . Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In respect of this criminal consequence of illegality, we have little but the statute to guide us. There are no common law crimes against the United States (In re Greene, 52 Fed. 104), nor did the common law of England include this offence as a crime, and so the statute is to be interpreted without this usual aid. The few prosecutions that have been brought under the Act have been decided adversely to the Government in the lower courts, usually upon demurrer or motion to quash, based upon insufficiencies of form. They settle practically but one point, — that the indictment must charge the offence with particularity, the words of the statute are insufficient. (See U. S. *v.* Greenhut, 50 Fed. 469; U. S. *v.* Patterson, 55 Fed. 605). Some light is shed upon the construction of these criminal provisions by

the Northern Securities case, as follows: "It is said that this statute contains criminal provisions and must therefore be strictly construed. . . . It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions." (193 U. S. 197, 358.)

Remedy by Injunction.

The statute reads:

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in the respective districts, under the direction of the Attorney-General to institute proceedings in equity to prevent and restrain such violations."

The section provides further as to procedure and authorizes a temporary injunction in proper case.

Plain as is the provision of the statute, the Supreme Court in the Trans-Missouri case (166 U. S. 290, 342), where the action was under this section, found it necessary to make this ruling:

"It is also argued that the United States have no standing in court to maintain this bill, that they have no pecuniary interest in the result of the litigation or in the question to be decided by the court. We think that the fourth section of the Act invests the Government with full power and authority to bring such an action as this, and if the facts be proved, an injunction should issue."

Under this section of the statute, an injunction has frequently been asked by parties other than the Government. The case most frequently quoted in this connection is Blindell *v.* Hagan (54 Fed. 40), where an injunction was asked under the Act in a suit between individuals, and the court held: "it (the Act) gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits are not authorized by it." This question has never been passed upon the the Supreme Court, but, by reason of its inherent logic and frequent affirmances by the Circuit Court of Appeals, it may be regarded as settled law.

In the hands of the Government, however, this remedy has proven a most effective one, and has been liberally applied by the Supreme Court. In the Northern Securities case (193 U. S 197) the Government sought an injunction against a combination that was well calculated, in form, to thwart the purposes of the anti-trust act. The contract was in form a mere sale of stock of two competing railway companies by the majority (in value) of the stockholders to one company, the defendant corporation, organized and given power to hold stock by the laws of New Jersey, which holding company issued its own stock to the formal vendors of the stock of the two railways. After it had been determined that the direct effect was to restrain trade contrary to the Act, it was argued that Congress could not constitutionally interfere by injunction with the ownership of stock and organization of a corporation given power by a State to do the specific acts complained of. The court held that it could legally enjoin the holding company from voting the stock and from exercising any control over the railway companies, and could enjoin the railway companies from paying dividends to the holding company; the shield of a State corporation could not protect a combination illegal under a constitutional Federal law. "In short," said the court, "the Court may make any order necessary to bring about the dissolution or suppression of an illegal combination" (p. 346).

Seizure of Property.

A remedy that has as yet assumed no importance is that provided by Section 6 of the statute:

"Sec. 6. Any property owned under any contract or by any combination, or pursuant

to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law."

Suit for Threefold Damages.

The statute reads:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

This suit for threefold damages is the only affirmative redress given by the act to individuals injured by contracts in restraint of trade. The most important limitation placed upon the Act in this regard is that the action to recover damages must be a direct one, and that relief cannot be claimed by way of set-off to a suit by the combination upon a collateral contract. In Connolly *v.* Union Sewer Pipe Co. (*supra*), such damages were claimed by way of set-off, and disallowed by the court, because, as the court said, the action authorized by the statute "must be a direct one" (p. 552). The right of an individual to recover in a direct action for threefold damages was sustained in the case of Montague *v.* Lowry, which case has already been discussed.

This second inquiry may well be concluded by the suggestion with which it was begun, that the plain provisions of the Statute are to be looked to, to determine the consequences of the criminality of illegality of a contract within the purview of the anti-trust laws.

General Conclusions.

To summarize briefly: (1) (a) Any interference, however reasonable, with the natural play of competition is a restraint of trade; (b) the element of restraint must enter *directly* into a contract to bring it within the purview of the act; (2) The statute makes such a contract illegal and void; gives rise to a right in the Government to prosecute criminally the contractors, to enjoin the carrying out of the contract, and, in proper case, to seize the property involved; and gives to an individual injured a right of action for threefold damages.

Washington, D. C., March, 1908.

THE SCOTTISH LAW STUDENT

By "Gael."

I wonder why I canna read,
Why a' my thoughts awa' recede
Frae books an' law, an' take no heed
O' Shelley's case,
An' seek alway with utmost speed
Her bonnie face.

I canna think on estates tail,
Statute de donis old an' stale,
Frae a' sic things I take leg bail,
Maist a' the while,
An' seek her house in yonder dale,
To see her smile.

I canna burn the midnight oil;
I canna like a student toil;
Frae a' sic things I do recoil,
An' 'tis no sport
To hear about a foolish broil
Or sit in court.

I'd rather be upon the braes,
These warm an' bonnie springtime days,
An' hear the birdies sing their lays,
An' with her bide,
Than study up assaults, affrays
Or homicide.

I know folk winna call it wise:
It's foolishness I'll na disguise;
But sic soft light is in her eyes,
With it a-shining,
For law nae power within me lies
To be a-pining.

I fear I'll meet with degredation,
When asked in my examination
To give some rule or illustration
Or draw a pleading,
An' well I know it's my salvation
To be a-reading.

I'll gae to work without delay;
This foolishness it winna pay;
I'll study seven hours a day,
An' win a prize:—
Gin to her graces a' I may
But shut my eyes.

Humboldt, Iowa, March, 1908.

SQUIRE ATTOM'S DECISIONS

UNDER THE TWELVE OR FOURTEEN MAXIMS OF EQUITY

As Specially Edited by Herbert J. Adams

MAXIM VII.

Equity Aids the Vigilant, not the Indolent.

Editor's Note: We do not believe the Squire was right. Make-up is very much a part of the histrionic art. For instance; what would Juliet think, and above all how would she feel, in view of cosmetics, if Romeo were to make a mistake, and in place of the refined and sensitive gotee, he should adorn his physiognomy for the balcony scene with the facial peculiarity affected by the Russian nihilist? In such case Romeo would not survive Juliet, and the play would be spoiled.

Whether the honors lean a little in favor of the Judge as between the freedom of his criticism from the involved language of the Heaven sent stage critic, and his own crimes revealed in the 3rd paragraph of the opinion in this case (which paragraph the special editor would like to omit here, as it will be omitted in the edition de luxe) will be left to a fair trial at his day of judgment, for contempt in his own court, when no doubt it will be justly decided that as there is a reward for every virtue, so is there a punishment for every pun and no corroboration needed to convict.

STORM *vs.* BARNES.

Appeal by Defendant from the Propositions and Threats contained in the Summons

Equity of the Case: The well established rule in equity against indolent delay applies against a stale claim long dormant, even where it is attempted to sustain it by only recent constructive possession, and this especially in favor of a party in continuous possession of the real key to the situation, abstract, or measured by pennyweights and pounds, and in such party's pocket; and *held*, that all keys are useful alike according to the value of the thing on the other side of the lock, and the time and manner in which the keys are turned.

Where the use of the key to a trunk might tend to endanger if not shift the equities as the court finds them to exist, and in addition promote profitless wrangling, *held* that it is proper at once to decree upon the findings, apply the maxim, and assess the costs; for delay defeats equity.

Statement of the Case.

Plaintiff, Philander Storm, brings suit against the Hippodrome Theatre Company, for part of one week's wages, $30.00, and $20.00 borrowed money, and in his opening statement asks the court to protect his security for the $20.00 consisting of a trunk which is being used to confine certain properties of the plaintiff in the way of items of make-up such as bald scalps, wigs, sideburns, imperials, mustaches, gotees, whiskers, moles, a couple of tatoos, birthmarks, sets of corns and bunions with shoes to match, all of great value in his calling as actor. Defendant claims he only loaned the trunk to plaintiff because of an accident to an old one of the plaintiff's, and that this trunk is temporarily located at the theatre. It seems another claims a lien on the trunk in connection with a contract entered into some years years ago to manufacture it for the defendant, on which contract there is a nearly outlawed balance of $10.00. This lienholder, since this suit was brought has delegated the stage carpenter to keep watch of the trunk for him. The defendant has delegated himself to watch the lien. He claims that though plaintiff is engaged under written contract at $50.00 per week as leading man in a melodramatic repertoire now running

at the Hippodrome, he had warned him some weeks ago that he was not acting up to the standard; but being assured by plaintiff that he would "make good," things were comfortable till the next morning, during which interim he and plaintiff transacted some business.

Defendant claims to have relied upon plaintiff's representations as to his genius. Both parties attempted to introduce expert testimony bearing on the questions what was and what was not such histronic work as was sufficient under the contract. All parties agreeing, the trunk was sent for, the jury meanwhile being excused to take a cold bath and bring along their bottles of Peruna.

OPINION BY ATTOM, J. P. 1. It now being in the midst of the dog-day term of the court, when everybody is taking Saturday afternoon off, and the churches all day Sunday, and there being little to excite the conscience of the law-abiding citizen to wakefulness, the court has deemed it opportune that the trunk which figures equitably in this litigation should be brought into court. It was thought that a trunk said to have its insides bristling with tufts of all manner of uncanny hair, especially if it remain within the full vision of the jury, and more especially if it were not allowed to be opened in their presence at all, would have a tendency in these, the aforementioned dog-days, to keep the members thereof sitting on the jury instead of sleeping on it; for sometimes that which conscience on account of absence cannot keep awake, curiosity will.

2. Further the court is not inclined to hold that the mere possession of any amount of make-up, from a wooden leg to a false wart, is evidence of ability as a play-actor. Evidence that a party knew enough to use such stage properties in time might appeal to equity under the maxim herein, but not that he in time might know enough. Neither question arises, however, and time is precious.

3. Therefore it is open to argument outside this court only that the trunk had better have been opened. Cases are permitted to be opened in this court; but this trunk is not such a case. Hence, there will be no splitting of hairs on fine legal points as to the competency of the contents thereof in this issue. This is not saying what might have been the ruling had it been a case containing a certain other thing this hot afternoon in the dog-days.

4. It seems that the plaintiff was engaged to play the part of the honest and smart young workingman, John Tressider, in the play, "Woman *v.* Woman," and the defendant claims that he did not correctly interpret his part, particularly in the scene where John after his day's work returns to his wife and baby, where he finds the evening meal nicely served for him. It is in evidence that the gallery went into a rage and then sulked through the balance of the play because Storm did not grab his two months-baby, throw it up to the ceiling and dexterously catch it by the leg as it came down, in exhuberance of fatherly pride. But this warning by the gallery against taking the baby up tenderly as he had presumed to do has been stubbornly ignored by the plaintiff.

5. While the claim of defendant that Storm was too gentlemanly in his part of the young husband and father at home affects chiefly the question of his fulfilling his contract to act right, the court must not lose sight of the equities involved in the continuous possession before and at the time of suit of the key to the trunk. Defendant will not be heard to say that complainant is not acting like a gentleman in declining to surrender his interest in the trunk. Ungentlemanly once, ungentlemanly always, and vice versa.

6. It is practically undisputed that the stage carpenter was not special bailee of the maker of the trunk when defendant, owner of the theatre, turned said trunk, which appears to be a good one, over to com-

plainant as inducement to or security for,— it matters not which — the loan, the receptacle Storm brought there having been carelessly smashed by this same carpenter of this same theatre, where there seem to be authoritative monitors of correct home conduct. The plaintiff here scores one.

7. As to the $10.00 lien claimed, it may be said there is no question here of priority of equities, which would be gauged by another maxim. This is too well known to any farming community to need elucidation. The language in one of the cases is clear. "A court of equity (like this) is never active (in the dog-days) in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights," and more. Mr. Shellfish's 54th Edition. You see how it is. A man may well sleep upon his purse, if there is anything in it; but this is different.

8. The court is inclined to believe that the gallery is often a good judge of acting, particularly when the part does not involve those customs, situation and ideals which the personnel of the gallery fall short of being much acquainted with.

9. The court, the constable and the jury it is apprehended, have not the necessary tickets by which they may gain needed information as to this play-acting, and such as can not be gotten out of an investigation of the contents of the trunk. Upon production of the passports this case will be continued till to-morrow; and the jury may retire, the court only suggesting that they take seats as far forward as possible, yet avoiding the fiercer glare of the footlights. The court, and no doubt the jury have already made up their minds, subject only to the result of observations this evening. If the character, John Tressider, comes in to supper, throws his leg over the back of his chair and then himself into it, in the approved hurry of the waggish workingman, of course the court and jury may change their mind. And if nothing is doing in this line, it may at least be determined who Bessie is wife to.

10. In the meantime it is hoped the plaintiff will keep the key to the trunk in his pocket in public, and the trunk where he pleases, until settlement is made of the loan, and thereby keep himself awake as to the equities. Upon finding that the plaintiff very aptly portrays the home manners of the workingman as they are and ought to be,

DELAYED JUDGMENT in his favor is AFFIRMED.

MAXIM VIII

Equality is Equity.

EDITOR'S NOTE: The special editor would like to see the opinion, which he has taken unusual pains to draw out of the shorthand notes of this case, introduced into the schools.

LAVENDAR *vs.* BACHELOR.

Appeal from chattel mortgage foreclosure by Officer of State Court.

EQUITY OF THE CASE: When personal property of one alleged by complainant to be deceased is in possesion of defendant under bill of sale to secure payment of money by the owner, although complainant, husband of such owner proves an equity therein, *held*, that equity can't help such party out, though never so de-light-ed to do so as being nothing more than a square deal.

Where parties to a divorce suit brought in one court, come together like old times in another court, *held*, that the latter forum may, under what equitable jurisdiction it boasts, equalize the honors, order a dismissal, and wait for the order to be complied with.

STATEMENT OF THE CASE.

Enos Lavendar brings replevin to secure possession of a piano claimed by defendant under a bill of sale from the wife of Lavendar, conditioned upon her failure to pay the vendee's attorney fee in said case. The

husband, Lavendar, had sued for divorce in the absence of his wife at her folks', but upon hearing of her death had dropped the suit; and in the present litigation claims the piano as survivor, on account of having paid half the purchase price, substantiating the allegation by receipts to him. Sworn copies of the Bill and answer in the divorce proceeding were introduced in evidence as hearing upon the question of intention as to property.

At this moment an appealing voice speaking the words " Oh, Enos " sounded from the corner of the room where a veiled woman had seated herself; and she was at once found by the constable huddled on the floor. Complainant, himself almost in a state of collapse, tottered to her side and relieved the constable; and the court adjourned without further inquisitiveness.

Judgment by confession favor of Mr. & Mrs. Enos Lavendar, subject to lien and costs.

BENEDICT LOVEJOY, O.L.D. BACHELLOR, *Attorneys for Plaintiff.*

OPINION BY ATTOM, J. P.: 1. The suit for divorce developed in the evidence introduced has not been nor will be tried here. The court hopes none will come before it unless the parties remain alive till the costs are paid. This court does not advertise for divorces. Yet the one in question is so clean, though so bitter, that even this court could have stood to try it behind closed doors, there being no third party to spoil a pleasant little company of litigants. No prejudice is maintained here against the complainant for not bringing the suit here, nor against the defendant for not taking a change of venue. See recognized work on Removal of Causes.

2. Yet the court is not relieved from some responsibility respecting that case. Though brought in the circuit court, incidents so strong, yea, dramatic, bearing upon the relations of the parties, have occurred in this piano case as to impel the attaching of our jurisdiction thereto; and once attached, the case must be followed up to the bitter end, and all h — can't get us loose. The court will stop short of absolutely dismissing the suit as to files and records merely, but nevertheless does so as on the merits, and will lay down certain rules and opinions to hereafter govern such causes in this court. See some book on Practice.

3. The bonds of matrimony have often been applied to various impatient parties in this court. In fact, the court has worked up quite a bonding business. Many conscientious people regard our article as inferior to the sacred kind they get at the church; but the cases have made no distinction even though ours is much cheaper. Some marriages under religious auspices are sustained by a sense of duty, and some by desire for good form. Ours are apt to be sustained by poverty or fear.

4. When court adjourned in the piano case there was hardly enough left of it to support an opinion, yet that does not offset the costs, the constable will note. Complainant claimed the right to the piano upon satisfying the attorney fee the piano secured; but upon the swooning of his erstwhile divorce client the defendant at once bid the court a fond *auf wieder sehen*. We always took him for a soft-hearted fellow, and are again sustained.

5. But the defendant was right, if he could have followed it up without interference by the resurrection of that client, in his claim that he was not obliged to accept his fee from the husband and release the piano. He could hold the piano till the wife paid him, even to postponing the redemption to the beyond. " Equity delighteth in Equality," and pauseth at survivorship; and Lavender had to pause because lacking proof of death. But while Equity delighteth, the court, just before the tableau, grieved that it had ever taken hold of an equity that could not help the young man out.

Remanded to the circuit court for dismissal of Lavender *vs.* wife, and ordered that she with her husband be allowed to redeem the piano.

INDIANAPOLIS, IND., March, 1908.

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.

A NEW FEDERAL COURT

The Committee of the American Bar Association on Patents, Trade Marks and Copyright Law have issued a circular to those who are interested in the establishment of the proposed new Court of Patent Appeals, urging them to use their influence to obtain the adoption by Congress of the pending legislation. Although this subject has been before the public for nearly eight years, and the plan has been worked out in detail and subjected to thorough criticism, it may be well to recall again the reasons for the proposed change. With the establishment of the present Circuit Courts of Appeal to relieve the Supreme Court of some of its burden of litigation, it was provided that these courts should have exclusive and final appellate jurisdiction in all cases arising under the Patent Laws, subject only to the qualification that the Supreme Court might specially order any such case, pending in or decided by any Circuit Court of Appeals, to be sent to it for consideration by writ of certiorari or otherwise. This is a jurisdiction which in the nature of things can be exercised by that court but rarely, and any frequent resort to it would defeat the object of the law. In fact, only ten patent cases have been carried up in this way in sixteen years.

While the law has been thus singularly effective in producing the result aimed at, it has had another effect not foreseen at the time of its enactment. Since our Circuit Courts of Appeal are entirely independent of each other, and show frequent disinclination to co-ordinate or harmonize their opinions, it has resulted that we now have nine final tribunals to determine patent causes, instead of one, as is the case in all other departments of the law. The importance of certainty in Patent Law is as great as, if not greater than, in general jurisprudence, and although the subject is a highly specialized one and is regarded by most lawyers as outside their field, it is one of great importance to all citizens, for it takes but slight reflection to appreciate our universal dependence upon patented inventions. It is claimed, not without reason, that our marvellous economic development has been largely due to the influence of the monopoly granted to inventors. For the reason, moreover, that the subject is highly specialized and technical, and deals largely with matters susceptible of exact definition, it is peculiarly unfortunate that the opportunity for finality which it affords is not realized. The differences of opinion in the different circuits have already in some important cases resulted in absurdities and injustice, and this tendency is bound to increase if the present situation continues. As the Committee says, "The lawyer can tell his client nothing reliable without reference to the decisions of the courts, and with these in conflict, the law becomes undiscoverable knowledge; it degenerates from a science to guess-work."

The reasons for the creation of a new court seem, therefore, decisive and the only dispute so far has been as to the method of selection of the judges. The plan proposed in the pending bills is in line with the methods adopted in creation of the Circuit Courts of Appeals, but has some unique features that have caused hesitation. It provides for the selection by the Supreme Court, from the existing circuit and district judges, of four judges who with a presiding justice, appointed by the President, shall form the Court of Patent Appeals. The four judges designated shall sit for limited periods of six years each, retiring in rotation. The advocates of the plan insist that it is important not only to have judges who have already proved themselves experts in patent questions, but that they should not, by being confined to that narrow subject, lose the breadth of view which

comes from consideration of the general problems of litigation. It seems likely, however, that the judges who serve in this court would find their appointments renewed at the end of their terms, and the provision for rotation would be valuable only as a means of gracefully retiring an unsatisfactory member. Objection may be made that this is a departure from the principle of independence due to permanence of tenure which prevails throughout the Federal judiciary. Since the designations, however, are to be made by the Supreme Court, and not by any elective body, it seems unlikely that this possibility should have any effect upon the judges of the proposed court except to stimulate them to devoted service.

POLITICAL THEORIES OF THE SUPREME COURT.

In the February *American Political Science Review* (Vol. ii), page 221, Charles G. Haines publishes a valuable thesis entitled "Political Theories of the Supreme Court from 1789 to 1835." It is interesting for its frank recognition of the remarkable characteristic of our highest judicial tribunal. He says that "In accordance with the principles of ancient custom, a court was a tribunal established by law with the power to hear controversies between persons and to administer relief or punishment." Such was the traditional position of the country when the Federal Constitution went into operation, and the early decisions of the Supreme Court recognized the limitation of its field. In Colonial days, however, the theory had been evolved that acts of the legislature might be regarded as void, and since the Revolution was born of resistance to the arbitrary acts of an unlimited government, the doctrine was soon advanced that courts of justice could declare void acts of Parliament. It was a natural development, therefore, that the same doctrine should be applied to acts of Congress in violation of the Constitution; and it was in consequence of this development that the court has had to deal with questions purely political and governmental, and to discuss questions of political, economic and social theory, which from a strictly judicial standpoint should not be expounded. The doctrine of separation of powers which permeated the political philosophy of the times was another influence which tended to carry the Supreme Court in the same direction. The Supreme Court, guided by a Constitution which rather broadly determined its field and defined its powers, became henceforth the final interpreter of its own authority over the other departments. To have abused this power, especially at the beginning, would have meant the speedy downfall of the high authority of the Court. Hence, the Court proceeded with caution, and declared that it would not deal with political questions. It also rejected the doctrine that it could declare void laws contrary to natural justice. But the separation of powers meant that in a certain sense the Court must exercise legislative duties, and that laws of Congress in one sense are not final until this highest Court has granted its seal of approval. The author then calls attention to indications in the decisions of the Court of the influence of the social contract theory, and to the theories which it evolved of state and national sovereignty, which were new in political thinking. He also describes how the Court under the lead of Chief Justice Marshall developed the doctrines of limitations on the powers of the States, and of implied powers under the Federal Constitution, which were the chief instrument in creating our strong national government.

The article above summarized covers only the formative period which ends with the death of Marshall, but it would be interesting to trace, from the same frank governmental point of view, the further history of the Court through the remainder of the conflict between State rights and centralized government. Still more interesting will it be for the future historian to study the development now in progress, which began with the rise of economic questions incident to the development of the wealth of the country during the last generation. The unforeseen effects of the adoption of the 14th Amendment have been bringing all these questions for final judgment to the Supreme Court of the United States and we are at last awakening to the political significance of its decisions and to their effect upon popular confidence.

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

Two articles of very general interest on account of their political bearing and timeliness, as well as the quality of their thought, are Mr. Sunderland's paper on "The government's suit against the Union Pacific," and Mr. Guthrie's address on "The power of the Federal courts to enjoin the enforcement of state statutes." Articles of more restricted interest but of high quality to which attention may be called are Mr. Warren's on "Collateral attack on incorporation," Mr. Bartlett's on "The effect of marriage on a woman's nationality," Mr. Smith's on "Material-men's liens" and Mr. Walter's on "The rights of life tenants and remainder-men as to corporation stock."

ADMIRALTY. "Admiralty Law," by Alfred C. Coxe. *Columbia Law Review* (V. viii, p. 172). A brief exposition of the subject and a plea for more attention to it in law school curricula.

ADMIRALTY (Material-men's Liens). "The Confusion in the Law Relating to Material-men's Liens," by Fitz-Henry Smith, Jr., *Harvard Law Review* (V. xxi, p. 332). The law in this country regarding material-men's liens on vessels is in a very confused state. Mr. Smith considers most of the difficulties and anomalies due to three cases decided by the Supreme Court. The General Smith, 4 Wheat, 438, gave rise to the distinction between "foreign" and "domestic" vessels, by declaring that whether a lien arose for supplies furnished in the vessel's own port or state depended on the law of the state. The St. Jago de Cuba declared (1) that it was not in the power of any one except the master to give implied lien on a vessel; and (2) that when the owner is present "the contract is inferred to be with the owner himself on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." People's Ferry Co. *v.* Beers, 20 How., 393, held that a contract for the construction of a vessel is not maritime because neither made nor to be performed on the water, and hence is not within the jurisdiction of the admiralty courts. These decisions the author considers erroneous and he declares they have caused great confusion and uncertainty in practice. The diversity of the state statutes and the frequent conflicts of authority due to the large number of courts with admiralty jurisdiction under our system add to this confusion.

Congressional legislation to remedy this is needed. Its first aim should be the eradication of the distinction between "foreign" and "domestic" vessels. In the other matters it should proceed "upon one of two theories: either (1) that all repairs upon or necessaries delivered to a vessel by order of a person in authority shall give rise to a claim on the *res* without reference to the matter of credit; or (2) that no lien shall exist in the absence of an express agreement therefor, evidenced preferably by a writing."

ANTI-TRUST PROSECUTIONS. "The Suit Against the Union Pacific" by Edson R. Sunderland, *Michigan Law Review* (V. vi, p. 361). Analyzing the situation of the Union Pacific Railroad, against which a bill under the Anti-Trust law was filed by the government on February 1, 1908, Mr. Sunderland declares it clearly within the Northern Securities decision that any combination which *tends to restrain* interstate commerce or *tends to create a monopoly* in such commerce is a violation of the law. He agrees with Justice Holmes that if the Northern Securities decision rules were strictly applied to the business world we should find ourselves plunged into an eternal war of each against all which would disintegrate society into individual storm. The railroads wish to be at peace; the government would compel them to be at war, contrary to their own interests and those of the public.

"Viewed in this light it might seem that the suit against the Union Pacific involves the most far-reaching and disastrous conse-

quences to the integrity and permanence of American industrial enterprise. But three considerations ameliorate the situation.

"In the first place, it is doubtful if the United States Supreme Court will follow its decision in the Northern Securities case, for the reason that the majority of the Court which rendered it was opposed to its sweeping terms. Perhaps the qualification suggested by Justice Brewer will be the means of deflecting the Anti-Trust law into a comparatively innocuous channel. When brought face to face with such serious consequences to business interests, public policy may deter the court from a strict adherence to an extreme doctrine.

"In the second place, the good to be accomplished by a prosecution under the Anti-Trust law is small beyond all reason compared to the vexatious and destructive results to the railway industry. If present methods of inter-railway adjustments are illegal, railway ingenuity will simply devise others. The means of avoiding internecine conflicts are many and subtle, and a victory for the government will merely cause a change in form while preserving identity in substance. . . . If the government succeeds in its suit it may be necessary for the Union Pacific to sell its holdings in competing lines, but it will by no means follow that a vigorous competition will thereupon spring up among the Pacific roads. If they are determined not to fight, they cannot be compelled to do so by all the laws that Congress can enact. The government may, therefore, forego a general and drastic attack upon the various forms of community of interest in railroad management, in the belief that the game is not worth the candle.

"In the third place, a really adequate means has been devised for dealing with the problem of railroad rates. The Anti-Trust act was passed eighteen years ago, in the days before Congress became convinced that an Interstate Commerce Commission might be safely entrusted with power to fix tariffs. . . .

"The radical amendment to the Act to Regulate Commerce, which was passed in 1906, whereby the Interstate Commerce Commission was given power, after full hearing upon complaint made, to determine and prescribe what will be reasonable rates respecting the subject matter of the complaint and to establish through routes and joint rates, has substantially superseded the Anti-Trust act as a preventive of excessive railroad rates. If the public can get reasonable rates, together with adequate facilities, it becomes wholly immaterial whether competing roads consolidate or combine or pool their earnings or own each other's capital stock or are operated under holding companies. All such matters will then concern the railroad owners and managers only. The public will get what it wants, and the railroads will be left to their own devices in the conduct of their business.

"While, therefore, the suit against the Union Pacific is one of great interest from a strictly legal standpoint and is not without significance in its bearing upon future railroad relations, it probably is not to be looked upon as involving such far-reaching consequences as some of the justices believed would flow from the opinion of the court in the Northern Securities case. It is perhaps rather to be considered a belated attack with obsolete weapons against an abuse which can much more effectually be met with the modern instrumentality of a rate-making commission."

ASSUMPSIT (Right of Beneficiary). "The Limitations of the Action of Assumpsit as Affecting the Right of Action of the Beneficiary, by Crawford D. Hening. *University of Pennsylvania Law Review and American Law Register* (V. lvi, p. 73). A scholarly paper examining the judicial reasoning which enlarged the remedy of the beneficiary of a contract, by giving him the writ of Debt, in addition to the writ of Account, and adding to these two the further alternative of an Action on the Case. These are traced from the beginning to the end of the seventeenth century.

BILLS AND NOTES. An account of the origin of the so-called "Bremen Rules," a suggestion for international uniformity in the law of negotiable instruments which preceded our own Uniform Act, is given by Thomas Baty in the *Journal of the Society of Comparative Legislation* (V. viii, n. s. p. 229).

BIOGRAPHY (Beccaria). "The Great Jurists of the World; VIII Caesar Bonesara, Marquis di Beccaria," by Thomas Rawling Bridgwater in the *Journal of the Society of Comparative Legislation* (V. viii, n. s. p. 219).

BIOGRAPHY. "Chancellor Kent at Yale," by Hon. Macgrane Coxe, *Yale Law Journal* (V. xvii, p. 311). To be concluded in April.

BIOGRAPHY. "Sir Samuel Romilly," by J. A. Lovat-Fraser, *Law Magazine and Review* (V. xxxiii, p. 141).

CAPITAL AND INCOME. "Rights of Life Tenants and Remainder-men to Distribution of Stock and Corporate Assets Made by Corporations to their Stockholders," by Carroll G. Walter, *American Law Review*

(V. xlii, p. 25). Many cases appear in the books in which this question is involved. This article makes a minute study of the two rules in vogue in this country, the Massachusetts rule and the Pennsylvania rule. The latter is sometimes said to be followed by so many other states as to be entitled to be called the American rule, but Mr. Walter disagrees with this opinion.

Summing up the Pennsylvania cases, "we find that the doctrine of the courts of that State is that the actual value of stock at the time of the testator's death, as determined by the total amount of all the assets of the corporation of whatever kind, is the principal or corpus of the estate, which no act of the corporation or of the executors or trustees is allowed to diminish or even increase. The cases clearly hold that the failure of the trustee to change the form of investment, or the act of the corporation in retaining or distributing its earnings, will not be permitted to extract one cent from the testator's proportional interest in the assets of the corporation as they existed at his death. In other words, the value of his proportional interest at the moment of his decease is seized upon and impounded as the maximum and minimum amount to which the remaindermen are entitled. They even go so far as to say that even a right to subscribe for new shares will not be allowed to add to that amount."

In the Massachusetts and United States Supreme courts, the rule has been established "that what the corporation capitalizes in its business, by investing it in property used in the prosecution of that business or using it as working capital, is capital for the remaindermen; and what it pays out to its stockholders as profits is income for the life tenants. The question that they investigate is what the corporation did; and if, upon the investigation of the substance and intent of the act of the corporation, it appears that the dividend is a segregation of a part of the assets of the company from the remainder of those assets and a payment of the part so segregated to the stockholders so as to change the ownership thereof from the corporation to the stockholders, they hold that the dividend is income, whatever be the form of payment; while if it appear that the dividend is a distribution to the stockholders of mere evidences of an equitable interest in assets of the company that are retained by it for use in its business, then they hold that the dividend is capital, whether such distribution be made in the form of new certificates of stock or bonds, or even checks, or money."

An extended comparison of the theory and working of the two rules is all is favor of the Massachusetts rule. The testator's intent should govern, of course, the trouble is that he hardly ever expresses himself clearly on this point.

"There should, however, be some broad and clear rule making the nearest possible approach to exact justice, and we are inclined to think that the rights of the parties can be most equitably adjusted by drawing the distinction between *working capital* and *floating capital* . . ... and awarding all issues of additional stock against accumulated surpluses and all cash dividends from working capital to the remainder-men, and all the current dividends and all the cash dividends from floating capital to the life tenants."

CARRIERS. "The Law of Street Car Transfers," by Raymond D. Thurber, *Bench and Bar* (V. xii, p. 61).

CONFLICT OF LAWS. "Jurisdiction in Divorce," by J. Arthur Barratt. *Law Magazine and Review* (V. xxxiii, p. 199). A paper read at the Portland conference of the International Law Association, August 30, 1907, stating the cases in which the English courts will recognize an American divorce. The author suggests that the decrees rendered in every state should be required to be filed with the state secretary of state, before they become final. A central registry at Washington would be a still longer step in the right direction. It would then be possible to find out, without searching the records of every county in the United States — "first whether a divorce decree had been rendered, and, secondly, where it had been rendered; and a woman could find out what her husband was doing, and proceedings could be taken in the proper State to annul or stop many of these fraudulent divorces.

"I think also, that, on the lines of my former suggestions, there ought to be a statute passed in every state, as I believe

there is in some states, similar to the Legitimacy Declaration Act in England, by which when anyone's marriage or divorce is questioned, he or she can petition the Court to have a decision at once as to the validity or non-validity of the marriage or the divorce. . . . The attorney-general should be cited to prevent fraud as in England."

CONSTITUTIONAL LAW (see Marriage).

CONSTITUTIONAL LAW. "Is the Federal Constitution Adapted to Present Necessities, or Must the American People Have a New One?" by Ralph W. Breckenridge. *Yale Law Journal* (V. xvii, p. 347). Taking the ground that the Constitution gives ample power for the needed control of commerce by the central government, notwithstanding "a resurrected claim of the rights of the states."

CONSTITUTIONAL LAW (Injunction by Federal Court Against Enforcement of State Statute). "The Eleventh Article of Amendment to the Constitution of the United States," by William D. Guthrie. *Columbia Law Review* (V. viii, p. 183). This address delivered before the New York State Bar Association, January 25, discusses the timely question whether the framers of the Eleventh Amendment intended, in prohibiting suits by an individual against a state, likewise to deny to the courts of the United States the power to enjoin a state officer from enforcing a state statute in conflict with the national Constitution.

"In the light of the long-settled and well-known rules of the common law, establishing the distinction between suits against the king under the petition of right and suits against officers of the crown for violating the legal rights of individuals, it is most significant and persuasive, if not convincing, that the framers of the Eleventh Amendment confined its language to suits directly against a State, and did not attempt to prohibit suits against officers of a State when acting as its representatives. . . . They clearly contemplated that state statutes might be passed in conflict with the Constitution of the United States and that these statutes would necessarily have to be enforced or attempted to be enforced by state officers. They must have appreciated that if state officers, as agents of their respective States, were granted immunity from suit in a court of the United States because they were acting for and on behalf of their States, the Constitution could in many respects be rendered ineffective and nugatory. The failure to prohibit suits against officers of a State must, therefore, have been intentional. It is highly improbable that any one at the time conceived that the language adopted was broad enough to prohibit suits against officers of a state. On the contrary, it is proper to assume that the framers of the Eleventh Amendment did not intend to permit an officer of a state, while acting under the color or excuse of an unconstitutional state statute, to invade or deny any right guaranteed by the Constitution of the United States and be immune from suit in a court of the United States merely because he was acting in a representative capacity as an agent of the state. The courts of the United States were specially charged with the preservation of the Constitution, so far, indeed, as it can be preserved by judicial authority. The Federalist shows how clearly it was contemplated that the federal courts were to have power to overrule state statutes in manifest contravention of the Constitution. . . . There is no longer any question but that the Eleventh Amendment does not shield state officers from suits at law in a court of the United States to recover damages for any invasion of private rights under the color of an unconstitutional statute, or to recover possession of real property in the custody of such officers. The rule is axiomatic that no officer in this country is so high that he is above the constitution of the United States, and that no officer of the law, state or national, may violate it under the color or excuse of a statute, national or state, in conflict with its provisions."

This reasoning leads to the conclusion that injunctions should be to restrain state officers from enforcing state statutes alleged to be unconstitutional in order to avoid irreparable injury. This makes the Constitution an effective shield against confiscatory, oppressive and tyrannical legislation. Injunctions should be granted in proper cases if the relief or remedy sought can be granted in the absence of the state as a party defendant.

While severely condemning recent attempts of legislatures to coerce corporations into abandoning their constitutional right to appeal to the courts by imposing enormous and unreasonable fines or threatening them with forfeiture of the protection of the government, Mr. Guthrie freely admits that reform is necessary so that the exasperating delays in determining the constitutionality of statutes regulating corporations may be done away with.

"There is no reason why in the majority of cases such a suit should not be ready for final hearing and actually heard within sixty days or why it should not be finally disposed of in the appellate courts within less than a year. It should have preference on all calendars. The expedition act of Congress, applicable to cases arising under the anti-trust and interstate commerce laws, would furnish a good model for cases involving the validity of state laws. The conditions which now confront the people in many States, where statutes regulating public service corporations are often tied up for years by litigation, tend to create discontent, impatience and dissatisfaction with the courts and to engender a desire for revolutionary change from an intolerable situation."

CONTEMPT. "The Law of Contempt in India," by Sarat Chandra Lahiri, *Criminal Law Journal of India* (V. vii, p. 33).

CONTRACTS. "Appropriation of Payments," by N. S. Natesan, *Bombay Law Reporter* (V. x, p. 51).

CONTRACTS (Consideration). "Void, Illegal or Unenforceable Consideration," by William P. Rogers, *Yale Law Journal* (V. xvii, p. 338). Examining the principles and decisions on this subject, summing up thus:

"It is difficult to state any rule bearing upon this subject against which some authority may not be cited. But the following rules may be stated, being well supported by authority:

"(a) Where two or more promises are made, part of which are legal and part illegal (not *malum in se*) in consideration of a legal promise, he who has made the legal promise may waive those promises which are illegal and enforce those which are legal, provided his part of the contract has been performed; but if his promise is also executory the contract being bilateral and being partly illegal cannot be enforced by either party thereto:

"(b) But the contract cannot be enforced in any event by the party who made the illegal promise.

"(c) If the illegal promise, so connected with a legal promise, is *malum in se*, or is a promise to perform a criminal act, the whole contract is void and unenforceable by either party thereto.

"(d) But if the promise, so connected with a valid legal promise, is not illegal, but simply unenforceable, as one falling within the Statute of Frauds, it will not prevent the party who has made a legal promise on the other side, though it be executory, from waiving such unenforceable promise and enforcing the remaining promise."

CORPORATIONS. "Paying Dividends out of Capital," by Frank Hodgins, K. C., *Canada Law Journal* (V. xliv, p. 94).

CORPORATIONS. "Collateral Attack on Incorporation," by Edward H. Warren, *Harvard Law Review* (V. xxi, p. 305).

"In a former article dealing with unauthorized corporate action, by hypothesis, (1) the associates had made an attempt to incorporate, resulting in a colorable corporate organization; (2) there was a law authorizing the formation of such a corporation as was attempted; (3) there had been user of some of the powers which such a corporation would possess; and (4) the persons seeking to prevent collateral attack had acted in good faith. This article deals with unauthorized corporate action when some one or more of these conditions are lacking. It also, preliminarily, inquires more fully into the nature of the questions underlying the whole subject of unauthorized corporate action."

Examination of principles and authorities leads to the following conclusion:

"Viewing the subject as a whole, it is seen that whether or not collateral attack is to be permitted depends not so much on logical deductions as on the exercise of a sound judgment. Opposing considerations must be weighed. The law, therefore, cannot be pictured in bright lines. Some large features, however, emerge. 1. Collateral attack should be permitted to a stranger to whose prejudice the associates seek to assert a right dependent upon incorporation, — and this whether there are the technical requisites of the de facto doctrine, or not. 2. The associates should not be shielded from full liability where their legal incorporation failed for some reason more serious than an informality or irregularity in their organization. 3. These effective checks by collateral attack being established, the courts may, in many other instances, properly deny such attack, — and this whether there are the technical requisites of the de facto doctrine, or not. Thus, notably, where A seeks to avoid liability on the ground that there was no law under which the associates could have obtained authority for their corporate action."

CRIMINAL LAW. "Why Capital Punishment should be Abolished," by E. M. John, *Criminal Law Journal of India* (V. vii, p. 40).

CRIMINAL LAW REFORM. "Criminals and Crime," by Lex., *Law Magazine and Review* (V. xxxiii, p. 129). Adverse comments on Sir Robert Anderson's recent book

of the same title as this article, which severely criticises some phases of the criminal law reform movement.

DIVORCE (see Conflict of Laws).

EMPLOYERS' LIABILITY. In *Charities and the Commons* for March is an article by Crystal Eastman on "Employers' Liability in Pennsylvania." The decision of the Supreme Court of the United States that the Federal Act is unconstitutional makes it of especial interest to students of sociology at this time to know how far our state law gives a remedy for what is coming to be recognized as a public damage.

EQUITY. "Equity Follows the Law," by Robert L. McWilliams, *Central Law Journal* (V. lxvi, p. 177).

GOVERNMENT (United States). "The National Government," by Alfred Spring, *American Law Review* (V. xlii, p. 79). An analysis of our system, pointing out the steps in its development, with a tribute to the work of the Supreme Court in interpreting the Constitution in accordance with the need of a strong central government and the developing national spirit.

HISTORY. "The Oration on the Crown," by Pliny B. Smith, March *Illinois Law Review* (V. ii., p. 496).

HISTORY. "Censorship of Stage Plays," by W. T. Craies in the *Journal of the Society of Comparative Legislation* (V. viii, p. 196). A history of English statutes.

HISTORY. Herbert N. Casson who described in the February *Broadway Magazine* the late Samuel C. T. Dodd, the founder of the legal system of the Standard Oil Company devotes his article in the March number (V. xix, p. 671) to a diverting account of the prosecution at Chicago which resulted in the great fine imposed by Judge Landis. The characterization of the Judge and of the methods pursued by the counsel for the defense go far to explain the startling features of that decision.

HISTORY (Pennsylvania Courts). "The Courts from the Revolution to the Revision of the Civil Code," by William H. Loyd, Jr. *University of Pennsylvania Law Review* (V. lvi, p. 88).

HUSBAND AND WIFE. "Marriage with a Deceased Wife's Sister," by George S. Holmstead, K.C., *Canadian Law Times and Review* (V. xxviii, p. 108).

INSURANCE. "A Statement Concerning Mr. Samuel B. Clarke's Article Entitled 'Defects of the Armstrong Committee's Legislation Relating to the Dividends of Mutual Life Insurance Policy-Holders' and Mr. James McKeen's Answer," by William Trenholm, *American Law Review* (V. xlii, p. 1). Agreeing with Mr. Clarke's views as to defects in the Armstrong committee legislation.

INSURANCE. "Distribution of Surplus by Insurance Companies," by Herbert H. Reed, *American Law Review* (V. xlii, p. 12).

INSURANCE (Liability Insurance). In the *Standard* for February 22 (V. xlii, p. 197), Edwin G. Anderson, of the claim department of the accident and liability branch of the Aetna Life Insurance Company, gives an interesting account of the history of the English law of liability for death, together with some comments on modern statutes.

INTERNATIONAL LAW (Pan-American Conference). "Extradition and Protection Against Anarchy," by Edwin Maxey, *Yale Law Journal* (V. xvii, p. 376). Account and discussion of the work of the Pan-American Conference in regard to extradition, with special reference to the question of anarchy.

INTERNATIONAL LAW (Compelling Arbitration). "Can Any Right of Direct Citation Be Given to a State in International Conflicts by Jacques Dumas, *Yale Law Journal* (V. xvii, p. 365). Arguing that a state should have the power to cite its adversary directly before the Hague Tribunal and, if it does not present itself, demand judgment by default.

JURISPRUDENCE. "Customary and Other Laws in the East Africa Protectorate," by Sir Lewis Tupper in the *Journal of the Society of Comparative Legislation* (V. viii, n. s., p. 172) will interest students of primitive law and customs.

JURISPRUDENCE. A review of Ching Hui Wang's English work on German Law is reviewed by Ernest J. Schuster under the title of "A Chinese Commentary on the

German Civil Code," in the *Journal of the Society of Comparative Legislation* (V. viii, p. 247).

JURISPRUDENCE. A review of "Sir A. F. S. Maasdorp's Institutes of Cape Law," by R. W. Lee is contributed to the *Journal of the Society of Comparative Legislation* (V. viii, n. s., p. 239).

JURISPRUDENCE. "Roman Law and Mohammedan Jurisprudence, Part III," by Theodore P. Ion, *Michigan Law Review* (V. vi, p. 371). The two earlier parts of this article reviewed the historical connection between the Roman and the Mohammedan laws and the social conditions of the respective peoples; the third part, beginning with "an explanation of jurisprudence in both systems and an attempt to show the likeness of their respective jurisconsults," then compares the law proper, showing the connection and in some parts the identity — at least in contracts — of both legal systems.

LEGAL PROFESSION. "The Bar in the United States," by Edward S. Cox-Sinclair, *Law Magazine and Review* (V. xxxiii, p. 164). History, characteristics and tendencies of the bar of the United States, with comparisons with that of other countries.

MARRIAGE (Effect on Woman's Nationality). "Woman's Expatriation by Marriage," by C. A. Hereshoff Bartlett, *Law Magazine and Review* (V. xxxiii, p. 150). Legislation as to the change of a woman's nationality by marriage is almost universal. This article states the statutes of many countries on this question.

"It is admitted that by the law of England and the United States an alien woman on her marriage with a subject or citizen merges her nationality in that of her husband. But the converse has not heretofore been established as the law of the United States, and it was not until the Naturalization Act of 1870 that an English woman lost her quality as a British subject and was deemed to be a subject of the State of which her husband is for the time being a subject. The United States has until this year been one of the few countries where the nationality of a native-born woman is not on marriage merged in that of her husband. By the exceptional law of the United States, until the recent Act of Congress, a native woman marrying a foreigner remained a subject of her State, though an alien woman marrying an American citizen became herself naturalized."

The Act of Congress of March 2, 1907, provided that "any American woman who marries a foreigner shall take the nationality of her husband." This law Mr. Bartlett declares unconstitutional for the Supreme Court has held that the power of naturalization vested in Congress by the Constitution is a power to *confer* citizenship, not a power to *take it away*. Change of allegiance is a personal right and whether it is exercised or not is a fact to be determined by the acts of the person. Mere marriage with a foreigner is not an exercise of that right and Congress is powerless to make it so. A decision to that effect is confidently predicted if the question ever comes before our highest tribunal.

PRACTICE. "Guardian ad Litem," by Surendra Nath Ray, *Allahabad Law Journal* (V. v, p. 39).

PROCEDURE. "The Code of Civil Procedure in India" Anonymous, *Journal of the Society of Comparative Legislation* (V. viii, n. s. p. 235).

PROPERTY. "Some observations on the rights of Landowners in Subterranean Percolating Water," by Sumner Kenner, *Central Law Journal* (V. 66, p. 194).

PROPERTY. "Some Recent Criticisms on Real Property Statutes," by G. S. Holmstead, *Canada Law Journal* (V. xliv, p. 136).

TORTS. In the March *Illinois Law Review* (V. ii, p. 487), John H. Wigmore gives a striking criticism of a recent Illinois decision entitled "Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death." The author condemns, as over technical the attitude of most courts that they cannot investigate the question who will ultimately benefit by the recovery and make his contributory negligence a bar. In contrast he emphasizes the importance of an Ohio case where the court instructed the jury to make such a determination.

"This opinion merits the reverence of the profession for its presage of a coming Spirit of Law superior to the now dominant one. 'Justice,' said Justinian, in that famous opening sentence of the Institutes, 'is the constant and never-failing will to award to each man his due.' It is the adaptiveness of justice that we need to cultivate. If we

are ever to mold our law into an instrument of justice, so that it becomes merely a means to an end, it will be by aiming more consciously 'to award to each man his due,' by infusing a greater flexibility, by viewing more keenly the ends desired, by abandoning form for substance, by adapting rules to results. All along the line of procedure the need is greatest. But the present instance illustrates also for the substantive law the shortcomings of the present mechanical methods."

TORTS. "The Doctrine of Last Clear Chance," by George W. Payne, *Central Law Journal* (V. lxvi, p. 215).

TORTS. "Should the Doctrine of the 'Turn-Table' cases, holding Railroad Corporations Liable for injuries to trespassing children be extended so as to make land owners liable for injuries caused to trespassing children by unguarded ditches, ponds, etc.," by Sumner Kenner, *Central Law Journal* (V. lxvi, p. 137).

TORTS. In the *Journal of the Society of Comparative Legislation* (V. viii, n. s., p. 185) is an article by Thomas Beven entitled "'Volenti Non Fit Injuria' in the Light of Recent Labour Legislation. It shows that the principle of consent as a bar to private action is fundamental and universal. He traces the history of the principle in Roman and Canon Law and in the early English law and shows that there was no element of contract in it. Then came the development of the law of master and servant as an accompaniment to the growth of modern industry and soon in these cases of employers' liability the judges began to derive the defence from an implied contract at the time of employment. Since public sentiment forced the enactment of employers' liability legislation and the tendency has arisen to limit by law freedom of contract, the English judges have gone farther than those in the United States in restricting this supposed contract to assume the risks, and now the old presumption arising from acceptance of employment is abolished and the defendant has to prove an intention on the part of the plaintiff to take the ordinary risks of the employment.

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.) **R. I.** Under the rule of practice in Rhode Island requiring that an applicant for admission to the bar who has not received a classical education or studied at a law school, must have studied law three years in an office of an attorney or counsellor at law, the Supreme court of Rhode Island in *In re* Bosworth, 68 Atl. Rep. 316, held that an applicant who filed notice in the clerk of court's office that he had registered as a law student in the office of an attorney of the court, and who for three years thereafter received instructions from such attorney and studied law under his direction, was not entitled to take an examination for admission to the Bar, where it appeared that during these three years, he was not in attendance at the office during the day time, but was employed during the working hours of the day as a clerk in a department store. The court states that the rule demands that the study of law during ordinary business hours in a law office must be the student's chief occupation in order to give him the right to take the examination for admission to the Bar, and that while other employment may be taken out of office hours or in vacation, other continuous employment during the business hours of the day, is not compatible with such a course of study as is contemplated by the rule, and that the qualification prescribed is a necessary prerequisite to the right to an examination.

CARRIERS. (Forfeiture of Ticket.) **Ind.** The Supreme Court of Indiana, in Baltimore & O. S. W. R. Co. *v.* Evans, 82 N. E. Rep. 773, in a lengthy opinion gets by technical errors in the presentation of the appeal, and discusses the merits of a cause involving the ejection of a passenger. It appeared that plaintiff, to secure a reduced fare, made a special contract by which the ticket was limited to use by himself and members of his family, and contained a stipulation that a transfer of it for one or more trips involved its forfeiture. In violation of this agreement, he had permitted persons to use the ticket, who were not entitled to do so. The conductor, who ejected him, refused to accept the ticket because it had expired. The interesting portion of of the decision turns on the discussion of the question of the forfeiture of the ticket, by which it was claimed plaintiff had lost the right to transportation. After discussing the merits of the several contentions, the court concludes that by the voluntary transfer of his ticket, in violation of the positive stipulation or condition embraced in the contract, plaintiff had *ipso facto* terminated or forfeited his right to longer use the ticket for transportation over the defendant's road. Consequently at the time of his expulsion he had no right to require the company to carry him over the road, unless it had legally waived the wrongful transfer by him of his ticket. On the question of waiver, it was said that there was nothing in the record going to show that the company in honoring the ticket after the transfer had any knowledge or notice whatever that he in any manner had incurred a forfeiture thereof. On the contention that the conductor in refusing the ticket did so on the ground that it had expired, the court said that if his right to be transported on the ticket at the time of his expulsion had been terminated or forfeited on account of his violation of the contract, it was of no material importance that the act of the conductor was technically placed on the wrong ground, for back of the act of the conductor was the fact that plaintiff's right to be longer carried on the ticket had been forfeited, and that the ticket, therefore, was invalid.

CONSTITUTIONAL LAW. (Employers' Liability Act.) **U. S. Sup. Ct.** — Few, if any, more important decisions have been rendered by the highest judicial tribunal in this country than that in the case of Howard *v.* Illinois Central R. Co. 28 Sup. Ct. Rep. 141, holding the Employers' Liability Act invalid and resulting in the recommendation by the President in a special message that a similar statute with such changes as might be necessary to meet the constitutional requirements be immediately enacted. The act purported to make common carriers engaged in interstate commerce as well as those operating in the District of Columbia and the territories liable for injuries resulting from negligence of fellow

servants, nullified the defense of contributory negligence when comparatively slight, and provided that no contract of employment, insurance or relief benefit, should bar an action against the employer.

The entire act was held invalid on the ground that it assumed to regulate, not only acts done in furtherance of interstate commerce, but acts and relations which might in no sense be of an interstate character, simply because a part of the business of a carrier might extend beyond the limits of a single state. The portions which might have been valid if standing alone were held so interblended with the unconstitutional portions as to fall with them.

Mr. Justice Moody rendered a vigorous dissenting opinion. Justices Harlan, McKenna and Holmes also dissented.

Decisions such as this are responsible for no little of the lack of confidence in the law which is unfortunately so common in America to-day. It is unfortunate that they so often appear in what may be termed labor cases. Their result has been and will in the future be bring about the entry of "organized labor" into the political field for the purpose of dominating the bench of the country, an action which is to be regretted no matter by what party or faction taken. The case is but another of those of recent years in which the social ideas have clashed and the old fashioned individualism of the majority of the Supreme Court has been opposed to modern collectivism. Justices Peckham and Brewer have in all of their decisions been deeply rooted individualists of the old laissez faire, laissez passer type, absolutely unable to see any necessity for governmental interference for the protection of the laboring man and the employee. In almost any other case there can be no doubt that the old rule would have been applied "that if the section admits of two interpretations one of which brings it within and the other presses it beyond the constitutional authority of congress, it becomes the duty of the courts to adopt the former construction; because a presumption never ought to be indulged that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous." There can be no doubt that the defendant in the particular case was engaged in interstate commerce, nor can there be any doubt that the intention of congress was to confine the scope of the act to interstate matters and relations.

ANDREW A. BRUCE.

CONSTITUTIONAL LAW. (Seizure of Abandoned Animals.) **Colo. Sup. Ct.** — Could Jenks as an officer and agent of the Colorado Humane Society seize and hold until the expenses of such seizure and holding were paid, the cows of Stump because they were abandoned, neglected and cruelly treated by Stump was the question for determination by the Colorado Supreme Court in Jenks *v.* Stump, 93 Pac. 17.

The Colorado Legislature by Mills Ann. St. §§ 111–112–114 authorized any officer of the humane society to take charge of any abandoned or cruelly treated animal, provide it with food, and detain it until the expenses so incurred were paid etc., but failed to provide for any hearing to determine the facts. The court declared that the statute authorized a taking of property without due process of law in violation of the 14th Amendment to the Federal Constitution and the Constitution of Colorado Art. 2 § 25 since it did not restrict the power to cases of emergency in which property may be taken without notice.

CONTEMPT. (Misstatement of Opinion of Court.) **R. I.** A misstatement by a newspaper, of the law as laid down by the Supreme Court of Rhode Island, was the basis of contempt proceedings, report of which is found in *In re* Providence Journal Co., 68 Atl. Rep. 428. The offending paper acknowledged that it had a correct copy of the opinion, and that the published statement of it was incorrect but alleged that the mistake was wholly unintentional. The court held its good intentions to be no excuse in view of the fact that its act in attempting to state the law to its readers was purely voluntary, but allowed it to purge itself by publishing the opinion in the contempt case on its editorial page where the former article appeared.

CRIMINAL LAW. (Arrest Without Warrant.) **Cal.** — In people *v.* Craig, 91 Pac. Rep. 997, vagrancy, as defined in Penal Code, § 607, subd. 6, is held to be a misdemeanor that can be committed in the presence of an officer, so as to justify him in making an arrest without a warrant. The interesting portion of the decision turns upon the discussion of the question of the right of the officers to arrest the defendant on the charge of vagrancy. The court states that a doubtful question was raised by the evidence of the officers themselves that the real motive of the arrest was not the fact that defendant was a vagrant, but was a report brought to their knowledge that at an earlier hour in the night that defendant with another had assaulted and beaten a man passing along the street. This offense they had not seen, and on consultation they concluded that as they could not arrest the defendant and his companion for the battery without a warrant, they would arrest them as vagrants known to them to be such. The court points out that it was generally

held that an arrest for misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the arresting officer, and it was contended that according to the officers' own testimony the occasion for arresting defendant as a vagrant had long passed, since if he had known him to be a vagrant at all he had known it for several months. The court concludes that the fact that defendant would not have been arrested if he had confined himself to vagrancy, did not render his arrest for that offense illegal. The officer knew that defendant was still a vagrant at the moment of the arrest, and having heard that he had committed a crime, he had a sufficient reason, as he had a perfect right, to make the arrest at the time that he did.

CRIMINAL LAW. (**Arrest Without Warrant.**) **Va. S. Ct.** In Hill *v.* Smith, 59 S. E Rep. 475, a prisoner was discharged on *habeas corpus* on the ground that he was not held in accordance with the law of the land. He possibly deserved a different fate than to escape through a technicality of the law. Acting on information in his possession, a police officer had arrested him on suspicion of being the perpetrator of a felony of the gravest nature. Instead, however, of charging him with being suspected of this specific offense, he was arrested and held merely as a suspicious character. The court in holding that the detention of the prisoner was unlawful, draws a broad distinction between holding a prisoner because he is suspected of the commission of a specific offense and holding him on a warrant which merely charges that he is a suspicious character. An officer it continues, may arrest, if he has reasonable ground to suspect the prisoner of having committed a felony, and having arrested him should take him before a police justice whose duty it would be, without unnecessary delay, to formulate a specific complaint, informing him of the offense of which he was accused. On such a complaint he might be held lawfully until his case could be disposed of according to law. Such course, not having been pursued, the prisoner was detained unlawfully and was entitled to his discharge.

CRIMINAL LAW. (**Evidence of Tracking Accused by Dogs.**) **Ohio.** — The law relating to evidence of the use of bloodhounds in tracking criminals is of recent origin ond somewhat unsettled.

An interesting discussion of decisions bearing on it is found in the opinion of the Ohio Supreme Court in the case of State *v.* Dickerson, 82 N. E. Rep. 969. Defendant had been convicted of murder, and on appeal contended that his constitutional right to be confronted by the witnesses was invaded by admission of evidence that bloodhounds trailed him from the scene of the crime to his home and claimed that even if that assignment of error should be held unfounded there was not sufficient preliminary proof of the qualifications of the dogs. The court dismissed the first contention by merely saying that the persons telling of the acts and conduct of the animals were the witnesses and not the dogs, and attempted to formulate a rule regarding the preliminary proof of qualification.

DEAD BODIES. (**Rights of Relatives as to Burial and Removal.**) **N. H.** — The perplexing question "What are the rights of surviving relatives as to the disposition of a dead body?" was considered by the Supreme Court of New Hampshire in Wilson *v.* Read, 68 Atl. Rep. 37. The controversy arose over the opening of the grave of an infant sister of plaintiff a half century after her decease and depositing therein the remains of defendant's mother, the stepmother of plaintiff. No traces of the body of the child could be found, but the earth from the grave was removed to another location. The court held that as no remains could be discovered, a decree commanding their restoration to the original place of sepulchre would be impossible of performance and hence futile. There is some discussion as to the general rights of relatives and of the expressed desires of persons since deceased as to burial. The court says that defendants, who owned the lot, "had not the absolute right to disturb the grave already upon the lot. Neither has the plaintiff, as next of kin, an absolute right to prevent the removal of the remains of one buried there, or other use of the land. The rights of each are bounded by rules of propriety and reasonableness determinable by a court of equity."

DIVORCE. (**Proceedure.**) **N. Y. Sup. Ct.** — A very peculiar state of affairs is disclosed in the divorce suit of Adams *v.* Adams, 106 N. Y. Supp. 1064. An interlocutory decree for divorce had been entered for plaintiff on the ordinary condition that an absolute decree might be entered after three months. At the expiration of that time plaintiff appeared to have changed her mind and concluded she did not want a divorce, that she still retained affection for her husband and hoped for a reconciliation. She therefore asked that the cause be dismissed. Defendant however, was not satisfied to drop matters in that way and asked that final decree be entered in accordance with the interlocutory one. The court recognized the novelty of the position of a

defeated party seeking to have a decree against him put into full force and declined to compel the wife to take a decree to which she was entitled but did not desire.

FEDERAL PRACTICE. (Diverse Citizenship — Corporation Existing in Different States.) U. S. Sup. Ct. — The Supreme Court of the United States recently passed upon the right of a corporation coming into existence by the consolidation of various companies organized in different states to remove to a federal court an action instituted in a court of the state of incorporation of one of its constituent companies, and held that the fact that it was not only incorporated in the state in which suit was brought but also in others, did not make it a nonresident and that consequently it was not entitled to removal. The title and citation of the decision is Patch *v.* Wabash R. Co. 28 Sup. Ct. Rep. 80.

INSURANCE. (Insurable Interest.) N. Y. Ct. of App. — The question of insurable interest of a person keeping up a policy payable to the insured's children, is discussed in Reed *v.* Provident Savings Life Assur. Society of New York, 82 N. E. Rep. 734. Plaintiff made an agreement with insured, whereby insurance was to be taken out on his life, of which his children were to be the principal beneficiaries, and to be named as such in the policies. Plaintiff was to keep the policies in force until insured's death, by paying all premiums, and from the proceeds was to be reimbursed for his advances of premiums, with interest on his payments, and be paid a substantial sum in addition. The policies were obtained in some of which the children were named as sole beneficiaries; in others plaintiff was joined with them, and one was payable to plaintiff and his assigns. It was argued by the company that plaintiff had no insurable interest in the life of assured, and that the policy issued by it was, therefore, void. The court points out that a life insurance policy is not a contract of indemnity, but is a contract to pay a sum of money on the death of the assured, in consideration of certain payments being duly made at fixed periods during his life. If the insurance is made on application of one who has no insurable interest whatever in the life insured, it is a wager policy, that is to say, a speculative contract, which the law condemns. But a person may insure his own life and provide in the contract that the money shall be payable to any one whom he may appoint or assign the policy to. The court holds that plaintiff had an insurable interest in the life of insured because all the insurance was procured in pursuance of a contract between the assured and his his children, for their benefit, and plaintiff was to be compensated by the repayment out of the proceeds of the policy of the amount of his advances of premiums or assessments with interest, and by the payment of a substantial sum in addition. By their agreement he acted for them and could be held to the performance of the contract, if necessary, as their trustee.

NEGLIGENCE. (Places Attractive to Children.) Ohio. — The doctrine of the turntable cases receives consideration by the Ohio Supreme Court, in Wheeling & L. E. R. Co. *v.* Harvey and Swarts *v.* Akron Water Works Co., decided together in 83 N. E. Rep. 66. The first action was for injuries to a child playing on a turntable and the second for death of a child drowned in a reservoir.

The court refers to the decision in Sioux City & Pac. R. R. Co. *v.* Stout, 17 Wall. (U. S.) 657, 21 L. Ed. 745, as the leading case holding owners of premises liable for injuries from instrumentalities attractive to trespassing children but refuses to follow it. A great many cases, some following and some declining to follow the Stout case, are cited.

PARTNERSHIP. (Limited Partnership — Liabilities of Partners to Creditors.) Mich. — In the case of Wood *v.* Sloman, 114 N. W. Rep. 317 is disclosed an example of what may, perhaps, be appropriately called "frenzied finance." The Manna Cereal Company, a limited partnership organized under the laws of Michigan, having been adjudged a bankrupt, action was brought by the trustee against the subscribers to the stock to enforce contribution for payment of creditors on the ground that the representations as to the capital being paid in full were fraudulent. It appeared that the firm was organized with an alleged fully paid capital of $500,000 consisting of $2 cash and a breakfast food formula of the supposed value of $499,998.

A portion of the stock was transferred to a trustee to be sold as treasury stock and the proceeds turned over to the firm. The tangible assets at the time of bankruptcy were between four thousand and five thousand dollars and the debts more than twenty-three thousand dollars. Demurrer was interposed to the bill of complaint on the ground that it affirmatively appeared that the statutory statement of organization filed with the register of deeds fully disclosed the nature of the assets of the firm, and that as it was a matter of public record no one could be misled by any statement relating thereto. The court overruled the demurrer and intimated that the payment for stock should have been by property of substantial value.

PROPERTY. (Fixtures.) N. Y. Sup. Gt.— Defendant, in the case of Brunswick Construction Co. *v.* Burden, 101 N. Y. Supp. 716, sold his dwelling house to plaintiffs on condition that he might "remove all fixtures attached to said premises." He subsequently carried away mantels and hinges made to match the furniture, and parquet flooring laid over a permanent floor. Plaintiff sued for their recovery. The court said that they were not distinctively realty and refused to grant any relief. It also held that the right of removal was not affected by failure to reserve it in the deed as there was an agreement to that effect in the contract of sale, an oral agreement of a similar character at the time the deed was made, and defendant was allowed to remain in possession of the premises for some time thereafter.

PROPERTY. (Homestead — Conveyance of by Husband to Wife.) Ill. — The strictness with which the courts construe statutes relating to conveyances of homesteads is illustrated by the decision in Smith *v.* Hollenbeck, 83 N. E. Rep. 206. It appeared that Henry Hollenbeck, through whom all the parties claimed title, executed a deed of his homestead to his wife without her joining in the conveyance and at the same time made a will by which, after making certain specific bequests, he devised the remainder of his property to defendant as residuary legatee. On the death of the wife, who survived her husband, a question arose as to the rights of the heirs in the homestead. The court decided that the conveyance by the husband without joinder by the wife was void so far as the homestead rights to the extent of one thousand dollars were concerned and that the fact of the will being made at the same time as the contract made no difference.

STATUTES. (Sufficiency of Title.) Colo. Sup. Ct. — The constitution of Colorado Art. 5, § 21 provides that the subject matter of a statute must be expressed in its title and § 25a requires the legislature to provide for an eight hour day for persons employed in certain employments that the legislature may consider injurious to health. The legislature in its "Women and Children Labor Act" of 1903, Sess. Laws 1903, p. 310, c. 138; (3 Mills. Ann. St. Rev. Supp. p. 757) provided that no woman of 16 years of age or more be required to work for more than 8 hours a day in any mill, factory, manufacturing establishment, shop or store where she is required to stand upon her feet in order to perform her labor. The act was entitled "An act to prescribe and regulate the hours of employment for women and children in mills, factories, manufacturing establishments, shops, stores and any other occupation which may be deemed unhealthful or dangerous.

The Supreme Court of Colorado in Burcher *et al.* *v.* People, 93 Pac. 14 a prosecution under the above act for employing a woman above the age of 16 in a laundry for more than 8 hours per day, held that the title of the act was not broad enough to cover the provision prohibiting the employment of women for more than 8 hours a day in a mill, factory, etc., since the title relates to occupations injurious to health and the provision treats of occupations which may not be unhealthful.

TAXATION. (Jurisdiction — Piers Extending Over the Water.) Md. — A peculiar question as to the Municipal boundaries and the right to levy taxes as affected thereby is discussed by the Maryland Court of Appeals in Western Maryland T. R. Co. *v.* Mayor, etc., of Baltimore, 68 Atl. Rep. 6. A portion of the southern boundary of the City of Baltimore is declared to run with the main branch of the Patapsco River. Plaintiffs in error constructed piers extending out over the water from lots owned by them and they were assessed for taxes by the city. The evidence went to show that the main part and value of the piers was beyond the line of the city as originally established. It was contended on the one side that as they were attached to the land and would be useless without it they should be considered in the same light as accretions and as a part of the land to which they were attached. On the other hand that only the part built on the land could be taxed by the city and that the remaining portion was under the jurisdiction of the county adjoining. The court speaks of the character of the structures, and the fact that they are dependent on the city for fire and police protection and comes to the conclusion that they are properly taxable by the city to their entire extent.

THE LIGHTER SIDE

Highly Suspicious. — " It is a rule to which good lawyers usually adhere," says a Philadelphia attorney, " never to tell more than one knows. There was an instance in England, not many years ago, wherein a lawyer carried the rule to the extreme.

" One of the agents in a Midland Revision Court objected to a person whose name was on the register, on the ground that he was dead. The revision attorney declined to accept the assurance, however, and demanded conclusive testimony on the point.

" The agent on the other side arose and gave corroborative evidence as to the decease of the man in question.

" ' But, sir, how do you know the man's dead?' demanded the barrister.

" ' Well,' was the reply, ' I don't know. It's very difficult to prove.'

" ' As I suspected,' returned the barrister. ' You don't know whether he's dead or not.'

" Whereupon the witness coolly continued: ' I was saying, sir, that I don't know whether he is dead or not; but I do know this: they buried him about a month ago on suspicion." — *Harper's Weekly.*

A Lawyer's Luck. — A North Carolina lawyer says that when Judge Buxton of that State, made his first appearance at the bar as a young lawyer, he was given charge by the State's solicitor, of the prosecution of a man charged with some misdemeanor.

It soon appeared that there was no evidence against the man, but Buxton did his best, and was astonised when the jury brought in a verdict of " guilty."

After the trial one of the jurors tapped the young attorney on the shoulder. " Buxton," said he, " we didn't think the feller was guilty, but at the same time didn't like to discourage a young lawyer by acquitting him." —*Lippincott's.*

Not for the Court to Decide. The judge decided that certain evidence was inadmissible. The attorney took strong exception to the ruling and insisted that it was admissible.

" I know, your honor," said he, warmly, " that it is proper evidence. Here I have been practicing at the bar for 40 years, and now I want to know if I am a fool?"

" That," quietly replied the court, " is a question of fact, and not of law, so I won't pass any opinion upon it, but will let the jury decide," — *Stray Stories.*

Lawsuits About Trifles. — Some years ago, when a Scottish farmer brought an action against the customs authorities for a wrongful levy of 1d, he recovered his 1d at a cost to himself and the defendants of £150 each.

An attempt to recover ½d from a Miss Annie Rayson cost a London tramways company £150 damages for malicious prosecution, in addition to heavy costs in all three sets of proceedings. But perhaps the most instructive case of all is one that was fought to the bitter end in the Italian courts.

A lawyer sued the octroi authorities for the recovery of a centime which he had been compelled to pay on a box of bonbons. This case was carried from court to court, with the ultimate result that the defendants had to refund the centime and to pay 3000 lire in addition for the expenses of the litigation.

A Higher Court. — " Ever try an automo bile, Judge?" said a friend.

" No," replied the Judge; " but I've tried a lot of people who have." — *Jewish Ledger.*

False Economy. — Patsy. — Begorra, Oi couldn't pay my $3 foine and Oi had to go to jail for six days.

Mike. — An' how much did yez spend to get drunk?"

Patsy. — Oh, 'bout $3.

Mike — Three dollars? Yes, fool, if yez had not spent yez $3 for drink yez'd had yer $3 to pay yez foine wid. — *Harper's Weekly.*

Within His Rights. — The Judge — " Was your chauffeur guilty in this accident?"

The Prisoner — " No, your honor, the victim was run over in entire compliance with the ordinance." — *Meggendorfer Blaetter.*

Religious Persecution. — A man addicted to walking in his sleep went to bed all right one night, but when he awoke he found himself on the street in the grasp of a policeman. "Hold on" he cried, "you mustn't arrest me. I'm a somnambulist" To which the policeman replied, "I don't care what your religion is — yer can't walk the streets in yer nightshirt." — *New England Craftsman.*

Address. — Joseph Chamberlain was the guest of honor at a dinner in an important city. The mayor presided, and, when coffee was being served, the mayor leaned over and touched Mr. Chamberlain, saying, "Shall we let the people enjoy themselves a little longer, or had we better have your speech now?" — *Christian Register.*

Quite Feasible. — A farmer, though severely cross-examined on the matter, remained very positive as to the identity of some ducks which he alleged had been stolen from him.

"How can you be so certain?" asked the counsel for the prisoner. "I have some ducks of the same kind."

"Very likely," was the cool answer of the farmer; "those are not the only ducks I've had stolen."

A Pleading Song.

The Legal Bird on musty leaves doth sit
And sing his old refrain: "To wit, to wit."
— *November Lippincott's.*

Nothing More to Say. — They were cross-examining, in a Chicago court recently, a bookmaker who had been caught in the toils for playing some other game than his own.

The third sub-assistant district attorney was intent upon a conviction, however, and was doing his best, none too successfully, to shake the testimony of the defendant.

"You're sure of that?" he yelled, as the bookmaker stuck to an assertion that did not suit the case of the state.

"Sure, I am certain," came the answer.

"You remember that you are under oath?"

"I do that."

"And you'd swear to this statement of yours?"

"Swear to it? Why, Mr. Lawyer and judge, your honor, I'd bet a hundred on it any day." — *Spare Moments.*

In a French Court. — Counsel (*addressing the judge after he had got his client, a thief, acquitted in the face of strong evidence*): Your honor, I would be obliged if you would order that this man be not released from custody until to-morrow.

Judge: Certainly; but what is your reason?

"Well, you see, the road near my home is rather lonely, and as my client knows quite well that I shall have money on me he might possibly lie in wait for me." — *Bon Vivant.*

Negotiable. — Although "there is nothing new under the sun," a man who spends the greater part of his time in examining records occasionally brings to light some rather unique instruments. The following is taken from the records of the Register of Deeds, Raleigh, North Carolina:

"$75. Raleigh, N. C. Nov. 30th 1907.

On the 1 day of Dec. 1908, for value received, with interest from date at six per cent per annum, we, or either of us, promise to pay C. E. Mangum or order seventy-five dollars for 1 sorrell mare 12 years old and one 1 horse wagon and harness, and if he gets drunk at any time I am to take mare, wagon and harness in my possession and sell the same and credit this note for spree.

J. E. MANGUM (seal)"

Imaginative. — A contributor to the *London Law Journal* indulges in a bit of unintentional humor in his account of the numerous attorneys who have abandoned the law for the pleaures of a literary career. After reciting many instances of those who were unsuccessful at the Bar, he cites Barry Cornwall as one who had considerable vogue as a poet in the early part of the last century, was a solicitor and produced the greater part of his poetic work before he passed to the other branch of the profession. He then adds, "He is perhaps the only lawyer whose achievements as a poet have helped him to a legal appointment, for within a few months of joining the Bar he was appointed a Commissioner in Lunacy, an office which he held for twenty years."

Choate Stories. — Once, when he was defending a suit against a large corporation, the plaintiff's counsel, a well known New York lawyer, raked Mr. Choate's clients fore and aft in the good old-fashioned style of invective, denouncing them as "vampires, monsters that feed on the blood of the people," and so forth. The jury was evidently impressed, and the orator, after a final broadside from his heaviest batteries, sat down in triumph. Mr. Choate had been leaning back at ease in his chair with his hands in his pockets. He rose to reply with a pleasant smile upon his handsome face:

"Gentlemen of the jury," he said in quiet tones, "do you know what a vampire really is? Look at the Quaker gentleman who is the president of the defendant company — sitting there with a gray suit and a white neckcloth. Look at the seemingly inoffensive young man sitting beside him — his secretary. You thought vampires were something terrible when Brother Parsons described them; but can it be so? For these gentlemen are vampires!"

The effect of the opposing lawyer's ponderous artillery was undone.

Yet Mr. Choate could say very cutting things in his suave and courteous way. He once commended a candidate for a judicial nomination as "a capable young man, a very capable young man. In his fourteen-year term he will learn enough to be a judge."

He was making the closing speech in an important case before the state supreme court when the judge wheeled round in his chair and began to talk to a friend. The lawyer ceased speaking. The justice, noticing the silence, looked inquiringly at him.

"Your honor," said Choate, "I have just 40 minutes in which to make my final argument. I shall not only need every second of that time to do it justice, but I shall also need your undivided attention."

The undivided attention was secured.

The stories told of Mr. Choate are countless. Here is one of his best, a typical flash of his epigrammatic philosophy:

Some one asked him who he would choose to be, if he were not Joseph H. Choate.

"Mrs. Choate's second husband," was the instantaneous reply.

The same fine courtesy, which is characteristic of the man, showed in the sentence with which he began a speech at a public dinner, when he glanced at the gallery above him and saw that it was full of ladies.

"Now," he said, "I understand the meaning of the scriptural phrase, 'Thou madest man a little lower than the angels.'"

Choate's wit has been a fatal bar to his success as a party man asking for votes. An after-dinner speech which made him thousands of enemies in the lower wards was the one in which he defended the citizens of New York against the accusation of having the worst government on earth.

"It is most unfair to charge the citizens of New York with any complicity in this matter," he protested. "The citizens of New York are the only persons in the city who have absolutely nothing to do with its government; it's the citizens of foreign countries who run that."

This witticism brought down the house. It also brought down upon its author's head the wrath of every man with a foreign name who was holding a place of trust or profit in the city government, from the mayor then n office to the gate-keepers of the parks.

On another occasion, at a New England society dinner, where all the great men assembled were lauding the Pilgrim fathers to the skies for their stern piety and rectitude of conduct, Mr. Choate struck a discordant note by remarking that, for his part, he thought the Pilgrim mothers were the persons who deserved most and received least of the plaudits of posterity.

"For gentlemen," said he, "they had to endure not only the privations, and the climate, and the terrors of Indian warfare, but the society of the Pilgrim fathers besides, who, from all that has been said about them here tonight, must have been the most insufferable prigs in the world."

Vol. XX, No. 5 MAY, 1908

THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

S. R. WRIGHTINGTON: Editor
WALTER F. WYMAN: Manager

CONTENTS

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THE PUBLISHER'S DEPARTMENT

Constitutional Law

Mr. Stimson's work on the FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES will be published by the time this is before you.

We have alluded to it before in this department, but the work is so important and is treated on such original lines, that we deem it wise to give it even more extended space.

We believe that it will prove to be the leading legal treatise of the year.

A careful reading of the advance sheets shows to the publishers that it should be read not only by the profession, but should be accessible to students of the subject of civil government.

General Description

It will be published in one volume, bound in cloth, and will be sold at $3.50. It will be divided into three books.

Book I will give the origin and growth of the American Constitutions. This portion of the work will contain an introductory chapter tracing the historical principles from Magna Carta, and chapters on the Right to Law, the Right of Liberty, on Chancery and the Injunction Order, the Right to Labor and Trade, and the Right to Property.

Book II will contain a chronological table of first appearance of constitutional principles and of English social legislation.

Book III presents a concise statement of all the propositions of all the American State Constitutions in their latest development, including the corresponding principles of the Federal constitution.

Treatment of Subject

The *main subject* of the work is that branch of Constitutional law which relates to the liberties of the people, which is the most important part in our Constitution to-day, and the most neglected by historians and in treatises on constitutional law.

In our Federal Constitution we have not only to secure these liberties to the individual as against the Federal government, but in some cases against the State governments as well; and our State Constitutions seek to protect the individual also against the State Legislatures.

There are many political treatises in which matters relating to government, hitherto deemed most interesting and perhaps most important, have been exhaustively treated; but in *no work* has attention been concentrated on those constitutional documents which embody the people's liberties; and in *none* is the Federal with all the State Constitutions compared and brought together.

Historical Digest of English Social Legislation

An interesting feature of the work will be that portion wherein the laws, which marked the evolution of constitutional liberty, are abstracted and arranged chronologically, from the Conquest, in 1066, to the Railway Rate Regulation (Hepburn) Act, in 1906.

"Magna Carta and the other constitutional documents are but the record of the victories of the people in the long fight which they waged for their liberties against the Crown; they mark the definite establishment of Anglo-Saxon notions of liberty and law over the feudal or Norman, European, Roman, or Civil Law view, which the Norman kings after the Conquest, and, later, even the Tudors and the Stuarts, endeavored to impose upon the English people." [*Introductory.*]

Chronological Table

The *constitutional principles protecting personal liberties* and *private rights*, as expressed in constitutional documents from Magna Carta to the United States Constitution, are arranged under subject headings in the order of their appearance.

This portion of the work is arranged as follows:

Liberty

(a) General Right to; Jury Trial.
(b) Habeas Corpus and Indictment.
(c) Bail and Punishment.
(d) Trial and Evidence.
(e) Bills of Attainder.
(f) Suspending Laws.
(g) Treason.

Law

(a) Common Law; Judges.
(b) Local Courts.
(c) Martial Law; Right to Arms; etc.
(d) Military Power.

Property and Trade

(a) Property.
(b) Trade.
(c) Taxation.

Miscellaneous Rights

Freedom of Speech. Right of Petition. Search Warrants.

Political Rights

(a) Elections.
(b) Legislatures.
(c) Theory of Government.

Graphic Chart

A novel feature is the chart which serves as frontispiece to the volume. To quote the author's words:—

"The frontispiece graphically represents the exact division of political and legislative power between the States and the Federal Government, as well as the large field reserved by the Constitution to the people; and it does this even to the finer shades of distinction, as when powers delegated to the Nation are, at the same time, forbidden to the States, or when they are shared by the Nation and the States, or when nothing is said about it, so that the matter must depend upon the interpretation of the Supreme Court."

This is accomplished by an ingenious arrangement of zones, whose clear fields represent clear powers while their intersections cover cases of doubt or conflict. The zones and their intersections are lettered and explained as follows:—

AZ.—*Federal Powers which are forbidden to the States.*

A.—*Powers granted to the United States simply.*

AB.—*Powers common to the Nation aud the States.*

B.—*Powers reserved in the States simply.*

BX.—*State powers forbidden to the United States.*

X.—*Powers forbidden to the United States simply.*

Z.—*Powers forbidden to the States simply.*

ZX.—*Powers expressly forbidden to both the Nation and the States.*

Y.—*Rights reserved or expressly retained in the people.*

The author says: "If the reader of this book will take the diagram and carefully, for himself, decide (for on some clauses there may be a difference of opinion) just what sentences or sections of the Constitution, or matters or powers mentioned therein, fall within each of these nine divisions of our sphere of the total powers of government, he will almost, by the very study required, the close examination of the Constitution necessary, become a good American constitutional lawyer."

Our Contributors.

HON. JOHN C. CHANEY was born in Ohio. After graduating from Terre Haute College he taught school for several years. He graduated from Cincinnati Law School in 1882 and at once began practicing in Sullivan, Indiana, where he now resides. For several years he was a member of the staff of the Department of Justice of the United States and has been a member of the 59th and 60th Congress.

We are glad to publish in this number MR. BOSTON'S sane discussion of the important problem of Legal Ethics. The article was prepared for publication at the suggestion of the secretary of the committee on Legal Ethics of the American Bar Association as a result of the author's response to the committee's request for criticisms. Mr. Boston is junior member of the firm of Hornblower, Miller and Potter of New York City.

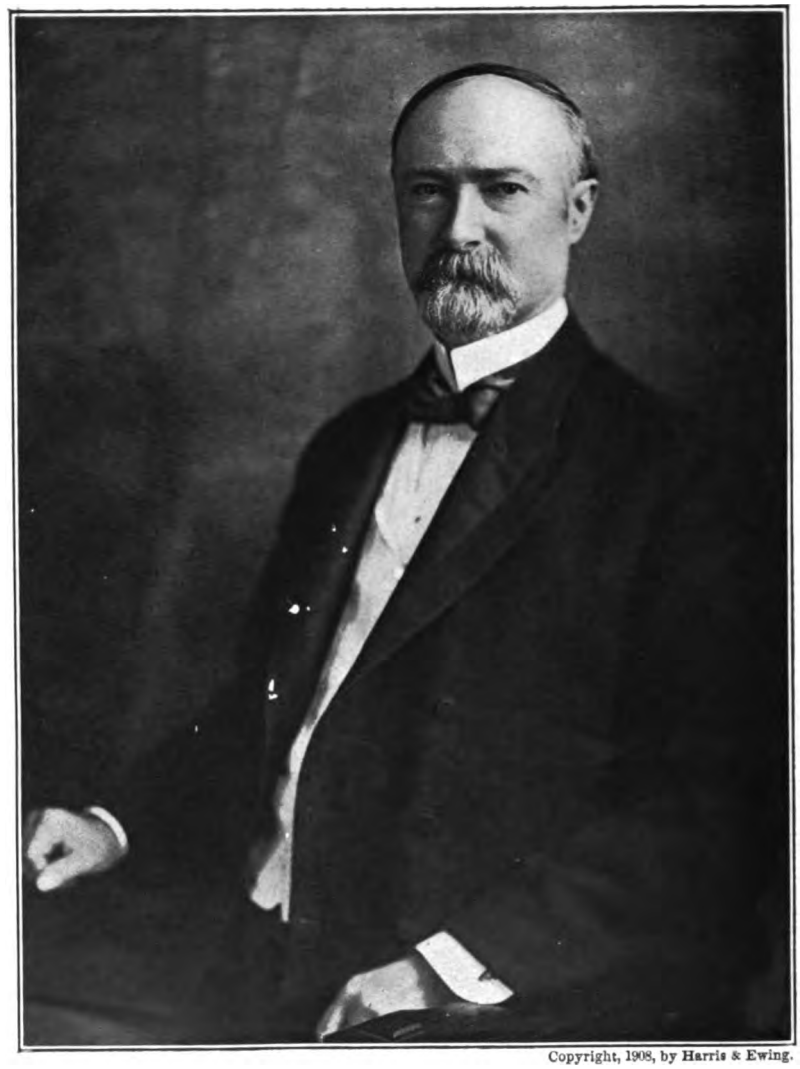
Our readers are already familiar with the work of PROF. EDWIN MAXEY, now of the Law School of the University of Nebraska, who is a frequent contributor to current legal periodicals.

HARRY RANDOLPH BLYTHE is a graduate of Dartmouth and at present a student in the Harvard Law School, where he still finds time to indulge his taste for literary work.

HON. HIRAM D. PECK was born in Kentucky in 1844, is a graduate of Miami University and the Harvard Law School. He served in the Union Army in the Civil War, and has since practiced in Cincinnati. He has served as City Solicitor and as Judge of the Superior Court.

ROBERT SPRAGUE HALL is a graduate of Harvard College who was privately prepared for the Bar and has always practiced in Boston.

The first series of circuit riding stories of Philippine judicial life which Judge Blount contributed to our magazine proved so successful that he has consented to start a second series. It is to be hoped that he will ultimately prepare these for publication in book form.



Chas W. Fairbanks

The Green Bag

Vol. XX. No. 5 BOSTON May, 1908

CHARLES W. FAIRBANKS AS A LAWYER

By Hon John C. Chaney.

THE Vice President was not the proverbially poor boy, yet he was not born with a silver spoon in his mouth. His eyes first saw the light in a prosperous community in Ohio, where schools and churches guided and guarded the youth of the neighborhood, and where sturdy manhood counted for much, consequently he did not know what the inside of a saloon looked like — never even smoked a cigar. His family were comfortably housed, though not elaborately. The elder Fairbanks believed in intellectual and moral education and practiced his belief.

After the common school, therefore, young Fairbanks was sent to the country college, nearby, where practical education is prized above mere technique; where athletics do not go to seed; where the boy is in the midst of the strenuous life every day, riding, clearing, plowing, reaping; where the ball game is really played, where character is builded and manhood made. For the last forty years, no youth in Ohio, Indiana or Illinois — so much alike in growth and enterprise — has been able to say he had not the opportunity of an education, or that he had a limited chance to get on in the world. In these states, opportunity drives his car past every man's door every day. Books and teachers are at every elbow, and he who walks or runs may read, obtain knowledge, and reach success.

After the college, young Fairbanks took up the study of the law and mastered its fundamental principles as he had solved the problems of algebra and geometry at college. He came to the bar in 1874 and soon learned that a lawyer must "live like a hermit and work like a horse" if he would succeed among the men who then graced the profession. He soon came to Indianapolis and "hung out his shingle on his own hook." He found at the Indianapolis Bar, Thomas A. Hendricks, John M. Butler, John H. Baker, Oscar B. Hord, Albert G. Porter, Benjamin Harrison, David Turpie, William H. H. Miller, and many others of their calibre in an established practice, but young Fairbanks courageously rented an office and went at it by himself.

His first business was the collection of the outstanding accounts of a grocer at whose counter he found it convenient to munch crackers and cheese for his noonday luncheon. This service brought him into contact with a number of people some of whom, observing the young lawyer's aptness, courtesy and earnestness, afterwards became his clients and his warm friends. Young Fairbanks came to Indianapolis bearing the best credentials in the world — namely, that of an honorable family, and letters from worthy men in Ohio. In Sunday-school and church he was welcomed, and every new acquaintance took an interest in the struggling "young lawyer who had just come to town." He entered into a general practice of the law and took whatever business was offered him. It was a part of the Elder Fairbanks' make-up to do all things he undertook *well;* and this quality was transmitted to lawyer Fairbanks who always made sure of his facts before he applied the law; and then

never failed to find the law to fit the facts. Industry and fidelity governed Mr. Fairbanks in every legal battle. However humble the client, or inconsequential the case, lawyer Fairbanks limited not his efforts to secure considerate judgment. He was eminently successful in the business he handled and within three years after he entered the practice of the law, had a reputation for thoroughness among men of consequence who were not tardy in calling him into important legal matters.

The second mortgage bond-holders of the Chicago and Atlantic Railroad Company, finding their half-million of investment in danger called Mr. Fairbanks to their assistance in a legal battle, or series of legal battles, extending for five years, in the courts of Ohio, Indiana and Illinois; and by his sagacity, skill and persistence he saved them whole. He represented the Receiver of the Bloomington and Indianapolis Road on an occasion where to have let the Receiver be dismissed he could have had employment by a proposed new organization of the railroad with the guaranty of pay for his service to the Receiver, who had not yet been able to pay him a cent for what he had done; — but he faithfully stood by his client and tided him through the troubled sea of financial difficulties to a successful issue. In these matters, and others, he met in opposition the best legal minds the country afforded and came through with enhanced prestige every time.

In a great legal battle involving the rights of prior lien-holders and bond-holders relating to certain railroad properties in which a number of citizens in Indiana and Ohio were interested, Ex-President Harrison met him in opposition in a contest of several days duration, at Toledo, Ohio. Although that litigation was not concluded under Mr. Fairbanks' direction, he having severed his connection therewith on his election to the Senate, General Harrison said of his argument on that occasion that "It was apt in its philosophy, correct in its logic, forceful in its application, and worthy of any lawyer." General Harrison was himself a great lawyer, and was not given to fulsome eulogy. When he complimented a man on an argument or a speech the recipient might well feel honored.

For ten years of Mr. Fairbanks active practice just before coming to the Senate, he was engaged in great undertakings in the legal field, and was more in the Federal Courts than the State Courts. His motto as a lawyer was to make himself valuable to his clients, and he made himself so valuable to them that they could not get along without him. He possessed business acumen, and sometimes in connection with legal questions his advice was sought as to the expediency of things. It is an axiom in logic that all things that are right and lawful are not always expedient. Interested in great enterprises, he yet never forgot the individual rights which are often involved and which ought always to be respected and considered. He, therefore, had a liking for equity, and in equity practice he excelled even his brilliant efforts on the law side of the court. His best briefs and arguments will, therefore, be found among the records in the equity cases in which he appeared as counsel. So broad was his learning and so accurate was his judgment in business law, that he had a clientele who had him regularly employed as counsel to keep them out of lawsuits. And those who thus employed him were never haled into court because of an error in his advice and direction.

More and more the real lawyer is sought in his office for his advice as to what the law is — in short how to follow and obey the law. Mr. Fairbanks never learned the so-called "tricks of the trade" and, therefore, never studied how to evade the law. When a man once came to his office to "know how he could beat the law" in a particular matter, Mr. Fairbanks told him that he could not undertake to advise him in the

matter as he did not know how to violate the law himself; and would therefore be unable to show any one else how to do it. Mr. Fairbanks always stood for law and order, and has always, therefore, been a conservator of the public good. He learned well the lesson of the lawyer in the beginning; that a lawyer above all things should never be a law-breaker, and this lesson has guided his life. Mr. Fairbanks comes of a family of constructive people — men who do things, — do things of consequence. Law grows as men grow. As civilization progresses the law, which is but a concrete expression of progress, keeps up with the procession. He has been, therefore, a student of the times in which we live — an American lawyer partaking of the spirit of the age, — a vital force in his great profession. The change from a small business to a large business, from individual capital to aggregated capital, from haphazard to organized enterprise, came as natural to Mr. Fairbanks in the course of his profession as the growth of an orchard, and the results were as natural as the ripened fruit. His grasp of these conditions was only equaled by the recognition of his great abilities as a constructive lawyer, piloting the way to honorable achievements.

While the best of Mr. Fairbanks' legal career has been devoted to matters involving contract relationships, and the development of great enterprises, where questions of cold law need careful interpretation, he was yet a great trial lawyer, and always made good before a jury. He was always able to talk of the facts in a case in a comprehensive mannner. He was accustomed to the impulses of the country whence jurors come, and his language was familiar to them because it was the product of his country rearing. He always said, "If I understand the facts myself I am sure I can make the jury understand," and with clearness and certainty, he brushed aside the sophistries which often presented themselves in the *nisi prius* court and riveted attention upon the salient facts and features of the case in hand. It is said that no executive officer is quite equipped for his duties except he be a lawyer himself, or is guided by a lawyer. Whether as an executive in charge of an important trust, or as a lawyer showing the way to successful work, Charles W. Fairbanks holds an enviable place at the bar of his adopted state and also at the Bar of the federal judiciary — and he is held in high esteem by his brethren of the profession everywhere.

WASHINGTON, D.C., April, 1908.

A CODE OF LEGAL ETHICS

By Charles A. Boston

PROMPTED by the invitation of the Committee on Professional Ethics of the American Bar Association to members of the Association the writer carefully considered its report of 1907, with its accompanying Codes of Ethics respectively adopted by several State Bar Associations, and the following is substantially the result of that consideration.

The environment of any thinker doubtless influences his conclusions, and in a practical matter such as professional ethics, it seems proper that one should apply any proposed code to the conditions of which he is cognizant in order to foreshadow, if possible, the degree of its usefulness.

The writer, therefore, considered the subject from the standpoint of local conditions in the city of New York, while not unfamiliar with, nor blind to, conditions elsewhere. New York City presents perhaps the extreme type and latest development of the modern tendency in the practice of law, although the writer would not be understood as intimating that the ethics of all, or of any relatively great number, of New York practitioners, are a departure from well recognized standards or ideals.

The Existing Codes.

The writer examined the codes of ethics mentioned in the Committee's report with two ideas in mind; first, whether the canons of the respective codes were in a desirable form, and second, whether such a code as has been adopted by the State Bar Associations is adequate or efficient for existing evils. He was forced to conclude that the answer to the second of his questions is negative, and therefore he has suggested to the Committee a somewhat radical departure from the codes already adopted by the Bar Associations in the states. This subject will be treated as a practical suggestion at the close of this article. The suggestion for this radical departure is, however, perhaps only supplemental to the code of ethics of a bar association, and does not necessarily preclude more elaborate codes for such associations.

The fact that was most patent upon an examination of the subject was that the existing codes are in the nature of by-laws of voluntary associations of lawyers. Such codes may be adopted and observed by the members of such associations without curing a single present evil. The American Bar Association, the New York State Bar Association, the Association of the Bar of the City of New York, taking them as types, are all selective, voluntary associations; they may have the power to exclude members of the bar from their number, but they have no disciplinary or visitorial powers over the Bar in general, nor can they effect the relations of their own members in their capacity as officers in the state judicial systems. Such codes, therefore, are like the creeds of the churches, to be observed by those who accept them, to be rejected or disregarded by those who dislike them or are ignorant of them: failure to regard them may be accompanied by some penalty within the body, but a mere violation of these codes, unless it is also a violation of a legal duty, does not subject the member of the association, nor the non-member who is a member of the Bar, to any penalty in his official relation.[1] Therefore such a code, while it may be a guide to one who seeks light, is not a curb to one who wilfully, or even ignorantly, errs.

The writer, while regarding such a code as wholly inefficient against those who are degrading professional ethical standards,

[1] Cf. to the same effect, in respect to a Medical Society, People *v.* Medical Society of Erie Co., 32 N. Y. 187.

nevertheless considered them for what they professedly are, codes adopted by State Bar Associations as expressions of the standards of ethics which should be adopted and observed by members of the Bar. Considered from this standpoint alone, and without regard to their efficiency against wilful or ignorant offenders, it still seems that they might be substantially improved.

In the first place they appear to be altogether too specific. The modern tendency of legal thought, as illustrated in New York, and doubtless also elsewhere, is to disregard principles for specific instances. This seems to be the result of codification of the law and modern methods of legal instruction. The object of a code of ethics is to instill principles of conduct adequate to any case that may arise. A thousand concrete cases may be selected and the solution given, yet, if no principle is stated, or deducible from the instances, the one-thousand-and-first will present to the inquiring mind a still unsolved problem.

The typical code also seems faulty in the following additional particulars: it is argumentative; it covers subjects which in some instances are governed by statutes or decisions, and is at variance with the statutes or decisions; it is inapplicable to the conditions in certain states even in its particular instances; it suggests too close a consideration of purely local conditions not prevalent elsewhere; some of its provisions appear to advocate views of doubtful soundness; and some of the language seems to be unnecessarily grandiloquent.

An *argumentative* canon appears to the writer to be faulty, because it intimates that the conclusion is or may be erroneous. If it needs argument to demonstrate its force, that force is weakened to the extent that the argument is introduced into the canon. Argument is rarely convincing to all minds; it suggests doubt, it intimates a contrary argument of some force, and canons, once adopted, should have an *ex cathedra* form.

In several of the states, the specific canons are preceded by preliminary and explanatory statements of general principles: these, however, also seem to contain some features of doubtful utility. Of these paragraph II in the usual Code expresses the high toned morality deemed essential, and comments at length on the temptations of the lawyer and the pitfalls and mantraps at every step. It is a quotation from Judge Sharswood. It may be a fact; but it seems to the writer that to dwell on the temptations that beset the practitioner as the reason for adopting a code of ethics is certainly non-essential, and if it is made to appear that one who does his professional duty is doing an exceptionally worthy act, it affords him a ready and substantial excuse if he yields to the temptation which is so graphically described. Accordingly, without pride of opinion, and not assuming to supersede Sharswood, he ventured to suggest as a substitute in this particular place, the following, as a good introductory statement:

"Observance of high moral principle is essential to the practitioner of law: it is the official duty of every member of the Bar, not only to cultivate its observance by his own conduct, but jealously to see that it is observed by other practitioners, and that infractions of such principles are reported and properly disciplined by the proper body."

To the writer's observation, it is the inaction and disinclination of reputable practitioners that encourages and permits the spread and ravages of the disreputable. They do not deem it their duty to interfere.

The one further thing noticeable about the Codes of the various State Bar Associations, is their complete silence as to sanctions. The bar associations are presumably without substantial power to visit penalties except within their body. Their enactments lack efficient force. One of the noticeable things about the ten commandments is the absence of penalties. In the

first reported case of their violation (so far as the writer knows), where an Israelitish woman's son blasphemed, they put him in ward until Moses learned by divine direction that he should be stoned.[1] Even the ten commandments, therefore, lacked efficient force until the penalty was attached.

These, then, are the desirable changes in the existing codes of ethics, if they are to be adopted in that general form. But they will still lack what seems to the writer the essential virility of an effective sanction.

The need of an efficient Code and its essential features.

As already indicated, the writer has suggested what seems to be better adapted to present conditions. Let us pause to consider the ancestry of the existing codes. The American Bar Association's report already cited traces them one and all, except the Louisiana Code, back to Sharswood's Legal Ethics, founded on a series of lectures delivered in 1854 in Philadelphia, to prospective lawyers of that city. While the writer does not, perhaps, adequately appreciate the proverbial *Philadelphia lawyer*, he has always pictured him as a combination of keen intelligence, legal acumen and the highest conceptions of professional duty. Certainly the Philadelphia Bar in 1854 was not permeated with ambulance chasers, nor, presumably, did its practitioners employ, nor were they employed by, cappers and runners; nor, if I mistake not, did they have a lien on their client's cause of action, which they could enforce for their own benefit against his opponent. These appear to be the outgrowth of a later civilization. Judge Sharswood may be pardoned if he did not foresee them, and contented himself with reasoning about the intellectual problems presented to the lawyer by specific cases within his ken.

Nor is Alabama to be blamed if, in 1887, it adopted his views, contracted into fifty or sixty definite canons, for presumably at that time Alabama too was a homogeneous community, where the law was an honorable profession, and not a trade, and where the practices of many races and of commercial craft had not destroyed notions of ethical standards, nor introduced practitioners actually ignorant that there might be such standards. And the other Bar Associations which have codes (excepting Louisiana), have merely adopted the Alabama Code with a very few changes applicable to local conditions.

But now a generation has arisen that "knows not Joseph": it follows the law as a trade. A well known justice of the Supreme Court of New York is stated to have said at a dinner a few years ago, in substance, that according to his observation law was ceasing to be a profession, and becoming a trade. At the annual meeting just past, of the New York State Bar Association, one of the committees reported that the business of ambulance chasing had now assumed such a progressive form, that the ambulance chaser in the most advanced cases is no longer either a lawyer or his runner, but a layman who pursues the business on his own account, and sells out his cases to the highest bidder among the lawyers. Can it be conceived that Bar Association codes, without penalties, couched in sweet words and full of intellectual pabulum on the duty to the poor and oppressed, will ever percolate within the reach of this gentry? It is they, and their like, that are bringing the practice of the law into disrepute, by disreputable practices, and that without let or hindrance.

Schools for the education of witnesses in accident cases, with working models of machinery, are said to have been discovered in operation in New York, prepared to demonstrate accidents that never happened. Men have confessed that they were employed by litigants to serve on juries, by falsely impersonating talesmen, possibly, and even probably, with the knowledge of the attorney. Do learned codes of ethics,

[1] Leviticus xxiv, 11.

of sixty or seventy paragraphs of specific instances, meet such conditions? What regard have such people for professional ethics? Against such, care is to be exercised in admitting practitioners, and after their admission, measures adequate both to their discouragement and punishment should be adopted and enforced.

As now required, a code of ethics is a *remedy* for existing conditions: it should be for the reclamation of present offenders and a guide for future practitioners. The observance of *principles* is all any of them need, and consequently a code of principles is sufficient. Any other code will be interesting but inefficient. A few principles well known, well remembered and scrupulously enforced, are all that is requisite.

Let us consider some actual conditions which, although they may, so far as they consist of examples, illustrate only extreme cases, are indexes of what an efficient code ought to meet.

So far as my own observation and experience go, there is slight occasion for a code of ethics, except in the largest cities. The social conditions, taking New York as a type, are such that many men select the practice of law as a business, and some are, I fancy, ignorant of ethical standards; success as they define it to themselves is the only standard that they know, and they utilize the highly artificial rules of practice evolved in and from the execrable Code of Civil Procedure, to attain that end, wholly regardless of any ethical conceptions: there is no brotherhood; the Bar is too numerous and too heterogeneous for any central influence.

The Association of the Bar of the City of New York numbers 1900 members; it has no code of ethics; its meetings are attended by not more than one hundred men on an average. The principle of election to membership is selective, and involves such scrutiny and discrimination that, while calculated to reject all men whose professional record is open to any ethical criticism, it is in many quarters, especially in political quarters, sneeringly regarded as a lot of exclusive Pharisees; it exercises little or no influence on the practice, or on the judicial selections; men have repeatedly been elected to judicial position by overwhelming majorities, whom it has disapproved after investigation; its opinions have been contemptuously treated by those in control of nominations to judicial office; those whom it has recommended as eminently fit have been scorned by political bosses and voters alike; if it exercises any influence ethically outside of its own limited membership, it is imperceptible, except that of late it has manifested activity in promoting the prosecution of those members of the Bar who have been credibly accused of such practices as to merit their disbarment. In short, until the Bar Association industriously began to act as public prosecutor in cases of flagrant misconduct, it exercised apparently no ethical influence on the Bar at large. Formerly it was practically impossible to get its grievance committee to seriously consider charges against members of the Bar; it had no disciplinary power; it could only, in proper cases, act as relator in disbarment proceedings; the practice was such as to discourage charges against offending practitioners. I have been told that no charge would be investigated as long as either civil or criminal proceedings were pending against an accused lawyer, and that complaining parties were made to feel that they were deemed the culprits. Of late, however, the atmosphere has changed, with the result that disbarment proceedings, inaugurated by the Bar Association, are now not uncommon, and they commonly result either in suspension or disbarment.

The forces working for uplifting the Bar in New York are the greater strictness and uniformity with which Bar examinations are conducted now than formerly, the strictness of the so-called character examination in New York City and the more highly scientific character of legal instruction (of

which, however, so far as I know, legal ethics is no part). These methods have not been so long inaugurated as to show their results.

The forces working for deterioration are: the elaborate Code of Civil Procedure, which substitutes an infinite number of technical rules for liberal principles of practice, begetting petty motions in court over non-essentials of procedure; the concomitant costs which are the perquisites of the attorney at every stage of a litigated controversy, particularly the motion costs; the abolition of the home and the almost universal substitution of flat or apartment dwelling, with the consequent disappearance of the personal identity that accompanied home-dwelling, and the ideals that were a part of it; the ambitious and intellectual capacity of Oriental immigrants, with no apparent conception of English or Teutonic ideals; the conspicuous success of counsel for certain large aggregations of capital, the ways of whose clients have been opened to public opprobrium; and the commercialization of the people, substituting profit for principle.

When I was first admitted to the Bar in New York it was the common practice, under the cover of a provision of statute allowing the court to tax an additional fee for extra trouble and expense, for the deputy sheriffs and their assistants to demand exorbitant fees, without the formality of a taxation, and (it was said) without accounting for them to the sheriff; if the fees had been taxed they would have been the sheriff's perquisites, but being demanded without taxation, the sheriff had no means of knowing what had been exacted and the deputies would almost invariably demand and receive much more than they would report to the sheriff; the difference was their graft; what they acknowledged was the sheriff's perquisite. If any one protested, he was threatened and abused, and if a lawyer, he might know that thenceforth the sheriff's minions would find ways to vex and annoy, if not to cheat, him and his clients. That was the condition that confronted practicing lawyers, and a certain class of them knowingly took advantage of these conditions to the abuse of justice. Fortunately, conditions are better now; the sheriff's office is a salaried one; his deputies have salaries; theoretically at least they must keep an accurate report of their receipts, which belong to the state; their fees are fixed and they are liable to severe penalties for extortion. Probably such a condition as formerly existed would now be openly condemned by the Bar Association. However that may be, the change was brought about by legislation at Albany, not by any local or professional clamor. It was the result of an investigation in which it appeared that one prominent firm of attorneys paid very large annual sums under the guise of such extra compensation to the sheriff's office, and it was commonly reported that legal process was held up in the sheriff's office and the hour of its receipt falsified in order to give certain attorneys a chance to lodge prior process after being secretly notified from the sheriff's office. They were never disciplined.

The successful notoriety of a particular firm whose surviving member was recently in prison for his practices, was for many years of national cognizance. It was as well known twenty years ago as it is to-day but the Bar and the judiciary never during that time took any steps against it. It took the present District Attorney of New York City, by criminal proceedings, to put the firm out of business.

These, then, are, or very recently were, existing conditions. They are not universal but are sufficiently widespread to be typical and characteristic, rather than rare and so exceptional as to be unworthy of notice. It is for such conditions that a code of ethics is essential; it will be readily seen that such a code of ethics must be universal in its operation, rather than specific; for it would be perfectly easy for the unmoral

craft, of which I speak, to evade all specific rules, by inventing devices which they would not fit. It also will be readily seen that while a code of ethics would rescue some of these typical offenders, by showing them a light of which they were previously ignorant, theirs is such a type that the only efficient code will be one that is certainly enforced by sufficient penalties, certain also to be invoked.

So that, to my mind, for the conditions which I picture, the code must be simple, all-embracing, certain, efficient and both capable and certain of being applied and enforced against those who act in the practice of their profession in violation of ethical principles. The code should not only be the expression of proper ideals of professional practice, but should contain canons that would indicate and insure the enforcement of its principles in practice. For that reason, it should be not only the code of voluntary associations of lawyers similarly minded, but should be the law of the state, with proper penal and disciplinary provisions; and then, too, there should be means provided for making the enforcement of the law certain in proper cases. Any observer of such matters in New York City knows that prosecutions of offending lawyers, for the purpose of disbarment, are much more frequent now than formerly, and it is because the Bar Association, after years and years of comparative inactivity on the part of its grievance committee, has finally authorized the employment of paid counsel to prosecute flagrant offenders. But even now it is only the most flagrant cases that are moved against; it is only such cases as are apt to demand disbarment or suspension from practice that come out of committee; neither the committee nor the Association have themselves any disciplinary power; they can only recommend a prosecution before the Appellate Division of the Supreme Court, and cases for a mere warning or reprimand are not usually deemed worthy of their serious attention. Consequently petty offenders can pursue their unethical and disgraceful ways without fear of molestation to the serious annoyance, if not loss, of their clients and fellow members of the Bar.

Specific Recommendations.

I therefore recommend for the actual reformation of the bar, in my own community:

A Code of Ethics which every member of the bar is by law or rule of court *bound* to observe — simple in structure, comprehensive in scope, certain in effect, with sufficient and certain penalties for all substantial infractions, and with a power of visitation and discipline lodged where it will be certain to be invoked and applied in *all* proper cases.

To this end I would have a body, composed of practicing lawyers, similar to a court for the trial of impeachments, by which any complaint of any infraction of the code could be heard summarily and a warning or reprimand administered, and with the power in flagrant cases to recommend suspension or disbarment, and pursuant to such recommendation, to become relator against the accused in a proper judicial proceeding in which he would be entitled to a full hearing *de novo* and without prejudice; and with the right to review by *certiorari* its proceedings ending in a warning or reprimand.

This procedure would be somewhat similar to the proceedings by which, in some of the states, physicians guilty of unprofessional conduct are subject to revocation of their licenses by the State Medical Board, but it seems to me is an improvement on such proceedings (with which I am fairly familiar owing to having compiled them for Witthaus & Becker's Medical Jurisprudence). It differs from the usual scope of such proceedings in that it contemplates:

1. A Code of Ethics having the force of law, which the medical laws do not.

2. The legal body empowered to administer minor penalties only. (The medical

laws generally lodge the power of revocation in the Medical Board.)

3. Flagrant cases heard *de novo* in a court. (The medical laws, with a few exceptions, do not grant a hearing *de novo*.)

This would have the advantage over present procedure, that it would discipline petty offenders, who now escape discipline by the comparative paltriness of their offenses, though they invite the cultivation of that craft which can continually violate ethical principles and escape all punishment.

This perhaps is not a suggestion for the American Bar Association, for it contemplates local application. But I apprehend that this Association is not after a code of ethics which will merely affect its own members: I fancy they need no code of ethics. My suggestions contemplate an efficient remedy for those offenders at the Bar who disgrace the office of Attorney and Counsellor, not merely the formulation of an ideal for those who are consciously seeking the written expression of their own highest ideals.

For the purpose of illustrating the form of code which would, as a rule of conduct, meet my suggestions, I would select as the legal expression of the lawyer's duty (in addition to whatever special rules Bar Associations might adopt for the governance of their own members as such), the following combination of elements, taken from the Louisiana Code and the Washington oath, modified to accord with the foregoing views, the whole of which would then read as follows:

CODE OF ETHICS

It is the Legal Duty of Members of the Bar in the State of to:

1. Support the constitution and laws of the state and of the United States.

2. Maintain the respect due to courts of justice and judicial officers.

3. Employ for the purpose of maintaining causes confided to them, and of advising clients conferring with them, such means only as are consistent with truth; never seek to mislead a judge or jury or other constituent part of any court of justice or administrator of the law, by artifices or false statement of the law or facts.

4. Maintain inviolate the confidence and preserve the secrets of clients, subject, however, to the provisions of law with respect to the admission in evidence of such testimony.

5. Abstain from offensive personalities; advance no fact prejudicial to the honor or reputation of party, witness or other person, unless required by the justice of the cause with which he is charged.

6. Encourage neither the commencement nor the continuance of an action or proceeding from any motive of passion or interest; not to reject from personal considerations the cause of the defenseless or oppressed.

7. Live uprightly, and so conduct himself as to exhibit and enhance the dignity, honor and integrity of the profession and members of the Bar.

8. Counsel and maintain only such actions, proceedings and defenses as appear to him to be legal and just, except the defense of a person charged with a public offense.

9. In his practice generally to observe the following additional canons:

The observance of high moral principle is essential to the practitioner of the law.

It is his official duty not only to cultivate its observance himself, and by his own conduct, but jealously to see that it is observed by other practitioners; and that infractions of such practice are reported and properly disciplined by the proper body.

In his own conduct and in his advice to clients generally, to observe the principles of action which are commonly recognized as ethically sound, and to reject those which are commonly regarded as open to criticism from an ethical standpoint.

10. The reciprocal duties of the judiciary

and members of the Bar are indicated by the following canons:

It is the professional duty of judicial officers to so conduct themselves in all of their judicial functions as to win the approval of right-minded men, including members of the Bar, for their high ethical standards.

It is the duty of members of the Bar to conduct themselves respectfully to judicial officers, and to observe their judgments until properly reviewed or suspended, but a member of the Bar is under no obligation to overlook acts of judicial malfeasance out of a false respect for the office.

11. The qualities desirable in a judge are courtesy, affability, even temper, patience, conscientiousness, legal learning, sound sense and judgment, the moral courage to meet an issue squarely, an impartial mind and unquestionable probity in all of his judicial acts.

It has been suggested to the writer, by one eminent authority on the subject, to whom he submitted its substance, that the objection to such a code is that moral precepts cannot be enforced by statutory provision; but the answer appeared to be that where the enforcement of such precepts is essential to the proper administration of justice, and the precepts are made to apply only to members of the Bar, this forms the basis for a proper exception to the general rule, on the same theory by which officers of the army and navy may be dismissed or disciplined for conduct unbecoming an officer and a gentleman, when the interest of the service demands it.

I am also aware that a statute should be sufficiently specific to point out the offense, before one can be disciplined under it for an offense, for instance, under the medical laws in Kentucky, where the statute did not define "grossly unprofessional conduct of a character likely to deceive or defraud the public," the court held that as the statute did not advise the practitioner what was unprofessional conduct, he could not knowingly or intentionally be guilty of it; that if the legislature desired to declare for what acts or conduct a license should be revoked, it might do so and vest in some tribunal the right to investigate the charges; but that the Kentucky statute was deficient in that it prescribed no rule to govern the conduct of the profession, or board in adjudging its effect.[1]

On the other hand, in Missouri it was said that, as the legislature had not defined unprofessional or dishonorable conduct, those words must be understood to mean such conduct as would in common judgment be deemed unprofessional or dishonorable.[2]

It would seem, however, that the above code sufficiently indicates the principles of action, to define unprofessional or dishonorable conduct of the practitioner.

NEW YORK, N.Y., April, 1908.

[1] Matthews *v.* Murphy, 23 Ky. Law R. 750; 54 L. R. A. 415; 63 S. W. Rep. 785.

[2] State ex rel Hathaway *v.* State Board of Health, 103 Mo. 22.

ASSIGNABILITY OF LIFE INSURANCE POLICY TO ONE PAYING THE PREMIUM

By Edwin Maxey.

In view of the fact that it is not uncommon for a person wishing to borrow money to assign his insurance policy to any one who is willing to furnish the money, the assignee to keep the policy alive by paying the premiums, — it is important that we inquire into the validity of such assignments. If made merely as collateral security for the payment of a debt, the matter is free from doubt, because the creditor has an insurable interest in the life of the insured to the extent of his indebtedness; or, if for any other reason the assignee has an insurable interest, there is no question as to his right to make a valid contract with the insured or his beneficiaries for the assignment of the policy. But suppose, as often happens, that he has no insurable interest and that his sole claim to collect insurance rests upon his contract with the assignor and the fact that he has paid the premiums, what are his rights?

Upon this question the decisions of the courts are hopelessly in conflict. They vary from the extreme view that insurance policies are assignable just as any other chose in action, to the equally extreme view that such an assignment renders the policy absolutely void. A considerable portion of this conflict is fairly traceable to the language used by the Supreme Court of the United States in the much-quoted case of Warnock *v.* Davis, 104 U. S. 775. This was a case in which, by an agreement bearing even date with the policy, the insured assigned the policy to one having no insurable interest in the life of the insured. By the conditions of the assignment, the assignee was to pay the premiums and receive nine-tenths of the proceeds of the policy. The court held that the assignee was entitled to retain out of the policy, merely what was necessary to reimburse him for what he had expended in purchasing the policy and keeping it alive. But in its opinion the court said that "the assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." This is not good logic, neither is it consistent with the decision, for if the policy would have been taken out by the assignee in this case it would have been void and no one would have acquired any rights under it. This part of the opinion must be considered as mere *obiter*, the real ground of the decision being that as there was an agreement to assign at the time the policy was taken out the assignment was in the nature of a wagering contract except in so far as it was made to secure the assignee for amounts paid by him on the policy. The decision in this case was based largely on Cammack *v.* Lewis, 15 Wallace 643, in which it was held that where a policy of $3000.00 was assigned to one who was creditor to the extent of but $70.00, assignee to pay premiums, he could collect but $70.00 plus the premium, notwithstanding the assignment was absolute in form.

The theory underlying both these cases is that an assignment of a life insurance policy to one not having an insurable interest, though absolute in its terms, is to be construed as an assignment for the purpose of furnishing collateral security to the assignee rather than as being an absolute transfer of the rights of the insured under the policy. Such a construction takes the transaction out of the class of gambling contracts and measurably relieves it of the objection that it is contrary to public policy in that it creates an interest in the assignee in favor of the early death of the insured. It has been followed in Helmetag *v.* Miller, 76 Ala. 183; Rison *v.* Wilkerson, 3 Sneed,

Manhattan Life Insurance Co. *v.* Hennesey, 39 C. C. A. 625; Cawthorn *v.* Perry, 76 Texas, 383; Strode *v.* Meyer Bros. Drug Co., 101 Mo. App. 627; Gilbert *v.* Moose, 104 Pa. 74; Hendricks *v.* Reeves, 2 Pa. Superior Ct. 545; Metropolitan Life Ins. Co. *v.* O'Brien, 92 Mich. 584; Culver *v.* Guyer, 129 Ala. 622, Price *v.* Supreme Lodge K. of H., 68 Texas 361; Morris *v.* Sav. & Bkg. Co., 109 Ga. 12; Hays *v.* Lapeyre, 48 La. Ann. 749; First Nat. Bank *v.* Terry, 99 Va. 194; Schonfeld *v.* Turner, 75 Texas, 324; Stoelker *v.* Thornton, 88 Ala. 241; Heusner *v.* Mut. Life Ins. Co., 47 Mo. App. 336; Quinn *v.* Supreme Council C. K. of A., 99 Tenn 80; Brown *v.* Equitable Life, 75 Minn., 412; Mich. Mutual *v.* Rolfe, 76 Mich., 146; Quillian *v.* Johnson, 122 Ga. 49; Evans *v.* Moore, 28 Ohio L. C. 1; Bramblett *v.* Hargis' Ex'x, 94 S. W. 20.

The assignment has been similarly construed where only a part of the interest is assigned. Thus in the case of Spies *v.* Stikes, 112 Ala. 584, where the insured, who was in ill health and unable to pay the dues and assessments, assigned to a stranger a fifth interest in the policy on condition that he pay all future dues and assessments, which expenditures would later be refunded, it was held that assignee could secure nothing out of the proceeds of the policy except reimbursement for dues and assessments paid. This decision was followed in Baird *v.* Sharp, 100 Ky. 606.

Somewhat closely allied to this theory is the one which considers the assignment valid provided the amount paid or likely to be paid is not inconsiderable compared with the amount which the assignee is to secure under the policy. The difficulty in the application of this latter theory being in the determination of what constitutes a disproportion in the two amounts. In an extreme case it is easy, as for instance where a policy of $3000.00 is assigned absolutely for $70.00, as in the case of Cammack *v.* Lewis, *supra*, the courts would have no difficulty in determining that there is a disproportion between the two amounts. The same is true of an assignment for $65.00 of a policy for $2000.00 on which $185.00 in premiums have been paid, as in Downey *v.* Hoffer, 110 Pa. 109; or an assignment of a policy of $2000.00, on which $356.00 in premiums have been paid, for $28.00, as in Gilbert *v.* Moose, 104 Pa. 74. Equally easy was the question in Basye *v.* Adams, 81 Ky. 368; Cooper *v.* Shaeffer, 7 Sadler 405. And the disparity was still more evident in Franklin Life Ins. Co. *v.* Hazzard, 41 Ind. 116; where but $20.00 was paid for an absolute assignment of a policy of $3000.00 on which $62.40 had been paid in premiums. But where, as in the case of Givens *v.* Veeder, 9 N. M. 256, the assignee had paid $2000.00 down and $2500.00 in premiums and interest on a policy of $5000.00 it was held that there was no disproportion between the amounts and that the assignment was valid. In applying this theory it is necessary for the courts to take into account the life expectancy of the insured, his conditions of health at the time the assignment is made, and any changes which have taken place since the policy was issued tending to make the insured a worse risk. Cases in which the courts have attempted to do this will be found in Amick *v.* Butler, 111 Ind. 578; Supreme Lodge K. of H. *v.* Metcalf, 15 Ind. App. 135; Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131; Ulrich *v.* Reinoehl, 143 Pa. 238; Shaffer *v.* Spangler, 144 Pa. 223; McHale *v.* McDonnell, 175 Pa. 632; Whelan *v.* Atwood, 192 Pa. 237.

Some courts take the extreme view that an assignment to one having no insurable interest, assignee to pay the premiums, renders the policy void. About the only decisions which, until very recently, have followed this theory are those of Indiana and Kansas. The courts of the former state have not as yet seen fit to overrule the decision in Franklin Life Ins. Co. *v.* Hazzard, 41 Ind. 116, approved in Franklin Life Ins. Co. *v.* Sefton, 53, Ind. 380, and

in Davis *v.* Brown, 159 Ind. 644. The Kansas courts have stated the rule with considerable more emphasis than have those of Indiana. In Missouri Valley Life Ins. Co. *v.* Sturges, 18 Kan. 93, suit was brought on a policy for $2000.00 procured by Enoch Haynes on March 16, 1870, and assigned by him to Arthur D. Sturges, May 8, 1872. The court said: "Hayne's life cost Sturges $150.32 each year, without the slightest benefit in return, while Hayne's death would be worth to Sturges $2000.00 without the slightest loss or inconvenience whatever. Now can such a state of things be tolerated by the laws of any civilized country? Of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation. This is just what the present insurance policy was, in the hands of Sturges, a mere wagering contract upon the life of Haynes. And if said assignment from Haynes to Sturges were to be upheld, as valid under the law, it would be virtually saying that the law authorizes mere wagering speculations, mere mercenary traffic, concerning human life, and it would be opening the door wide, and inviting to enter the most shocking of all human crimes." 18 Kan. 95. Held that the assignee having no insurable interest in the life of Haynes, could not recover because the court would not lend its aid to enforce a gambling transaction.

In Missouri Valley Life Ins. Co. *v.* McCrum, 36 Kan. 146, the court went a step further and decided that where a policy had been once assigned to one having no insurable interest and afterward reassigned to the original lawful beneficiary, said beneficiary could not collect from the insurance company. The court said: "The law does not tolerate attempted frauds any more than it does those that are consummated. In making the transfer and assignment, and in receiving the money therefor, the beneficiaries were participants with Mrs. Parker in the attempted fraud on the insurance company. The whole transaction between the beneficiaries and Mrs. Parker contravenes public policy and the law leaves the parties where it found them. If Mrs. Parker, before the death of the insured, had demanded from the beneficiaries the money that she had paid for the assignment, upon the ground that the sale to her was void, she could not have recovered. If the beneficiaries can now recover, they are doubly benefitted by the questionable transaction in which they were engaged." This decision was followed in the case of Met. L. Ins. Co. *v.* Elison, 83 Pacific 410. In Bromley's Adm'r. *v.* Washington Life Ins. Co., 92 S. W. 17, decided by the Supreme Court of Kentucky, March, 1906, it was held that an assignment, to one not having an insurable interest, made in accordance with an understanding at the time the policy was taken out, that such an assignment would be made, renders the policy void both as to assignee and the administrator of the insured, notwithstanding the fact that the Insurance Company knew of the nature of the transaction and never delivered the policy to the insured but held it until the assignee paid the first premium and then delivered it to him.

The principle which seems to be lost sight of by these courts, is that provided there is an insurable interest at the inception of the policy it need not continue throughout its life. This may be considered a well settled principle as it has been followed in England since it was enunciated in Dalby *v.* India, and London Life Ass. Co., 15 C. B. 365. In this case life insurance was distinguished from other forms of insurance in which the insurable interest had to be continuous. The distinction was approved in Law *v.* London Indisputable Life Policy Co., 1 Kay & J. 223. In this country the English rule has been followed by the Supreme Court of the United States in Connecticut Mut. Life Ins. Co. *v.* Schaeffer, 94 U. S. 457, and by our state courts in Rawls *v.* Ins. Co., 27 N. Y 282, Corson's Appeal, 113 Pa. 438;

Overhiser's Adm'r. *v.* Overhiser, 63 Ohio St. 77. Mowry *v.* Ins. Co., 9 R. I. 346. This list might be almost indefinitely extended.

At the opposite pole from the Kansas theory is the theory that a policy of insurance is assignable as any other chose in action. The ground upon which this theory is based is that it enables one who can no longer pay the premiums on his policy to sell it or borrow money on it from others than the insurance company. Where policies may be forfeited for non-payment of premiums, it is a hardship on the insured not to be able to assign his policy. And even where he may borrow from the insurance company on the policy as security, the fact that he may not sell to any one else except those having an insurable interest in his life, who may have no money, gives to the company a monopoly and places the insured at a disadvantage. Nor is the danger to the company from an assignment to one not having an insurable interest so great as it appears at first blush. The insured is not likely to assign to one in whom he has not great confidence and the company in the majority of cases, assents to the assignment. They are therefore doubly protected. To allow an insurance company to refuse to pay anything to an assignee in cases where it has consented to the assignment, either expressly or by receiving premiums from him, looks very much like assisting, or at least countenancing, the perpetration of a fraud.

This view was taken in St. John *v.* American Mut. Life Ins. Co., 13 N. Y. 31. The court used the following language: "It seems to me it cannot be doubted but that the assured might legally assign the policies to the plaintiff. It has been said that without the right to assign, insurances on lives lose half their usefulness. Policies of insurance are choses in action; they are governed by the same principles applicable to other agreements involving pecuniary obligations. So far as regards the question of the liability of the company, it is not material whether the plaintiff paid a full consideration upon such transfer or not. Such liability in no manner depends upon the amount of consideration of the assignments. The assignments on their face show a sufficient consideration to render them valid in the hands of the assignee, as against the company. On the death of Mr. Noyes, if he died within the period limited by the policies, the company agreed to pay the amount of the insurance. It cannot be material, neither does it affect the liability of the company, whether the money is due and payable to the legal representatives of the assured or to his assignee."

Substantially the same position was taken in A. O. U. W. *v.* Brown, 112 Ga. 545; Fitzpatrick *v.* Hartford Life & Annuity Ins. Co., 56 Conn. 116, though in this case the assignee was a distant relative of the assured; Valton *v.* Natl. Fund Life Ins. Co., 20 N. Y. 32; Olmsted *v.* Keyes, 85 N. Y. 593; Bond *v.* Bunting, 78 Pa. 210; Cunningham *v.* Smith, 70 Pa. 450. In Mutual Life Ins. Co. *v.* Armstrong, 117 U. S. 591, it was held that "A policy of life insurance without restrictive words is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies; and payment thereof may be enforced for the benefit of the assignee and, under the system of procedure in many states, in his name." This decision is interesting as showing a tendency upon the Supreme Court of the United States to look with greater liberality upon assignments than when it decided Cammack *v.* Lewis and Warnock *v.* Davis.

The question of the validity of the assignment arises more often between the assignee and the personal representatives of the insured than between the assignee and the insurance company. Among the leading cases in which the courts have held that even against the personal representatives of

the insured, a policy of life insurance is assignable just as any other chose in action, we note Chamberlain *v.* Butler, 61 Neb. 730. In this case a policy for $5000.00 was assigned for $75.00 to Chamberlain who had no insurable interest, assignee to pay premiums. Upon the death of Butler his administratrix demanded the insurance from the company which refused on the ground that they had paid it to the assignee of the policy. She then brought suit against Chamberlain for $5000.00, minus $75.00, and the four premiums of $135.95 each, paid by him. A decision in her favor by the circuit court was reversed by the Supreme Court, giving as a reason that "until it shall be made to appear that in those jurisdictions where such policies are assignable absolutely, crimes committed by such assignees are more frequent than in those where assignments of the nature of the one here involved are illegal, we are of opinion that the reasons for holding such transactions void are insufficient."

In Steinback *v.* Diepenbrock, 158 N. Y. 24, it was held that if the policy is taken out in good faith it may be treated as any other chose in action and that there is no sufficient reason why he should not be permitted to go into what he conceives to be the best market to sell or borrow on his policy. The same conclusion was reached in Strike *v.* Wisconsin Odd Fellows Mut. Life Ins. Co., 95 Wis. 583; Bowen *v.* Natl. Life Assoc., 63 Conn. 460; Ritter *v.* Smith, 70 Md. 261; Souder *v.* Home Friendly Soc., 72 Md. 511; Clogg *v.* McDaniel, 89 Md. 416; Mut. Life Ins. Co. *v.* Allen, 138 Mass. 24; Dixon *v.* Nat. Life Ins. Co., 168 Mass. 48; Ashley *v.* Ashley, 3 Sim. 149; Clark *v.* Allen, 11 R. I. 439; Johnson *v.* Epps, 14 Ill. App. 201; Brett *v.* Warnick, 44 Oregon 511; Myers *v.* Schuman, 54 N. J. Eq. 414, in this case the assignment of the policy was an absolute gift, Stoelker *v.* Thornton, 88 Ala. 421. McFarland *v.* Creath, 35 Mo. Appeals 112, Rylander *et al v.* Allen, 53 S. E. 1032. In Harrison's Adm'r *v.* Northwestern Mutual Life Ins. Co., 94 Atl. 321, decided by the Supreme Court of Vermont, April, 1906, it was held that though the policy was procured for the purpose of immediately assigning it to one having no insurable interest and though it was assigned to such person without consideration this did not make it a wagering policy neither did it invalidate the assignment. This decision was based largely on that in Fairchild *v.* Northeastern Mutual Life Assn., 51 Vt. 613.

The time of assignment is a factor which has exerted no small degree of influence over the decisions of courts. If the insured has carried the policy for a long time, and then assigned it, the transaction is looked upon with much less suspicion than when the taking out of the insurance and the assignment, or agreement to assign, are of even date or nearly so. As was held by the court in an English case, Schilling *v.* Accident Ins. Co., 27 L. J. Ex. 16, where the agreement at the time of the issuance of the policy is that another is to pay the premiums, such agreement is evidence that the interest is really in a third party, and in Clement *v.* N. Y. Life, 46 S. W. 561, it was held that an agreement to assign, made prior to the issuance of the policy, assignee to pay premiums, vitiates the assignment. The decision in Warnock *v.* Davis was based mainly upon the suspicion with which the court viewed the agreement to assign bearing even date with the issuance of the policy.

But the lapse of the time between the issuance of the policy and its assignment is of consequence merely as tending to show whether the insurance was the act of the nominally insured or of some third person — the assignee. If the latter, then the policy is void unless such person have an insurable interest so that he could have taken out the policy in his own name. The courts do not look with favor upon doing a thing indirectly which the law forbids one to do directly. But if the policy is valid in its inception it matters not how much or how little time elapses before it is assigned.

Similarly the question of who pays the premiums is important merely as evidence as to who has really taken out the insurance. The payment of premiums by the assignee cannot form the basis of his claim neither can it defeat such claim when once lawfully acquired. In Aetna Insurance Co. *v.* France, 94 U. S. 561, the court sustained the refusal of the lower court to instruct the jury that if they found that the premiums had been paid by Lucretia P. France, it would show that the application for insurance was made and the policy in question was taken out by her for her own benefit, in which case it would be necessary for her to show that she had insurable interest at the time the policy was taken out. The position of the courts upon the question whether payment of premiums by the assignee will of itself defeat his claim, unless it can be shown that he is the real party to the contract of insurance, may be regarded as settled in the negative. In this regard the same rule holds as to the assignee and beneficiary.

LINCOLN, NEB., April, 1908.

YE OLD ENGLISH BENCH.

BY HARRY RANDOLPH BLYTHE.

With powdered wigs and grave demien
Upon the Bench of King or Queen
They sat amid a nation's awe
And reared the landmarks of the law.

Their words march on abreast of time,
Their works are great in every clime,
At neither works nor wigs I scoff
But what of them when wigs are off?

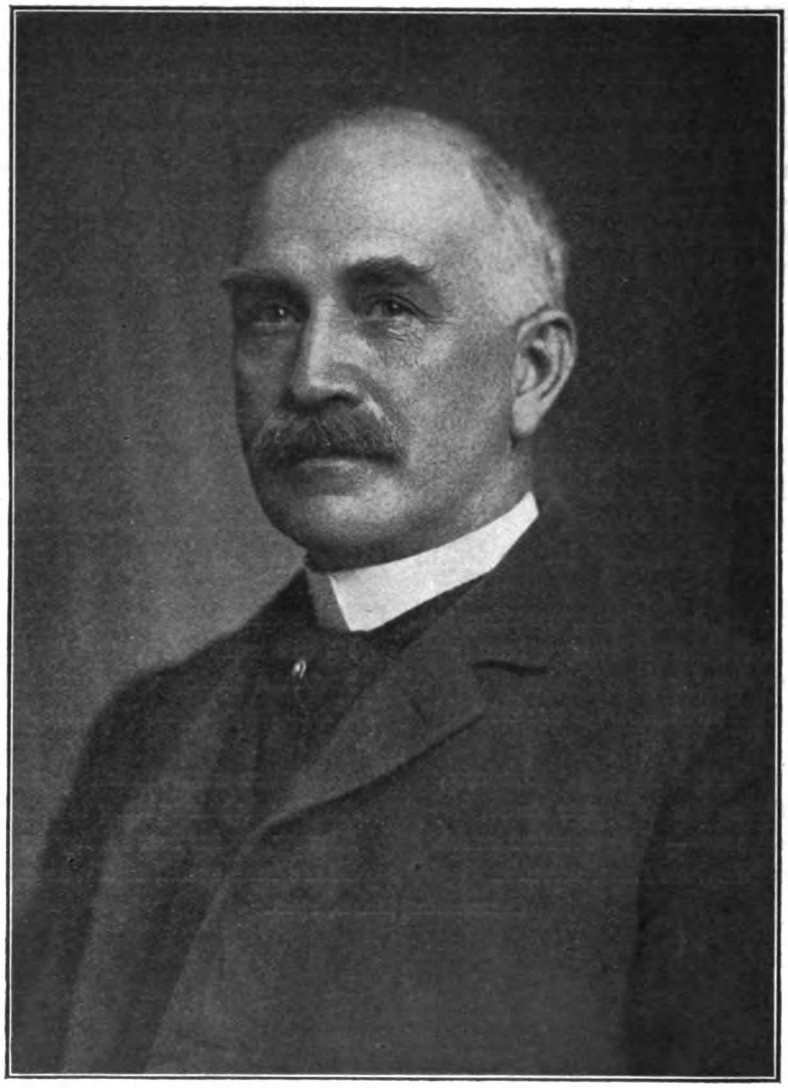
They liked to hunt with dogs, no doubt,
And drain their cups of porter stout,
And this we know — they courted much
Besides their Mistress Law, as such.

They surely were not perfect men,
They fought a little, now and then,
And jested too, I vow, at least
Whene'er they gave a gallant feast.

But somehow when I know the rest
I like them with their wigs the best,
For then their greatness shines a bit
When they begin, "Whereas, to wit."

And when unto their books I turn
Aught of their stately law to learn,
I know, to further all my ends.
These men stand ready as my friends.

CAMBRIDGE, MASS., 1908.



Judson Harmon

JUDSON HARMON

By Hon. H. D. Peck

JUDSON Harmon was born at Newtown near Cincinnati in the year 1846 and grew up and received his early education in the schools in that vicinity. As he approached manhood he went to the Dennison University at Granville, Ohio, from which he received a degree in the year 1866. His father, the Rev. Benjamin F. Harmon, was a Baptist minister, much beloved in the community where he lived, and a descendant of old New England Puritan stock, — as was also Julia Bronson Harmon, his mother. While at college and as a young man Judson Harmon was noted among other things for his proficiency in athletic sports. Traditions still linger about his native place concerning his skill and prowess in the game of baseball. An elderly member of the Cincinnati bar delights to relate how his first sight of the future jurist and statesman was when he was posing in the center of the diamond as pitcher for his village team; and throughout his whole life to this day Judge Harmon has retained his appearance of athletic strength and vigor. More than six feet in height, of a broad and powerful frame, erect in carriage, swift and graceful in movement, he remains as he always has been, a commanding figure among men. It is also related of him that he distinguished himself in the collegiate debates and discussions in which he took part, which can be readily believed by those who know him well and appreciate his fondness for the discussion of legal propositions.

After graduation he studied law in the office of Judge George Hoadly and at the Cincinnati Law School, from which he was admitted to the bar in March, 1869. He had already achieved a considerable success as a practitioner, when in October, 1876, he was nominated by the Democratic party as a candidate for judge of the Court of Common Pleas of Hamilton County. At the election he received a majority of the votes, but the result was very close and party feeling ran very high, so that the election was contested; and the senate of the state, at that time Republican, ousted him from his position on the ground that there had been illegal votes cast at the election.

A year or two afterwards he was nominated and elected a judge of the Superior Court of Cincinnati, and in the year 1883 he was re-elected by an increased majority. He administered his office of judge of the Superior Court to the great satisfaction of the people and the admiration of the bar for about nine years, terminating with his resignation in 1887, which was brought about by reason of the fact that Ex-Governor Hoadly had determined to remove to New York and engage in the practice there, and he and his partners invited Judge Harmon to take his place at the head of the firm of which Ex-Governor Hoadly was then a member, and which enjoyed a very large practice.

Upon his retirement from the bench he recommended to the governor the appointment as his successor of a rising young Cincinnati lawyer, now the Secretary of War, and so it happened that William H. Taft was appointed to his first judicial position by Joseph B. Foraker upon the recommendation of Judson Harmon.

Judge Harmon met with the same success in resuming the practice which he always had in his professional endeavors. His clients were numerous and his days filled with the congenial labor which is the delight of a lawyer who loves his profession. One day in June, 1895, he was astonished to find among his correspondence a letter from President Cleveland, inquiring whether he would accept the office of attorney-general. As it was the one office, other than judicial, for which he was by nature and training best

fitted, it was not long before the President received an affirmative answer to his question and Judge Harmon was nominated and appointed attorney-general, which position he occupied until the close of Mr. Cleveland's administration in March, 1897.

On the bench Judge Harmon was distinguished for that trait which is always marked in judicial characters of the highest class, namely, the desire that every interest should be heard and every argument considered which could affect the question to be determined. He was patient and careful to a degree, and the argument of the youngest practitioner was given as complete consideration as that of the more distinguished members of the bar. As a rule, he was prompt in arriving at a conclusion, and always firm in adhering to and enforcing it, when reached. He was not to be driven from logical conclusions by stress of argument or weight of character.

Quite a number of his opinions may be found among the published reports of his court, and they are always marked by thoroughness of consideration, breadth of view and strict adherence to principle.

The same qualities which distinguished him as a judge were manifest in his work at the bar. A skilful, accurate and determined advocate, his conduct of a trial was tempered by good feeling and careful consideration for the rights and even the sensibilities of all concerned; so that he frequently emerged from a warm contest, a firm friend of persons with whom he had been contesting and who were previously unknown to him. He is a strong, clear and at times eloquent speaker. He has also a great sense of humor, so that anything which is legitimately amusing or may be made the subject of a witticism rarely escapes him.

His efforts in the Supreme Court of the United States, both in his capacity as attorney-general and at other times, have met with a good deal of success. During his term in that office the question as to "trusts," combinations and conspiracies in restraint of commerce, was first extensively agitated. The first of the great cases on that subject, The United States *v.* The Trans-Missouri Freight Association, was argued by him at the October term, 1896. It was a suit in equity to enjoin the execution of an agreement forming the defendant association, for the purpose of establishing and maintaining rates of freight, on the ground that the agreement and the existence of the association were in violation of the act of July 2, 1890, entitled, "*An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies.*" Judge Harmon was opposed in that case by a great array of counsel, representing the various railroad companies composing the defendant association, among whom were Mr. James C. Carter, Mr. E. J. Phelps, Mr. John F. Dillon, Mr. W. F. Guthrie and several other lawyers of great reputation. Some two days were consumed in the argument in the Supreme Court. The principal questions discussed were whether the act of June 2, 1890, was applicable to railroad companies, and whether the agreement under which defendant companies were acting was in violation of the act. It will be remembered that the terms of the act are very general, declaring that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal; and every person who shall make any such contract or engage in any such conspiracy shall be deemed guilty of a misdemeanor," etc.: also that "every contract or combination in form of trust or otherwise or conspiracy in restraint of trade or commerce is declared illegal.

It was contended by the defendants that the act was not intended to and did not apply to the business of transportation by railroad, because such transportation did not come within the ordinary meaning of commerce; and further, because that subject was dealt with by the Interstate Com-

merce law, which was peculiarly applicable to railroads and rendered the so-called "Sherman" law inapplicable thereto: but the court negatived both of these contentions and held with the government that the act did apply to a combination of railroad companies and that the association of defendants was in violation of its terms. In the opinion of the court, Mr. Justice Peckham, after an elaborate discussion of the questions involved, says: "The conclusion which we have drawn from the examination above made in the question before us is that the anti-trust act applies to railroads and that it renders illegal all agreements which are in restraint of trade or commerce, as we have above defined that expression; and the question then arises whether the agreement before us is of that nature," which question he subsequently answers in the affirmative; so that the court by a majority of five justices, to four dissenting, reversed the judgments of the Circuit Court and the Circuit Court of Appeals for the District of Kansas, where the case originated, and which had been in favor of the association.

This was the first of the great "Anti-trust" cases, and it formed a large part of the foundation of the subsequent ones. The brief filed by Judge Harmon in that case was regarded as a very strong one, and has been in great demand, — so much so that several subsequent editions of it were published and it is still difficult to obtain a copy. The case is reported in the 166 U. S. 290. The cases of the United States *v.* Freight Traffic Association, 171 U. S. 505, and Addyston Pipe Company *v.* United States, 175 U. S. 211, were commenced by Judge Harmon during his term of office as attorney-general, but were argued by his successor.

On the 7th of January, 1896, the House of Representatives passed a resolution requesting Judge Harmon to report what steps, if any, he had taken to enforce the law of the United States against trusts, combinations and conspiracies in restraint of trade and commerce, and what further legislation, if any, was needed, in his opinion, to protect the people against the same. For answer, he stated that two of the cases above mentioned were pending; and to that part of the resolution which invites suggestion as to further legislation to protect the people against trusts, combinations and conspiracies, he said: "I suggest an amendment that will leave no doubt as to what is meant by attempting to monopolize, and by contracts, combinations and conspiracies in restraint of trade and commerce. It should not be difficult to distinguish legitimate enterprises carried on by individuals or by associations of individuals in bona fide partnerships and corporations, however great and successful they may become by superior capacity, facilities or enterprise, from combinations of rival concerns, no matter under what form of disguise, whose object is to stifle competition and thereby secure illicit control of the markets. The real nature and desire of the organization would always be a question of fact. Courts have no difficulty in deciding this question when it arises between the parties. They would have none in deciding it when it arises between the Government and the parties." He further says that the present law should contain a provision like that of the Interstate Commerce law, to prevent the refusal of witnesses to answer on the ground of self-incrimination; that this difficulty had been severely felt in all attempts to enforce the law.

From all this it would seem that during his brief term of office Judge Harmon had done a great deal towards solving the questions raised by the huge combinations of trade and commerce which have grown up within the last few years, and which questions are of such complexity and difficulty as to tax the resources of our best equipped lawyers.

Since the expiration of his term of office as attorney-general, Judge Harmon has persistently refused to become a candidate

for any office, but he has always kept up a lively interest in public affairs, both local and national. This is well illustrated by the case of the state, on the relation of the attorney-general, *v.* Hobart *et al.*, which was an action commenced by the attorney-general of Ohio to secure an injunction against the holding in Cincinnati of an exhibition which it was alleged would be a prize fight, on the ground that it would constitute a public nuisance. The case excited a great deal of public interest and feeling, a large part of the community being of the opinion that such exhibitions were improper and immoral, — while the contrary was held by a considerable minority. Those who were opposed to the exhibition induced the attorney-general to commence proceedings to secure an injunction, and sundry leaders of the bar, among whom was Judge Harmon, volunteered to prosecute the action. It was heard in the Court of Common Pleas of Hamilton County, and hotly contested. The defendants strenuously insisted that it was not a case for a court of equity. Judge Harmon made a powerful and elaborate argument, largely devoted to the proposition that equitable remedies are not exclusively devoted to rights of property, but may in exceptional cases extend to the protection of public interests; and succeeded in obtaining an injunction against the proposed exhibition.

An incident in the career of Judge Harmon since his retirement from office which attracted a great deal of public attention at the time, occurred when he was retained in connection with Mr. Frederick N. Judson of St. Louis by Attorney-General Moody, at the direction of the President, to examine and report to the Interstate Commerce Commission as to the matter of unlawful rates and practices in the transportation of coal and mining supplies by The Atchison, Topeka & Santa Fe Railway Company. The case was pending at the time that he was retained and a decree had already been entered against the Railway Company, forbidding them from acting under or enforcing or executing in any manner any agreement to transport over its railroad any interstate traffic at other than the schedule rates.

Upon investigation of the facts of which evidence had been taken, the special counsel found and reported that the Railway Company, its officers and agents, had been guilty of contempt in a great many instances, and that an immense quantity of coal and other things had been shipped over its road in violation of the order of injunction.

They recommended that proceedings in contempt be taken against the Railway Company and its officers, saying: "The abolition of imprisonment by the Elkins law does not apply to contempts, so that this penalty as well as a fine may be imposed, if in the judgment of the court a case for such punishment be made out against any officer. At the same time, the court has a much broader discretion than it would have in a strictly criminal proceeding to adapt its punishment to the degree of guilt in the case of each defendant."

Upon this report a correspondence ensued between the special counsel and the attorney-general, in which it was evident that the latter preferred that proceedings should be taken against the Railway Company, but was not willing, as the case then stood, to commence proceedings against individuals. Messrs. Harmon and Judson insisted upon the propriety of proceeding against the officers of the corporation, as well as against the company itself, and in a letter dated April 11, 1905, to the attorney-general they say: "It necessarily follows, therefore, that when there is proof of the violation of the court's order by a corporate defendant, some individuals are chargeable with the wrong and they are presumably the officers in charge of the corporate business involved. We deem it of importance to the interests of the Government and as a judicial precedent that this principle of individual responsibility for corporate ac-

tion should be insisted upon as essential for the enforcement of the judicial power in this, the first important case wherein the remedy of injunction is enforced by the Government against a railway company under the Interstate Commerce act."

To this the attorney-general replied with an argument based upon the evidence taken in the case, contending that it did not show that the principal officers of the Company were responsible for the action taken, and that it would be improper to make any accusation against them under such circumstances.

The special counsel in reply stated that what they recommended did not amount to a direct charge or accusation, but was only a rule upon the officers to show cause why they should not be held responsible for the action of the Company, saying: "We fully concur that no proceedings should be commenced without evidence, but facts presumed or judicially noticed are evidence. The proceeding we recommend is not unusual or exceptional, but on the contrary is the natural and ordinary one in such cases. What we have said is peculiarly true of the great corporations of our day. They cannot be imprisoned, and punishment by fine is not only inadequate, but reaches the real culprits only lightly, — if at all. The evils with which we are now confronted are corporate in name, but individual in fact. Guilt is always personal. So long as officials can hide behind their corporations, no remedy can be effectual. When the Government searches out the guilty men, and makes corporate wrongdoing mean personal punishment and dishonor, the laws will be obeyed," and conclude their letter by resigning their position as counsel, — because they were not permitted to proceed in the manner which they advised.

This clear and forcible statement of the proper application of remedies in such cases has been many times repeated, — and is so plainly correct as hardly to admit of dispute. It is obvious that if the contests against rebates and other illegal corporate action were conducted along the lines indicated by Judge Harmon and his colleague, it would probably bring the practice to a speedy end.

Judge Harmon is a forcible and interesting public speaker. He has delivered many occasional addresses, political and non-political, which have generally been heard with great satisfaction. His serious style is clear, trenchant and forcible, and his rich vein of humor enlivens the whole, — so that the result is most effective.

CINCINNATI, OHIO, APRIL, 1908.

THE DARTMOUTH COLLEGE CASE

By Robert Sprague Hall

FROM the middle West, from Chicago and St. Louis, comes a wail of anguish, over John Marshall's opinion, pronounced in 1819, in the case of Trustees of Dartmouth College *v.* Woodward. The writer of the Jeremiad declares that the decision in that case was destructive of the rights of the states, and, thereby, of the people's rights; that it was not adjudication, but usurpation. His pamphlet contains an introduction, by the editor of one of the newspapers in which its text had appeared, who asserts that the "Marshall decision is the backbone, the vitality, of all corporate power," "the secret of corporate tyranny over the people," and more of the same sort, and that the decision "must be reversed and its logic denounced, if this government is to fulfil the purpose of its founders." Nearly thirty years ago, St. Louis had given us a volume on the same case, by a New Hampshire man, John M. Shirley, who concluded with these words: viz., "the pernicious principles supposed to have been established in Trustees of Dartmouth College *v.* Woodward."

In that word "supposed," lies a suggestion for the solution of any problem which seems to involve the decision. The nub of the matter is the right of the legislatures of our various states to repeal the charters which they have granted to corporations. Ten of those states have constitutional provisions to secure that right, and any state legislature may secure it, by introducing an appropriate clause in any charter granted by it. Of course, the latter method is subject to the uncertainty that attends all efforts to restrict acts of the legislature when powerful interests are working against the restrictions.

But, to return to the famous case. The legislature of New Hampshire, in 1816, passed certain acts, with a view to the modification of the charter of the corporation known as The Trustees of Dartmouth College. The trustees objected, and took their case to the courts. The Superior Court, the highest in the state, decided against them, and they appealed to the Supreme Court of the United States. There, they were successful, six out of seven judges, including the chief justice, John Marshall, deciding that their charter was a contract, within the meaning of the clause in the United States constitution forbidding any state to pass any law impairing the obligation of contracts. Three opinions were written and published, those of Marshall, Bushrod Washington, and Joseph Story, all concurring. The dissenting justice, Duval, handed in no opinion.

The most obvious feature of the decision is that it concerns, and is authoritative for, the charters of one class only of corporations, the class including those of the type of Dartmouth College, that is, private eleemosynary institutions. Marshall's opinion contains no reference to business corporations, and he distinguishes the case in hand from those where the state has granted charters to political corporations, creating civil institutions for governmental purposes, holding that the charters of the latter are not contracts, and are not within the protection of the clause in the United States constitution. He holds that the charter of the College is not a grant of political power, but that the College is a private eleemosynary institution, devoted to objects unconnected with government, and supported by funds bestowed upon the faith that they would be administered according to the provisions of the charter. He regards the trustees as the representatives, for all time, of the persons who gave their money for certain purposes, set forth in the charter, and who would not have given their money

under any other ascertainable conditions. Marshall admits that such contracts as this charter were probably not in the minds of the framers of the constitution, when the protective clause was introduced. But he declares that it is not enough to say this. We would have to say that, "if this particular case had been suggested, the language would have been so varied as to exclude it or it would have been made a special exception." This language has excited the wrath of one commentator, as if the judge had therein announced a reckless disregard for legal principles, and had been guilty of a rank usurpation of authority. Marshall adds, "The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." He points out that the provisions in the constitution for patents and copyrights argue interest, on the part of the framers of the instrument, in science and the useful arts; and he asks why we must suppose contracts in the interest of literature to be excluded from provisions made for the security of ordinary agreements between man and man.

Not a trace is to be found in Marshall's opinion of a desire to broaden its scope in a way to include any other sort of a charter than one to a private, eleemosynary institution. Washington, even more carefully, limited his conclusions to the case in hand, seeking to forestall any attempt to apply the decision to cases involving different sets of circumstances. He sharply distinguished incorporated private charities from public corporations, holding the charters of the former to be contracts between their founders and the state, and to be protected by the United States constitution, but the charters of the latter to be simply descriptive of the powers of bodies created as instruments for carrying out the purposes of the state itself, whether for government or for work under the control of the state. He, too, does not consider business corporations, and intends, therefore, that his opinion shall not apply to them.

Story points out that, when the argument is advanced that because the charity is public, the corporation is public, the popular sense of the word "public" is confounded with the strictly legal sense in which the word is applied to corporations. It is in Story's opinion that we find the only trace discoverable in the decision rendered by the court of an extension of the principle of the inviolability of charters to those of business corporations. He supposes the case of a bank, where the stockholders pay in their money, and where the benefit accrues to the stockholders themselves. He holds that the charter of the bank would be inviolable by the state, as long as the bank conformed to the general laws of the state and the terms of the charter. Of course, this expression of opinion is obiter, and of no binding force upon future decisions of the courts, although Story draws an *a fortiori* conclusion, in view of the greater value to the public of a public charity, in favor of the inviolability of the charter of such a charity. He instances the protection accorded to devises and legacies to municipal corporations, the funds being inviolate under any change of charter that the legislature may make. Here, he is close to the heart of the question, as we shall presently see. He takes far broader ground than Marshall, holding that corporate franchises are property, with all the rights of property secured by the constitutions of the state and of the United States.

Strange to say, in all the arguments of counsel, and in all the discussions of the case by the various judges whose opinions have been published, little is made of the fact that the circumstances of the incorporation of the trustees was important only as giving them a collective individuality and perpetuity, while their real character lay in

the fact that they were trustees. The point at issue was really whether the legislatures of the states may deal with trustees who are incorporated as if there were nothing involved but the charter of incorporation. The arguments played around this point, but stress was laid rather upon the kind of corporation than upon the kind of property involved.

Let us glance at that property aspect of the case. There was a time, not so many centuries ago in England, when statutes were found necessary to enable a man to dispose of his property by will. There was also a time when the Court of Chancery first undertook to protect property in trust, and to see that it was applied according to the intentions of the donors. The confidence of a testator that his plans in regard to the uses to which his property is to be applied after his death, and the confidence of any creator of, or donor to, a trust that the declared purposes of the trust will be adhered to, rest upon a belief in the stability of the law, and, especially, upon a belief that the people will continue to regard the right of persons to deal with their own property in their own way, provided they injure not others, as sacred.

Suppose I choose to devote my property to educational purposes, and open a school. My school being well patronized, I decide to enlarge my enterprise, and I take in a partner, and finally, the business still increasing, I apply, with others, for a charter of incorporation. It is evident that a business corporation of this sort would be subject to the general laws of the state, and that it would be protected from any legislation which would not affect all similar corporations which might exist in the state. Such a corporation, although mere business interests are involved, is never interfered with, except where it has become insolvent, and the rights or creditors demand that it should be wound up, so long as the corporation conforms to the general laws and to its charter.

Suppose, now, a number of wealthy persons should endow a charity, and the trustees of the charity should be incorporated. Would their incorporation destroy their character as trustees, and give the legislature power to dictate in regard to the purpose for which they were originally made trustees? It was argued, and afterwards made much of, in the College case, that abuses might creep in which might not be such distinct violations of the trust as to enable the courts to apply a remedy. But, underneath this argument, lay the suppressed premise, that education, being an important public interest, should be the object of the legislature's particular care. It was forgotten, or ignored, that the legislature was not restrained from promoting that object merely because the Trustees, in pursuance of the purposes of the trust, were promoting the same object.

Again, a group of men may have formed a trust for the purpose of promoting the planting of trees, and may have definitely fixed the method which they have decided to follow in carrying out their design. A charter of incorporation may have been obtained by them. After they have carried on the work for some years, one of them, dissatisfied with the method of procedure laid down, goes to the legislature, to get it to modify the charter to suit his own ideas. By political influence, by "pull," in other words, he succeeds in having an act passed that accomplishes his purpose, or would do so, if it could be upheld by the courts. This is no idle supposition, but exactly corresponds to what happened in the College case. The President of the College fell out with the trustees, was dismissed from his office, and determined to get even with them. He took his grievance to the legislature, and secured following enough to get the questionable acts passed. Seventy-five out of one hundred and ninety members of the House protested against the first, and principal, act, and their protest was entered upon the journal of the House. The protest

was based upon the grounds that the trustees would be despoiled of their rights without a proper hearing, that the College was prosperous and no legislative interference was needed, that the effect of the act would be to endanger the College funds — by destroying the trust — and that its tendency was to make the College subject to every change of political party. Dr. Wheelock, the deposed President of the College, had maintained, some ten years before, that the charter was not within the power of the legislature to alter or repeal. During the debate in the legislature, Daniel Webster had suggested a move to bring about a compromise, by getting a bill passed to found a new university, but the move did not succeed.

The court that first decided the College case found it difficult to understand "how a privilege can be protected from the law of the land by a clause in the constitution declaring that it shall not be taken away but by the law of the land." But, is a special act of legislature, which itself may be a violation of the constitution, for any one of several reasons, to be considered a part of the law of the land recognized by that constitution? Is this the sort of "law of the land" under which the American people suppose themselves to be living? The legislature that we have supposed to pass the act modifying the tree trust might have tried to justify its proceedings by arguing that the public interest in the object of the trust was greater than that of the trustees, and that the impractical and antiquated methods of the trustees conduced very badly to the end proposed.

The case produced a tremendous excitement in many quarters, for several years, and the opinion of Judge Marshall provoked much criticism, on the score of its tendency to fortify all corporations against control by the states that had created them. Of course, the decision could be authority only for the principles that controlled the decision, and only to the extent to which the principles were necessarily involved. The fundamental aim of the decision had been to uphold good faith in the dealings of a state with its citizens.

There is no doubt of the power of the states to limit the extent of the privileges granted by charter, either through the voluntary action of the legislature making the grant, or by a provision in the fundamental law of the state making such action by the legislature obligatory. Massachusetts has sought to accomplish the object by a middle course, that is, by a general law, making every act of incorporation, after March 11, 1831, subject to "amendment, alteration, or repeal, at the pleasure of the general court." Of course, a single legislature might repeal this very law, but, in the present temper of the community towards corporations, such action is extremely unlikely.

From what goes before, it should be evident that Marshall's opinion does not deserve the opprobrium cast upon it by the authors quoted, and that it has not been an obstacle in the way of progress. One is tempted, after a perusal of its temperate language and moderate scope, to conjecture whether the said authors have really read it, or have merely accepted its dangerous character on the faith of others. The opinions may be found in the fourth volume of Wheaton's U. S. Reports, but also in a volume compiled by Timothy Farrar, entitled "Report of the case of the Trustees of Dartmouth College, against William H. Woodward," which includes, also, the arguments and decision in the state court. This volume appeared in 1819, and its four hundred pages are well worth the attention of any American who desires to form a just conception of the spirit of the constitution under which we are living, of which spirit John Marshall is justly regarded as one of the soundest exponents.

BOSTON, MASS., APRIL, 1908.

THE ROAD TO JAIL

By James H. Blount

IN the fall of 1903 an insurrection against American authority had been in progress in the Province of Albay, Philippine Islands, for about a year. About October, if the writer recollects correctly, this insurrection culminated in the surrender of "General" Simeon Ola, with all his forces, consisting of about 600 men. Ola claimed that his surrender was made with the understanding that he and his people were not to be severely dealt with. The government, on the other hand, claimed that his surrender was unconditional, and therefore it insisted upon indicting him and all his followers under the criminal statutes relating to offenses against public order. These statutes varied in severity. The earlier ones were enacted by the insular government shortly after Judge Taft took charge. They dealt with crimes concededly political, defining and fixing penalties for sedition and kindred transgressions. The later statutes were prompted by the persistence of the Filipinos in waging a sort of guerrilla warfare, conducted by small bands acting independently of each other, long after the organized fighting had ceased. When the backbone of an insurrection is once broken, and further resistance has become hopeless, such further resistance is *per se* a crime against the peace of the world. War is hell at best. The shorter a war, the more humane it is, provided it entail no violation of the "Laws of war," such as refusing quarter to a prostrate foe.

In proportion as the so-called guerrilla warfare in the Philippine Islands after 1901 grew more and more attenuated, it grew less and less respectable in the eyes of Filipinos who had done their part in the war for independence against the United States, but who, having surrendered, had done so in good faith, and wished only an opportunity to labor upon their farms unmolested.

As already intimated, insurgents who surrendered, and were liberated on parole after taking the oath of allegiance to our government, and then went back to fighting us again soon after, were only charged, when recaptured, with the crime of sedition. The maximum penalty for this under the sedition law enacted by the American Civil Commission was ten years. Finally, however, as this sort of sedition grew more remote in point of time from the period of the surrender of the organized insurgent forces, it degenerated into pure brigandage. So the actual conditions had to be recognized by the enactment of what became known as the "Brigandage Law." This law was extremely drastic. The minimum penalty for a person convicted under it was twenty years and the maximum penalty was death.

When the aforesaid "General" Ola and his forces surrendered and were taken into custody by the American authorities, they filled not only the Provincial Jail proper, but also one or two other Provincial buildings which were then available. It therefore became important to "separate the sheep from the goats," that is to say, to find out at the earliest practicable moment through the counsel for the government whether or not there was proof enough against the different prisoners to authorize their detention, and if not, to release them promptly. If there was *prima facie* evidence enough, they were put on trial without unnecessary delay. It is no easy task to take proper care of 500 or 600 prisoners where the jail accommodations are extremely limited. This is especially true in tropical countries. Careless sanitation may result in an epidemic of cholera or small-pox at any time. On the other hand, the authori-

ties must always bear in mind the possibility of a concerted attempt to escape.

In the fall of 1903, the regular Judge of the Court of First Instance of the province of Albay was Hon. Adam C. Carson, now one of the Justices of the Supreme Court of the Philippine Islands. The criminal docket resulting from the surrender of Ola's outfit was too large for one judge to dispose of properly within a reasonable time. Therefore, pursuant to his custom in like cases, Governor Taft determined to send another judge of First Instance to Albay to assist the regular incumbent by holding Part II of the Court of First Instance, while the latter held Part I of the same Court. It fell to the lot of the writer to hold Part II.

Of course we did not go through a trial with each of these 500 or 600 people. The counsel for the government, who was a man of rare ability in handling natives, having come out to the islands as a Captain of Volunteers in 1898, and remained there continuously up to the time now spoken of, determined just as a Grand Jury would, which ones should be indicted and which should not be indicted. He immediately recommended to the Court the release of those classified in the latter category, his recommendations for the release of people being always at once acted upon favorably. This disposed of quite a number within a short time. There was then in force a "vagrancy law" which made vagrancy punishable with one year at hard labor upon the public works of the Province — a department of involuntary servitude known in some of the United States as the "chain gang." Quite a number of Ola's followers had simply strayed off to the hills out of curiosity to see what the "General's" command was doing, and, after talking with some of its members, had joined it for a short while. Such people as these were allowed to plead guilty to vagrancy, sentenced to twelve months on the public works, and forthwith sent to the "chain gang." This eliminated several score from among the prisoners in the jail, thereby greatly reducing the danger of an epidemic. A number of the prisoners who it was clear had played a considerable, though not a leading part, in the operations of this band of brigands, and who freely admitted it, were allowed to plead guilty to sedition, and given ten years each. This may seem to some of the readers of the GREEN BAG rather severe, but Ola's band had been very active in its depredations for about a year, swooping down from the mountains upon the people of the lowlands from time to time, pillaging, killing and burning. It was necessary to discourage in that province, a repetition of such things.

The more serious offenders were, of course, tried under the Brigandage Law. Of these four were sentenced to death in Part I of the Court of First Instance and eight in Part II. In all these twelve cases there was conclusive evidence that the defendants had, during the period of their membership in the outlaw band, committed either murder, arson, rape, or some other heinous crime. I especially recall that two of those I sentenced to death were charged with burying an American alive and proven guilty beyond a reasonable doubt. They were duly executed after the Supreme Court had reviewed and affirmed the decision of the Court below.

It became necessary for Judge Carson to leave Albay before I did. He had been recommissioned as District Judge for another district, whither he was to go by way of Manila. He decided to go on a special Coast Guard boat which had been sent down from Manila to Legaspi to bring up to the Central Penitentiary at Manila those of the Ola band whose cases had been at that time disposed of by final conviction. On the night Judge Carson left Albay the Americans and Europeans in the province gave him a banquet. During the course of it I noticed a man whom I seemed to have seen about the jail theretofore helping the head-waiter in getting the banquet

served. Upon inquiry it was ascertained that he was the possessor of no less illustrious a name than Adam Smith. He had been sentenced some six months before to three years in the penitentiary for defrauding natives out of large sums of money, either by cheating and swindling them, or by forgery. While his case was pending an appeal before the Supreme Court he became a sort of "trusty." He was a handy and accommodating chap and all the American officials had grown to like him, and to feel rather sorry for him. Shortly before the banquet we have in mind, the judgment and sentence of the trial court in the case of the United States against Adam Smith had been affirmed by the Supreme Court and duly published to the defendant in the trial Court. The law required that no prisoner sentenced to a term of two years or longer should be retained in the province where convicted, but that he should be sent to the penitentiary at Manila. Smith had a great horror of going to the last named place. He always cherished the hope that he might be allowed to serve out his three years sentence in the province of Albay where he had been convicted, and where, since conviction, he had been a "trusty," and where, if he should remain, he would probably continue to be a "trusty" until the expiration of the sentence. Judge Carson did not take Smith to Manila on the boat he went on that night. He was too kind hearted. Smith begged so piteously that he was allowed to remain, and the unpleasant task of taking him to Manila was relegated to me. After the whole docket had been disposed of, I also telegraphed for a special Coast Guard boat. It came, and all the long-term convicts, together with those sentenced to death, were put aboard. Just before the hour fixed for our departure, Adam Smith had a fit. Prior to that the commanding officer of the Constabulary, Capt. Neville, who is now a Major of the Philippines Constabulary, had asked me if I could not see my way to let Smith remain in Albay. The reply of course had been "no." As soon as the jailer reported that Adam Smith was having a fit, I sent for Capt. Neville and asked him point blank whether or not he thought the fit was genuine. Neville was as honest as he was brave, and replied very promptly that he had serious doubts, that in fact it was not unlikely that Smith was malingering. I told him to have his Constabulary Surgeon examine the patient and report. The surgeon made an examination, with the aid of a stethoscope, and reported that there was nothing whatever the matter with Smith. This eliminated all apprehension of Smith dying on the voyage up to Manila. It was a desperate gang of thieves and cut-throats who were to go upon that boat with us, and I had made a special request of the Chief of Constabulary of the Islands that Capt. Neville, whom we all recognized as one of the best men in the service, be detailed in charge of the guard for the prisoners on the Coast Guard boat. Smith's last hope of remaining in Albay being exhausted and the prospect of being transported to the penitentiary at Manila having become a certainty he became like a stag at bay, and when Capt. Neville proceeded to put him in the patrol wagon to take him to the wharf he abused the Captain most outrageously. The latter was a stout husky Texan. Smith was a very small man, reminding one as much of a fox as Neville did of a lion. The Captain could not strike his prisoner, even for cursing him. But Smith actually resisted when Neville told him to get in the patrol wagon. Whereupon, Neville, who was a man of immense strength, deftly tossed Smith into the wagon in such a way that he landed on his nose. On the way to the wharf the Captain stopped in front of a store and went in to make a few small purchases, leaving Smith in the patrol wagon without handcuffs or anklets and with no one watching over him save an

unarmed Filipino driver. In a few moments the captain returned to the wagon only to find his captive gone. He saw him some two blocks down the street just turning the corner and followed him at full speed, finally recapturing him. Smith was really as fond of Neville as a dog is of its master, but he was unable to understand why Neville was so heartless as to wish to take him to Manila, and began to curse him as before, whereupon Neville put him aboard the boat, in the hold of the vessel, and chained him to one of the native murderers. The central penitentiary at Manila is called "*Bilibid.*" Upon landing at Manila, Neville made ready to take his prisoners thither. Just before disembarking, Smith begged Captain Neville most pathetically not to march him from the wharf through the streets of Manila chained to a Filipino murderer and promised "upon his word of honor" that if allowed to march to the prison unchained and unhandcuffed he would not attempt to escape. Neville said "Very well, Smith, I will allow you to do so upon this distinct understanding — that if you attempt to escape I am going to kill you." Smith readily agreed to do this and kept his promise, possibly for ethical reasons, but more probably because he knew Neville to be a man of his word and a dead shot with a revolver.

Thus was Adam Smith safely transported from Albay to the Manila penitentiary, without the shedding of blood and otherwise without prejudice to the wealth of nations.

The rest of this story concerns "General" Ola, who was one of Smith's fellow convicts, having been sentenced to thirty years in the penitentiary upon a plea of guilty. On the voyage up to Manila, Ola was neither handcuffed nor chained but was allowed the freedom of the boat. He had made himself very useful during the trial of his band of outlaws by turning State's evidence and telling everything he knew about every one of them. This had been done by virtue of an agreement between him and the prosecuting attorney under which the latter had said that while he would not undertake to promise him (Ola) absolute immunity, yet he would recommend that to the Governor-General, and would do all he could to secure executive clemency. Ola also understood that both Judge Carson and myself expected to make a similar recommendation. Under these circumstances, of course, it seemed entirely prudent to allow Ola the freedom of the ship. The second night out from Legaspi, which is the seaport for the town of Albay, the weather being very warm, about two o'clock in the morning I left my stateroom, carrying along a blanket and a pillow, located what appeared to be a good place to finish the night at the poop over the storm steering gear, took possession, and went to sleep. Sometime before daybreak I woke up for some unaccountable reason, and in a moment became aware of the crown of a human head adjacent to the crown of my own head. Not having invited anyone to share the opposite side of my pillow, I arose to a sitting posture and turned to see who the intruder might be. It was Ola himself, the Chief of the Brigands. I said "Hello, Ola, what are you doing here?" It seemed he had been somewhat restless during the night, and had finally laid down where I now discovered him. The night was dark and he had supposed that the owner of this pillow was one of the crew. He arose at once when spoken to, and was very profuse in his apologies. After that I went to sleep again but was dimly conscious several times that Ola was pacing up and down, apparently determined to see that my slumbers were not again disturbed by anyone else. About daybreak some of the guard who were sleeping in that part of the ship awakened, and began to chatter quite volubly; whereupon "General" Ola said to his captors in the unmistakable tones of a person accustomed to command, "Hush! the Judge is sleeping." Whereupon, silence prevailed.

Ola was pardoned.

MACON, GA., APRIL, 1908.

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, facetiæ, and anecdotes.

MODERN METHODS

We have grown familiar with the once derided theory that the climax of artistic development is a union for greater perfection of the various plastic, dramatic and musical arts. Must it not be equally true that the perfection of professional development will result from a closer union in spirit and purpose for the great professions? Even now, indications are apparent of a tendency to "community of interest" in the three great professions of Law, Medicine and Journalism. Thus far the clergy has not been included, although sometimes a connection has been suspected between the shriver of the dying and the disposition of his estate. Perhaps we may some day see the realization of this alliance of all learning, in the pursuit of its common object, the good of humanity. For the present we can only hail with joy the preliminary movements in this march of progress. The most recent and marked of these comes to us from the foreign city of New York and deserves the immediate attention of the profession. We are told that a circular recently issued invites subscriptions to an Amputation Information Bureau which issues a bulletin three times a week covering cases on Amputation Information "from which any good live attorney can get 25 to 50 cases with a value in each case of $5000 to $25,000, and as these cases are taken on the basis of 50 per cent, the income an attorney can secure from this information is far greater than the salary of the President of the United States. This information costs you only $5.00 a month."

It should be noted that these valuable circulars have not been scattered broadcast but are the privilege of a select list of New York barristers. The recipients seem somewhat modest about mentioning their distinction but copies of the circular have been allowed to become public. The individuals behind the movement have been equally shy of disclosing their names so that future monuments to their memory may have to be anonymous. It is an interesting evidence of the great moral awakening that this altruistic association should spring into being at the very time that the committee of the American Bar Association is drafting its code of ethics.

AMERICAN LEGAL HISTORY

The interest of the Green Bag in perpetuating the memory of the leaders at the Bar has been shown from the beginning of its career. We are glad therefore, to welcome the publication of a series of legal biographies written and edited by competent critics. We have already reviewed a collection in book-form of essays on Anglo-American Legal History which with this new series on "Great American Lawyers" edited by William Draper Lewis, will furnish the nucleus for some future history of American Law. The subjects of the biographies, the first volume of which is reviewed elsewhere, were selected as we are informed by the editor, not merely with reference to the distinction of individual lawyers, but with a purpose that the articles as a whole should give as complete a history as possible of the legal profession in America and of the development of our legal institutions.

A NOTABLE ANNIVERSARY

The 75th anniversary of the founding of the first law school west of the Alleghanies will be celebrated on June 5th by the Cincinnati Law School. Elaborate preparations have been made for a celebration of national importance under the auspices of the Alumni of the school and the bar of Hamilton County. There will be a meeting in the Scottish Rite Cathedral and a dinner in the evening, at which some of the most eminent lawyers in the country will be heard.

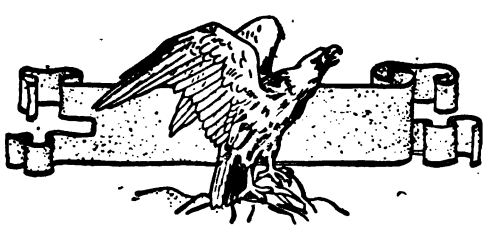
PENALTIES FOR GRAFT

Amid the cry for more legislation to punish thieving politicians, and the complaint that the technicalities of the law and the evil ingenuity of the bar make punishment at present impossible, it is interesting to hear the words of an expert in municipal politics. Despite a tendency to color in high lights for dramatic effect doubtless necessary to successfully arouse and interest his readers, Mr. Steffens has a knowledge of municipal conditions during recent years based upon a broader experience than that of any other investigator. He has voiced a national yearning and stimulated a national upheaval. In addition to his writings, he occasionally speaks upon the subject, and his talk on the reform movement and its prospects is inspiring and increases respect for the man. To the suggestion that judicial sympathy for betrayers of public trust has allowed too many offenders to escape with light sentences, in a recent address he replied that punishment alone will not prevent crime. The truth of this belief has been made familiar to us by instances related by the advocates of the abolition of the death penalty. Not often, however, do we have as clear an illustration as he brought us from recent developments in San Francisco. There, in the midst of the trial of one group of public men for bribery in obtaining a public franchise, an entirely different group, who had not before been caught made a second payment of bribe money to obtain a franchise which they wanted. Fortunately, however, the reformers had obtained control of the situation, and as the payment was made to their agent the offenders were promptly indicted. It was almost with scorn that this writer of stories of municipal corruption brushed aside the law as a remedy, and insisted that the only cure is an increase in good will among men. Perhaps after all the church may recognize its opportunity and return to its own. At least we may believe that the law should devote itself to the improvement of defects peculiarly its own, which, indeed, are sufficiently numerous to absorb all the intelligence and energy available for that purpose. But little has been heard this year of the work of the committee of the American Bar Association on reform of procedure, from the appointment of which so much was expected last summer; but perhaps it is well that we should concentrate our energies for the present on the definition of the new code of legal ethics which will be made public before this number goes to press. We are glad again to give space in this issue for an intelligent discussion of this subject by one who has seen its necessity in our larger centers as it can be seen only by one who comes there from a freer atmosphere.

LEGAL INITIATIVE

The following significant editorial which recently appeared in one of our contemporaries is deserving of wider publicity.

"Lawyers as a class lack the ability to take the initiative. They are inclined to take things as they are and make the best of them. Lawyers are not law-makers. They are law appliers and law construers. That lawyers have a reputation for making laws is due to the fact that they constitute the largest representation of any class in our law-making bodies. They are forced to father bills which originated with others and their framing of the bill and modelling it into a law is merely part of the work for which they are best fitted. If lawyers were the only ones who did originate laws, there would be far fewer laws, and that would not be a bad thing either; but we fear they would be found far too slow in originating needed legislation."



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.

To one who reads the current legal literature a most striking characteristic of the day is the frequency with which reference is made to the growth of the federal power. The essential unity of the United States under modern conditions of ease of communication makes variations in state laws a source of constant vexation and expense and the demand for uniformity continually finds expression. Mr. Jackson E. Reynold's article on railway valuation, reviewed below, shows the tendency to turn for relief to the national government when perplexing conditions arise, even if that relief requires an elastic interpretation of the constitution. Hon. Richard Olney's article on discrimination against unions, valuable for its own sake is also interesting as containing an admission of the existence of the tendency toward increased federal power, from which, however, he thinks he sees a reaction. Judge William Lahsfield's uncompleted article on "Uniformity of Law as an American Ideal" voices strongly the protest against uncertainty and variation in the law, although he does not refer to what may be called the political phase of the matter.

ADMINISTRATIVE LAW. "The American Government: Organization and Officials: with the Duties and Powers of Federal Office Holders, by H. C. Gauss, New York, L. R. Hammersly & Co. 1908, pp. i–xxiii, 1–871, 8 vo. cloth. This should prove to be a useful manual for those who want a first view of the actual organization of the American administration. The arrangement is rather good, and some discrimination has been used in the handling of the material. It gives a straightforward account of the many phases of governmental activity in the diverse forms of administrative organization. This is not altogether an easy thing to do as there are many departures in the Federal hierarchy from the typical forms.

BILLS AND NOTES. "Liability of Bank Collecting Commercial Paper," by George I. Wooley, *Bench and Bar* (V. xii, p. 100).

BIOGRAPHY. The first volume of the series of essays entitled "Great American Lawyers," edited by William Draper Lewis, John C. Winston Company, Philadelphia, 1907, comprises the following: —

"Andrew Hamilton," by William Henry Loyd, Jr., "George Wythe," by Lyon Gardiner Tyler, "Patrick Henry," by Adelaide Cooper Scott, "James Wilson," by Margaret Center Klingelsmith, "William Paterson," by Courtlandt Parker, "John Jay," by James Brown Scott, "Oliver Ellsworth," by Frank Gaylord Cook, "Alexander Hamilton," by James Brown Scott, and "Robert R. Livingstone," by James Brown Scott.

This volume is really a history of the Colonial Bar. Concerning the statesmen of the Revolution there is much material, though not always about their legal careers, and in these short essays free use has been made, as is frankly confessed by Mr. Scott, of the longer biographies of their subjects. There was less to work on in preparing the accounts of Andrew Hamilton, whose successful, but forgotten career as an advocate in the middle states had closed before the Revolution made our Constitutional lawyers, and of George Wythe, our first professor of law, in the College of William and Mary. The most interesting and best written of the essays is that on Patrick Henry. The author's brilliant style is most appropriate to Henry's dramatic life. The accounts of Jay and Hamilton have already been published in periodicals and reviewed in this department. The story of Wilson was written before the recent interest in his life was aroused by the removal of his remains to Philadelphia, and our readers will find much additional information in Mr. Alexander's manuscript which we published at that time. Mr. Parker's account of Paterson is marred by an involved style, but Mr. Scott's essays are always clear and

convincing. He seems also able to avoid biographical enthusiasm and presents a fair estimate of the relative importance of his several subjects. The volume as a whole sets a high standard for those that are to follow.

BIOGRAPHY (HADLEY). An account of the official career of Attorney-General Hadley of Missouri entitled "The People His Clients," by H. J. Haskell appears in the April *Outlook* (V. lxxxviii, p. 717). It shows how his policy of publicity of the doings of his office on the ground that his clients are entitled to the information followed by the success of his litigations have made it likely that he will soon be a candidate for governor of the state.

BIOGRAPHY. "Samuel Freeman Miller, Associate Justice of the Supreme Court of the United States," by Charles Noble Gregory, *Yale Law Journal* (V. xvii, p. 422).

BROKERS. "Recovery in New York of Interest in Excess of Six Per Cent Paid by Brokers on Money Borrowed to Purchase and Carry Stocks on Margin," by Harold C. McCollom, *Columbia Law Review* (V. viii, p. 281).

CARRIERS. "Can Express Companies be Compelled to make Personal Delivery?" by George W. Payne, *Central Law Journal* (V. lxvi, p. 275).

COLLEGE FRATERNITIES. "The Legal Status of a College Fraternity Chapter," by Olcott O. Partridge, *American Law Review* (V. xlii, p. 168). In this interesting paper the author briefly describes the usual organization of fraternities, which, beginning as "voluntary associations," have now in many cases vested their property in trustees or have organized corporations. After reference to the legal rights of the members and the question of taxation, the rules as to gifts and legacies to fraternities are analyzed. The author sums up his conclusions on this highly technical branch of the subject as follows:

"I. In most states there is serious reason for doubt whether a gift made by deed or will directly to an unincorporated non-charitable association, such as a fraternity chapter, would be valid. If the gift is made to trustees in trust to pay the income to or to expend the income for, the chapter, and the trustees are willing to perform the trusts, the gift is probably valid, though a possible question may be raised on the ground that there is no legal person capable of enforcing the trust as beneficiary.

"II. If the chapter or a chapter house association has been incorporated, the donor may adopt one of several courses. He may (1) give the money or property to the corporation outright; (2) give it to the corporaton in trust to apply the income annually for certain specific purposes forever; (3) give the property to the corporation as trustee in trust to pay the income to, or expend it as directed for, the unincorporated chapter; (4) give it to trustees in trust to pay the income to the corporation annually forever; or (5) give it to trustees in trust to pay the income to or expend it for the corporation for a stated period of time, and then pay over the principal to some person or corporation to become its unrestricted property.

"Of the above gifts, there is no doubt that (1) is valid. The corporation has the unrestricted use of the principal. Whether (2) is valid depends on whether the purpose is within the purpose stated in the corporation's charter, and if so, whether it has power under its charter and the statutes of the state to hold funds in perpetual trust for the purposes of its incorporation. As to (3), this gift raises the same question as would be raised by a gift to individual trustees in trust for the unincorporated chapter. The gift in (4) is valid; and this would ordinarily be a satisfactory way to make such a gift, as the corporation and trustees could pretty certainly be depended upon to carry out the donor's wishes. The corporation, however, has the right at any time to call upon the trustees for the principal, which it may then use in any way it sees fit. Its right to the income is assignable, and is subject to the claims of the corporation's creditors; in most states, at least, it cannot be made otherwise. The validity of the gift in (5) depends on the time at which the principal is to be paid over. The trust in this case cannot be made to exceed the period stated in the rule against perpetuities. The corporation cannot call for the principal. Whether, if the income is payable to the corporation, it can be prevented from assigning its right to the income, and whether creditors can be prevented from

reaching its equitable interest, by a declaration by the donor that the right to the income shall not be subject to voluntary or involuntary alienation, or by conditions providing for forfeiture, is a somewhat difficult question."

COMMERCE REGULATION (see Labor and the Law).

CONSTITUTIONAL LAW (see Commerce Regulations).

CONSTITUTIONAL LAW. "Constitutional Impediment to Government of the People, by the People and for the People," by W. A. Coutts, *Central Law Journal* (V. lxvi, p. 293).

CONTRACTS. "The Doctrine of Duress as Applied to Executory Contracts," by Henry T. Ferriss, *Central Law Journal* (V. lxvi, p. 236).

CONTRACTS. "Damages upon Repudiation of a Contract," by Joseph H. Beale, Jr. *Yale Law Journal* (V. xvii, p. 443). Examination of the rules of law as to damages in the various situations arising out of repudiation.

CORPORATIONS. The third edition of "The Incorporation and Organization of Corporations," by Thomas Gold Frost, Little Brown & Co., Boston, 1908, price $5.00 net, is much larger than its predecessors.

In addition to an exposition of methods of organization and the legal principles involved supported by citation of many cases, the book contains a very valuable synopsis of the corporation laws of all the states brought down to date as well as forms for organization in all the states. There are also many useful forms of object clauses and by-laws.

CORPORATIONS (Stockholders' Double Liability). "The Extra-territorial Enforcement of Statutes Imposing Double Liability upon Stockholders," by Arthur K. Kuhn, *Yale Law Journal* (V. xvii, p. 457).

CRIMINAL LAW (Evidence). "Orthodox" English Rule *v.* Exchequer Rule of Evidence, by William H. Thomas, *Albany Law Journal* (V. lxx, p. 77). This is the report of the Committee on Judicial Administration and Remedial Proceedure before the Alabama State Bar Association relating to the abuse of criminal appeals by reversals for technical errors in the admission of evidence not going to the merits of the controversy. It deserves serious attention.

DAMAGES (see Contracts).

DAMAGES. "The Measure of Damages in Cases where one Officer of a Corporation Wrongfully Prevents a co-officer from Discharging his Duties," by W. F. Meier, *Central Law Journal* (V. lxvi, p. 255).

DOMESTIC RELATIONS. "The Status of Adopted Sons," by S. Vencatachariar, *Bombay Law Reporter* (V. x, p. 57).

DOMESTIC RELATIONS. "Jurisdiction in Divorce," by J. Arthur Barratt, *Albany Law Journal* (V. lxx, p. 84).

EDUCATION. "Of Logic and its Uses; A Lawyer's View," by George H. Smith. *American Law Review* (V. xlii, p. 229).

EMPLOYER'S LIABILITY. "Employer's Liability in Pennsylvania," by Crystal Eastman, *Albany Law Journal* (V. lxx, p. 68).

ETHICS. "Legal Ethics," by C. A. Kent. *Michigan Law Review* (V. vi, p. 468).

HISTORY. "Origin of Shorthand Reporting in the Courts," by Hon. Thomas Hodgins, *Canadian Law Times and Review* (V. xxviii, p. 139).

JURISPRUDENCE. "Common Law and Legislation," by Roscoe Pound, *Harvard Law Review* (V. xxi, p. 383). A plea for a different attitude toward statute law on the part of the bench and the legal profession, pointing out that there is coming to be a science of legislation and that judge-made law has its own defects.

"But it is objected that statutes 'have no roots' and are 'hastily and inconsiderately adopted'; that they are crude and ill-adapted to the cases to which they are to be applied, and are unenforced and incapable of enforcement; and that they 'breed litigation,' whereas, supposedly free from the foregoing defects, judge-made laws 'rest on principles of right' and 'are the slow fruit of long-fought controversies between opposing interests.' Very little reflection is needed to show how ill-founded these oft-repeated statements are in fact. Dicey has shown that the married women's acts had very deep roots in the equity doctrines as to separate property. Can we say that homestead and exemption laws, mechanics' lien laws, bankruptcy laws, divorce laws, wills acts, statutes abolishing the common law disqualifications of witnesses, permitting accused persons to testify and allowing appeals in criminal causes, had no roots? Do any judge-made doctrines rest more firmly upon principles of right than these

statutes, or than Lord Campbell's Act or Lord St. Leonard's Act or the Negotiable Instruments Law? Do the refinements of equity and the ultra-ethical impossibilities which the chancellors imposed upon trustees have deeper roots or represent right and justice better than trustees' relief acts? Are any judicial decisions more deliberately worked out or more carefully adjusted to the circumstances to which they are to be applied than the draft acts proposed by the Conference of Commissioners on Uniform State Laws or the National Congress on Uniform Divorce Legislation? What court that passes upon industrial legislation is able or pretends to investigate conditions of manufacture, to visit factories and workshops and see them in operation, and to take the testimony of employers, employees, physicians, social workers, and economists as to the needs of workmen and of the public, as a legislative committee may and often does? Failures are not confined to legislative law-making. The fate of the fellow servant rule, of the doctrine of assumption of risk, and of the whole judge-made law of employers' liability, the Taff-Vale case in England, and the fate of judicial adjustment of water-rights in America should make lawyers more cautious in criticizing the legislature. Freaks of judicial law-making are abundant. Spendthrift trusts are as out of line with right and justice as any statute-made institution ever was. The Exchequer rule as to reversal for error in admission of evidence, our American judge-made law of instructions to juries, our practice of new trials on the slightest provocation, and our whole pitfall-bestrewn practice in appellate courts are warnings of the evil possibilities even of judicial law-making. In short, crudity and carelessness have too often characterized American law-making both legislative and judicial. They do not inhere necessarily in the one any more than in the other.

" Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed. To-day we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more direct and accurate expression of the general will. We are told that law-making of the future will consist in putting the sanction of society on what has been worked out in the sociological laboratory. That courts cannot conduct such laboratories is self evident. Courts are fond of saying that they apply old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter — probably more so as our legislation improves. The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed."

JURISPRUDENCE. " Christian Science and the Law," by John C. Myers, *Law Notes* (V. xii, p. 5).

JUVENILE COURTS. " Children's Courts," by J. J. Kelso, *Canadian Law Times and Review* (V. xxviii, p. 163).

LABOR AND THE LAW (Power of Congress to Forbid Discrimination Against Unions). Discrimination Against Union Labor — " Legal ? " by Richard Olney, *American Law Review* (V. xlii, p. 161).

" For some ten years at least the tendency of every branch of the general government has been in the direction of enlarging the functions of the nation and belittling those of the several states. It is not strange if a reaction has set in. It would naturally first show itself in the judiciary, because upon that department falls the burden and the strain of accommodating the plain text of the Constitution to the wishes and wants of the legislative and executive departments. Such a reaction, though to be expected, would indeed be remarkable if it did not become excessive — if it did not cause the pendulum, which has been swinging much too far towards increasing the powers of the nation, now to swing too far in the opposite direction. An instance in point would seem to be the recent decision of the United States Supreme Court pronouncing unconstitutional those provisions of the Act of July, 1898, which . . . prohibit a carrier engaged in interstate commerce from discriminating against union labor through any of the well-known methods by which the member of such a union is for that fact alone practically denied employment by the carrier. The

public policy of the United States favors labor unions — as shown by provisions for incorporating them with restrictions aimed to prevent them or their members from pursuing their ends by intimidation or other illegal measures. Congress manifests the same spirit and acts upon the same public policy when, in legislation designed to prevent or settle strikes, and to minimize interference with interstate commerce, it provides for voluntary arbitrations of differences between national carriers and their employees, and makes the labor organizations concerned legal parties to such arbitrations. Having thus recognized and promoted labor unions, Congress simply takes the next logical, almost necessary, step in the same direction when it seeks to protect the employee of an interstate carrier against discrimination and loss of employment simply because of his membership of such a union. How could Congress do otherwise? . . . It is a matter of common knowledge that all the material provisions of the Act of 1898 had their origin in the Chicago railway strike of 1894 — that their purpose was to prevent the recurrence of the evils and perils so emphatically impressed upon the public mind by that strike and its accompanying incidents. All of them are addressed to that one great end, and all are parts of one comprehensive scheme for the accomplishment of that end. This scheme the decision of the Court in question antagonizes, perhaps practically nullifies, by eliminating one of its most important features, viz., the employee's protection against loss of his job merely because of his membership of a labor union. The judicial department of the government thus puts itself in direct collision with the other departments — and a law which Congress has enacted as matter of important public policy, and which the executive stands ready to execute, the judicial department annuls and will not permit to be executed."

The court finds in the law an invasion of the liberty which the Fifth Amendment guarantees to employers of labor and employees alike, and to the argument that that liberty, so far as it is connected with interstate commerce is subject to the regulation of Congress, says.

"What possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" Mr. Olney asserts that as a matter of fact there is an intimate connection, known perfectly to everybody, and of which the court should take judicial cognizance. It is archaic to deal with capital and labor in such indiction as if dealing with individuals. Capital has organized and labor has been obliged to do the same to safeguard its interests.

"Because of this direct and immediate connection between membership of a labor union and the carrying on of interstate commerce; because an interstate carrier's refusal of work to a member solely on the ground of such membership would in all human probability provoke a strike more or less analogous to the Chicago strike of 1894; Congress was satisfied a situation existed which called for its interposition. It was possible for it to legislate on either of two lines. It might restrict the carrier's liberty in the matter of the employment and discharge of employees or it might restrict the liberty of employees in the matter of initiating and maintaining a strike. It used its discretion against the last and in favor of the first named method — a discretion political in its essence and not subject to review by any other department of the government.

"Mr. Olney finds equally untenable Mr. Justice Harlan's suggestion that the liberty of the individual guaranteed by the Fifth Amendment overrules and controls the national power to regulate commerce. It seems to him quite irreconcilable with previous decisions of the same court affirming the right of Congress to prescribe railroad safety appliances and to determine the liability of an interstate carrier to its employees. "Interstate commerce is certainly as directly and seriously affected by the relations of interstate carriers and their employees to labor unions as it can be by the relations of such carriers and their employees *inter sese*."

LABOR AND THE LAW. (THE RIGHT OF COMBINATION). "Recent American Decisions and English Legislation Affecting Labor Unions," by Charles R. Darling, *American Law Review* (V. xlii, p. 200).

The recent Massachusetts case of Pickett *v.* Walsh holding a strike by a union to be unlawful, where it arose not from a trade dispute with the employer, but because the

employer, a building contractor, worked on another building where non-union men were employed by the owner, and the two recent cases in the Federal courts of California holding unlawful a labor-union boycott of a dealer by declaring him "unfair" because he employed non-union men. These decisions put under the ban some of the commonest practices of labor unions which say they violate fundamental principles of the law, viz., the right to strike and the right of peaceable persuasion, the one founded on the right of personal liberty and the other on the right of freedom of speech.

In contrast with these and other decisions in this country the English "Trades and Disputes Act," passed in 1906, does away with combination and interference with another in his trade, business or employment as grounds of liability when the act is done in contemplation or furtherance of a trade dispute. The expression "trade dispute" is given a broad meaning, so as to include cases in which the dispute is not with the employers of the striking workmen.

Only Mr. Darling's summary of his arguments can be given here. We believe the English position to be the more just and suited to the conditions of the times.

"The right of servants at will to strike should be recognized as an absolute right subject to no limitations whatever, being merely an assertion of freedom of the person and, therefore, not subject to any restrictions depending on motive, combination or other circumstances.

"The rule against interference or molestation should be regarded as a rule of limited rather than of general application. This for the reason that the parties, employers on the one side and workmen on the other, are engaged in a contest for advantage, for supremacy. From the right of workingmen to engage in such a contest it results that the disadvantages suffered by employers in consequence thereof are not necessarily or presumptively actionable. The act which is complained of as constituting interference is usually refusing to deal with a person or persuading others to do so, the former an absolute right and the latter one which, if not so broad as the former, may be exercised under a great variety of circumtances, as shown by the discussion herein. In this contest the field of combat is a wide one and the contestants have a right to conduct their campaign accordingly. Acts which may advance their interests in a general or indirect way should be regarded as lawful no less than acts designed to gain direct advantages in a special instance. The opponents of the union would limit the contest to a form which may be likened to a duel, denying the right of a general engagement or the employment of strategy, as when it is said that men have no right to strike to (to combine to strike, to state their contention more precisely) when they have no dispute with their employer. The Trade Disputes Act in this matter of interference, as in the matter of combination, has put the matter on a juster basis. The apparent intention is to make the scope of the enactment as broad as the contest between employers and workmen generally, in contrast to limiting it to contests between an employer and his workmen in individual instances. It is enough if the act is done in pursuit of a trade advantage, any trade advantage; it need not be an advantage over the person immediately affected."

LEGISLATION. "Digest of Governors' Messages, 1907," N. Y. State Library, Albany, N. Y., 1908.

LEGISLATION. Report of Board of Statutory Consolidation of the Legislature of the State of New York, J. B. Lyon and Co., Albany, 1908 (8 vols.)

MUNICIPAL CORPORATIONS. "May any Discretion be Exercised in the Issuance of Municipal Licenses?" by Wilmer T. Fox, *Central Law Journal* (V. lxvi, p. 314).

NEGOTIABLE INSTRUMENTS. (Effect of Seals). "The Conflict Between Negotiable Instruments and Instruments Under Seal," by H. W. Humble, *American Law Review* (V. xlii, p. 263). A discussion of some of the characteristics of sealed instruments and the overthrow in modern times of the doctrine that a seal destroys negotiability.

PARTNERSHIP. "The Indian Law of Partnership," by S. N. Roy, *Bombay Law Reporter* (V. x, p. 82).

PATENT PRACTICE. "The Proposed Court of Patent Appeals," by Otto Raymond Barnett, *Michigan Law Review* (V. vi, p. 441). An exposition of the present unsatisfactory condition of our practice whereby the validity or

invalidity of a patent often cannot be finally decided for several years, with description of the bill, was before Congress, creating a special appellate court for patent appeals. Such a court, it is believed, would be able for years to come to keep up with its docket so that within a few months after any patent had been passed on at a final hearing by a circuit court its station throughout the United States could be finally settled.

PRACTICE. "Organization of a Legal Business," by R. V. Harris, *Canadian Law Times and Review* (V. xxviii, p. 157).

PRACTICE. "Legal Procedure and Practice in Illinois," by M. J. Gorman, *Canadian Law Times and Review.* (V. xxviii, p. 147).

PRACTICE (BRIEF MAKING). "Is Brief Making a Lost Art?" by Alfred C. Coxe, *Yale Law Journal* (V. xvii, p. 413). Judge Coxe is very decidedly of the opinion that the brief of to-day is usually too long, that the standard has deteriorated.

"Half a century ago, when the law was more of a science and less of a business than it is to-day, the lawyer took a personal pride in presenting to the court the best product of his brain which hard and conscientious labor could produce. He did not delegate this work to stenographers, clerks and office boys. He did not patronize law factories where briefs are quoted at so much per dozen, with a liberal discount for cash. He sat alone in his library, often at night, and did not abandon his task until he had reduced the facts to their last analysis, stated the principal questions of law and had cited one or perhaps two, leading authorities in support of those propositions which might be regarded as debatable. Occasionally there was a short quotation from a report or text-book, but generally the judges were expected to examine the authorities at fountain head. Those having an indirect bearing or based on doubtful premises were ruthlessly cast aside; it was the survival of the fittest. The single purpose of the brief was to put the court in possession of the salient features of the case in as few words as possible. The writer of the brief did not waste his time and energies in arguing inconsequential and technical exceptions. He knew that 'judges are people,' and that even the most careful and conscientious judge can hardly avoid being prejudiced against a case where the most trival points as well as the most weighty are given the same prominence.

. . . . . .

"Such briefs are sometimes met with at the present time, but they are the exception, not the rule. . . . It is to-day as difficult to find a hand-made brief as it is to find a hand-made shoe. The prevailing characteristics of the modern brief are discursiveness and prolixity. In the courts of the United States a brief under thirty pages is the pleasing exception and there are authentic instances where they have exceeded eight hundred printed pages. *Valde deflendus!* What is true of the federal courts, is, I am informed, also true of the state courts. It seems to be thought that quantity and not quanlity is what will most surely convince the courts."

. . . . . .

"Why it is that the art of brief making has declined? There is more average ability in the profession to-day than ever before. The twentieth century lawyer is as able and industrious as his brother of a half century ago. What, then, is the reason? May it not be found in the changed environment and the intense activity of modern life? To keep pace with the age, the lawyer is compelled to resort to modern methods. Where there was one report to examine there are now a hundred; where there was one statute to construe there are now fifty; where there was a page of testimony to review there is now a volume. Small wonder that the lawyer of to-day seeks the assistance of digesters, stenographers and typewriters. The result is not a carefully thought-out argument; it is a digest. Everything bearing on the issue is found in the modern brief — somewhere. It is, however, so hidden in the wilderness of quotations from record and reports that it is apt to escape the attention of the most careful reader. At almost every term of court several of these bulky volumes appear."

Whether Judge Coxe is correct in his comparison of the brief of to-day with that of earlier times this department does not pretend to say. The *laudator temporis acti* may always fairly be asked if he has not compared the exceptionally good early work with the exceptionally poor of to-day. But

there is much truth in these following paragraphs:

"What is the explanation of this unquestioned tendency to prolixity? In a word, it is due, I think, to the ease with which speech can be converted into type by modern methods. Human beings like to discourse. It requires no great mental or physical exertion to lean back in one's easy-chair and pour out floods of erudition into the ears of a stenographer, whose rapid pen catches and holds captive the inspired thoughts until they are embalmed forever in imperishable type. While the modern brief maker is lying back in ease the ancient brief-maker was bending over his desk and laboriously writing down each sentence.

. . . . .

"I fully realize that any one who advises the abolition of dictation will be regarded as a hopeless reactionist, but I submit that its uses should be greatly curtailed in the preparation of opinions and briefs. This should be so, at least, until the habit of putting thought into the fewest possible words has been acquired by a careful apprenticeship with the pen. Undoubtedly it is more luxurious to talk to a human writing machine than to bend over the desk, pen in hand, but can there be a doubt as to which produces the best results? Is it not certain that the forty-page opinion and the four-hundred page brief would disappear, if in their preparation the pen were substituted for the mouth?"

PROPERTY. "Impartible Estates as Family Property," by S. V., *Madras Law Journal* (V. xviii, p. 1).

PROPERTY. "Permissive Waste by Tenants for Life or Years," by G. S. Holmested, *Canada Law Journal* (V. xliv, p. 175).

PROPERTY. (Rights of Surface Drainage). "Surface Water in Cities," by John R. Rood, *Michigan Law Review* (V. vi, p. 448). A valuable examination of the state of the law in this country on this important subject. Mr. Rood believes that no hard and fast rule can be applied to all cases in either city or country and is emphatic in his statement that different rules are called for by the difference between rural and urban conditions. He disagrees, however, with Washburn's statement that the natural right of drainage from the upper to the lower land, where recognized, had no application to land in cities. "There is little or nothing to justify this statement," he says. "Wherever the civil law rule has been recognized, the right of surface drainage has been recognized, in the cities as much as in the country, due allowance being made for change of circumstances; and in states claiming to follow the so-called common law rule, so far as they have admitted a right to drainage of surface water at all, as in ravines, the right has been protected as to city property as much as in its application to rural land."

The so-called common law or Massachusetts rule that there is no right of drainage for surface waters outside of grant or prescription and that a man may improve his land as he sees fit without regard to whether he causes his surface water to stand in unusual quantities on other adjacent lands, or to pass over it in greater quantities or in new direction he declares to be an error. This doctrine he declares, is inconsistent with the doctrine, nowhere denied and enforced in Massachusetts, that a man is liable for casting water from his roof so that it runs upon his neighbor's land, though the eaves do not overhang. Several courts have claimed to follow this so-called common law rule, but a number of them have nevertheless refused to follow it to its logical conclusion.

Mr. Rood finds the law of the majority of the states and England to be the rule he approves, that the proprietor above is entitled to the natural flow of the surface water, but can do nothing to aggravate the burden on the proprietor below.

PROPERTY (Remainders). "Vested and Contingent Remainder," by Albert M. Kales. *Columbia Law Review* (V. viii, p. 245). Continuing Professor Kales' arguments in behalf of a new classification of remainders previously noticed.

PUBLIC POLICY. "Should Trial by Jury be Abolished," by Hal. W. Greer, *American Law Review* (V. xlii, p. 192). Arguing the affirmative of the question.

RAILROAD REGULATION (Valuation). "Railway Valuation — Is it a Panacea?" by Jackson E. Reynolds, *Columbia Law Review* (V. viii, p. 265). Declaring that "there seems to be a growing tendency in exalted quarters to regard the propaganda of

railway valuation as a panacea for all the ills of the present railway situation, in so far as it involves the incidence of rates upon the shipping public," and regarding panaceas with misgiving Mr. Reynolds analyzes this one. The superhuman task of rate-making, he says, is sorely in need of a rule of thumb of easy application. This fact and the " very general superstition that under the guise of freight tolls the railways levy tribute on the public for the payment of dividends on watered stock" have tended to make this new doctrine popular. In simplest terms the rule of thumb is " that a railroad is not justified in adopting a schedule of rates which as a whole produce a revenue more than sufficient to defray the running expenses and yield 'a fair interest return upon the fair value of the property employed in the enterprise.' "

Dodging the difficulty of deciding what a " fair interest return " is by assuming for the discussion that it would be six per cent and ignoring utterly that of determining the " fair value " the author concedes for the sake of argument that the rule proposed is of substantial assistance in deciding the " reasonableness of the rates of public service corporations whose operations are in their nature localized within a single jurisdiction, and whose activities are in other respects less complex than those of the great railroads."

" After the filing of the referee's report as to the 'fair value of the property devoted to the public use' in such cases, and making allowance for running expenses and depreciation, it needs only the application of the multiplication table, using our agreed six per cent as the multiplier, to arrive at a conclusion as to the reasonable total revenue to be allowed a defendant company. Then to learn whether an individual rate is reasonable it is only necessary to divide the total revenue by the total number of units sold within the period under investigation. The quotient represents the reasonable rate and if the prevailing rate is higher it can be reduced so as to conform to that quotient without resulting in confiscation within the meaning of the Federal constitution."

This method utterly breaks down when applied to the great railroad systems. Take a two-cent-fare law, for instance, within a single state. We find the fair valuation of the system and separate the passenger from the freight receipts, but two questions loom up. What is the value of the portion of the property devoted to passenger business and what proportion of the total disbursements is to be attributed to it? The sponsors of the panacea have not worked out this detail. Various methods all arbitrary, have been adopted. Some divide the unassignable disbursements in the ratio indicated by the gross revenues of the two branches of the business, others on a " wheelage " basis and still others on the basis of locomotive mileage. The Interstate Commerce Commission has manifested its preference for a division in the proportion which the respective train mileage bears to the total mileage of train earning revenue. Each side in a litigation will adopt the method which will make the best showing in support of its contentions and neither will be able to give any logical reason for the basis adopted.

" The second case may be well illustrated in an attempt to use the fetich in order to determine the reasonableness of a single rate, as for example the carload rate on wheat from Buffalo to New York. Giving a referee's valuation of each of the half dozen trunk lines at a figure different from the other five, and a report as to the annual expenses and revenues of each line varying in the same manner (as would necessarily be the case). we do not need the experience of litigation to assure us that the rate would not be different on any one line from what it was on all the others. The one element of competition would prevent any application of the theory discussed in the introductory paragraphs of this article. But such a case aside, it is so apparent as to be axiomatic that such a formula is of no practical use in determining how a reasonable aggregate revenue of a company should be distributed among the nine or ten thousand articles of commerce moving in railroad traffic in shipments varying as they do one from another in value, bulk, risk of carriage, weight, distance carried, expense of handling, volume of traffic, and numerous other characteristics influencing the rate."

" These two cases indicate that the scope of the proposed test is limited to those cases where the reasonableness of the total revenues

of a carrier or the rate schedule as a whole is called in question."

But on account of the conflict of jurisdiction between state and federal governments it is useless when applied to an interstate road on account of the impossibility of making a fair division for jurisdictional purposes between the federal authority and the various states. If the jurisdiction could be lodged in the federal government the question of the reasonableness of a schedule *as an entirety* would, however, become at least as simple as the corresponding questions involving the rates of gas, water and traction companies. Constitutional amendment or the sort of "constitutional construction" recently advocated by the secretary of state are the only two ways this can be brought about. Mr. Reynolds thinks that the more probable of these two is that the Supreme Court would countenance the assertion by the Interstate Commerce Commission of a jurisdiction over all the rates of railroads engaged in interstate commerce, whether the rates are imposed upon an intra-state or an interstate movement. He finds in the commission, in Congress and in the courts a tendency toward this result, which if finally reached will be of undoubted value in simplifying the rate question.

RES JUDICATA. "Erroneous Decision on a Point of Law," by C. S. Bhashyam, *Allahabad Law Journal* (V. v, p. 71).

TAXATION. The "Taxation of Inheritances," by Joseph F. McCloy in the *Business World* for March (V. xxviii, p. 113) is a consideration of the legislation suggested by President Roosevelt.

TORTS. (Conversion). "The Test of Conversion," by George Luther Clark, *Harvard Law Review* (V. xxi, p. 408). Arguing that upon principle "in order to constitute a conversion there ought to be coupled with the act of intermeddling the intent to deprive the plaintiff permanently of all his rights in the chattel — an element which was present in the early history of the action." If the defendant claims the chattel claiming only a limited interest as a right to use it for a month or a lien on it, the plaintiff would be protected by his action on the bailment of replevin or of case. By giving a count in case and one in trover, if he failed to prove the intent permanently to deprive required under this test he could still recover in case and not be thrown out of court.

TORTS (see Property).

UNIFORMITY OF LAW. (United States). "Uniformity of Law in the Several States as an American Ideal. I. Case Law," by William Schofield, *Harvard Law Review* (V. xxi, p. 416).

"The accumulation of case law and statutes in the United States has reached such proportions that it demands serious attention from all who are engaged in the serious study or the administration of the law. . . . In this paper it is proposed to consider the best method of avoiding the dangers arising from the accumulation of case law."

The attempt to reduce the volume of reports by omitting reports of cases has failed because "the bar seems to feel instinctively that the strength of the case law comes largely from the fact that judges have given their reasons publicly for their decisions. . . . Without weakening this main pillar of the judicial system and of the common law much may be done by the highest courts, in the exercise of their discretion, to shorten reports by filing mere resolutions or conclusions in cases requiring no extended reasoning." Something has been done by publishers to reduce the case law to manageable bulk, but "it remains for lawyers and judges to devise and adopt some rational method of dealing with the precedents which will prevent their increasing volume from causing danger to the law.

"One practical problem in dealing with the precedents is to evolve some principle of selection by which the cases that are useful as precedents may be separated from those which are useless to all but the parties. This ought not to be done or attempted by an exercise of legislative power such as the periodical revision and consolidation of the statutes . . . but should be brought about by a process of natural development, by common consent, through the competition of different methods of dealing with the subject. . . . Just as Littleton's Tenures and Blackstone's Commentaries . . . acquired almost unquestioned authority in the historical development of the law. Under the new method of study by cases it seems not impossible that some collections of cases may attain similar rank."

But the great question is the manner in

which the cases are studied and used. Little changes will result from the increase in the number of cases habitually studied and issued as illustrations and valuable only for the principles embodied and applied. This course must now be adopted more generally and applied more vigorously if the law is not to be lost in the mere accumulation of cases. Before proceeding to discuss the efficacy in preserving unity of this method of dealing with the precedents Judge Schofield considers the results of a conspicuous case where the court failed to follow principle — Lawrence *v.* Fox. The difficulties arising from this erroneous decision allowing a third person to sue upon a contract illustrate the way in which incorrect decisions cause variations in the law. This discussion closes the present installment.

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.)

ATTORNEY AND CLIENT. (Disbarment for Contempt.) Nev.— The Supreme Court of Nevada was recently called upon to sustain its dignity as against certain statements made by one of the district judges of that state. The case is reported in 93 Pac. Rep. 997, under the title *In re* Breen. A murder case tried before respondent had been appealed to the Supreme Court. After the decision by the appellate court the district attorney in open court made certain statements relative to the opinion handed down by the Supreme Court, upon the conclusion of which respondent, who was presiding judge, stated that he heartily commended the remarks and made a statement of his own which he directed to be entered in the court records in connection with that of the district attorney in which he severely criticised the opinion of the Supreme Court "as being an abnormally strange document," and "whether or not it was made for the purpose of bolstering up a decision which to my mind is neither founded on law or supported by fact;" "reprehensible, as a modification I shall say — reprehensible if the court knew what it was doing, pitiful if it did not." Citation was issued to respondent to show cause why he should not be adjudged in contempt of court and his name stricken from the roll of attorneys. His answer denied intentional disrespect and alleged that his remarks were due to a misunderstanding. The Supreme Court however directed that he be suspended from practice until further order and that he cause the expunging from his court record of the objectionable statement. In the contempt case in the same connection, *In re* Breen, 93 Pac. Rep. 1004, it was decided that no further punishment than such as had been meted out in the disbarment proceedings should be inflicted as if that should be done it would be in the nature of double punishment.

BILLS AND NOTES. (Illegality of Consideration.) Mass. — Decisions involving the validity of contracts as dependent on the legality of consideration are of frequent occurrence but that of the Supreme Judicial Court of Massachusetts in Kennedy *v.* Welch, 83 N. E. Rep. 11, discusses some phases of the question of rather unusual interest. The note in suit was given in consideration of release of liability on another note and dismissal of an action thereon. The consideration of the original note was the transfer of a liquor license in violation of law. The court held that the illegality permeated the entire transaction and that as the first note was invalid, the dismissal of an action on it furnished no valid independent consideration for the new note.

COMMERCE. (Boycott — Anti-Trust Law.) U. S. Sup. Ct. — Few, if any decisions more important to labor unions have ever been handed down by the courts than that of Loewe *v.* Lawlor, 28 Sup. Ct. Rep. 301. The case was heard on demurrer to the complaint which alleged that complainants were manufacturers of hats at Danbury, Conn., and engaged in interstate trade in many other states, and practically dependent thereon for the disposition of their product; that defendants were members of the United Hatters of North America and combined with The American Federation of Labor; that they were attempting to force all hat manufacturers to unionize their establishments and on refusal of complainants to do so, had instituted a boycott against them and such dealers as handled their hats; that the combination was so nearly complete that seventy out of eighty-two manufacturers had acceded to their demands; that the acts of defendants constituted a violation of the Act of Congress of July 2, 1890 [26 Stat. 209 c. 647, U. S. Comp. Stat. 1901, p. 3200] entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" and asked for three fold damages under that act.

It was claimed that the statute was not applicable to labor unions and the demurrer to the complaint was sustained by the circuit court. The Supreme Court reviewed, to some extent, the history of the legislation and directed that the demurrer be overruled. The complainants in selling their hats in the various states were held to be engaged in interstate commerce; thus bringing the boycott within the terms of the anti-trust act.

As the Federal Anti-Trust Law has at divers times since its enactment, been held applicable to

combinations of laborers by the Federal Courts the particular importance of this decision in law is in the confirmation of these previous opinions. That a boycott is one of the most unreasonable forms of restraint of trade has long been recognized in all jurisdictions. It would seem to be sufficiently obvious that as the complainants were engaged in interstate commerce the acts of the defendants complained of were in restraint of that trade. The chief importance of this decision bids fair to be political, however. It remains to be seen whether organized labor can get enacted by Congress, for its benefit in America, even more extraordinary exemption from civil liability than it has succeeded recently in obtaining in England from Parliament.

B. W.

CONSTITUTIONAL LAW. (Discharge of Servant because of Membership in Labor Organization.) U. S. Sup. Ct. — The 10th section of the Act of Congress of October 1, 1888, 25 Stat. 501, c. 1063, forbidding employers to threaten employes with loss of employment or to unjustly discriminate against any employe because of his membership in a labor organization, was held invalid by the United States Supreme Court in Adair *v.* United States, 28 Sup. Ct. Rep. 277, as being in violation of the 5th Amendment to the Federal Constitution, declaring that no person shall be deprived of liberty or property without due process of law. The court holds that such liberty and right embraces the right to make contracts for the purchase and sale of labor and that the act in question constituted an unlawful invasion thereof. As to the suggestion that the law should be upheld as being within the power of Congress relating to interstate commerce, it holds that the relation of an employe to a labor organization can have no bearing in the eye of the law upon the commerce which the employe may be called upon to assist in carrying on under the terms of his employment and that his fitness for labor and diligence in discharge of his duties can not be held in any way dependable upon his membership or non-membership in a labor union.

Much unfair criticism has been directed by organized labor against this decision, and numerous newspaper articles and headlines have chronicled it as a judicial attack upon labor, and as an evidence of hostility on the part of the courts. As a matter of fact the question is not a new one, and the decision of the Supreme Court of the United States is entirely in harmony with numerous decisions of the State Courts on similar statutes. Organized labor would hardly favor a statute which should deny to a workman, as an individual, the right to quit an employment because the employer employs some persons who were not members of a Union, or who were otherwise distasteful to him, and it can hardly demand that an employer shall be compelled by law to keep in his employment persons whom he does not desire, or to give his reasons for discharging them.

ANDREW A. BRUCE.

COMMERCE. (Power of Commission.) U. S. C. C., S. D., N. Y. — Considerable interest is taken in the decision of the United States Circuit Court in the case of Interstate Commerce Commission *v.* Harriman *et al.*, 157 Fed. Rep. 432, on account of the prominence of the defendants and the notoriety attendant upon some of their recent financial and railroad operations. The proceeding arose out of the refusal of Messrs. Harriman and Kahn to answer certain questions propounded by the Interstate Commerce Commission under a resolution passed by it providing for investigation of operations in which these gentlemen were interested in connection with the Union Pacific and other railroads. Several grounds of objection to the questions were urged by respondents, one of the most important of which was the contention that Congress had no power to legislate on the matters under consideration and could not therefore investigate nor delegate to the Commission any power of investigation. The court held that notwithstanding the fact that Congress might not have the power to punish malfeasance by officers of corporations engaged in interstate commerce, yet the matters here sought to be investigated were such as might tend to defeat the purposes of valid Federal legislation. To quote the language of the court: " No person or company can engage in any commercial occupation without capital and the management and investment thereof is as much a commercial instrumentality as is a locomotive or an engineer, and that the power of Congress extends over all instrumentalities of commerce is no longer doubtful. . . . To me it seems clear that financial regulation of corporations engaged in interstate commerce is a regulation of that commerce by regulating its most potent instrumentality." It was held that, with certain exceptions, respondents should be compelled to answer any of the questions propounded.

CONSTITUTIONAL LAW. (Regulating Hours of Labor by Women.) U. S. Sup. Ct. — The Oregon law regulating hours of employment of women in laundries is held valid by the United States Supreme Court. The statute provides that no woman shall be employed in any mechanical establishment, factory, or laundry more than ten hours in any one day. The law was held constitutional by the Oregon Supreme Court in State *v.* Muller, 85 Pac. Rep. 855 and the decision

affirmed by the United States Supreme Court in Muller *v.* Oregon, 28 Sup. Ct. Rep. 324. The decision proceeds on the theory of the inherent difference in physical structure of the two sexes and the necessity of protecting women both for their own sakes and the welfare of posterity. The claim against its validity was based on the 14th Amendment to the Constitution. In holding that contention without merit the court said: "The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all.

"We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

"For these reasons, and without questioning in any respect the decision in Lochner *v.* New York, [198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539], we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is affirmed."

So far only two decisions have denied, in any way, the right of the state to reasonably regulate the hours of employment of women, — that of Ritchie v. People, 155 Ill. 98, and People v. Williams, 81 N. E. 778.

The first of these was largely decided on the now discredited theory that legislation of this kind must be omnibus in order to escape the charge of class-legislation, and the second on the ground that the act, which only forbade labor between six o'clock P.M. and nine o'clock A.M., did not appear to the New York Court to be promoted by the desire to protect the health of the women concerned, the Court absolutely overlooking the fact that morals, and not health, were the main objects of legislative concern, and that the state is as much interested in the one as in the other. The question is still an open one, however, as to how far the Supreme Court of the United States will and should go in opposing the individual opinions of its members as to the necessity of a regulation (which is pre-eminently a question of fact and not of law) to the opinions of the State Courts and the State Legislatures. The Fourteenth amendment was certainly adopted solely for the purpose of preventing oppression, and not for the purpose of tying the hands of the state when it sought to protect the lives and health of its citizens. It would certainly seem that the local legislature and the local courts are better able to judge of the fact as to whether or not certain employments are injurious, or hours of labor too exacting, than a court thousands of miles from the scene of the industry, which can only view the case from the library and the printed record. This fact the Supreme Court of the United States seems to have fully recognized until called upon to announce its judgment in the case of Lockner v. New York, 198 U. S. 45, and this last mentioned decision stands by itself, and cannot on principle be reconciled with any of its predecessors.

ANDREW A. BRUCE.

CONSTITUTIONAL LAW. (Regulation of Rates.) N. Y. Ct. of App. — The New York Legislature in 1905 passed a law providing for the appointment of a commission to determine, upon complaint of municipal authority or consumers, the maximum price to be charged for service by gas and electric light companies. The validity of the statute is considered by the New York Court of Appeals in Trustees of Saratoga Springs *v.* Saratoga Gas, E. L. & P. Co., 83 N. E. Rep. 693. The statute was attacked on several constitutional grounds, only one of which is held by the court to be meritorious, though an elaborate discussion is given of the others. It was claimed that the act was an unconstitutional delegation of legislative power to the commission and so blended legislative and executive or administrative powers as to violate the Federal Constitution, guarantying to every state a republican form of government. Reference is made by the court to the fact that at the time the Federal Constitution was adopted, the highest judicial tribunal in New York was composed of the memebers of the State Senate and certain other judges and brushes aside at once the claim of unconstitutionality on that ground. Reference is made to the inability of the legislature to examine into and determine upon the question of reasonableness in rates for each particular gas company in the state and to the fact that matters of that character such as regulation of rates of carriers are now very generally put in the hands of boards of commissioners, and while stating that the considerations of convenience or necessity would not justify overriding the constitution, they may be taken into consideration on the question as to how far the principle preventing delegation of legislative power may be considered to extend, and holds that the constitution is not violated in that respect in the case at bar. The statute enacts that "the price so fixed by the commission shall be the maximum price to be charged for a term of three years and until after

the expiration of such term, such commission shall upon complaint as provided again fix the price of gas or electricity." The only persons authorized to make complaint are municipal officers or customers or purchasers of gas or electricity, and no such right is given to the corporation furnishing the service. This is held by the court to be in violation of the 14th Amendment to the Federal Constitution, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws.

COPYRIGHTS. (Musical Compositions.) U. S. Sup. Ct. — The decision of the United States Supreme Court in White-Smith Music Publishing Co. *v.* Apollo Co., 28 Sup. Ct. Rep. 319, has been the cause of considerable comment. The question involved was whether the manufacture and sale of perforated rolls to be used in connection with mechanical piano players was an infringent of the copyright on musical compositions. The court discusses the manner in which these rolls are prepared and the use to which they are put and while recognizing the fact that manufacturers thereof are enabled to use musical compositions for which they pay no value, holds that the copyright laws are not thereby violated.

CRIMINAL LAW. (Conspiracy.) U. S. D. C., Colo. — The indictment in United States *v.* Keitel, 157 Fed. Rep. 396, alleged that the defendants had entered into a conspiracy to cause certain persons to make entries of coal lands in their own names to be paid for by money furnished by a corporation in which defendants were interested and to whom the lands were to be conveyed. The first count charged these acts as constituting a conspiracy to defraud within section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676.] The second count alleged the same acts to constitute a conspiracy to commit a crime against the United States in violation of section 4746 of the Revised Statutes as amended, [U. S. Comp. St. 1901, p. 3279], which provided punishment for the making or presentation of certain false and fraudulent affidavits, declarations, certificates, etc., pertaining to matters within the jurisdiction of the Secretary of the Interior. In referring to the first count the court says that it is necessary to look to the common law to determine what constitutes a conspiracy within the meaning of section 5440 and comes to the conclusion that the acts charged do not make out a crime; that "the entrymen were qualified as such, they obtained no more land than the acreage limited by the act and they paid the price fixed by Congress. The act does not denounce what they did as criminal, nor does it place a prohibition against their conduct so that we can say their acts are therefore unlawful." In regard to the second count it was held that the charge therein contained did not relate to "matters within the jurisdiction of the Secretary of the Interior" as that phrase is used in section 4746. Motions to quash both counts were sustained.

CRIMINAL LAW. (Limited Parole.) Va. — The case of Scott *v.* Chichester, 60 S. E. Rep. 95, involves a determination by the Virginia Supreme Court of Appeals of the effect of the parole of a person imprisoned in the city jail on the computation of his sentence when retaken for violation of the parole. Plaintiff had been sentenced to a term of imprisonment of eight months for an unlawful assault and after serving a part of this period was released on suspension of judgment. Subsequently he was found guilty of another offense and on the theory that he was simply out on probation was remanded to jail to serve the remainder of his sentence. On the part of accused it was claimed that the sentence being originally for a definite time, which expired at a certain date, could not thereafter be extended by the fact that during a part of this period he had been released from custody. The court refers to the case of Cleek *v.* Commonwealth, 21 Grat. 777, as authority on the question of re-imprisonment of a prisoner after escape, but draws a distinction between that class of cases and the present one and holds the prisoner entitled to release at the date set in the original sentence.

CRIMINAL LAW. (Spring Gun.) Wash. — Spring gun cases are rather infrequent, but an interesting example is found State *v.* Marfaudille, 92 Pac. Rep. 939, decided by the Washington Supreme Court. Defendant had arranged a gun in his trunk in such a way that the opening of the trunk would discharge it. His landlady on going to his room to make the bed found the key to the trunk and with no apparent object other than to satisfy her curiosity opened it and was killed by a shot from the weapon concealed within. Defendant was convicted of murder in the second degree and appealed. The conviction was reversed on account of errors in course of selection of the jury and erroneous statements by the trial court but the appellate tribunal took occasion to say that a warning by accused to decedent would be no defense unless her act was with intention to cause self destruction nor would a lack of intent to kill the particular person who fell a victim be any excuse.

CRIMINAL LAW. (Verdict in Absence of Accused.) Ala. — A novel question of criminal law is presented in the decision of the Supreme Court of Alabama in Harris *v.* State, 45 So. Rep. 216. Harris was tried for murder and while he and his counsel were absent from the court room, the jury brought in a verdict of guilty of murder

in the second degree, and were thereupon discharged. After learning these facts accused and his attorney went into the court room and the judge recalled the members of the jury who were still in or near the court house. The verdict was read to them and they were asked if that was their verdict, and some or all of them replied it was. Accused then applied for his discharge on the ground that the verdict was invalid and that he could not be retried because of having once been put in jeopardy. The court refers to several cases having more or less bearing upon the questions involved and comes to the conclusion that accused cannot be retried and will have to be discharged from further prosecution.

DEEDS. (Defective Acknowledgment.) Tex. Ct. of Civ. App. — The right to introduce parole evidence to show that an acknowledgment of a conveyance of separate property of a married woman was properly taken, notwithstanding defects in the certificate, was passed upon by the court of civil appeals of Texas in Veeder *v.* Gilmer, 105 S. W. Rep. 331. The action was one of trespass to try title. Plaintiff was the grantor in the conveyance alleged to have been invalid and defendant the grantee. Defendant by cross-proceeding asked correction of the defective acknowledgment. Plaintiff's plea of limitations to this proceeding was sustained, but the court held that the conveyance was not absolutely void and that parole evidence might be introduced to show that the acknowledgment was properly taken merely for the purpose of making the deed color of title under which adverse possession might be claimed but not for the purpose of establishing it as directly conveying title.

DIVORCE. (Legitimation of Issue of Subsequent Marriage.) N. Y. Ct. of App. — The New York Court of Appeals recently decided a knotty question as to legitimacy in the case of Olmsted *v.* Olmsted, 83 N. E. Rep. 569. All parties to the action claimed as remainder men through their father who was life tenant under a devise to him for life with remainder to his "lawful issue." The father having abandoned his first wife and family of four children in New York, went to New Jersey where he again married without having obtained a divorce. Two children were born as issue of this unlawful wedlock. Subsequently he removed with his second wife and their children to Michigan where he instituted divorce proceedings against his first wife by publication. She received no notice of the proceedings and a decree for divorce was awarded to her husband who thereupon went through another marriage ceremony with his second wife. The first wife thereafter obtained a judicial separation in New York by proceedings in which her husband appeared by an attorney. By the law of Michigan the intermarriage of parents legitimizes their offspring. The New York Court held that the Michigan Court never obtained jurisdiction of the person of the first wife, that its decree of divorce was therefore not a judgment which it was bound to respect, and that the subsequent marriage was invalid and did not operate as a legitimation of the issue of the second wife. Adams *v.* Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275, is cited in the opinion as involving very similar questions.

EQUITY. (Adequacy of Remedy at Law.) Mass. — The defense of adequacy of remedy at law was held by the Supreme Judicial Court of Massachusetts In Russo *v.* Chapin, 83 N. E. Rep. 308, available to defendant in a suit to cancel a bond given under a statute which plaintiff alleged to be void. The court held that its invalidity might be pleaded and determined in any action for breach of the bond and a decision against its constitutionality pleaded in bar in any other action for different breaches so as to not make it a case for equitable cognizance on the ground of multiplicity of suits.

HIGHWAYS. (Injuries to Automobile from Defects.) Mass. — Is an automobile a carriage within the meaning of a statute providing that highways shall be kept in repair at the expense of a city or town so as to be reasonably safe and convenient for travelers with carriages? The Supreme Judicial Court of Massachusetts, in the case of Doherty *v.* Town of Ayer, 83 N. E. Rep. 677, holds that it is not. The highway, where the accident occurred, was being reconstructed by a railroad company preparatory to laying a track partly within the highway and was cut down to the depth of two or three feet and covered with sand. Plaintiff's automobile stuck in the sand as he was attempting to pass over it. Help had to be secured in pulling it out and the machine was injured while this was being done. Action was then instituted for recovery of damages. The court held that it would be unreasonable to construe a statute which was first enacted more than 100 years ago to include within the term "carriages" such heavy machines as present-day automobiles, and referred to the enormous expense it would be for towns and cities in sparsely settled regions to keep their highways in such repair at all times that automobiles could pass safely over them.

INSURANCE. (Legal Execution of Insured.) Ill. — The case of Collins *v.* Metropolitan Life Ins. Co., 83 N. E. Rep. 542, decided by the Supreme Court of Illinois, is said to bring up a question of first impression in that state in the law of insurance. The action was brought for recovery of an insurance policy issued on the life of one Kil-

patrick, who was subsequently legally executed for murder. The court refers to the English case of Amicable Society *v.* Bolland, 4 Bligh (N. R.) 194, as a leading case in which recovery under somewhat similar circumstances was denied, and discusses to some extent the old English laws and decisions relating to forfeitures of estates of felons and indicates that the decision in the Amicable Society case was probably influenced by them to some extent. All of these old laws and decisions were held inapplicable to conditions in America and the court refused to follow the decisions in the English case, but decided that the fact that the insured came to his death in the manner stated did not in any way release the insurance company from liability on the policy.

LANDLORD AND TENANT. (Liability of Lessor of Theatre for Death of Patron.) La. — The action of McCain *v.* Majestic Bldg. Co., 45 So. Rep. 258, was brought by the parents of a young man who was killed by stepping through an unguarded door at a theatre and falling therefrom to the walk below. It seemed that the building which was owned by defendant was not entirely completed at the time of the accident, but had been leased to an amusement company and was to some extent at least in its control. The evidence went to show that the door from which deceased fell was marked "Exit," and had a red light suspended above it and was not locked or otherwise guarded; that no stairs had been put up to it and when deceased opened it and stepped out into the darkness he fell directly to the sidewalk, receiving the injuries from which he died. The programs of the performance stated that the red lights indicated exists. Without passing on any question as to the liability of the lessee company giving the performance, the court held that the premises were so placed in their control as to relieve the lessor and denied recovery.

LIMITATION OF ACTIONS. (Validity of Statute.) Mass. — The validity of an amendment of the statute of limitations of Massachusetts was passed upon by the Supreme Judicial Court of that Commonwealth in Mulvey *v.* City of Boston, 83 N. E. Rep. 402. The statute of limitations in force prior to the amendment in question granted a period of six years for the bringing of actions of tort for injuries to the person against cities, but this was cut down to two years by the Laws of 1902, p. 322, c. 406, and no provision made restricting its operation as to causes of action then existing. Laws go into operation in that state within thirty days after their passage. Limitations did not, as a matter of fact, operate on the cause of action in this case until a year and seven months after the statute was passed, but it was claimed that the act was invalid on the ground that the thirty days during which its operation would be suspended as to causes of action on which the prior statute had almost run would not be a reasonable length of time as to them. The court comments on numerous cases involving somewhat similar questions and comes to the conclusion that in a small state like Massachusetts, where means of communication are so adequate, that the legislature would not be held to have abused its power by not giving a longer period, although a different rule might be applicable to larger states not having as great facilities for transmission of knowledge of passage of legislative enactments.

MANDAMUS. (Criminal Law.) N. Y. Sup. Ct. — A peculiar state of affairs comes to light in Gow *v.* Bingham, 107 N. Y. Supp. 1011, where mandamus is refused on the ground that it is not the remedy applicable to the case though no other means of relief is suggested, save by voluntary action of the police department. Plaintiff, who was charged with grand larceny and forgery, while waiting at the office of the district attorney for the perfection of arrangements for bail, was taken in custody by a member of the police force, who accompanied him to police headquarters, where a photograph and Bertillion measurements were made. He subsequently instituted mandamus proceedings to compel the destruction of the records of measurements and the photograph. The court condemned the action of the police department in very strong terms, saying that the members who had participated in the acts complained of might be held liable to a civil action for damages and subjected to criminal prosecution for assault and criminal libel, but as there was no express statutory duty imposed upon the police department to keep such records, mandamus would not lie to compel their destruction, as such remedy lies only "to compel one to do what ought to be done in the discharge of a public duty."

PRACTICE. (New Trial.) N. Y. Sup. Ct. — The trial judge in the case of Rogers *v.* Macbeth, reported upon appeal to the Appellate Division of the New York Supreme Court in 108 N. Y. Supp. 74, refused defendant's request for a new trial, stating that his ground for so doing was his belief that no other or more intelligent or conscientious jury could be found than the one that heard the evidence in the case, though plainly stating that he did not consider the evidence sufficient to justify the verdict, but thought that another jury might perhaps give even heavier damages than the first one. The Appellate Division stamps the decision of the trial court as a case of "paternalism foreign to judicial function" and says "If the defendant chose to hazard another trial, it was not for the court to seek to save him from

himself by withholding from him that which the court thought he was entitled to receive."

QUO WARRANTO. (Compelling Grant of Petition for.) **Ill.** — The right of a private relator to institute proceedings in the nature of *quo warranto* is sometimes of great importance, but as such action cannot be taken without consent of a prosecuting officer it is of interest to know that the Supreme Court of Illionis has decided in People *v.* Healy, 82 N. E. Rep. 599, that mandamus will lie to compel signature of a petition therefore where the officer to whom application is made abuses the discretion entrusted to him in such matters.

Relator in the mandamus proceedings alleged that a certain person was exercising without right, the office of treasurer of a corporation of which relator was secretary and a director; that he had applied to the states attorney of Cook County and to the attorney general for leave to institute *quo warranto* proceedings to inquire into the right to such office, but his request had been refused by both officers though no other legal remedy was suggested. The court refers to the history of the right to the writ and comes to the conclusion that in so far as it is a private remedy, allowance to begin the proceeding may be compelled as against an officer unjustly withholding his consent.

RAILROADS. (Injuries to Animals on Right of Way.) **Ala.** — The case of Southern Ry. Co. *v.* Dickens, 45 So. Rep. 215, was instituted by defendant in error for the recovery of damages for loss of a cow killed by the railroad company in the operation of its trains. The railroad company set up as a defense that plaintiff had agreed to maintain at his own cost and expense, fencing on each side of the railroad where it passed through his land, and that in consequence of allowing this fence to be broken down the animal for the death of which the action was brought, escaped to the track and was there killed, and that this failure to keep up the fence proximately contributed to plaintiff's damages. The court holds, however, that the answer is demurrable on the ground that the death of the cow did not proximately result from breach of the contract.

RAILROADS. (Trespass.) **Utah.** — The Supreme Court of Utah in case of the Gesas *v.* Oregon Short Line R. Co., 93 Pac. Rep. 274, held that a boy, who had waited half an hour for a train to move from a crossing, did not become a trespasser by attempting to cross between the cars, in the doing of which he was injured. The court said that he was "at a place where he had a right to be. His right to the use of the crossing was in most respects reciprocal and equal with that of the defendant except as to the right of way of passage."

SHERIFFS. (Neglect — Indemnity.) **Ky.** — Whether a sheriff may escape liability for failure to levy execution by reason of a *bona fide* claim that the judgment on which the execution is levied is invalid was discussed by the Court of Appeals of Kentucky in Crane *v.* Crane, 105 S. W. Rep. 370. Execution was placed in the hands of the sheriff but attorneys for certain parties interested in the action notified him that they considered the judgment invalid and that if it should subsequently be so determined they would hold him liable for any loss suffered in case of levy. He consulted other counsel, who also expressed the opinion that the judgment was invalid. He then asked for an indemnity bond from execution plaintiffs, which was refused. The court said that if it were an open question, it might be seriously doubted whether the sheriff had any authority to inquire into the validity of the judgment under which execution was issued, but held that the question had been settled in that state by the decision in Board *v.* Helm, 59 Ky. (2 Metc.) 500, in which the officer stated in his return that the judgment on which execution issued was obtained without service on defendant in execution and the court decided that he was not bound to run the risk of the levy without indemnity.

WILLS. (Revocation by Subsequent Marriage of Testator.) **N. Y. Sur. Ct.** — The contestant of the will involved in the case of *In re* Del Genovese's Will, 107 N. Y. Sup. 1033, claimed that it had been revoked by her marriage to testator subsequent to its execution. Proponent claimed that at the time at which decedent alleged she married testator, she had another husband living; that her marriage was therefore invalid and the will not thereby revoked. The evidence went to show that the former husband had disappeared several years before and that the marriage was contracted in good faith. The court held that that being so, it was not entirely void, if even voidable, but was good as to all the world unless the first husband should appear and institute an action to annul the same. It naturally followed from such holding that the marriage revoked the will.

THE LIGHTER SIDE

An Open-air Court. — For holding a court under the canopy of heaven there are precedents entitled to respect. Did not Deborah, as we read in the Book of Judges, sit under a palm tree, when the children of Israel came to her for judgment? In comparatively, modern times Prynne tells us that the Admirals "held their Courts upon the keyes of seaports, close by the flux and reflux of the sea;" and we know that at the beginning of the fifteenth century the Admiralty Court used to sit upon a quay in Southwark near to London Bridge, though we suppose that some shelter was provided for the judge and those who had business in his Court. From the North of England there now comes a story of a Revising Barrister who did hold a Court in the open. It was in a secluded village, where the school-house, in which the Court was usually held, happened not to be available. The vicarage was courteously placed at the barrister's disposal by the incumbent, but the overseers attending the Court were a arge company, who would have taxed the capacity of any ordinary room, and the day was warm. Consequently the barrister took his seat under a tree in the old-world vicarage garden, while the overseers settled themselves upon a grassy bank facing him. We are told that no untimely shower fell to mar the proceedings. Nevertheless, if only for climatic reasons, open-air Courts are not likely to become the fashion in this country. — *Law Journal.*

Anecdotes of Choate. — Russell Sage will always remember the occasion when he was on the witness stand, answering questions in his familiar half-whisper, and Choate prodded with: "Now, then, speak up, Mr. Sage, so that the jury can hear you. Speak as loud as you would, for instance, if you were driving a first-rate bargain on the stock exchange!"

Again, when he had on the rack a well-known manipulator of bankrupt railway properties, he suddenly asked: "Were you interested in the trial of Dr. Briggs for heresy?"

"No!" was the answer. Choate passed to other subjects; but the witness, as he left the stand, paused at Choate's seat and remarked in an indignant tone:

"I fail to see, Mr. Choate, the purpose of your question about the Briggs' heresy trial."

"Oh," answered Choate, carelessly, but loud enough for the jury to hear, "I thought perhaps you were trying to break up the Presbyterian church so as to get a chance to reorganize it."

One of Choate's witticisms which has been most frequently repeated was uttered in the Feauardent-Cesnola libel case, which turned upon the authenticity of some alleged antique statues. It was charged among other things, that a certain figure of Venus had been worked over and made into a Hope. A witness had sworn that the statue as it then appeared was different from the way it looked when first taken out of the packing box.

"Lost flesh in the hot weather, I suppose?" suggested Choate.

"My learned brother is so fond of making jests that he overlooks some of the serious points in the testimony," interposed the counsel for the other side. "Now, if my learned brother ——"

"Pray don't drag me in all the time," interrupted Choate, rather tartly. "I'm not on trial here. Please go on with the business in hand, and leave me out."

"Leave my learned brother out!" exclaimed the opposing counsel with mock alarm. "Why, we might as well leave out Venus herself."

"Oh, very well," returned Choate, "leave me out with Venus and I won't object."

In the suit of Hunt, the great architect, against Mrs. Paran Stevens, he dwelt upon her humble origin and her successive rises in the social world, concluding with, "At last the arm of royalty was bent to receive her gloved hand, and how, gentlemen of the jury, did she reach this imposing eminence (pause.) Upon a mountain of unpaid bills."

A well known clergyman once invoked Mr. Choate's services in the settlement of a much involved and heavy estate. In due time he received his bill. The client appeared in a few days with a smile of deprecation.

"I always understood Mr. Choate," he objected, "that you gentlemen of the Bar were not in the habit of charging clergymen for your services."

"You are much in error," returned Mr. Choate firmly — "much in error. You look for your reward in the next world, but we lawyers have to get ours in this."

An incident in Mr. Choate's early practice was recently related by an old-time lawyer. He was opposed to a hot-tempered attorney by no means his equal in repartee. In the progress of the case Choate's adversary wholly departed from his self-control and threatened physical hurt to his opponent.

"I can whip six like you," asserted the lawyer. Choate looked at him with a profound, calm contempt.

"When I was a boy," he returned, "my father owned a bull. He was a wonder to fight. He could whip all the cattle in the neighborhood, and did it. But at that," concluded the young man, "he couldn't win a lawsuit."

On at least two occasions Mr. Choate got the worst of the discussion. One was in the trial of a will case, and Felix McClusky, doorkeeper of the House of Representatives, was on the stand. McClusky had testified definitely and emphatically to certain facts which unless controverted, would seriously affect the interests of Mr. Choate's client. On cross-examination, of course, it was Mr. Choate's business so far as possible to discredit the witness by his own assertions. The first question asked was this:

"Is it true, Mr. McClusky, that you have general repute as the modern Baron Munchausen?"

"You are the second blackguard that has asked me that question in the last week!" shouted McClusky, red of face and neck, and the examination presently closed. If McClusky's testimony were impaired, it was by other evidence than his own.

A Touching Appeal. — A North Carolina lawyer sends the following clipping from a newspaper, which shows that the days of true eloquence have not passed: —

"This was a trial in Unacoi county, East Tennessee," said the lawyer, "and the indictment of defendant was for killing the prosecutor's hog.

"The facts were that the prosecutor lived on the head of a stream, and the defendant lived about a mile or two lower down the stream, and, in the month of May, the prosecutor's old sow got out and strayed off down the valley and got out in the defendant's field and rooted up his corn. The allegation was that the defendant killed her, mangling her up pretty badly, and cutting her up with knives.

"A young barrister named Smith, who had just gotten his license, was employed to aid the solicitor in the prosecution. The case was set for trial, and the attorney arose and, with a very solemn air, said: —

"'May it please your honor, and you, gentlemen of the jury, since the days of the assassination of the lamented president of the United States, to wit, Abraham Lincoln, no such foul crime has stained our country's escutcheon as the assassination of Jack Edwards' black and white spotted sow.

"'Gentlemen of the jury, and may it please your honor, go with me to the place of the tragedy and contemplate the scene and the circumstances.

"'On that lovely morning in May, when the earth was dressed in her robes of green, and the air filled with the smell of sweet-scented flowers and enlivened by the voice of merry songsters, as that old sow walked forth in her innocence down that little stream, listening to the music of the waters, little did she dream that before the king of day hid himself behind the western horizon she should become the victim of a foul assassination.'"—*Case and Comment.*

It Pays to Advertise. — After experiments extending over a period of six months, Justice Werremeyer of Clayton has decided that it pays to advertise. Acting promptly on his decision, he began Monday the posting of his latest appeal for lovesick couples to embark on the "sea of matrimony" from his port.

This new advertisement replaces his well-known couplet:

"Go choose the one you love the best,
Then come to Clayton for the rest."

The new verse reads:

"As these two hearts are intertwined
So may your lives be bound.
And when you've set the wedding day
At Clayton I'll be found."

The reference in the first line is to two overgrown hearts, printed in brilliant red and pierced by an arrow so large that Cupid must have had the assistance of Hymen in discharging it. The poetry, in blue, is printed boldly across the blood-red hearts and is followed by Justice Werremeyer's announcement of his business interest in courtship.

Justice Werremeyer has married more than 300 couples in the past six months, and nearly 1000 couples have obtained licenses in Clayton since the Justice composed his famous couplet.

The Age of Brass. — The National Corporation Reporter in commenting on the two series of antiquarian studies of legal history, published by Professor Zane in the *Illinois Law Review*, entitled respectively, "The Golden Age of the Bench and Bar" and "The Bench and Barin the Silver Age of the Common Law," suggests that he should complete a trilogy with a series on the Brazen Age of the profession, "The reader of that article" it says, "will need no subhead to inform him to what precise period of human history it refers. Never, we believe, has the profession been so generally degraded to the lead of a trade, and a far from clean trade, as at the present time."

A PLEADING SONG

The Legal Bird on musty leaves doth sit
And sing his old refrain: "To wit, to wit."

—*Lippincott's.*

Nothing More to Say. — They were cross-examining, in a Chicago court recently, a bookmaker who had been caught in the toils for playing some other game than his own.

The third sub-assistant district attorney was intent upon a conviction, however, and was doing his best, none too sucessfully, to shake the testimony of the defendant.

"You're sure of that?" he yelled, as the bookmaker stuck to an assertion that did not suit the case of the state.

"Sure, I am certain," came the answer.

"You remember that you are under oath?"

"I do that."

"And you'd swear to this statement of yours?"

"Swear to it? Why, Mr. Lawyer and judge, your honor, I'd give a hundred to one on it any day." — *Spare Moments.*

More Choatiana. — Mr. Choate was a passenger on one of the sound steamers, going to Newport, perhaps. In appearance he has that clean-cut, closely-shaven, man-of-the-world appearance, which appertains to prosperous lawyers and men successful, perhaps, in other and not so honorable walks of life.

Mr. Choate, as is his custom, was carefully though not ostentatiously attired, wearing as usual a carefully brushed high hat about two seasons behind the current block. Over his arm he carried a light overcoat, and in his hand a small mahogany dressing case. As he stood on the deck he was approached by a person somewhat prognathous as to jaw and certainly vociferous as to the raiment that he wore.

"Where are you going to open, colonel?" inquired the stranger, addressing Mr. Choate.

"What do you mean?" returned the great lawyer.

"I mean what I say," replied the other, a little disposed to take offense. "Where are you going to set up the layout, at the port or at the pier?"

"Whom do you take me to be?" pursued Mr. Choate, himself becoming interested.

"I don't know who you be, but I can make a good stiff guess at your game. I'd call it faro for favorite; or maybe it's a sweat cloth for second choice."

Mr. Choate put his mahogany case on a convenient deck chair and opened it. He displayed a toilet outfit, mug, brush, razors, combs, and other necessities of life. The man with the checked suit looked at it with lofty disregard.

"I mistook you for a sport," he said, as he turned away. "If I had known you was a barber, I never would have spoken to you. It's one on me."

Legal Fictions. — A Missouri judge, traveling on circuit, once had before him, in a small country town, a case in which a tavern-keeper was held for the payment on a land transaction of a large amount of money which he had not agreed definitely to pay. The Court declared that, although his agreement was not

on record, it was involved by construction, or implied, in his participation in a business proceeding connected with it.

After judgment had been rendered the court adjourned for dinner, and the judge found that the only eating-house in the place was the inn kept by the defendant in the case he had just decided. He also found that the defendant personally superintended the preparation of the meals, and that the food was charged for on the European plan.

The judge called for two boiled eggs, which, with the other food he ordered, were brought to him done to a turn. He ate them, and at the end of the meal the bill was presented to him. He was astonished to read on it the following items:

Two boiled eggs . . . . . 15 cents
Two chickens, at 75 cents $1.50

Calling the proprietor, he asked: "How's this? I've had no chickens; why do you charge me for them?"

"Those are constructive chickens, your Honor," answered the innkeeper.

"What?"

"Why, they are implied in the eggs, you know," the man persisted.

His Honor began to understand, and said no more. — *New York Times.*

Easy on Them. — A Chicago lawyer tells about a case that was tried in a backwoods court. One of the lawyers retained was an Eastern man, new to the country.

"Does your Honor wish to charge the jury?" asked the legal light, when all evidence was in.

"No, I guess not," replied the judge. "I never charge 'em anything. These fellows don't know much, anyway, an' I let 'em have all they can make." — *Harper's Weekly.*

No Intent. — *Magistrate:* This man caught you with your hand in his trousers pocket. What have you to say for yourself?

Pickpocket: Honest, Judge, them trousers looked jest like a pair I own, and I got sort o' confused and was thinking I had me hand in me own pocket. — *Cleveland Leader.*

A Shameful Mistake. — *Judge:* "You were caught carrying a sackful of jewelry and silverware, and have the audacity to plead not guilty?"

Prisoner: "An annoying mistake, your honor. I am a souvenir collector."

The Retort Courteous. — William M. Ivins, the New York lawyer, is a foe to the harsh, cruel, brow-beating type of cross-examination.

"But the brow-beating cross-examiner does not always get the best of it," he said the other day. "I remember, years ago, hearing one of these gentlemen thunder at a meek and quiet witness.

"'I can teach you law, sir, but I cannot teach you manners.'

"The witness smiled slightly.

"'That is true,' he said."

Scoundrels All. — "Gentlemen of the jury," said the prosecuting barrister, "this prisoner is an unmitigated scoundrel; he acknowledges it. And yet, thanks to the wisdom of the common law, he has been given a fair trial by a jury of his peers."

Sober as a Judge. — *Witness:* "No, I was not drunk. I was sober as a ——, I was sober, my lord."

Judge: "You were going to say as sober as a judge."

Witness: "Well, my lord, I was, and I beg your pardon; but I stopped myself in time."

Judge: "Oh, I don't mind it at all. In fact, I consider it something of a compliment, but why it cannot be varied now, I fail to understand."

Compromised. — Judge Caswell Bennet, for many years judge of the Kentucky court of appeals, while a resident of Frankfort, made his home on Upper Main street. Next to the judge's yard was a livery stable. In the capital city, as in most small cities, the liveryman did not have room to house all of the conveyances of their customers, especially on big days, and the buggies, carriages, etc., were lined up in the streets, close to the curbing.

This was very annoying to Judge Bennet, and he decided to try to break up the practice. He first appealed to the liveryman, then to the newspapers, and finally to the city authorities, but the custom was too firmly planted in the city, and his efforts availed him nothing.

One day Judge Bennet was walking down

town and was accosted by a friend, a prominent member of the Franklin county bar.

"Judge, how did you come out on your fight against the liveryman; did you win out or not?"

"Well," said Judge Bennet, "we compromised the matter, yes, we compromised it."

"I am mighty glad to hear that, Judge, and if it's no secret I would like to know the terms of the compromise."

"It's no secret at all, no secret; I merely agreed to quit grumbling, complaining, and kicking, and they agreed not to put any of their vehicles in my parlor." — *Ohio Law Bulletin.*

Police Power. — The legislature of Wisconsin in 1907, enacted a law providing that anyone paying for a double lower berth in a sleeping car should have the right to direct whether the upper berth should be open or closed unless actually occupied. The question of its validity was passed upon in the case of State *v.* Redmon, 114 N. W. Rep. 137. It was earnestly contended that it was valid as a police regulation but the Supreme Court said that its operation was made dependent on the wills of the occupants of lower berths without regard to the rights of others and declared it unconstitutional. An able and somewhat extended discussion of the meaning and bounds of the police power is found in the opinion.

A Lawyer's Funeral. — Last summer there died at Washington a lawyer who for many years had shocked a large number of friends by his rather liberal views touching religion. A friend of the deceased, who cut short a Canadian trip to hurry back to Washington for the purpose of attending the last rites for his colleague, entered the late lawyer's home some minutes after the beginning of the service. "What part of the service is this?" he inquired in a whisper of another legal friend standing in the crowded hallway. "I've just come myself," said the other, "but I believe they've opened for the defense." — *Ohio Law Bulletin.*

A Good One on Him. — A Minnesota lawyer sent us the following letter, which a prospective bridegroom wrote when returning a marriage license that he found he did not want:

". . . . . ,

"Dear Sir: —

"I will return those licens they are no good to me. For the stuff is off for this time. And they are no good to me with that girl.

"Now if there is anything els to the returning of thes papers let me no an I will make it right pleas keep this as quite a possible (although it is a good one on me) and oblige

"Yours truly

"X..... Z....."

— *Case and Comment.*

All Signs Fail in Dry Weather. — "I Do" and "I Don't" stood before Justice Grannan of the Central district, Baltimore, Md., this morning. The two men are well-known figures on the city streets as advertising a certain patent medicine. "I Do" is over six feet tall and athletically proportioned. "I Don't" is a scant five feet, of slender build and docile, woebegone appearance.

The two men wear signs, "I Do's" proclaiming that he uses the medicine and "I Don't's" sign proclaiming that he does not use it. The right name of "I Don't," as he testified before Justice Grannan this morning, is George Dent, and "I Do's" surname is Gardiner. Dent is an Englishman and Gardiner is a native of Charleston, S. C.

"I Do" and "I Don't" have spent several years in their unique partnership. Yesterday "I Don't" felt indisposed and felt that whisky was the only remedy that would cure his complaint, and he imbibed of it until he was found in a roisterous condition at the corner of Clay and Charles streets last evening by Patrolman Myers, who arrested him on the charge of being drunk on the street.

He was locked up and when brought before Justice Grannan this morning declined to make a statement.

"I Don't" was taken back to a cell to await transportation to Jail in default of fine, and then "I Do" appeared and introduced himself to the Justice.

Vol. XX, No. 6 JUNE, 1908

THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

S. R. WRIGHTINGTON: Editor
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CONTENTS

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— VOL. 27 —

[FIRST SUPPLEMENTARY VOLUME.]

Abandonment to Will.

Early in June we will publish this volume, which will bring the set of English Ruling Cases down to as late as July, 1907.

Trials of the Publisher.

Work on this volume was begun five years ago. The manuscript of the English editor, Mr. Robert Campbell, was first put into the hands of John M. Gould, Esq., who undertook the American annotations. He was obliged to give it up because of ill health.

James T. Keen, Esq., succeeded him. He concentrated his brilliant mind on his work, and developed it beyond what the publishers could reasonably ask, with the result that before his notes were all finally in type his health became so impaired that he was obliged to abandon the work. Fortunately but few of the notes had to be touched up and the final proof read. This was done by F. E. Chipman, Esq., who also made the index and directed the making of the table of cases.

New Features.

The notes in this volume differ in some degree from those of its predecessors. No effort has been made to cite all recent American decisions which reaffirm the doctrines of the Ruling Cases. But where those doctrines have been reversed or modified by recent decisions the changes are carefully noted.

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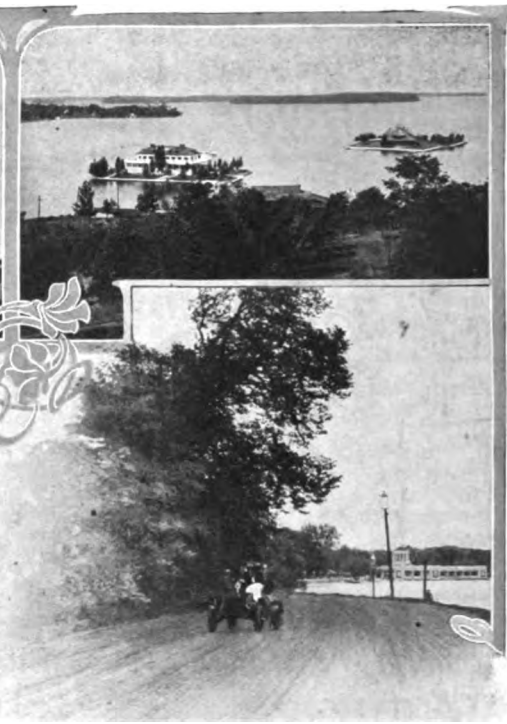

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Our Contributors.

In pursuance of our policy of publishing accounts of the leading lawyers who are Presidential candidates, we present in this number a sketch of Judge Gray, by GEORGE H. BATES. Mr. Bates is a native of Wilmington, Del., and was for twenty-five years in active practice in that city. In 1889 he was one of the three Commissioners who represented the United States at the International Conference at Berlin which regulated the Government of the Samoan Islands. For several years past he has been engaged in special legal and historical studies in Philadelphia, and in addition has appeared as special counsel for the State of Deleware in an important boundary litigation with the State of New Jersey involving expert historical knowledge.

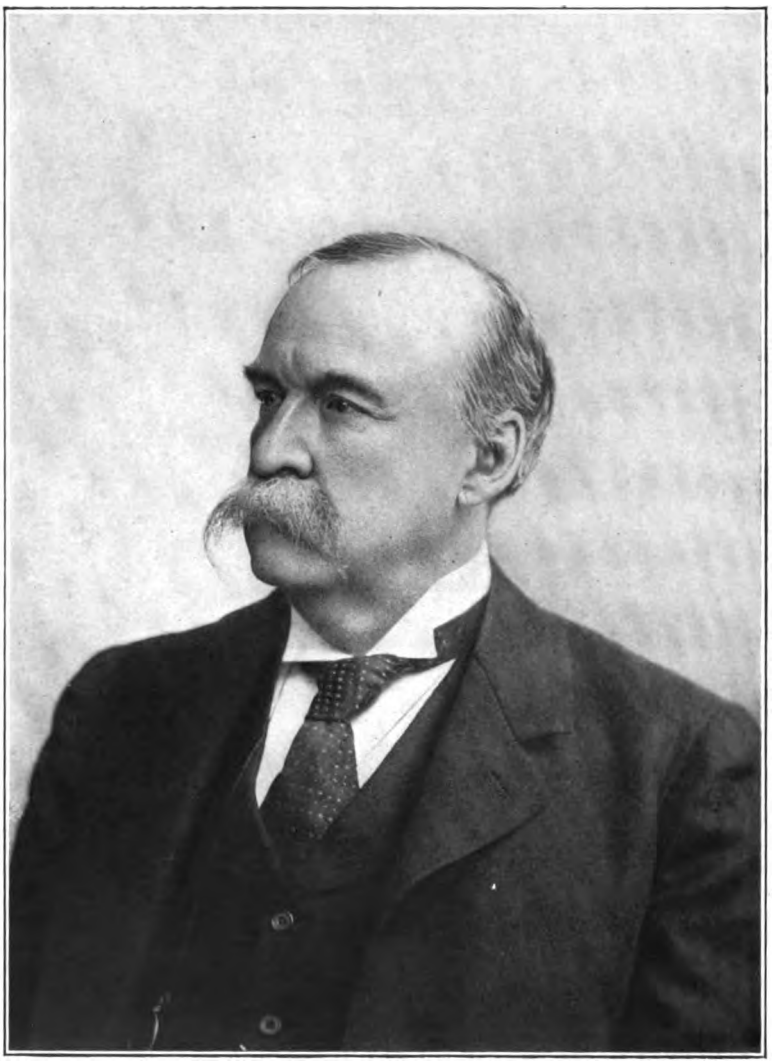
CHARLES WARREN is the head of the firm of Warren, Perry and Codman of Boston and is also chairman of the Massachusetts Civil Service Commission. He is a native of Boston, a graduate of Harvard Law School. The account of the Charles River Bridge case, the first installment of which we published in this number, is to be a chapter in the forthcoming history of the Harvard Law School, which he is preparing.

HARRY RANDOLPH BLYTHE, a graduate of Dartmouth College, is at present a student in the Harvard Law School. He has previously contributed verses to this magazine.

EUGENE WAMBAUGH is a native of Ohio and a graduate of Harvard College and the Harvard Law School. After several years of practice in Cincinnati, he became a professor in the Law School of the University of Iowa. Since 1892 he has been professor of law in the Harvard Law School, where he now holds the Langdell professorship. He has for many years given valuable counsel to the Editor of this magazine.

DR. RUDOLPH LEONHARD is a professor in the University of Breslau. Last winter he was the exchange Professor at Columbia University under its arrangement with the German Government. He delivered there an important series of lectures on German law and has consented to send us the brief commentary which we publish in this number.

JUDGE BLOUNT, who is again a welcome contributor to this number, is now a resident of Washington, D. C., where he intends to engage in practice.



Yours truly Geo. Gray

The Green Bag

Vol. XX. No. 6 BOSTON June, 1908

JUDGE GEORGE GRAY

By George H. Bates

A DISPASSIONATE judgment upon the career of a lawyer and a judge must be formed mainly from an impartial examination of the man himself and his accomplishments in his practice at the Bar and in those high stations to which he has from time to time been assigned in the public service, whether official or unofficial. At the same time it is always useful as well as interesting to know something of a man's forbears, as well as of his upbringing, when we are called on to form a critical judgment upon his life and character. In the case of George Gray these influences seem to have operated very strongly and to justify a somewhat more detailed statement of his family history than is ordinarily necessary.

His ancestry was such as naturally to produce the character and the mental and moral attributes which his life has developed. William Gray, a son of Andrew Gray, early in the eighteenth century, sailed from Belfast, Ireland, as an emigrant to the American Colonies. He was accompanied by his wife and a young son, William, who, in the course of the voyage, lost both of his parents by ship fever. The lad was landed on the shore of the Delaware River, an orphan, but fortunately possessed of a fair inheritance. The boy and his fortune were well taken care of by his guardian, a member of the Caldwell family, well known in Delaware in Revolutionary history. After reaching the estate of manhood, William Gray married Jean, the daughter of Andrew Caldwell, one of the judges of the colony before the time of William Penn. A son, Andrew, was graduated from the University of Pennsylvania, after a careful preparatory education. He inherited from his grandfather Caldwell a large landed estate in Kent County, Delaware, on which he lived until 1808, when he removed to New Castle County, near Newark, and there spent the rest of his life. He was five times elected to the state legislature, serving in both branches. He also wrote many pamphlets, some of which were of a philosophical character, and he was an enthusiastic and thorough student of the classics. His wife was Rebecca, the sister of the Commodores John and George Rodgers, both distinguished in the War of 1812. The child of this marriage was Andrew Caldwell Gray, the father of the judge, born in 1804. He was well educated, graduated from Princeton College in 1821 at the age of seventeen, was admitted to the Bar and practiced at New Castle with ability and success. He was always a student and like his father, continued his study of the classics through life. As a lawyer he was reputed by his contemporaries to have been conspicuous both for strong grasp of the legal bearings of a case and the force and clearness of his argument of it. Being counsel for the Delaware and Chesapeake Canal Company, he became its president in 1853, and thereafter retired from active practice and devoted himself to the interests of the canal and a railroad of which he was also president. During this period of his life he was at the head of a bank and also of a manufacturing company, one of the pioneers of locomotive building in the United States. He persistently declined to be a candidate for public office, and yet, having from preference remained during his life a private

citizen, the Legislature of the State adjourned to attend his funeral. His wife was Elizabeth, daughter of Frederick Scofield of Stamford, Conn., and her mother was a daughter of Colonel George Starr, of a well known family of that state.

Of the children of this marriage, George Gray, the eldest, was born May 4, 1840, at New Castle, Delaware, where he spent his youth and received his preparatory schooling. He entered the junior class at Princeton College in 1857, and after making a good record during his two-year course, graduated at the head of his class, being assigned to deliver the Philosophical Oration. His choice of "Gallio's Oath" as his subject, at his age, is not to be passed by as an ill-considered trifle in forming a just estimate of the man.

Before leaving the boy to contemplate the development of the man, there are circumstances of his boyhood which deserve a passing mention as indicating certain characteristics which manifested themselves in manhood. As a boy, he was not only studious, but manifested great interest in machinery and the processes of the manufacturing and railroad business in which his father was then interested. As a result of this he became a favorite of the employees and spent hours of his recreation time in learning what he could of these practical operations, either in the factory or riding in the cab of a locomotive, as he frequently did. His home surroundings also lent themselves to constant sailing on the noble river on whose western shore his early life was spent, and he became an expert sailor — reputed, indeed, as one of the best in a community largely bred to that craft as a means of living.

This early training in the critical observation of the actual working of machinery and in the management of sail boats, and the natural bent which turned the boy's mind in these directions can hardly be overlooked in connection with the fact shown by an examination of the reports during Judge Gray's service on the Bench, that in nearly all of the Admiralty and Patent cases he was assigned to write the opinions.

On the return of the young graduate from college he studied law under his father and also under Hon. William C. Spruance, now a Judge of the Supreme Court of Delaware, and spent one year at the Harvard Law School, and was admitted to the Bar in 1863. He practiced for a time at New Castle and, after the removal of the county seat, at Wilmington, where he has since resided.

The young lawyer at once himself unreservedly devoted himself to his profession and speedily developed those qualities and capacities which commanded the respect of the Bar and the confidence of the Courts at home, and which, through his public services in wider spheres of action, have become known as well to the country at large.

After sixteen years, having won for himself a commanding position at the Bar of his county and being favorably known throughout the State, Mr. Gray was in 1879 appointed Attorney-General and was reappointed in 1884. His administration of the duties of that office was marked by efficiency, fidelity and ability, and added to the reputation which he had gained in private practice. While by nature conservative and by habit inclined to adhere closely to settled rules of law and forms of procedure, he did not hesitate, when it was necessary, to adapt himself to new conditions not controlled by precedent. Thus it happened that during his term of service for the first time in the history of the State, a corporation was indicted, and, though a powerful railroad company, it was convicted and fined.

Of his service in this office, the late Chancellor Wolcott, himself a leader of the Bar who reached the highest judicial position, remarked some years afterwards: "In this state we have never had a man who filled the position of Attorney-General as ably as he did, and he had many eminent prede-

cessors." Mr. Gray's incumbency of his second term as Attorney-General was cut short by his election, on March 16, 1885, to be a Senator of the United States, to fill the vacancy caused by the resignation of the Hon. Thomas F. Bayard to become Secretary of State in the cabinet of President Cleveland. The newly elected Senator commenced his service March 19th, and being twice re-elected for a full term, he held the office until March 3, 1899, when a change of political control in his State alone caused his retirement.

As the present purpose is to sketch briefly the legal and not the political career of Judge Gray, this is not the opportunity to refer at large to his service in the Senate. At an early period of it, he began to take a leading rank among those of his own political faith and was appreciated by his opponents both for his personal character, his sound judgment and his ability in debate. The character of Senator Gray's service brings to mind a remark of the late Secretary Seward in his eulogy of John M. Clayton, a distinguished predecessor of Mr. Gray in the National forum. "Fame is attained in the Senate," said Mr. Seward, "by pursuing either one of two courses, namely, either by the practice of delivering the prepared, elaborate and exhaustive oration, which can be done only infrequently, and always on transcendent occasions, or by skill, power and dignity in the daily and desultory debates on all questions of public interest as they happen to arise."

It was in the latter method that Mr. Gray acquired a fine reputation and he became recognized as a ready debater whose aid was always welcomed by those in accord with him and feared by those who were not. That he was seldom absent from his seat and, while there, was a ready and frequent participant in the current of business of the sessions is ascertained from an examination of the record of his fourteen years of service. Occasionally, on a question which specially interested him, he would speak at large, being well adapted for both formal and running debates. On one notable occasion, when the Federal Election, popularly known as the "Force Bill," was about to be put to a vote, with a general belief that it would pass, Senator Gray took the floor and made a speech against it, continuing for three days, which was generally admitted to have caused the defeat of the measure. In the course of that speech he was frequently interrupted and, as the record shows, was abundantly able to cope with the ablest lawyers of the opposing party in the Senate, such as Senators Hoar and Evarts.

As a senator he was always considered reliable by his own party. From his youth he had been deeply imbued with the principles underlying the constitutional theory of our government as held by the Democratic party. His father had been, in the days of its power, a member of the Whig party and a supporter of Mr. Clay. As a Whig he was elected to the only office he ever consented to accept, that of membership in a constitutional convention. At the downfall of the Whig party he became a Democrat and his son George grew up in that faith, which commended itself to his judgment and has always received his unvarying and consistent support. The fundamental doctrines of the real democracy were part of George Gray's mental equipment and his fidelity to them has grown with his growth. While far removed from being a hidebound or intolerant partisan, he rested securely upon the bed-rock of those doctrines and applied them as a test to the various measures which from time to time he was required to pass judgment upon and to vote. As a senator he was emphatically a faithful advocate of the policies of his party and of the principles in which he believed, while always tolerant to those who honestly differed with him. There was absolutely nothing in him either of the opportunist or the visionary. He had no sympathy, indeed was impatient, with those, of whom there have been too many in our public life, who

wish to do nothing, while appearing to do something for which, at the moment, there seems to be a public demand. He did not merely occupy a senatorial seat, he filled it. He was not merely a member of the body, whose vote would count, but a constructive statesman with the capacity to perceive both the evil to be cured and the remedy to be applied, and the ability to enforce his views by reason, authority and illustration. One instance may be noted which shows the value of his legal judgment in the performance of his legislative duties.

When the Sherman Anti-trust act was under consideration, eighteen years ago, Senator Gray criticized the bill first proposed as probably an ineffeetive remedy for the evils apprehended from trust combinations. He offered and urged an amended bill covering these points.

1. Authorizing the President and making it his duty, by proclamation to suspend for ninety days the customs duty upon any trust-made article, upon being satisfied that, in consequence of a trust, contract, agreement, or combination, the price of the article had been enhanced.

2. To exempt from the operation of the act combinations of laborers for lessening hours of labor or increasing wages, and also of persons engaged in agriculture and horticulture to enhance the price of their products.

3. To authorize the Federal Courts to dismiss any suits in which it should be pleaded and proved that the cause of action was founded upon a trust agreement or combination such as the act was intended to prohibit.

The entire proposal was negatived by a strict party vote, but on the first proposition offered separately by Senator Gray, though it was defeated, Senator Edmunds of Vermont voted affirmatively with the Democrats and Senator Blodgett of New Jersey in the negative with the Republicans.

Leaving out of question differences of opinion as to the political bearing of this proposed legislation, it must be admitted that the position taken by Senator Gray in this matter is of interest to every student of our political history, especially in view of the action of the present administration in the enforcement of the anti-trust acts, the pending discussions in Congress respecting proposed modifications thereof, and the recent decisions of the Supreme Court construing them.

After only three years' service in the Senate, Mr. Gray had strongly impressed himself upon that body, then comprising many able lawyers, and his legal ability had been conspicuously manifested and generally recognized on both sides of the Chamber. Accordingly, after the death of Chief Justice Waite, Mr. Gray's name was included among those who were proposed as his successor, and he was earnestly recommended by his colleagues of the Senate without distinction of party. The suggestion of his name also evoked an expression of confidence, esteem and admiration from the Bench and Bar of his own State which has probably never been exceeded, if equalled, in the case of any lawyer. A reference to the opinions then publicly expressed shows that every judge, Federal or State, and every member of the Bar (including all who have since held judicial positions) in Delaware expressed the belief that in every sense he was worthy to be called to the highest judicial position. The late Chief Justice Comegys, before whom Senator Gray had constantly practiced, but voiced the general opinion, as individually expressed, when he said that there was no man in the country, so far as he knew, better qualified for this high office. What is herein said of the character and legal attainments of Senator Gray is fully supported by the expressions made public at that time. It is believed that nowhere in the country was there any doubt of Mr. Gray's fitness for any judicial position, and that other considerations of a political nature had their influence with reference to him as to the ten or twelve

others whose names were considered. It is not an unimportant fact to be remembered in connection with Mr. Gray's service in the Senate that President Cleveland had taken for the Cabinet three of the strongest men of his party in the Senate and that Mr. Gray, coming in at that juncture, in a comparatively short time had acquired such a position of influence that he was very much relied on by the administration as a supporter of its policy and measures on the floor of the Senate.

During the year 1898 Mr. Gray was appointed by President McKinley a member of the Joint High Commission to negotiate a settlement of differences between the United States and the Dominion of Canada, and he entered upon the performance of that duty. But again in 1898, and before the work of that commission was concluded, the Delaware Senator was called to serve in an important international conference. A truce having been agreed to between the United States and Spain, three senators, Messrs. Frye, Davis and Gray were named as members of the commission which met in Paris and negotiated the treaty of peace, which definitely terminated hostilities. During the sessions of the commission, Senator Gray was strongly opposed to the acquisition of the Philippine Islands, and so expressed himself in an earnest despatch to the Secretary of State. His views, however, being overruled, both by his colleagues and by the President, when he found that the cession of the islands could not be avoided, he signed the treaty in order that there might not be presented to the world a division of opinion among the American representatives. It was manifest, then and since, that, believing the acquisition of the islands undesirable, he will favor the promotion from time to time of the largest measure of self government consistent with the interest of their inhabitants and the obligations to them, both legal and moral, which we assumed.

At this period Senator Gray was also appointed by the President one of the American members of the permanent Court of Arbitration at The Hague, and by his acceptance of that office as well as by public addresses of an unofficial character, he has indicated his lively interest in every well-designed effort for the promotion of international peace.

In 1899, after his retirement from the Senate, Mr. Gray was appointed United States Circuit Judge for the Third Circuit, a law having been passed providing for an additional judge therein; and since that time he has discharged the duties of that high office in such a manner as most fully to justify his selection. His opinions in the Circuit Court of Appeals, reported through more than thirty volumes of the decisions, are the best illustration of his fitness for the Bench. Covering the wide range of questions cognizable in the Federal Courts, they show patient investigation both of law and facts, keen discrimination in the examination of authorities and the testimony, thorough mastery of fundamental principles, sound judgment in seeking and applying such of them as should rule the particular question involved, and an overmastering desire to determine the very right of the case in hand. It is noticeable that in his Court of Appeals, in most of the Admiralty and Patent cases, he has written the opinions. This appears from the reports to have been the usual practice of the Court and, if it be so, it is readily accounted for by certain characteristics of the man already alluded to. Judge Gray's belief in the importance of making the decisions of the Court of last resort as authoritative as possible would seem to be indicated by the fact that he has seldom dissented, and though time has not permitted a thorough examination of the records, it appears from the Appellate Reports, that his own decisions in the Circuit Courts have seldom, if ever, been reversed.

It is the judgment of the members of the Bar who practice before him, which finally

determines the fitness of a judge for his office. Measured by this standard Judge Gray's career on the bench has been a success. Leaving out of question his home state, members of the Bar of the other districts of his circuit, one of them the highest law officer of his own state, have expressed themselves in the most emphatic terms as to his judicial character and capacity and the high estimate of both which is held by those who practice before him.

Circumstances rendered it possible for Judge Gray to render unofficial service of a very high order which brought him prominently before the public eye. During the coal strike of 1902, when the business of the country was paralyzed and there seemed to be no remedy, the exigencies of the situation appealed to the high public spirit of the President, who appointed a commission to arbitrate between the operators and the miners, both sides having agreed to accept and abide by the award. In accordance with the original suggestion, upon which the President acted, that a judge of his circuit should be one of the commissioners, Judge Gray was made the head of it and presided over its sessions, which continued for some months. The result of this remarkable arbitration, unprecedented in both its creation and its successful result, is now history and need not be repeated. The commission was appointed in October, 1902, and the award, generally understood to have been written by Judge Gray, was communicated to the President under date of March 16, 1903. It was accepted and acted upon by both parties. This decision is a masterpiece of its kind and includes not only a thorough discussion in detail of the case in hand, but incidentally much reference to the problems involved in the mutual relations of capital and labor, which are not only of lasting value but display at once the critical acumen of the Judge, and the breadth of view and thoughtful consideration of the strenuous problems of life as seen by the statesman. In a published letter to Judge Gray, President Roosevelt afterwards wrote, "You have rendered many services to the country, but you never rendered a greater service than what you did as Chairman of the Anthracite Strike Commission."

The success of this arbitration led to the selection of Judge Gray as practically sole arbitrator in subsequent serious labor disputes in Alabama and Illinois; and in both cases his decisions were accepted by both sides.

Judge Gray has never posed as an orator, but whether in general debate in the Senate, in arguments before the Court or Jury, or in addresses of a more formal character, few men excel him as a forceful and effective speaker, of winning and attractive personality and compelling attention and thoughtful consideration by the accuracy of his statements and the logical force of his reasoning. Among his formal addresses may be instanced his speech in the Democratic National Convention of 1880, nominating Mr. Bayard for the presidency, a Fourth of July oration at Wilkes-Barre Pa., in 1903, and the annual address before the Pennsylvania Bar Association on June 25, 1907. On the last occasion he struck the keynote of the present discussion of the true basis of our Government and the danger of centralization, on which subject many leading men of both parties have followed him in addresses of the same character.

As a lawyer he started with a good professional education and had an aptitude for the consideration of legal questions added to a philosophical and judicial mind and temperament. His fairness and frankness commended him to the jury, and he was always courteous to his opponents, while his thorough preparation and effective reasoning powers made him strong before the court. In speaking of him, three able lawyers, at different times closely associated with him, separately used the same expression, remarking that in every emergency

requiring extraordinary effort and acumen he has always had a reserve force fully equal to the occasion.

Judge Gray has occasionally disclosed to us certain of his own ideals, the repetition of which is like casting sidelights on his own character.

In his eulogy of a deceased senator, he referred to him as the embodiment of all that was meant by "a gentleman in the best acceptation of that word," and he quoted the first five verses of the Fifteenth Psalm, as "the best description of a gentleman that I know . . . given by inspiration."

On another occasion as far back as 1879, in his remarks at a Bar meeting, he said concerning a deceased judge, "he more nearly filled my ideal of a perfect judge than any I have ever known" who "possessed to a degree that I have never seen and hardly hope to see equaled, those qualities of patient listening, that attention which helps the counsel who is arguing a cause and endeavoring to put before him the result of his study. All of us here have experienced his manner, his attitude of awakened attention and careful noting of what you consider the strong points of your case, that very comforting assurance to counsel who is engaged in presenting a case to the court that the points he is making are not being overlooked and will receive the attention and consideration which they deserve; and then that very remarkable quality that, when the judgment was delivered, the acquiescence in the result seemed to be compelled from both sides by its clearness and impartiality and the evident ability which he had devoted to it."

Such then in brief is the character and such has been the legal life of this lawyer, senator, diplomatist, arbitrator, and judge, for whom those who know him consider no honor too great, although he is too modest and retiring to seek any for himself.

PHILADELPHIA, PA., May, 1908.

THE CHARLES RIVER BRIDGE CASE

By Charles Warren

In a lecture delivered to the students of the Harvard Law School, in 1838, Professor Simon Greenleaf, speaking of the proper attitude in which a case in the law reports should be studied, made the following suggestive comments.

"Judges and lawyers, like other classes of men, become interested in the absorbing topics of the day, and subjected to their magnetic influences; and some passages in the history of the times, or some glimpses of their temper and fashion may be seen in the most dispassionate legal judgments. . . . The manner of the decision, the reasons on which it is professedly founded, and even the decision itself, may receive come coloring and impress from the position of the judges, their political principles, their habits of life, their physical temperament, their intellectual, moral and religious character. . . . Thus we should hardly expect to find any gratuitous presumption in favor of innocence or any leanings *in mitiori sensu* in the bloodthirsty and infamous Jeffries; nor could we, while reading and considering their legal opinions, forget either the low breeding and meanness of Saunders, the ardent temperament of Buller, the dissolute habits, ferocity and profaneness of Thurlow; or the intellectual, greatness and integrity of Hobart, the sublimated piety and enlightened conscience of Hale, the originality and genius of Holt, the elegant manners and varied learning of Mansfield, or the conservative principles, the lofty tone of morals, and vast comprehension of Marshall.

Neither should we expect a decision leaning in favor of the liberty of the subject from the Star Chamber; nor against the King's prerogative among the judges in the reigns of the Tudors or of James the first; nor should we on this side of the water, resort to the decisions in Westminster Hall to learn the true extent of the Admiralty jurisdiction which the English Common Law Courts have been always disposed to curtail and in many points to deny; while it is so clearly expounded in the masterly judgments of Lord Stowell, and of his no less distinguished and yet living American contemporary (Story)."

Just one year before Greenleaf made the above remarks, the United States Supreme Court had decided, in 1837, one of the most noted and historic cases, ever argued before that tribunal — Charles River Bridge *v.* Warren Bridge. (11 Peters 420.)

The decision in this case regarded merely as the announcement of a legal principle is of no great interest or novelty at the present day. A closer study of the facts of the case, of the counsel engaged, and of the judges who heard it, makes it clear social and economic conditions greatly influenced the establishment of the legal doctrine. The fact is that the Charles River Bridge Case, begun in 1828, and the noted Steamboat case of Gibbons *v.* Ogden, decided in 1824, were the great Anti-Trust cases of the early nineteenth century.

If the Charles River Bridge Proprietors had not been regarded as the "grasping monopoly" of Boston, and as the "octopus corporation" of its time, it is highly probable that the court would have reached a different conclusion; and it is certain that the fact that railroads were just starting as struggling enterprises, needing protection against possible claims for damages which might be set up by rich turnpike corporations, had a very marked influence upon the final decision of the case.

The roots of the case went back to the early date of October 17, 1640 (ten years after the founding of Boston) when at the General Court of Massachusetts Bay Colony it was resolved that "the ferry between Boston and Charlestown is granted to the College" — this vote being one of the many measures by which the early colonists set out to encourage liberal education. For forty years after 1672 various statutes recognized that the profits and revenues of the ferry belonged exclusively to Harvard College. In 1701 appeared the first entry on

the College books showing the letting of the ferry by the College. During the 18th century, the ferry was not a great source of revenue, owing to the cost of maintenance. Between 1775 and 1781, it had been supported at an actual loss. In 1785, however, when the College had just expended 300 pounds in repairing the ferry ways, and when it was beginning to receive 200 pounds annual rent, with an apparent certainty of a steady increase, the Commonwealth of Massachusetts took action gravely affecting the interests of the College.

For on March 9, 1785, John Hancock, Thomas Russell and others, were incorporated by the Legislature as the "Proprietors of Charles River Bridge," to build a bridge in place of the ferry, the charter providing that the grantees should pay the College 200 pounds a year for forty years, at the end of which time the bridge was to become the property of the Commonwealth: "saving to the said College a reasonable and annual compensation for the annual income of the ferry which they might have received had not said bridge been erected."

To the inexact and careless wording of this charter — "an act not drawn with any commendable accuracy," as Judge Story mildly said [1] — was due the long legislative and legal fight which ensued for sixty years after its date, and which resulted in one of the great cases in American legal history.

The bridge itself, the first one connecting Boston with the mainland, was opened June 17, 1786, and was considered at the time one of the marvels of the United States, attracting many persons from other parts of the country to view it.

Of the hazards of its construction, mention was made in the argument at Washington, fifty-one years later:

"It was hazardous, for no attempt at that time had been made to carry a bridge over tide water; and so doubtful were the subscribers of its stability that a number of them insured their interest in it. The hazard was all their own; and so great was it thought to be, upon the breaking up of the ice, persons assembled on the shore to see it carried away. It has stood, however, against the time and the elements; it has stood aganst everything except legislation. It was opened with processions and every demonstration of a general rejoicing, and was considered, at the time, as an enterprise of great patriotism as well as of utility.[1]

The *Independent Chronicle*, in June, 1786, referred to the opening day as a "day of rejoicing"; and thus described the bridge itself:

"This commodious and handsome structure is 1470 feet in length, and 42 feet within the paling. This bridge has been completed in 13 months, and while it exhibits the greatest effect of private enterprise within the United States, is a most pleasing proof how certain objects of magnitude may be attained by spirited exertions."[2]

The capital stock of the bridge was 150 shares of a par value of $333.33.

Six years later, in 1792, a petition came before the Legislature to incorporate the Proprietors of the West Boston Bridge, to build a bridge between Boston and Cambridge.

Harvard College objected strongly, on the ground that it would reduce the revenues of the Charles River Bridge. The Charles River Bridge urged that it had spent for erection of its bridge $51,000, that the cost of support was $18,800, and that its profits had not amounted to 11 per cent. A joint committee of the Legislature, however, reported that Charles River Bridge had no exclusive rights, and the Legislature granted the West Boston Bridge charter (St. 1791 c. 62); but at the same

[1] See Story's dissenting opinion in 11 Peters (1837).

[1] See argument of Warren Dutton counsel for the Charles River Bridge, in report of the case. 11 Peters (1837).

[2] "The Ferry, the Charles River Bridge and the Charlestown Bridge. Historical comment prepared for the Boston Transit Commission by its Chairman," November 27, 1899.

time it recognized the interests of the College and of the old bridge, by providing that "Whereas the erection of the Charles River Bridge was a work of hazard and public utility, and another bridge in the place proposed for the West Boston bridge may diminish the emoluments of the Charles River Bridge, therefore for the encouragement of enterprize" an annuity of 300 (reduced by an Act passed in the same year to 200), pounds, should be paid to the College, and the rights and privileges of the Charles River Bridge and the annuity payable by it to the College should be extended from 40 to 70 years.[1]

The West Boston Bridge was opened November 23, 1793, Elbridge Gerry, who then resided in "Elmwood," being the first person allowed to go over it. It was described as a "magnificent structure"; and the *Independent Chronicle* said, "for length, elegance and grandeur not exceeded by any in the United States, if in any part of the world."

For many years these two toll bridges played an important part in the life of the community. The amount of money invested in them was large. Many noted citizens of Boston and of Charlestown were involved in the enterprises. All residents of the towns and counties north of Boston were vitally interested in their maintenance.

By 1805 the traffic over the Charles River Bridge and its consequent income had so increased that the value of its shares had risen to $1650. In 1814, Harvard College bought two shares at $2080 per share.

Naturally the large profits accruing from tolls produced at last a feeling of unrest in the public, and cries of "grinding monopoly" were heard on all sides.

Webster, in his argument in 1837, thus described the local conditions; "The history of the Warren Bridge began with a clamor about monopoly. It was asserted that the public had a right to break up the monopoly which was held by the Charles River Bridge Company; that they had a right to have a free bridge. Application was frequently made to the Legislature on those principles, and for that purpose, during five years without success, and the bill authorizing the bridge, when it was first passed by the Legislature, was rejected by the veto of the governor. When the charter was granted it passed by a very small majority, the Boston representatives voting against it."

While the profits from the old bridge had undoubtedly been very large,[1] those who indulged in the outcry against this monopoly ignored other features of the situation, described later by Peter C. Brooks, in a letter to Josiah Quincy.

"I might instance the cost of your relative Lieutenant Governor Phillips' estate in Tremont Street, which cost, if I mistake not, $9500 in 1807, and has since been sold for about $80,000. I mention this to show the value of money when the bridge was built, and to do away the senseless clamor about the inordinate gain to the proprietors from being the owners of the stock. The same sum laid out in real estate over the city would have been in many instances quite as profitable. All this nonsensical noise had nothing on earth to do with the merits of the question. And so as to income it was great, after a few years, to those who held shares from the beginning; but to those who become owners after 1805 — comprising about three-fourths of the 150 shares, it was not so good as 6 per cent, and more especially if you consider that the principal was sinking

[1] Two other bridge charters were granted, affecting Cambridge and the College — one, the act of February 27, 1807, incorporated Christopher Gore and others, as Proprietors of the Canal Bridge, to build from the Northwest end of Leverett Street in Boston to the east end of Lechmere's Point (now Craigie or East Cambridge Bridge), payment to be made to the West Boston Bridge of an annuity of $333.33, and the West Boston Bridge to be continued a corporation for seventy years from completion of Canal Bridge, and to pay to the College an annuity of $666.66 during that term. The other was the Act of June 21, 1806, chartering the Proprietors of Prison Point Dam Corporation, under which, in 1815–16, a bridge was built from Cambridge to Charlestown.

[1] The total tolls from June, 1786, to January, 1827, were $824,498, an average of $20,000 a year.

fast and would be wholly lost in about 20-30 years. At the time when Warren Bridge was thought of in 1827, there was but one share held by an original subscriber."[1]

The legislative contest, which was to last five years, began with the petition of John Skinner and other citizens of Charlestown for a charter to build a bridge which should be "toll free for foot passengers,"[2] introduced in the Senate May 30, 1823. Many remonstrances were filed against this petition by wharf owners in Cambridgeport, Charlestown, and Boston, urging the obstruction to navigation which would be caused by the new bridge. The Charles River Bridge Proprietors objected, denying any public necessity for another bridge, and setting forth the injury to their own property, then valued by them at $280,000: "by far the greater part of which is holden by persons who have purchased the stock within the last ten or fifteen years — by widows, by orphans, by literary and charitable institutions. The erection of another bridge from Charlestown to Boston would annihilate at once two-thirds of this property."

In February, 1824, the Legislature gave the petitioners leave to bring in a bill, and they were ordered to give notice to parties interested. The Charles River Bridge, thereupon by formal vote of February 25, 1825, offered to make any addition or alteration in its present structure that the Legislature might desire; and the Legislature postponed action on the Skinner petition.

In June, 1825, a new petition was filed, offering to build either a free bridge to be maintained by the counties of Suffolk and Middlesex, or a toll bridge to become free after its cost with interest should be reimbursed.

In January, 1826, the petition came up again; and there were many memorials in its favor from inhabitants of towns in Essex and Middlesex counties, objecting to the payment of the high tolls demanded by the Charles River Bridge, and urging their right to a free bridge.

The joint legislative committee headed by the great lawyer, Samuel Hoar, a senator from Middlesex, made an adverse report on the bill; and it was referred to the next Legislature. This report was of interest as containing in concise form the grounds on which the case was later argued before the courts. It found that there was no "public necessity" for the new bridge, that the question of toll had no bearing on the determination of the general public necessity, and that the Charles River Bridge Charter was "a contract," which under the doctrine of Fletcher *v.* Peck,[1] the Legislature could not impair, and that a new bridge would be a nuisance as against the rights of the old bridge.[2]

In June, 1826, a new petition was filed, in which the claim was advanced that Charles River Bridge had obtained its extension of its charter in 1792 by fraudulent representations as to its profits. This petition contained a long and plausible legal argument, evidently drafted by eminent counsel.

[1] See Harvard College Archives, Quincy Papers, unpublished letter of Peter C. Brooks, September, 1840.

[2] See manuscript Legislative Records of Massachusetts.

[1] Fletcher *v.* Peck (6 Cranch 87) had been decided by the United States Supreme Court in 1810, having been argued by Luther Martin of Maryland, against Robert G. Harper of Maryland and Joseph Story of Massachusetts, the latter prevailing. As is well known this case was the precursor of the decision in the Dartmouth College Case nine years later, in 1819 (4 Wheaton) in which Story sat as one of the Justices of the Court.

[2] In an elaborate pamphlet published in 1825, entitled "Reasons, Principally of a Public Nature, against a New Bridge from Charlestown to Boston," it is said: "The present bridge was not granted as a favour to the stockholders, but because the legislature perceived that the whole community were to be benefitted, and the terms on which the proprietors were willing to undertake this novel and hazardous enterprise gave an advantageous bargain to the public. The object in view in obtaining this projected bridge is merely local and personal, so entirely a project to get rid of paying foot toll at the present bridge, that scarcely a man in Charlestown would be in favour of a new bridge if the charter contained a provision for taking a foot toll."

Hitherto the case for the petitioners had been urged simply on grounds of the public need of a new bridge. In this petition, however, the popular prejudice against the old bridge, which in reality formed the basis for the desired legislation, was made clear:

"It is plain that most of the remonstrants must resort to the ambuscade of vested rights in Charles River Bridge in order even to make out a plausible case. And upon this point your petitioners are free to say that if vested rights of the kind insisted upon actually exist, they will never ask for their violation. But if they do not, from what we know of the history of Charles River Bridge, we are equally free to say that that corporation is, under all circumstances, one of the last which demands the sympathy of the Legislature."

Harvard College had early foreseen the injury to its interests, if the petition for the new bridge should be granted; and, June 27, 1824, the Corporation voted that the President and Treasurer should "attend to the College interests relating to an application for a bridge from Charlestown to Boston, and make such Memorial and Remonstrance as they may deem proper." During all the succeeding legislative struggle the interests of the College were vigorously defended in the debates. For the first three years, however, no attention to its rights had been paid by the adherents of the bill; but in the new petition of June 8, 1826, the College rights were thus mentioned:

"The Interest of Harvard College in this matter is too trifling to intercept the progress of the petition. At most it cannot exceed, now, or hereafter, $700 a year, and a way can be easily found to obviate the ground of complaint without any injustice to the University."

No action was taken by the Legislature in 1826; and in June, 1827, for the fourth time, a new petition was filed, asking for a toll bridge, which should become free after reinbursement of the proprietors. By this time, the public were greatly aroused. Over one thousand citizens of Charlestown signed the petition, and the matter had become a political issue on which the Democrats and country legislators were lined up largely in favor of the new bridge, — the Whigs, the lawyers, the merchants with old Federalist affiliations, and the city legislators supporting the old bridge.

The sharp drawing of political lines gradually made it evident to the Charles River Bridge faction that their previous feeling of confidence was now no longer warranted.

In the Senate, an attempt was made at a compromise, and a committee was appointed to report at what date the present stockholders of Charles River Bridge would realize the amount paid by them for further stock, and six per cent interest. The committee reported such reimbursement would be effected through accrued profits by the year 1859.[1]

This was felt by the Senate to be too long a period to continue the rights of the old bridge; and notwithstanding generous offers on the part of the old bridge proprietors to build a new draw, to repair or reconstruct their bridge or to build a spur bridge, and to make a reduction of 50 per cent on all tolls except foot passengers, or a 50 per cent reduction on foot tolls and a reduction of over one-third on all other tolls, a bill passed both House and Senate, granting a charter for the new bridge, but postponing its construction for four years if the old bridge proprietors should within 60 days agree to convey their property to the State on December 31, 1831.

So intense, however, were the feelings created by the passage of this bill, that fourteen senators, among whom were Caleb Cushing, James T. Austin (later Massachusetts Attorney General), David Sears, the

[1] The Committee reported that it found that 82 shares had been bought by stockholders, 1812 to 1823, at prices varying from $1800 to $2200. That between October, 1823, and April, 1824, the stock sold for from $1270 to $1550; and that $1600 was a fair market value, October 1, 1820. The dividends for 1821 were $129; for 1826, $138.

noted Boston merchant, and Nymphas Marston, the eminent lawyer of Barnstable, signed a formal protest, filed on the Senate records March 9, 1827.[1]

On March 10, 1827, Governor Levi Lincoln vetoed the bill, which passed over his veto in the House, but was lost in the Senate, 16–12. In his veto, after speaking of the violation of contract and of vested rights caused by the new charter, he thus mentioned the College interests.

"Further the obligation to keep up and repair the bridges and pay the College ought not to be continued if they are not to receive tolls. It is not equitable or good faith.

"The money pledged to the College must also be paid from the Treasury or lost to science and the faith of the government here again violated."

Further, Governor Lincoln, bearing in mind that the State was being agitated from one end to the other by various schemes for new canals, and that the Commission on Internal Improvement was making a report advocating the construction of the then novel system of railroads and providing for surveys from Boston to the Rhode Island and New York boundaries, was profoundly impressed with the serious effect which this legislative act would have in unsettling the confidence of financial men, and dampening their ardor for embarking in new enterprises.

"In one other point of view the bill is regarded as unsalutary. Great improvements of the country have, with us, been the work of private enterprises and responsibility. To the interest and confidence of private associations we must look for investments of funds in the prosecution of valuable and useful objects, and it is only from a firm reliance on the most scrupulous regard to rights under acts of incorporation that they will be encouraged to action. Let distrust of the good faith of the government, nay of its most careful and jealous protection of corporate interests, once be entertained, and there is an end to the labors of associations of individuals in great and noble undertakings. The worst policy will be introduced and the greatest prejudice to country suffered."

It is to be recalled that only six months previous, in October, 1826, George Stephenson in England had demonstrated the success of his steam locomotive "The Rocket." A full description of this had appeared for the first time in the Boston Daily Advertiser, November 23, 1826. On November 25 that newspaper had stated "These experiments constitute a new era in the history of railroads. They prove conclusively that they are adapted in the most perfect manner for rapid traveling — whatever power may be used." Earlier, in 1826, the first railway corporation was chartered in Massachusetts — the "Granite Railway Corporation," a tramroad for horse power from the Quincy quarries to the Neponset River. In the same year New York had chartered the Mohawk and Hudson Railroad Company.

Undiscouraged by their fourth failure, the Warren Bridge petitioners appeared with a new bill in the Legislature early in 1828; and on January 12, 1828, the Charles River Bridge filed a memorial: "We do hereby most respectfully but earnestly and for the fifth time demonstrate, etc." A remonstrance of the great Middlesex Canal corporation was also filed.

Compromise suggestions were made by the Proprietors of the old bridge to surrender their property to the State at once, for a sum to be fixed by impartial commissioners, or as an alternative o surrender without any payment at the end of eight years. They also

[1] The undersigned, members of the Senate of the Commonwealth of Massachusetts, hereby protest against the enactment of a bill to establish the Warren Bridge Corporation for the erection of a free bridge over Charles River between Boston and Charlestown, for the following reasons, viz:

Because the erection of the contemplated bridge in the manner authorized in and by said bill would destroy the franchise which the proprietors of Charles River Bridge hold under a grant of this Commonwealth having all the force of a contract; and

Because the grant contemplated by said bill would be in violation of the public faith and of the constitutional rights of the proprietors of said Charles River Bridge, and would tend to unsettle the security of private property.

expressed, through a committee consisting of Warren Dutton, Richard Sullivan, and Peter C. Brooks, their willingness to reduce tolls, and stated that

"We can discern nothing in the facts or the law of the case or in the present state of public opinion, which should impair their confidence or discourage their hopes. They rely with confidence on the intelligence, wisdom and good faith of the Government for a reasonable protection.

"At the same time they are ready to admit that they are desirous of being relieved from the very great burden of making a defence before successive committees of the Legislature, or ultimately, if it should become necessary, which they do not believe, before other tribunals."

By this time, however, the new bridge party in the Legislature was in no mood to accept any offers, however generous or adequate to meet the public needs.

The fight had now become one of the country against the city — the country members insisting on the right of their constituents to enter Boston without payment of toll; the city members, having a large financial and commercial constituency, insisting that the State should keep faith and observe its solemn contract. There was also prevalent in the State at this time, a very violent anti-corporation feeling, and the Charles River Bridge corporation was held up as the shining example of a grasping monopoly.[1]

The joint committee reported in favor of the bill, which was ordered to a first reading in the House, February 5, 1828, by a large majority.

The Charles River Bridge Proprietors were now thoroughly alarmed; and they again, by vote of February 25, 1828, offered to alter their present bridge, and even to build a new bridge in any manner the Legislature might desire, stating that they made "an earnest appeal to the enlightened wisdom of the Legislature to decide whether the Public Good or Public Policy, without reference to the equity, justice, or legality of such a measure, can require the absolute sacrifice of the great amount of property which they have innocently purchased, and now hold upon the faith of the government."

The Legislature paid no attention to the offer, and on March 12, 1828, the bill passed, granting a charter to the Proprietors of Warren Bridge, with a right to take toll until the cost of construction with 5 per cent interest should be reimbursed, the bridge to then revert to the State and to become a free bridge, the term of toll, however, not to exceed six years, and until the reversion of the bridge, the Proprietors to pay one-half of the annuity of $666.66 required to be paid to the College by the Charles River Bridge, the latter being relieved from paying this one-half. (See c 127 of the acts of 1827).

Before the bill was signed by the Governor a protest was filed in the House on March 11, 1828, signed by 70 members, among whom were the following prominent lawyers: — Rufus Choate, Emory Washburn, Leverett Saltonstall, Asahel Huntingdon, Joseph Willard — and also noted men like Horace Mann and James Savage.[1]

Construction of this new bridge was at

[1] The Free Bridge question had become a political issue to such an extent that in the state election of 1827, in April, a candidate was put into the field in opposition to Gov. Levi Lincoln, who based his campaign on this issue — William C. Jarvis, Speaker of the House of Representatives. Owing to Lincoln's personal popularity, Jarvis only received 7130 votes to 29029 for Lincoln.

[1] The protest was based on the following grounds —

First, because neither the public convenience nor necessity require it.

Second, because evidence of amount of tolls was one of ingredients of public conveniences and necessity on which the committee founded this report.

Third, the granting of another bridge so near as to essentially injure value of property without providing any indemnity, is a violation of existing right, a breach of public faith, and tends to diminish the confidence in and lessen the security of the right of property.

Fourth, because the Legislature have no right to obstruct an important navigable river by another bridge when the same is not required by public convenience and necessity, "apart from any consideration of tolls."

once begun; and it was so located that on the Charlestown end, the distance between the two bridges were only 260 feet, and on the Boston end 916 feet, the roads leading from the two bridges converging to within a distance of 26 feet. The distance to Charlestown by the old bridge was 3134 feet, by the new, 3243 feet.

The new bridge was opened December 25, 1828; and the effect was seen at once in the alarmingly rapid diminution of traffic over the old bridge, whose toll fell, in the first six months of 1829, from $15,000 to $6500, as compared with the same period in 1828.

It was quite apparent, therefore, that when the Warren Bridge should become a free bridge in 1834, the Charles River Bridge stock would be worth practically nothing. The damage to the interests of Harvard College would also be severe — first, by its loss of an annuity of $666.66 which had nearly 23 years more to run; second, by the decrease in the value of the Bridge stock owned by it; third, by the loss of the reversionary right which was to remain in the College after the expiration of the old bridge charter, but which would become valueless when the Warren Bridge became a free bridge.

The Charles River Bridge did not wait for the completion of the new bridge before taking action in the courts, but at once engaged as counsel two of the leading lawyers of the State, Daniel Webster and Lemuel Shaw who proceeded to file a bill in equity June 17, 1828, in the Massachusetts Supreme Court, setting forth the new bridge as a nuisance and an injury to the exclusive rights of the old bridge, and asking for a preliminary injunction.

It is interesting to note that this was one of the first equity suits in the State, based on nuisance; for the statute giving equity jurisdiction in such cases had only recently been passed (St. 1827 c 88). Up to that time, the only matters in equity cognizable by the Massachusetts Courts had been, mortgages and forfeitures under St. 1785 c 22; trusts arising under deeds, wills or in the settlement of estates, and contracts in writing where specfic performance was claimed, under St. 1817, c 87; redemption of lands, under St. 1818, c 98 and St. 1821 c 85; bills for discovery and adjustments between freighters and other parties interested in the same subject matter, under St. 1818 c 122; bills for discovery and delivery of goods, etc. secreted, and bills of account between partners, etc., under St. 1823 c 140.

Richard Fletcher and William C. Aylwin, who appeared for the Warren Bridge, vigorously opposed the issuance of any preliminary injunction and denied the court's jurisdiction.

Chief Justice Isaac Parker (who had resigned as Professor in the Harvard Law School only a year and a half before) gave the opinion of the court (6 Pickering 376), holding that the Court had jurisdiction, but refusing to issue any preliminary injunction, and — what is surprising to modern lawyers — stating that the plaintiff's request for such an injunction prior to filing of an answer, was something "novel," and almost as "startling" as the first application for this kind of injunction in 1752 seemed to Lord Hardwicke.[1] The Chief Justice said that this kind of injunction was "but sparingly exercised, and only in cases which hardly admit of controversy"; and such conditions he did not find in this case. In order, however, to make it plain that the court had not considered the merits of the case, he began his opinion by warning counsel.

"We think it will be unsafe for either party to found any hope or expectation of the final result of this bill upon the failure of the present motion, for it will be seen that there was no occasion to go into the general merits of the case in order to discharge our present duty, and we have not thought our-

[1] In 1752 in an anonymous case, 2 Vesey 414, Lord Hardwicke summarily dismissed such an application for a preliminary injunction, "saying this was a most extraordinary attempt of which he never knew an instance before."

selves authorized in the actual state of the proceedings, when only one party is formally before the court (the time for answer not having arrived), to decide or even deliberate upon a question on all hands deemed to be of magnitude and importance."

Meanwhile, pending the decision, there had been much speculation in the stock of the Bridge Company. This was the period when the first railroad enterprises were being discussed, and plans for railroad charters made throughout the State. It was foreseen that the final decision of this case would be of vast effect upon the respective rights of such railroads and of the old and powerful turnpike corporations which, it was then apparent, the railroads were likely to supplant. There was consequently immense excitement over the question in all business and financial circles. This fact the Chief Justice recognized, for he closed his opinion as he had begun, by giving "a caution to the parties and to others interested in the question, to all who may wish to speculate on the result for whose projects and schemes are connected with the maintenance or overthrow of the bridge, that we consider the question of the validity of the grant and charter of the new bridge as open and undecided as it was before this motion was made."

Before the Warren Bridge was in actual receipt of tolls, a supplemental bill was filed and later an amendment (the Warren Bridge then being in receipt of tolls), claiming that the charter under which the Proprietors acted was a violation of the contract of the State with the Proprietors of the Charles River Bridge, and was therefore repugnant to the Constitution of the United States, and claiming further that it was a taking of property without compensation, and thus in violation of the Massachusetts Constitution.

On December 2, 1828, the defendants filed their answer, and both parties proceeded to take depositions. In June, 1829, the defendants asked for delay, claiming insufficient time to gather evidence, but in fact wishing delay until the bridge should be completed and public sentiment created in their favor. This motion being denied, on June 15, the defendants claimed a right under the Constitution to a trial by jury. In deciding this point, Judge Parker spoke of the limited time and opportunity given the court to consider it, as one of the obvious disadvantages of the method of administering equity; and said that the incessant engagements on the common law side of the court unfitted the judges to give the proper amount of attention to its equity cases. He held, however, that no rights of the defendants were infringed if the court should decide which facts, if any, were proper to be left to the jury. The defendants thereupon waived the point, and in October, 1829, the case was argued on its merits by the same counsel as at the previous hearing.

Opinions were given in the case, January 12, 1830 (7 Pick 344). The court divided evenly, two judges, — Chief Justice Isaac Parker and Judge Samuel Putnam, denying the constitutionality of the Statute; two upholding it — Judge Samuel Sumner Wilde and Judge Marcus Morton.[1]

Judge Parker upheld fully the plaintiff's contention that the statute was an impairment of contract and also a taking of property without compensation, saying:

"I think this question of the necessity of indemnifying the proprietors of the Charles River Bridge has been prejudiced by the well known fact that the profits of the bridge have been great beyond the example of any similar institutions in this country. It seems to me that if the legislature of 1787, which is one year after the building of the bridge, when its success could be only conjectural and the experiment of its durability was scarcely tried, had incorporated this company to build the Warren bridge with-

[1] Robert Rantoul, in his noted Fourth of July oration at Scituate in 1836, spoke of the tendency among corporation advocates to hold an "obnoxious statute unconstitutional, as would have happened in the case of the Warren Bridge, but for the firmness of Judge Morton." See "Memoirs of Robert Rantoul, Jr.," by Luther Hamilton (1854).

out indemnifying the proprietors of the old bridge, the opinion of the injustice would have been universal."

Judge Morton (a robust Democrat of the radical type), took the position that to hold the statute unconstitutional would retard all progress, that such a construction as the plaintiffs claimed was not to be placed on a charter for a great public work, and that the grant was to be construed rigidly in favor of the State and against the grantee. The extent to which the economic and social conditions of the day entered into the decision is well illustrated by his remarks:

"Scarcely a turnpike has been established in the state which has not diverted more or less travel from the former ones. If, therefore, the different private charters in the Commonwealth, granted for the purpose of improving the state of the country and bettering the condition of the people, are to receive the extensive construction contended for, they amount to an entire prohibition of all further internal improvement during their continuance. No improved road, no new bridge, no canal, no railroad, can be constitutionally established. For I think, in the present state of our country, no such improved channel of communication can be opened without diminishing the profits of some old corporation."

Meanwhile, the pendency of this case had already had a serious effect in retarding the development of railroads in Massachusetts. South Carolina, Maryland, New Jersey and New York had already chartered and operated railroads; but Massachusetts financiers had hesitated to embark in such doubtful enterprises, fearing future action of the Legislature which might destroy the value of their charters, similar to that which had wrecked the Charles River Bridge. Finally, in 1830, however, a charter was obtained for the Boston and Lowell Railroad, though with the protection of the express grant of an exclusive right for thirty years. Other charters were granted in the same year without such right; but the difficulties of obtaining stock subscriptions were so great that no railroad was opened for operation until 1834. And even as late as 1835, the effect of the Bridge case was felt when attempts were made to finance the Western Railroad (chartered in March, 1833), which was to connect Boston with Albany. Thus, Josiah Quincy, Jr., its treasurer, noted in his diary, November 25, 1835:

"Went round with Mr. Edmund Dwight to obtain subscribers for the Western Railroad and they all with one accord began to make excuses. Some think the city is large enough and do not want to increase it. Some have no faith in legislative grants of charters since the fate of Charlestown Bridge. . . . It is the most unpleasant business I ever engaged in."

An appeal was taken at an early moment from the decision of the Massachusetts Court; and the case was entered in the United States Supreme Court March 19, 1830, to be argued in the January term of 1831. At this point, the great case becomes intimately and interestingly connected with the history of the Harvard Law School, — then an institution only fourteen years old. Judge Joseph Story of the United States Supreme Court had been appointed Dane Professor in the School in 1829, delivering his lectures in the fall and spring, and sitting in the Court in Washington from January to March. Two weeks before the argument of the case of Charles River Bridge *v.* Warren Bridge, on February 24, 1831, Story wrote to his colleague Professor Ashmun, then Royall Professor in the Law School.:

"We are not yet at the Charlestown Bridge case though it has been staring us in the face for a week past. I think it will be reached next week and then comes the tug of war. We have already a deputation from Charlestown to take care of the court and report progress, and the address of Mr. (Marcus) Morton's constituents has taken some pains to prevent our falling into great errors without all proper admonitions. I want no better gauge of the man than that as a judge he is willing to be the

candidate of such people with such avowed opinions.[1] "

The case was argued on March 7 to 11, 1831, before Chief Justice Marshall and Justices Joseph Story, Smith Thompson, John McLean, and Henry Baldwin, Justices Gabriel Duvall and William Johnson, being absent. For the Charles River Bridge Daniel Webster appeared as counsel with Warren Dutton, the latter being one of the most prominent of the Bridge Proprietors. For the Warren Bridge were Walter Jones, the noted lawyer of the District of Columbia, and William Wirt of Maryland, who had recently resigned as Attorney General of the United States. Judge Story wrote to Professor Ashmun March 10:

"We are now upon the Charlestown Bridge case and have heard the opening counsel on each side in three days. Dutton for the plaintiffs made a capital argument in point of matter and manner, lawyerlike, close, searching and exact; Jones on the other side was ingenious, metaphysical, and occasionally strong and striking. Wirt goes on to-day and Webster will follow tomorrow. Six Judges only are present which I regret, Duvall having been called suddenly away. . . ."

No more important constitutional question had come before the Supreme Court than that involved in this case, since the famous steamboat case of Gibbons *v.* Ogden, in 1824. Not only was the fate of this particular corporation involved, but the whole trend of future railroad and other corporate development was to hang upon the decision.

After the arguments, it was at once evident that no agreement could be reached by the judges at the current term, and the case was taken under advisement until the January term of 1832.

At this term, on March 1, 1832, Judge Story wrote to Professor Ashmun:

"The Charlestown Bridge cases not yet decided. Some of the judges had not prepared their opinions when we met; and Judge Johnson has been absent the whole term from indisposition. . . . I may tell you, confidentially, that we are greatly divided in opinion, and it is not certain what the finale may be. Perhaps it may not be decided this term. We shall rise about the middle of March, and I shall find my way home as soon as possible afterwards, so that I may relieve you from some extra duty. I would rather work in the Law School than here."

Though no definite knowledge has ever been had of the decision reached by the court at this time, it seems probable that Marshall, Story, and a majority of the judges who had heard the argument, had arrived at a conclusion in favor of Charles River Bridge and contrary to that reached by Chief Justice Taney and the court at the final decision of the case made in 1837. At all events, Story had writen out his opinion as early as November 19, 1831, for in a letter on that day to Jeremiah Mason he wrote:

"I am now engaged on the Charles River Bridge case. After it is finished I should be glad to have you read it over if I thought it might not give you too much trouble. It is so important a constitutional question that I am anxious that some other mind should see, what the writer rarely can in his zeal, whether there is any weak point which can be fortified or ought to be abandoned. The general structure of the argument, I hope, is sound, but all the details may not be."

To this Mason replied, November 24, 1831:

"I will most willingly examine your opinion on the case you mention, and give you the result of my reflections on it."

On December 23, 1831, Story wrote again that illness had delayed the completion of

[1] *The Boston Daily Advertiser*, of February 7, 1831, quoting from the *Bunker Hill Aurora*, said, "agents for the parties in the case have repaired to Washington to conduct the cause to its final issue before the Supreme Court now in session. General Austin left town on Thursday."

The reference in Story's letter to Morton is to the fact that Marcus Morton, while still a Justice of the Massachusetts Supreme Court, was the Democratic candidate for Governor in each year from 1828 to 1834 inclusive, the Democrats being largely Warren Bridge men.

his opinion, but that he would send it soon, and he continued:

"I wish to make some remarks to explain the great length and the repetition of the same suggestions in different parts of the same opinion. I have written my opinion in the hope of meeting the doubts of some of the brethren, which are various and apply to different aspects of the case. To accomplish my object, I felt compelled to deal with each argument separately and answer it in every form, since the objections of one mind were different from those of another. One of the most formidable objections is the rule that royal grants, etc., are to be strictly construed; another is against implications in legislative grants; another is against monopolies; another is that franchises of this sort are bounded by local limits; another, that the construction contended for will bar all public improvements. I have been compelled, therefore, to restate the arguments in different connections. I have done so, hoping in this way to gain allies. I should otherwise have compressed my opinion within half the limits."

The opinion thus referred to became the dissenting opinon delivered by Judge Story, when the case was finally decided six years later.

A long delay now ensued, owing to illness and death of several members of the court, and to the discinclination of the court to hear or decide so important a case involving a state statute, unless the full court should be present. By January, 1832, the court had come to no conclusion; and owing to the illness of Judge Johnson, the case was again held under advisement until the January term of 1833, when, on February 26, 1833, it was ordered for re-argument. Owing to the illness of Judge Baldwin, no argument was had at that term. In 1834, Judge Johnson died, and Judge Duvall was ill. During the next year, 1835, came the death of Chief Justice Marshall and the resignation of Judge Duvall.[1]

[1] In Massachusetts, Lieutenant-Governor S. T. Armstrong sent the following special message to the legislature, March 20, 1835:

"It appears that at the term of the court which has just closed, there being a vacancy on the bench, the cause was again continued and now stands for argument at the next term in January, 1836; and that it is understood that the Supreme Court of the United States will not usually hear a cause involving the validity of a state law unless all the Judges by law to be appointed are commissioned and present on the Bench; so that it is not to be expected that this cause will be again argued without a full court."

Meanwhile William Wirt, then one of the leaders of the United States Bar and chief counsel for the Warren Bridge had died on February 14, 1834; and after much consideration, the Proprietors decided to retain in Wirt's place Simon Greenleaf, then Royall Professor in the Harvard Law School.

Although Greenleaf as counsel in this case would be obliged to act in a capacity adverse to Harvard College, no question seems to have been raised by the College as to the propriety of his action. The only official reference to the case is to be found in the following letter now in the Harvard Archives and in an ensuing vote of the Harvard Corporation.

Greenleaf writes[1] to the Corporation, November 27, 1834.

"Having been requested to argue a cause before the Supreme Court at Washington some time in the ensuing winter I deem this a proper occasion respectfully to ask whether in your opinion the statutes of the Law Department militate with the practice of law by the Royall Professor, and if not entirely so then to what extent you should consider him at liberty to accept professional engagements; or by what rule is he to govern himself in such cases. I have hitherto followed the course I understand to have been pursued by my predecessor, accepting only such engagements as I thought would not injuriously interfere with the duties of the Professorship; but the present application inviting me beyond the limits of any former precedent, I feel some difficulty in deciding how to dispose of it. I would request the favor of your opinion as early as convenient, it being for the interest of all parties that no time be lost in preparing the cause."

[1] See *Harv. Coll. Papers*, 2d Series, Vol. vi.

In response to this letter the Corporation voted on November 29, 1834:

Voted that the request of Professor Greenleaf for the permission to be absent during the ensuing term one fortnight, for the purpose of arguing an important cause before the Supreme Court of the United States be granted under the Circumstances stated by him, — such absence not being likely to be injurious to the Law School in the opinion of the Law Faculty.

Thus it was that when this great case was argued and decided, nearly three years later (in 1837), it was won by one Harvard Law School professor, arguing directly contrary to the interests of Harvard College, and with the other Harvard Law School Professor, Joseph Story, delivering from the Bench a dissenting opinion, denying the validity of his Law School colleague's argument.

In 1836, Chief Justice Taney (appointed in December, 1835), and Judge Barbour (Duvall's successor), did not take their seats until the end of the term; so that it was not until 1837, six years after the first argument, that a full court assembled to hear the famous case.[1]

[1] Professor Greenleaf had written to Treasurer Ward, Jan. 9, 1835:

"My journey to Washington will depend on the contingency of President Jackson's filling the present vacancy on the Bench, and of the new judge taking his seat this term; as the case of the Warren Bridge will not be argued but to a full Bench. Should I go, I shall be happy to be of service to you." — See Letters to the Treasurers, Harvard College Archives.

BOSTON, MASS., May 9, 1908.

ON LANGDELL HALL

BY HARRY RANDOLPH BLYTHE.

STERN temple of eternal law! the sight
Of thy strong body looming grey and grand
Makes pulses leap. For over all our land
No force like thine so girded is with might,
So fruitful, yet so latent of the Light;
What freighted trust is thine! — that from thy band
The Nation's captains rise to take command,
'Tis well thou art the Citadel of Right! —

Thy first-born sons are we, yet thou so well
Hast forged thy blood into our blood and bone
That we, with zeal like thine will guard the laws;
Thy trust fails not. So potent is thy spell
That thou shalt ever know us for thine own
In truth's far fields still fighting for thy cause.

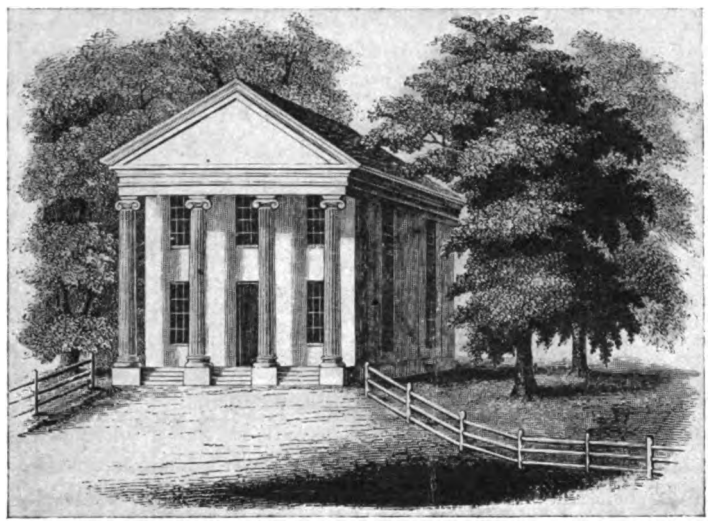
CAMBRIDGE, MASS., May, 1908.

LANGDELL HALL AND THE EARLIER BUILDINGS OF THE HARVARD LAW SCHOOL

By Eugene Wambaugh

A NEW building, Langdell Hall, was in the autumn of 1907 added to the facilities of the Harvard Law School. It is about seventy-five feet to the northeast of the old building, Austin Hall, and connected with it by a subway. As the law school uses both of these buildings, and as Walter Hastings Hall, about seventy-five feet to the northwest of Austin and parallel with Langdell, is largely occupied by law students, there is now something like a law school quadrangle, giving an approximation architecturally, as there has long been an approximation otherwise, to the attitude of a distinct institution within the university. In fact, the buildings successively occupied by the law school have always borne some relation to the school's history and condition. Hence, before describing Langdell Hall, it seems worth while to run rapidly over the buildings and the history which preceded it.

It was in 1815 that the first professorship of law was filled at Harvard. This professorship was the fruit of a gift by a testator whose will, made many years earlier, had been influenced by the creation of the Vinerian professorship at Oxford. Naturally enough, the first Royall professor at Harvard, Isaac Parker, like the first Vinerian professor at Oxford, Blackstone, began his professorial career by addressing somewhat popular lectures to college undergraduates, who may or may not have intended to enter upon the profession of law. This was not professional training, did not call for the segregation of students, did not call for a collection of books, and did not call for a building; and hence there was no building for several years.



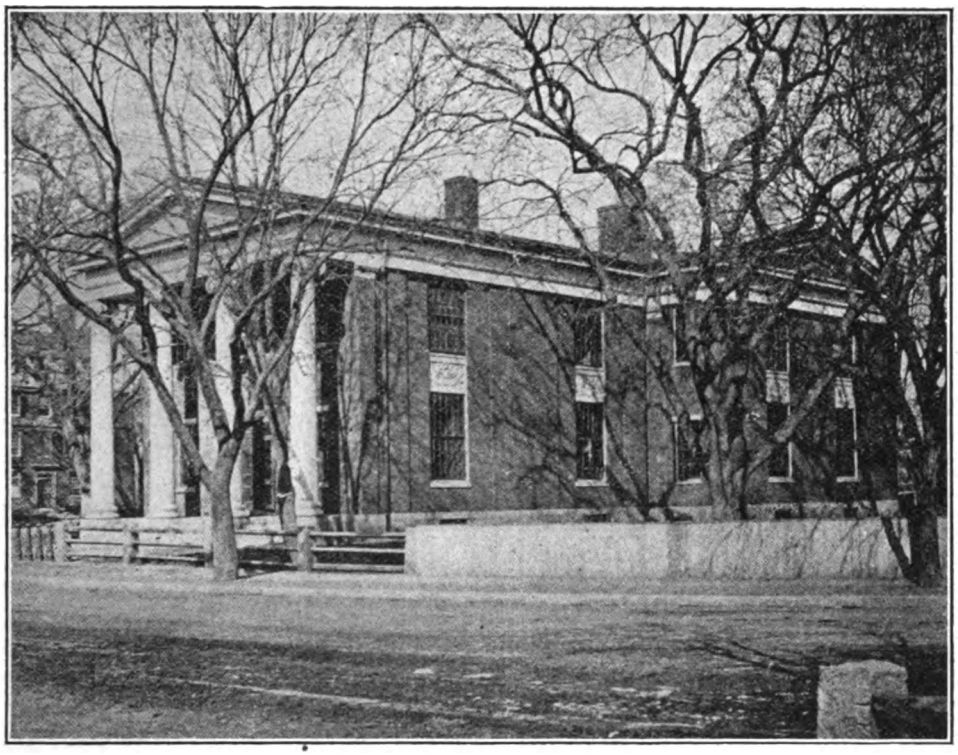
DANE HALL, 1832 TO 1845
Gift of Hon. Nathan Dane

The date commonly given for the beginning of the Harvard Law School is 1817. In that year another professorship of law was added, and simultaneously came technical instruction in law, genuine law students — none of them college undergraduates, — and separate accommodations for law work. That was, however, a day of small things. In the first twelve years, ending in 1829, only one hundred and six students left the law school. In other words, there were on the average not more than ten students annually. Many of these entries were for only a short time. Before 1830 there were only twenty-six graduates in law. The explanation is that law students still preferred the private law schools, of which the one at Litchfield was the largest and most famous. Yet even in those early days the Harvard Law School deserved to be treated with respect. Its two professors, Isaac Parker and Asahel Stearns, were lawyers of high local repute; and Stearns was the author of a work on Real Actions, the earliest law book produced at Harvard. The students were well fitted to procure professional study. Of the one hundred and six who left the school before 1830, seventy-six were college graduates before entrance. Only twenty-six took the degree in law, and of these the college graduates numbered twenty-two — all of them being college graduates of at least three years' standing. Among those who took the degree, the one best known to-day was Luther S. Cushing, the author of several books, among them a large work entitled the Law and Practice of Legislative Assemblies, and a still more widely circulated Manual of Parliamentary Practice. Of those who did not take the degree the best known were Caleb Cushing, Rufus Choate, Emory Washburn, and Francis Hilliard — the last being the author of many books once used by practitioners, including one which is said to be the earliest treatise on Torts. Notwithstanding the merits of the instructors — merits which attracted students from both north and south — the Harvard Law School of those days was an experiment, not yet showing much growth, and certainly not needing large accommodations. Hence it found a temporary home in a building not designed for its purposes. This was a wooden structure called Second College House, occupying part of the site of the College House of the present time. Second College House typified the Harvard Law School of the days of Isaac Parker and Asahel Stearns, and it was identified with those professors.

In 1829 came a great change, beginning with an entirely new faculty. Parker had resigned in 1827, and thereupon the attendance, always small, had distinctly diminished. In 1828–29 the students numbered six. Stearns resigned in 1829. Both professorships being vacant, Joseph Story and John Hooker Ashmun were appointed in June, 1829. Story was already of national importance by reason of his being an eminent justice of the Supreme Court of the United States, but as his judicial duties kept him away from Cambridge for a substantial part of the year, it was requisite that there should be some other professor always on the ground, and hence the appointment of Ashmun, a young man who had already taught in the private law school at Northampton, was a matter of great consequence. The membership of the school immediately increased with rapidity. In 1829–30 the students numbered twenty-four. It is interesting to notice that among the students leaving the school in 1830 were B. R. Curtis, O. W. Holmes, Theodore Sedgwick, and Timothy Walker. The school held its growth, but for almost ten years it continued to be the practice not to take the law degree. At the same time the percentage of college graduates fell to about sixty-six. The attendance being, from 1829 to 1832, about thirty annually, a permanent home become necessary. In 1832 Dane Hall was built. Its name honored Nathan Dane, who founded the Dane professorship for Joseph Story, on the basis of the profits from

Dane's Abridgment of American Law, precisely as Viner founded the Vinerian professorship at Oxford on the basis of the profits from Viner's Abridgment. Dane Hall in its original shape stood south of Massachusetts Hall and west of the site of Matthews Hall. In situation and size it balanced Holden Chapel, being larger than Holden Chapel in about the same ratio as that in which Massachusetts Hall exceeds in size the neighboring Harvard Hall. In style the original Dane Hall resembled Holden Chapel, except that the front of Dane Hall was ornamented with a portico and a row of pillars. The original Dane Hall was in architectural effect a small copy of the brick court houses of that period.

Ashmun died the year after Dane Hall was occupied. He was succeeded by Simon Greenleaf, who, by reason of Story's frequent absences, was the administrative head of the school. The building stood without change until 1845. Ashmun taught in it for a few months, and Charles Sumner sometimes taught in it as Story's substitute. With these exceptions, no one except Story and Greenleaf taught in Dane Hall as it originally stood. The building was remodeled in 1845. Story died in this year and Greenleaf retired in 1848. Dane Hall in its original form is thus peculiarly identified with Story and Greenleaf. There was produced "Greenleaf on Evidence," said to be the American law book of the widest influence in America and England. There were produced Story's numerous books, some of which are in use still and all of which have aided to make Story the most versatile figure in American law — eminent as teacher, author, and judge. Surely it is unfortunate that the old Dane Hall cannot be longer seen in its original condition. Yet a glance at the Harvard



DANE HALL, 1845 TO 1871

Law Quinquennial shows that although one page is enough to contain the names of one class in 1830, three pages are not enough in 1845; and as the attendance in one academic year sometimes reached one hundred and fifty, the building could no longer accommodate the school.

In 1845 Dane Hall was enlarged by adding at the back a part much larger than the original building. The old part was preserved without exterior change. The building as enlarged was, of course, a monument to the eminence of Story and Greenleaf. Yet in its new condition it was to be identified with new names. The building stood in the same form from 1845 to 1871. The three professors who were most nearly contemporaneous with that condition of Dane Hall were Joel Parker, professor from 1847 to 1868, Theophilus Parsons, from 1848 to 1869, and Emory Washburn, from 1856 to 1876. Other persons, including John C. Gray and C. C. Langdell, taught for a short time between 1845 and 1871; but Dane Hall enlarged, standing on its original site, is necessarily identified with Parker, Parsons, and Washburn — the last two being widely known through their writings and the first being a teacher who was no less esteemed by the pupils of that day, and who, as Chief Justice of New Hampshire, must always be remembered in connection with the famous case of Britton *v.* Turner.

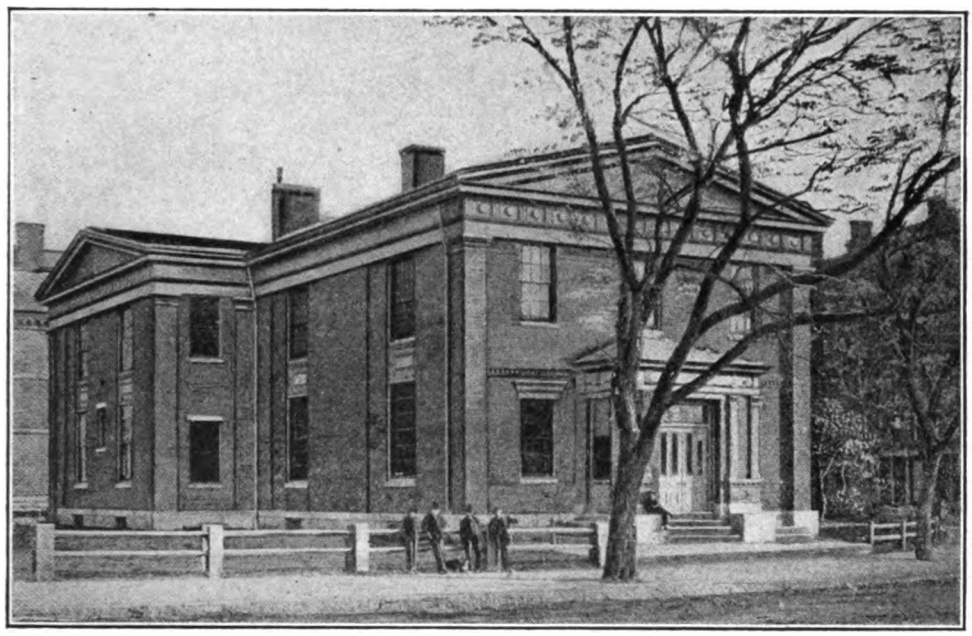
The next change in Dane Hall is the only architectural change in the law school which does not represent a change in the school's needs. The numbers of the time of Story and Greenleaf were sustained, though not uniformly, throughout the time of Parker, Parsons, and Washburn, but the numbers did not increase. The change that next took place in Dane Hall was rendered necessary by an increase in the dormitory accommodations of Harvard College. What happened was no enlargement of Dane Hall, but simply a removal some seventy feet southward in order to make room for Matthews Hall. The removal placed Dane Hall so near the street that the portico and columns had to be sacrificed. This change was made in 1871. The building stood thus, unaltered in exterior appearance, but from time to time slightly remodeled inside, until the school removed in 1883; and the building presents nearly the same exterior appearance still. The extension in the rear held the library, including both the stack and the reading room. Above the library was the lecture room. The front part of the building was devoted partly to professors' studies.

As has been indicated, the removal of Dane Hall from its original to its present site was caused by no change in the needs of the school. Yet by a strange chance this removal was substantially contemporaneous with the beginning of a change that was really a revolution, for it was in 1870 that Professor Langdell had become a professor. Further, by another strange chance, Dane Hall in this new site became closely identified with a new group of instructors. Omitting the names of those who served for comparatively short times, one finds that throughout nearly the whole of the period from 1871 to 1883 instruction was given by John C. Gray, C. C. Langdell, J. B. Ames, and J. B. Thayer. To that Dane Hall and to that period and to that list of names must be conceded an intimate connection with the development of a new system of teaching law — the case system.

It is to the case system, rather than to any increase in the number of students, that one must attribute the next change — the removal from Dane Hall and the building of Austin Hall. The case system had caused, or at least had encouraged, a great growth in the library and in the use of books by the students. It became the students' course of business to spend the whole day in the reading room. It was desirable to have a seat in that room for each student. Further, intimately connected with the introduction of the case system was the extension of the course to three years, necessitating more

lecture rooms. For all these reasons, larger quarters were required.

Austin Hall, from 1883 to 1907 the sole home of the Harvard Law School, is still the scene of about half the lectures. It is a building of reddish brown stone, with buff trimmings, and is one of the most highly admired works of the late H. H. Richardson. That limit was reached in 1889–90. In 1899–1900, the last year of Professor Langdell's teaching the number of students had reached six hundred and thirteen. The number in 1907–08 was seven hundred and sixteen. For years the students were subjected to the discomfort of not being able to find seats in the reading room. Besides, the

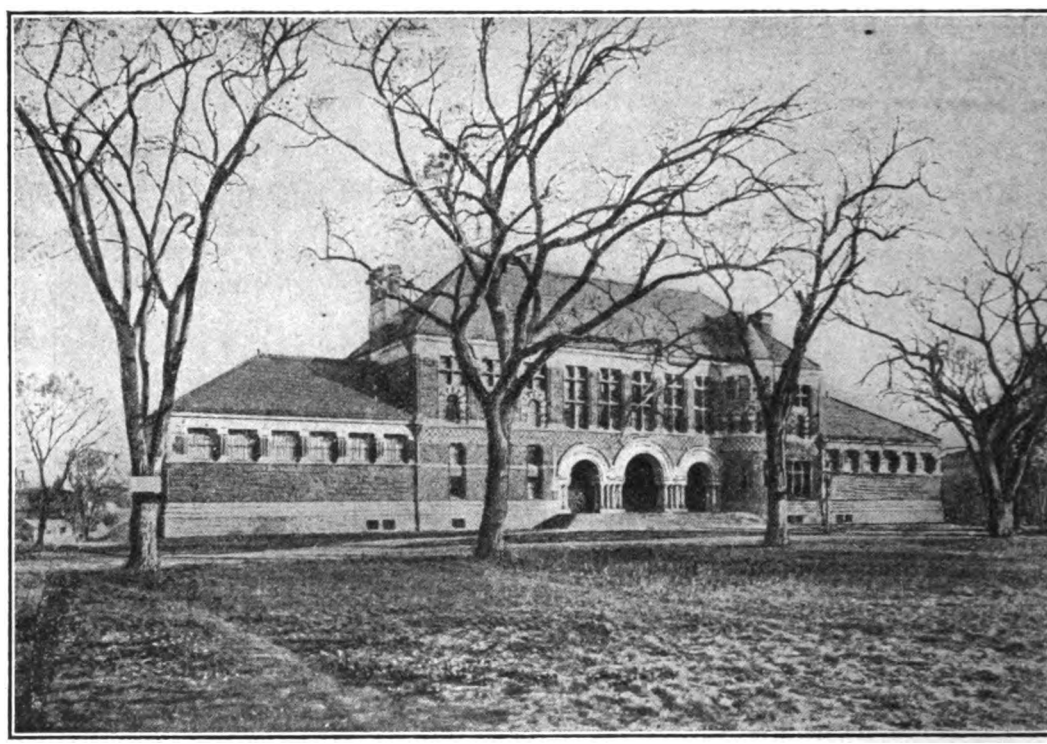


DANE HALL, 1871 TO 1883

It is very characteristic of the architect — having round arches, a conspicuous roof, and a general effect of richness and warmth. It contains one lecture room accommodating about two hundred and fifty, one accommodating about sixty, and two accommodating about one hundred and fifty each. It contains reading room accommodations for two hundred and forty, and a library stack for about fifty thousand volumes. When it was built the law school had one hundred and thirty students. There was a reasonable expectation that some day the number might be two hundred and fifty. Consequently the architect so devised the building that, with slight alterations, two hundred and fifty students could be accommodated. lecture rooms became too few and the stack ceased to accommodate the books — many thousands being stored in inconvenient places. There were reasons enough for enlarging the building or obtaining a new one. Austin Hall, however, proved incapable of enlargement. The erecting of a supplemental building was rendered difficult by a provision made by the donor of Austin Hall to the effect that there should be no other building within sixty feet. Besides, the increase in the cost of structural iron work and in other items caused a financial difficulty. Thus it happens that for a longer time than one could wish Austin Hall has been the law school's only home.

As has been pointed out, the need of an

additional building has been caused by the growth in the appreciation of the Langdell system of instruction; and thus again there is a connection between the history of the school and the history of its buildings. In fact both Austin Hall and Langdell Hall serve as commemorations of Professor Langdell, the former marking the end of the experimental stage, at Harvard, of his method of teaching, and the latter marking the ultimate approval of the results of his method by an important part of the American bar.

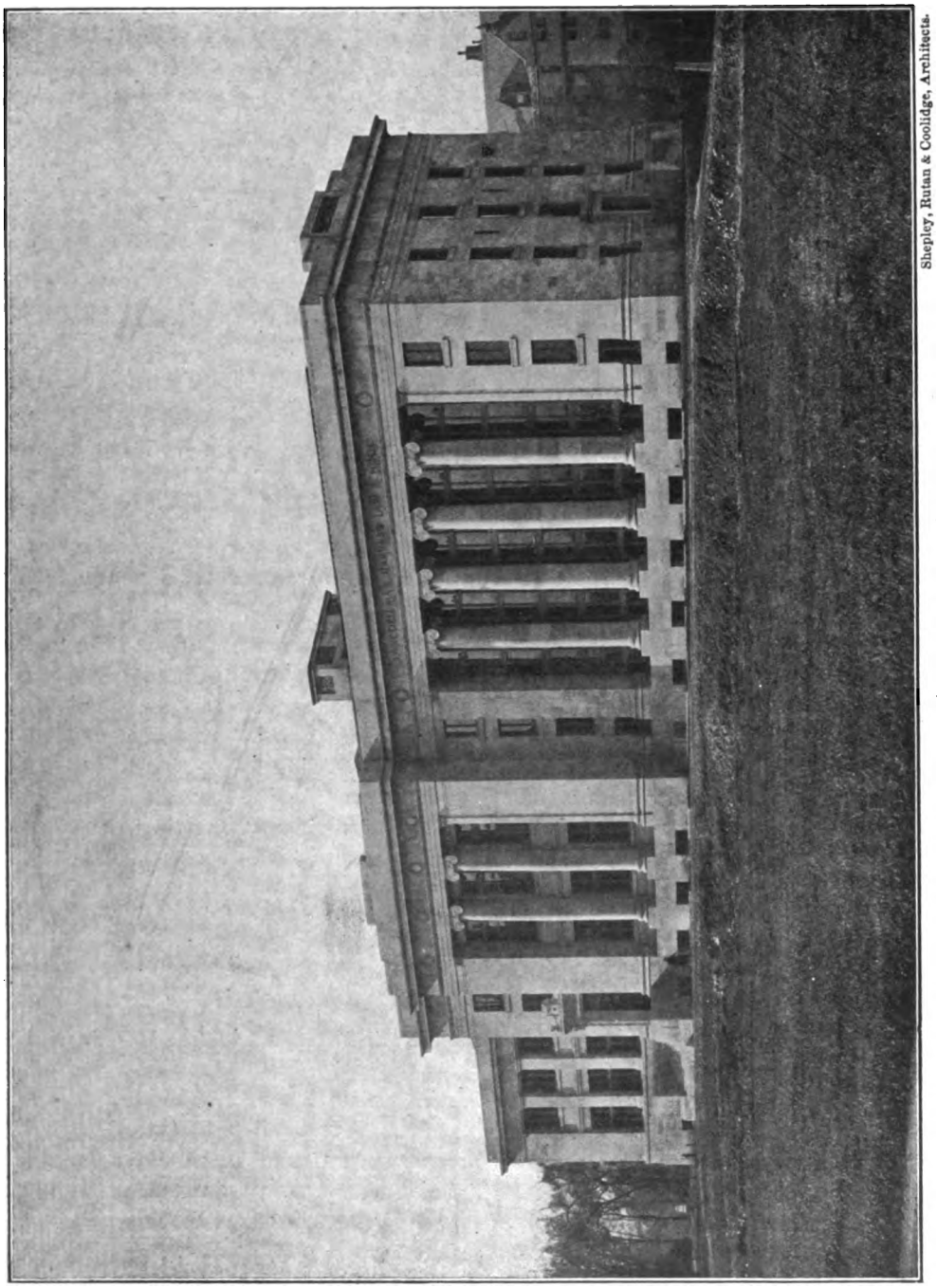


AUSTIN HALL
Occupied since 1883. Gift of Edward Austin, Esq.

Langdell Hall is named for the late Professor C. C. Langdell, who was appointed Dane Professor of Law Jan. 6, 1870, and Dean of the Law Faculty Sept. 27, 1870; and who resigned as Dean June 18, 1895, and as Dane Professor Oct. 9, 1900, thereupon being appointed Dane Professor *Emeritus*. Professor Langdell died July 6, 1906; but the name of Langdell Hall had already been decided upon and the foundation had been laid. It is worthy of notice that at Harvard no other building has been named in honor of a living professor.

The building was not ready for occupancy at the beginning of the academic year 1907–08, but parts of it were ready shortly afterwards. The first lecture was delivered at 9 o'clock, on Oct. 17, 1907. By the beginning of 1908 nearly the whole of the building was in use.

The present dimensions of Langdell Hall are: from north to south, two hundred and twenty-nine feet; from east to west, seventy feet in the stack, eighty-two feet in the wing south of the stack, forty-seven feet in the wing at the extreme south; and eighty-three feet from basement to roof. The



Shepley, Rutan & Coolidge, Architects.

LANGDELL HALL,
HARVARD LAW SCHOOL.

cost, including plants for heating and ventilation, but not including furnishing, has been $365,000. The cost has been paid out of the surplus earned by the school. When the building is completed, its length will be increased by one hundred and thirty-two feet. In other words, the portion now built is about two-thirds of the whole building. The material is buff limestone. The style is classic. The general effect is square and lofty, reminding one of other works of the architects, Messrs. Shepley, Rutan & Coolidge. Perhaps the most noticeable features are the great Ionic columns — which may serve as reminders of the modest columns that used to ornament Dane Hall. The east and west fronts are identical.

In the northern part of Langdell Hall as it now stands, but in the central part of the building as it is to be, is the library stack, which ultimately will accommodate three hundred thousand volumes. As yet only the eastern half of the stack is fitted with shelving, the western half being used for one supplemental reading room and one small lecture room. At the north and south ends of the stack are studies for the professors and the librarians. The stack is fireproof, with glass floors and metal shelving; and on one of the floors are desks for the professors, separated by glass partitions for the sake of quiet, so that the professors have that ease of consulting the books and one another which has long been an attractive feature of the law school.

South of the stack is a broader section of the building, containing on the ground floor a lecture room called Langdell Centre, which is somewhat larger than Austin North and accommodates about three hundred and fifty. Above this lecture room is the main reading room, somewhat larger than the main reading room in Austin Hall. Still farther south is a lower and narrower wing, containing on the ground floor a lecture room which accommodates about one hundred and seventy-five; and upon the upper floor is another reading room which connects with the main reading room by a passage in which are placed works of reference. Around the walls of the reading rooms are several thousands of volumes, chiefly reports that are duplicates of copies in the stack. The main reading room, the south reading room, and the passage connecting these two accommodate two hundred and seventy-seven; and the supplemental reading room in its stack accommodates eighty-four.

The public entrances to Langdell Hall are at the head of broad steps leading to the east and west ends of a corridor that runs between the lecture room called Langdell Centre and the one called Langdell South. There is also a subway connecting Langdell with Austin.

When the whole of Langdell Hall is built, there will be to the north of the stack precisely the same amount of reading room and of lecture room accommodation as is now found to the south of the stack; but the interior arrangements may differ in some details from the arrangements of the parts now completed. The present small lecture room in the stack is to become part of the region for storing books, and the present supplemental reading room in the stack is to become a corridor connecting the southern reading rooms with those which are to be constructed in the northern extension.

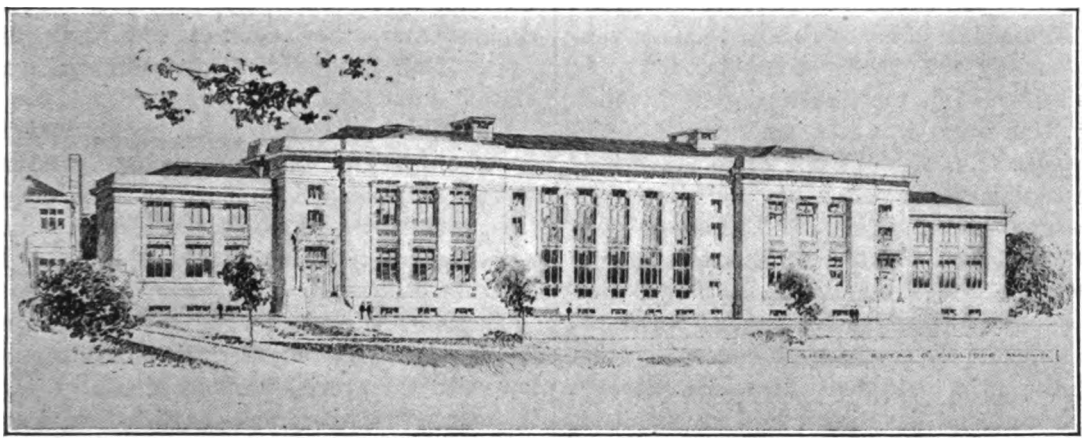
In addition to the features already described, there are various conveniences, including a room for the Harvard Law Review, metal lockers, a freight elevator, and an electric lift for books. The woodwork throughout is dark oak. It ought to be added that among the most attractive features are the adequate studies for the professors and the successful schemes for light and for ventilation. The walls will soon be ornamented with engravings and paintings, without, however, robbing Austin Hall.

According to the present mode of dividing the work of the school between the two buildings, Austin Hall is devoted to most

of the lectures in second year subjects and its reading room is supposed to be used by students of that year, for whose benefit the walls of the reading room are supplied with books as heretofore, and the stack is also provided with a large library; and Langdell Hall is devoted to lectures for first year students and for third year students, and its reading rooms are designed chiefly for them, and its stack holds the principal library, including duplicates of the books found elsewhere.

Between Langdell Hall and Walter Hastings there is to be something like a private yard for the law school, called the Law Court. Between Langdell Hall and Pierce Hall is a much larger yard. The view of Langdell Hall from either one of these yards is impressive, but Langdell Hall is so completely surrounded by other buildings that no adequate view of it can be obtained from the streets. It already dominates Holmes Field, for it is the largest and most striking building there. It is at present about twice the size of Austin. When finally completed it will probably remain for many years one of the largest buildings in Cambridge, for it will be at least fifty feet longer than Memorial Hall. In style of architecture and in color it differs emphatically from all neighboring buildings. In commenting upon this diversity, an English barrister said — as doubtless many an American lawyer will say — "From what I know of Professor Langdell's services to the law I am of opinion that a monument to him may appropriately be unique."

CAMBRIDGE, MASS., May, 1908.



PROPOSED NEW BUILDING
Langdell Hall

GERMAN IDEALS CONCERNING PRIVATE LAW

By Dr. Rudolf Leonhard

COMING over in order to lecture in Columbia University at New York about private law, I considered what matters could be of interest to American hearers.

At the close of my work here I am explaining briefly the results of my lectures. As an adherent of the historical school, which explains every law as a consequence of historical facts, I could not doubt that it is impossible to suggest a direct imitation of German law to the United States. The difference in the history of the two countries forbids any idea of this sort.

But in spite of this it seemed to be advantageous to recommend a consideration of the principal goals to which German jurisprudence is directed, because it is possible to go towards similar advantages in an American way.

There are especially four ideals followed in Germany, which may be of value for American politics:

1. The use of Roman texts for the education of future lawyers and judges.

2. The codification of the principles observed formerly in the unwritten law.

3. The tendency to avoid unnecessary differences in the private law of the various states.

4. The care for labor laws, especially for a workingmen-insurance in the cases of sickness, accidents and disability.

1. The Roman law will be cultivated by every nation as a splendid product of the history of former times. But that is not enough. We use its texts in Germany also for a practical purpose.

These texts mention general notions and terminologies which have been received by all peoples of European civilization, including the English people, and which came over to America with the English common law. The explanation of the initial steps of this development gives a deeper understanding of the modern practice, of which the rules have been created in former times. Besides that, they connect the jurisprudence of all European peoples and make a mutual understanding possible.

Unhappily the European books which have been written with such a purpose have always a national character, because they must be adapted to the special territory the practitioners of which should be educated by Roman ideas.

Therefore it can be suggested to American scholars to write a description of Roman law with the special purpose of connecting its contents with the English-American common law. That must be done in accordance with the same method, which the so-called Pandektists in Europe followed in instructing their pupils.

2. For codification a scientific preparation seems to be indispensable. A systematic science must be developed before a lawgiver can accept a system as the foundation of a written private law. Such a codification has been made especially in Prussia, in France and in most European states. Finally Germany obtained a civil code which has been in force since 1900.

The value of such a work is a political one. It helps to protect the interests of the poor people, who cannot protect themselves as well as the rich people can by the power which naturally is connected with the wealth.

By destroying the doubts which arise in practice a codified law gives to the less educated classes a feeling of certainty which helps one in the struggles of the life.

Therefore the European systematic science gives a splendid example for the English and the American Universities in order to show the methods which must be adopted

by them. In the United States the law, which must be condensed and explained in the form of written rules, must be the English-American law, not the European continental law. But the European continent must give its methods and its experiences to this work.

3. Very different from the codification is the harmonization or unification of the laws of different states, although both things, codification and unification, have been connected very often in the history of law. But such a connection of tendencies is not necessary.

That is important for America because the constitution of the United States forbids the creation of a common civil code as it exists for Germany.

But in spite of it you can come to a unification of the different American statutes and codes, as far as it seems desirable. Even Germany obtained a common commercial code in a time in which it was not yet perfectly united. The Alliance, which connected only superficially the German states, recommended a project of such a code and the single states published it, every one as a special law of its own. The result was a common commercial law. In this way you can arrive by agreement between the single states at a similar goal, as you have already approximated in the law relating to negotiable instruments.

Perhaps you will continue this method in order to unite all, which cannot longer be permitted to remain different in the various states on account of the increasing unity of commerce and of national life.

The German experience proves a fact which is very important for American politics. There were in Germany people who feared to remove the difference between the laws for the whole empire. They said that the people would be unhappy if deprived of their special laws. But after the unification every one was content, notwithstanding some special paragraphs which aroused a protest (for instance the law about the damage caused by animals), but even this protest concerned the whole empire, not the special districts.

Naturally we have even now in Germany for the special parts of the empire particular laws, if the interests of these parts have a special character; for instance, the laws concerning water and water rights are very different in Germany from this point of view. But there are only a few matters which demand such a distinction. Generally it is a benefit to unite different laws, because such a union prevents the evasion of the laws, as you see in the laws of divorce and of forbidden marriages; laws which are evaded very often by people going over the frontier. Moreover, the larger a district is in which a law is applicable, the more scholars and practitioners can unite their mental forces to cultivate its theory and practice.

Therefore all interchanges of lawyers, judges and professors between the single states have a value for the nation by uniting the different parts to a healthy unity.

4. At last I mention the workingmen's insurance, which has been described very well by an American author (Willoughby, "Workingmen-insurance"). This help is an obligatory one in Germany and is recommanded not only by humanity, but also by political reasons. It diminishes the embittered feeling of the bread masses and cleans the sentiments, which are empoisoned by a dangerous agitation. Besides that, it gives to the working classes an interest in the conservation of the present social order, because a social revolution would damage them by destroying their own hopes of support and of a pension.

In America it would not be possible to enact such an obligatory insurance by federal legislation, but even its creation by the single states would make enormous difficulties.

Perhaps the whole workingmen's insurance seems not to be so important for America as it was for Europe, because the high wages

of this country make it easier for the workingmen to care for themselves by private contracts with insurance companies.

But in spite of this no European improvement of the condition of the bread masses can be overlooked entirely in a country which is connected so closely with Europe, where the laborers enjoy very much the new laws created at first by Germany.

The most convenient would be for the American people to go to this European goal in an American way. In the same tendency, which leads you to care for religion and science by private activity, you could collect or simply give funds in order to help the working people in cases of emergency.

In projecting the rules for the administration of such funds you could use the experience which has been enjoyed in Germany and in some other parts of Europe in this matter hitherto.

After all, it seems that it is worth while to connect the European science of private law with the American more than has been done up to this moment. I hope to work in this direction as much as possible in the future.

New York, N. Y., May, 1908.

LACSON *v.* LACSON

By James H. Blount

THE case of Lacson *v.* Lacson is a *cause celèbre* in the legal annals of the Island of Negros in the Philippine Archipelago. Negros is the great sugar country of the Philippines. The plaintiff in the above stated case, Don Aniceto Lacson, and the defendant, Don Hilario Lacson, his uncle, were two of the largest sugar planters in the Island. Prior to the law suit now under consideration, they had lived in peace and harmony as neighbors, for many years, on adjoining plantations along the banks of a river which had served to make their estates almost as fertile as the valley of the Nile. By a judicious use of the waters of this river in irrigating their respective cane fields, both had grown rich and prosperous, and both had reared large families in comfort, and even affluence. Just exactly what it was they had fallen out about I never knew, although some of the villagers in the town where the case was tried used to say that the real cause of the trouble had nothing whatever to do with the land, which was the subject matter of the suit. They even went so far as to intimate that the estrangement or family feud was really traceable to the womenfolk of the families in question, and their playing at precedence with each other in the social whirl of the country-side. However, let the case be stated.

In the spring of 1903 a great drought, lasting for a number of months, visited the island of Negros. Prior to the institution of the suit, the plaintiff had long been getting water from the river to irrigate his cane fields by means of a canal which passed through the lands of the up-stream man, the defendant, and then flowed on down to his lands. During this drought the up-stream man had entirely cut off the plaintiff's water supply. Plaintiff thereupon dug another canal. Upon learning that the work of digging this canal was in progress, defendant sent from his estate down stream a detachment of laborers, who fell upon the laborers of the plaintiff, beat them severely, and put them to flight. The point was that defendant claimed that the canal was being dug upon land which belonged to him; while the plaintiff stoutly maintained that it did not belong to his adversary but to himself, and if not to himself, then that title was still in the State. The strip of land in dispute was not forty feet wide, but it was the only available route by which the plaintiff could tap the river and get his lands irrigated, otherwise his great cane fields would necessarily dry up. It was a splendid estate, worth a great many thousand dollars, and in the absence of some means of irrigation would become worthless. The strip of land in dispute was so tiny an area as to be worth very little to the defendant, even if he did own it, but under the circumstances, it was worth a very great deal to the plaintiff. Obviously these facts were within the knowledge of both parties. Hence it was that I made the inquiry which disclosed that personal ill feeling was what kept the up-stream man from agreeing with his adversary quickly upon some compromise instead of seeking thus to injure him.

The little battle of the "canal zone" was followed shortly by a suspension of hostilities brought about by a temporary injunction against the up-stream man, granted by a circuit judge who had been sent to Negros especially to pass upon the matter, the regular judge of the district (a native) being disqualified by reason of kinship to some of the parties in interest. This restraining order had forbidden the up-stream man from interfering with the digging of the canal by the plaintiff until the further order of the court. During the aforesaid suspension

of hostilities the feud took on proportions as exciting and picturesque as if the dispute had occurred in Kentucky instead of Negros. Everyone in the region round about the disputed strip of land took sides with one or the other of the parties. So high ran the feeling that upon more than one occasion the partisans of one side, after a spirited discussion of the merits of the case, had even come to blows. When the case came on for a final hearing, it fell to the lot of the undersigned to be sent to Negros to dispose of it. This was in the fall of the year, after the dry season had set in. The roads being in fairly good condition at that period of the year, farmers from far and wide came to town to attend the trial. They have in the Philippines a small, square, two-wheeled vehicle, called a *carromata*, having a seating capacity for four people. During the whole three weeks of that trial, from 30 to 40 of those vehicles flocked to town each day, bringing the partisans of the respective litigants, who had come to lend moral aid and comfort to one side or the other, and also to enjoy the time-honored — but not otherwise honored — pleasure of hearing their friend's lawyer brow-beat, abuse or ridicule the witnesses on the other side. Every day throughout the trial the court room was crowded with from one hundred to one hundred and fifty of such visitors, who, notwithstanding the truly beautiful reverence for authority characteristic of the Filipino people, had to be called to order by the court more than once, and admonished not to again betray their emotions so audibly as to disturb the progress of the cause. It was a very tedious trial. Clouds of witnesses appeared for the plaintiff, and other like clouds showered upon the court records the testimony for the defendant. There is a lamentable dearth of Spanish stenographers in the Philippines. This is true even in Spain. In the early days of American occupation, during the existence of the military government, Governor General MacArthur, to whose headquarters the writer was attached as one of his legal advisers, finding no stenographers in the Philippines able to take down Spanish in shorthand, had to have some brought out from Madrid through the co-operation of our Minister there. These, however, were so much needed in Manila, that very often, as in the present case, it was necessary outside Manila, to take the testimony down in onghand, the official language of the courts of the Philippine Islands being then, as it still is, Spanish.

It was very trying upon one's patience to have to sit and listen to witness after witness, whose testimony could of necessity travel only as fast as the pen of the Deputy Clerk of the court, especially when, as was often true with many of them, it was clear that whatever the real truth about the ownership of the strip of land the witness was unworthy of belief, being simply there as a partisan of the one by whom he had been subpœnaed. At the end of three weeks, the Court knew as little about who was the real owner of that strip of land as it did at the beginning of the trial. Night after night of reflection upon the testimony adduced during the day brought no light upon the real merits of the issue. It looked at one time as if it would be necessary simply to count up how many dozen witnesses had sworn for the plaintiff, and how many for the defendant, and just let the majority rule. At last a light broke in upon my brain. Why not adjourn court to the premises in dispute, which were situated only about five miles from the town of Bacolod, the provincial capital city, where the trial was being held? This suggestion was made from the bench the next day. It was promptly acceded to by counsel for both sides. Accordingly the presiding Judge, the Clerk and his Deputies, including the one reporting the trial, the counsel on both sides, numbering some six or eight, the parties litigant, each with his army of partisans, drove out to the plantation by the river, assembled at the premises in dispute, and held a session in

primeval fashion, under the open sky. It was indeed a memorable and an amusing caravan which the undersigned on that September morning led from Bacolod to the sugar estates of the Lacsons. The memory of it, as the writer saw it from time to time; when glancing back, winding its way along the sunlit road, is still vivid, and still serves to provoke a smile at the foibles and unnecessary strife which so often make their appearance among mortals. Upon reaching the disputed strip of land hereinbefore designated as the "canal zone," and opening the session there, the Court observed for the first time that the defendant did not even speak to the plaintiff, although the plaintiff was his nephew. Asked if plaintiff was his nephew, and if so whether of the whole blood or the half blood, he replied very quaintly, but with manifestly intense feeling, that he was not now his nephew at all, because he had disowned him as such on account of his digging this canal.

The visit to the premises brought out a fact which made the true legal status of the disputed strip of land as clear as the noonday sun, as simple as Columbus' traditional solution of the problem of standing an egg on its end by slightly crushing it. The disputed strip was on the right bank of the stream. The right bank was very low ground, while the left bank was very high. It was perhaps twenty feet from the vegetation on the top of this bluff to the surface of the water of the river. There was an abundance of foliage and grass on that side, which extended down the almost perpendicular bluff of the left bank, to a certain point, where it suddenly stopped. The line of the lowest limit of vegetation, clearly indicating the ordinary high-water mark, was plain, distinct, unmistakable. The soil of the bank being fertile, vegetation could of course live upon it down to the ordinary high-water mark, and must necessarily cease there because of the more or less constant erosion. This ordinary high-water mark, looked at from the opposite bank, that is to say from the side where the plaintiff had dug his canal, was so high that you could readily see measuring only with the eye, that the tiny little canal zone in dispute would always of necessity be submerged whenever the river rose to high-water mark. In the Spanish jurisprudence all matters connected with irrigation are dealt with in a general law which went into effect on August 3, 1866, and is known as the "Law of Waters." This is an extremely interesting law, and a very elaborate one. It will be remembered that the Spaniards at a very early date in their history had already carried the science of irrigation to a very advanced stage. They had learned it from the Moors, who brought it over from Africa, where irrigation of the soil had been necessary from the earliest times for the subsistence of man. The law referred to was thus the result of intimate acquaintance with that department of science which it purported to regulate. Article 70 of this law of 1866 provided: "The natural bed or channel of a . . . river includes the land usually covered by its waters at ordinary high water mark." A subsequent Article of the same law provided that the natural beds or channels of rivers are the property of the State. Clearly therefore the land in dispute, being part of the natural bed or channel of this river, that is to say, part of the land usually covered by its waters at ordinary high-water mark, was the property of the State and not of the defendant. The plaintiff, therefore, was clearly entitled, so far as defendant was concerned, to dig his canal. Accordingly the temporary injunction issued in the preceding spring against the defendant was made perpetual.

The plaintiff had claimed a large amount of damages in his petition, about twenty thousand dollars, if memory serves me aright, but no attempt was made during the trial to show any such damages. The stress of the conflict being centered so completely upon the main issue, the question of damages was lost sight of both

by the plaintiff's counsel and by the plaintiff himself, and also by the Court in its final decree.

The law of procedure of the islands allowed ten days for an appeal. Within a very few days after the decree aforesaid, it began to be noised abroad in the village of Bacolod and throughout the surrounding country, that the successful litigant was preparing to give a *fiesta*, which being interpreted literally means a feast, but which in this instance specifically meant a dinner dance to be given at his palatial country house, in celebration of his victory, and incidentally to taunt his defeated opponent. The second largest city of the Philippine Archipelago is called Iloilo. One of the causes contributing to its abounding prosperity is that the sugar crop of Negros reaches the markets of the world via Iloilo, which is a splendid seaport, and also a port of entry from which the sugar of Negros may be shipped directly to China, Australia, or India without stopping at Manila. The plaintiff, Don Aniceto Lacson, had a wide circle of acquaintances in Iloilo, as a wealthy planter naturally would have in the city nearest his estates and this acquaintance was the more intimate because he had several highly accomplished and handsome daughters. The Lacson girls had been educated in the French Convent at Hongkong; they spoke French fluently and were extremely good musicians. The Lacson mansion was provided with a fine piano upon which the daughters often performed to the delight of visiting friends. Their home being five miles "from town" — *i.e.*, from Bacolod, and Iloilo being just across the straits about 20 miles from Bacolod, the Lacson girls often visited the larger city, where they were always feted and entertained during their stay. Young *caballeros* always danced attendance upon them with enthusiasm. As the time drew near for the Lacson *baile* (ball) all social Iloilo was on the *qui vive*. Don Aniceto was not a man to do things by halves. He chartered a steamer when the time came, and brought over a whole ship load of guests from Iloilo, to attend his entertainment. Naturally the defeated defendant chafed under the noise of his adversary's preparations for signalizing his victory. On the tenth day after the decree was rendered, which was also the last day remaining for appeal, the counsel for the defendant came to the courthouse and "had the honor to announce," in very courtly fashion, that the defendant was not going to appeal. This was of course extremely gratifying to me, because it was an implied admission that the judgment was a just one. I expressed my gratification, and told him with earnest cordiality that inasmuch as a house divided against itself cannot stand, it was most devoutly to be wished that his client, the uncle, should be reconciled to the plaintiff, his nephew, forget the family feud, and live hereafter upon terms of amity and concord. Counsel replied with true Castillian elegance of manner, and said he would convey this message of peace and good will to his client. Whether he conveyed the message or not, I do not know, but certainly he succeeded in soothing the wounded feelings of the vanquished. It seems, as was afterwards learned, that he pointed out to his client that while the plaintiff's prayer for injunction had been granted, yet his prayer for damages had not been granted, and therefore he, the defendant, had been as victorious as his adversary. The defendant at once adopted this cheery view, and diligently circulated this theory of the case among his disappointed friends and partisans, who likewise accepted it and reiterated it with enthusiasm, whenever the partisans of the plaintiff were heard boasting that he had won the case. A day or two after the counsel for the defendant made to the court the announcement above mentioned that there would be no appeal, the presiding Judge received an invitation from the defendant to a dinner-dance, which invitation recited that it was to be given by the defendant in compliment to his counsel.

It was evident that he proposed to save his prestige, by simply claiming a victory and celebrating it. He proposed to counteract the effect of the ball to be given by the plaintiff upon his own prestige in the community; in other words, he was going to give a rival ball himself. Though invited to both balls, I did not go to either, because if I went to one, I would have to go to the other, and that meant staying up nearly all night, and acquiring indigestion by the consumption of ice-cream, warm beer, cake and candy, to say nothing of the prodigal viands which would necessarily precede these. However, both balls were duly given, and were said to have cost each of the givers some 1500 pesos ($750, American money). When I left Bacolod for Manila, we stopped at Iloilo. The local paper there published in Spanish had an account of the case, and of the two rival dinner-dances, remarking at the end of the narrative, that it was a rare Judge who could decide a case in favor of both sides. The story of the case of Lacson *v.* Lacson was repeated to Governor Taft, who, according to my informant, manifested his edification by one of those genial, hearty, Santa Claus laughs, which his friends always enjoy nearly as much as he does. Better still His Honor was soon given a better circuit.

WASHINGTON, D. C., May, 1908.

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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 LAYMAN AND LAW REFORM.

Amid the many movements for reform now pressing for public attention there is danger of indifference and weariness of flesh. It is inevitable that some, however worthy, which lack dramatic interest and organized support, should be lost in the eddies of the larger current. Lawyers as a class are justly regarded as conservative. This, doubtless, is the necessary consequence of their training in submission to precedent. It is only by the utmost courage and patience that they can usually be aroused to sustained radical effort. It is distressing, therefore, when they really exert themselves to reform glaring anachronisms, that their efforts should be thwarted by unexpected public conservatism due to very different causes. One of the mediaeval survivals which England has long since buried is the fiction of identity of husband and wife and the prohibition of transfers and contracts between them. Many of our states, following the English example, have abolished the absurd consequences of this ancient fiction. Massachusetts has gone more slowly in this direction. Last year, however, Mr. Ernst of Boston, who has been active in advocating the removal of the last bar to complete freedom of contract, tried single handed to obtain the passage of his bill in the legislature. This year his bill was supported and advocated by a group of the most eminent lawyers of the bar. There was no public opposition, but the indifference of legislators and the conservatism of a few uninformed members, sufficed to defeat it. It was a plain case of lack of enlightenment. Though the judges who have had to deal with these questions for years have gone to the verge of their powers in suggesting in their opinions their dependence on the legislature to remedy this defect in our jurisprudence, and individual lawyers at last have endeavored to transmit these instructions to the legislature, laymen, laboring perhaps under an impression that in this was hidden some assault on the sanctity of marriage, forced its defeat. One wonders what would have happened had the bill been supported by a strong state bar association. It would have avoided the objection that it was the work of only a few Boston lawyers. It is to be hoped that another bill, now before the same body, will be given more careful attention. As the result of long controversy between the two professions, physicians and lawyers of Massachusetts united this year in proposing a bill to eliminate the abuses of medical expert testimony. The plan, in brief, is to authorize the court in its discretion to appoint a medical expert to investigate and report upon the medical aspect of a case, his report to be *prima facie* evidence. He is to be paid by the county, but his fees are to be refunded in civil cases by the losing party. Either party may call other medical witnesses, taxing only the usual witness fees, however, in the execution. Though there is some difference of opinion among lawyers as to the propriety of the change, the plan can hardly be regarded as radical in comparison with plans of this sort most frequently suggested; and since all are agreed that the present situation is intolerable, the experiment is at least worth trying, for its success can be determined only after application.

LAWYERS AND THE PREMIERSHIP.

The promotion of Mr. Asquith to be Prime Minister of England leads the *Law Journal* to note that

"It is nearly a hundred years since a lawyer was at the head of the Government. The last practising lawyer to occupy the position was Mr. Spencer Perceval, who was

assassinated in the Lobby of the House of Commons in 1812. Mr. Perceval, who, like Mr. Asquith, was a member of Lincoln's Inn, was successively Solicitor-General and Attorney-General in the Addington Administration. He may, indeed, be regarded as the only other practising member of the profession who has risen to be Prime Minister. Grenville was called to the bar at the Inner Temple in 1735, and Pitt at Lincoln's Inn in 1780, but neither made any prolonged attempt to practise, Pitt's only active connection with the bar being a single journey on the Western Circuit. It has apparently become less difficult for practising members of the bar to win distinction in the legislature. Mr. Asquith will preside over a cabinet in which the legal element is unprecedentedly large. Lord Loreburn, Mr. Haldane, Mr. Birrell, Mr. McKenna, Sir Henry Fowler, and Mr. Lloyd-George have all been practising lawyers. If the rumour that Mr. Lloyd-George will succeed Mr. Asquith as Chancellor of the Exchequer prove to be well founded, the two chief members of the Cabinet will be lawyers, the one a barrister and the other a solicitor."

TYPEWRITTEN WILLS.

The practice of typewriting wills was recently condemned by the surrogate of King's County, because of the ease of alteration. In the *New York Law Journal* a correspondent suggested that the following simple precautions would obviate these objections:

"(1) Have the testator sign at bottom of *each page*.

"(2) Have the typewriting free of erasures or interlineations, with all blank space ruled off.

"(3) Recite in the *in testimonium* clause the facts:

"(a) That the will is contained on so many sheets of paper.

"(b) That the testator has subscribed his name at the bottom of each sheet thereof, and 'to this, the last sheet thereof, he has hereto subscribed his name and affixed his seal,' etc.

"While no seal is necessary, and but two witnesses are required in this state, by adding the seal and a third witness a will thus executed is probatable in every state of the Union.

"It is my uniform custom to have *all* wills executed in this manner so as to provide against local intestacy consequent upon a testator becoming afterwards seized of real property in a state foreign to his domicile or to the place where the will is executed."

A still simpler precaution, and one which will prove most efficacious, is to make a letter press copy of the original typewritten sheets. After the sheets have once been wet and dried they are at least as difficult to alter as handwriting.

THE ENGLISH CAUSE LISTS.

It is interesting to those of us who are familiar with the crowded dockets of our large cities where a hearing is a matter of years, to read the comments of the *London Law Journal* upon the state of the Cause List in the land that was once the historic home of the Law's delay. Thus the *Law Times* of May second complains that on the civil list in the King's Bench division cases are still waiting trial which were entered as far back as last October. It is interesting to note that this extreme congestion is attributed to the fact that the workmen's compensation cases are all assigned to this division. The Chancery division seems to have more cases pending than the King's Bench division. There were 326 cases on this list, but it is stated that this is less than half the number pending in 1898. In the Appeal Court a hearing can be had within three months after the appeal is taken. It should be added, however, that the judicial statistics for 1906 just published indicate what the *Law Journal* describes as "a melancholy truth" that the volume of litigation in the High Court is declining. A study of the cause of this should be full of 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.

Among the articles of general interest to students of the law and its tendencies noted in this department this month special attention may well be given to Professor Bohlen's examination into the question of how far the law recognizes the moral duty to aid others as a basis of tort liability, Judge Schofield's discussion of the means of attaining uniformity of law in America, and Mr. John B. Sanborn's discussion of recent legislative tendencies. In narrower fields of inquiry there is the usual wide range of articles of merit on technical questions.

ADMIRALTY. "Jurisdiction in Salvage Cases," by James D. Dewell, Jr. *Yale Law Journal* (V. xvii, p. 513).

ADMIRALTY (Salvage). "Maritime Salvage and Chartered Freight," by H. Birch Sharpe. *Law Quarterly Review* (V. xxiv, p. 206). Answering the negative to following question:

"When a ship under charter proceeding in ballast to an outward port, there to load and bring back a specified cargo, is rescued from danger under circumstances which entitle her rescuer to rank as a salvor in the courts of this country, can the salvor make good claim for remuneration in respect of the freight then in course of being earned under the charter party?"

AGENCY. "The Execution of Sealed Instruments by an Agent," by Floyd R. Mecham. *Michigan Law Review* (V. vi, p. 552).

BANKING. "The German Bourse Law," by G. Plochman. May *North American Review* (V. 187, p. 742).

BIBLIOGRAPHY. "The Library," by Charles Morse. *Canadian Law Times and Review* (V. xxviii, p. 300).

BIOGRAPHY. The second volume of "Great American Lawyers" John Winston & Co., Philadelphia, 1908, is devoted to the judges and advocates who laid the foundations of our common law and our constitutional law at the beginning of the last century. Marshall and Tilghman represent the judges who dealt with constitutional questions. Luther Martin and William Pinkney were the advocates and William Wirt the Attorney-General who argued the early cases that now are our constitutional precedents. On the other hand, Parsons, Swift, Boyle, and Martin established on firm foundations the Supreme Courts in their respective jurisdictions, and adapted to the needs of this country the principles of English common law, especially relating to real property and the rights of the individual. Gould and Kent, although they also participated in the work of the courts, are remembered chiefly as expounders of the law. Gould was the central figure in the first law school in the country, at Litchfield, Conn. Kent, after establishing the first Court of Chancery in this country, made our first orderly presentation of the common law as well as of international and constitutional law through his lectures at Columbia and especially through his Commentaries. His enthusiastic biographer claims for him the first rank in American jurisprudence. The biography of Marshall is perhaps the most interesting of all, both because of the personal charm of the subject and the importance of his work; it shows us Marshall not only as the great statesman of the bench, but as the leading practicing lawyer in Richmond at the beginning of the century. The local interest attaching to the others will give to each reader his own special preference. The biographies are as follows: Luther Martin by Ashley Mulgrave Gould, Theophilus Parsons by Frank Gaylord Cook, Zephaniah Swift by Simeon E. Baldwin, William Tilghman by Horace Stern, William Pinkney by Alfred Salem Niles, John

Boyle by George DuRelle, John Marshall by William Draper Lewis, Francois Xavier Martin by William Wirt Howe, and James Kent by James Brown Scott.

CONFLICT OF LAWS. "Conflict of Control of Corporations," Anon. *Canada Law Journal* (V. xliv, p. 249).

CONFLICT OF LAWS (Renvoi). "Is the *Renvoi* a Part of the Common Law?" by Edwin H. Abbott, Jr. *Law Quarterly Review* (V. xxiv, p. 133).

"Suppose that A dies leaving movables in England, that according to English law his last domicil was French, and that according to French law his last domicil was English. Assuming that England will apply the law of A's domicil at the time of A's death, by what law will England distribute these movables? If the common law reject the *renvoi* (a noun coined from the French verb *renvoyer* to describe a doctrine which has excited much controversy in the civil law), England will consider irrelevant the French conclusion as to A's domicil and will apply the French statute of distributions immediately. If, however, the common law include the *renvoi*, England will accept the French conclusion as to A's domicil and permit France to send back the case to English law for farther determination. Or, to put the problem in another fashion, rejection of the *renvoi* implies but one application, acceptance of the *renvoi* two or more applications of the rules of private international law to the distribution of these movables. Which view is supported by principle and authority?"

Mr. Abbott's analysis of principles and cases results in the following conclusions:

"1. Since the law of the situs is supreme, the law of any other country can have only that effect which the law of the situs may give it.

"2. By the great weight of English and American authority, the law of the situs, in disposing of movables, will effectuate the law of the domicil.

"3. By the great weight of English and American authority, the domicil of the deceased will be ascertained with reference to the law of the situs, and with reference to that law only.

"4. The legal meaning of the phrase, 'law of the domicil,' with reference to the law of the situs is either (*a*) the private international law of the country in question or (*b*) the internal law of such country.

"5. If the law of the situs and the foreign law differ as to the criteria of domicil, and each effectuates the private international law of the other, there results an endless conflict as to domicil which never arrives at a rule of succession.

"6. Mr. Westlake's suggestion that the *renvoi* be stopped after one reference back is open to three objections: (*a*) It makes English law contradict itself; if it be invoked as the *law of situs* it incorporates the private international law of the domicil, if it be invoked as the *law of the domicil* it incorporates the 'internal' law only. (*b*) It involves reopening the question of domicil, which has already been decided by the court of the situs with reference to the law of the situs, and a reversal, by that court, of its prior decision. (*c*) Since the ascertainment of domicil with reference to foreign law would be final (*ex hypothesi*), this is equivalent to ascertaining domicil with reference to the foreign law in the first place, which is contrary to the great weight of authority.

"7. The present English law is settled adversely to the *renvoi* by *Bremer* v. *Freeman*, 10 Moo. P. C. 306, decided in the Privy Council in 1857, and followed in *Hamilton* v. *Dallas*, L.R. 1 Ch. 257 in 1875. Unfortunately these cases were overlooked in *Re Johnson* [1903] 1 Ch. 821, and *Re Bowes*, 22 T. L. R. 711 (Ch. D. 1906), which laid down a rule inconsistent therewith. The Privy Council case, however, remains the controlling decision. It is to be hoped, therefore, that when the question next arises, these cases may be noticed and on this point expressly disapproved. The single American case, Harral *v.* Harral, 39 N. J. Eq. 279, follows Bremer *v.* Freeman. At present, therefore, the *renvoi* cannot be considered a part of the common law, either on principle or authority."

CONSTITUTIONAL LAW. "The Eleventh Amendment and State Rate Regulation," by T. H. Calvert. *Law Notes* (V. xii, p. 25).

CONSTITUTIONAL LAW. "Rights of Aliens," by Edwin Maxey. *American Lawyer* (V. xvi, p. 171).

CONSTITUTIONAL LAW. The American Constitution. Lowell Institute Lectures, by Frederic Jesup Stimson. Charles Scribner's Sons, New York, 1908.

These lectures, although addressed to a general audience, are of interest to lawyers. The assumption made by the author is that the reader is not a stranger to the provisions of the Constitution of the United States and to their history and purpose. Merely elementary matters are consequently omitted, and the author devotes attention to less obvious discussion, often dealing pointedly with current questions. The result is necessarily a book that occasionally conflicts with the views of many readers and that certainly cannot be read by any one without profit.

The volume must not be confused with one by the same author, appearing almost simultaneously, and bearing a similar name, "Federal and State Constitutions of the United States."

CONSTITUTIONAL LAW. "The Law of the State and Federal Constitutions of the United States," by F. J. Stimson. The Boston Book Co., Boston, 1908. (Price, $3.50.)

The writing of this book required vast and careful research. The greater part of the volume is a comparative view of the important provisions in the constitutions of the several states. Here, for example, one finds a condensation of the various provisions as to eminent domain, the right of suffrage, and taxation, with verbatim extracts whenever necessary. This part is a revision of the constitutional division of the author's American Statute Law. Another part shows minutely, with the aid of a very ingenious diagram, the division of national and state powers. Another part gives an historical digest, in chronological order, covering English social legislation from the time of the Conquest. Another part gives verbatim, with an arrangement according to topics, the constitutional principles protecting personal liberties and private rights as expressed in constitutional documents from Magna Charta through the Constitution of the United States; and herein one can trace the very words that have, from time to time, embodied approximately the same ideas. The parts already described are indispensable to any one interested in the comparison or the history of constitutional provisions; and no one not interested in such topics can appreciate the labor represented by these pages and the extent to which they aid future investigators. Prefixed to these valuable condensations of materials are eleven chapters in which the author, in the light of the researches condensed in the other parts of the volume, gives some of his own conclusions, chiefly showing the historical development of constitutional principles. The titles of these chapters are: Introductory; The Right to Law; The Right of Liberty; Chancery and the Injunction Order; The Right to Labor and Trade; The Right to Property; Other Constitutional Rights; Rights of Government; Government Organization; Federal and State Powers; and The State Constitution.

The volume is devoted to the constitutions themselves as distinguished from the decisions under them. It is prepared, as the author explains, not so much for lawyers as for students. Yet no lawyer in investigating a question of either state or federal constitutional law should neglect to examine these pages. Here he is likely to find comparative or historical matter showing how the same topic has been treated in other jurisdictions or at other times; and even if he finds no such matter he will have ascertained that the phraseology with which he has to deal is unique and hence probably the subject of judicial decision in only one locality.

As state constitutions are too much neglected, this volume deserves praise for encouraging the study of them. It is equally useful in studying federal questions. The diagram of state and federal powers has been spoken of already; but it deserves to be spoken of again, for it is extremly enlightening, and, as the author well says, "if the reader of this book will take the diagram and carefully, for himself, decide (for on some clauses there may be a difference of opinion) just what sentences or sections of the Constitution, or matters or powers mentioned therein, fall within each of these nine divisions of our sphere of the total powers of government, he will almost, by the very study required, the close examination of the Constitution necessary, become a good American constitutional lawyer." He adds that many decisions of the Supreme Court have done

something towards settling the more debatable areas in his classification. Thus here, as elsewhere, the volume has the excellent trait of awakening interest and encouraging further investigation.

CONSTITUTIONAL LAW (Restricting Hours of Labor). "Due Process of Law and the Eight-Hour Day," by Learned Hand. *Harvard Law Review* (V. xxi, p. 495). Arguing that the possible wisdom of an eight-hour law, and therefore its validity, being already fairly within the field of rational discussion, should be passed upon by the legislative body and not by the court.

CONSTITUTIONAL LAW (Michigan). "The Michigan Constitutional Convention," by John A. Fairlie. *Michigan Law Review* (V. vi, p. 535). An account of the convention and exposition of the important changes in the revised constitution which is to be submitted to popular vote in November.

CONTEMPT OF COURT (Libel by a Stranger). "The King *v.* Almon I," by John Charles Fox. *The Law Quarterly Review* (V. xxiv, p. 184). The judgment in Rex *v.* Almon (1765, Wilmot's Notes, p. 243), an attachment for libeling the Chief Justice, Lord Mansfield, was prepared but never delivered, as the prosecution was dropped. The case has, however, often been cited. Pointing out certain distinctions between contempt of court by disobedience to process by a party and contumelious behavior to the court by a party or a stranger, the author says the first adoption of the summary jurisdiction upon contumelious behavior has not been clearly traced, but instances can be cited to show the early practice. It is the object of the present paper to show that the jurisdiction in the case of a libel on the court by a stranger (the offense in Almon case) was the latest to be established, and that no recorded instance is to be found earlier than the eighteenth century. It is to be continued.

CONSULAR COURTS. "American Consular Jurisdiction in the Orient," by Frank E. Hinckley, Doctor of Philosophy, Columbia University School of Political Science; Clerk of the United States Court for China. Washington, 1908. 8vo, pages 283.

This is hardly a law book but, as the titles of the author would indicate, is an historical and descriptive statement of the jurisdiction exercised by the United States Consular Courts in Turkey, Egypt, and China. It gives an excellent summary of the history of Capitulations and Treaties conferring Exterritoriality in the Orient, and in particular a statement of the American Treaties. Then follows an examination of the acts of Congress for the establishment of Consular Courts and a description of the nature and jurisdiction of such courts and a brief and elementary discussion of the rights and liabilities dealt with in such courts.

An appendix contains pertinent treaties, statutes, and executive orders, rules of court, and other interesting matter. While the book can hardly be described as possessing independent authority it is a handy compilation of information which would be useful to any one having to do with the Consular Courts of the United States.

CONSULAR COURTS. "Consular Jurisdiction and Residence in Oriental Countries," by Sir Francis Piggott, Chief Justice of Hong Kong. New edition, revised and enlarged. Hong Kong and London, 1907. 8vo, pages 326.

This is a new edition of Judge Piggott's excellent little book on Exterritoriality. While he deals only with the English Statutes and Cases the scholarly and lawyer-like quality of his discussion makes it a book which will be of the greatest assistance to American lawyers having occasion to deal with the subject. While a large part of the work consists of the statement and interpretation of the British Statutes governing the powers and the operation of Consular Courts, Judge Piggott goes at length and thoroughly into such questions as the nature of the power exercised under the treaty by a Consular Court, the power of Parliament to direct the action of such courts, and the application of the Oriental Law of Marriage and Divorce to the case of Mixed Marriages. Judge Piggott's conclusions appear to be entirely sound, and his criticisms of some of the English decisions are accurate and just.

He takes the ground which is now firmly fixed in England that in exercising its treaty power the Consular Court is acting merely as an agency in the native government. He further concludes that any act of Parliament

applicable to such courts which transcends or is contrary to the powers conferred by the treaty is void, — an interesting and rather daring opinion to be held by an English judge. On the question of marriage he takes the view that the doctrine of the Mormon case (Hyde *v.* Hyde), which is that an English court will not recognize or enforce a marriage created by the laws of a country which permits polygamy, applies only so far as to prevent the application in the case of such a marriage of some special provision of the English marriage law. He concludes, and we believe rightly, that on all questions outside the scope of the marriage law, for instance on questions of inheritance, of legitimacy, etc., such a marriage if valid by law of the domicile of the parties and of the place of celebration would be given full effect in England.

The book may be commended as a distinct contribution to the literature of this branch of the Conflict of Laws.

CORPORATIONS. "The Corporation Manual," by John Parker. Fifteenth annual edition. Corporation Manual Company, New York, 1908. (Price $6.50 net.)

This work, which was formerly called the American Corporation Legal Manual, appears under a new title and with a new and uniform classification of topics conforming to the accepted digest classification. It consists of summaries of the corporation laws of all the states and of Mexico and Canada, with references to statutes and decisions. It concludes with a valuable collection of charter forms.

CONVEYANCING (See Real Property).

CORPORATIONS. "The Status of Provincial Companies," by J. D. Spence, *Canadian Law Times and Review* (V. xxviii, p. 239).

DICTIONARIES. Mozley and Whiteley's Law Dictionary, 3d edition by Leonard H. West and F. G. Neave, Butterworth & Co., London, 1908, 369 pages. A compact volume of definitions with few citations.

DOMESTIC RELATIONS. "Family Safeguards of a Semi-barbarous Code," by Joseph W. Rice, *Law Notes* (V. xii, p. 294).

DOMESTIC RELATIONS. "Marriage with Deceased Wife's Sister," by (I) A. McLeod, (II) J. D. Falconbridge, *Canadian Law Times and Review* (V. xxviii, p. 253).

EMPLOYER'S LIABILITY. In the *Maine Law Review* for April (V. i, p. 4), Dean W. E. Walz begins a series of articles on "The Liability of Employers." The old common law developed in a time of enthusiastic individualism, and this is particularly conspicuous in the fellow servant rule and the doctrine of assumption of risk. As society has tended toward the more collective organization the courts in the absence of legislation have continued to apply the common law rules, but, though fair enough when first enunciated, they have had the effect of throwing on the employee the whole burden of all the accidents due to the fearful and inevitable yet ordinary risks of modern business. The era of individualism had been ushered in with the applause of the multitude, but equality before the law was to many a great disappointment. The author believes that if the courts would accept as a principle in deciding these cases that "there is responsibility only where there is freedom of action," just results would be attained without further legislation. In Teutonic countries the sane conservatives slightly outweigh in the law the sane progressives, but in the legislatures the balance is just slightly reversed. Hence, we turn to the legislature for our remedy.

GOVERNMENT. "The States and Federal Government," by Woodrow Wilson, May *North American Review* (V. 187, p. 684).

HISTORY. "The Fall of Hummel," by Arthur Train, June *Cosmopolitan* (V. xlv, p. 28).

HISTORY. "A City Without Records," by Richard C. Harrison, *American Lawyer* (V. xvi, p. 155).

HISTORY (England). "The House of Lords. Its History and Constitution, I," by Charles R. A. Howden, *The Juridical Review* (V. xx, p. 16).

HISTORY (English). "The Legal Profession in the Fourteenth and Fifteenth Centuries, II," by W. S. Holdsworth, *Law Quarterly Review* (V. xxiv, p. 172). Principally devoted to the Inns of Court.

INHERITANCE. "The Mitakshara Theory of Sapindaship in Hindu Law," by S. Venkatachariar, *Allahabad Law Journal* (V. v, p. 103).

JOINT STOCK COMPANIES (England). "The Evolution of the English Joint Stock Trading Company," by Frank Evans, *Columbia Law Review* (V. viii, p. 339). To be concluded.

JURISPRUDENCE. "Case Law," by Surendra Nath Roy, *Allahabad Law Journal* (V. v, p. 123).

JURISPRUDENCE. "Law: Its Origin, Growth, and Function," by James Coolidge Carter, G. P. Putnam's Sons, New York, 1907.

The late Mr. Carter was best known in his lifetime as one of the leaders of the New York bar; but his posthumous volume entitled "Law: Its Origin, Growth, and Function," is theoretical rather than practical, and must be classified with works on analytical jurisprudence. The volume deals with such general questions as What is law? and How is law made? and What is sovereignty? and What are the functions of the judiciary and of the legislature? This is a rather unusual field for an active practitioner, but Mr. Carter's entrance upon it is easily traceable to one of his well-known activities. Many years ago he was prominent in opposition to the adoption of the proposed Civil Code of New York. Thus he was led to prepare pamphlets against codification and to make addresses upon kindred topics. The ultimate result was the present volume, embodying lectures which were intended to be delivered at the Harvard Law School.

The general doctrine of the volume is that law has its origin in custom and that to custom should be left almost exclusively the growth of law. The development of this doctrine causes the author to travel ground that is not new; but eventually, through an argument which gives prominence to familiar instances wherein statutes have been disregarded by hostile courts, he is led to adopt a somewhat novel and extreme position, for his conclusions seem to be substantially that statutes which are not enforced are not law, that statutes will not be enforced unless they harmonize with custom, and that hence — save in rare instances — law cannot be made by statutes. These conclusions, however, are not essential to the author's chief contention, that the growth of law should usually be left to custom and that codification is an undesirable mode of preventing normal growth.

The author's views demand attention because of his eminence on the practical side of the profession, and they do not lose in interest through being to a great extent the fruit of the author's personal thought, largely uninfluenced by the enormous mass of literature with which the subject is already incrusted. Even a reader who has not time to examine the whole volume should read the criticism upon Austin's and Maine's theories of law and of sovereignty (pp. 181–204), and also the discussion of the systems of Justinian, the Code Napoleon, the Louisiana Code, and other nominal or actual instances of codification (pp. 296–319).

JURISPRUDENCE (Meaning of Fictions). "An Example of Legal Make-Believe," by P. J. Hamilton-Grierson, *The Juridical Review* (V. xx, p. 32).

A study of the forms of adoption practiced among primitive peoples, explaining them as examples of the beliefs that an effect is produced by imitating it or that the nature of anything inheres in all the parts. The first principle explains the simulation of birth or suckling, the second such ceremonies as include the exchange of substance, including in it not only a man's blood, saliva, hair, and the like, but also his garments, weapons and name. Exchange of substance creates a bond so intimate that its rupture cannot fail to produce evil consequences to the man who breaks it. One giving to another "gives part of himself and thus brings that other into close contact with himself — a contact partly spiritual and, in part, material. It is this notion of union by contact which underlies the form of binding the parties together by the adopter's girdle, that of partaking of a common meal, or taking part in a common sacrifice or sacrament, that of drawing on the shoe as practiced in the countries of the North, and that of cutting or touching the hair of the person to be adopted."

JURISPRUDENCE (Roman Dutch Law). "Modern Roman Dutch Law," by W. R. Bisschop, *Law Quarterly Review* (V. xxiv, p. 157). An outline of Roman Dutch law and its history.

JURY SYSTEM. "Jury Justice," by Hector Burn Murdoch, *The Juridical Review* (V. xx, p. 59). Arguing that trial by jury is no longer a valuable institution for administering justice.

LEGAL EDUCATION. "The Study of Law in Roman Law Schools," by Charles P. Sherman, *Yale Law Journal* (V. xvii, p. 499).

LEGAL EDUCATION. "The Law Teacher: His Functions and Responsibilities," by H. B. Hutchins, *Columbia Law Review* (V. viii, p. 362).

LEGISLATION (United States). "Some Recent Legislative Tendencies," by John Bell Sanborn. *Columbia Law Review* (V. viii, p. 384). In Mr. Sanborn's opinion the great increase in the variety of subjects dealt with by legislatures, and in the minuteness of regulation is a result of modern conditions, and is in response to a popular demand. This has caused the increase in length of session, noted almost everywhere, and often commented on unfavorably. This author, however, questions whether this increase in time is in proportion to the increase of work, for the reason that legislators cannot afford to give all that is required, to the neglect of their private affairs. The following paragraphs should be considered when discussing the payment of legislators.

"In this country, at least as far as state legislatures are concerned, conditions have been such that it has been practically impossible for one to adopt law-making as a vocation. The salaries are usually insufficient to pay even the actual legitimate expense of securing an election to office and the additional expense caused by a residence at the state capital. Our theory is that the legislator is a man with a regular business or profession, and that the legislative session need not interfere with his regular earnings. That theory is becoming somewhat disturbed by the increased time and attention required for the making of laws.

"It is undoubtedly true that there were in the past many members of legislatures who made law-making their business, and to whom it was very profitable. I believe, however, that the number of these has been constantly diminished during recent years. We must hope that this tendency is not to be checked by an increasing demand upon the time of the legislators and that the new conditions will not involve a return to the type of legislator comparatively common during past years. It must be remembered, however, that we have not in this country any leisure class from which we can draw our lawmakers, and even if such a class is being created the turning over of legislation to it would be a step out of harmony with American institutions."

MASTER AND SERVANT. "The Doctrine of the Liability of the Master for the Torts of His Servants and Its Anomalies in Illinois," by Charles Lederer. April *Illinois Law Review* (V. ii, p. 553).

LITERATURE. In the April *Illinois Law Review* (V. ii, p. 574), John H. Wigmore publishes a very interesting article containing a list of novels in which a lawyer especially should be interested. He classifies these into four groups.

(*a*) Novels in which some trial scene is described.

(*b*) Novels in which the typical traits of a lawyer, judge or the ways of professional life are protrayed.

(*c*) Novels in which the methods of the law in the detection, pursuit and punishment of crime are delineated.

(*d*) Novels in which some point of law affecting the rights of the characters enters into the plot.

The list is based upon a number of lists previously published with additions resulting from the reading of a group of students in the law school of Northwestern University. Dean Wigmore also in his article indicates other lines of classification of the more important authors.

MAXIMS. "Some Special Applications of Maxims Concerning Impossibility," by Nathan Newmark. *Central Law Journal* (V. 66, p. 367).

MAXIMS. "The Maxim that the Law Does Not Require Impossibilities," by Nathan Newmark. *Central Law Journal* (V. 66, p. 331).

MAXIMS. "Maxims Concerning Useless as Well as Impossible Things," by Nathan Newmark. *Central Law Journal* (V. 66, p. 349).

MORTGAGES (Redemption). "The Clog on the Equity of Redemption," by Bruce Wyman. *Harvard Law Review* (V. xxi, p. 459). Extended examination of the principle forbidding the clogging of the equity and of the leading cases that establish and illustrate it.

PAN-AMERICAN CONFERENCE. "Practice of the Learned Professions," by Edwin Maxey. *Yale Law Journal* (V. xvii, p. 516). Account of and comment on the convention adopted by the second Pan-American Conference in regard to the recognition by signatory nations of each other's diplomas or titles, authorizing the practice of the learned professions.

PARLIAMENTARY LAW. In the April *Maine Law Review* (V. i, p. 16) Asa P. Hines discusses most interestingly "The Origin and Development of the Law of the House of Representatives." It shows the causes of the development of our peculiar system of parliamentary procedure in the national House of Representatives.

PARTNERSHIP. "Limited Partnership in England and America," by Francis M. Burdick. *Michigan Law Review* (V. vi, p. 525). Comparing the British statute, in effect Jan. 1, 1908, legalizing limited partnerships, with similar legislation in the United States and Canada.

PARTNERSHIP. "Limited Partnerships," by J. Meillon. *Commonwealth Law Review* (V. v, p. 107).

PRACTICE. "The Lawyer and the Bar Association," by Richard S. Harvey. *American Lawyer* (V. xvi, p. 166).

PRACTICE. "The Organization of a Legal Business," by R. V. Harris. *Canadian Law Times and Review* (V. xxviii, p. 284).

PRACTICE. In *Government* for May (V. iii, p. 91) Hon. Lewis R. Works discusses "Public Court Trials and Mesmerism." He urges that weak minds are inflamed by suggestion by reading lurid newspaper accounts of criminal and divorce cases, and that open trials be suppressed.

PRACTICE (Germany). "Non-Contentious Jurisdiction in Germany," by Walter Weitzel. *Harvard Law Review* (V. xxi, p. 476).

PRACTICE (Pennsylvania). "Foreign Attachment in Pennsylvania (An Outline)," by John W. Patton. *University of Pennsylvania Law Review and American Law Register* (V. lvi. p. 137). History, present provisions and decisions on the foreign attachment law.

PROCEDURE. "Law Reform as Applied to Ontario Legal Appeals," by D. B. Maclennan. *Canadian Law Times and Review* (V. xxviii, p. 295).

PROPERTY. "The Working of the Land Titles Registration System in Ontario," by F. E. Hodgins. *Canadian Law Times and Review* (V. xxviii, p. 276).

PROPERTY (Future Interests). "Vested and Contingent Interests and the Rule against Perpetuities," by Roland R. Foulke. *University of Pennsylvania Law Review and American Law Register* (V. lvi, p. 245). A few suggestions on the subject of Professor Kales' recent criticisms of Gray's "Rule against Perpetuities."

PUBLIC SERVICE CORPORATIONS (Connecticut). "Street Railway Laws and Railroad Commissioners in Connecticut," by Arthur L. Shipman. *Yale Law Journal* (V. xvii, p. 526).

REAL PROPERTY (Easements). "The Easement of Light and Air and its Limitations under English Law," by F. Y. R. Radcliffe. *Law Quarterly Review* (V. xxiv, p. 120). An extended discussion of the state of the English law on the right to light and air. To be continued.

REAL PROPERTY (Egypt). "The Law Applicable to the Succession to Land in Egypt Owned by a British Subject," by F. R. Sanderson. *The Juridical Review* (V. xx, p. 47).

REAL PROPERTY (Scotland). "Registration of Title and Scottish Conveyancing," by J. S. Sturrock. *The Juridical Review* (V. xx, p. 1).

REAL PROPERTY. "Alienations by Married Women without Separate Examination," by A. E. Randall. *Law Quarterly Review* (V. xxiv, p. 202).

REAL PROPERTY (Easements). "Can an Easement be Granted in Perpetuity without Words of Limitation?" by Arthur Underhill. *Law Quarterly Review* (V. xxiv, p. 199). Arguing briefly in the affirmative and con-

cluding " that the practice of conveyancers in using words of limitation in the creation of easements *de novo* has been merely *ex abundanti cantela*.

ROMAN LAW. The first article in the first number of the new *Maine Law Review* is a brief argument in favor of the study of Roman Law, by Chief Justice Emery of the Maine Supreme Court. He emphasizes the fact that while many systems of law have disappeared or become stationary, like the Hindoo law, the Roman Law, though of ancient origin, is still spreading and developing. The practical reason for its study in this country is its relation to the fundamental law of our new possessions.

SALES (Market Overt). " The Change of the Property in Goods by Sale in Market Overt," by J. G. Pease. *Columbia Law Review* (V. viii, p. 375). A history of the principle of sale in market overt, giving also the present state of the English law.

TORTS (Moral Duty). " The Moral Duty to Aid Others as a Basis of Tort Liability. I," by Francis H. Bohlen. *University of Pennsylvania Law Review and American Law Register* (V. lvi, p. 217). Professor Bohlen is moved by several recent cases to inquire " how far, if at all, is one man bound, being able to do so without serious inconvenience to himself, to go out of his way to care for those injured without any fault of his? . . . It is curious to find that many text writers flatly assert the existence of such a duty, at least in those cases where the harm or peril has been caused by some act of the defendant, even though that act be legally innocent. This doctrine is so opposed to the normal attitude of common law, and to the statements thereof, (generally, it is true) by way of dictum, of so many eminent judges, that it is necessary to examine the decided cases to see whether they afford any authority in favor, *first*, of a general duty to act as a good Samaritan; or, *second*, whether innocent but injurious action entails upon the actor a duty to remove as far as possible the injury which he has caused; or, *third*, whether again, there may not be other definite classes of circumstances or relations out of which may arise a duty of this sort peculiar to themselves."

In the first place the author deduces that the rule against actively causing harm to a trespasser whose presence is known, and the doctrine of the last clear chance afford no authority for the doctrine that " the law has recognized as a legal duty the moral, ethical and humanitarian obligation to aid the unfortunate."

. . . . . .

" It may be said with some confidence that the primary conception of the common law was that which regarded the individual as competent to protect himself if not interfered with from without. So while there is a general liability recognized in common law courts for the natural consequences of all actions whose probable result will be a positive injury to others, duties of positive action for the benefit of others are not general to the common law, but exceptional and abnormal, requiring some other basis than the mere probability that such action is necessary to protect others from an injurious situation not caused by any antecedent misconduct of the defendant himself. Now, while the duty to take active care for others is not general in the common law, there are undoubtedly many relations to which duties of this nature of varying stringency do attach."

Professor Bohlen doubts if breach of obligation to take positive beneficial action ever should have been regarded as a true tort, the differences between it and active misconduct being so marked. But the historical development of the writ of trespass on the case, and the common law tendency to classify rights by the remedy applicable, rather than by their substantive characteristics have resulted in ignoring these differences.

" Were it possible to rearrange and reclassify common law liabilities and duties one might place all obligations to act in a class distinct from the obligations to refrain from injurious actions (if this indeed be the proper conception of tort liability). While such an attempt would, at this date, savor of mere theory and useless affection, it is quite possible to segregate such positive obligations as remain after the removal of those based solely on the consent of the individuals into a distinct class of tort obligation.

" This class is composed of certain distinct groups: *First*, those obligations expressly created by statute, in which the extent of the obligation depends entirely upon the intent of the legislative body which enacts the statute.

Second, those arising out of the family relation. *Third*, those attached by custom as an incident to the tenure of real estate, or the incumbency of some office. *Fourth*, those annexed by the policy of the law as necessary incidents to a relation voluntarily assumed, normally varying in extent as the relation is gratuitous or beneficial to him on whom the obligation is laid."

The examination of these groups leads to the following conclusions:

"On the whole it may be said that duties to take positive action for the benefit and protection of others attach only to certain relations; and are imposed only when absolutely necessary for the protection of others and only to the extent generally necessary to afford them protection. Save where the state has by legislative enactment imposed such obligations, they do not exist, unless there be some family relation; tenure or occupancy of real property, or the voluntary act of consciously entering into some relationship to which such duties are attached because necessary for the protection of one's associates. Even in the case of family relationship there is present the will of the citizen to become a husband or father, so that even here the relation is, in the last analysis, the creature of voluntary action on his part. The occupancy of real estate is, save perhaps in the case where it comes into one's possession by inheritance, a conscious, voluntary act. It is not too much to say, therefore, that, saving the case of an inherited estate, if indeed this be an exception, no man can be saddled with a burden of positive action without some voluntary act on his part which renders him subject thereto. In addition it would appear that save in the case of family relations, where the interest of the state to avoid being unduly burdened with the support of those whose relations are able to care for them naturally leads to the burden of the support of the members of a family being placed upon its head; no obligation beyond that of good faith and fair dealing is laid upon any individual unless he voluntarily occupies a relation materially beneficial to him. Finally it may be said that these obligations only attach where the one party, having exclusive control of a condition, has the entire power to prevent harm arising from it, and where the other, from the very nature of the relation, must be altogether helpless and incapable of protecting himself, and so is forced to rely implicitly upon the care of his associate for his safety."

TRUSTS (Preference of Legal Estate). "The Legal Estate," by Edward Jenks. *Law Quarterly Review* (V. xxiv, p. 147). An iconoclastic query whether the absolute legal rule that, as against a purchaser for value of the legal estate without notice and without negligence, no equitable interest, of however long standing, is of any avail, is justifiable at the present day. He suggests that in such cases as Pilcher *v.* Rawlins, neither that rule, nor the rule of *prior in tempore* be used, but that the loss be equally divided between the innocent parties. Another suggestion is that a *cestui que trust* be absolutely bound against innocent strangers, by his trustee's misconduct.

UNIFORMITY OF LAW (United States). "Uniformity of Law as an American Ideal," by William Schofield. *Harvard Law Review* (V. xxi, p. 510). Continuing the article reviewed in the May GREEN BAG, Judge Schofield considers statute law and its probable effect upon uniformity of law in the several states. The larger part of statute law, he says, can be neglected, for it is administrative, not private, law. On most matters of private law there is practically no public opinion. The governors of the states and the judges are precluded by the doctrine of the separation of powers from exerting much influence, and the bar has, in most cases, the control. This fact tends to secure uniformity, as also does the legislative tendency to follow precedent and to adopt or copy the statutes of other legislatures. Striking examples are the Statute of Frauds, the Employers' Liability Acts, the Field Code of Procedure, the Negotiable Instruments Act, the Warehouse Receipt Act, the Uniform Sales Act. Forces of the first importance in securing many of these have been the American Bar Association, the National Conference of Commissioners on Uniform State Laws, and the Association of American Law Schools.

"It is plain that uniformity of private law is more easily and surely obtainable from the action of legislatures than from the action of the courts. The corrective action of the

courts, when once a diversity in case law appears among the several states, is slow and uncertain, while that of the legislatures is prompt and sure. The courts are obliged to wait until some case is presented for decision in the ordinary course of litigation before they can act. The action of the legislature may be invoked at any time. It does not follow, however, from these considerations, that the friends of uniformity of law should favor the enactment of codes or statutes which invade the province of case law. A comparison of the merits and defects of the two systems must first be made."

Such a comparison convinces Judge Schofield that rules made by experienced judges, with direct regard to facts proved in court, are more likely to be just and adapted to each case than general rules framed by statute upon such statements of fact as are usually made before legislative committees; the courts have the benefit of the assistance of counsel in declaring the law, and criticism by expert professional opinion is efficient protection against arbitrary action; responsibility for case law is fixed upon the judges, while in legislation it is not fixed; case law is based on principle, has historical continuity, and aims at logical symmetry, while statutes, although based on principle, as a rule stand by themselves; the closer touch of the legislature with popular feeling has advantages and disadvantages, but it is an advantage to the community that case law develops slowly. Case law is useful as a basis for legislation when the principle of the cases has been developed to its full extent, and the needs of the community require a modification of the principle, or the introduction of new rules based upon new principles.

"The community in short is better served when private or case law is left to the courts, and legislation is confined to administrative law, and to dealing with new political or economic or social conditions which common law or equity cannot meet."

. . . . . .

"The quality of the law depends at last upon the quality of the work done in making or declaring it. . . . An American bar, inspired with a love for the common law, and well grounded in its principles, is a force more essential to the uniformity of law in the United States, and to a sound development of the law, than the enactment of uniform statutes or codes. It is also more difficult to obtain. To produce and maintain such a bar requires long co-operation by all the law schools of the country upon a general plan of education, and the steady leadership of the courts in adhering to sound principle, even when opposed to precedents."

To obtain a complete view of the subject of uniformity of law Judge Schofield will consider one further topic briefly — the relation between the state and the federal courts.

WILLS. "Limitations on the Power of Testamentary Disposition," by F. R. Jordan. *Commonwealth Law Review* (V. v, p. 97).

WORKMEN'S COMPENSATION LEGISLATION. "Recent European Legislation with Regard to Compensation for Industrial Accidents," by Sir Kenelm E. Digby. *Yale Law Journal* (V. xvii, p. 485).

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. (Concealment of Property.) **U. S. Cir. Ct. of App.** — In Johnson *v.* United States, 158 Fed. Rep. 69, the Circuit Court of Appeals holds that an indictment will not lie under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to effect the concealment by a bankrupt of property from his trustee, in violation of Bankr. Act 1898, § 29b, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], where the trustee himself is charged as one of the conspirators, and the averments of the indictment show that there was, in fact, no concealment of property from him, and no purpose that there should be such concealment.

In arriving at this conclusion, the court finds that the conspiracy charged was that the trustee and a third person were to unite with the bankrupt in knowingly and fraudulently concealing from his trustee in bankruptcy a certain part of his stock and a certain amount of money belonging to the bankrupt's estate. It appeared even in the charge of the conspiracy that the trustee in bankruptcy was a party to it, and the part of the indictment describing the offense that the defendants conspired to commit, described in detail the articles that were to be concealed and to which the conspiracy related. The indictment, therefore, showed that the trustee himself knew of the concealing or withholding of the described articles from the schedules and from his possession. In other words, although the indictment charged a conspiracy to conceal and a concealing from the trustee, facts were stated which showed that there was no concealment in fact from him. Consequently, the indictment was fatally defective in charging the trustee, one of the alleged conspirators, with participation in, and knowledge of the transaction, which could only be an offense against the law when it was concealed from him.

CARRIERS. (Rebates.) **U. S. Sup. Ct.** — A question of considerable importance to the railroads and shippers of the country was decided by the United States Supreme Court in Armour Packing Company *v.* United States, 28 Sup. Ct. Rep. 428. It appeared that in the early summer of 1905, the Chicago, Burlington, & Quincy Railway Company with its connecting lines east of the Mississippi River had filed a joint rate in accordance with the Act of Congress showing the proportionate part thereof from points on the Mississippi River to New York to be 23 cents per 100 pounds. While this rate was in effect, the Burlington Company contracted with the Armour Packing Company to carry its products to New York until December 31, 1905 at a certain rate, the proportionate part of which east of the Mississippi River was to be 23 cents per 100 pounds in accordance with that published. In August of that year the schedule of rates was amended so as to increase the charge from Mississippi River points to New York to 35 cents per 100 pounds, but the Burlington road still continued to carry the Armour products at the 23 cent rate in accordance with their contract. Proceedings were instituted against the packing company to recover penalties, alleging that the arrangement with the railroad company amounted to giving a rebate of 12 cents per 100 pounds, in violation of the Elkins Act. Defendant was found guilty, the conviction affirmed by the Circuit Court of Appeals, and an appeal then taken to the Supreme Court of the United States which held that the contract between the packing company and the railroad company was no defense, and that it made no difference that there may have been no fraud practiced in making it, as the statute prohibited the obtaining of rebates or discriminations by any "device or means."

It is probably settled by this interesting case that special arrangements in respect to common carriage, valid when made, become unavailing when the law changes. It is certainly a desirable result that those who have made long time contracts shall not secure thereby preferential treatment. It may be that the result cannot be reached without the acceptance of a general principle that all contracts with public service companies are subject inevitably to subsequent changes in the peculiar law.

CIVIL SERVICE. (Solicitation of Campaign Funds.) U. S. Sup. Ct. — The federal statute prohibiting the solicitation of campaign funds in any room or building occupied in the discharge of official duties by certain officer or employes of the United States is construed in United States *v.* Thayer, 28 Sup. Ct. Rep. 426, to include the mailing of letters to be delivered in such buildings to civil service employes employed therein. The court discusses the question as to what constitutes a solicitation and holds that it may be done as well by writing as by word of mouth and that the act is not complete until delivery of the letter.

CONSTITUTIONAL LAW. (Commerce.) Mont. — The legislature of Montana, in 1907, passed a law restricting the hours of labor by engineers and other employes of carriers operating in that state, to not more than sixteen hours in any twenty-four hour period. In the case of State *v.* Northern Pacific Ry. Co., 93 Pac. Rep. 945, defendant, charged with violation of this statute, defended on the ground that it was unconstitutional as an interference with interstate commerce. The court held that it was a legitimate exercise of the power of the state, unless conflicting with some act of congress on the same subject. The claim was then made that congress had legislated on that very proposition by an act which was to go into effect March 4, 1908, but the court held that the law passed by the legislature could not in any way conflict with that enacted by congress, until the actual time of taking effect of the later statute, notwithstanding it was enacted several months before the decision was rendered.

CONSTITUTIONAL LAW. (Indeterminate Sentence.) U. S. Sup. Ct. — The validity of the indeterminate sentence act of Michigan is called in question in Ughbanks *v.* Armstrong, 28 Sup. Ct. Rep. 372. Plaintiff in error was convicted of burglary and sentenced by one of the Michigan courts to a term of imprisonment in the penitentiary for a period not less than one year nor more than two years. Upon the expiration of the minimum period he applied for parole, but was informed that his application could not be considered on account of the fact that the records showed that he had been twice before convicted of felony. After expiration of the full two years of the sentence, being still detained in prison, he instituted habeas corpus proceedings to obtain his release, but his application was denied by the Supreme Court of Michigan. The case in the Supreme Court of the United States was on appeal from this decision. Under the provisions of the indeterminate sentence law that part of the sentence fixing the maximum punishment was void because the maximum penalty was fixed by the statute itself. Plaintiff in error contended that the law was invalid because it denied to prisoners of the class to which he belonged the right to apply for parole given to those who had not been previously convicted of any crime, but the Supreme Court held that the giving of such right was a mere question of privilege which might be extended or withheld as the legislature saw fit.

CONSTITUTIONAL LAW. (Penalties — Courts.) U. S. Sup. Ct. — Questions of vast importance as to how far a state may go in the fixing of railroad rates are discussed in the case of *Ex parte* Young, 28 Sup. Ct. Rep. 441. In 1907 the legislature of Minnesota passed a law restricting passenger rates to two cents per mile, and another statute fixing the charges for transportation of certain commodities. Penalties consisting of very large fines, and in some instances imprisonment, were prescribed for violation of these laws. The railroads alleged that the restrictions on rates would so materially reduce their income as to amount to a taking of their property without due process of law, and that on the other hand if they attempted to operate under the old rates, they and their employes would be subjected to such enormous penalties as to practically force them to suspend business. The court said, "Now, to impose upon a party interested, the burden of obtaining a judicial decision of such a question (no prior hearing having been given) only upon condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts is, in effect, to close up all approaches to the courts and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low and therefore invalid." It was therefore held that on account of these provisions the laws were invalid without regard to the question whether the rates prescribed were too low.

There are some difficulties in the course of this decision but its substantial justice can hardly be questioned. It is rather remarkable that the matter had not been settled long before. As a matter of truth such pains and penalties may really close up all access to the courts. The recognition of the inherent wrong in this is as old as Magna Charta itself.

CONSTITUTIONAL LAW (Primary Election Law.) N. D. — The provision of the North Dakota primary election law assessing certain fees on candidates as a condition to placing their names on the primary ballot was attacked on various grounds in case of Johnson *v.* Grand Forks County, 113 N. W. Rep. 1071, and held invalid. It was said for one thing that in case a man whom the people were seeking to place in office was either unwilling or unable to pay the fee, the only way in which

the desires of the voters to elect him could be carried out would be by making the payment themselves, and that this would constitute a condition to their right to vote not contemplated by the Constitution. As against the plea that blank spaces were provided on the ballots, so that the voters might indicate their choice by writing the name of one whose name was not printed thereon, the court said that while this was possible, it was so impracticable as to be almost valueless. Reference is made to the Illinois case of People *v.* Board of Election Commissioners of Chicago, 221 Ill. 9, 77 N. E. 321, and to the decision of the Nebraska Supreme Court in State *v.* Drexel, 105 N. W. 174, in which somewhat similar questions were involved. The law was held invalid.

CONSTITUTIONAL LAW. (Peonage.) U. S. Cir. Ct. of App. — The case of Smith *v.* United States, 157 Fed. Rep. 721, was a prosecution for violation of section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712] by conspiring to injure, oppress, threaten or intimidate a citizen of the United States in the free exercise and enjoyment of rights and privileges secured by the Constitution and laws of the United States. It appeared that some of the defendants were owners of large tracts of land in southern Missouri, and that others of them were overseers employed thereon. The evidence showed that they had by fraudulent representations transported a number of negroes to their farms and had there kept them in servitude under the most brutal and shocking conditions. It was claimed on the part of defendants that the right to freedom from involuntary servitude and slavery was inborn or natural and not one secured by the Constitution or laws of the United States, but the court said that while the right might be inborn or natural that fact did not prevent it from being one "secured" by law. All assignments of error by defendants' counsel were overruled and the conviction sustained.

CONSTITUTIONAL LAW. (Revocation of Charter of Social Club.) U. S. Sup. Ct. — In Cosmopolitan Club *v.* Virginia, 28 Sup. Ct. Rep. 394, the Supreme Court of the United States held that the revocation of the charter of a social club, because of its violation of laws relating to sale of liquor, did not constitute an impairment of the contract obligation arising from the issuance of the corporate charter. It was said that, notwithstanding the fact that the charter constituted a contract with the state, it did not authorize the club to disregard the state laws and that on violation of these and misuse of corporate privileges, there was full authority for revocation of the charter without conflicting with any provision of the United States Constitution.

CONSTITUTIONAL LAW. (State Rights — Void Act.) U. S. Sup. Ct. — Several months ago interested persons brought action in the United States Circuit Court for the District of Minnesota to restrain the attorney general of that state, from enforcing certain laws relating to maximum charges by carriers on the ground that they were unconstitutional. The attorney general insisted that if he should attempt to carry the law into effect it would be, not individually, but by virtue of his office and that the suit was really against the state and consequently beyond the jurisdiction of the court. Judge Lochren, before whom the case was tried, held that it was not an action against the state, that the law was invalid, and enjoined any action looking to its enforcement. Subsequently the attorney general, still maintaining the correctness of his contention in the injunction suit, instituted mandamus proceedings in the state court to compel putting the rates into effect in violation of the order of the federal court. He was thereupon cited for contempt and adjudged guilty. He at once asked for a writ of *habeas corpus* from the Supreme Court which was denied in the case entitled *Ex parte* Young, 28 Sup. Ct. Rep. 441.

Justice Peckham, who wrote the majority opinion, reviewed at length the former decisions thought to involve similar questions and said, "The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not effect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional."

CORPORATIONS. (Action by Foreign Corporation.) N. Y. — The South Bay Co., a foreign corporation doing business in New York and plaintiff in the case of South Bay Co. *v.* Howey, 83 N. E. Rep. 26, brought action in the Supreme Court of that state on a contract of insurance. Defendant insurance company alleged that plaintiff had not obtained permission to do business in the state and therefore could maintain no action therein. The New York Court of Appeals held this to be a good defense and reversed the judgment of the lower court to the contrary.

This decision is based upon the following provision in Sec. 15 of the New York General Corporation Law, namely: "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such

contract it shall have procured such certificate," i.e. a certificate from the Secretary of State that it has complied with all requirements of law to authorize it to do business therein. This provision does not apply to foreign corporations unless they are stock corporations. Wright & Co. v. Faulkner, 52 Misc. (N.Y.) 100; South Bay Co. v. Howey, 113 App. Div. (N.Y.) 382. And it applies to them only in case they are doing business in the state of New York. See Penn. Collieries Co. v. McKeever, 188 N.Y. 98. As to what is "doing business in the state" the authorities are too multitudinous to quote here, and they are not altogether harmonious. Then too this section applies only to suits on contract, and does not prevent such unauthorized corporations from suing on other causes of action. Schlitz Brewery Co. v. Ester, 86 Hun. (N.Y.) 22, affirmed without opinion in 157 N.Y. 714; American Typefounders Co. v. Connor, 6 Misc. (N.Y.) 391. And this limitation is further narrowed to those contracts made within the state by the unauthorized foreign corporations. They can still sue in New York on contracts made by them elsewhere, or upon contracts made by others in New York and assigned to them. Oreilly, Skelly & Fogarty Co. v. Greene, 18 Misc. (N.Y.) 423.

In the principal case the plaintiff was a foreign corporation doing business in New York, and had apparently made the contract sued on in that state, but there was nothing to show whether or not it was a stock corporation. The decision does not lay down any broad doctrine that failure to obtain permission to do business in the state is a defense generally, nor does it overrule the cases which hold that the section applies only to foreign stock corporations. Its only new point is that where there is nothing to show one way or the other whether the foreign corporation is a stock corporation, the court will presume it to be so if under New York law a corporation of its nature could be organized only as a stock corporation. Otherwise it is merely in line with the other authorities on this section of the statute. F. T. C.

New York, May 15, 1908.

CORPORATIONS. (Foreign Corporation doing Business in State.) **Minn.** — The Supreme Court of Minnesota, in Thomas Mfg. Co. *v.* Knapp, 112 N. W. Rep. 989, denied the right of a foreign corporation to maintain an action in the courts of that state on the ground that it had not complied with the requirements of the statute as to the right to do business in the state. The main office of the company seems to have been in Ohio, but it had agencies in various towns in Minnesota, to which it shipped farm machinery for sale. The agents were required to pay the freight on the goods received by them and to make all reasonable efforts to sell the same but the title and ownership of the machines shipped was to remain in the company subject to its orders until full payment should be made for the same. The corporation claimed that this did not constitute "doing business within the state" but was interstate commerce. The court on review of the authorities stated that a distinction was to be drawn between those cases in which sales were simply made by a traveling salesman and goods shipped directly to the customers and those in which agencies were established in the state to which goods were to be shipped for sale by resident agents, and held that the acts of plaintiff did not constitute interstate commerce but did constitute a doing of business within the state in violation of law and that no recovery could be had on a contract entered into with an agent for the price of goods shipped to him.

CORPORATIONS. (Foreign Corporations doing Business in State.) **Kan.** — The Supreme Court of Kansas recently had before it a novel proposition, relative to foreign corporations doing business within the state. A Kansas statute, known as the Busch Law, requires foreign corporations to comply with certain conditions before engaging in business within the state. The legislature of 1905 authorized the governor to employ competent accountants to investigate the various state departments, and he, on carrying out the provisions of this enactment, appointed a foreign corporation to perform the services. After completion of the work the state Treasurer refused payment on the ground that the law contemplated appointment of a "person," and called for the doing of certain acts, the performance of which was impossible by a corporation, that the complaining company had not complied with the statutes granting it the right to do business in the state, and could not, therefore, maintain any action therein. The court decided that these contentions were not well founded; that the services of complainant did not constitute the doing of business within the state, and that even if they did, the foreign corporation law could not be construed as affecting the right of the state to contract for services to be performed for it, notwithstanding the other party to the contract might be one whose ordinary business would fall within the purview of the statute. The case is Haskins & Sells *v.* Kelly, 93 Pac. Rep. 605.

CRIMINAL LAW. (Judicial Legislation.) **Cal.** — The Supreme Court of California was placed in rather a peculiar position in a recent case heard by it, — People *v.* Ryan, 92 Pac. Rep. 853. For some time past, it has criticised instructions in

criminal cases calling attention to the interest of the accused and indicating that his testimony might be looked upon with some degree of allowance. Finally in People *v.* Maughs, 149 Cal. 253, 86 Pac. 187, it declared that in the future, instructions of the character referred to would be considered ground for reversal. The Ryan case had already been tried but had not been heard on appeal. When it did go to the Supreme Court that tribunal stated that its holding in the Maughs case was not applicable as it was not meant to have any retroactive effect.

CRIMINAL LAW. (Nuisance.) Iowa. — Some rather interesting questions arose in Hammond *v.* King, 114 N. W. Rep. 1062. The action was instituted for the apparent purpose of abating a liquor nuisance maintained by defendant, but the case, as presented by an agreed statement of facts, showed that the real object was to obtain a construction of the liquor law on the question, whether the day on which a school election was held was to be considered as an "election day" within the provisions of the statute prohibiting sales of liquor on any election day or legal holiday. The court below refused to pass on this question, on the ground that it was not shown that defendant was maintaining a nuisance at the time of the institution of the action, but the Supreme Court held that if sale by defendant on a school election day was really a violation of the statute, by the provisions of the Mulct Law, his carrying on the business thereafter constituted a nuisance. It then proceeded to determine the question submitted by the statement of facts, and held that sales on school election days were prohibited. The decision of the court carries with it the determination that whenever a saloon keeper has once violated the provisions of the statute referred to, his business from that time on constitutes a nuisance, subject to abatement.

DAMAGES. (Future Earnings.) Mo. Ct. of App. — Is evidence of the unchaste character of a female suing for personal injuries admissible on the question of her probable future earnings? Plaintiff, in the case of Carlton *v.* St. Louis & Suburban Ry. Co., 106 S. W. Rep. 1100, sued for injuries received while alighting from one of defendant's cars. It appeared that her occupation was that of laundress and seamstress, and defendant contended that her chastity should be considered on the question of her earning capacity, but the trial court instructed that it could only be considered as affecting her credibility as a witness. The Court of Appeals cited Abbott *v.* Tolliver, 71 Wis. 64, 36 N. W. 622, Boyle *v.* Case (C. C.), 18 Fed. 880, Kingston *v.* Fort Wayne, etc. R. R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131, and Metropolitan St. R. T. Co. *v.* Kennedy, 82 Fed. 158, 27 C. C. A. 136, as upholding defendant's assignments of error to the charge and reversed the judgment of the lower court.

EXECUTORS. (Duty as to Trusts.) Cal. — Whether an executrix may impose as a condition to payment of a legacy for charitable uses, an agreement on the part of the trustee to apply the money as intended by the testator was decided adversely to her contention in the case of St. Mary's Hospital *v.* Perry, 92 Pac. Rep. 864. Testator made a bequest of a thousand dollars to plaintiff for the purpose of endowing a bed for the poor. Defendant alleged that she was ready to pay over the money under a decree of distribution if plaintiff would agree to carry out the terms of the bequest, but that plaintiff refused to so do. The court held that it was no concern of the executrix as to what plaintiff might intend to do with the money and directed payment to be made.

FRAUDULENT CONVEYANCES. (Liability of Grantee for Rents.) Neb. — The liability of a fraudulent grantee to creditors for rents and profits is discussed in First Nat. Bank of Plattsmouth *v.* Gibson, 114 N. W. Rep. 777. The decision is the result of protracted litigation commenced in 1889. It seems that the question involved was decided in a former appeal (105 N. W. Rep. 1081), where it was held that when a conveyance of real estate is set aside as fraudulent at the suit of a creditor, and the land subjected to the lien of his judgment, and is insufficient to pay the judgment, such fraudulent grantee, in a proper proceeding, may be compelled to apply on the judgment the rents and profits of the land which accrued while the land was in his possession under the fraudulent conveyance. On the subsequent appeal, the court adheres to its former concluson and finally disposes of the case.

MONOPOLIES. (Validity of Law Allowing Pooling of Farm Products.) Ky. — The state of Kentucky has a statute entitled, "An Act permitting persons to combine or pool their crops of wheat, tobacco and other products, and sell the same as a whole, and making contracts in pursuance thereof valid." Farmers are thereby authorized to pool their products for the purpose of classifying and grading the same, so as to obtain higher prices than if sold separately by the individuals owning them. In the case of Owen County Burley Tobacco Society *v.* Brumback, 107 S. W. Rep. 710, complainants charged that defendant had entered into an agreement for pooling with other persons, members of the complainant society, but in violation of his agreement had sold portions of his crop, and was threatening to sell the remainder; that such further sales would work irreparable injury to complainant, and asked for

an injunction. The validity of the statute referred to above, under which the pooling agreement was made, was attacked as being in violation of the Bill of Rights prohibiting the grant of exclusive privileges, of the section of the Constitution requiring the General Assembly to enact necessary laws to prevent trusts, pools and other combinations "to enhance the cost of any article above its real value," and of the fourteenth amendment to the Constitution of the United States. The court said that there was nothing in the evidence tending to show that it was the intention of the complainant to force prices up above the "real value" of the products pooled, and that, although the law confined the privileges granted to farmers, it did not in terms prohibit other persons from pooling or pledging their products for disposition, and came to the conclusion that it should be sustained.

This case, unless properly distinguished, is likely to lead to confusion. It does not attempt to express the common law as to the public policy of the combination dealt with. The combination is tolerated merely because seemingly authorized by the statute, which in turn is enacted under a constitutional provision which authorizes such combinations provided that they do not raise prices beyond the real value of the product or article. The court, while recognizing the abuses which may grow up under the sanction of this statute and the impossibility of finding out in many instances what the real value is, feels constrained to yield to the public policy expressed by the constitution. Certainly under the common law it would not be necessary in order to invalidate the combination to show that the prices were actually raised thereby beyond the fair value of the products, but simply that the organization had it in its power at any time to so raise them. From the viewpoint of the political scientist both the statute and the constitutional provision are interesting in that they recognize and encourage collective bargaining. **ANDREW A. BRUCE.**

MUNICIPAL CORPORATIONS. (Validity of Ordinance.) N. Y. Sup. Ct. — An unusual question, relative to the validity of a municipal ordinance, was decided in People *v.* City of Buffalo, 108 N. Y. Supp. 331. A few years prior to the decision proceedings were instituted for certain paving to be done, and the matter was thereafter advanced in various ways, an ordinance confirming the assessment roll eventually adopted by the board of aldermen and common council, and presented to the mayor, by whom it was vetoed, and transmitted back to the board of aldermen. Subsequent to the veto by the mayor, new members of the common council and board of aldermen were elected, and took office. The matter of confirmation was again taken up, and the ordinance passed over the mayor's veto. It was contended that the common council could not be considered as a continuous body and that the new board could not "reconsider" the question on the ground that they had never considered it in the first place, and that if any action could be taken at all relative to confirmation, it must be a vote on the original proposition, instead of one to pass the ordinance over the veto of the mayor. The Supreme Court held that a distinction should be drawn between the state legislature and common council, and that the latter should be considered as a continuous body, and that the ordinance was valid as passed.

PROPERTY. (Notice of Tax Sale.) N. Y. Sup. Ct. — An objection was raised to the title of land under contract of sale, in Rosenblum *v.* Eisenberg, 108 N. Y. Supp. 350, on the ground that a tax sale of the premises was invalid by reason of no notice of proceedings being given to the wife of the owner, and that therefore her inchoate right of dower was not extinguished. The statute provides for right of redemption by any person having estate in the lands or tenements sold, but the court held that an inchoate right of dower was not such an estate or interest as was contemplated, and that the wife of the owner was not entitled to any notice of the tax sale, and failure to give it could not therefore affect the marketability of the title.

TRADE-MARKS. (Uncopyrighted Post Cards.) U. S. Cir. Ct., E. D. Pa. — The right of uncopyrighted post cards to protection as trade-marks is discussed in Bamforth *v.* Douglass Post Card & Machine Company, 158 Fed. Rep. 355, and it is held that they are not entitled to such protection, because they do not identify and distinguish the product of the manufacturer, but constitute the product itself. The photographs were first made by the usual process and duplicates were printed on post cards, which were offered for sale to the public, and were sold in large numbers The defendants made exact copies of these photographs by the half-tone process and were selling them on post cards at a much lower price than the original. The court says that a photograph, which is the result of original intellectual conception of the author may be copyrighted with the same effect as if it were a book; but without such protection neither the book nor the photograph could continue to be the author's exclusive property after it had been printed and offered for sale. It concludes that plaintiff was not entitled to protection because it failed to avail itself of the protection provided by the copyright statutes, and

must be presumed to have presented to the public the product of its creative powers, though it may have had no intention of making such a gift.

TRUSTS. (Notice — Payment of Premiums by Checks of Municipal Corporation.) Mass. — In City of Newburyport *v.* Fidelity Mut. Life Ins. Co., 84 N. E. Rep. 111, it appears that the city treasurer paid life insurance premiums with checks bearing the name of the city and signed by himself as treasurer, and it is held that the city was entitled to recover the amount of the checks from the insurance company. The checks were on their face the checks of the city, and the court very properly points out that the insurance company must have known this, and further that they were delivered in payment of the individual debt of the treasurer. After a reference to Rev. Laws, c. 73, § 73, providing that to constitute notice of an infirmity in a negotiable instrument or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, the court concludes that the knowledge of the agent of the insurance company that the treasurer was using the funds of the city for individual purposes was imputable to the company. In adverting to the question of ratification by the city of the act of its officer, it is stated that the facts were not known, and further that the negligence of the auditing officers of the city in not sooner discovering that the treasurer had used the city's funds in payment of premiums was not available as a defense in the action by the city to recover the funds so misappropriated.

Wills. (Construction.) Va. Sup. Ct. App. — A testatrix, by a clause of her will, provided for the cancellation and surrender by her executor to the obligors of all notes, bonds or other evidences of debt belonging to her and remaining unpaid at the date of her death from whomsoever due. Later, she executed a codicil revoking this clause and provided in lieu thereof a direction that any note or other evidence of indebtedness remaining unpaid at the date of death from certain specified individuals including B. should be cancelled and surrendered by her executor to the obligors in full satisfaction thereof. At her death, testatrix held the obligations of all the persons named in the codicil except B. who was not indebted to her but was indebted to another on an unmatured obligation secured by a mortgage on her farm. In Brown *v.* Gibson's Executor, 59 S. E. Rep. 384, the court had to decide whether or not it was the duty of the executor to purchase the debt due from B. and cancel it under the terms of the will and codicil. The court held that although B. was one of the specified individuals mentioned in the codicil to the will whose obligations should be cancelled by the executor, the codicil did not create an obligation on the part of the executor to purchase her debt, which was not then due, from the holder, a third person, and cancel the same.

THE LIGHTER SIDE

Why the Court Smiled. — A lawyer whose attainments were scarcely of the first quality was arguing in one of the Philadelphia courts before a patient judge. His argument was not without flaws, and at one point he fairly screamed out that if his client had done wrong then he, the lawyer, was equally wrong, for he failed to see that any fault had been committed.

"But, Mr. Blank," urged the judge, "ignorance of the law excuses no man."

"Your honor," shouted the lawyer, "I do not want any excuse; what I say is excuse enough."

Soothing Ruffled Dignity. — A lawyer who had been "jacked up" for speaking disrespectfully of the court apologized in the following terms: "Your honor, I retract what I said, for I find that you were right and I was wrong, as you usually are." This of course was entirely soothing to the ruffled dignity of the court. — *Law Notes.*

What a Libel! — "Witness, did you ever see the prisoner at the bar?" "Oh, yes, very frequently. That is where I got acquainted with him." — *Ohio Law Bulletin.*

Preference. — In the case of Macon Grocery Co. *v.* Beach, 156 Fed. Rep. 1009, it became necessary for the court to determine whether the payment of the sum of two dollars and seventy-five cents by an alleged bankrupt while insolvent, and owing something like thirteen thousand dollars, should be considered as a preference in contemplation of the United States Bankruptcy Act. Comment is made on the smallness of the payment, and the cases of *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. Benkr. Rep. 101, and *In re* Douglass Coal and Coke Co., 131 Fed. Rep. 769 are cited as also discussing transfers and payments insignificant in amount as compared with the property of the bankrupt.

An itemized account paid in this case showed that it was for lemonade, soda water, coca cola, a bar of soap, and a dressed doll. The court says of it:

"The soda water and lemonade to the value of 50 cents, with which Beach allays the thirst proper to his clime, were inexpensive refreshments, as innocuous as the 'cup which cheers, but not inebriates.' More debatable is the effect of coca cola. But his purchase of this mysterious elixir amounted to only five cents. The bar of soap, worth five cents, is without the pale of judicial discussion. It is true that there was a dressed doll, the price of which was more extravagant. This was $2.15. Beach testifies that it was 'for a present' The evidence fails to disclose upon whom this marvel of art and fashionable millinery was bestowed. It, however, appears that Beach is a bachelor — 'old bachelor,' we may presume — and perhaps the 'dressed doll' made happy the heart of some tiny maiden, whose lovely face and graceful form brought back to the veteran and hapless heart of the alleged bankrupt the memory of features which 'love used to wear,' in the words of Ossian, 'sweet and sad to the soul, like the memory of joys that are gone.'"

A Peculiar Will. — The books of law are said to be full of tragedy, romance and comedy. W. C. Rogers of the Cleveland bar has discovered that the divine afflatus has found its way between the musty covers. Reported in 2 Ramsey (Scotch) is the following:

The Marry Testament of Master Andro Kennedy.
When he was like to die.

I, Master Andro Kennedy,
A curio quando sum vocatus,
Begotten with some Incuby,
Or with some freir infatuatus;
I cannot, Faith, tell redely,
Unde aut ubi sui natus,
But this in Truth I trow trewly,
Quod sum Diabolus incarnatus.

Cum mihi fit certius morte,
We maun all die quhen we haif done,
Nescimus quando, vel, qua forte,
Nor blind allane wait of the Mone;
Ego patior in pectore,
Throw Nicht I could not sleip a Wink,
Licet aeger in corpore,
Zit wald my Mouth be wat with Drink.

Nunc condo Testamentum meum,
I leave me Saul for evirmair,
Per omnipotent Deum,
Into my Lordis gude Wyne-Cellar,
Semper ibi ad remanendum,
Till Dumesday cum without Dissever,
Bonum Vinum ad bibendum,
With sweit Cuthbert that luved me nevir.

Ipse est dulcis ad amandum,
He wald aft ban me in his Braith,
Det mihi modo ad potandum,
And I forgave him laith and wraith,
Quia in Cellar cum cervisia,
I had leur lv baith air and late,
Nudus solus in camisia,
Than in my Lords braw Bed of State.

A Barrell being at my Bosom,
Of warldly Gude I had nae mair,
Et corpus meum ebriosum,
I leif unto the Toun of Air,
In a Draff Midding eir and ay,
Ut ibi sepelire queam;
Quhair Drink and Draff may ilka Day
Re custen super faciem meam.

I leif my Heart that neir was sicker,
Sed semper variabile,
That everrair wad flow and flicker,
Comforti meo Jacobi;
Thoch I wald bind it with a Wicker,
Verum Deum renui,
But, I hecht to tume a Bicker,
Hoc pactum semper tenui.

Syne leif I the best Aucht I bocht,
Quod est Latinum propter cape
To my Kin-heid, but waite I nocht,
Quis est ille, than schrew my Skape:
I, tald my Lord my Heid but hiddle,
Sed mille alii hoc sciverunt,
We wer as sib as Sive and Riddle
Quia mea solatia.

. . . . . .

They wer but Leisings all and ane,
Cum omni fraude et Salatia,
I leif the Maister of Sanct Anthane,
To William Gray ein sine gratia,
My ain deir Cusine, as I wene,
Qui numquam fabricat mendacia,
But quhen the Holland-tree grows grene.

My fenzeing and my false Winning,
Relinquo falsis fratribus,
For that conforms to Gods ain Bidding,
Disparsis debit pauperibus;
For Mens Sauls they say and sing,
Mentientes pro muneribus,
Now God give them an evil Ending,
Pro suis pravis operibus.

To Jok the Fule, my Folly frie,
Lego post corpus sepultum,
In Faith I am mair Fule than he,
Licet ostendo bonum multum,
Of Corn and Cattle, Gold and Fie,
Ipse habet valde multum,
And zit he bleiris my Lordis Ee,
Fingendo eum fore stultum.

To Master Johny Clerk syne,
Do et lego intime,
Gods braid Maleson and myne,
Nam ipse est causa mortis meae,
Wer I a Dog, and he a Swyne,
Multi mirantur super me,
But I suld gar that Lurdane quhryne,
Scribendo dentes sine D.

Residuum omnium bonorum,
Rests to dispone my Lord sall haif,
Cum tutela puerorum,
Baith Edie, Katie, and all the laife;
In Faith I will no longer raife,
Pre sepultura ordino,
On the new Gyse, sae God me saife,
Non sicut more solito.

In die meae sepulturae,
I will haif nane but our ain Gang,
Et duos rusticos de rure,
Bearand ane Barrell on a Stang,
Drinkand and playand Cap-out evin,
Sicut egomet solebam,
Singand and greitand with the Stevin,
Potum meum cum fletu miscebam.

I will nae Priests for me shall sing,
Dies irae dies illa,
Nor zit nae Bells for me to ring,
Sicut semper solet fieri,
But a Bag-pyp to play a Spring,
Et unum Ale-wisp ante me,
Instead of Torches for to bring,
Quartuor lagunas cervisiae,
Within the Grave to set sie Thing
Inmodum crucis juxta me,
To fley the Feynds, than hardly sing
De terra plasmasti me.

— *Ohio Law Bulletin*

Following a Precedent. — The readiness with which courts adopt precedents rendered in other jurisdictions is shown by the following decision of a justice of the peace in Arizona. *The Arizona Daily Star* says that the justice is a stickler for order within certain limits, and that he showed the other day that he was also the observer of judicial precedent. His town is described as one of the principal stations on the great hobo route across the continent, and the place where

most of the hobo passengers get ditched. The account says that they linger about the station waiting for an outlet, and many of them give way to lawless tendencies. Further proceedings may be given in the language of the *Star*.

"Justice Williams orders them arrested in the evening, and they are chained to a stake on the desert until next morning, when they are given a more or less summary trial. It is too expensive to send them to Florence, the county seat. The court therefore administers an alternative sentence consisting of an hour or two to get out of the bailiwick. The defendant, after his night on the desert, usually accepts the alternative.

"The other day a hobo who had been so chained out was brought before the court and was promptly convicted. In pronouncing his doom, Judge Williams said: 'It is the judgment of this court that you are guilty as charged, and this court, following the precedent recently set by another learned and eminent jurist of the east, will assess against you a fine of $29,400,000, or, as an alternative, this court will give you two hours to get out of town.'"

"The hobo rose, bowed and said: 'Judge, will you please let me have a check book. I dislike to part with so large a sum in a single lump, but circumstances compel me to do it. I am, as you may observe, in ill health, and am traveling on the advice of my family physician, who has warned me against doing anything precipitate. I fear the result on my heart of the suddenness of action involved in your alternative. Let me have the check book.'

"It is needless to say he hiked." — *Case and Comment.*

All About a Cat. — The dignity of the bench sometimes confronts situations that puts a severe strain upon it. Such a one has recently developed in New York. An actress at the Irving Place Theatre had a cat which she sometimes took with her when making her daily visits to a neighboring bakery. The proprietor and his pretty cashier both became fond of the large, white beauty, and when the actress had occasion to go to the far West for a few months she thought this a good asylum for her pet. The pretty cashier accepted the trust of caring for it, but soon after she married a waiter and left the bakery. But she pined for the cat, so her husband obligingly went to her old place of employment and brought it away for her. Then the proprietor had him arrested for grand larceny. The magistrate discharged him, and in turn he sued the baker for ten thousand dollars damages for false arrest. The case was tried by a jury before a judge of the Supreme Court and the plaintiff was given $700. The loser appealed, and now five judges of the appellate division are wrestling with the complication. If they confirm the previous decision the baker will take it to the Court of Appeals. Meanwhile, the original owner cannot recall the terms upon which she permitted the innocent cause of the trouble to leave her possession. King Solomon, in the famous case of disputed maternity, furnished the only precedent of which we are aware for clearing up this situation. Let the cat be divided and give each a half. That would probably satisfy the neighbors, at least.

Case for an Expert. — "Have you fixed up my will just the way I told you?" asked the sick man, who was the possessor of many needy relatives and some well-to-do but grasping ones.

"I have," asserted the lawyer.

"Just as strong and tight as you can make it, eh?" asked his client.

The lawyer nodded.

"All right," said the sick man. "Now I want to ask you one thing — not professionally — who do you think stands the best chance of getting the property when I'm gone?" — *Youth's Companion.*

Circumstantial Evidence. — "You say you met the defendant on a street-car, and that he had been drinking and gambling," said the attorney for the defense during the cross examination.

"Yes," replied the witness.

"Did you see him take a drink?"

"No."

"Did you see him gambling?"

"No."

"Then how do you *know*," demanded the attorney, "that the defendant had been drinking and gambling?"

"Well," explained the witness, "he gave the conductor a blue chip for his car-fare, and told him to keep the change." — *Lippincott's.*

Vol. XX, No. 7 JULY, 1908

THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

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CONTENTS

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Our Contributors.

The nomination of Judge Taft by the Republican party makes particularly appropriate the sketch of his legal career which we publish in this issue. JUDGE HOLLISTER was born in Cincinnati in 1856. He is a graduate of Yale College and has practised in Cincinnati since 1887, where he has served as assistant prosecuting attorney and judge of the court of Common Pleas. The latter office he has filled since 1893.

In this number we conclude MR. WARREN'S story of the Charles River Bridge case begun in our last issue. The articles will ultimately form a chapter in the history of the Harvard Law School which Mr. Warren is writing.

WILLIAM ROMAINE TYREE is a native of Staunton, Virginia. He received his legal education in the University of Virginia and first practiced in Staunton, where he was Right-of-Way Attorney for the Virginian Railroad Company. He has recently removed to the county seat, Chatham, Virginia.

MR. BLYTHE and JUDGE BLOUNT are becoming such regular contributors this year that our readers will not need a further introduction.

PERCY A. ATHERTON is a graduate of the Harvard Law School and of Harvard College who is in active practice in Boston as a member of the firm of Morse & Friedman. He finds time, however, to take an active part in public work and to indulge his taste for literature.

The Green Bag

Vol. XX. No. 7 BOSTON July, 1908

WILLIAM H. TAFT AT THE BAR AND ON THE BENCH

By Howard C. Hollister

IT is difficult to say when the education of William H. Taft in the law actually began. His father, Alphonso Taft, was a lawyer of great learning, had been a Judge of the Superior Court of Cincinnati, and was engaged in important active practice of the law for forty years. He was, moreover, a man of great public spirit, intensely interested in all questions affecting government, and was called to perform distinguished public service as Secretary of War, Attorney General, Minister to Austria and Minister to Russia.

Charles P. Taft and Peter R. Taft, William's older brothers, were members of the Bar in active practice for a number of years as partners of their father, and lived, during their brother's earlier years, at home.

The law, the Constitution and current public questions were important topics of conversation at that house, and their discussion could not but have contributed much, if only by absorption, to the foundation of the thorough legal education William H. Taft acquired afterwards by his own efforts.

Alphonso Taft's five sons became lawyers and were all at some time in the active practice. Peter died early in his career; Charles became editor of the *Cincinnati Times-Star;* Henry W. Taft is a leading member of the New York Bar; while Horace D. Taft's inclinations led him to the profession of teaching, he now having a flourishing preparatory school for boys at Watertown, Connecticut.

From his mother William inherited many strong qualities. She was a woman of much energy, of great force of character, ambitious for the success of her family, and a power in the higher life of the community. His father was born in Vermont and his mother in Massachusetts, and both were of the pure stock of New England for generations, with all the traditions toward self-improvement characteristic of that people, and especially for the necessity of the highest education the country affords. It is not surprising, therefore, that the five sons were all graduates of Yale, all with most creditable standing, while Peter stood first in his class and William took the Salutatory in his.

Graduated in June, 1878, second in a class of one hundred and thirty men and not twenty-one years of age by two months, William H. Taft, in the fall of that year, entered the Cincinnati Law School, from which he was graduated, easily first in his class, in May, 1880, and in that month was admitted by the Supreme Court of Ohio to the practice in that state.

While in the Law School, his desire to be independent was first given opportunity through employment as reporter of court proceedings for the Cincinnati Commercial. Murat Halstead, the distinguished editor of that paper, saw the promise of future achievement in that young man, who, he said, had the greatest combination of brains and brawn of any young man he had ever seen. This experience brought the reporter in daily contact with the proceedings of all the important courts, and was a legal education in itself. Through it he very soon became acquainted with all the judges, lawyers, court officials, county

and city officials and their deputies, and at once became a factor in local politics and of influence in the selection of candidates of his party for public office.

In January, 1881, Miller Outcalt, then Prosecuting Attorney, afterwards Judge of the Court of Common Pleas, appointed Mr. Taft his assistant. For fourteen months the entire charge of the prosecution of felonies was in the hands of these two young men. The way in which Mr. Taft handled this work soon attracted the attention of the community. His industry and thoroughness were marked; he was constantly in the trial of cases, many hard fought, and often against criminal lawyers of great reputation as such. It was here and in his work as reporter and in his experience in politics that his wonderful knowledge of human nature, of so great value to him ever afterwards, was accumulating rapidly.

From this office he was called, in March, 1882, by President Arthur, to the collectorship of Internal Revenue at Cincinnati. He soon saw that continuance in such service would lead him into political life, and away from the law, in which alone his ambitions lay. He resigned, therefore, in the same year, and in January, 1883, entered into partnership with Major H. P. Lloyd, who had been his father's partner, and began his first experience in the general practice of the law. The practice of the firm was substantial and afforded opportunity for growth in the knowledge of the law and in establishing the reputation he had already acquired as a thorough lawyer. It was in the discharge of his duties as Assistant Prosecuting Attorney that he first came in contact with T. C. Campbell, a criminal lawyer of ability, reputed to be utterly unscrupulous, and in league with all the evil elements in society, and whose influence in local politics had grown so strong as to be felt, it was said, on the Bench. It was Campbell's boast that no client of his, indicted for murder in the first degree, was ever convicted. He was believed generally to be a suborner of perjury and a "jury fixer." The people were shocked by miscarriages of justice. A number of atrocious murderers in jail were awaiting trial, and when, in March, 1884, one Berner, a red-handed murderer, was convicted only of manslaughter in a trial in which Campbell was his attorney, an indignation meeting was called at Music Hall by leading citizens. Well meant but intemperate speeches roused the mob spirit in the audience and a great crowd of men and boys, shouting "Clean out the jail," "Hang the murderers," proceeded to the County Jail, attacked it and besieged it that night and the next day. The Sheriff and local militia were strong enough to protect the jail, but could not, or did not, disperse the crowd. The next night the city was subjected to the disgrace of a Court House burned by its own citizens, a mob of irresponsible men and boys, mostly of the criminal class. That night, by the direction of Governor Hoadly, militia from other parts of the state arrived and soon controlled the situation, but not until many persons had been killed.

Soon afterwards the Bar Association appointed a committee to prefer charges against Campbell, seeking his disbarment. A number of leading lawyers volunteered, the prosecution was put in the charge of E. W. Kittredge and William M. Ramsey, who, and the Bar generally, looked to Mr. Taft to perform the difficult service of preparing the case for trial. During the entire summer of 1884, and well into the fall, he, with John R. Holmes, traveled to many cities in a number of states taking depositions, and a case was presented generally satisfying the Bar and the public that Campbell ought to be disbarred. After a trial consuming more than twenty days, the three Judges before whom the case was tried, took the view, generally believed by lawyers to be erroneous, that the proof in such a case should be as strong as in criminal cases. Two of the Judges held that the proof on

none of the charges showed Campbell to be guilty beyond a reasonable doubt, while one of the Judges found one charge sufficiently established even by that test. The community was shocked again and even newspapers believed to be friendly to Campbell did not refrain from severe criticism of the finding.

The result was the same as if the prosecution had been technically successful. Campbell's power was broken and he soon left Cincinnati.

No man ever did a more beneficial service to his native town than did William H. Taft in the prosecution of Campbell. He showed the same fearlessness, the same disregard of consequences personal to himself that have characterized his conduct ever since when called upon to do service for the public. Mr. Taft opened his four hours' speech in that case in this way:

"The relators in this case have been actuated by no other motive than a desire that the profession should be purged of a man whose success in this community threatens every institution of justice that is dear to us or necessary to good government.

"We admit the ability, the energy, the shrewdness of the respondent and his power in the community. It is no small reason that would lead to the prosecution in this case with the lifelong hostility that it must engender and the danger that there is in incurring the undying enmity of a man as powerful as the respondent has grown in this community."

He was at this time but twenty-eight years of age.

In January, 1885, he undertook, without leaving the general practice, the duties of Assistant County Solicitor, to which office he was appointed by Rufus B. Smith, then County Solicitor and afterwards Judge of the Superior Court of Cincinnati. It was his duty chiefly to advise the various county officers of their duties, and he became thoroughly familiar with all the details of the system of the government of the state and of its subdivisions, and particularly with all laws affecting taxation. No subject for his consideration was passed without complete mastery of it. His industry, thoroughness and ability had already marked him as the most promising young man at the Bar. To such an extent was this recognized that Governor Foraker, in March, 1887, appointed him to fill the vacancy on the Superior Court Bench caused by the resignation of Judson Harmon. At the end of a year, in the spring of 1888, he was nominated as its candidate for the Superior Court Bench by the Republican City Convention and was elected by a majority very large for that time, being over five thousand. This is the only time, to this date, his name has been submitted to the suffrages of the people. With the exception of the two years from January, 1883, to January, 1885, Mr. Taft has been in public office since January, 1881, in each instance, except when elected to the Superior Court Bench, having been called to an appointive office, and never through any solicitation of his own.

When on that Bench, so great had his reputation for fairness, thoroughness and knowledge of the law become that leading lawyers sought to time the trial of important and close cases so that they might come before him. It was even then his custom to write his decisions in almost all of the cases which he decided. For conciseness and strength of statement, laborious research, penetrating analysis and inexorable logic, his decisions, young as he was, cannot be excelled by the monuments of legal learning found in the reports from the pens of great lawyers who at times have been incumbents of that Bench. The reports of his decisions as Judge of that Court and as Judge of the Circuit Court of Appeals are mines of apt precedents of great assistance now to members of the profession in the preparation of their cases. Perhaps his most important decisions as Judge of the Superior Court of Cincinnati were the Southern Railroad cases, involving questions arising from the over-

issue of stock of the C. N. O. & T. P. Railway Company through the fraud of Doughty, its Secretary, and the carelessness of Cook, its President; the Telephone case, involving the relative rights of the Telephone Company and of a street railroad operated by electricity, both having franchises in the streets of Cincinnati, to the use of the ground as a return circuit; and the case of Moores *v.* Bricklayers' union, in which he set out at great length the relative rights, under the law, of employers and employees in their dealings with each other, and particularly with respect to the legal status of a secondary boycott. This decision was affirmed by the Supreme Court of Ohio, and so clearly had Judge Taft stated the facts and the law that the Supreme Court's affirmance was made without opinion. The principles declared in this case have been recognized by judges and lawyers all over the country, were reaffirmed by Judge Taft in the Phelan case, decided by him when Judge of the Circuit Court of Appeals, and he said in his recent address at Cooper Institute on "Capital and Labor" that he had never departed from his views as expressed in that case.

Scarcely a year and a half of his term had elapsed when, a vacancy occurring in the office of the Solicitor General of the United States, he was, at the suggestion of Benjamin Butterworth, then in Congress, and John Addison Porter, editor of the *Hartford Post* and afterward Secretary to President McKinley, seconded by the efforts of leading members of the Bar and former colleagues of the Superior Court Bench, appointed to that office by President Harrison in January of 1890.

The quality of his equipment for this service found immediate recognition at Washington. It was his duty to represent the Government in the trial of most of its cases before the Supreme Court, to act as Attorney General in the absence of that officer, to prepare the most important opinions requested by the President or the heads of Departments, except such as are required by law to be written by the Attorney General in person, and generally to confer on intricate and important questions of law and administrative policy with the Attorney General and the Assistant Attorneys General. One associated with him in that office says:

"In all this work Solicitor General Taft impressed upon his associates in the Department of Justice his wide knowledge of the law, the fairness and wisdom of his judgment and the courtesy and cordiality of his manner."

It is the practice of the Government to take to the Supreme Court only cases of great importance either because of the nature of the questions presented, or the large amount involved, or they are of such character that the decision of one will dispose of others of the same class.

Of exceptional importance were the Behring Sea cases (*In re* Cooper, 138 U. S. 404; 143 U. S. 472), the Quorum case (U. S. *v.* Ballin, 144 U. S. 1), and the Tariff Act cases (Field *v.* Clark, 143 U. S. 649).

In the first of these, one Cooper, a British subject, owner of the schooner "W. P. Sayward," the Canadian Government also intervening, had petitioned for a writ of prohibition against the enforcement of a sentence of forfeiture and condemnation entered by the District Court of Alaska on a libel filed by the United States against that vessel for the alleged illegal killing of fur seals. Leave to file the petition was granted, but on return of the rule to show cause, the Supreme Court declined to issue the writ.

The second involved the question of the legality of an act in the passing of which the Speaker of the House counted, in determining whether a quorum was present or not, members who were actually present but did not vote.

In the Tariff cases it was held that the validity of an act of Congress, signed by the presiding officers of the two Houses and approved by the President, could not be attacked by anything on the journals of

either House showing that the act did not in fact pass in the precise form in which it was so authenticated. These cases attracted wide attention. The Solicitor General participated in the argument of all of them. In the Behring Sea case the principal argument was made by him. He prepared the brief in that case and in the Tariff cases, and it is agreed that they are monuments of tireless energy and research.

It is not usual for the Solicitor General to participate in the trial in the lower courts of cases in which the Government is concerned, yet Mr. Taft, believing that, under the construction given certain sections of the Tariff Act in the "Hat Trimmings" cases (Hartranft *v.* Langfeld, 125 U. S. 128; Robertson *v.* Edelhoff, 132 U. S. 614), vast sums could be saved the Government by the judicial establishment of the rules which should determine whether silks in certain form and combination should be regarded as hat trimmings or not, appeared with John R. Read, United States Attorney at Philadelphia, and W. P. Hepburn, then Solicitor of the Treasury, before Judge Acheson and a jury in two cases (Meyer *v.* Cadwalader, 49 Fed. Rep. 19, 26, 32), and for nearly a month tried the questions out. As a result of the rulings and verdicts in these cases and settlements based on them, many millions of revenue were saved to the Government.

These "hat trimmings" cases are illustrative of what clearness of thought, application, persistence and thoroughness will accomplish in the practice of the law against the weight of discouraging prior rulings apparently insurmountable.

Judge Taft's reputation among the judges and the great lawyers in this wide field was now completely established, and when, under the act creating the Circuit Court of Appeals, a new Judge was to be appointed in each circuit, President Harrison, himself a lawyer of consummate ability, whose discernment had long since discovered the judicial qualities of the Solicitor General, appointed him to the Judgeship in the Sixth Circuit. This was in March, 1892, and for eight years, associated at different times with Howell E. Jackson and William R. Day, both afterwards appointed to the Supreme Bench, and with Horace H. Lurton and Henry F. Severens, present incumbents, all of them great judges, he contributed his full share to the strength of a court of recognized character and capacity.

It was his fortune to be called to preside over many important cases and some of especial moment involving the constitutional, industrial, and partly social questions then and now dominating in the public mind all other matters of governmental administration and power.

Such were the Ann Arbor Railroad case in 1893 (Toledo, Ann Arbor & North Michigan Ry. Co. *v.* Pennsylvania Co., 54 Fed. Rep. 730), the Phelan case in 1894 (Thomas *v.* C. N. O. & T. P. Ry. Co., 62 Fed. Rep. 803) and the Addyston Pipe case in 1898 (U. S. *v.* Addyston Pipe & Steel Co., 85 Fed. Rep. 271) and others.

The importance of these decisions requires consideration at some length.

Engineers of the Toledo & Ann Arbor Railroad were on strike. Rule 12 of the Brotherhood of Locomotive Engineers, to which they belonged, required members of the Brotherhood, engineers of connecting roads, to refuse to handle the cars of that road until the strike was settled. Injunction was sought by the Ann Arbor Railroad against the connecting roads on the ground that refusal by them to haul complainant's cars was an interference with its right and duty to transport interstate commerce, and a mandatory order against Chief Arthur of the Brotherhood was asked, requiring him not to enforce that rule. Judge Taft shows clearly that, under the law, a temporary mandatory order was the only remedy which could prevent irreparable injury to interstate commerce, and that the nature of the service performed by engineers on railroads carrying commerce between the states was of such a

character that the combination among the engineers employed on roads other than the one complained of by its engineers was a boycott and therefore unlawful.

The view expressed in this case has not only received the approval of the courts and the public generally, but the attorney for the Railroad Brotherhoods in the Wabash case (121 Fed. Rep. 563), Mr. Frederick N. Judson of St. Louis, says (and it is well known), "was accepted by the Railroad Brotherhoods as a fair statement of the law under the peculiar conditions of the railroad service."

The Cincinnati Southern Railroad was in the hands of a receiver appointed by the United States Circuit Court. The receiver was under contract with the Pullman Company to operate its cars. Phelan and others, officers of the American Railway Union, for the purpose of injuring the Pullman Company and compelling it to accede to their demand for higher wages for certain persons, its employees but not employed by the receiver or by any other railroad, conspired to prevent the receiver and the owners of other railroads from using Pullman cars in the operation of their roads by inciting members of the Railway Union employed by the receiver to refuse to handle Pullman cars. The testimony showed clearly that Phelan was engaged in a conspiracy "to incite the employees of all of the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic in order to starve the railway companies and the public into compelling an owner of cars used in operating the roads to pay his employees more wages, they having no lawful right to compel him." Judge Taft held this to be a boycott and an unlawful conspiracy at common law, and also that such a combination, its purpose being to paralyze the interstate commerce of the country, was within the provisions of the Sherman Anti-Trust Act.

It is very interesting to note that the Supreme Court of the United States (Loewe *v.* Lawlor, 28 Supreme Court Rep. 301, February, 1908), have recently held that a boycott of that kind came within the inhibition of the Sherman Anti-Trust Act as a conspiracy in restraint of interstate commerce. Judge Taft showed that a boycott of this character has been held to be illegal by every court in which the question has arisen, and his exposition of the rights of employees is accepted as a clear declaration of the law on the subject. In defining their rights he said, with much else that was pertinent, they "had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is a benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the interest of the single employee may compel him to accept any terms from him. . . . They have a right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or if they choose to repose such authority in any one, he may order them, on pain of expulsion from the union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory."

It is from the decisions in the Ann Arbor case and the Phelan case that the misguided zeal of political opponents has tried to discover in Judge Taft an unfriendliness to organized labor as such. No fair-minded man, acquainted with these cases and with the Addyston Pipe case, and with Judge Taft's entire career, will entertain the thought for a moment. Mr. Judson has

shown, in a most thorough analysis of those cases and of Moores *v.* Bricklayers' Union how senseless such a suggestion is (The Review of Reviews, August, 1907). He was able, as attorney for the Brotherhoods in the Wabash case, to use the opinion of Judge Taft in the Phelan case, quoted above, in defense of the right of organized labor to appoint advisers and be governed by their instructions in controversies with their employees, so long, of course, as they acted, in their operations, within the laws governing the relative rights of employers and employees. Judge Adams, in his opinion in the Wabash case, says:

"On the subject of organized labor no one has spoken more clearly or acceptably than did Judge Taft in the case of Thomas *v.* C. N. O. & T. P. Ry. Co. (Phelan case)."

But a combination of manufacturers, unmindful of the law, also met with a declaration of the law by Judge Taft which put an end to their conspiracy and to all others of a similar character.

The facts in the Addyston Pipe case showed that manufacturers of cast iron pipe, one a corporation of Ohio, one in Kentucky, two in Tennessee and two in Alabama, entered into an agreement covering thirty-six states and territories, by which they bound themselves to bid in such a way for contracts as that one of them would in all probability get the award as against others not in the combination. It was held to be a contract in restraint of interstate commerce. Here first the Sherman Anti-Trust Act was applied to illegal combinations among manufacturers. Judge Taft held that the reasonable restraints of trade recognized by common law, which are merely ancillary to some lawful contract between the parties, did not extend to agreements the sole purpose of which was to restrain competition and enhance and maintain prices, and that this agreement was not only illegal at common law, but, affecting as it did commerce between the states, was an unlawful combination under the act against trusts and monopolies. This decision was affirmed by the Supreme Court (175 U. S. 211), and it is to be noted that the principles declared by Judge Taft in all of the cases in which he had taken apparently advanced ground relative to the scope and application of the Sherman Anti-Trust Act, have received the affirmance of the highest tribunal in the land.

He gave his decisions in these cases, as in all others, without fear or favor and without respect to persons. His aim was to ascertain the law and then declare it regardless of individuals or combinations of individuals who might be affected thereby.

On the one hand, the ill-advised laboring man, going beyond his rights, and on the other, the greedy manufacturer exceeding his rights, have each felt the repressing hand of this courageous expounder of the law. And if he had taken any other position than he did, he would have forfeited the respect of both. But he could not, for he must declare the law as he found it, and the weakness of expediency is not in the man.

It so happens from the nature of things that injunctions have ordinarily been sought, when labor questions were involved, by the employer, usually some wealthy corporation. This fact undoubtedly prompted the inquiry put to Judge Taft by someone in the audience on the occasion of his speech on "Capital and Labor" at Cooper Institute, January 10, 1908.

"Why," asked his interlocutor, "should not a blacklisted laborer be allowed an injunction as well as a boycotted capitalist?"

Instantly came the answer: "He ought to be, and if I were on the Bench, I would give him one mighty quick."

That suggestion of unfriendliness comes either from dishonesty or ignorance. The searcher for truth, be he capitalist or laboring man, will, when he reads these cases, the answer of Judge Taft to the letter of January 4, 1908, addressed to him by Mr. Llewelyn Lewis, President of the Ohio Federation of Labor, the address before the Cooper

Institute, January 10, 1908, and the answers to the questions put to Judge Taft on that occasion, will come away from their perusal with a profound respect and admiration for this fair-minded man.

Want of space forbids the review of any considerable number of Judge Taft's decisions as Circuit Judge. Before him came the question of the constitutionality of the Nichols law, through which the Legislature of Ohio sought successfully to tax as property of express companies that proportion of the value of their whole business as a unit which was transacted in the state, and the many cases growing out of the failure of the Fidelity National Bank, and many other important cases.

Patent lawyers were glad to bring their cases in his jurisdiction. His training in mathematics probably contributed to an easy comprehension of questions involving mechanics and physics, and he has been heard to say that no more intricate or difficult questions were presented in patent cases than in many cases arising in the general practice of the law.

In the midst of his judicial labors he at all times had in mind the improvement of the facilities for the administration of justice and the maintenance of high standards at the Bar, and he made opportunities for carrying his purposes into effect. It was through his efforts that the valuable Law Library of the United States Circuit Court of Appeals was established in Cincinnati, and in 1896 he was largely instrumental in bringing about the merger of the Cincinnati Law School into the University of Cincinnati as its Department of Law. He was the professor of the law of real property in that institution and Dean of the Law School until he left Cincinnati to go to the Philippines.

His judicial service was brought to an end in March, 1900, when he was called by President McKinley to the Presidency of the Philippine Commission, and in January, 1901, he was made the first Civil Governor of the Philippines. His knowledge of our Constitution and institutions, our system of government, national and state, and the detailed workings of the system, even in the smallest governmental subdivisions, and his familiarity with the courts and their important decisions, and our methods of administering justice, civil and criminal, qualified him to an exceptional degree for this extraordinary service.

Well might a modest man hesitate, as he did, before accepting this great responsibility, but President McKinley knew the kind of man he was sending to work out problems of government theretofore unknown in the history of our country.

And in this work he gave evidence of a marked administrative capacity for the exhibition of which no previous public service had given him adequate opportunity.

Judge Taft's ambition to become a member of the Supreme Court of the United States was well known and he was twice offered by President Roosevelt a seat on that Bench, but he declined on the sole ground that he did not think his work in the Philippines was finished.

In January, 1904, he was given by President Roosevelt the portfolio of Secretary of War, and his executive and administrative qualities have been frequently called into activity, more especially through the intimate relation of that office to the administration of the Philippines, of Porto Rico, and to the construction of the Panama Canal.

Judge Taft's style in his written opinions is forceful and to the point. There is little *obiter dictum*. It was his practice to consult first the English cases bearing on the question under consideration, and on this foundation to build his conclusions fortified by the decisions of our own greatest courts. When, therefore, he was through with a subject, it was pretty well exhausted.

His decisions carry the convincing quality, and his sincerity of purpose was so evident

that he was seldom the subject of the hostile criticism judges so often incur from the unsuccessful lawyer and litigant.

His amiability, patience and genuineness won for him sentiments, not only of respect, but of affection, from the litigants and lawyers with whom he came in contact, and he probably has not an enemy among the reputable lawyers who have practiced before him. Yet he is capable of vigorous outbursts of righteous wrath, and more than once his flashing eye and clenched fist have attested his abhorence of the fraud and its perpetrators, disclosed by the evidence in the case on trial.

His frame of mind and the nature of the forces which impel him are disclosed by the character of his work and by his conversation.

When his attention was called to the use of his name for the Presidency of Yale University, when that office was vacant, he said to a friend, "I think a man could do more in such a place for the cause of righteousness than in any other I know of." And when speaking about the Philippines, he said to a company of friends, "I have some hesitation in saying what I am about to say, for I know there are some real missionaries in this company, and I may mistake the emotion, but I sincerely believe I have the missionary spirit. I know I want to do those people good."

Judge Taft's sense of justice is keen and his conscience is of the traditional New England type. He has the soundness of an abundant common sense and the amenities of a rich fund of humor. These qualities, united with physical strength, phenomenal capacity for labor, a good memory, tenacity of will, and that indefinable something called character, have made him equal to the great tasks to which he has been called and qualify him for any service the future may have in store for him.

CINCINNATI, OHIO, June 1908.

THE THEORIST

BY HARRY RANDOLPH BLYTHE

To split the hairs down lengthwise
  Was work that he adored;
So over musty volumes
  He pored and pored and pored.

But when he sought in court rooms
  To find fame as reward,
Alas! both judge and jury
  Were bored and bored and bored.

CAMBRIDGE, MASS., June, 1908.

THE CHARLES RIVER BRIDGE CASE

Part II

By Charles Warren

Meanwhile the earnings of the new Warren Bridge had been so large that early in 1832, within about two years after its construction, the bridge had paid for itself, and therefore should under its charter become a free bridge.

As, however, an adverse court decision might impose large damages on the corporation, it was deemed by the Legislature advisable to continue the tolls.

Accordingly by act of March 24, 1832 (c 170), the tolls were extended until the last day of the first session of the next Legislature. No decision having been rendered by the Supreme Court, the Legislature by act of March 28, 1833 (c 219), again extended the tolls, and provided that unless the Warren Bridge should give a suitable bond, the State should itself collect the tolls and assume the defence of the suit. The Warren Bridge gave its bond, and continued to collect the tolls, and to pay to Harvard College the money required by its charter.

The year 1833 passed without any decision from the Supreme Court. Meanwhile the same popular feeling was now growing against the Warren Bridge as had risen against the Charles River Bridge. The public demanded that the bridge should become free.

Nevertheless, Governor John Davis sent a special message to the Legislature, February 12, 1834, stating that he was informed the case was to stand over until 1835, and that "in order to do justice to all parties this will probably render further legislation necessary." Hence, by act of March 28, 1834 (c 131), the tolls were for a third time continued. The same action was attempted in the spring of 1835; but the opposition of the town of Charlestown and of petitioners in 60 other petitions, demanding the abolition of tolls, was so strong that the two branches of the Legislature could not agree on a bill. At the first session of the Legislature,[1] by act of November 4, 1835 (c 155), the tolls were continued until March, 1836, with the following proviso:

"That the tolls already collected and such as may hereafter be collected shall be exclusively appropriated to the repairs and maintenance of such bridge, and other purposes relating thereto, and to the payment of all such sums of money as may be recovered by the proprietors of Charles River Bridge in any suit in law or equity."

By this act the Warren Bridge Corporation lost all pecuniary interest in the tolls. A resolve of the Legislature of April 16, 1836, having directed the Governor to appoint a State agent to take charge of Warren Bridge, and the bridge having then become free of tolls, a great celebration was held in Charlestown to celebrate the event; and the noted lawyer and democrat, Robert Rantoul, was formally thanked for his "indefatigable exertions" in behalf of a free bridge.

The event, however, was a serious one for Harvard College; for when the Warren

[1] Lieutenant-Governor, S. T. Armstrong, on September 2, 1835, sent a special message to the Legislature saying:

"Many well disposed persons expressed doubts as to legality of longer demanding tolls, strenuously contended that Act of 1834, c. 131, had expired, and that there was no authority anywhere conferred by virtue of which tolls could be lawfully demanded, and that the Bridge had become a free public highway.

. . . Our fellow citizens who are to be so much affected by the eventual decision of this protracted controversy wait with patience and confidence for the removal of the burden of which they complain. . . . Will it not be best to consider and decide the question early and declare what is intended as our settled policy?"

Bridge became free, it discontinued payment of all annuities to the College.[1]

On April 21, 1836, the College Treasurer informed the Corporation that the Charles River Bridge also declined to make any further payment, and on September 19, 1836 he reported that "the bridge shares are at present valueless."[2]

The Charles River Bridge received from 1828 to 1836 about one-third of the tolls collected on the two bridges. It was kept open for about one year after the Warren Bridge became free, but was discontinued as a public highway, May 5, 1837, the Legislature having refused its petition for compensation.

The loss to the College was therefore figured as follows: On the two shares purchased by it in 1814 at $2080–$4160 loss. The annuity of $666.66 represented a capital of $11111.11 and the loss of interest on the shares for nine years figured $8246.40 — a total loss of $23517.71.[1]

Such was the situation when Daniel Webster and Warren Dutton for the Charles River Bridge; and Professor Simon Greenleaf and John Davis (then Senator from Massachusetts), for the Warren Bridge, went to Washington in January, 1837 to argue the great case. Owing to the absence of Judge James M. Wayne, Greenleaf was compelled to wait in Washington for over two weeks, the re-argument of the case not being heard until January 19, 1837 and ending January 26.

The following correspondence between Greenleaf and Charles Sumner, who was supplying his place as instructor at the Harvard Law School, during his absence, is full of interest.[2]

On January 1, 1837, Greenleaf wrote from Washington:

"This is indeed the city of magnificent distances, not only in its own arrangements but in its distance from good New England, and especially from that most desirable of all places, the very oculus Novanglia and therefore oculus mundi — need I say, Dane Hall? What is this mighty mass of marble called the Capitol compared with that little edifice of brick which honest Mr. Dane (may he rest in peace) so eloquently remarked to the President was 'worth the money it cost?' And what is this mighty realm of Mephistopheles, this, his very headquarters, in comparison with the circle of choice and cultivated spirits, and above all the moral atmosphere, of our own Cambridge? Away with the pitiable race of cringing colored menials whose very demeanour speaks slavery, and let me once again

[1] See the following interesting letter from N. I. Bowditch of this Corporation, to Treasurer T. W. Ward, November 24, 1835, *Harv. Coll. Papers*, 2nd Series, Vol. vii.

"I have conferred with Mr. [William] Prescott upon the subject of the rights of the College in the annuity payable by Charles River Bridge. He says that it is possible in case the College have accepted from Warren Bridge the half of said annuity by which by their charter they were bound to pay, that act may have operated as an extinguishment of one-half of the annuity in favor of Charles River Bridge, leaving the College to look solely to Warren Bridge for that half — and when that is made free, to the Legislature who made it so. It is clear that nothing can be done by the College until a failure of payment of the annuity occurs. And then Mr. Prescott thinks that the first step should be a petition or memorial to the Legislature reciting the original rights of the College and the subsequent arrangements by which the same became converted into an annuity — and the final act by which the franchise of the corporation chargeable with payment of it has become worthless and their property destroyed, and praying for relief. If this is refused, a suit must be commenced against Charles River Bridge, and perhaps in the new aspect presented by Warren Bridge being made free, a decision of our courts may be obtained which could not be while it continued a toll bridge. Mr. Prescott says that he is happy to be of any service to the College, and makes no charge for his trouble."

[2] See Reports of the Treasurer, April 21, 1836, *Harv. Coll. Papers*, 2nd series, Vol. vii, and September 12, 1836; *Harv. Coll. Papers*, 2nd series, Vol. viii.

[1] See estimate made for President Quincy in Harvard Archives — Quincy Papers. In the History of Harvard University, Vol. ii, App. liii, Quincy figures the loss at $35,401.16.

[2] The letters from Greenleaf of January 11, 1837, and January 28, 1837, never before published, are to be found in the "Sumner Papers" in the Harvard College Library. The letter from Sumner is to be found in "Memoirs of the Life of Charles Sumner" by Edward L. Pierce Vol. II. The letters from Story unless otherwise stated are to be found in his "Life and Letters," by W. W. Story.

be served by Jonathan at the top of his stature for twelve dollars a month, and Betty in pink ribbons Sundays, 'only till spring,' when she is to be married perchance, or go to Lowell.

You perceive that I am ready to return home so far as the disposition is concerned, but when that blessed day will dawn is deplorably uncertain. Judge Wayne is not arrived. He usually comes to New York in a packet. . . The Court has as yet done nothing but meet and adjourn, in the hope that by tomorrow he may be here, when our cause will be taken up, it being the first for argument. As soon as the argument is closed I shall start for home on the wings of steam.

I am with you daily in imagination and trust that you are by this time fairly at work. Give my affectionate regards to the members of the school, one and all, for they are capital fellows and I love them as my own brothers."

On January 24, 1837, Greenleaf wrote:

"For a week I have had scarcely a thought that was not upon Warren Bridge. The argument was begun Thursday by Mr. Dutton, who concluded Saturday morning. I spoke about two hours on Saturday and nearly three on Monday, and yet merely went straight over my brief, answering, by the way, a few objections on the other side. Mr. Davis followed me yesterday and concluded in three hours to-day, in a most cogent, close, clear and convincing argument. Peters the Supreme Court Reporter says the cause was not nearly as well argued before as now; and in proof of it says that his own opinion is changed by it and that he now goes for the Def'ts! Mr. Webster spoke about an hour this afternoon on general and miscellaneous topics in the cause, and will probably occupy all day to-morrow, as he said he should consume considerable time. He told us he should 'tear our arguments to pieces,' and abuse me. The former will puzzle him; the latter I doubt not he will do, as he was observed to be very uneasy and moody during the whole defense. Both Mr. Davis and I avoided everything 'peoplish' in our remarks, confining ourselves closely to legal views alone. But we expect a great effort from Mr. W. tomorrow.

It causes me much uneasiness to be absent from the Law School so long; but I was delighted to learn from your letter to the Judge that things go on so well They are capital fellows, and possess a large share of my affections.

Present to them my hearty love and good will, and tell them I hope to see them all next week. . . . Had Judge Wayne been here at the opening of the Court, I should have been on my return as early within a day as I anticipated before I left home. But it is now well understood that he and Cuthbert staid at home to work at the election of a member of Congress.

It has given me a fortnight's residence in Washington and the opportunity to see a little of this great world. Most of the great men, as usually happens on a near view, appear smaller than before, and some who were scarcely seen in the distance, appear greater. The newspapers, as you know by similar experience, give us a very imperfect and often erroneous view of things here. . . My present judgment is that political life is not to be coveted; that at the present day and in this country, whatever it may have been in the proud days of the old school, the corruptions of public places are great and that it requires no small degree of virtue to withstand them.

I think that many a man used to the world comes here in his complete simplicity and is mortally polluted in a single session — thought here are any others who may remain for years unscathed. After all, give me New England and her sons. There is, to be sure, excellent pluck in the south — men of worth and of valor too — but I cannot sigh with the poet for "a beaker full of the warm south," nor, on the other hand should I prefer our land, for the same reason given by him who "longed to see white women and yellow butter" once more. . . . Heaven bless you."

Sumner wrote on January 25, 1837:

"Many thanks for your cordial letter of the 11th from Washington; . . . Pray stay as long as your affection requires, with your daughter, and banish all thought of the law school. All are cheerful, respectful and contented, and seem to receive the law with perfect faith from their pro tem professor. A murmur, slight as that of a distant brook, has reached me from a counsel against whom I decided in a moot-court case, with an expression of an intention to appeal to Caesar on his return. The parties were, however, entirely respectful, and none have given me any reason to be uneasy. Starkie

I hear three days in the week, while Kent I encounter every day. This week I have held two courts, and decided the questions of our partnership and statute of limitations; and also that of the Hindu witness.

The students inquire of me daily when you will be back, and enter earnestly into forensic contest. I have explained again and again the nature of the question you have argued, and endeavoured to enforce and illustrate your views; in short, to make the school "Warren-Bridge men." I have been with you in your labors, and have hung with anxious confidence upon the accents of your lips. I have hoped that some of your points might reach our dear judge's prejudices and bear them away. If such be the case I shall have great joy with you. To convince him would be a greater triumph than to storm a citadel . . . "

Two days after the close of the argument Judge Story wrote to his son W. W. Story, January 28, 1837:[1]

"I am glad to learn the localities and gossip and news of Cambridge. To me these have more interest than many topics of great stirring moment to the public, and especially to public men, for I have long seen and known that it is scarce worth while to be worried about public affairs, since they are rarely such as are controllable by any appeals to wisdom or experience or patriotism, and mainly go just as the headlong, headstrong zeal and discipline of party directs.

"We have been for a week engaged in hearing the Charles River Bridge cause. It was a glorious argument on all sides, strong and powerful and apt. Mr. Greenleaf spoke with great ability and honored Dane College — Mr. Webster pronounced one of his greatest speeches. Mr. Dutton was full of learning and acute remarks, and so was Governor Davis — 'Greek met Greek.'"

Of the arguments of counsel, Judge Story said afterwards, in his dissenting opinion:

"The arguments at the former term were conducted with great learning, research and ability, and have been renewed at the present term with equal learning, research and ability. But the grounds have been in some respects varied and new grounds."

[1] See unpublished letter in "Story Papers" — Massachusetts Historical Society Library.

Of Professor Greenleaf's argument, his colleague, John Davis said, in opening his own argument:

"If others had not exhausted the subject my worthy and learned associate has brought such untiring industry into the case that nothing remains to me but a method of my own, less perfect than his, and a mere revision of the subject under that arrangement."

Story wrote regarding the argument to Sumner January 25, 1837.

"I thank you truly and heartily for your kind letter. It was like a warm spring breeze, after a cold, wintry, northern blast which had frozen up all one's feelings and sensations. It was not the less comforting, that it was dated from Dane College, and told of all that was thought and done there, and of the law, and the learned in the law, sojourning there in literary ease, and not disquieted with the turmoils of Washington.

"The Charles River Bridge case has been under argument ever since last Wednesday, and is just concluded. Every argument was very good, above and beyond expectation, and that is truly no slight praise, considering all circumstances. Our friend Greenleaf's argument was excellent, — full of ability, point, learning, condensed thought, and strong illustration, — delivered with great presence of mind, modestly, calmly, and resolutely. It was every way worthy of him and the cause. It has given him a high character with the Bench and with the Bar, and placed him in public opinion exactly where you and I could wish him to be, among the most honored of the profession. He has given Dane College new *éclat*, sounding and resounding fame; I speak this unhesitatingly. But at the same time I do not say that he will win the cause. That is uncertain yet, and will not probably be decided under weeks to come. I say so the more resolutely because on some points he did not convince me; but I felt the force of his argument. Governor Davis made a sound argument, exhibiting a great deal of acuteness and power of thinking. Dutton's argument was strong, clear, pointed, and replete with learning. Webster's closing reply was in his best manner, but with a little too much of *fierté* here and there. He had manifestly studied it with great care and sobriety of spirit. On the whole it

was a glorious exhibition for old Massachusetts; four of her leading men brought out in the same cause, and none of them inferior to those who are accustomed to the lead here. The audience was very large, especially as the cause advanced; — a large circle of ladies, of the highest fashion, and taste, and intelligence, numerous lawyers, and gentlemen of both houses of Congress, and towards the close, the foreign ministers, or at least some two or three of them.

"The Judges go on quite harmoniously. The new Chief Justice conducts himself with great urbanity and propriety. Judge Barbour is a very conscientious and painstaking Judge, and I think will improve as he goes on. . . . Greenleaf departs tomorrow morning, but he leaves a high repute behind. I feel a sort of homesickness in parting with him, though I have seen less of him here than I should at home."

Later, Story wrote to Professor Greenleaf, on February 11, 1837, just before the announcement of the decision of the case:

"I have the pleasure of your letter from Dane College, and I rejoice at it because you are safe and sound at home and in 'good fame' abroad. . . The Court will adjourn on Tuesday or Wednesday next. I shall then go on the speed of high pressure to Cambridge, tne first and last in all my thoughts. Tomorrow (Monday) the opinion of the Court will be delivered on the Bridge Case. You have triumphed."

On February 14, Story wrote to his wife;

"Mr. Greenleaf has gained the cause, and I am sorry for it . . . A case of grosser injustice or more oppressive legislation never existed. I feel humiliated, as I think every one is here, by the act which has now been confirmed."

The decision of the court, as is well known, was that public grants are to be construed strictly, and that in the absence of express words in a charter giving exclusive privileges, no such grant can be inferred. While the legal grounds of the opinion were strong, it is strikingly clear that the Court was powerfully influenced in its decision by the economic conditions of the times and especially by the effect which it was supposed a contrary decision would have upon the development of the young railroads of the country.

On this latter point Dutton for the plaintiff argued:

"But the principles to be established by the judgment of the court, in this case, will decide the title to more than ten millions of dollars in the State of Massachusetts alone. If that judgment shall decide that the legislature of Massachusetts has the constitutional power to pass the act in question, what and where is the security for other corporate property? More than four millions of dollars have been invested in three railroads leading from Boston, under charters granted by the Legislature. The title to these franchises is no other, and no better than that of the plaintiffs. The same means may be employed to accomplish the same ends, and who can say that the same results will not follow? Popular prejudice may be again appealed to; and popular passions excited by passionate declamations against tribute money, exclusive privileges, and odious monopolies; and these, under skilful management, may be combined, and brought to bear upon all chartered rights, with a resistless and crushing power. Are we to be told that these dangers are imaginary? That all these interests may be safely confided to the equity and justice of the Legislature? That a just and paternal regard for the rights of property and the obligations of good faith, will always afford a reasonable protection against oppression or injustice? I answer all such fine sentiments by holding up the charter of Charles River Bridge, once worth half a million of dollars, and now not worth the parchment it is written upon."

To this Davis for the defendant replied:

"The counsel are mistaken when they say that a decision in favor of the defendants will be fatal to future enterprises. This case has stood decided in their court for several years, and the history of Massachusetts can exhibit no period that will compare with it in investments for internal improvements; confidence in the integrity and good faith of the state never stood higher, nor did capitalists ever go forward with greater resolution and courage."

Chief Justice Taney in his opinion dealt at length and very powerfully with this argument: — [11 Peters 551–552].

"Indeed, the practice and usage of almost every State in the Union old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession on the same line of travel; the latter ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and traveling. In some cases railroads have rendered the turnpike roads on the same line of travel so entirely useless that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. . . . We cannot deal thus with the rights reserved to the States; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvements which is so necessary to their well being and prosperity. . . . Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of traveling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity and the convenience and comfort of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court is not prepared to sanction principles which must lead to such results. . . ."

Judge Story and Judge Thompson dissented from this decision, Story's opinion being undoubtedly one of the ablest works of his life. In it he said:

"I have examined the case with the most anxious care and deliberation and with all the lights which the researches of the years intervening between the first and last argument have enabled me to obtain, and I am free to confess that the opinion which I originally formed after the first argument is that which now has my most firm and unhesitating conviction. The argument at the present term, so far from shaking my confidence in it, has, every step, served to confirm it. . . . In now delivering the results of that opinon I shall be compelled to notice the principal arguments urged the other way. My great respect for the counsel who have pressed them and the importance of the cause will, I trust, be thought a sufficient apology for the course which I have, with great reluctance thought it necessary to pursue."

The interest taken at the Harvard Law School in the case is well shown in a letter from Sumner to Story March 25, 1837, after the decision had been announced:

"I have read most deliberately all the opinions of the judges in the Warren Bridge case. I have studied them and pondered them, and feel unable to restrain the expression of my highest admiration for the learning the argument, the ardour and the style in which you have put your views. If I had not been magnetized by many conversations with Mr. Greenleaf and Mr. Fletcher, and by the deep interest which I was induced, from my friendly intercourse with them, to take in favor of the Warren Bridge,

I should feel irresistibly carried away by the rushing current of your opinion. Reading it with a mind already pre-engaged to the other side, I feel my faith shaken, nevertheless, and cannot but say, 'Thou almost persuadest me.' . . . As I read Taney's before I read yours, I felt agreeably surprised by the clearness and distinction with which he had expressed himself and the analysis by which he appeared to have been able to avoid the consideration of many of the topics introduced into the argument. But on reverting to his opinion again after a thorough study of yours, it seemed meagre indeed. Your richness of learning and argument was wanting. I thought of Wilke's exclamation on hearing the opinion of Lord Mansfield and his associates in his famous case — that listening to the latter after the former was taking hog wash after champagne. Your opinion is a wonderful monument of juridical learning and science. Indeed, I do not know where to turn for its match in all the books. . . . At present it will suffice for me to say that you have made a skeptic, even if you have not gained a convert.

Nobody in our country, or in the world, could have written your opinion but yourself. . . . Aut Morus, Aut Diabolus. It will stand in our books as an overtopping landmark of professional learning and science."

Ex-Chancellor James Kent wrote to Story April 18, 1837:

"The Bridge case I read as soon as I received it, to the end of the opinion of the Chief Justice, and I then dropped the pamphlet in disgust and read no more. I have just now finished your masterly and exhausting argument."

Later he wrote to Story, June 23, 1837:

"I have re-perused the Charles River Bridge case, and with increased disgust. It abandons, or overthrows, a great principle of constitutional morality, and I think goes to destroy the security and value of legislative franchises. It injures the moral sense of the community, and destroys the sanctity of contracts. If the Legislature can quibble away, or whittle away its contracts with impunity, the people will be sure to follow. *Quidquid delirant reges plectuntur Achivi.* I abhor the doctrine that the legislature is not bound by every thing that is necessarily implied in a contract, in order to give it effect and value, and by nothing that is not expressed *in hæc verba*, that one rule of interpretation is to be applied to their engagements, and another rule to the contracts of individuals. . . . But I had the consolation, in reading the case, to know that you have vindicated the principles and authority of the old settled law, with your accustomed learning, vigor, and warmth, and force."

Story's dissenting opinion was also approved by such eminent Massachusetts lawyers as Webster, William Prescott and Jeremiah Mason. Webster wrote, shortly after the decision:

"I lost the first five minutes of your opinion, but I heard enough to satisfy me that the opposite opinion had not a foot, nor an inch, of ground to stand on.

"I say, in all candor, that it is the ablest, and best written opinion, I ever heard you deliver. It is close, searching, and scrutinizing; and at the same time full of strong and rather popular illustrations.

"The intelligent part of the profession will all be with you. There is no doubt of that; but then the decision of the Court will have completely overturned, in my judgment, one great provision of the Constitution."

Later, Webster said in an argument in behalf of the Lowell & Boston Railroad Company made in January, 1845, before a committee of the Massachusetts Legislature

"When I look back now after a long lapse of years and read the judgments of those judges — I must say that I see, or think I see, all the difference between a manly, honest, and just maintenance of the right, and an ingenious, elaborate, and sometimes half shame-faced apology for what is wrong. Now I am willing to stake what belongs to me as a lawyer, and I have nothing else, and to place on record my decision that that decision cannot stand; that it does not now enjoy the general confidence of the profession; that there is not a head, with common sense in it, whether learned or unlearned, that does not think, not a breast that does not feel, that, in this case, the right has quailed before the concurrence of unfortunate circumstances."

The last reference to this case, made by Judge Story in his correspondence, was in a

letter to Mr. Justice McLean, May 10, 1837, in which his general despondency over the change in the attitude of the court is clearly set forth:

"The opinion delivered by the Chief Justice has not been deemed satisfactory; and, indeed, I think I may say that a great majority of our ablest lawyers are against the decision of the Court; and those who think otherwise are not content with the views taken by the Chief Justice.

"There will not, I fear, ever in our day, be any case in which a law of a State or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away, and a change has come over the public mind, from which I augur little good. Indeed, on my return home, I came to the conclusion to resign."

As a summary of the whole case, perhaps the following statement by George W. Biddle is among the best of the many favorable comments upon it:[1]

"Story's dissenting opinion in the bridge case is a wonderful combination of great learning, and, if the phrase may be permitted, of judicial oratory, in defense of a cause in which he thought the principles of morality and public integrity were involved and about to be successfully overthrown in the person of a valuable corporation which had been a pioneer in the cause of internal improvements. It was lighted up with the fires, not yet cooled, of the rulings in the Dartmouth College case, and was something like a protest against an assault supposed to be about to be committed upon the doctrine solemnly announced by that important decision.

In truth, the principle of the Dartmouth College case perhaps correct enough, when limited as it was, applied to a private grant, had been pushed by its advocates to an extreme that would have left our State governments in possession of little more than the shell of legislative power. If the liberality of construction contended for had been permitted, all its essential attributes would have been parcelled out without possibility of reclamation, through recklessness or something worse, among the greedy applicants for monopolistic privileges.

. . . Unless the luxuriant growth, the result of the decision in 4 Wheaton, had been lopped and cut away by the somewhat trenchant reasoning of the Chief Justice, the whole field of legislation would have been choked and rendered useless in time to come for the production of any laws that would have met the needs of the increasing and highly developed energies of a steadily advancing community."

Whether the above tribute to the decision of the case has been justified may well be doubted.

In view of the expansion of railroads, the unnecessary paralleling of lines and the recklessness of legislatures in granting charters, in subsequent years, a very strong argument could be made that the prosperity of the country would have been better promoted had the court followed Judge Story's decision on the law and the arguments urged by Mr. Dutton and Mr. Webster.

The subsequent course of State statute law in the United States would seem to show that the legislatures needed no judicial encouragement from the bench towards a relaxation of the policy of maintaining complete faith as to past grants.

The sequel to this case may be briefly summed up.

At the session of the Massachusetts Legislature of 1837, the Charles River Bridge applied for compensation but without success, although by resolve of April 20, 1837, a joint committee was appointed: "to consider and report: 1. What is the value of Charles River Bridge? 2. What would have been the value of the franchise of the Corporation if the Warren Bridge charter had not been granted? What would have been its value if the Warren Bridge had remained a toll bridge and what is its value as it is now situated? 3. To inquire whether any arrangement can be made with any cities, towns or counties, for contributing to support said bridge as a free public avenue."

[1] "Constitutional Developments in the United States as Influenced by Chief Justice Taney," by George W. Biddle.

In 1838, notwithstanding Governor Edward Everett, in his message of January 9, recommended "a final adjustment on liberal and equitable principles," nothing was done for the Charles River Bridge. In 1839, in his message of June 10, Governor Everett said, "Public convenience and private seem to call loudly for some definite arrangement as to the Warren Bridge," but again nothing was done. In 1840, Marcus Morton was elected Governor as a Democrat, by one vote over Edward Everett. As, however, he had been the judge who had prevented a decision in favor of the Charles River Bridge in the Massachusetts Supreme Court, and as he was strongly opposed to all corporations, it was not to be expected that the Legislature would do anything for the bridge.

In 1841, however, when John Davis, a Whig, was elected Governor, the long drawn controversy which had now lasted for eighteen years, was finally settled so far as the Bridge was concerned by the passage of an act, March 17, 1841 (c 88) providing for the payment of the meagre sum of $25,000 for a surrender of all the rights and title to the Charles River Bridge and of its charter. The long fight, however, came to a most impotent and unsatisfactory conclusion as regarded the general public; for notwithstanding the determined struggles of the public for a free bridge, the statute provided that while Charles River Bridge should be opened again for travel (it having been closed for nearly four years), yet toll should be collected, and at the same time it provided that the Warren Bridge should again become a toll bridge.

Thus at a cost of only $25,000, plus the amount spent by the State in maintaining the Warren Bridge for the last five years, the State came into possession of two fine bridges, and the public was still obliged to pay toll.

No action was taken in 1841, however, as to compensation to Harvard College for its losses. But in 1847 the College received recognition; for by Resolve of April 26, 1847, (c 98) justice was at last done to it; and the Charles River Bridge Chapter on the legislative records was closed, as described by the Treasurer of Harvard College in his annual report for 1846–7 as follows:

"Another sum has been received during the past year, which is gratifying, not so much for its amount, as for the sense of justice which dictated its payment. The legislature of the Commonwealth last winter voted that the sum of $3,333 30 should be paid to Harvard College in compensation for the loss of the annuity from Charles River Bridge during the five years the bridge has been in the possession of the Commonwealth; and the original annuity has been also voted for what would have been the remainder of the term of that corporation, had it continued to exist. This is a partial revival of one of the first legislative grants to the College, one which bears date more than two centuries ago (1640); and although it by no means compensates the loss of the College, yet it is agreeable to see the disposition manifested by the State, once more to do something for education at Cambridge after the lapse of so long an interval in her patronage; and it encourages the hope that her liberality may provide for some of those wants which are heavily felt there, and which by limiting the education of her sons, limit also her own prosperity. . . ."

BOSTON, MASS., May, 1908.

THE EARLY VIRGINIA BAR

By William Romaine Tyree

IN speaking of the early days of the Bench and Bar of Virginia, one's curiosity is naturally aroused as to the life, both professional and domestic, of these early barristers — we wish to know what were the habits of the times among our prototypes of the past. And from all we hear and read of this life, the difference seems vast in comparison to our own material age, in which it has grown from a profession into an ordinary business calling, requiring much legal acumen and great business ability.

Let one enter now the offices of a prominent firm of attorneys in our cities — large or small cities — and what a contrast is presented as we recall what has indelibly been fixed in our minds and greatly heightened by our own imagination, of a lawyer's office one hundred or more years ago. Time which has revolutionized our business methods has laid strong hands upon the law itself, or, at least, its practice and its every-day methods.

Rarely do we find to-day one of our sect reaching his conclusion from a thorough study and mastery of the great principles of the law from arduous perusals of Coke, Blackstone, Littleton's Tenures and other great masterpieces of the profession, thus keeping ever before him the celebrated phrase of Coke's, "The reason of the law is the life of the law, but we find our latter-day practitioner reaching for his digests, where he may consult, through its aid, a decision in point upon the subject — here lies one of the greatest differences between past and present; our ancestors were compelled to more individual and independent actions of thought; we, to-day, have had it all thrashed out for us, and it continues to be handed to us without any effort on our part but to pay our book bills. We may well ask ourselves, have we benefited greatly by this change? In some ways, greatly, yet, at the cost of taking from our profession that incentive for pure, unalloyed thought, which our predecessors used with such powerful effect in their arguments.

And now let us take a cursory glance at the early legal life and customs of Virginia. However, of the first days of the infant there is little, or no authentic information, except that for many years the profession went through the fiery furnace, inasmuch as there was great opposition brought to bear upon it by the aristocracy of the colony.

We cannot say what practise our old historical acquaintance, Nathaniel Bacon, may have enjoyed, or as to its class. We do know, though, that he was an able member of the guild; if not by quiet acquiescence in the policy of the colonial government, by the strife which he afterwards engendered. Our imagination — from this domestic age — may likewise conjure up the thought of vast retainers paid him by London Trading companies for the use of his shrewd and able mind and which, also, must have been employed at odd moments upon real estate speculations, all of which were forfeited by reason of his irascible disposition; so he seems to be better known to us as a turbulent character than a guardian of justice.

His life seems not to have been of that placid indifference to the outside world which marks the period of our successful lawyer; but was lived like those of the adventurers around him, in the smash-buckling escapades of the period — his office must have been at Jamestown, but his practice was, no doubt, diffuse.

Our next step, in the progress of the legal profession, is toward the days of our first barristers, Edward Barradall and Sir John Randolph — this era, in reality, marks the beginning of the history of the legal profession in Virginia and the report of cases in which they were counsel; for, while from the

earliest days of the colony there were attorneys, any true sketch of their personal traits, character or causes in which they appeared are, for the most part, lost if, in fact, they were ever printed.

It is believed, however, that no license upon examination was required for the practice of the law, until May, 1732 (6 Geo. II); before that time, the profession was, to some extent, recruited from the aristocracy of the colony, who were educated in the law at the Temple, either emigrating as lawyers or being sent to England for the purpose of a classic and legal education. However, these gentlemen, so eminently prepared for the arduous labors of the profession, were greatly in the minority, for it is an historical fact that our ancestors cherished bitter prejudices against the professional lawyer, a dislike which seemed at the time also to prevail in England, and was brought about, no doubt, either by jealousy at their rise to fame, especially in England, by distrust, or by considering them in the light of mercenary traders upon the misfortunes of others — this condition prevailing in Virginia, as a few quotations from early statutes will disclose.

The earliest manifestation of this, occurred the year 1642, when an act was passed, "For the better regulating attorneys, and the *great fees exacted by them*," by which it was declared that it should be, — "Not lawful to plead for another without *license from the court where he pleadeth*, and can have license only in the *quarter-court*," (held by the governor and council at the seat of government at Williamsburg), "and one county-court." The same act also prescribing what fees should be taken; for the county-court (where the great bulk of the business was transacted), *twenty* pounds of tobacco, and in the quarter-court (the supreme court of the colony), fifty pounds. The act concludes, "No attorney shall refuse to be *entertayned* provided he be not *entertayned* by the opposite party," upon pain of heavy fines. (1 Hen. Stats. 275).

In November, 1645, we find the following statute:

"Whereas, many troublesome suits are multiplied by the unskillfulness and covetousness of attorneys, who have more intended their own profit, and their inordinate lucre, than the good of their clients; Be it, therefore, enacted, that all *mercenary* attorneys be wholly expelled from such office." (1 Hen. Stats. 302.)

In the year 1647, we read the following:

"It is thought fitt that unto the act forbidding mercenary attorneys, it bee added that they shall not take any recompense, either directly or indirectly. And that it be further enacted, that in case the courts shall perceive that in any case, either plaintiff or defendant, by his weakness, shall be likely to lose his cause, that they themselves may either open the cause in such case of weakness, or shall appoint some fitt man out of the people to plead the cause, and allow him satisfaction requisite, and not to allow any other attorneys in private causes betwixt man and man in the country." (1 Hen. Stats. 349.)

Thus the profession seems, with varying success, to have struggled until March, 1658, when some proposition was brought forward by the house of burgesses (the popular branch of the colonial legislature) which, in its short-sighted wisdom — in the meanwhile it having been referred to the Governor, Sir William Claiborne — proposed, whether or not there should be a total ejection of lawyers. The subject of such drastic legislation being submitted to the Burgessees by the Governor and Council for investigation whether there was anything in Magna Charta to prohibit it, and having been answered in the negative, a vote for a *total ejection* was carried — the following statute being enacted in March, 1658. (9 Commonwealth).

"Whereas, there doth much charge and trouble arise by the admittance of attorneys and lawyers, through pleading of causes, thereby to maintaine suites in lawe to the

great prejudice and charge of the inhabitants of this collony; for prevention thereof, be it enacted by the authoritee of this present grand assembly, that noe person or persons whatsoever, within this collony either lawyers or any other, shall pleade in any court of judicature within this collony, or give councill in any cause, or controvercie whatsoever, for any kind of reward or profitt whatsoever, either directly or indirectly, upon the penalty of ffive thousand pounds of tobacco upon every breach thereof. And because the breakers thereof, through their subtillity, cannot easily be discerned, Bee it, therefore, enacted, that every one pleading as an attorney to any other person or persons, if either plt. or defendant desire it, shall make oath that he neither directly nor indirectly is a breaker of the act aforesaid." (1 Hen. Stats. 495–482.)

Even after such a seeming death blow to the profession, the fraternity, with the perseverance which they have ever shown, struggled on in this crippled condition with the hope of ultimately convincing the public of their error and the usefulness of the craft in affairs politic. This they finally accomplished at an early age, for there was, in a few years, a repeal of the statute, leaving the bar ever afterwards free of such persecution.

During these early days there was little to distinguish our brothers-in-arms from the prosperous planters or merchants of the period; that is, before the war with England, inasmuch as we were a dependent colony, we looked to the mother-country for support in things military as well as civil. Mercantile transactions were in their infancy; there were few courts and those were held, for the most part, at the capital. But although the trials of those great causes, which have formed precedents in our law, and the record of forensic eloquence had not yet made their appearances, the profession was gradually becoming moulded into concrete form; and, in the early eighteenth century, such names as Sir John Randolph and Edward Barradall — barristers educated and equipped in England at her courts at Westminster — begin to throw a glimmer of light upon this hitherto prosaic period of legal attainments. One can readily see with such men of influence, wealth and education entering the legal life of the colony, that it was a step towards the placing the profession of law upon the eminence which it has since enjoyed.

These two great barristers of early days — for they were the prototypes of what was best in their calling — practiced, for the most part, at the bar of the general court, the highest tribunal of the colony in those days; and history records that Mr. Randolph was in the habit of lecturing upon the law to the young men of the day who were in attendance at the College of William and Mary, in which place his remains lie at the present time in a vault beneath the chancel of the chapel.

These two, being of aristocratic parentage, were educated far above the middle class, and laid the foundation for [that subsequent period which may well boast of the greatest galaxy of legal minds ever associated in any of the original thirteen colonies, either before or since; for now sprang into prominence the great Wythe, Pendleton, the Randolphs, Peyton and John, sons of Sir John, Mason and others.

The change to a more democratic atmosphere from that of the old knights was beginning to be felt; the colony had commenced to extend its civilization toward the great blue range on the west; trade of every description was on the increase; courts were more often held; fees were becoming established upon a currency basis; and more young men were coming to the bar. In this manner the Guild was being formed; and so popular had it become to be a member thereof, that the greatest ambition of the young Virginian of the day was to be a disciple of a creed so honorably established.

The outlying counties from the capital at Williamsburg being sparsely populated, it is at Williamsburg we find the principal

markets of trade, the courts and the legal profession, likewise the schools for the young men of the day; and hither they came to enter upon their studies of the classics and the law — hearing lectures from some one or two of the prominent barristers of the general court, and, if fortunate, becoming an apprentice to one of these distinguished gentlemen, where our embryo attorney not only laid the foundation of future triumphs at the bar by a careful perusal of "Coke upon Littleton" and the mysteries of the pleading of the times, but was taught the art of being a gentleman by reading after the authors of the Old World, learning the steps of the stately minuet, fox-hunting, the discussion of political affairs, the writing of political pamphlets, and keeping in vogue with the fashions of London and Paris.

In spite of this frivolity, however, our young attorney lived in a time which gave much and demanded much. For, should he be ambitious — and this was generally the case with the example before him of those honored by reason of their calling — there were many days and nights of painstaking preparation before he could hope to appear at the slightest advantage in the conduct of his causes. Moreover, the mere association with minds of such finished elegance gave him that food for absorption which permeated his whole being.

After the War of the Revolution, Williamsburg lost much of its ancient greatness; the capital of the commonwealth was moved to Richmond; the far-off counties began to come into civilization and recognition; and the courts began to be scattered into all parts of the state, in this way bringing to our attention the importance of the county court, which had already been the most popular tribunal of the colony; and that Mecca of each county, the county-seat, at which place this court was held once every month — presided over, in the early days, by justices of the peace of the county, who were the most influential men in the colony and commonwealth, and later by the county judge (this court has lately been abolished under the new constitution of Virginia). With the importance of this tribunal to the layman and lawyer and before the days of the railways, comes that heyday of the bar, the "riding upon circuit."

The profession at this period in its history, while in fact more of a profession than at the present time, was marked by a feeling of good fellowship, good living and a jollity among its members which is unobtainable at the present time. And though our brothers-in-arms were, for the most part, poorly paid — often taking their fees in livestock and poultry — yet this seemed to lessen not a whit the vigor of their arguments; and this same produce went to laden the hospitable boards of those whose gates were thrown wide to the gay young and learned old barristers who rode the circuit.

Each tavern was a meeting-place for these choice spirits; and in the midst of their evening revels there flowed an infinite variety of wit and humor; also much learning and hard common sense were a part of each conversation.

To add to this unbounded hospitality, eager crowds waited upon the court green to catch a glimpse and listen. And during political campaigns, joint debates between the leading lawyers of the county were eagerly enjoyed by the inhabitants of the countryside, who came from far and near to listen, sometimes, to rather lurid oratory, for even a seat in the state legislature was bitterly fought, the incumbent knowing full well the importance which it brought to thus represent his constitutents.

Mr. John P. Kennedy, an able lawyer of the old school, in his life of Wirt — who was an exemplar of the young barrister of his day — says:

"Such a character (speaking of Wirt's) we may suppose to be but too susceptible to the influences of goodfellowship, which, in the jollity of youthful association, not unfrequently take the discretion of the votary by surprise, and disarm its sentinels.

The fashion of that time" (speaking of the early part of the nineteenth century) "increased this peril. An unbounded hospitality amongst the gentlemen of the country opened every door to the indulgence of convivial habits. The means of enjoyment were not more constantly present than the solicitations to use them. Every dinner-party was a revel; every ordinary visit was a temptation. The gentlemen of the bar especially indulged in a license of free living, which habitually approached the confines of excess and often overstepped them. The riding of the circuit, which always brought several into company, and the adventures of the wayside, gave to the bar a sportive and light-hearted tone of association which greatly fostered the opportunity and the inclination for convivial pleasures. A day spent upon the road on horseback, the customary visits made to friends by the way, the jest and the song, the unchecked vivacity inspired by this grouping together of kindred spirits — all had their share in imparting to the brotherhood that facility of temper and recklessness of the more serious and sober comment of the world. . . ."

Then the contests of the bar which followed in the forum, the occasions they afforded for the display of wit and eloquence, and the congratulations of friends, were so many additional provocatives to that indulgence which found free scope when evening brought all together under one roof, to rehearse their pleasant adventures, and to set flowing the currents of mirth and good humor — "to make a night of it, as the phrase is, kept merry by the stimulants of good cheer. . . ."

We need not think, however, from this short history of the professional men of the day, that these sporting gentlemen were inattentive to the interests of their clients. On the contrary, none were more zealous than they in the arduous preparation and trial of their causes. I know of an instance, whereupon a certain lawyer, having been retained in a causeof some importance — he a fox-hunting barrister, too, and his library, though quite extensive, not containing the decision in point — who, in some manner, had the case continued until he could send to England for his authority, and upon this authority he won his case both in the lower and higher courts.

Of course, it takes only a cursory glance to convince us that the practice of the profession has greatly changed since the days of our brother, Wirt; our fox-hunting, sporting and jovial attorneys of the past were more red-blooded; there was more of the poet in their compositions; they were more versed in the classics and the master-pieces of fiction than we of to-day, which they used by constantly referring to them in their arguments and conversations, rendering them full, round, rich and far more pleasing to the ear than ours of a more technical kind. These were men, every inch of them, filled with the virtues, follies and vices of the times in which they lived, but containing withal a nobleness of spirit and adherence to principle in their grand old manner which is far beyond us of a more material age.

There were few diversions beyond their simple home lives and their daily communion with their friends and acquaintances. And though the bar was within the reach of all, it was held in respectful esteem and oftentimes veneration by the populace.

ROANOKE, VA., June, 1908.

THE FOUNDING OF THE CIVIL GOVERNMENT OF THE PHILLIPINES

By James H. Blount.

THE backbone of the Philippine insurrection against American authority was broken in May, 1901, by the capture of Aguinaldo. Governor Taft was inaugurated as civil governor of the islands on July 4 thereafter.

The Taft Philippine Commission had come out to the islands in the summer of the year previous, arriving at Manila June 3, 1900. As fast as provinces were pacified, military government would be superseded by local provincial self-government, shared between natives and Americans. What was known as the General Provincial Government Act was passed early in February, 1901. When a province was deemed restored to a sufficient degree of law and order, the commission — the lawmaking body — consisting of five Americans, would visit that province, pass, at a session held at its capital, a special act placing said province under the operation of the general Provincial Government Act, appoint the governor, treasurer, and other provincial officials called for by the Provincial Government Act, and then depart forthwith. Sometimes they would do all this in three or four hours. The first province so organized was set going about the middle of February, 1901. By June following some 25 provinces had been thus visited and "admitted into the Union" as it were, and, as above stated, the central government, which is to be the nucleus of the future federal government, was inaugurated July 4, 1901. Of the forty and odd provinces composing the Philippines, there were on July 4, 1901, a half dozen or more others, besides the 25 already organized which were deemed ready for self-government, but they had not been so organized simply because the commission had not been able to get round to them, hold the necessary session, pass the necessary act, and appoint the officials. As the routine in each case was pretty much the same, a description of the organization of provincial government in one of these provinces will, it is believed, convey a fair idea of the details of the founding of the civil government of the Philippines. While the first 25 provinces aforesaid were being organized, i.e. between February and June, 1901, the writer was not connected with the Philippine Civil Commission in any way, being still an officer of the Philippine volunteer army, detailed in the office of the military governor as one of his legal advisers, where he remained until the end of the fiscal year June 30, 1901, the date of the muster out of the volunteer army, going into the service of the civil government on the following day, July 1, as Judge of First Instance of the First Judicial District. This district consisted of the four most northerly provinces of the archipelago, all of which were among the "half dozen or more" that were on July 4, 1901, deemed ready for organization under the Provincial Government Act, but had not been reached simply for lack of time. The writer had the good fortune to see civil government founded in one of these four provinces in August, after the inauguration of Judge Taft as our chief magistrate, and will endeavor to describe it here for the entertainment of the readers of the Green Bag.

Of the 17 United States district judges (called out there Judges of First Instance) originally appointed by Governor Taft in 1901, four were taken from the volunteer army, viz., Capt. Adam C. Carson, of Virginia, 28th Infantry, U. S. V., now one of the associate justices of the Supreme Court of the Philippine Islands; Capt. W. H.

Ickis, of Iowa, 36th Infantry, U. S. V., now dead; Lieut. George P. Whitsitt, of Missouri, 32nd Infantry, U. S. V.; and the writer.

We waited over in Manila to see the Taft inauguration ceremonies on July 4, and thereafter made ready to proceed to our respective districts. Before parting, however, we decided, the four of us, to go in and pay our respects to Governor Taft and say good-by.

Judge Carson, being an Irishman, could talk better than the rest of us, and he, by common tacit consent, acted as spokesman for the party. He said: "Governor, besides saying good-by, it might be well to ask if you have any suggestions that might help us. We have been under military orders so long that, while, of course, we don't expect any orders from you as to administering the duties of our offices, we would like to hear any suggestions that may occur to you as opportune." The governor replied: "Well, gentlemen, we have often been told that the courts of our predecessors in sovereignty operated rather to delay justice than to dispense it. You are Americans. All I can suggest is that you proceed at once to your respective districts and get to work" — which we did.

The first province I went to work in was Ilocos Norte. The judiciary laws contemplated that in each province there should be two regular terms of court held each year. The midsummer term of the Court of First Instance for the province of Ilocos Norte was fixed by law for the first Tuesday in July, and that for the next adjoining province of the First Judicial District, viz., the province of Cagayan, for the third Tuesday in August. I went to work to clear up the Ilocos Norte docket in time to open court in Cagayan on the date fixed by law. There was a large criminal docket — a jail containing more than a hundred prisoners — and also a considerable civil docket. I recollect disposing one day of a lawsuit about some land which had actually been pending in that court for more than a hundred years.

As the third Tuesday in August approached I was getting the docket pretty well cleaned up, and began to cast about for some means of transportation to Tuguegarao, capital of Cagayan province aforesaid. About that time a message came that the Philippine Commission would visit Laoag on Tuesday, August 20, for the purpose of establishing civil government in the province of Ilocos Norte, and would sail the same day for Cagayan province. So I determined to wait and see the proceedings, and also ask the commission to take me along with them to Cagayan province.

Tuesday, Aug. 20, 1901, was a great day in Laoag, the capital of the Province of Ilocos Norte. We had been advised by telegram that the commission would arrive off the port of Laoag, which is some three or four miles from the town, at seven o'clock in the morning, Tuesday. At five that morning the writer rose, took his morning's exercise, slashed around in the commodious tiled bath-room of our Laoag residence, a most elegant house of masonry costing the moderate rental of fifteen dollars per month, shaved, donned the immaculate white clothing and straw hat worn by nearly all Europeans and Americans in Hawaii, the Philippines and other tropical countries, and sallied forth at six-thirty to breakfast. This disposed of with the relish lent by the exercise aforesaid, he proceeded to the court room for the purpose of signing certain papers, the last official documents to be signed during that term of Laoag court, which had been left over from the evening before because it had not been possible to finish them up.

Then all the lawyers, court employees, Mr. Brower, stenographer for the district, and I, got into conveyances and went to meet the dignitaries. We met them on the road. They had already disembarked,

and were coming to town in a long string of vehicles, the first occupied by the rotund and ample person of his Excellency the Governor, and Gen. J. Franklin Bell.

The latter is about a couple of inches over six feet, weighs about 200 pounds, is very broad-shouldered and deep-chested, has a clear, healthy complexion, a fine brown eye, frank, piercing and aggressive, is as active and restless as a panther, has a way of giving orders like one who always had been, and proposed to be, implicitly obeyed, and is altogether a very martial figure, a most commanding presence. They all said that nobody but General Bell could have got them landed at Laoag on schedule time. The petty officials at the port said repeatedly "No puede," "No puede" — "it cannot be done." But the general said if it could not be done he was going to "know the reason why." So Achilles got the Solons safely through the breakers to the beach, in "virays," great, flat-bottomed canoes about 30 or 40 feet long, manned by natives and propelled by the use of oars, much resembling the olden time galleys of the Norsemen; thus demonstrating to the Filipinos as Oscar King Davis has wittily put it the "puedebility" of "no puede." He is certainly a fine specimen of manhood, if immense physical strength, and consequent tirelessness, demonstrated recklessness of danger in the presence of something to be accomplished, and capacity to get out of men what they themselves didn't know was in them, be a fair test. If I were to compare the three young men I have known who have come most prominently to the front since a mixture of imagined patriotism and other things switched me off from my profession in the spring of 1898, I would say that this one could lead a charge after the manner of Pickett or Gordon, that Gen. Leonard Wood could "fight it out on this line if it took all summer," and that General Funston could do things like Mosby used to do, performances whose sheer audacity captivates the imagination.

But let us return to the procession here-in-above mentioned as en route from where the China Sea breaks on Luzon beach about the mouth of Laoag River, to the pueblo of that name, and to the other occupant of the first carriage in that procession, Judge Taft. As they passed, we turned to the side of the road to make room, the governor bowing pleasantly to all of us. He is almost as big as Mr. Cleveland was when he was President. A Yale man, and one who took quite a part in all athletics while at college, I am told, he is now exceedingly fleshy, with finely chiselled features, blonde moustache and hair whose decidedly Teutonic type particularly impress one, and the bearing that a man may well have when life has been a placid series of great successes due to a pleasing manner, an equable temperament, a capacious mind, unvarying industry, unimpeachable character, and continuous good luck.

He was Solicitor-General of the United States when but little over thirty years of age, and although now only about forty-two or three, he has already been a federal circuit judge, and is not at all unlikely to reach, at some future date, a still higher station.

Finally we reached the river, where a raft awaited the party. On it was a pavilion built of bamboo for the occasion, and decorated with American flags and other drapery. Crossing the river, which is about one-fourth as wide as the East River at New York, we had a full view, several hundred yards down stream, of one of the principal sights of the locality, the washerwomen and water carriers — *lavanderas and aguadoras* — plying their morning vocation. Hundreds of these congregate on an island or sand bank in midstream every day with great wooden tubs shaped like a soup plate, and on this they beat the clothes with a paddle, the combined sound of the many paddles resembling the patter of distant

musketry. Before the American occupation, it is said that these washerwomen used to strip to the waist like a pugilist when they began their daily attack on the sartorial belongings of the *caballeros* of the city, but since the new régime they have yielded to the artificial niceties of civilization so far as to enter upon their labors in ordinary extreme décolleté, à la court de Louis Quinze. The *aguadoras* shock our western civilization in a different way. They have to wade out into the stream to fill their "ollas," large porous earthernware jars, and when the *ollas* are filled they put them on their heads, and march out, and up through the streets of the pueblo, with their brown legs shining in the sun, all unaware that in the United States to which they belong, this might be considered carelessness in dress.

But to return to the floating pavilion, which we left in midstream during this diversion. A band was waiting on the farther side shore, as usual on all such occasions, and vehicles galore, but as the vehicles were manufactured to hold only four of the people of this country — "quilez" is the name of them — it would be hardly possible for Judge Taft to get into one — so he walked on up to headquarters, and we all followed suit.

They had all gotten soaked to the skin crossing the breakers, and so an hour was spent in drying off and getting into more white clothes. Thus, pursuant to the program, on which the military commander at Laoag and myself had agreed, viz., that my court room should be used for the public meeting, the visitors were escorted thither. That court room was the "swellest" thing of the kind imaginable. I would not like to describe it to the American or to the Georgia Bar Association, for instance, without a word in extenuation. It was a room perhaps as large as the United States Supreme Court chamber. The "Tribunal" (rostrum) was not so high, but it was hung in red velvet with a thin rod of gilt moulding tacked at the top, a "docel" or dais of like velvet standing just back of the chair of the judge, and a bar railing upholstered in the same velvet, also bordered with gilt moulding. I worked myself up to it gradually through the exhortation of the clerk of the court, who was my predecessor. He was a most excellent man, with a talent for ornamentation, and a belief that to get obedience from, you must "fill the eye of" the Orient. He was anxious to fix up my place of doing business in Spanish style, he said, so I gave him a bit of leeway. As the work proceeded, I had to check him occasionally. For example, I came in one morning during the progress of the painting and found the wainscoting of the walls swathed in a ribbon of vermilion and the cornice-work all around in as light a sky blue as ever graced a maiden's dress at a May-day picnic in "the land of the free and the home of the brave." I thought all that might do for an adobe "alcaldia" in Mexico or Cuba, but not for any sanctuary where I was to officiate as high priest of the law. So after a tour through the city among the stores of the "Chinos" — (every one in the Philippines says "Chino," pronounced "Cheeno," instead of Chinamen) pigments enough were found to darken the wainscoting to a subdued garnet and the cornice to a blue black, and this, with the walls painted an ordinary white, at last reassured the judge of the court that the shades of Sir William Blackstone would not haunt him in the darkness of night, though he realized Anglo-Saxon jurisprudence had come into a remote country whose people love gorgeous decoration and are awed thereby.

First, before entering the court room itself, the gubernatorial party were ushered into my office, which adjoined the court room, and was connected with it by a doorway and two steps, which you ascended as a sort of stage entrance, i.e., a way to get on the rostrum and come out from behind the dais, the rostrum being backed up

against the door connecting the court room with the Judge's office.

Reverting, however, to the eminent gentlemen who are being so recklessly subordinated to the drawing of a *genre* picture:

Governor Taft delivered his address, outlining the plan of government for the province, and pointing out its more distinctive features of local self-government. He never attempted to speak any Spanish in a public address. His speeches were interpreted by my late beloved friend, Mr. A. W. Fergusson, secretary to the commission, who spoke Spanish, probably as well as any other person in the world whose mother tongue was English. He was interpreter on behalf of the Americans at the Paris Peace Commission of 1898, and so well satisfied were the eminent public men of Spain who represented her on that occasion with the faithfulness of his translations and interpretations that they stated, at one of the meetings of their own motion, that Mr. Fergusson was entirely satisfactory to them and that they would no longer retain their own interpreter. All this appears in the official proceedings, and is certainly a splendid guarantee of Mr. Fergusson's knowledge of Spanish. He was for a long number of years connected with the Bureau of Spanish-American Republics at Washington, in the capacity of interpreter. He was, at one time, a lawyer, having been admitted to and engaged in the practice of law in the city of Washington years ago. He seemed to have a talent for conversation in both languages, being exceptionally witty in either. There were perhaps few, if any, men who could have conveyed so faithfully to the minds of the Filipino people every shade of thought expressed by Americans as Mr. Fergusson did.

During the course of the discussion on the scope of the Civil Provincial Government about to be organized, an invitation was extended to all of the citizens of the province present at the meeting to partake in the discussion and ask any question which they might see fit. One member of the town counsel got up and in very roundabout and grandiloquent terms asked whether or not the right of local self-government included the idea of exemption from interference by the military authorities with city ordinances. Judge Taft replied, that so long as the town council, in creating legislation, kept within the scope of the authority vested in it by the Organic Law, its action could not be questioned by the higher local authorities. The eyes of our herein-before mentioned friend Achilles "flashed their full lightnings by" during these remarks, and at the end of them he said to Governor Taft, "He is talking about stocks; I forbade the use of stocks up here." One or two little hits at the military were made, but the Governor explained it very clearly to them that under a General Order (giving the number of it) the military authorities would from now on have nothing to do with the government except in certain specific ways and for certain specific purposes set forth in the order. And General Bell added, addressing himself to Mr. Fergusson, "You may tell him too that I am just as glad to relinquish my authority as they are to get out from under it." And as Archilles glared at the audience like a roused lion, Mr. Fergusson interpreted the remarks, and Judge Taft turned it off with a jolly laugh, such as only good-natured fat men can get off. The audience caught the humor of the situation and came to the right understanding of the matter.

After the morning session had adjourned for lunch, a good deal of caucusing followed in regard to the election of provincial governor of the Province of Ilocos Norte and secretary thereof.

The Americanista element had their candidates and the Insurrecto element had theirs for each of the places to be filled, and finally the matter was settled by the commission appointing a certain man gov-

ernor because all the Americans were heartily in favor of him, on account of his having been a friend to our cause from the first. The provincial secretary was a thoroughgoing insurrecto. So there was a good deal of feeling while the caucusing was going on, the insurrecto element being very bitter against our man.

In announcing the result Judge Taft said to the audience, "Some of you may think we have made a mistake in the selection of the governor; if it be true that we have made a mistake you can correct it at the coming general election, but we have acted as we thought best; we don't hold it against any of you that you have been insurgents, and we will not permit you to hold it against any man that he has been a friend to the cause of the Americans."

We left Laoag for the beach at about 4 o'clock on the afternoon of that same day, Tuesday, Aug. 20, and had quite a time of it going out to the boat. We came near being swamped while the great colossal canoes, already described, were endeavoring to ride over breakers. As I stood on the side of the boat to keep out of the water, I noticed Governor Taft standing knee deep in the water. We felt that forty-foot canoe tremble from the shock of an extra big breaker. It was a new experience in circuit-riding, both for the big judge and for the little one.

Judge Ide is a very precise, methodical gentleman, from the poise of his spectacles and the cut of his waistcoat, to the exact and careful way he places one foot foremost and then the other in order to execute the process of walking. He is accuracy personified.

When we finally reached the big boat in safety and had dried our clothes, and were comfortably seated at the supper table, Judge Ide remarked that he did not want any more breaker riding; that General Bell's enthusiasm had got him into it this time, but that he did not propose to have any more of it if he could get out of it on this side of the river Styx; in reply to which Professor Worcester, who impresses one at first as a rather surly person, sent a laugh around the table by remarking: "Well, you need not worry about the last, for it is popularly reputed to be a very sluggish stream."

Here the whistle blew, and, leaving Ilocos Norte duly clothed with civil liberty, we started, outward bound, to fit the same garment upon the body politic of the Province of Cagayan on the morrow.

WASHINGTON, D. C., June, 1908.

BOMBAY IN THE DAYS OF GEORGE IV[1]

By Percy A. Atherton.

TO the reader this story of the conflict of the King's Court with the East India Company, and the struggle of the King's Judges to curb the headstrong officials of the company, seems well nigh inconceivable. Respect for the authority of the state, and respect for its judiciary, have come to be today so much a part of daily life as to pass unnoticed. Yet this life of Sir Edward West, this defense of the right of an English judge to administer justice, under strange conditions and in the face of great difficulties, throws an interesting light on the strength and vigor of Anglo-Saxon institutions.

Born in 1782, Edward West had the sturdy training of Harrow, and the opportunities of University College, Oxford, a typical English education of the best sort. In 1814, at the comparatively youthful age of 32, he was called to the Bar of the Inner Temple. In the meantime he had been elected a Fellow of his college, and had done notable work in economics. Eight years later, after a moderate success at the Bar, he was appointed recorder of Bombay and knighted as Sir Edward West.

India, at the end of the eighteenth century, was governed by the East India Company, and administration of justice was at a very low ebb. Mere boys with little training or experience were sent by the company to India to sit in the Provincial Courts, and matters had reached such a state that King's Courts were created in 1799 to curb the East India Company's growing power, and to give to the native some degree of protection to life and property — both endangered by the aggressiveness of the company. As may well be seen the position of a King's Judge, sent out from England by the Crown, was anything but enviable. The East India Company looked on him with distrust and disfavor; and the natives had not yet learned that a Judge could act with uprightness and independence. The company regarded the Sovereignty of India as its own private property, and resented all interference with it by the British Parliament as an unwarranted invasion of its rights. Under such conditions it was impossible for a Judge, who did his duty as he saw it, not to come into collision with the traditions of the company. He faced a European colony hostile to him, he lacked the moral support of an independent public opinion, and further, he had to apply Anglo-Saxon theories of justice to native India conditions.

Nevertheless, Edward West, married on the eve of his sailing for India, did not hesitate for a moment. His entire work in India was crowded into six brief years, first as "Recorder of Bombay," then as "Chief Justice of the Supreme Court of Judicature" — the successor of the Recorder's Court; yet, even then, he served longer than the average of the early English judges in India. In the first quarter of a century of the King's Court not one King's Judge lived to return to England, and the average length of their service was a little over three years.

Throughout his six years' service as a Judge West seems to have been in constant conflict with the East India Company. He had scarce arrived in India when the new Supreme Court of Judicature was substituted for the old Recorder's Court, and he became its Chief Justice. That he proposed to reform the Bench and Bar was evident from the outset. Within a month after he was sworn in as Chief Justice he dismissed the Master in Equity and the Clerk of

[1] Memoir of Sir Edward West, A King's Judge under the Company, by F. Dawtrey Drewitt, M.A., M.D. Longmans, Green & Co., London, 1907.

Court, both for irregularities of professional conduct. He next suspended from practice for overcharges made to clients, five of the six barristers practicing in his court. He insisted that the English residents must perform their jury duty, and he reformed the administration of the jails. These reforms, all of them of vital necessity to the proper administration of justice, created violent opposition from successive governors of the company.

In 1825 West, in an elaborate charge to the Grand Jury, then sitting, urged an investigation of the treatment of native prisoners by the lower courts, which were run entirely by the company; and an investigation into the unnecessary severity, and even illegality of many sentences pronounced by the company's judges and police magistrates. Unfortunately the Grand Jury declined to act, great as was the need of reform in the company's treatment of the natives; and West's charge to the Grand Jury seems only to have aroused the increased enmity and hostility of the company and its officers. At the same time there was great unrest and ill feeling in the Colony as is shown by the following paragraph: "The new year (1826) found Bombay society in a quarrelsome mood. Mr. Norton, the loud-voiced Advocate-General to the Bombay government, had been challenged by a Mr. Browne, but had refused to go out with him. Martin West (Sir E. West's nephew), had been insulted by Mr. Norris, a member of the Bombay government, and had been obliged to demand an apology. Mr. Graham, an attorney, had libelled and had challenged Mr. Irwin, a barrister, and on the challenge being declined had horsewhipped him. Mr. Warden had circulated a defamatory paper aspersing the character of Mr. Graham, and trials for assault and libel occupied the attention of the Supreme Court." Truly a most unhappy picture of life in the small English Colony at Bombay!

In this stormy atmosphere it occurred to those who were smarting under West's recent charge to the Grand Jury, and who looked upon an independent King's Court as a nuisance, that the Chief Justice might, with advantage, be provoked into a duel. Accordingly the company's governor, Ephinstone, openly insulted the Chief Justice at a dinner, and upon the Chief Justice's asking an explanation, the governor promptly sent him a challenge. This West, in a very manly way, declined, pointing out the disgrace that would thereby be brought upon his court, but the entire episode made West's work more trying and more difficult.

Through all these troublesome times West was constantly endeavoring to improve the condition of the natives, and to soften the harshness of their treatment by the company. One difficult problem he worked out was a set of "Rules" regulating the service of Mahometans, Hindoos and Parsees upon juries. The difficulty of this in connection with the "Caste" system may well be imagined.

This was the last work he did. In August, 1828, he was suddenly seized with a malady not recognized by his physicians, from which, after an illness of a few days, he died. An added touch of sadness was the death of Lady West two weeks later, in giving birth to a son who did not survive.

The striking feature of this brief and tragic story of West's life and work lies in the almost superhuman difficulties overcome by the King's Judges in India. Sir Edward West, in the face of these difficulties, upheld the best traditions of the English Judiciary. He was a fearless, high-minded Judge—an honor to the profession of the law, a friend to the people of India.

BOSTON, MASS., June, 1908.

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, facetiæ, and anecdotes.

THE PRELIMINARY DRAFT OF OUR CODE OF ETHICS

The preliminary draft of the code of ethics prepared by the committee of the American Bar Association, which has recently been distributed to members for criticism, does not purport to do more than codify existing standards of conduct. It is not a reforming document. It does, however, crystallize the better sentiment of the profession in opposition to admitted abuses and will furnish a base from which advance from time to time may be made. The most important part of the code relates to the difficult problem of the relation of lawyer to his client and to the court. In this first draft, unfortunately, this subject is treated from slightly different points of view in four different sections. Section 15 is entitled "How far a lawyer may go in supporting his client's cause." Section 16, "Restraining a client from improprieties." Section 22, "Candor and fairness." Section 32, "The lawyer's duty in its last analysis." These sections to a certain extent are open to the criticism made by Mr. Boston in his article in our April number in that they are frequently argumentative rather than expository. In substance they will be accepted and the specific suggestions in section 22 will be helpful. It would seem, however, that in the final draft these sections might well be consolidated or brought into closer relation and given the most important place at the end of the code. In brief they call for candor and fairness toward the court and the opposing counsel and require that a lawyer should not do for a client what his sense of honor would forbid him to do for himself. Perhaps it would be safer to substitute "a high sense of honor" for "his sense of honor," since the code will be chiefly useful in dealing with members of the bar whose sense of honor is not discernible. Since our profession combines the duties of barrister and solicitor, these simple principles are all that can be laid down for our guidance, which must be left to vigorous enforcement by the bench through rules that may be developed in consequence of the adoption of this code.

If the code were a reforming document, clause 5 might be worthy of further consideration. This states the accepted doctrine that a lawyer may with propriety defend one whom he knows to be guilty on the theory that even a guilty man is entitled to a fair trial. This is one of those practical but illogical doctrines familiar to Englishmen. As a matter of reasoning why should one who is admittedly guilty be entitled to any sort of trial? Even assuming the most extreme individualism, it is difficult to appreciate the public policy which justifies a lawyer in resorting to every technical defense to protect a client who he knows is guilty. No matter how carefully it is phrased, this is what the canon amounts to, though from the heading one might suppose that it was limited to cases where the attorney believed or had no definite knowledge of his client's guilt. Exceptional cases might be cited of morbid individuals who have claimed to be guilty of crimes they did not commit or who for some reason have remained silent to protect others, but it seems unlikely that these are sufficientiy frequent to justify a rule which is admittedly responsible for serious abuses in practice.

As a whole the code will command the approval of the profession, and the members of the committee are to be congratulated on the pains they have taken in performing their task. Unlike some Bar Association committees, the members of this one actually labored for the cause and were in session for some days at Washington last spring. The energetic secretary of the committee, Mr. Alexander,

has been in constant correspondence with state and local bar associations, many of which he reports are enthusiastically following the work of the committee and are prepared to adopt its final report.

THE LITIGIOUS SPIRIT

Despite the prevailing notion of our critics, it is an accepted maxim of the profession that litigation is to be discouraged, and though the conduct of individuals it must be admitted frequently falls below our ideals, no one who has dealt with reputable practitioners can fairly deny that lawyers settle their cases when clients will consent. With respect to the beginning of litigation, modern practice, especially in personal injuries cases, shows slighter inclination toward the discouragement of strife, and in wrestling with the problem of the propriety of contingent fees those who are drafting our Code of Ethics have based all their argument on the virtue of this maxim. It is unsafe, however, to reason from a premise not carefully defined and acceptable without qualification. Reduction of litigation is a benefit only when it means a reduction of the causes of litigation. Forced endurance of misfortunes that are believed to be wrongs is prolific of discontent, which is itself a source of danger in a democracy. The ideal of the law to which all others must bend is justice, the redress of all wrongs. It would be better, perhaps, for the profession and certainly would reduce litigation if the English fee system prevailed here, but when one considers the excessive cost of English litigation, one may well doubt if it would be better for the public. The poor and the moderately poor must have their champions, and these for the present at least must work for reward. Legal aid societies do not wholly fill the demand, for these people do not want charity. It is not best for them to receive charity. Justice dictates that the wrongdoer should fully reimburse the plaintiff by paying his actual counsel fees, but the danger of abuse of such a rule is too obvious to the profession to make it likely to be adopted. Public sentiment, however, is less hostile, and with the education of the public in the methods and even the abuses of personal injury litigation it is becoming increasingly evident that juries add to the natural verdict enough to cover the fee they think will be exacted. Developments such as these warn us that the subject needs more definite regulation and those who adhere to the older standards demand it for their protection.

A distinction should be made at the start between fees wholly contingent, including champertous agreements to assume the expense of litigation, and fees graded according to success with or without definite agreement. These are admittedly legal and consistent with our existing theories of a lawyer's duty to the court and to clients. It is the champertous agreements, which the demands of clients are rapidly making customary, that need prompt regulation. Clients are coming to regard a demand for a retainer in a personal injury action as exorbitant and take their cases to more compliant offices. The preliminary draft of the Code of Ethics of the American Bar Association contains the following canon: "Contingent fees may be contracted for, but they lead to many abuses and should be under the supervision of the court." In a Code of Ethics which does not purport to outline in detail all the duties of a lawyer or to be in form for statutory enactment, it may be that this clause is sufficiently definite. Probably the disagreement of the members of the committee upon it has made it impossible to make the canon more positive. The subject, however, is important and bound to lead to much discussion. It is well therefore to determine, at some stage in this discussion, in what form the supervision of the court should be exercised. It was apparently the intention of the committee of the New York State Bar Association, with whom the idea originated, that a petition should be filed with the entry of the case for permission to take it on a contingent fee, the amount of which should be determined by the court after verdict. This suggestion seems sensible. All the evils now complained of from the abuse of contingent fees should disappear in the solvent of sunlight, for they are all products of secrecy.

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.

ADMIRALTY. "Salvage Awards," by A. R. Kennedy, *Law Magazine and Review* (V. xxxiii, p. 301). Interesting discussion of some of the principles followed by English judges in assessing salvage awards, the amount being entirely dependent upon the exercise of judicial discretion.

BIOGRAPHY. The third volume of Great American Lawyers, edited by Wm. Draper Lewis, The John C. Winston Co., Phildelphia, 1908, deals chiefly with those who developed the common law in our State courts in the first half of the last century, though some of the subjects such as Clayton and Webster are more especially noted as constitutional lawyers, and Judge Story's fame must rest in part on his decisions under the Constitution. Wheaton is chiefly famous as an international lawyer, and Wheaton, Cranch, and Blackford represent the early reporters of decision. The best written of these essays is that on Judge Shaw by Joseph Henry Beale, Jr., which contains many delightfully satirical touches. The most important subject in this volume is Joseph Story, of whom Judge Schofield says: "Tried by the quantity, quality, and variety of his legal work, and by the influence which it has exerted and is still exerting upon the law, he is the foremost jurist America has produced." The biographies in this volume are as follows: Jeremiah Mason, by John Chipman Gray; William Gaston, by Henry G. Connor; William Cranch, by Alexander Burton Hagner; Joseph Story, by William Schofield; Isaac Blackford, by William Wheeler Thornton; William Harper, by William Hugins Brawley; Henry Wheaton, by James Brown Scott; Daniel Webster, by Everett Pepperrell Wheeler; Peter Hitchcock, by Willis Seymour Metcalf; John Bannister Gibson, by Samuel Dreher Matlack; John Middleton Clayton, by William Elbert Wright; Lemuel Shaw, by Joseph Henry Beale, Jr.; Roger Sherman Baldwin, by Simeon Eben Baldwin; Rufus Choate, by Joseph Hodges Choate.

CARRIERS. "Duties of Common Carriers Transporting Explosives," by Joseph Riddell, *American Lawyer* (V. xvi, p. 218).

CONSTITUTIONAL LAW. "Powers of the American People, Congress, President, and Courts, according to Evolution of Constitutional Construction," by Masuji Miyakawa. The Wilkins Sheiry Co., Washington, 1906.

This book is a summary of the powers of the American people and of the legislative, executive, and judicial branches of our government, which, apart from any extraordinary intrinsic merit, at once invites attention from the fact, appearing on its title-page, that it emanates from the pen of "the first Japanese attorney ever admitted to the American bar." So considered it must be recognized as a notable achievement by an author whose familiarity with our language and ideas is very evidently the result of studious acquirement. He has succeeded in sufficiently Americanizing himself to produce a good summary of the particular phases of constitutional law of which he treats; but as a result of his facility in adapting himself his book loses much that it might otherwise have gained from the fact of its alien authorship. The interest expected to attach to a bird's-eye view of American institutions from the outside is missing, and there is a sense of disappointment in finding, instead of a Japanese picture of our Constitution and government, a treatise not essentially differing from others by our own writers on the same topics.

Considered, however, as its author evidently meant it to be considered, on its merits as a domestic production, it contains a thorough, if somewhat elementary, discussion of the distribution of gavernmental power; and in the article dealing with Congress especially, is clear and complete. In an appendix there is a terse and at the same time comprehensive sketch of the development of republican principles, culminating in the adoption of the national Constitutional, in which there are

several passages extremely well written and interesting.

CONSTITUTIONAL LAW. - In the May *American Political Science Review* (V. ii, p. 347) James D. Barnett publishes a thoughtful consideration of the decisions relating to "Delegation of Legislative Power to the States." He shows that "although the accepted doctrine in regard to the unconstitutionality of the delegation of legislative power has never been expressly denied in this connection but at times has been clearly stated and strictly applied, more often there have been attempts to avoid a conflict with the theory by indirect legislation or forced construction, or the theory has been utterly ignored, with the result that relations between the Union and the States, supposedly determined by the Constitution, have been altered by the action of Congress." The instances referred to are cases where Congress has tried to reach a sensible result to which all parties were agreed, but the courts have found it difficult in passing upon it to base their decisions on a satisfactory theory.

CONSTITUTIONAL LAW. "The Law of Impeachment in the United States," by David Y. Thomas, May *American Political Science Review* (V. ii, p. 378). This is an interesting discussion of the procedure in impeachment cases, showing that impeachment is a common law proceeding adopted by the Constitution and that its incidents are not yet fully determined in this country.

CONSTITUTIONAL LAW (Constructive Crimes). "The Scientific Aspect of Due Process of Law and Constructive Crimes," by Theodore Schroeder, *American Law Review* (V. xlii, p. 369).

CONSTITUTIONAL LAW (Hepburn Act). "Constitutional Questions Involved in the Commodity Clause of the Hepburn Act," by Wm. Draper Lewis, *Harvard Law Review* (V. xxi, p. 595). After May 1, 1908, the Hepburn Act makes it unlawful for any railroad company to transport from any state to any other state or foreign country "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." Is this act constitutional? The questions discussed in this article are: Does the power to "regulate" commerce give the power to prohibit? If it does, is the act nevertheless unsound as constituting a deprivation of property without due process of law or a taking of private property for a public use without just compensation? An adequate summary of Mr. Lewis' discussion would exceed the space limit advisable, but readers seeking a judicial view of the question will find this article full of suggestion.

CONSTITUTIONAL LAW (Oklahoma). "The Oklahoma Constitution," by John Bell Sanborn, *American Law Review* (V. xlii, p. 362). A short analysis, pointing out that the keynote is distrust of the Legislature and a less noticeable distrust in the executive. Primary legislative power is placed in the hands of the people and representative government is repudiated as far as possible under modern conditions.

CONSTITUTIONAL LAW (see Jurisdiction).

CONVEYANCING. "Progress in Land Title Transfers; the New Registration Law of New York," by Alfred G. Reeves, *Columbia Law Review* (V. viii, p. 438). Outlining briefly the history of the manipulation of titles to real property, especially in common law jurisdictions, and concluding with a brief argument in favor of the method of registering titles provided by Chapter 444, Laws of 1908, of the state of New York.

CORPORATIONS. "Liability of Stockholders to Creditors of a Missouri Corporation upon Unpaid Stock," by Eugene H. Angert, *Central Law Journal* (V. lxvi, p. 424).

CORPORATIONS. "The Present Practice with respect to Defective Transfers of Stock or Shares," by N. G. Pilcher, *Commonwealth Law Review* (V. v, p. 145).

CRIME. "Criminals and Crime," by Sir Robert Anderson, *Law Magazine and Review* (V. xxxiii, p. 264). A reply to a recent criticism of the author's book bearing the same title as the article.

CRIME (ENGLAND). "Criminal Statistics." *Law Magazine and Review* (V. xxxiii, p. 282.) An unsigned article analyzing and comment-

ing on Part I (Criminal Statistics) of "Judicial Statistics (England and Wales), 1906."

CRIMINAL LAW. "Evidence coming before Grand Juries in Considering the Finding of a Bill Preferred," by William Steers, *Canadian Law Times and Review* (V. xxviii, p. 355).

CRIMINAL LAW. "Interim Stay in Criminal Proceedings," by R. Srinivasa, *Allahabad Law Journal* (V. v, p. 142).

DAMAGES. "Claims for Pecuniary Damages," by Edwin Maxey, *Albany Law Journal* (V. lxx, p. 130).

ECONOMICS. "Economics from a Legal Standpoint," by H. W. Humble, *American Law Review* (V. xlii, p. 379). Arguing for a greater coöperation between lawyers and economists in solving the problems of the day.

EMPLOYER'S LIABILITY. "Purpose and Character of Employer's Liability Legislation in the United States," by C. T. Bond, *Central Law Journal* (V. lxvi, p. 483)."

EMPLOYER'S LIABILITY. "The Legal Liability of Employers for Injuries of their Employees in the United States," by Lindley D. Clark, Bulletin No. 74 of the United States Bureau of Labor, Washington, D.C., 1908. A general account of the present state of legislation and common law liability on this subject, followed by copies of or summaries of the law in different states.

ETHICS. "The Data of Professional Ethics," by W. R. Curran, May *Illinois Law Review* (V. iv, p. 29.) Discusses admitted principles at the basis of this subject.

HISTORY. "The Historical Interpretation of 'Law' in Relation to Its Certainty," by Theodore Schroeder, *Albany Law Journal* (V. 70, p. 101).

HISTORY. "Judicial Aspect of the Peace Conference," by Hayne Davis, *American Lawyer* (V. xvi, p. 210).

HISTORY. "The Trial and Crucifixion of Jesus Christ of Nazareth," by M. Brodrick. Longmans, Green & Co., New York, 1908. A series of lectures on the historical and legal aspects of the subject which show familiarity with the original sources of information as well as with the best modern commentaries. It gives in very readable form a clear conception of the Hebrew judicial system which illuminates the fragmentary accounts we have of the trial of Jesus.

HISTORY (England). "The Middle Temple Library," by C. E. A. Bedwell, *Law Magazine and Review* (V. xxxiii, p. 274). A brief account of the origin and development.

INTERNATIONAL LAW. "Neutral Rights and Obligations in the Anglo-Boer War," by Robert Granville Campbell, Numbers 4, 5 and 6 of series 26 in Johns Hopkins University Studies in History and Political Science, The Johns Hopkins Press, Baltimore, 1908.

JOINT-STOCK COMPANIES (England). "The Evolution of the English Joint-Stock Limited Trading Company," by Frank Evans, *Columbia Law Review* (V. viii, p. 461). Conclusion of an article begun in the May number.

JURISDICTION. "The Relationship of the State and National Courts," by Jacob Trieber, *American Law Review* (V. xlii, p. 321). This paper read before the Arkansas State Bar Association, May 21, 1908, reviews the judicial definitions of the relative powers and duties of the state and the national courts and strongly insists that there is no "irrepressible conflict" between the two. So well have the provinces of the two been defined that the possible conflict of jurisdiction, held up as a scarecrow under the names "centralization, usurpation, destruction of the liberties of the people," is declared to be a mere resort of the demagogue.

JURISPRUDENCE (Indian). "The Parajikas," by Edward P. Buffet, *American Law Review* (V. xlii, p. 387). Setting forth for the first time to American, if not indeed to any occidental, students of legal history an ancient and important system of jurisprudence contained in one of the books of the primitive Buddhist canon dating from the fifth century B.C. It comprises not only a statutory code and verbal commentary, but collections of cases hypothetical and quasi historical.

LIBEL AND SLANDER. "Local Authorities: Publication of Proceedings," by Harry C. Bickmore, *Law Magazine and Review* (V. xxxiii, p. 310). Discussing the rights of the general public and of a particular limited public to obtain admission to the meetings of local authorities, and the liability attaching to a local authority, or any member thereof, to actions for libel or slander, based upon the publication, either oral or written, of the proceedings of the authority.

MASTER AND SERVANT. "What Persons are within the Purview of Statutes affecting the Enforcement of Claims for Service?" by C. B. Labatt, *Canada Law Journal* (V. xliv, p. 369).

MASTER AND SERVANT. "The Basis of a Master's Liability for the Wilful Wrongs of His Servant," by Herbert Nicholls, *Commonwealth Law Review* (V. v, p. 145).

MINING. "Comparison between the Mining Laws of United States and Mexico," by Frederick R. Kellogg, *American Lawyer* (V. xvi, p. 205).

MUNICIPAL CORPORATIONS. "Municipal Government by Commission," by W. H. Moore, *Canadian Law Times and Review* (V. xxviii, p. 336).

MUNICIPAL CORPORATIONS. "Are Cities and Towns Liable for Negligence in Management of Public Parks?" by George W. Payne, *Central Law Journal* (V. lxvi, p. 463).

NEGLIGENCE. "The Use of the Phrase '*Res Ipsa Loquitur*,'" by C. T. Bond, *Central Law Journal* (V. lxvi, p. 386).

PRACTICE. "Organization of a Legal Business," by R. V. Harris, *Canadian Law Times and Review* (V. xxviii, p. 362).

PRACTICE. "Striking out Sham Defenses," by George I. Wooley, *Bench and Bar* (V. xiii, p. 57).

PROCEDURE. In the June *North American Review* (V. clxxxvii, p. 851) Secretary William H. Taft publishes a summary of his address before the Civic Forum in New York entitled "Delays and Defects in the Enforcement of the Law in this Country." The facts to which he calls our attention are not new. They have been iterated in recent years, but so far with little effect, and still they need repetition. The high authority of Judge Taft, however, makes his earnest support of the cause of great importance, and we hope that public interest will be aroused by his cogent argument. The causes of failure of justice to which he points are chiefly idolization of the jury system, regulation of procedure by legislatures instead of courts, unrestricted appeal, and reversals for error not affecting the merits. The chief reason for the perpetuation of these errors he justly ascribes to the financial interest of the bar in protracted litigation.

PROCEDURE. "The Character of Government depends upon its Legal Procedure," by W. T. Hughes, May *Illinois Law Review* (V. iii, p. 24).

PROPERTY. "The Erection and Maintenance of Buildings," by O. H. Myrick, *Central Law Journal* (V. lxvi, p. 443).

PUBLIC POLICY. "Bar Associations and the State," by Richard S. Harvey, *American Lawyer* (V. xvi, p. 201).

REAL PROPERTY (Waste). "Liability for Waste. I. At Common Law," by George W. Kirchwey, *Columbia Law Review* (V. viii, p. 425). Giving not only the common law as to waste but the statutes of Marlbridge and Gloucester.

SALES (Express Warranty). "What Constitutes an Express Warranty in the Law of Sales," by Samuel Williston, *Harvard Law Review* (V. xxi, p. 555). Considering what promises or statements make a seller liable for the character or quality of the goods which are the subject of the sale.

The action on a warranty was conceived of at the outset as an action of tort, and the law of warranty is older by a century than special *assumpsit*. The action upon the case on a warranty seems to have been one of the bases upon which the law of *assumpsit* was built. "It is probable that to-day most persons instinctively think of a warranty as a contract or promise; but it is believed that the original character of the action cannot safely be lost sight of, and that the seller's liability upon a warranty may sound in tort as well as in contract." This fact explains features of the law of warranty that would have no proper explanation if the action sounded wholly in contract. "The rule in regard to obvious defects is of this sort. There seems no reason why a seller should not promise to be answerable in damages for obvious defects, but his liability in tort is another matter. Just as in deceit it is essential that the statements must be such as to induce the plaintiff naturally to rely on them, so in warranty this natural reliance on the seller's assertions was early regarded as essential." This fact also explains the curiosity in the early law of warranty stated by Blackstone that "the warranty can only reach things in being at the time of the warrant made, and not things in *future*."

Many courts in this country have lost sight of the idea of warranty forming the basis of a tort, " and most of the confusion in the law of express warranty is due to a failure to observe that a representation or affirmation by the seller which cannot without straining the facts be properly regarded as contractual (though the remedy of assumpsit and its equivalents may for convenience be permitted) is, and should be, a ground of liability for the seller."

An express promise or agreement to warrant, made at the time of the sale, clearly renders the seller liable. But there is much conflict and inexactness in defining what statements not made in the form of an express warranty or promise will render the seller liable. Pennsylvania seems to have confined the liability to cases of express promise. No other American jurisdiction seems to go thus far, but many, especially the older ones, require an " intention to warrant." This requirement generally means, however, not an intent to contract or agree to be bound, but an intent to make a statement as matter of fact rather than as matter of opinion. The American cases are in great conflict, but an examination discloses a growing tendency to regard a positive statement by the seller by way of description of the goods or in regard to them as binding; and the meaning of the intent, if inserted in the definition of warranty at all, seems to be apparent intent to assert a fact rather than an intent to agree to be bound.

A troublesome distinction is sometimes made between " mere description " and " statements constituting a warranty." " The law, however, is now convincingly settled that descriptive statements do constitute a warranty, whether the seller makes them or whether the buyer in ordering goods makes them and the seller furnishes goods in response to such an order."

The tortious character of warranty is of vital importance in considering how far statements made previously to the bargain may constitute a warranty. Such statements affect a buyer's mind and are frequently the inducement to an ultimate sale. If such statements were a natural inducement to the bargain and the seller ought to have so understood, he should be liable, though they were long prior to the bargain and not naturally to be regarded as forming part of the contract itself.

The relation of warranty to tort is of importance when considering the parole evidence rule, the basis of which is that it must be assumed that when parties were contracting in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement. This reason is obviously inapplicable to a situation where an obligation is imposed by law irrespective of any intention to contract. Therefore if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. The distinction between a statement of fact and one of opinion continually causes difficulty. Professor Williston states a number of cases on each side as the best way of indicating where the line is to be drawn. The article concludes with a discussion of the rules as to the requirement of reliance by the buyer upon the seller's statement.

SHERMAN ACT (Defects and Remedies). " The Sherman Anti-Monopoly Act and Proposed Amendments," by Everett P. Wheeler, *Columbia Law Review* (V. viii, p. 452). The Sherman Act is considered by Mr. Wheeler " one of a series of enactments . . . popular with the noisy part of the American people. An abuse is discovered. Immediately a cry is raised against the use of the thing which has been abused, and an application is made to the legislature to prohibit its use altogether.' The abuses, he admits, were many. Capital showed a tendency to combine. Many combinations were of public benefit. But other combinations had attempted to drive competitors out of business, not by producing a better article or selling continuously at a lower price, but by methods which whether legal or not were morally indefensible. Unfortunately the government did not confine its proceedings to cases of this description; one of its first actions was to restrain the enforcement of an agreement made by railroads west of the Mississippi to enable them to carry out the provisions of the Interstate Commerce Act in regard to the uniformity of rates. The Supreme Court held it would enforce the provisions of the act without limitation by

judicial construction. Perhaps the only limitation which has been held to be implied is that a combination to fix the prices of patented articles and the terms of use is held not to be illegal. The Northern Securities case seems to defeat the rule of the common law that a person selling a business could lawfully not contract that he would not engage in competition with the vender, at least so far as concerns a sale by a corporation or to a corporation formed for the purpose of acquiring the stock of other corporations. Thus the act has been extended to prohibit contracts not within the mischiefs at which its framers aimed. Probably its application to trade unions was not intended. A bill introduced in the House of Representatives in March proposes to amend the Sherman Act by authorizing all corporations except common carriers to register with the commissioner of corporations a copy of every "contract or combination hereafter made other than a contract or combination with a common carrier." The commissioner with the concurrence of the secretary of commerce and labor may "enter an order declaring that in his judgment such contract or combination is in unreasonable restraint of trade or commerce among the several states or with foreign nations." If no such order is made the contract is valid "unless the same be in unreasonable restraint of trade or commerce among the several states or with foreign nations." A common carrier may similarly file with the Interstate Commerce Commission a copy of a contract or combination hereafter made. This may be in the same way declared to be in unreasonable restraint; if it is not so declared no suit by the United States will lie unless the contract be unreasonable restraint of interstate or foreign trade. This is a novel proposition, in effect authorizing an officer of the federal government to license a contract in reasonable restraint of trade, notwithstanding that such contract is prohibited unless licensed. Mr. Wheeler questions whether it would not be better to define in the act the contracts deemed in reasonable restraint and to authorize those in express terms, and whether the act does not impose on the officers of the government a burden greater than is defensible upon any theory of wise legislation.

The bill proposes to take away the right to treble damages; for this change he sees no good reason. A wiser change would be to give the jury a right to find a verdict for exemplary damages in cases of a willful violation of the act and a willful tort. The constitutionality of the proposed act has been assailed on the ground that Congress has no right to delegate its power in the premises, but it seems to Mr. Wheeler to be merely a case of intrusting to officers of the government power to make regulations for the enforcement or application of general rules prescribed by statute.

UNIFORMITY OF LAW (United States). "Uniformity of Law in the Several States as an American Ideal. IV. — State Courts *vs.* Federal Courts," by William Schofield, *Harvard Law Review* (V. xxi, p. 583). This concluding section of Judge Schofield's article points out that the federal courts have great influence in securing uniformity of law and the amount of business in the federal courts is increasing.

"In the competition, so to speak, between the state courts and the federal courts, it is of the utmost importance that the efficiency of the judiciary of the states should be maintained. If diversities in the laws of the states continue to increase, increasing dissatisfaction of the community may cause all persons who are interested in uniformity of law to unite in a general movement to extend the federal jurisdiction in the sphere of private law. If Congress should make the jurisdiction of the federal courts exclusive in every case to which the judicial power of the United States extends, the volume of business in the state courts would be diminished.

"There is a strong tendency at the present time to extend the legislative power of the national legislature, especially in the regulation of interstate commerce. It is quite probable that in the future Congress will exercise control under the Constitution over subjects which have hitherto been left to the legislative action of the states. That tendency is increased by the unfortunate belief which is widespread among the people that state legislatures have not legislated with wisdom and fidelity to the public interests. The existence of this belief is proved convincingly by the many provisions of modern state constitutions manifestly

aimed at the restriction of legislative power. If, unhappily, the judiciary department of the states, or of a number of the states, should also fail in public esteem or confidence, what would become of the governments of the states? Without an upright and efficient judiciary the states cannot endure. Without the states the union of states cannot endure.

"Uniformity of law in the several states gains new importance when viewed as a means of upholding the state courts as against the federal courts, and of preserving the just balance between the federal government and the governments of the states. Such uniformity cannot be attained or preserved merely by reducing the law or a portion of the law to a statute or code. It can be attained and preserved only by the united efforts of all who are engaged in the study or administration of the law, in a spirit of loyal devotion to the inherited systems of common law and equity which have descended to us from the past. The most effective organization of courts in the several states, with a view to secure to the public the best administration of justice, and to maintain the science of jurisprudence in spite of the mass of precedents and statutes and the bewildering diversity of rules, will come only through labors informed and inspired from the same great sources. Upon the quality of the work done by the judges lawyers, and teachers of law in the United States, in their respective spheres, depends the future of uniformity of law in the several states, and, it may almost be said, the existence of state law, and of the states themselves as political sovereignties."

UNIVERSITIES. "The Law of the Universities. I. General," by James Williams, *Law Magazine and Review* (V. xxxiii, p. 264). A short article giving some account of the legal history and powers of the universities.

WILLS. In the May *Illinois Law Review* (V. iii, p. 1), Professor Roscoe Pound gives a scholarly analysis of the theory on which the common law should deal with "Legacies on Impossible or Illegal Conditions Precedent." He shows that the doctrine that the condition may be disregarded is based on a disputed doctrine in the Roman law supported only by its rule *in favorem testamenti*. Under our modern statutes of distribution there is no presumption in favor of a legacy and the same rule should be applied in wills as in contracts. He holds that the question is still open in most American jurisdictions.

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. (Naturalization.) U. S. Dist. Ct. — By Act Congress, June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 419], it was provided that an alien may file a petition to be naturalized, not less than two years nor more than seven years after declaration of intention. The petitioner in the case of In re Wehrli, 157 Fed. Rep. 938, had filed declaration of intention to become a citizen in 1898, but failed to complete the proceedings necessary to naturalization until after the passage of the statute above referred to. It was then claimed that his right was barred, but the court held that the statute was in the nature of one of limitation; that it should not be given a retrospective effect, and that persons having filed declaration of intention previous to its enactment would not be barred from completion of the naturalization proceeding until seven years after its passage.

ANIMALS. (Injuries from Ferocious Beast.) N. Y. Ct. of App. — Plaintiff, in the case of Molloy *v.* Starin, 83 N. E. Rep. 588, sued defendant, who was a common carrier, for injuries received from a wild bear in one of defendant's freight houses. It was shown that several bears were shipped on one of defendant's steamboats, and that at the dock, plaintiff, a boy nine years old, out of a spirit of curiosity, went into one of the freight houses, where the animals were confined in cages and, coming too near one of them was seized by the foot and injured. Recovery was had in the trial court, and the decision affirmed by the Appellate Division, but the Court of Appeals reversed the judgment, and held that the carrier was under obligation to receive the animals for transportation, and no negligence on its part was shown warranting recovery.

In this case the principal point, aside from negligence and contributory negligence, was the question whether a common carrier which transports trained bears and allows them to remain in its warehouse for a few hours while their owner goes out to hire a truckman, thereby becomes the harborer or keeper of wild animals so as to make him an insurer, and absolutely liable for any damage done by them. It is to be noted that the owner accompanied the bears during the transportation and looked after them and left them only for a short time after their arrival. The case was vigorously contested by able counsel on both sides, but neither one could cite a decision precisely on this point. It seems to be assumed that a bear is a wild and dangerous animal within the rule, even though he be a trained or performing bear. And the majority opinion holds that the common carrier in this instance was not their keeper within the rule.

The trial court instructed the jury that the carrier could not refuse to take property for transportation simply because of its dangerous character. But that point is not determined upon this appeal, the majority of the court holding merely that the carrier was certainly warranted in taking this dangerous kind of property for transportation, and did not thereby become its owner or keeper within the rule of absolute liability. F. T. C.

BANKRUPTCY. (Preference by Bankrupt Stockbroker.) U. S. Sup. Ct. — The bankruptcy of a stock broker and the rights and liabilities arising therefrom command the attention of the United States Supreme Court in Richardson *v.* Shaw, 28 Sup. Ct. Rep. 512. The bankrupt had pledged stocks of his customers, and within four months of the adjudication and while insolvent had redeemed certain of them and turned them over to the customer for whom they were purchased. The trustee in bankruptcy brought action for their recovery on the ground that the transaction constituted a preference in violation of the Bankruptcy Act. The claim was made that as the broker was under no obligation to deliver particular certificates to the customer the relation of debtor and creditor rather than that of pledgor or pledgee existed at the time of insolvency. The court held that while the broker might not be technically a common law pledgee yet such was the real and essential character of the relation and as

the certificates of stock were not the property but only tokens of ownership, it was immaterial that he was not compelled to return any designated ones to his customer.

This case squarely raised the issue of what is the exact legal relation between a stock broker and his customer, where shares are bought on margin. When a broker takes an order for the purchase of shares of stock, he acts as agent for his customer. All the courts agree on this proposition.

Then the second stage of the transaction is for the broker to advance from his own funds for the benefit of his customer that part of the purchase price of the stocks which the customer has not paid. All the authorities agree that in the second stage of the transaction the stock broker does not act as an agent, but there has been a wide difference of opinion as to just what the relationship between the broker and his customer is during the second period.

In 1867 the New York Court for the first time gave this matter careful consideration, and held, in a majority opinion, that the relationship was that of pledgor and pledgee. This view was seriously questioned in some subsequent New York opinions. However, the majority of courts, as a matter of course, fell into line with the New York precedent.

For a collection of cases see

1 Dos Passos, Stock Brokers and Stock Exchanges, 193n.

Many of the better considered decisions, however, refused to follow the New York view, and held that this relationship between the customer and the broker was not that of pledgor and pledgee, but that of independent contractors, the one a buyer, the other a seller.

Flagg *v.* Baldwin, 38 N. J. Eq. at 228–9.
Rutchizky *v.* De Haven, 97 Pa. St. 202.
North *v.* Phillips, 89 Pa. St. 250.
Fariera *v.* Gabel, 89 Pa. St. 99.
Brua's Appeal, 55 Pa. St. 294.
Ingraham *v.* Taylor, 58 Conn. 503; 20 A. 601.
Thompson *v.* Cummings, 68 Ga. 124.
Gregory *v.* Wendell, 40 Mich. 432.
Re Daniels, 13 N. B. R. 46.
Wood *v.* Hayes, 15 Gray 375.
Covell *v.* Lord, 135 Mass. 41.
Weston *v.* Jordan, 168 Mass. 401; 47 N. E. 133.
Chase *v.* Boston, 180 Mass. 458; 62 N. E. 1059.
Rice *v.* Winslow, 180 Mass. 500.

In Re Swift 105 Fed. 493 S. C. in C. C. A. 112 Fed. 318.

Bongiovanni Societe Generale 54 L. T. (N.S.) 320.

Bentinck *v.* London Joint Stock Bank L. R. [1893] 2 Ch. 120.

The logic of the relationship seems most clearly analyzed by the English Chancery Court in the Bentinck case:

"When a client directs a broker to buy stock for which the client is not himself finding the money to pay at the time, the money is provided by the broker, and he borrows the money for the purpose. This is done sometimes, no doubt, by a pure and simple loan; but in a very large majority of cases . . . the thing is done by the broker finding the money on 'contango' and then what happens is this: he is treated not as the mortgagee or pledgee of the shares for the money which he advances, but he becomes by contract the purchaser of the shares out and out, and they become his own property. The shares are not yet transferred to him, he does not acquire any legal interest in them; but, as between the client on whose account he has bought them on the one hand, and himself on the other . . . he becomes the absolute owner of the property, subject, however, to a contract made at the same time, or part of the same contract, that he is to re-sell to the client a like amount, not the same identical shares, but a like amount of similar shares. . . . Therefore, in fact, these 'contango' transactions, although they are constantly treated as loans of money, even by persons who are thoroughly familiar with the business, although they are popularly spoken of, even on the Stock Exchange and by members of the Stock Exchange, when they come before the Court, as loans, yet when the transaction is regarded from a legal point of view, it is not a loan on the client's security, but is a sale by which the broker becomes entitled to the security as his own, although he is subject to a contract to re-sell to the client, not the same, but an equal amount of similar shares of stock at a future date. In all these transactions, therefore, when money is borrowed from a stock broker on 'contango' or 'continuation,' whether the money is obtained from the dealer or from other stock brokers, or from bankers, the result is the same: the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date. This being the

nature of the business between the parties, the reason why these 'contangos' or 'continuations' are often called loans is quite clear; but this does not alter the legal position of the parties concerned in them, or prevent the shares held by the brokers under such circumstances from being their own and available by them."

In the present decision the Supreme Court is inclined to adopt the New York view, but at the the same time does not come out squarely to that effect. It recognizes there are many incidents in the relationship which are inconsistent with that of a mere pledge. The Court reaches the conclusion that "although the broker may not be strictly a pledgee, as understood at common law, he is essentially a pledgee." By this we understand that the broker is some sort of a pledgee not known to the common law, not exactly a pledgee but still a pledgee. It is to be regretted that the Supreme Court has not come out squarely either for the New York or for the English doctrine.

LEE M. FRIEDMAN.

CARRIERS. (Street Railway Transfers.) **Minn.** — Street railway patrons will be interested in the decision of the Minnesota Supreme Court in Morrill *v.* Minneapolis St. Ry. Co., 115 N. W. Rep. 395. The action was brought for wrongful expulsion of plaintiff from one of defendant's cars. The evidence went to show that on alighting at a transfer point, plaintiff asked for a transfer to a designated line, and received from the conductor one which she supposed would be accepted on the cars on such line on which she subsequently took passage. The conductor on this car, however, refused to honor her transfer, and on her declining to pay another fare she was ejected from the car. One of the principal points of contention was as to whether plaintiff, as a passenger, was bound to examine the transfer slip on receiving it, to see that it was correct. The Supreme Court held that as it was the duty of the defendant company, under city regulations governing its operations, to issue transfers such as plaintiff requested, it was bound to see that those that were given were correct; that the rights of a passenger to whom a conductor has given a wrong transfer are in no wise affected by his negligence, and as the transfer is merely a certificate or token, and not a new contract between the carrier and passenger, the latter has a right to continue his journey on the line for which he asked the transfer, notwithstanding the mistake of the conductor in issuing it.

COPYRIGHTS. (Restraining Infringement.) **U. S. Sup. Ct.** — A question of infringement of the book of references of a mercantile agency, is passed upon by the United States Supreme Court in Dun *v.* Lumbermen's Credit Ass'n, 28 Sup. Ct. Rep. 335. It appeared from the facts found in the courts below that plaintiff was the proprietor of a mercantile agency publishing a book of references containing lists of merchants, manufacturers and traders throughout the United States and Canada. Defendants published a book called the reference book of the Lumbermen's Credit Ass'n. It was claimed that much of the information in defendant's book was copied from that published by plaintiff, but the evidence went to show that defendants' book of about 60,000 names contained more than 16,000 that were not found in that of plaintiff, and a great deal of additional information relative thereto. The Supreme Court, while recognizing the possibility that some of defendant's agents might have taken some advantage of plaintiff in the use of its book, held that no sufficient piracy was shown to warrant an injunction, and affirmed the decision, dismissing the bill for want of equity.

CORPORATIONS. (Right to Compel Service by Electric Company.) **Mass.** — The decision of the Supreme Judicial Court of Massachusetts in Weld *v.* Gas & Electric Light Com'rs, 84 N. E. Rep. 101, and Same *v.* Edison Electric Illuminating Co. Id., is of considerable importance to the general public as involving the right to compel service by an electric lighting company where light is furnished to complainant by another company. There are two electric lighting corporations holding franchises and doing business in Boston where complainant's house is located. He was formerly served by the respondent company but the two corporations entered into an agreement for division of territory and the right to supply complainant fell to the other company. There was no claim but that the service by it was adequate nor that the charges were excessive, but it was alleged that electric lighting companies were quasi public in nature and bound to serve all persons equally. This was recognized by the court as being true as a general principle but it held that the doctrine should not be carried so far as to take from corporations the administration of the details of their business, and as complainant showed no injury the petition to compel service was dismissed.

COURTS. (Jurisdiction of Action against Foreign Sovereign.) **Mass.** — In Mason *v.* Intercolonial Ry. Co. of Canada, 83 N. E. Rep. 876, an action for personal injuries, it appeared that the railroad belonged to King Edward VII, and the question at once arose whether that fact would defeat the jurisdiction of the court. It was held

that it would and that plaintiff had no remedy in the courts of this country. The American cases Briggs *v.* Lightboats, 11 Allen 157, and Schooner Exchange *v.* McFaddon, 7 Cranch (U.S.) 116, 3 L. Ed. 287 and several English decisions are cited as precedents.

CRIMINAL LAW. (Former Jeopardy.) Pa. — A question of former jeopardy was decided by the Pennsylvania Supreme Court in Commonwealth *v.* Ramunno, 68 Atl. Rep. 184, which, though by no means new, is interesting. After defendant had been convicted and imprisoned for an assault, his victim died from the effects of his wounds and defendant was thereupon tried and convicted of murder. The court held that as there could be no murder until death of the victim and as in this instance he was still alive at the time of the trial for assault, the plea of former jeopardy was properly overruled.

CRIMINAL LAW. (Right of Accused to be Confronted by Witnesses.) Ala. — The construction of the constitutional guaranty to an accused of the right to be confronted by the witnesses as including right of cross-examination, is the vital question in the case of Wray *v.* State, 45 So. Rep. 697, recently decided by the Supreme Court of Alabama. While accused was on trial for murder, a witness who was extremely ill was brought in on a cot. The court refused to allow a general examination on the ground that it would be inhuman and perhaps result fatally, but granted the request of the state to ask just one question. Accused was not refused the right to cross-examine but the Supreme Court held that he could not be compelled to take the risk invoked in doing so and reversed the judgment of conviction secured in the lower court.

INDICTMENT. (Defects in Conclusion.) Mo. — Defects in indictments which would probably appear very insignificant to the ordinary layman were held by the Missouri Supreme Court in State *v.* Skillman, 107 S. W. Rep. 1071, and State *v.* Campbell, 109 S. W. Rep. 706, to be fatal. The Constitution of Missouri provides that all indictments shall conclude "against the peace and dignity of the state." The indictments in each of these cases omitted the word "the" before state. The opinion of the court in the Campbell case reviews quite a number of decisions from other jurisdictions and says: "It is not a satisfactory solution of this proposition to say we know what was intended or meant by the conclusion in the case at bar, or that it was a mere matter of form. The proposition confronting us is not what the pleader meant to say, but what he did say, and do the terms used in concluding the indictment in this case substantially conform to the requirements prescribed by the Constitution?"

INFANTS. (Right of Next Friend to Select Tribunal.) U. S. Sup. Ct. — In the case of Matter of Moore, 28 Sup. Ct. Rep. 585, it appeared that one Albert Moore, an infant, had instituted suit in a state court in Missouri against the Louisville & Nashville R. R. Co. Defendant obtained an order for removal of the cause to the United States court, and plaintiff thereafter apparently acceded to proceedings in that tribunal by filing an amended petition, entering into stipulations, etc. Later on, an attempt was made to compel remand of the case by mandamus, it being claimed that the next friend in whose name the suit was instituted had no authority to proceed in the Federal Court. The United States Supreme Court held that the choice of tribunal was one properly devolving on a next friend and denied the petition for mandamus.

LANDLORD AND TENANT. (Destruction of Premises by Fire.) Mo. Court of Appeals. — In Sedalia Planing Mill & Lumber Co. *v.* Swift & Co., 107 S. W. Rep. 1093, the Kansas City Court of Appeals adds another case to the long line of decisions bearing on the liability of a tenant for rent on destruction of the premises by fire, and holds that recovery may be had notwithstanding the fact that the building which was destroyed was the thing which was leased, and that the landlord had collected insurance for the property destroyed.

MANDAMUS. (Compelling Remand of Case to State Court.) U. S. Sup. Ct. — An injunction suit was recently instituted in one of the state courts of Nebraska to prevent the Chicago, Burlington & Quincy Ry. Co. from charging rates for transportation in excess of those fixed by the state law. The state of Nebraska, the attorney general and the members of the state railway commission were named as plaintiffs. Defendant petitioned for removal of the cause to the Federal Circuit Court, on the ground that a controversy wholly between citizens of different states was involved, and that the state of Nebraska was not a necessary nor proper party. The prayer of the petition was granted, and the cause duly removed from the state court. The Supreme Court of the United States was then asked to grant a writ of mandamus to compel the Circuit Court to remand the case to the state court. This was refused in *Ex parte* Nebraska, 28 Sup. Ct. Rep. 581, on the ground that the judicial discretion of the lower court was involved in determining that the state was not a proper party, thus precluding review by mandamus.

MARRIAGE. (Common Law Marriage.) N. Y. Sup. Ct. — Questions as to legitimacy and inheritance as dependent on common law marriages are continually coming up in one form or other. In Geiger *v.* Ryan, 108 New York Supplement 13, it appeared that defendant celebrated a civil and an ecclesiastical marriage with the mother of plaintiff who was the daughter of a man with whom her mother had been cohabiting before her marriage to defendant. The mother outlived, by several years, the father of plaintiff, and after her marriage to defendant and up to the time of her death, cohabited with him. The court held that while a presumption of a valid marriage with the father of plaintiff might be presumed so as to legitimize plaintiff and possibly invalidate the ceremonial marriage with defendant, the continued cohabitation with defendant after death of plaintiff's father would establish a valid common law marriage with defendant.

NAVIGABLE WATERS. (Obstruction by Logging Operations.) Me. — Owners of summer cottages are held by the Supreme Judicial Court of Maine in Smart *v.* Aroostock Lumber Co., 68 Atl. Rep. 527, to a right of passage on a small navigable stream as against a logging company which had obstructed it for several miles with logs floated down to its mills. The defendant claimed that it had monopolized the commercial business on the stream and that consequently no one was injured, but the court held that plaintiff was entitled to its use for access to his summer cottage and that navigation for the purpose of mere pleasure is as much within the protection of the law as is a use for commercial purposes.

NEGLIGENCE. (Proximate Cause.) Mass. — In "Sullivan *v.* Old Colony Street Ry. Co." 83 N. E. Rep. 1091, it was claimed that the premature birth of a child, conceived several months after an injury to the mother, could not be charged to be the result of such injury as there must have been an intervening efficient cause by voluntary act. The court could not be persuaded to take that view but said "The perpetuation of the human race cannot be termed a voluntary act but it rests upon instincts and desires which are fundamentally imperative."

POST OFFICE. (Delivery of Mail.) U. S. Sup. Ct. — In the case entitled National Life Insurance Company of the United States of America *v.* National Life Insurance Company, 28 Sup. Ct. Rep. 541, the Supreme Court of the United States is asked to determine as to which of the parties mail matter addressed "National Life Insurance Company, Chicago, Ill.," without any designation of street or number or any other distinction should be delivered. It seemed that the complainant was chartered by act of Congress in 1868, while defendant was incorporated under the law of Vermont in 1848 under the name "National Life Insurance Company of the United States," which was changed in 1858 to its present name "National Life Insurance Company." It was admitted to do business in Illinois in 1860, and has continuously done business in that state since that time. Considerable mail matter has all along been received at the Chicago Post Office addressed simply "National Life Insurance Company" part of which was shown to belong to one of the parties to this suit and part to the other. There had been considerable discussion as to which one of these companies this matter should be delivered but the post office department finally issued an order that it should all be turned over to the defendant in view of the fact that the address corresponded with its name and it was first organized. The present action was to enjoin the carrying out of this order but the Supreme Court refused to interfere with the ruling of the postal authorities.

PROCEDURE. (Limitation of Actions.) Miss. — The application of the statute of limitations to recovery by heirs, of land sold to pay the debts of the estate, comes up in a peculiar way in Jordan *v.* Bobbitt, 45 So. Rep. 311. The owner through whom all parties claimed as a common source of title died in 1861. A few years later the widow conveyed her dower interest to a remote grantor of defendant who subsequently also purchased it at sale under order of court for payment of debts of the estate. After the death of the widow some thirty years later, the heirs brought action for recovery of the land claiming that the administrator's sale was invalid and as the purchaser was then in rightful possession under conveyance of the life interest of the widow they had no right of action to recover it until after her death and could only be barred by the ten years statute of limitation then in force and not by the one year statute in force at the time of sale. The Supreme Court of Mississippi held that the one year statute applied notwithstanding it had been repealed before the suit was commenced; that it began to run on the death of the widow and as the action was not begun within that time it was barred. Judge Whitfield dissents most emphatically from the majority of the court and characterizes the decision as one which leaves no rights to remaindermen and reversioners.

PROPERTY. (Party Walls.) Mass. — Where a party wall has been built by an adjoining landowner under agreement with his neighbor that reimbursement shall be made for one half the cost of the part he may subsequently use, will the

driving of nails and fastening pulleys and cords for the suspension of articles for sale constitute a prohibited use of a portion for which the person so doing has made no contribution to the cost? The Supreme Judicial Court of Massachusetts in the case of Berry *v.* Godfrey 84 N. E. Rep. 304 holds that it does and that the one constructing the wall is entitled to at least nominal damages therefor.

TAXATION. (Impairing Contract Right of Corporation to Exemption.) U. S. Sup. Ct. — An interesting question relating to exemption from taxation is passed on by the United States Supreme Court in Yazoo & Mississippi Valley Railway Company *v.* Vicksburg, 28 Sup. Ct. Rep. 510. It appeared that in 1888 the legislature of Mississippi passed an act giving authority to the city of Vicksburg to enter into a contract with the Memphis & Vicksburg Railway Company by which it was agreed that with certain exceptions it should be exempted from all municipal taxation for a period of 99 years and that this right should extend to its successors or any company into which it might merge by consolidation or otherwise. In 1890 a new state constitution was adopted which provided that "All corporate franchises under which organizations have not in good faith taken place at the adoption shall be subject to its provisions" and by another section provided that property of all private corporations for pecuniary gain shall be taxed the same as that of individuals.

In 1892, the Louisville, New Orleans and Texas Railway Company of which the Memphis & Vicksburg Company was a constituent part consolidated with complainant and thereafter claimed the right of exemption under the statute and contract above referred to. The court held, however, that the consolidation subsequent to the adoption of the new constitution brought it within its terms and that it could not now claim the exemption originally given to the Memphis & Vicksburg Company.

TORTS. (Joinder of Tort Feasors as Parties.) Tex. Civ. App. — Defendant in error in the case of Sun Co. *v.* Wyatt, 107 S. W. Rep. 934, brought action against the Sun Company, the Security Oil Company and the Higgins Oil & Fuel Company, to recover damages for a nuisance alleged to have been created by these parties by reason of certain pipe lines laid in front of the premises of plaintiff. Each of defendants demurred to the petition for misjoinder of parties defendant, on the ground that there was no averment of common ownership or operation of the pipe lines claimed to have caused the injury, nor any joint action in creating or maintaining the nuisance. The court below overruled the demurrers, and plaintiff recovered judgment assessing damages separately against each of the defendants, who thereupon appealed to the Court of Civil Appeals. That tribunal said: "It may be, and we are inclined to think that it would probably be a more sensible rule to allow all of the defendants to be sued in one action, holding each responsible only to the extent that its own acts contributed to the damages, but none of the authorities support this rule so far as we have been able to find, except the case of Warren *v.* Parkhurst, 92 N. Y. Supp. 725." The judgment of the trial court was therefore reversed and the cause remanded.

WITNESSES. (Credibility.) Mo. — The Supreme Court of Missouri, in the case of Huss *v.* Heydt Bakery Co., 108 S. W. Rep. 63, passed upon the question of the right to show membership of a witness in the same labor organization as that to which plaintiff belonged for the purpose of affecting credibility. The court said: "Had there been a manufacturers' union, and members thereof had been called for defendant, it would have been proper to have inquired of such witnesses as to whether or not they belonged to such union. In each the bonds of union are strong, as we are taught by common observation. . . . They may not be as closely interested as are partners, but they are interested in the promotion of a certain and definite purpose, and in that way would be subjected to the same rule. Certainly it would not be improper to ask a witness if he was a partner of a party to a suit. We conclude therefore that there was no error in the admission of this evidence."

THE LIGHTER SIDE

Law *v* Art. — Boston was convulsed, last winter, by an incident in the rivalry of two opera *impressarios*, which resulted in a suit in breach of contract by Mr. Hammerstein against the tenor Albani, then singing for Manager Russell On the theory that the defendant was about to leave the state, he was arrested on *mesne* process just before the curtain arose for the second act of *Il Trovatore*, in which he was singing Manrico. There was an awkward wait, then the manager appeared and related his troubles to the audience, and assured them that the performance should proceed, though it would be necessary that the constable accompany his prisoner until a suitable bond could be executed.

The director's next care was the tenor himself. Could he, would he, proceed with a deputy sheriff at his heels and mindful that such a prisoner had once escaped by a quick turn through the wings? Yes, Mr. Albani would continue. It was the business of Manrico to battle with all sorts of fate. Accordingly the curtain rose upon the familiar scene of the gypsy encampment. There reclined Manrico, "wrapped in a large cloak, his helmet at his feet, his sword grasped in his hand" — Verdi's stage directions to the letter and Mr. Albani looking every inch the romantic and fated hero. There, as well, in one of the wings, in full view of at least two-thirds of the audience, stood the constable looking also every inch a constable from the soles of his policeman's shoes to the crown of his derby hat — a portly and inoffensive person, half-amused, half-embarrassed, but dutiful always. An unappreciative audience hissed him with true Italian fervor, while Mr. Albani cast skew and expressive eyes upon him.

The action of the opera proceeded, and not long did Manrico recline. Now the "business" of his part bade him cross the stage, or take his place by the Gypsy's side. Or again he descended to the foot-lights the better to propel a high note to the ears of his hearers. At each movement, at each gesture, the constable started, as though his prisoner were about to leap across the footlights. Nothing happened, and the constable shifted his watchful pose to the other leg. At every pause, the audience showered its applause upon Manrico, and by this time Mr. Albani had caught the true spirit of the incident. He waved his hands scornfully at the deputy; he mocked him with his eyes; he chose the particular wing in which that officer stood for his final and excited rush from the stage, and before the curtain shut off that functionary he was obviously settling his hat anew upon his head.

The scene shifted to the sombre court-yard of the convent. Into it trooped the retainers of the Count di Luna; then Leonora and the nuns; then Manrico and his soldiers; and last the constable posting himself at the convent gates, well in the moonlight. Apparently his apprehensions had become fewer; at least Manrico was in the centre of his enemies. But the scene is bustling; to and fro through the gate flow the soldiers of the chorus and the singing actors. Were they as careful as they might be or did their histrionic energy make them careless. Who shall say, but more than once the deputy had to settle his hat afresh. At the end came his reward. Loud was the applause; many the calls for the singers; courteously Mr. Albani, now in high spirits, motioned to the constable to join him. He returned the bow with equal courtesy, but he budged not a step toward the footlights and the laughing audience. In the entr'acte Mr. Russell announced that a bond had been filed, and that Mr. Albani was free; and the rest of the performance returned to the normal. Presumably the deputy departed to meditate on his first and only appearance in "Il Trovatore," and Mr. Hammerstein in New York must have slept well.

Spiritualizing. — Robert Smith, brother of Sydney Smith, and an ex-Advocate-General, on one occasion engaged in an argument with a physician over the relative merits of their respective professions.

"I don't say that all lawyers are crooks," said the doctor, "but you'll have to admit that your profession doesn't make angels of men."

"No," retorted Smith, "you doctors certainly have the best of us there."—*Rochester Herald.*

A Commissioner. — Most of the members of the Bar have heard of various kinds of "commissioners" for example, Commissioners of Corporations, Transit Commissioners, Police Commissioners, and, in Boston, the Finance Commissioners, but a witness in the Superior Court the other day extended the name to still another line of work.

He gave his occupation as "Commissioner" and on direct examination it was left that way. On cross-examination, however, counsel was inquisitive and asked what his duties were, with the result that the witness proved to be a man who on hearing of an accident, saw the injured party and secured the case for some lawyer and received for his services a *commission* on the amount recovered. Or as counsel unfeeling put it he was an "ambulance chaser."

Sober as the Judge. — Judge Boyd of the Irish bench kept a supply of his favorite "pizen" on the desk before him in an inkstand of peculiar make. When he wanted a sip he took it through a quill pen, while counsel professed entire ignorance of the little manœuvre.

"Tell the Court truly," he once said to a witness, "were you drunk or sober?"

"Quite sober, my lord," replied the man.

And his counsel added, with a look at the inkpot: "As sober as a judge." — *Pall Mall Gazette.*

Conflicting Evidence. — The venerable and learned Justice John M. Harlan, during a game of golf at Chevy Chase, explained the intricacies of evidence to a young man.

"Usually, in conflicting evidence," he said, "one statement is far more probable than the other, so that we can decide easily which to believe.

"It is like the boy and the house hunter.

"A house hunter, getting off a train at a suburban station, said to a boy:

"'My lad, I am looking for Mr. Smithson's new block of semidetached cottages. How far are they from here?'

"'About twenty minutes' walk,' the boy replied.

"'Twenty minutes!' exclaimed the house hunter. 'Nonsense! The advertisement says five.'

"'Well,' said the boy, 'you can believe me or you can believe the advertisement; but I ain't tryin' to make no sale.'" — *Washington Star.*

The Lawyer and the Baker. — A Boston lawyer tells of the conversation between a legal light of that city, about to furnish a bill of costs, and his client, a baker.

"I hope, sir," said the latter, "that you will make it as light as possible."

"You might perhaps say that to the foreman of your establishment," suggested the attorney with a frigid smile; "but that is not the way I make my bread!" — *Lippincott's.*

The Judge's Advantage. — "There is one advantage which a judge always has in his profession."

"What is that?"

"Whether he succeeds in a given case or not, he can always try it." — *Kansas City Independent.*

The Magnates in Jail. — "So you people put a couple of magnates in jail on heavy fines, did you?" asks the investigating reformer.

"Yes," replies the native. "We fined them the limit; they wouldn't pay and we put them in cells."

"That's a good example."

"Is it? Within two days they organized the prisoners, guards and jailers into the International Penalty Company, issued five hundred million in bonds, paid the fines of all the prisoners, left us with a mortgage on the jail and the court-house — and stuck the surplus money in their pockets." — *Chicago Evening Post.*

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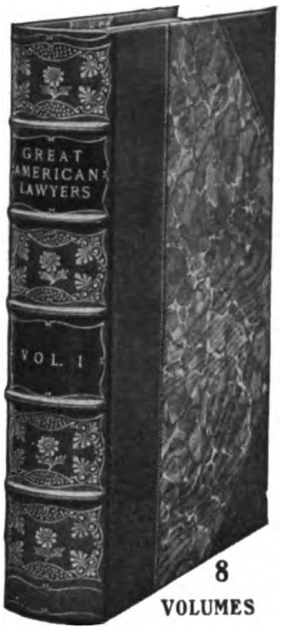

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Vol. XX, No. 8 AUGUST, 1908

THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

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CONTENTS

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Most important in our Constitutions today is the LIBERTIES OF THE PEOPLE,— the part most neglected by historians and commentators.

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This is a different work from Mr. Stimson's lectures on "The American Constitution," recently published by Scribner.

Our Contributors.

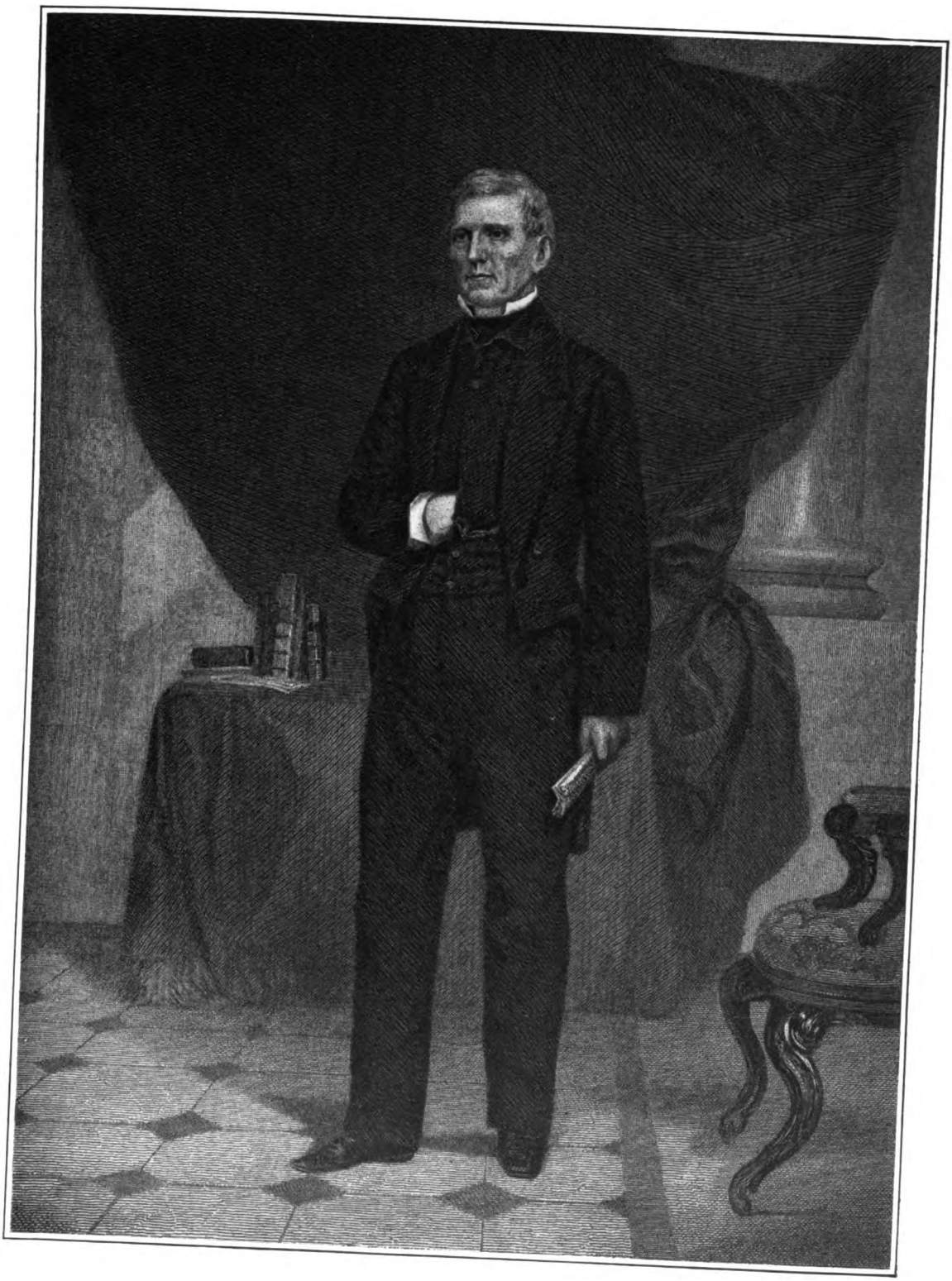
CHARLES FENNELL is a lawyer in active practice in Lexington, Kentucky, who has previously contributed to our pages an account of Thomas Marshall.

MR. BLYTHE found time to send us a few more verses before starting on his summer vacation. He has already been sufficiently introduced to our readers.

H. GERALD CHAPIN is Professor of Law in Fordham College, New York, and was formerly editor of the "American Lawyer." He is a frequent contributor to other legal periodicals.

ROSCOE POUND is Professor of Law in Northwestern University, as well as editor of the Illinois Law Review. He is one of the foremost of the group of Western lawyers who are ardent advocates of reform in our judicial procedures. Through his brilliant addresses before the American Bar Association, some of which we have printed, he has stirred the Association to the formation of a committee which is now dealing with this difficult and important topic. His contribution to this number is his address recently delivered at the annual meeting of the Illinois State Bar Association.

J. NOBLE HAYES is one of the New York lawyers who devote themselves to practice in courts. He has always taken an effective interest in the organization of the profession, and is in a large measure responsible for the activities of the new association which he describes in this number.



J. J. Crittenden

The Green Bag

Vol. XX. No. 8 BOSTON August, 1908

THE LEGAL CAREER OF JOHN J. CRITTENDEN

By Charles Fennell

AMONG all the great names which have given luster to the American bar few shine more brightly or are cherished more deservedly than that of John J. Crittenden. His more famous (though not more brilliant) labors as a public man, however, have to some extent overshadowed his fame as an advocate. This has been the general, the almost universal rule with all lawyers who have succeeded in public life. A speech in a law case will not be half as widely read nor remembered as long as a political speech of infinitely less merit. Few people have ever read the great speech of William Pinkney in the case of the Nereide, Webster's speech in the trial of Knapp, Marshall's defense of Matt Ward, Voorhees in the Cook and Mary Harris cases, Prentiss or Hardin in the trial of Wilkinson, or Wm. Wirt against Aaron Burr, yet these same people may have been carried away by admiration in reading political speeches containing not one-half the beauty or the strength of any of the above. But when the intelligent and candid reader does begin the study of the eloquence of the great stars of the American bar he soon learns that there is a genuine and irresistibly human attractiveness about it that is seldom to be met with in political speeches. The lawyer is confronted by judge or jury as the case may be and the decision is not based on political prejudices or party affinities but on the merits of the case. When the lawyer speaks he has hope of convincing — the politician has not. It is a fact, too, well worthy of note, that the great majority of the ablest statesmen and public men of our country have been educated for the law and most of them have practiced their profession. It is the intention of the writer to describe in as small a compass as possible the legal career alone of one who was an ornament both to our bar and to our Senate. His public life has been already placed in permanent form before the public and needs no discussion here. John Jordan Crittenden was born in Woodford County, Kentucky, on September 10, 1787. His early education was obtained in Jessamine County, Kentucky, where he had for his classmates many who afterward became famous in public life. After finishing in the Jessamine school he began the study of the law under Judge G. M. Bibb, in whose family he had for some time resided. He completed these studies at old William and Mary College in Virginia and, returning to his native county of Woodford, began the practice of his profession in 1807. He removed after a year or so to Russellville in Logan County, Kentucky, this place seeming to offer more inducements to promising and enterprising young men than what was then considered the older and more settled part of the state. Here by close attention to his business and by his persuasive eloquence and skill he soon won local fame and built up for himself a lucrative practice and by his cordial manner and chivalrous conduct impressed himself upon the good will and esteem of the people of the community. In those early days the "pioneer" portions of the state presented a picturesque appearance. The streets would be thronged on court days with huntsmen and college graduates alike, so that in one glance the observer might behold the various degrees between the typical fron-

tiersman and the polished Virginia gentlemen who had come out into those regions to grow up with the country and acquire a fortune. And as a rule those broadcloth sons of the Old Dominion were so winning of manner and so free from false pride as to mingle on the best of terms with the people among whom their lot was cast. But occasionally there would occur very strange and humorous events by reason of this mingling of extremes, and in one of these Crittenden was involved. There had been a man arrested for biting off the ear of another man in a street brawl and Crittenden was engaged as counsel for the defense. The presiding judge, Broadnax, was a stately, high-toned Virginia gentleman of the old school, a born aristocrat, and though a warm friend and admirer of Crittenden, he railed at him fiercely for taking fees of such a "low rascal." After great difficulty and delay eleven jurors had been selected. Many respectable-looking men had been summoned and rejected by the counsel for the defense, and both the judge and the sheriff were much exasperated. It was difficult to summon men for jury service in that sparsely settled country. At last an ill-looking fellow, with a tattered straw hat on his head, half the rim torn off, a lock of greasy hair sticking through the top, a piece of his nose gone and his face bearing other marks of brawls — in short about as ill-favored a rascal as ever offended a court of justice by his presence,— was brought in. After looking him over and asking him a few questions the replies to which established beyond a doubt his character as a roisterer and vagabond, Crittenden said, "Well, judge, rather than be the cause of any *more delay*, I'll take this man." The judge, who had been looking on angrily, could no longer contain himself. He sprang to his feet, exclaiming, "I knew it; yes, I knew it; the moment I laid eyes on the fellow I knew you would accept him." Then after a contemptuous survey of the jury he added in a withering tone, "Did any living man ever see such a jury before?" "Why, your Honor," said Crittenden, "I pronounce this a most respectable jury." Crittenden said that after that intemperate speech by the judge he felt easy as to the fate of his client. He knew that he would be acquitted — and he was.

Later Crittenden resumed the practice of his profession in his home county of Woodford, where he won a hold upon the hearts of the people that was never shaken and gained such an ascendency over the minds of the jurymen who tried his cases that there were few convictions ever registered against those whose cause he espoused. His method of conducting a case was peculiar to himself. Like Choate and Tom Marshall he relied on every extenuating plea presented, and some of his defenses were as sensational and as successful as the famous "somnambulism" defense of Choate in the Tirrell murder trial. In common with every great advocate he never discussed the evidence in detail, believing that the jurymen were men of sense and that the evidence, or such of it as they deemed worthy of notice, had impressed itself, in the form of an opinion, upon their minds before he rose to speak. What was the use then to go over a dry mass of testimony, more especially if it was unfavorable to his client? He would of course briefly analyze the evidence and show the inconsistencies and weaknesses of the opposing witnesses, weaving here and there a singularly eloquent and felicitous plea for mercy and for the "sympathy which man can give to man." His forte was persuasion. He was frank with a jury and never attempted to mislead them in discussion of the facts, and having in this manner gained their confidence, he would soften their hearts and persuade them to temper justice with mercy. This was not skill alone. He *felt* all that he said. It was his big human heart prompting the plea for mercy, and it seldom failed in its effect upon a warm-hearted and impulsive jury.

His daughter, Mrs. Coleman, thus

describes a trial in which, by his persuasive eloquence, he so completely fascinated the jury that they lost sight of the law and even of justice:

"Court day is a great day in the small inland towns of the West. All business to be done in the towns is, if possible, deferred until that day, and the plowing, planting, and reaping are stopped without remorse. The plow horses are fastened to the long lines of fence and the yeomanry gather in groups about the taverns and court house. Any important trial brought together the prominent speakers, and the chance of announcing and spreading one's opinions by a lusty fight or two was an ever new delight. Mr. Cole and a friend named Gillespie of the same caliber and tastes rode into the little town of Versailles on court day. Everything was propitious; they drank, played cards, and were merry. Late in the day they rode most amicably, side by side, out of Versailles, going home together. Unfortunately they had both cards and whiskey in their pockets and of the latter they partook freely. They rode slowly and were benighted. Passing a dismantled log cabin by the wayside, they determined to stop and rest, tied their horses, struck a light, and concluded to play 'High, low, jack and the game' and take a little grog from time to time by way of refreshment, till the morning. As might have been expected they grew quarrelsome and abusive. It is a short step from words to blows. Gillespie struck at his friend Cole with a knife and killed him instantly. The sight of the blood and of the dead man, his friend from boyhood, sobered him fully and his sorrow and remorse were indescribable. . . . Mr. Crittenden was employed to defend him. . . . Mr. Crittenden's speech was pronounced a masterpiece of oratory. Almost the entire assembly were moved to sobs and tears. The attempt was made to invalidate or set aside Gillespie's testimony; he acknowledged the killing and his statement of the circumstances was the single point in his favor. Mr. Crittenden's reply to this effort on the part of the prosecution is all I can recall of his speech. In fact I remember but he sentiment he expressed; the voice, the eloquent lip, it is impossible to portray. 'Can any man in his senses with a throbbing heart in his bosom doubt this man's testimony? No, gentlemen of the jury, the truth gushes from his burdened heart in that hour of agony as pure as the water from the rock when smitten by the hand of the prophet.' The orator seemed inspired and his aspect and words carried conviction not only to the audience but to the jury as well, as was evidenced by the verdict of acquittal. Afterward he was heard to say of the case, 'Yes, I begged that man's life of the jury.'" According to the law the man was guilty of manslaughter at least; but when the master hand had played upon the chords of human sympathy the jury could not find it in their hearts to convict. Gifted with the highest powers of eloquence and the possessor of as great and generous a heart as ever beat in a human breast, Crittenden easily impressed his own ardent and sympathetic views upon the minds and the hearts of his hearers. His eloquence was not a lot of stately imagery and rhetoric. It was a hot and glowing message direct from his heart. The words were but the echoes of his own generous impulses. Probably few more generous men than Crittenden ever lived. His magnanimity in the forgiveness of personal wrong was almost incredible. Take for instance his treatment of Francis Preston Blair. He and Blair had been friends through life until the "bargain and intrigue" days of the contest between Jackson and Adams, when they differed and became separated. The political feeling ran very high in Kentucky and Blair and Crittenden were frequently opposed to each other, each making speeches to further his cause in and around Frankfort. Mr. Blair is thus quoted in substance in connection with that period: A few days before the election was to take place, an appointment was made for a political meet-

ing in the neighborhood. Mr Blair reached the ground first, and made a violent speech, in which he brought many charges against Crittenden's political course, and abused him personally. He was greatly excited. Ashamed of his course toward his old friend, and afraid of the lashing he knew was in store for him, he had, during the tirade, been looking round anxiously for his opponent, and found his flashing eye fixed steadily upon him. He closed his speech, and a rather cowardly impulse took possession of him to steal off and escape the scourging the mere anticipation of which weighed heavily upon him. He reached the outskirts of the crowd, when, hearing *that* voice, which always thrilled and, in a measure, controlled him, he turned back almost involuntarily and gave himself up to justice. As he found that he was not personally alluded to, he drew nearer and nearer with some feeling of security. Mr. Crittenden took up the charges with which he had been assailed, one by one, and refuted them; managed to cast, from time to time, a furtive glance upon his adversary, but did not call his name or allude to him. At first this rather pleased Blair; then, as he became convinced that "John" meant to pass him by silently, he was humiliated and ashamed. A few days afterwards Blair was seated in one of the Clerk's offices in Frankfort, when Mr. Crittenden entered; he advanced to Blair with outstretched hand and a kindly greeting: "Well, Preston, how are you?" Blair, greatly embarrassed, stammered out a few words of salutation, and then, feeling that something must be said to break the silence, remarked, "You had a son born in your house yesterday, Crittenden; what do you intend to call him?" A cloud of mingled feelings passed over Crittenden's expressive countenance. After a moment's pause he said, "I have been thinking, Preston, of calling him by that name which you have been trying of late to dishonor." "That," with the kind and sorrowful glance which accompanied it, "went straight to my heart," said Mr. Blair, "the fountain of my speech was dried up, and this was the only reproach Mr. Crittenden ever made me." Another story illustrating the same point was told by Judge S. S. Nicholas of Louisville. He said that at one time he had become so exasperated with Blair for the unjust aspersions he had cast on Crittenden that he (Nicholas) resolved never again to acknowledge him (Blair) as an acquaintance. Being in Washington about this time he entered one of the departments to visit Crittenden. Several gentlemen were present and among them Blair. True to his resolve the judge straightened up and passed Blair without speaking or even bowing. Crittenden greeted him warmly and then, with some little embarrassment, turned him round quickly in front of Blair and said, "Here, Nicholas, here is our old friend Blair. I know you will be glad to see him." "There was no resisting this," said the judge; "I could but speak to Blair. As Mr. Crittenden would not resent Blair's conduct to himself, *I* could not very consistently do so." This trait won him the unfailing love of nearly everyone. He was the one man on whom all factions and enemies could unite. Men who hated each other fiercely united in loving Crittenden. But it must not be thought that he was lacking in courage to express his views or return the fire of an antagonist. He was always ready to do so, but nevertheless generally did it with such a heartfelt courtesy as to relieve anyone of the impression that he was actuated by malice or bitterness. Nature and art conspired to make him a perfect gentleman. His name has become the synonym of courtesy and gentlemanly tact. Whenever borne away by the excitement of the moment or through a love of fun he had unintentionally hurt the feelings of anyone, he would always find a way to as publicly make reparation for the imagined wrong. On one occasion he had been retained to defend a young Southerner, a student of Transylvania University, who during a

sudden brawl shot and killed a fellow student. Although the shooting was the result of folly (no previous bitterness having existed between the two) there was intense excitement in Lexington and the trial was removed to Versailles. An eccentric lawyer and rather prominent (not excellent) orator by the name of Major Flournoy volunteered his services to assist in the prosecution of the case. He was a solemnly comical figure as he carried out his part of the program. A wild confusion of waving arms, swaying body, and tottering legs, to the discordant shriek of a voice which disdained to articulate, was the general effect upon jury and spectators alike. He was a ranter, and in the excess of his fury he became merely noisy instead of either terrible or sublime. When he had ceased Crittenden arose calmly and after having passed his hand several times over his eyelids, as though still half asleep, spoke a few words as follows: "Gentlemen of the jury, I have either slept and dreamed, or I have had a vivid waking dream, which I can scarcely dispel. I thought I had gone out on a whaling vessel; the winds and waves were high and the mighty waters were roaring around me. Suddenly the sailors cried out, 'All hands on deck; the whale is upon us; she blows.' I looked, and there indeed was the monster of the deep; its tail was flying through the air and the surging waves, till we were enveloped in mist. I am stunned, confused, and your honor must grant me a few moments to recover my self-possession."

He then commenced his argument and in reply to the point urged by the prosecution that the prisoner should be punished as an example in order to quell, in a measure, the lawlessness then all too prevalent, he said, "The counsel against the prisoner demands an example. Yes, I agree with my stern and learned friend, we should make examples, from time to time, even among the young and thoughtless, to check the heat of youthful blood and the violence of ungoverned passion; but, my countrymen, let us take that example from among our own people, and not seize upon the youthful stranger, who came confidingly among us, to profit by the advantage of our literary institutions, to learn to be a man in the best and highest sense, honest and capable and cultivated. We have, I am grieved to say. frequent opportunities to make examples of our own sons in our own borders. Let us do this, then, when the occasion offers, but let us send this broken-hearted, trembling mother" (pointing to the prisoner's mother who was present) "and her dear loved son back to their home in peace. He has been overtaken in a great crime, but an acquittal, in consideration of his youth and other extenuating circumstances, will be honorable to our great state, and do no damage to the laws." After a few moments of deliberation the jury returned a verdict of not guilty. When Crittenden left the court room he observed Major Flournoy perched on the town pump, thoroughly enraged, and denouncing him in no uncertain terms to a crowd of amused listeners. Approaching silently Crittenden laid his hand on the shoulder of the irate orator and said, "How are you, old whale? I know you are dry after all that blowing; come and take a drink." His voice and manner softened the heart of the Major and clambering down from his platform he walked away arm in arm with the man he had been so strenuously denouncing, to settle their differences over a bowl of punch.

During the period of his retirement from the arena of national politics — between the years 1819 and 1835 — he was engaged almost exclusively in the practice of his profession and during that period there was hardly a case of importance carried before the Court of Appeals at Frankfort in which he did not appear as counsel for one side or the other. A tabulation of the reported cases of the court shows that from January, 1829, to November, 1831 there were 1103 cases heard before the court and Crittenden appeared in 254 of

those. In many of the cases no counsel were named, so that Crittenden had even a larger percentage of the contested cases than the above figures would indicate. At this time too the bar of the state was singularly able, numbering among its old members Clay, Bledsoe, Rowan, Hardin, Chapeye, Caperton, Guthrie, Wickliffe, Denny, and others of equal renown, which makes the feat all the more surprising. He was moreover engaged in many trial cases in which he was attended by uniform and brilliant success. In 1827 he was appointed District Attorney of the United States for Kentucky by President Adams, and in 1829 the same President nominated him to succeed Judge Trimble in the Supreme Court of the United States. A partisan Senate refused to act on it, however, and the nomination was never confirmed. About this time he was engaged as counsel together with Clay to defend Charles Wickliffe on a charge of murder. The killing had been brought about entirely by politics and this made Clay's interest the more intense, as the father of Wickliffe was one of his staunchest friends. The speech of Crittenden was great, but according to the popular voice Clay was the hero of the occasion, the "Old Sage" being at his best. An acquittal was the result. It is a pity that these speeches were not preserved, as their effect was electrical, and in all probability they embodied more of the persuasive eloquence of which Crittenden and Clay were capable than do their more formal addresses in Congress and before popular assemblies.

On one occasion he defended a man by the name of Goins, who was charged with murder. There had for some time been bitter feeling between the prisoner and the man he had killed and each day saw the bitterness increased until Goins heard that his life was threatened. This put him on the alert and thenceforward he found himself constantly dogged. Whenever he turned a corner there stood his enemy. Coming out of his house very early one morning he beheld the tormentor standing on the opposite side of the street. Thoroughly enraged he seized a cudgel and running the man down literally beat him to death. The defense relied upon was that a man had not only the right to live but to be happy, and in his address to the jury Crittenden pictured the unutterable horrors and torments to which the prisoner had been exposed. "There had been no moment day or night free from the apprehension of sudden and violent death. He could not enter his own home at night without finding this, his enemy, skulking around the corner; he could not leave his wife and child, with the sunrise, to go to his daily work, without seeing this terror before his door. Was it any wonder that he had been driven to frenzy and to a deed of blood by such a life?" The public feeling was at first strongly against Goins, but when his mental agonies had been pictured by the master hand of Crittenden a revulsion of feeling took place and he was acquitted with public approval. In 1842 he was associated as principal counsel with the wonderful "Tom" Marshall (whom many competent critics consider as the greatest of American orators) in the defense of Monroe Edwards in New York City. Both Marshall and Crittenden being "outsiders" it was deemed best to engage the services of some of the members of the New York bar as well, and among those so engaged was Wm. M. Evarts, then at the outset of his great career. In after life he met Mrs. Coleman, the daughter of Crittenden, in Washington, and being told of her plan to write a biography of her father he encouraged her in the work, and speaking of the Monroe Edwards trial he said: "Mrs. Coleman, I shall never forget that trial in connection with your father. I was a young man on the threshold of my professional career, and your father's reputation was firmly and widely established as a lawyer and a statesman.

His cordial manner throughout the trial is most gratefully remembered by me, and at its close he asked me to take a walk with him. During the walk he took a slight review of the trial, complimented me upon my course during its progress and the ability he was pleased to think I had manifested, and in conclusion, grasping my hand with warmth, he said, 'Allow me to congratulate and encourage you on the course of life you have adopted. I assure you that the highest honors of the profession are within your grasp, and with perseverance you may expect to attain them.' Those words from Mr. Crittenden would have gratified the pride of any young lawyer and given him new strength for the struggle of his profession. I can truly say they have been of the greatest value to me through life. When I came to Washington to take part in the defense of President Johnson, the associations of the Senate Chamber recalled the memory of your father's words and renewed my gratitude for his generous encouragement of my early hopes."

Crittenden was appointed Attorney-General of the United States by Harrison, but as he was one of the foremost statesmen and politicians of his day it can hardly be told whether the appointment was a compliment to his legal ability or a bid for his political influence. But nevertheless, after his resignation, he took part in many of the most important cases of the time, among them being the celebrated libel suit against Governor Thomas of Maryland, in which he was one of counsel for plaintiff. The case was eventually compromised. In the Supreme Court he appeared frequently and with great brilliancy and success. In a running debate with Crittenden in the Senate once Seward paid him the following compliment: "The honorable gentleman from Kentucky is the last man I would attempt to disparage as a lawyer. I consider him at the head of his profession."

In 1854 he volunteered his services in the defense of Matt Ward, a son of one of his lifelong friends. This was one of the greatest and most intensely interesting murder trials ever held in the United States. The accused was a young married man, an author of some genius and a man of hitherto irreproachable reputation. The dead man, Mr. Butler, was a highly beloved and respected teacher of Louisville. He and Matt had been friends up until the very moment almost of the killing. Mr. Butler had chastised a younger brother of Matt and in addition had called him a liar in the presence of the entire school. The next day Matt went to the school and demanded an explanation, which was refused. Matt then said, "Then, sir, I think that you are a scoundrel and a coward." Butler resented this warmly and being a much larger man than Ward soon forced him back against the wall with the evident intention of chastising him for the insult. At this juncture Ward drew a small pistol and fired, fatally wounding Butler. The testimony of the school children was conflicting, but at best the case was very unfavorable to Ward. The prosecution was represented by Allen, Gibson, and Carpenter, the latter being a man of great but somber genius and a prosecutor of terrific power. The defense was conducted by Nat Wolfe, the great Louisville lawyer, Gov. John Helm, "Tom" Marshall, and Crittenden. What an array of genius! And what a demand for genius! Carpenter spoke eight hours for the prosecution, and it was mainly against his powerful plea that the thunders of the defense were aimed. When Carpenter had concluded the audience felt that Ward's doom was sealed. Marshall followed and in thrilling words and with irresistible eloquence swept away the effect of Carpenter's speech and carried the audience with him. What a power has genius to calm or to sway the passions! Wolfe and Helm as well as Allen and Gibson made brilliant speeches. Crittenden's speech is the best he ever made. His powers of persuasion were never

perhaps as fully taxed and certainly never as eloquently displayed. And then, too, the thrilling words were supplemented and given added force by the flashing eye and the consummate action of the orator. Though a finished actor, he was natural — he felt all that he acted. In the outset he complimented the jury and congratulated them that they lived in a country where the right of trial by jury was in vogue, mentioned the fierce struggles to obtain this right, and then discussed it in the following felicitous manner: "You may wonder why it is they have been thus solicitous to preserve this right of trial by jury. You may inquire why they have not rather left it to the courts to try men who are charged with crime. The judges on the bench are usually able and honest men — men of superior wisdom to those who ordinarily compose a jury; men of greater knowledge of law, and men of undoubted integrity.

"It is not from any distrust of the judges, or fears that they might be swayed improperly, that this right has been preserved, but from a deeper and wiser motive. It is not because the people are equally learned with them but because they are less learned. It is because the law desires no man to be molested in his life or liberty until the popular sanction has been given to his sentence, and his cause pronounced upon by a jury of his peers. The court is expected to render all necessary assistance in stating the law; but his cause, in passing through the minds and hearts of his equals who are trying it, will be divested of all nice technicalities and subtle analogies, and decided on its simple merits, and according to the dictates of reason. The life of a man should be taken on no other judgment. You may lay down the law like a problem in Euclid; you may take one fact here and another there; connect this principle and that proposition, and then from one to the other reason plausibly and even logically that a man should receive sentence of death. But it was to avoid all this that this glorious right was kept inviolate. It was to bring the accused face to face with his accusers and to suffer only a jury of his equals, with their warm hearts and honest minds, to pronounce upon a cause involving his life or his liberty."

He then proceeded to comment briefly on the evidence, showing the inconsistencies and unreliable character of the testimony given by the frightened schoolboys who alone had witnessed the tragedy; intimated that they had been instructed, and having finished the discussion of the facts considered the law applicable to the case. In reply to some of Carpenter's bitter attacks he delivered this sublime plea for justice tempered with mercy: "He would have you tell the judge of the quick and the dead, when you stand at his tribunal, how manfully you performed your duty by sending your fellow-man to the gallows. He apprehends that it will go a great way to insure your acquittal there and your entrance to the regions of eternal bliss, if you are able to state that you regarded no extenuating plea — took no cognizance of the passions and infirmities of our common nature — showed no mercy, but sternly pronounced his irrevocable doom. I understand that it would be more likely to send you in a contrary direction. I understand that a lack of all compassion during life will hardly be a recommendation there. I understand that your own plea will then be for mercy; none, we are taught, can find salvation without it, — none can be saved on their merits. But according to Mr. Carpenter's idea, you are to rely there, not upon that mercy for which we all hope, but on your own merits in convicting Matt Ward. Don't you think the gentleman rather failed in the argumentative portion of his point? It seems to me he would have done better to take you *somewhere else* for trial.

"I have heard or read a story from one of those transcendental German writers, which tells us that when the Almighty designed to

create man, the various angels of his attributes came in their order before him and spoke of his purpose. Truth said: 'Create him not, Father. He will deny the right, deny his obligations to thee, and deny the sacred and inviolate truth; therefore create him not.' Justice said: 'Create him not, Father. He will fill the world with injustice and wrong, he will desecrate thy holy temple, do deeds of violence and of blood, and in the very first generation he will wantonly slay his brother; therefore create him not.' But gentle Mercy knelt by the throne and whispered: 'Create him, Father. I will be with him in all his wanderings, I will follow his wayward steps, and by the lessons he shall learn from the experience of his own errors, I will bring him back to thee.' 'And thus,' concludes the writer, 'learn, O man, mercy to thy fellow-man, if thou wouldst bring him back to thee and to God.'"

The latter portion of this passage has been the object of universal praise and admiration as indeed it deserves. This was not, however, the first time that Crittenden had used the image, as it had been credited to him in the papers of the country many years before. However, we may well congratulate ourselves that it was embodied in one of his reported speeches together with other beautiful thoughts instead of being preserved only in a fragmentary form. Later he pictured to the jury the effects upon themselves of their verdict in this manner: "Yes, you are to decide, and as I leave the case with you I implore you to consider it well and mercifully before you pronounce a verdict of guilty, — a verdict which is to cut asunder all the tender cords that bind heart to heart, and to consign this young man, in the flower of his days and in the midst of his hopes, to shame and to death. Such a verdict must often come up in your recollections — must live forever in your minds.

"And in after days, when the wild voice of clamor that now fills the air is hushed — when memory shall review this busy scene, should her accusing voice tell you you have dealt hardly with a brother's life — that you have sent him to death, when you have a doubt whether it is not your duty to restore him to life, — oh, what a moment that must be — how like a cancer will that remembrance prey upon your hearts!

"But if, on the other hand, having rendered a contrary verdict, you feel that there should have been a conviction, *that* sentiment will be easily satisfied; you will say, 'If I erred, it was on the side of mercy; thank God, I incurred no hazard by condemning a man I thought innocent.' How different the memory from that which may come in any calm moment, by day or by night, knocking at the door of your hearts and reminding you that in a case where you were doubtful, by your verdict you sent an innocent man to disgrace and to death. . . . There is another consideration of which we should not be unmindful. We are all conscious of the infirmities of our nature — we are all subject to them. The law makes an allowance for such infirmities. The Author of our being has been pleased to fashion us out of great and mighty elements, which make us but a little lower than the angels; but He has mingled in our composition weakness and passions. Will He punish us for frailties which nature has stamped upon us or for their necessary results? The difference between these and acts that proceed from a wicked and malignant heart is founded on eternal justice; and in the words of the Psalmist, 'He knoweth our frame; He remembereth that we are dust.' Shall not the rule He has established be good enough for us to judge by?

"Gentlemen, the case is closed. Again I ask you to consider it well before you pronounce a verdict which shall consign this prisoner to a grave of ignominy and dishonor. These are no idle words you have heard so often. This is your fellow-citizen — a youth of promise — the rose of his family — the possessor of all kind and virtuous and manly qualities. It is the blood of a Kentuckian you are called upon to shed. The blood that

flows in his veins has come down from those noble pioneers who laid the foundations for the greatness and glory of our state; it is the blood of a race who have never spared it when demanded by their country's cause. It is his fate you are to decide. I excite no poor unmanly sympathy — I appeal to no low, groveling spirit. He is a man — you are men — and I only ask that sympathy which man can give to man. I will not detain you longer. But you know, and it is right you should know, the terrible suspense in which some of these hearts must beat during your absence. It is proper for you to consider this, for, in such a case, all the feelings of the mind and heart should sit in counsel together. Your duty is yet to be done; perform it as you are ready to answer for it, here and hereafter. Perform it calmly and dispassionately, remembering that vengeance can give no satisfaction to any human being. But if you exercise it in this case, it will spread black midnight and despair over many aching hearts. May the God of all mercy be with you in your deliberations, assist you in the performance of your duty, and teach you to judge your fellow-being as you hope to be judged hereafter."

This was the last great case in which Crittenden appeared, his duties as a senator, etc., consuming all of his time. As an orator he is in the same class with the greatest our country has produced — the peer of them all. It requires genius to be placed in the same category with Tom Marshall, Webster, Clay, Pinkney, Choate, Corwin, and Wirt. He lived on excellent terms with all the great men of his time, never envying them their laurels and always rejoicing in their success. He died on the 26th of July, 1863, after having been in declining health for six months or more, leaving behind him the glorious memory of a life hallowed by all that is noble and inspiring; of a life devoted to justice, to mercy, and to the more consecrated offices of a patriot and statesman. On his monument, erected by the Legislature of an admiring state, are carved some words indicative of his character — some of the last he ever uttered:

"MAY ALL THE ENDS THEY AIM AT BE THEIR COUNTRY'S, THEIR GOD'S, AND TRUTH'S."

LEXINGTON, KY., July, 1908.

THE DOCTOR

BY HARRY RANDOLPH BLYTHE

He took them all: — the hopeless,
The bankrupt and the bruised;
A case that needed crutches
He never once refused.

He nursed them, propped them, petted,
Then gave them each a wrench,
And took them up undaunted
Before the big full Bench.

And many did he rescue
That else had known the grave,
So crafty was his cunning,
So great his might to save.

But O, the sin, the pity!
He lives in want and woe,
And only dreams of getting
The fees his clients owe.

CAMBRIDGE, MASS., July, 1908.

LAW AND LAWYERS OF DICKENS

By H. Gerald Chapin

So frequently have novelist and playwright utilized the court room as a background for the most dramatic of their situations that its effect, one might think, should have been lost or blunted long ago. But so far from this proving true, the trial scene still remains the most effective of climaxes. When one of the dramatis personae appears before a jury, a narrative of his further acts is destined to bear close resemblance to an epilogue. Unless the writer subsequently reaches a point where his previous effort is completely dwarfed, the work is apt to develop into a series of anti-climaxes. For which reason, novelists take notice, it is better to run no risk and prepare to write *finis* in as short a time as may be after the verdict has been rendered — unless as Dickens has done in his *Tale of Two Cities* and *Pickwick Papers* later on you overshadow your earlier scenes.

If we reflect upon the classics of English fiction, it will be found I think, that when a trial is pictured at any length, it furnishes the book's chief claim to recollection. Take as illustrative, Scott's *Heart of Mid-Lothian* and *Peveril of the Peak*, Bulwer Lytton's *Paul Clifford* and *Eugene Aram*, George Eliot's *Adam Bede* and Samuel Warren's *Ten Thousand a Year*. Also several of the works of Charles Reade.

Now to go a step further. Select any of the foregoing and institute a comparison with what are probably the best of the many court room scenes in Dickens, namely the trial of Charles Darnay and of Bardell *v.* Pickwick. On the one side, we have a history of facts sufficiently interesting by itself, but almost such a recital as might appear in the columns of any newspaper of the better class. Without the interest which the author has already excited in his characters, the situation would fail. This interest being sufficient to sustain the reader's attention, the dramatic power of the scene asserts itself. Without it, a more or less verbatim report from Howell's State Trials will exercise a stronger appeal. But the court scenes in Dickens stand alone, borrowing no strength from the plot, though in venturing the opinion that as an author, he occupies in this respect a plane apart, I speak subject to correction and with due reservation and exception in favor of Holland's *Sevenoakes* and Gray's *Last Sentence*. Each participant is a living, breathing personality, not a figure painted upon a background to lend color or a manikin stationed with others around a sentient figure. Starleigh, Buzfuz, Skimpin, Snubbin, Phunky, Perker, Dodson, Fogg and Pell are each and singly alone. Judges, parties, witnesses are distinct beings, even down to the third usher who on the summoning of Elizabeth Cluppins "rushed in a breathless state into King Street and screamed for Elizabeth Muffins until he was hoarse."

Another point worth noting is that although Dickens always strongly inclined towards sentimentalism, there is practically no evidence of this tendency when describing court procedure. We are not told in just so many words, how Amicus Curiae Esq. arose and began his plea for the life of Four-eyed Sam in a low and trembling voice, gaining in strength as he proceeded; how the faces of the jury, at first indifferent, began to show a dawning interest which increased to sympathy, until at the eloquent reference to the prisoner's aged mother the tears coursed down their seamed and weather-beaten countenances; and so forth, and so forth, and so on. It's the easiest thing in the world to reel off about five hundred words of it. Sometimes this particular brand of flapdoodle is inflicted because the writer is a layman and in these days of machine made books, doesn't care to bother about equip-

ping himself with information sufficient for a bill of particulars. Sometimes as in the case of one of our modern lawyer-novelists, he seemingly lacks a sense of perspective. In either event, the result is a nauseating blur.

But Dickens although a sentimentalist as already observed, if ever there was one, chooses his tone well. He may prefer satire or denunciation. He is never maudlin. Furthermore, each detail receives attention in proportion to its importance viewed from a literary standpoint — no more. One of the best bits of satire is reserved for Mr. Justice Stareleigh who

"summed up in the old-established and most approved form. He read as much of his notes to the jury as he could decipher on so short a notice, and made running comments on the evidence as he went along. If Mrs. Bardell was right, it was perfectly clear Mr. Pickwick was wrong, and if they thought the evidence of Mrs. Cluppins worthy of credence they would believe it and if they didn't why they wouldn't. If they were satisfied that a breach of promise of marriage had been committed, they would find for the plaintiff with such damages as they thought proper; and if on the other hand it appeared to them that no promise of marriage had ever been given they would find for the defendant with no damages at all."

If any reader doubt whether Justice Stareleigh is still with us, let him visit a few of the trial terms of our Supreme Court and he will there behold one or two of his incarnations. It has been said that cross examination is an exceedingly dangerous thing in that it bears quite a startling resemblance to pulling a tiger out of his den. You may get him, but the chances are that he will get you. I hope to see the day when every law school will have in its curriculum a course on how to conduct a case and if the instructor knows his business, he will request the students to pay particular attention to the result of Mr. Phunky's attempt on Mr. Winkle which illustrates the result of going far with a too-willing witness.

Quite different is the trial of Darnay.

"Mr. Cruncher had by this time taken quite a lunch of rust off his fingers in his following of the evidence. He had now to attend while Mr. Stryver fitted the prisoner's case on the jury like a compact suit of clothes, showing how the patriot Barsad was a hired spy and traitor, an unblushing trafficker in blood and one of the greatest scoundrels upon earth since accursed Judas — which he certainly did look rather like. How the virtuous servant Cly was his friend and partner and was worthy to be; how the watchful eyes of those forgers and false swearers had rested on the prisoner as a victim, because some family affairs in France, he being of French extraction, did require his making those passages across the Channel — though what those affairs were, a consideration for others who were near and dear to him forbade him, even for his life, to disclose. How the evidence that had been warped and wrested from the young lady whose anguish in giving it they had witnessed, came to nothing, involving the mere little gallantries and politenesses likely to pass between any young gentleman and lady so thrown together — with the exception of that reference to George Washington which was altogether too extravagant and impossible to be regarded in any other light than as a monstrous joke. How it would be a weakness in the government to break down in this attempt to practice for popularity on the lowest national antipathies and fears, and therefore Mr. Attorney-General had made the most of it, how nevertheless it rested upon nothing save that vile and infamous character of evidence too often disfiguring such cases and of which the state trials of this country are full. But there My Lord interposed (with as grave a face as if it had not been true) saying that he could not sit upon that bench and suffer those allusions."

"Mr. Stryver then called his few witnesses and Mr. Cruncher had next to attend while Mr. Attorney-General turned the whole suit of clothes Mr. Stryver had fitted on the jury inside out, showing how Barsad and Cly were even a hundred times better than he had thought them, and the prisoner a hundred times worse. Lastly came My Lord himself, turning the suit of clothes now inside out, now outside in, but on the whole decidedly trimming and shaping them into grave-clothes for the prisoner."

Note the touches of the master's hand — the simile of the grave clothes, Barsad's resemblance to Judas, the resentment of the judge at counsel's allusions to the disgraceful testimony introduced in state trials. Contrast the foregoing with Doe *ex dem* Titmouse *v.* Jolter, in *Ten Thousand a Year*. Observe how lifeless the latter appears by comparison though the work of an experienced lawyer, who took pains to explain every technicality as he went along.

Oliver Twist also contains a trial scene, this time written from the standpoint of the prisoner. "From the rail before the dock away into the sharpest angle of the smallest corner in the galleries, all eyes were fixed upon one man — the Jew. Before him and behind; above, below, on the right and on the left; he seemed to stand surrounded by a firmament, all bright with gleaming eyes." It is worth noting the similarity to the paragraph which tells how the breath of the crowd rolled in waves towards Darnay.

Dicken's experience as a clerk with the Solicitor, Mr. Edward Blackmore of Gray's Inn was so brief, extending as it did only from May, 1827, to November 1828, that it seems almost incredible that his intimate knowledge of the inner workings of the courts could have been acquired during that time. He was then but fifteen years of age, yet Mr. Blackmore has said "several incidents took place in the office of which he must have been a keen observer as I recognize some of them in his *Pickwick* and *Nickelby*; and I am much mistaken if some of his characters had not their originals in persons I well remember."

His modest salary of thirteen shilling and sixpence, afterwards increased to fifteen shillings per week, indicates the position which he held and (to borrow the language of his biographer, Forster) "we have but to turn to the passage in *Pickwick* which describes the several grades of attorney's clerk to understand it more clearly. He was very far below the articled clerk, who had paid a premium and is attorney in perspective. He was not so high as the salaried clerk, with nearly the whole of his weekly thirty shillings spent on his personal pleasures. He was not even on the level with his middle-aged copying clerk, always needy and uniformly shabby. He was simply among, however his own nature may have lifted him above, the "office lads in their first surtouts, who feel a befitting contempt for boys at day-schools, club as they go home at night for saveloys and porter and think there's nothing like life."

Nevertheless, and so far as I can recollect, with the exception of *Nicholas Nickelby*, *Dombey and Son* and *Hard Times* there is not a single one of his novels which lacks what might might be termed legal atmosphere or in which at least one lawyer is not numbered among the characters. The role may be a very minor one as in *Martin Chuzzlewit* where we have the mysterious Mr. Fipps of Austin Friars who it will be remembered "turned out to be the jolliest old dog that ever did violence to his convivial sentiments by shutting himself up in a dark office." On the other hand the lawyer may play as important a part as does Mr. Tulkinghorn. In *Oliver Twist* and *Pickwick Papers*, the magistrate is satirized, in *Bleak House* the Lord Chancellor. In *David Copperfield*, *Pickwick Papers* and *Little Dorrit* the debtor's prison is portrayed, in *Great Expectations* and *Barnaby Rudge* Newgate, in *The Tale of Two Cities* The Old Bailey, in *Pickwick Papers* the Common Pleas, in *David Copperfield* Doctors Commons and in *Bleak House* (the lawyer's novel par excellance) the Court of Chancery. The latter contains in almost every chapter some reference to that august tribunal, and constitutes one of the most terrific indictments of abuses to be found in the English language. What reader, be he lawyer or layman can forget that magnificent peroration?

"This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn

out lunatic in every mad-house and its dead in every church yard, which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance, which gives to moneyed might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart: that there is not an honorable man among its practitioners who would not give — who does not often give the warning "suffer any wrong that can be done you rather than come here."

But an entire article could be written of the courts of Dickens as distinguished from his lawyers. On the whole he has displayed no particular leniency in dealing with members of the profession, save possibly in the case of Mortimer Lightwood and Sydney Carton and we may query how far the latter should be considered as an exception. It has been claimed for Stryver's jackall that he is the noblest character in fiction. Be that as it may, his legal career certainly cannot be held up as a model to the rising generation. Even Perker would have appeared in better light had he reiterated less frequently and fervently his admiration for the shyster practices of Mrs. Bardell's solicitors.

In Stryver "stout, loud, red, bluff, and free from any drawback of delicacy," who "had a pushing way of shouldering himself morally and physically into companies and conversations that augured well for his shouldering himself up in life," we have the practitioner at the criminal bar drawn to the life. Paralleled with Stryver is Jaggers in *Great Expectations*, a portrait perhaps better drawn. In the days when Dickens wrote it was a cardinal rule to spare no pains in describing the persons and personalities of the characters. Whether this is a better plan than to require the reader to draw his own inference from their acts I leave it to critics to judge. Painting in the detail, at least does not leave us in the uncertainty often painful, provoked by the impressionist. Thus the features of Jaggers are itemized. "He was prematurely bald on the top of his head, with bushy black eyebrows that wouldn't lie down but stood up bristling. His eyes were set very deep in his head and were disagreeably sharp and suspicious. He had a large watch chain and strong black dots where his beard and whiskers would have been if he had let them." This massive chain which no London thief would dare to take, completes a portrait not unlike that of the senior member of the late firm of Howe and Hummel. And speaking of Jaggers brings up Wemmick whose mouth was like a slit in a post-office and whose predeliction was for portable property, chiefly mourning rings, therein somewhat resembling the senior member of that eminent firm Quirk, Gammon & Snap; the Wemmick of Walworth and of the city, whose marriage to Miss Skiffins is one of the most delightfully sketched scenes in the book.

If prominence has seemingly been given to the criminal branch of the profession in two of the novels already referred to, the Sage of Gadshill more than makes good any deficiency when we come to *Bleak House*. Here appear Messrs. Kenge and Carboy, Mr. Tangle and his "eighteen learned friends each armed with a little summary of eighteen hundred sheets" who bobbed up "like eighteen hammers on a pianoforte" and then dropped into obscurity, Mr. Vholes, he of the aged father in the Vale of Taunton and last but chief of all the great Mr. Tulkinghorn, "an oyster of the old school whom nobody can open."

In Lincoln's Inn he lived, "a large house formerly a house of state . . . let off in sets of chambers now, and in these shrunken fragments of its greatness lawyers lie like maggots in nuts." Not a very flattering comparison certainly. Later on there is presented the picture of Allegory "in Roman helmet and celestial linen" pointing to the lifeless form.

In *Pickwick Papers* are lawyers of a radically different type. First and foremost

comes the celebrated Sergeant Buzfuz whose opening address it is safe to say will continue to serve as a model for future generations of advocates.

"He began by saying that never in the whole course of his professional career — never from the very first moment of his applying himself to the study and practice of the law, had he approached a case with feelings of such deep emotion, or with such a heavy sense of the responsibility imposed upon him, a responsibility he would say which he never could have supported were he not buoyed up and sustained by a conviction so strong that it amounted to positive certainty, that the cause of truth and justice or in other words the cause of his much injured and most oppressed client must prevail with the highminded and intelligent dozen of men whom he now saw in the box before him.

"Counsel always begin in this way, because it puts the jury on the very best terms with themselves and makes them think what sharp fellows they must be. A visible effect was produced immediately, several jurymen beginning to take voluminous notes with the utmost eagerness."

Coupled with the mighty sergeant comes Mr. Skimpkin, while for the defendant appears the great Sergeant Snubbin (we remember his abstracted demeanor during Mr. Pickwick's call) and Mr. Phunkey. Poor Phunkey the infant barrister of but eight years standing, overwhelmed by the thought that at last his chance had come. What member of the bar who recalls his early days of practice can escape a thrill of sympathy for him when Justice Stareleigh pleasantly remarks "I never had the pleasure of hearing the gentleman's name before." Then comes Mr. Perker and those strong upholders of the contingent fee, Messrs. Dodson and Fogg. Also in *Pickwick* is fat, flabby Mr. Solomon Pell "in a surtout which looked green one minute and brown the next; with a velvet collar of the same chameleon tint" — friend of the Lord Chancellor, who "damns his-self in confidence."

But among the whole quiver-full of polished shafts which Dickens discharges he seeks no mark when he describes the selection of the jury. The first twelve men called seem to have been taken despite the protests of the chemist whose boy saw no difference between Epsom salts and oxalic acid, syrup of senna and laudanum. Had he only lived in the 20th century, how he would have revelled in the spectacle of three weeks consumed in the process of securing twelve men who had not discussed, formed an opinion or even heard of a case with which the Russian Jew landed twenty-four hours before was conversant.

In *David Copperfield* are the lovable but weak Mr. Wickfield and the "umble" Uriah, the majestic Mr. Spenlow and the mythical Mr. Jorkins. Here is Doctors Commons — a parallel to the Court of Chancery. (By the way, Dickens was in considerable doubt whether to make David a Proctor or a banker. Think what his readers would have missed had he chosen the latter). And speaking of Spenlow brings up his defense of the Prerogative Office. What was it after all, he asks, but a question of feeling. If the public felt that their wills were in safe keeping and took it for granted that the office was not to be made better, who was the worse for it? Nobody. Who was the better for it? All the sinecurists. Very well, then the good predominated.

The law as administered in Doctors Commons is made the subject of one of Boz's shorter sketches. A half obsolete statute of one of the Edwards forbade "brawling" and "smiting" in any church or vestry adjacent thereto and we are told how Thomas Sludberry, the defendant, as it appeared by some eight and twenty affidavits had used the words "you be blowed" in the course of a discussion with one Michael Bumple at a vestry meeting and "furthermore desired and requested to know whether the said Michael Bumple wanted anything for himself."

His introduction in the *Old Curiosity Shop*

of that legal gentleman of Bevis Marks in the City of London "whose melodious name was Brass" marks Dickens' descent into the depths. While it is a neck and neck race between this specimen of disreputapility and Uriah, I am inclined to award the palm to the former. In comparison, Messrs. Dodson and Fogg ooze virtue at every pore. There was the office too

"with a rickety table with spare bundles of paper, yellow and ragged from long carriage in the pocket, ostentatiously displayed upon its top; a couple of stools set face to face on opposite sides of this crazy piece of furniture; a treacherous old chair by the fireplace whose withered arms had hugged full many a client and helped to squeeze him dry; a second-hand wig box used as a depository for blank writs and declarations and other small forms of law, once the sole contents of the head which belonged to the wig which belonged to the box as they were now of the box itself, two or three common books of practice; a jar of ink, a pounce-box, a stunted hearth broom, a carpet trodden to shreds but still clinging with the tightness of desperation to its tacks — these with the yellow wainscot of the walls, the smoke discolored ceiling, the dust and cobwebs were among the most prominent decorations of the office of Mr. Sampson Brass."

Though indeed "dust and cobwebs" in and of themselves would not have injured any one's practice in those days. Witness the condition of Mr. Sergeant Snubbin's room. It is only within the past few years that we have arrived at a point where the office of the lawyer in active practice bears no resemblance to a vault in the Pyramids.

It would be unfair not to mention Miss Sally Brass "a kind of Amazon at common law" albeit that not having been admitted to practice she fell not as did brother Sampson.

What a group of clerks there is, Wemmick, Lowten, Jackson, Wicks, Swiveller, perpetual Grand Master of the "Glorious Apollers;" Guppy, lovelorn but with an eye to the main chance withal; Smallweed, fossil Imp, nursed by Law and Equity, sired by John Doe, his mother the only female member of the Roe family; Mallard, Jinks, chiefly to be remembered from the fact that on a certain occasion he "retired within himself — that being the only retirement he had except the sofa-bedstead in the small parlor which was occupied by his landlady's family in the daytime;" and others who are there I feel certain but whose names are not to be remembered.

We have two types of magistrates, in Mr. Fang commended "for the three hundred and fiftieth time to the special and particular notice of the Secretary of State for the Home Department," and Mr. Nupkins whose prowess stopped that little affair between the Middlesex Dumpling and the Suffolk Bantam.

And with these worthies we conclude. It has been difficult to avoid degeneration into a mere catalogue. Extended comment is an impossibility within the limits of this sketch. All that is hoped is that the reader may perchance find revived his recollection of some of the most dramatic scenes and truthfully drawn characters in fiction.

NEW YORK, N.Y., July, 1908.

ENFORCEMENT OF LAW[1]

By Roscoe Pound

IF, as many assert, law is the body of rules *enforced* by public or regular tribunals in the administration of justice,[2] recent experience has made it manifest that much which goes by the name of law should be required to furnish an abstract of title. A leader of the American bar, indeed, did not hesitate to say that but a small fraction of our huge annual legislative output is law in a real sense.[3] And, upon this basis, a great deal that goes by the name of common law has no better claim, as verdicts in causes involving the doctrines as to master and servant bear daily witness. But it is a serious condition if legislatures are sitting at no small expense to no purpose and volumes of reports are pouring forth filled with mere academic discussions of principles that do not obtain in action. Legislatures and courts formulate or seek to formulate the will of all of us as to the conduct of each of us in our relations with each other and with all. That will ought to be wholly effective. That it fails of effect in any degree is a misfortune. That it fails in any great degree is a menace. Hence the question of enforcement of law, which many recent occurrences have brought home to us as a living question, concerns the lawyer in his civic quite as much as in his professional capacity.

No useful purpose would be subserved on this occasion by encomia upon the law, by exhortations to obedience of it, or by declamation against those who violate or fail to enforce it. Rather let us ask the meaning of the current attitude toward the law, let us seek the causes of it, let us ask how these causes may be obviated or mitigated.

In the first place, we must observe that complaints of non-enforcement of law are perennial. Indeed, discussion of the subject as a scientific problem is at least as old as Aristotle.[1] Many of the causes of this complaint are inherent in the administration of justice, and appear in all systems at all times.[2] Some causes also affect the public attitude toward enforcement of law and are in the domain of the politician rather than that of the lawyer. The American citizen, feeling himself a partaker in sovereignty — in some sort a king — may possibly conceive that he wields a royal dispensing power, by virtue whereof he may override the law in particular instances in his own discretion. Undoubtedly the prevalence of eighteenth-century theories of natural law in our legal and political education leads men to think of the individual conscience and the individual reason as the ultimate arbiters in the matter of obedience to law. We may pass over this phase of the subject. For I believe that the real and serious disrespect for law which undoubtedly exists is due chiefly to causes directly affecting the administration of law by the courts themselves, and that, resulting from these causes, it is a normal phenomenon in legal history. It argues no degeneracy in the body politic. It proves no decadence of the law itself. It is a normal phenomenon of a period of transition in which the standard of justice is shifting, the growing-point of our legal system is shifting, and the relative importance of individual and society is shifting. The shifting of the standard of justice leads to temporary disagreement between the law

[1] Address before the Illinois State Bar Association, at Chicago, June 25, 1908.

[2] See Holland, Jurisprudence, Chap. 3, Salmond, Jurisprudence, § 5, Pollock & Maitland, History of English Law (1st ed.), Introduction, Gray, Definitions and Questions in Jurisprudence, 6 Harv. Law Rev. 24.

[3] Carter, Law. Its Origin, Growth and Function, 3.

[1] Politics, Bk. VII (VI), Chap. 8.

[2] See my "Causes of Popular Dissatisfaction with the Administration of Justice," Rep. Am. Bar Assn. xxix, 395.

and a large portion of the public as to the end of law, and thus makes administration of justice, adjustment of relations of individuals with each other and with the state, in accordance with the moral sense of the community, difficult, if not impossible. But this accord of legal result and public moral sense is a bulwark of the law. Whenever that is weakened or impaired, the law must of necessity suffer. The shifting of the growing-point of law from judicial decision to legislation leads to a complete change in what is demanded of the courts. When courts were relied on to make the law as well as to apply it, the exigencies of each case of necessity yielded to the public demand for a sound rule. As it was put, "John Doe must suffer for the Commonwealth's sake." But today the public do not look to the courts to work out principles and formulate rules. That work, for the most part, has been done. So far as it is undone, the public look to the legislature to do it. Hence today the demand is for satisfactory decision of individual cases. And elective courts naturally respond to that demand by lax or, if you will, equitable, methods of applying the law to concrete cases, which are out of accord with legal theory.[1] Finally, shifting of relative importance of individual and society leads to a complete change in the relation of law to administration, a relation with respect to which our common-law polity is characteristic and difficult of readjustment.

To the necessary and inevitable difficulties in the way of enforcement of law which grow out of the conditions just enumerated, one further cause of difficulty must be added, which is unnecessary and avoidable, — one, indeed, which has no excuse for existence in a progressive age and among a business-like people — archaic judicial organization and obsolete procedure. Thus we may recognize four chief causes of the difficulties which beset enforcement of law today in the United States: (1) Shifting of the standard of justice, shifting of the emphasis from property to person, shifting of the standpoint from individualism to collectivism, shifting of the end of law from the old so-called legal justice to the new social justice — a process which is going on the world over and is giving rise to the same problems everywhere; (2) conflict between legal theory and judicial practice in the application of law; (3) want of accord of the common-law theory of the relation of law to administration with the needs of the time, so that on the one hand vigorous executive action is hampered and on the other hand the law staggers under a burden of administrative work it is ill adapted to and all application of law is made unduly difficult; and (4) the backwardness of judicial organization and procedure in America.

I have discussed the shifting of the standard of justice now in progress on another occasion.[1] Here we may simply note its connection with current problems of application of law and its effect upon enforcement of and respect for legal rules. As justice, which is the end of law, is an ethical conception, theories as to the significance and the basis of law are usually direct reflections of corresponding ethical theories. But as law is conservative and even more lawyers are conservative, legal theory is very apt to be a reflection of ethical theory of the past. The older conception of law, to which very likely a preponderance of jurists as well as a great majority of practitioners still adhere, was thoroughly individualist. Blackstone has made it classical for us.[2] This conception corresponds faithfully to individualistic

[1] A less important result of the growing importance of legislation in our law may also be noted as affecting respect for the legal system. "All the potency of the law to secure obedience depends upon habit, and habit can only be formed by lapse of time; so that the ready transition from the existing laws to others that are new is a weakening of the efficacy of law itself."—Aristotle, Politics, Bk. ii, Chap. 9.

[1] The Need of a Sociological Jurisprudence, 19 GREEN BAG, 607.

[2] "The public good is in nothing more essentially interested than in the protection of every individual's private rights." — 1 Bl. Comm. 139.

ethics. The one puts as the end of law the protection of the individual. The other puts as the moral end the happiness of the individual. Today moralists and sociologists are taking another view of justice. Not liberation of energies but satisfaction of wants is made the central point.[1] They are defining social justice. They are teaching that while equality is a concept of individualization, justice is a concept of co-ordination.[2] In like manner jurists are taking a different view of law. The older formulas are characteristically individualist. Individual rights are the foundation of Blackstone's whole system. Although Austin so far departed from orthodox theory as to lay down that "duty is the basis of right,"[3] his followers, who ordinarily adhered almost slavishly to his formulas, without exception make individual rights the end of law. On the continent also, until recently individualist formulas were current. Savigny held that the end of legal rules was to give secure and free opportunity to the existence and activity of each individual.[4] A German institutional book on Roman law translated and widely used by students in this country puts as the end of law the granting to individuals a power over the outside world.[5] Contrast with these older statements the social conception of law upon which continental jurists are now insisting. Ihering defined law as "the securing, under the form of constraint, of the vital conditions of society."[6] Jellinek defines it as "the sum of conditions necessary for the maintenance of society."[7] A French author has recently defined it as "the aggregate of rules whose application should assure the normal functioning of society."[1] In other words, the center of juristic theory is no longer the individual; it is society. But legal theory lags. While moralists, sociologists and the more advanced jurists have taken up the social conception, the individualist conception dominates the law. Juries are conscious that the law in some way does not accord with the general sense of right, and find verdicts which are crude attempts to vindicate half-grasped conceptions of social justice. Judges feel that settled legal doctrines are leading them in particular cases to results that jar their feelings of right and of distributive justice, and resort to lax or equitable application of the law. Thus the legal machinery loses precision and accuracy of operation. Certainty is impaired, and as these failures of the judicial machine to work true become generally perceived, lack of confidence in the legal system results.

Of course this friction between ethical and sociological theory and legal theory is a temporary phenomenon. When the shifting to the newer standard of justice is accomplished, when education and the labors of sociologists have brought about the internal conditions of life measured by reason, the judicial machine will run normally once more and law will speedily take care of the external conditions.

Conflict between legal theory and judicial practice in the application of legal rules is a more subtle but also more active cause of lax enforcement of and popular disrespect of law. This conflict arises naturally out of the shifting of the growing-point in our legal system from judicial decision to legislation. The first century of American legal history was a period of growth. The principles of the common law had to be tested with reference to American conditions, social, economic, and political, and the application of the principles had to be adjusted accordingly. This testing and adjusting being left to the courts, the growing-point was in

[1] Ward, Applied Sociology, 22–24.

[2] Small, General Sociology, 603.

[3] Jurisprudence, Lect. xvi.

[4] System des heutigen römischen Rechts, i, §52.

[5] Sohm, Institutes of Roman Law, §7. In the last German edition the author substitutes for this a formula from the sociological standpoint.

[6] Zweck im Recht, i, 434.

[7] Die sozial-ethische Bedeutung von Recht, Unrecht, und Straf, 42.

[1] Worms, Philosophie des Sciences Sociales. ii, 210.

juristic speculation, carried on by counsel and judges, and the period is fairly comparable to the classical period of Roman law, or the development of equity or rise of the law merchant in England, or the rise of the natural-law theory on the Continent in the eighteenth century, or the working out of the *Pandektenrecht* in Germany in the nineteenth century. In all such periods of growth questions of application of the law are dormant. There is no occasion to ask them. Legal rules are flexible and their limits have to be determined as causes arise. Hence they adjust themselves readily to concrete controversies. But every such period of growth has been followed by a period of stability, in which the growing-point is in legislation. The jurist-made or judge-made rule has become fixed and rigid. New rules are formulated by the legislator, are imperative in form and are hard and fast. Such rules do not adjust themselves to concrete controversies, but require a conscious judicial adjustment in the course of which something of the certainty of the rule or something of the equities of the cause in hand, or possibly of both, must be filed away. In these periods questions of application of law have always been debated.

After Germany, under the influence of the historical school, had held out for her common law for nearly one hundred years, a period of enacted law has brought on a controversy among German jurists that is very instructive for us in America. Three schools may be distinguished in Germany today, differentiated according to the manner in which they apply code provisions and the point of view from which they approach the code. First, there is what we may call the literal school. The adherents of this school ask, What do the several code provisions mean as they stand, applying the canons of genuine interpretation? They endeavor to find the proper code-pigeonhole for each concrete cause, to put the cause in hand into it by a pure logical process, and to formulate the result in a judgment. Their standpoint is essentially analytical; and it is significant that analytical theories of jurisprudence and analytical methods of legal science have arisen in Germany only within the last thirty years with the growth and development of legislation under the Empire. For the analytical theory has always been a concomitant of periods of legislation.[1] A recent German controversial writer has described the point of view of this school thus:

"A superior magistrate with academic training, sits in his cell armed only with a thinking-machine, although one of the finest type. His sole furniture is a green table upon which there lies before him the official statute-book. One may hand him any case you please, actual or moot, and, performing his duty, he is prepared by the aid of pure logical operations and a secret technique intelligible only to himself, to indicate with absolute exactness the decision already determined by the law-maker in the statute-book."[2]

In other words, the whole human element is excluded. The process and the result are conceived of as something purely logical and scientific. If the result chances to be just, so much the better. But justice in the cause in hand is not the chief end. The facts of concrete causes are to be thrown into the judicial sausage-mill and are to be ground into uniformity; and the resulting sausage is to be labeled justice. Absolute uniformity of decision of cases logically alike and entire certainty in advance as to the outcome on any given state of facts are the ends it seeks.

Secondly, there is an historical school. With the adherents of this school the code provisions are assumed to be in the main declaratory of the law as it previously existed; the code is regarded as a continuation and development of pre-existing law. With them, all exposition of the code and of any provision thereof must begin by an

[1] See my pamphlet "A New School of Jurists." (1904.)

[2] Gnæus Flavius (Hermann Kantorowicz), Der Kampf um die Rechtswissenschaft, 7.

elaborate inquiry into the pre-existing law and the history and development of the competing juristic theories among which the framers of the code had to choose. Their method of application of the law, however, is substantially the same as that of the literal school. While they see in a code provision, not the command of the sovereign, to be regarded in and of itself in applying it, but a development out of the juristic theory of the past, they agree that when it is interpreted and its content is ascertained, the process of application is a purely logical one. Do the facts come within or fail to come within the rule? Such, according to this school also, is the sole question for the judge. Ethical questions are for the legislator. When the judge has, by historical investigation, found out what the rule is, he has simply to fit it to just and unjust alike.

A third school, which one might call the equitable school, has sprung up and waxed strong in Germany in the last ten years.[1] The starting-point of this school is philosophical or sociological. To this school the essential thing is a reasonable and just solution of the individual controversy. It conceives of the legislative rule as a general guide to the judge, leading him toward the just result; but it insists that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the reason and moral sense of ordinary men. It insists that application of law is not a purely mechanical process. It contends that the process involves, not logic merely, but discretion; that the cause is not to be fitted to the rule but the rule to the cause. "Whoever deals with juristic questions," says a contributor to this controversy, "must always at the same time be a bit legislator"[1] that is, to a certain extent he must *make* law for the case in hand. This theory and the school that contends for it are modern developments, under the influence of sociological thought, of the perennial notion of natural law, fruitful in so many epochs of legal history. It has always been the function of this notion to preserve or restore juristic ideals of reason and justice in times of matured or stable or rigid law.

Although we do not acknowledge it, we have the same problem in American law. Valuable as the historical method is in order to understand how a rule came into being and to judge how far it is now applicable, when the codifier or the legislator is at work, it may be doubted whether it has value for the immediate administration of justice. Whatever the original reason for rules, they are in force today for reasons of today, even if those reasons come to no more than *vis inertiæ*. For the legislator it is all-important not to be deceived by specious modern "reasons" for ancient rules. But for the judge, who has to apply the rules, there is a great deal to be said for such *ex post facto* reasons. They fix his mind upon the vital point that the rule is applying here and now to men of this day. Hence we may leave the historical school out of account for the purpose in hand. Between the other two schools the line is as sharp and the conflict as acute under the surface with us as it is openly in Germany. The theory of our legal system is that the court finds the law in statute or in adjudicated cases and applies it hard and fast to the facts of the case in hand. Many courts carry out this theory conscientiously in practice. But to a large and apparently growing extent the practice of our application of the law is, after all, that jurors or courts, as the case may be, take the rules of law as a general guide, determine what the equities of the

[1] See Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft, 1903, Stammler, Die Lehre von dem richtigen Rechte, 1902, Gnæus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft, 1906, Brütt, Die Kunst der Rechtsanwendung, 1907, Bozi, Die Weltanschauung der Jurisprudenz, 1907. A similar controversy has been raised in France, Lambert, La fonction de droit civil comparé, 1903.

[1] Zitelmann, Die Gefahren des BGB. für die Rechtswissenschaft, 19. This is taken for a motto by Brütt, Die Kunst der Rechtsanwendung.

cause demand, and contrive to find a verdict or render a judgment accordingly, wrenching the law no more than is necessary. Many courts today are suspected of ascertaining what the equities of a controversy require, and then raking up adjudicated cases to justify the result desired. Occasionally we find a judge avowing frankly that he looks chiefly at the ethical situation *inter partes* and does not allow the law to interfere therewith beyond what is inevitable.[1] This is essentially what the German equitable school contends for, and it is something of which complaint may be heard in this country today wherever a knot of lawyers is met with discussing recent decisions of the courts.

The necessarily mechanical operation of legal rules is an inherent difficulty in the administration of justice. This mechanical operation, the penalty we must pay for certainty and uniformity and elimination of the personal equation in the administration of justice, is a perennial source of irritation. Many devices have arisen for mitigating it. The first crude device was fiction — a pretending that a cause fell within or without a rule contrary to obvious fact. Another crude and primitive device was an executive dispensing power. That power is now relegated to punitive justice, so far as legal theory goes; but we must admit that juries wield something very like it. The chief reliance of our legal system toward this end is the power of juries to render general verdicts, the power to find the facts so as to compel a different result from that which the strict law requires. This power, which as Lord Coke expressed it, makes the jurors chancellors,[2] is creating great dissatisfaction with the jury in many quarters, and it is a serious question whether it should not be held down to criminal law and possibly be hedged about even there. Yet this power alone, probably, has made the common law of master and servant tolerable in twentieth-century American jurisdictions. Another device which operates with great effect at some periods of legal history is interposition of a prætor or chancellor on equitable grounds; the claim that a higher body of rules exists, by virtue of which magisterial interference to prevent exercise of strict legal rights may be justified, or a power of acting pursuant to principles assumed to obligate the individual to a higher standard than that of the law and requiring him to use or abstain from using his legal rights or powers accordingly. But in process of time equity crystallizes into a system everywhere and becomes but little less mechanical than the law itself. It has come with us to be a mere distinction of jurisdictions requiring certain causes to be brought to one court or be tried in one way while others go to a different court or are tried in a different manner, for historical reasons. There still remain discretion, interpretation and judicial law-making, which are points of contact between law and morals and admit of ethical considerations in application of the law. But discretion is now reduced to a strictly defined and narrowly limited minimum, and interpretation and judicial law-making settle the law for the next case and soon exhaust the field. Moreover, interpretation-clauses and the activities of the Commissioners on Uniform State Laws bid fair to limit the field yet more narrowly. With all of these mitigating agencies arrested or rigidly tied down, resort must be had to the power of equitable application of legal rules. This power is assumed by courts in America much more widely than we suspect — or at least more widely than we like to acknowledge. But there is this characteristic difference. In Germany it is admitted. A scientific theory is worked out to explain and justify it, and an open controversy rages as to its propriety. With us the process is concealed. Ostensibly there is no such power. The process reveals itself under the name of "implication" or in the guise of two lines of

[1] e.g. the frank statement of Mr. Justice Carter in 1 Ill. Law Rev. 151.

[2] Hixt *v.* Goats, 1 Rolle, 257.

decisions of the same tribunal upon the same point, from which it may choose at will, or in the form of what one might term soft spots in the law, spots where the lines are so drawn by the adjudicated cases that the court may go either way, as the ethical exigencies of the cause in hand require, with no apparent transgression of what purports to be a hard and fast rule. Thus we have a great deal of *freie Rechtsfindung* in America, while disclaiming it in theory, and that too in a way that is unhappily destructive of certainty and uniformity. Not only do lawyers and law-writers perceive this situation, but it is coming to be understood, in an age of publicity, by the people at large. Necessary as it is to some extent in the period in which we find ourselves, the method by which it is carried out in this country is rightly felt to be unlegal. It injures respect for law. If the court does not respect the law, who will? There is no one cause of the current attitude toward law. But this judicial evasion and warping of the law, in the endeavor to secure in practice a freedom of judical action not conceded in theory, is a prime cause.

Law will doubtless always continue to be "in a process of becoming"; it must be "as variable as man himself."[1] "Social life," says Wundt, "like all life, is change and development. Law would be neglecting one of its most important functions if it refused to meet the demands of this ceaseless evolution."[2] Hence legal principles after all can only furnish a broad outline. Hence all attempts to tie the law down tight lead in the end to fictions, or spurious interpretation, or the rise of a new system of rules of assumed higher validity, or equitable application. Hence in an epoch of matured law, when growth takes place by legislation, when doctrines are stable and principles fixed and rules determined, when the ordinary mitigating agencies of interpretation and judicial law-making have ceased to be effective, equitable application is but an assertion of the element of discretion, of reason, of equity in its wider sense, inherent in all law. Of course the other side of this is that conformity to the moral sense of the community is only one of the ends of the administration of justice according to law. Certainty is another and a no less important end; and certainty is wrecked by any considerable degree of latitude for equitable application. All legal history shows a struggle between the two elments in law, the technical and the discretionary. When the equitable element is dominant, practice soon crystallizes into hard and fast rules or doctrines of equity, under pressure of the demand for certainty. When the legal element is dominant, there is soon an equitable revolt or an insidious undermining in the interpretation or application of rules, under pressure of the demand for justice. The phenomenon today, therefore, is entirely normal. The discretionary element, headed off by the cessation of opportunity for judicial law-making, has broken out in another place. Nor is equitable application of rules a novel condition in our own legal history. In one other period of Anglo-American law, at the maturity of the old common law, just before Coke gave it its classical form, just before the establishment of equity under Elizabeth and James I, to be followed soon by the rise of the law merchant, relieved the pressure, we find complaint that the judges did not apply rigidly the decisions in the Year Books, but were wont to adjudge "as the circumstance of the case doth them move."[1]

I have endeavored to develop the reasons of and the arguments for equitable application of law at some length because to an audience of common-law lawyers the case against it does not need to be argued. Occasionally common-law judges have been found who frankly argued for something of the sort, always, however, with reference to wide powers in the jury.[2] For the most

[1] Wundt, Ethik (2d ed.), 566.
[2] Ibid. 581.

[1] Starkey's England (temp. Henry VIII), quoted in Maitland, English Law and the Renaissance, note 11.
[2] e.g. Erle, C. J., in Senior's Conversations with Distinguished Persons (ed. of 1880), 314; Judge Chalmers in 7 Law Quart. Rev. 19.

part, English and American lawyers have felt with Lord Campbell that wide discretion in the application of legal rules "is only fit for the Star Chamber, which was called a Court of Criminal Equity."[1] The purpose of matured law is not merely to do justice in each concrete cause but also to furnish a rule in advance of action by which men may be guided with assurance in the complicated transactions of modern business; to insure stability of industrial undertakings, to provide assured constancy of the conditions under which property is held and business is carried on.[2] Courts are provided to settle disputes and to curb the anti-social members of society.[3] They may conceivably perform these functions without law. But if they are to perform them according to law, they must perform them in a certain, uniform way. For certainty and uniformity are the essential attributes of law. And the same considerations that require administration of justice according to law require the law not merely to afford rules for settling disputes but to furnish rules of action upon which men may rely with a certain assurance, and thus obviate disputes. "The public is more interested than it knows," says an Australian judge, "in maintaining the highest *scientific* standard in the administration of the law. The intellectual interest thus created in the profession is one of the best guarantees for purity of administration. Thoroughbred lawyers are supremely anxious to be right in their law. They may not always succeed in freeing themselves from class prejudices and party ties, but their interest in abstract law makes them generally incapable of showing favor to individuals."[4]

How far can we reach a proper balance between certainty and flexibility of application to particular cases? In the first place we must not overvalue certainty. Absolute certainty is demanded chiefly with respect to property. May it not be that the overprominence of property in our individualist legal philosophy has led us to exaggerate the importance of certainty? If, as Ihering tells us, the line between the old and the new in the progress of law is to be found in "lower valuing of property, higher valuing of the person,"[1] it may well be that we shall abate somewhat the extreme insistence upon certainty in the interest of higher regard for the person in the adjustment of relations between man and man. Conceding, however, that our legal theory may come to admit a greater degree of flexibility in the application of law, the Anglo-Saxon repugnance to the deposit of unlimited power anywhere[2] must prevent any complete or general acceptance of the theory of equitable application. Hence for us a proper proportion between the technical and the discretionary elements in the administration of justice will give chief weight to the former. The present leaning of the scale toward the latter may be counteracted by providing a more rational and flexible procedure and by bringing about a better adjustment between law and administration. No danger is to be apprehended from wide discretion in procedure if we insist that, however summary and however flexible the procedure, the result must accord with a definite and scientific substantive law. If in the final result the relations of the parties have been adjusted in strict accordance with the rules of substantive law, an oriental directness of procedure can hurt no one. If they have not, the most scientific system of pleading and practice has simply defeated its own end — the administration of justice according to law — and has been made by one or the other litigant an instrument of injustice, a weapon of anarchy. The demand for wider discretion in the courts may be satisfied legitimately in the direction of procedure, and it is not unlikely that relaxation at this point would remove much of the pressure

[1] Emperor of Austria *v.* Day, 3 De G. F. & J. 211, 238.

[2] See Small, General Sociology, 608.

[3] Henderson, Social Elements, 301.

[4] Richmond, J., quoted in Clark, Australian Constitutional Law, 348.

[1] Ihering, Scherz und Ernst in der Jurisprudenz (9th ed.), 418.

[2] Miller, J., in Loan Ass'n *v.* Topeka, 20 Wall, 655, 662.

which is responsible for lax enforcement of the substantive law. A better adjustment between law and administration would remove more of this pressure. Mechanical action belongs to law; it is a proper quality of law. Discretion belongs to administration; it is a proper quality of administration. In the border line between the two, in places where for historical reasons law is set to do the proper work of administration, the legal theory is necessarily ill-adapted. But the discretion required in those cases is equally ill-adapted to cases of proper legal cognizance. Either the legal theory will be applied to the former or the administrative method to the latter, so long as our confusion of the provinces of law and of administration continues.[1] Even with these sources of unscientific application and lax enforcement attended to, there remains an insoluble precipitate of difficulty. The conflict between the two elements in the administration of justice can only be mitigated. It is one of the inherent difficulties in the way of judicial justice. The demands of times will differ. Some will insist chiefly upon certainty. Some will demand chiefly just results in individual cases. Undoubtedly whenever legislation is the type form of law, the latter demand will always be prominent.[2]

The weak point of our common-law polity is undeniably administration. I have discussed the effect of our conception of the relation of law and administration upon criminal law on another occasion.[3] Here I can only indicate briefly how it affects all enforcement and application of law and impairs respect for our legal system. England had a strong central government at an earlier date than the rest of the modern world. She had also strong courts of general jurisdiction before her neighbors. Hence before there was much call for administration of any modern sort, need had been felt of putting checks upon the English executive in the interest of the individual and of the local community; and strong courts were at hand to impose them. As a result, the individual has all the advantage against society in our legal system and the local community every advantage against the State. Each to large extent may defy society with impunity; for the common law was developed to protect them, not to bring them to their knees. Whenever such defiance takes place, needless to say, respect for law is sadly impaired. Another unfortunate feature of our common-law polity is the every-day spectacle of law paralyzing executive action, whether by compelling resort to the futile enforcing agency of criminal prosecution, or by its narrow rules as to jurisdiction of administrative tribunals, its presumptions against them and its hypercritical scrutiny of their proceedings, or by legal liabilities imposed upon administrative officers for action under color of their offices, or by direct judicial interference by injunction. Almost every day we read of some injunction against executive action. The enforcement of race-track statutes, of Sunday-closing statutes, and of Sunday-baseball statutes has been enjoined in various cities in the past few months. We read one day that the police are enjoined from raiding some notorious establishment. The next we read that they are enjoined from interfering in a strike. Enjoining of administrative boards has become too common to attract notice. We have continually before us the unseemly spectacle of one department of government arrayed against another. But the execution of law is the very life of it. Such a system, however wisely the judges administer it, however proper it was in the past, however much it wrought formerly for individual liberty, is wholly out of joint with the present. Not only is it clumsy and wasteful, but it is demoralizing. Surely

[1] Aristotle saw long ago that the debate as to the relative excellence of government by laws and by men came to this question of the relative provinces of law and administration. Politics, Bk. iii, Chap. 16.

[2] "Suitors take no interest in law as a science. They merely desire to have a decision in the case in which they are interested. They are not concerned with what has happened or may happen in any other matter." — Sir John Hollams, Jottings of an Old Solicitor, 161.

[3] Inherent and Acquired Difficulties in the Administration of Punitive Justice, Proc. Am. Pol. Sci. Assn. iv, 22.

the energies of government ought not to be dissipated in internal conflict when there is more than enough to be done in the protection of society. Surely it is folly to pay one set of magistrates to do what another is paid to undo. Moreover, the long struggle through the courts to make even a beginning of enforcing any administrative measure which a resourceful litigant objects to, creates a widespread impression that law is something to be evaded, if one has the money and the persistence and knows the ropes. The citizen, the juror, the malefactor is each led to think of the law as an obstacle to surmount, not as a bound to keep within.

Law is ill-adapted to do administrative work, but we throw a large burden of the purely administrative upon the courts. Continental experience has shown that the evils attendant upon promotion and stock manipulation may be met beforehand by preventive administrative measures. Our experience has shown that actions for deceit and suits for mismanagement effect nothing. The cost, delay, and clumsiness of judicial winding-up of banks and reorganization of public service companies are a disgrace to any administrative agency in a business age. So one might go on indefinitely. Sociologists have asserted that the effect of law has been to substitute a régime of cunning for one of force.[1] The problem of law in the past was to repress force. The problem today is to repress cunning. The rules and doctrines and machinery devised by our criminal law to deal with the one are ridiculously ineffective when appealed to to put down the other. It cannot be doubted that the whole legal system suffers from the strain put upon our courts in making them do administrative work. What compensation does our polity afford for the injury to all law and order wrought by the striking spectacle of the impotence of the law which the Sunday-closing verdicts recently afforded in this city? Yet administrative authorities could settle the whole matter offhand. One of the crying evils of American administration of justice is newspaper discussion of pending litigation. It is not easy, if indeed it is possible, for the public to discriminate between executive administration, which is a legitimate subject of press influence, and judicial administration, which is not, when courts and executives are so largely doing the same work. Newspaper interference, inevitable and by no means unreasonable in matters where the courts are performing administrative duties, soon spreads from the administrative functions of the courts to the purely judicial functions, to the injury of the latter. Moreover, attempt to commit administrative functions to the courts is producing its legitimate fruit when the manner in which federal courts shall exercise one of the oldest powers of a court of chancery becomes a matter for political party platforms. Such are the penalties we pay for individual liberty and local self-government. Undoubtedly they are worth a great price. But may we not mitigate the penalties? A more reasonable adjustment of the provinces of law and administration and of the relations of the executive and judicial departments than that which our legal history has left us would work great things for respect for the law.

Of the fourth and last cause, backwardness of judicial organization and procedure, there is no time for adequate discussion. Suffice it to say that every thoughtful lawyer who looks about him and sees how far we are lagging behind the remainder of the English-speaking world in these matters must recognize that herein lies a fruitful source of dissatisfaction with the administration of justice and disrespect for law. "I would," says Mr. Harris, "there were a short prayer in the Litany for common sense to direct our Legal Procedure."[1] Certainly it is time that the bar take this blemish upon our legal system into serious consideration before the layman starts the legislative steam-roller upon its destructive course and levels the good with the bad.

[1] Ward, Dynamic Sociology, i, 511.

[1] Before and at Trial (American ed.), 51.

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NEW YORK COUNTY LAWYERS' ASSOCIATION AND ITS OBJECTS

By J. Noble Hayes

WHAT is the New York County Lawyers' Association? What does it expect to accomplish for the legal profession? Why was it formed as an association independent of the venerable association of the Bar of the City of New York? And what are its prospects of success?

These are the questions which many lawyers throughout the county are asking and which it will be the object of this article in a measure to answer.

In the first place, it may be said with little fear of contradiction that the New York County Lawyers' Association represents the most systematic and thoroughly organized effort ever made in any American city to unite the members of its bar in an effective working organization for the protection of their professional interests, the maintenance of high standards of honor among its members, the safeguarding of the courts of justice, and the promotion of the orderly development of the science and practice of the law.

The significance of the movement and its possibilities for good become apparent when it is considered that there are upwards of 12,000 practicing lawyers in that portion of the greater city embraced within the county of New York, 3,000 of whom have joined in forming the Association and have agreed to pay annual dues of $10 a year, before it has had an opportunity to do more than adopt by-laws, elect officers, organize its standing committees, and project its career; and before it is able to offer its members any immediate material advantages or conveniences in the way of a library, club house, or other permanent place of meeting.

The Association is organized upon the broadest and most catholic lines. It aims to include in its membership every lawyer engaged in practice in the county of New York. Its fundamental postulate is that whoever is deemed fit by the state to practice law is *prima facie* qualified for membership in the Lawyers' Association of the county. Its doors are accordingly thrown wide open to all.

The provisions of its by-laws relating to qualifications for membership are as follows:

"Article VI. Section 1. "Every attorney or counsellor of the Supreme Court of the State of New York, in active practice and having an office in the County of New York, shall be eligible to membership in the Association."

Over this membership the Association proposes to exercise not only a protective but a disciplinary influence.

The movement was entirely popular in its origin, and had its inception in a resolution passed at a general meeting of the bar of the county in the fall of 1907 at Carnegie Hall, called for the purpose of taking action on impending local judicial nominations and other business that might be brought before it. A committee of twenty-five appointed by the chairman of the meeting, Mr. Strauss, in obedience to this resolution, was subsequently enlarged to a committee of one hundred and fifty members of the bar, carefully selected by the original committee.

The result of the labors of this large and representative committee is the present rapidly growing Association of 3,000 members, which held its initial annual meeting on April 28, 1908. At this meeting notable addresses were delivered by its venerable and distinguished President, Ex-Judge John, F. Dillon, and its three Vice-Presidents, Ex-Judge Alton B. Parker, Ex-Judge William, J. Wallace and Ex-Judge Joseph F. Daly, and by Judge Ward of the United States Circuit Court of Appeals and Judge Holt of

the United States Circuit Court, representing the Federal Judges of the District; Justice Clarke, representing the Appellate Division of the Supreme Court, First Department, and Justice Gildersleeve, representing the Justices of the Supreme Court. Certainly no professional association was ever launched under more favorable and distinguished auspices.

The address of Judge Dillon outlining the high purpose of the Association is a *classic*, written and delivered in the best style of that great jurist and orator, and will be long remembered by the great body of lawyers who were assembled to hear it.

The governing power of the Association is vested in a board of thirty directors consisting of its President, three Vice-Presidents, Secretary and Treasurer, and twenty-four members of the Association at large, divided into three equal classes, serving one, two, and three years, respectively, one class being elected each year.

The general work of the Association is divided up among fourteen great standing committees, each being appointed by the President, and also divided into three equal classes, as in the case of the Board of Directors, to which the committees report in most instances before committing the Association to any final action upon measures of importance and general interest.

The scheme of government thus devised is one of highly centralized power and widely diffused activity, it being the design to encourage as large a number of lawyers as possible to engage in the work of the Association, and to specialize it for that purpose and to ensure efficiency; and at the same time to hold it all together and prevent divergent and conflicting action on the part of various committees, by the central control of the Board of Directors.

The standing committees of the Association, which are indicative of its objects, are as follows: A House Committee, a Membership Committee, a Committee on Discipline, a Library and Publication Committee, a Committee on Professional Ethics, a Committee on the Judiciary, a Committee on the Practice and Procedure in the Supreme Court of the First Judicial Department, a Committee on the Federal Court and Procedure, a Committee on the Practice and Procedure in the Surrogates' Court of the County of New York, a Committee on the Practice and Procedure in the City Court of the City of New York, a Committee on the Practice and Procedure in the Municipal Courts, a Committee on Courts of Criminal Procedure, a Committee on Legislation, a Committee on Admission to the Bar of Attorneys and Counsellors at Law, a Committee on Court Houses and Court Rooms, and a Committee on Gratuity Fund.

But it is realized that all this paraphernalia of committees and boards and procedure will be ineffectual to accomplish the objects of the Association unless it be supported by an active and general interest on the part of its members; and it is therefore one, if not the chief, object of the Association to create and foster a strong *professional* sense, or *esprit de corps*, which shall extend throughout all ranks of the great army of lawyers who make up the active and learned bar of New York County, and inspirit them to unite upon all matters of common interest; that the commanding influence of the entire bar may be fully exerted upon its own affairs, and that it may be restored to the position of power and influence which the bar of the city once held and which is the rightful heritage of the profession in all times and places.

This spirit has been sadly lacking in the county bar since it became such a vast unorganized body, but it is now thought that with the formation of the new Association the bar of New York has "come to its own."

Another purpose of the organization is to provide for the common everyday comfort and convenience of the members of the bar, which have been so sadly neglected for

years by those whose duty it is to provide adequate facilities and accommodations for the bar as well as the bench in and about the courts. The New York lawyer has never known such a luxury as a lavatory, a coat room or writing room in the County Court House, much less a lunch room, or library that he can consult; these are amenities which he becomes familiar with only when he journeys into some other county or state. The Temple of Justice which the metropolis of America provides for its Supreme Court is the malodorous, inadequate and unsanitary old "Tweed Court House," which stands as a spectacle, and a monument to past infamies, and a warning to the future. The judges have not had sufficient influence to obtain relief from the city government, and the bar has exerted no influence upon the matter whatever; not because it has not suffered but because it has been *unorganized* and strangely helpless and acquiescent in all matters pertaining to the needs of the profession.

The Association proposes not only to provide its members with a commodious club house as soon as one can be built or purchased, and until it can be provided with suitable quarters by the city in the contemplated "New County Court House," but it proposes to acquire the use, if not the ownership, of the great Law Institute Library now in the Post Office Building, and to place it at the disposal of its members at or near the court house; and negotiations to that end are in progress. The placing of this great library within easy reach of twelve thousand members of the bar will, it may be assumed, have a very great educational significance and accomplish the object of its founders to an extent not heretofore attained; and this is the view taken by the Directors of the Law Institute.

Another object which the Association has in view, of supreme importance and significance, is indicated by the section of its by-laws defining the function of its "Committee on the Judiciary." As it presents some features which are novel, it is given in full and is as follows:

"Section 3. Prior to the fourth Monday in September in each year in which a judicial office is to be filled by election in the County of New York the Committee on Judiciary and the Directors shall meet on the call of five members of either, to decide whether a general meeting of the Association shall be called for the purpose of determining whether the Association shall take any action in nominating candidates for such office or recommending candidates to the respective political parties for nomination. Said Committee and the Board of Directors acting as a joint Committee on Nominations shall make rules for the calling and conduct of such general meeting of the Association and for the voting thereat. Seven hundred and fifty members shall constitute a quorum at such meeting. If at such meeting it shall be determined to nominate or recommend candidates for such office or offices, then an adjournment of the meeting shall be taken for not less than one week; at such adjourned meeting a like number shall constitute a quorum, and there shall be submitted at such meeting a printed ballot to be made up of candidates proposed by the Directors and Judiciary Committee of the Association acting as a Joint Committee on Nominations and also candidates nominated by petition of at least two hundred and fifty members of the Association, provided such nomination or nominations by petition shall have been given to the Chairman of the Directors forty-eight hours before the adjourned meeting. The ballot shall contain the names of the persons so nominated alphabetically arranged and the office for which the nomination is made, distinguishing the nominations by the Joint Committee on Nominations, and the voting upon such ballot shall be by making a cross before each name voted for. The candidates on such ballot chosen by two-thirds of the members present and voting at such meeting shall be the candidates of the Association; and if it

shall be resolved to nominate candidates, the said Joint Committee on Nominations shall cause to be circulated the necessary petition for such nomination to be filed with the proper officers in order that the candidates may have a place upon the official ballot; and it shall select the party symbol and designation under which the said ticket shall appear on the official ballot when this shall be necessary under the form of ballot then existing, and do all other things necessary in the premises. The rules governing the voting at such adjourned meeting shall be made by the said Joint Committee."

This section of the by-laws was adopted in the committee which framed them after long and animated discussion, and was at once the most important and carefully debated provision which they contain. While it was thought most desirable to keep the Association out of politics in every way, it was recognized that the whole system which it is designed to develop and protect centers in the judiciary, and that it could not decline the responsibility of asserting itself in behalf of a pure and enlightened bench, should occasion arise. The founders of the Association had in mind the recent failure of the Judicial Nominators' Association of 1906, which did not receive the support of the bar because of the unpopular and undemocratic manner in which the movement was organized, but carried its worthy candidates down to ignominious and unnecessary defeat. They therefore decided to place a sword in the hands of this young champion of the bar, that it might strike effectually, should a supreme occasion arise, when the politicians, disregarding its protests, should attempt to degrade the bench by unfit nominations.

A protest from a bar association which has behind it the entire bar of the county of New York, which stands ready to enforce it by an independent campaign, if necessary, is not apt to be disregarded by either political party. The section is so framed as to safeguard the Association from any attempt on the part of small cliques to use the Association in a political campaign for personal ends. Its successful working will depend upon the creation of a general sentiment among its members that they should be *lawyers* before they are *politicians* in all matters affecting professional interests.

But the reader will ask, why was not all this attempted to be carried out by means of the historic organization known as the Association of the Bar of the City of New York, which has occupied the field since 1867? Why form a new Association? The answer is that the old Association has never been able to reach more than a comparatively small, though very influential, part of the bar. Of the twelve thousand practicing attorneys in this county but nineteen hundred are on its list of membership. It partakes of the nature of a social club, and its doors are by no means thrown open indiscriminately to the rank and file of the bar. Its membership dues are $50 a year, and its library and club house are situated too far from the Court House and business center of the city (about three miles) to be generally available. Its policies have always been *negative* policies, and it is not *constructive*, but *critical* merely, in its aims. Its studied conservatism has been at the expense of popularity; and it cannot be said that it has proven effective on many occasions in influencing public opinion. Many abuses have grown up during its time seriously affecting the administration of justice in the city, the correction of which it has left to others. Its membership has always been of the most distinguished character; and it has been governed wisely, within its limits, by a clique of very eminent gentlemen who are sometimes spoken of as the " Old Guard of the Bar " and who have been the soul of many reform movements outside the Association. Their control within the Bar Association has been too absolute to diffuse general interest in its affairs, its important meetings are poorly attended because debate is discouraged, and this is

felt most among its younger members, although by no means confined to them. It is an association of great prestige but little real power and no initiative. That it has been and is a great conservative body of essential usefulness and high purposes none will be found to question. A large percentage of the lawyers who have joined the new and more democratic Association, and are upon its most important committees, are its members and they have joined the lawyers' association not because of any lack of loyalty to the old association but because they see the uses of the new, and believe it will form a potent ally and not a rival in the common cause of maintaining high standards upon the bench and at the bar, and promoting the efficiency of the courts of justice.

Such are the principal if not the only reasons why New York County has *two* bar associations. If there is an essential difference between the two it consists in this, that the policy of the Association of the Bar has been to distrust the profession as a whole and guard against action by it, while the policy of the Lawyers' Association is to trust it and encourage it to action, in the belief that the real leaders will lead and the just cause triumph, and that anything is better than supineness, — a difference, perhaps, after all of *method*.

The experiment is one of great importance to the New York bar, and will be watched with deep interest, no doubt, by the bar of the entire county, for standards set up here are seen afar off and have a far-reaching influence. "A city that is set on an hill cannot be hid."

Will the new Association succeed?

The answer is, it has already achieved a large and unprecedented measure of success considering its very recent origin. It is today one of the large if not the largest lawyers' associations in the country. Its principal officers are men of national reputations. It membership of 3000 will, it is anticipated, be increased to 5000 by the end of the year; and there appears to be no reason why it should not soon include every reputable member of the bar of the county; for as soon as it is in full working order its advantages to members of the bar will be so manifest as to make it indispensable to all. This will insure it a very large income with which to carry on its work. But its greatest promise of success is the enthusiasm of its members and the unselfish devotion which they have thus far shown to its interests.

Few movements such as this achieve the full measure of their anticipations, although it is given to some to far exceed them. But it may be said in all reason and moderation that the New York County Lawyers' Association has the promise of becoming one of the most powerful and influential bodies in the land — a new force in the legal world to help ennoble and uplift the profession and inspire it with devotion.

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The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

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

THE ETHICS OF ADVOCACY.

The following editorial from the London *Law Journal* is of especial interest at this time.

Of more than usual interest to the English lawyer will be the forthcoming meeting of the American Bar Association. A committee of the association has drafted what purports to be a complete code of professional ethics, and the discussion of these proposed canons, which are thirty-two in number, will be the main business of the meeting. One of the draft rules is quite inconsistent with the traditions of the English Bar. "A lawyer may counsel and maintain only such actions and proceedings as appear to him just. His appearance in Court should be deemed equivalent to an assertion, on his honor, that, in his opinion, his client is justly entitled to some measure of relief." The observance of such a regulation would, of course, be quite incompatible with the impersonality that belongs to the English advocate. "A man's rights," said Lord Bramwell, "are to be determined by the Court, not by his advocate or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, 'I want your advocacy, not your judgment; I prefer that of the Court.'" Lord Halsbury has expressed a similar view. He has described the contention that "an advocate is bound to convince himself by something like an original investigation that his client is in the right before he undertakes the duty of acting for him" as "ridiculous, impossible of performance, and calculated to lead to great injustice." The rule that an advocate ought not to express his personal opinion in a criminal case has often been insisted upon. Sergeant Shee's expression of belief in the innocence of Palmer, the Rugeley poisoner, drew a strong protest from Sir Alexander Cockburn, who remarked that the counsel for the defense "had better have abstained from making any observations which involved the assurance of his own conviction." Johnson, when asked by Boswell whether a lawyer ought to support a cause which he knew to be bad, replied: "Sir, you do not know it to be good or bad till the judge determines it." That is really the conclusion of the matter. Much injustice would be done if the character and eminence of a counsel were always to be regarded in determining the justice of his client's cause, and this would be the inevitable result of the rule which the American Law Association is to be asked to adopt.

LAW BINDINGS.

The lawyer who is burdened with a library of moldy sheep-clad volumes should take his stand in favor of the cleaner and more durable buckram by refusing to buy the old-fashioned expensive book. The law libraries are making an effort to induce publishers to abandon "law sheep" entirely. The following letter from Mr. Edwin Gholsox, librarian of the Cincinnati Law Library Association, states their point of view:

"The law libraries of the country are now facing a very serious problem. The income of most of them is limited, hence, if the larger part of their available funds are spent for rebindings, the number of new books which they are able to purchase is correspondingly decreased, and this, of course, works to the detriment of the publishers.

"It is no exaggeration for me to say, for it is based upon my own experience here, that approximately one-fourth of the income of every large law library in the country is absolutely and needlessly wasted, and that this sum might be saved to them and put to a

much better use if the law book publishers would only adopt a good grade of cloth or buckram binding instead of the 'law-sheep' they now use. The life of the best of this law-sheep, exposed on open shelves to the action of an atmosphere laden with the gases thrown off in the combustion of either soft or hard coal, averages less than four years, while a good article of cloth binding, subject to the same conditions, will last indefinitely. Some eight years ago, when I took charge of this library, my first innovation was to substitute a heavy canvas instead of the law-sheep that had been used on our rebindings. Out of the ten thousand volumes bound in this material now on our shelves only one single volume has gone back to the bindery, and this upon a book which was subjected to the most constant and severe use. Of the new books which have come in during this same period, and which were bound in law-sheep, fully one-fifth have already had new bindings and hundreds of others are in a condition requiring it."

A MODERN TENDENCY.

Once more the methods of procedure of England and the United States in criminal cases, and in civil as well, are compared, much to the disadvantage of the latter, by Francis M. Burdick in the July *North American Review* (V. 188, p. 126), entitled "Swiftness and Certainty of Justice in England and the United States." The author recites the various reasons which account for the greater celerity of English trials, with which our readers have now become familiar. Like most who have carefully investigated the facts, he believes the key to the situation is in the infrequency of reversals on appeal for errors in the admission of evidence in England. The practice of appellate courts in this country of presuming the materiality of such an error, and granting a new trial merely upon proof of the error, is responsible for much of the delay at *nisi prius*, because the judge of the lower court, fearful of a reversal, avoids interference with the conduct of the trial, and long wrangles on the admissibility of testimony ensue. An important reason for the absence of this in English trials is the higher quality of judges, for there they are taken from the highest ranks of the bar and are paid salaries commensurate with the importance of their position, being about five times the best salaries paid in this country for like service. The respect of the attorneys for the opinions of the court is equaled only by the confidence of the public in their judgments. In some of our states this latter quality is lost by their system of electing judges. The desirability of the elective judiciary, however, is a fallacy so deeply rooted in popular fancy that states which have submitted to the incubus are unlikely for a long time to be able to escape. The increased control of the presiding judge over the trial of the cause is, however, a remedy quite within our reach, and it is interesting to note the increasing demand for a change in the policy of appellate courts. Even the conservative Supreme Court of Massachusetts is showing a tendency to require the excepting party to show that the evidence improperly admitted may have materially affected the jury. This is a task, however, which presents serious difficulties. To show specifically the effect of any given part of the testimony is obviously impossible, and there are few guides for the appellate court in determining such a question even from an examination of the record. It means, therefore, that the appellate court must examine the entire record and pass its own judgment upon the importance of the evidence in question. This solution of the problem is not without its objections and its difficulties, but we believe that the tendency of the times is clearly in that direction.

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.

BANKRUPTCY. "Provincial Insolvency Act," by R. Padmanabhachari. *Bombay Law Reporter* (V. x, p. 97).

BANKRUPTCY. "A Treatise on the Bankruptcy Law of the United States," by Harold Remington. 2 vols. The Michie Co., Charlottesville, Va. 1908.

This latest book upon the subject of the United States Bankruptcy Law is written by Harold Remington, referee in bankruptcy in the Cleveland District of Ohio and lecturer on the law of bankruptcy at Western Reserve University.

The work is most complete and covers the law itself and the decisions in a learned and accurate manner. It is especially valuable to attorneys because the book is the result of the numberless questions of law and procedure presented to a referee, and not only are the several subjects and their subdivisions covered from a legal standpoint but the author cites a large number of cases in the federal and state courts upon these various subjects. The book in this particular alone, is of great value, since it provides a ready reference to bankruptcy cases throughout the United States upon the many different points which are every day arising in the administration of the bankruptcy act.

The preparation of the book indicates a large amount of careful, painstaking work, and the copious quotations from the different decisions referred to are of great value to the practicing lawyer.

BIOGRAPHY. "The Life and Career of Sir T. M. Aiyar, K.C.I.E.," by F. Rowlandson. *The Citator* (V. iii, p. 1).

CONSTITUTIONAL LAW. "May a State in the Exercise of the Police Power Prohibit the Use of the National Flag for Advertising Purposes?" by George A. Lee. *Central Law Journal* (V. lxvii, p. 2).

BIOGRAPHY. "Chancellor Kent at Yale," by Hon. Macgrane Cox. *Yale Law Journal* (V. xvii, p. 553). Conclusion of an article begun in the March number.

BIOGRAPHY. "Sir Matthew Hale," by Henry Flanders. *University of Pennsylvania Law Review and American Law Register* (V. lvi, p. 384).

CONSTITUTIONAL LAW. In the June *Illinois Law Review* (V. iii, p. 65) Henry Schofield discusses "The Claim of a Federal Right to Enforce in One State the Death Statute of Another." This is a criticism of the case of Chambers *v.* B. & O. R. Co., decided last year in the Supreme Court of the United States, which held constitutional a statute of Ohio making Ohio citizenship of the deceased the test of the jurisdiction of the Ohio courts to enforce the death statutes of other states. The author believes the decision is wrong and hopes that the federal court, when the occasion presents itself, will take a broader view of the claim of a federal right to sue in one state to collect money claimed to be due under a death statute of another state.

CONSTITUTIONAL LAW (Division of Power). "The Intention and Wisdom of the Division of Legislative Power between Congress and the States," by F. J. Stimson. *University of Pennsylvania Law Review and American Law Register* (V. lvi, p. 361). An interesting analysis of the powers of our dual government. The author says in conclusion:

"I believe that the constitutional decisions of the next ten years will prove the most important in the history of our own republic. It is peculiarly the duty of those of our profession to point out the dangers that beset the path upon which the people may wish to go. Legislation is now pending in Congress which seems to me to be more radical, more un-English than anything that has been enacted in an English-speaking legislature for many centuries. It has been the proud boast of the great statesmen and lawyers of England that we have no administrative law, no law peculiar

to the government or administered by government officials, but that every officer, civil or military, must answer for his acts in the common law courts, and that every individual or association of individuals has the right to have their legality tried there, and tried there alone. To submit the judgment of the great right of freedom of contract and association to the judgment of an administrative official would be well on the road to the introduction of the whole European system of administrative law and government by bureaucracy. When a man is responsible for his acts or contracts not to legislatures or courts and juries, but to executive officers, you cease to be American and become European, if not Oriental, and when you give up your care for local self-government and your home courts and juries, you are not far from the state of the kingdom of Italy or the Empire of Russia, where a mighty central government stretches its paralyzing hand between the laborer and his daily bread, the merchant and his trade, the citizen and his vote."

CONSTITUTIONAL LAW. "The United States Supreme Court and the Commercial Era," by John R. Dos Passos. *Yale Law Journal* (V. xvii, p. 573). A brief examination of the principles of our Constitution, with observations upon the effect which our great commercial era has had upon the development of constitutional law within the last four decades. The judiciary department has tried in that time to perform its full duty of maintaining in form and spirit the federation as formed by the original states. But the new commercial era has forced upon it by legislation questions of a commercial and economic character, and the decisions are unsatisfactory, both from their lack of unanimity and from their being decided on technical grounds. The author is of those who do not believe that these questions of trusts, railroads, capital and labor are proper subjects for legislation at all. If they are, their proper handling requires amendments to the Constitution, giving us a centralized power and a paternalism which will crush out the spirit of individual ambition.

CONSTITUTIONAL LAW (see **Labor Question**).

CORPORATIONS (see **Highways**).

CRIMINAL LAW. "Criminal Issues in Civil Actions," by William Steers. *Canadian Law Times and Review* (V. xxviii, p. 430).

DIVORCE. "Migratory American Divorces — Their International Status — Is a Central Registry Practicable?" by J. Arthur Barratt. *Yale Law Journal* (V. xvii, p. 589). Calling attention to the firmness with which British courts refuse to recognize divorces where there has been no *bona fide* domicile in the state granting the decree, and briefly summarizing the points that have been decided.

The author offers the following practical suggestion to remove serious difficulties now experienced in ascertaining the marital status of parties:

"(1) That all matrimonial decrees (divorce, nullity, or separation) should be recorded, not only in the office of the clerk of the county where the judgment was rendered, but also in the office of the secretary of state of the state in which such county is situated; and that it is also desirable that a copy of the complaint and the summons or writ should be filed in such secretary of state's office immediately after service. (2) All such matrimonial actions should be under the supervision of the attorney-general of the state and his assistants, who would be able to intervene in cases of fraud, in much the same way that the king's proctor in England may intervene, and of his own motion take steps to prevent the decree *nisi* being made final in the states where decrees *nisi* are granted. It would also be well if he had power to ascertain whether the necessary jurisdictional facts (e.g. *bona fide* domicile) existed before allowing the action to proceed. (3) The creation at Washington, or some central place, of a central registry for the recording of all such matrimonial decrees throughout the United States — to be done at the expense of the several states agreeing to use such registry."

ETHICS. "The American Bar Association's Proposed Code and Oath," by William A. Purrington. *Bench and Bar* (V. xiii, p. 98).

EVIDENCE. "Examinations Before Trial—Most Recent Cases," by Raymond D. Thurber. *Bench and Bar* (V. xiii, p. 111).

HIGHWAYS. "The Corporation in the Street," by Charles L. Dibble. *Michigan Law Review* (V. vi, p. 624). The first part of this paper treats of the corporation and the

abutting landowner, summing up their rights as follows:

"1. The property of the public in the highway includes, beside the right of travel, also the right to permit, by the proper official action, the establishment therein of such public utilities as are reasonably necessary for the comfort and convenience of the people of the community and do not interfere unreasonably with other proper uses of the same highway. Any other occupancy of the highway is a nuisance and unlawful.

"2. A public service corporation lawfully occupying a highway is liable to abutters only for actual damage to their land or the easements in the street appurtenant thereto.

"In these rules the doctrine of additional servitudes has no place. The growth of that doctrine is another instance of a hard case making bad law. The trouble arose over steam railroads. In the beginning resembling more closely the trolley lines than the steam railroads of the present day, they were welcomed to the streets. Eventually they became a hindrance, although changing only in the size, frequency, and speed of the trains. The courts desired to give the abutting property owner some redress in the numerous cases where he was seriously hindered in the ingress to his property, or was deprived of light and air. The doctrine of easements of access, etc., had not yet been developed. Accordingly the theory of additional servitudes was invented. At present the above named easements are universally recognized and furnish sufficient protection. To award damages for further real or fancied injuries is not only illogical but practically unjust."

The following is the author's summary of the law, according to the best authorities, as to the relations between various public utilities occupying the street:

"1. As between a municipal corporation, acting in furtherance of its governmental functions, and a private corporation, the only consideration in the location of the municipal works is their own efficiency. The municipality may choose that location most convenient to its purpose, regardless of inconvenience to the private corporation or interference with the operation of its plant. And in the absence of malice or oppression, the decision of the proper municipal officers as to the location of public works will not be reviewed by the courts.

"2. As between private corporations, co-licensees of the municipality, the prevailing consideration is the accommodation of the greatest possible number of uses beneficial to the public and proper to the street. The second consideration is the commission of the least possible injury to the equipment of prior occupants. The resulting rule is that a new corporation will be enjoined from any material interference with equipment already in place, unless an avoidance of the interference would be inconsistent with the reasonably successful operation of the new utility.

"3. For such unavoidable interference, not extending to actual injury to its physical property, the prior occupant of the street can obtain no damages, either by way of compensation for increased cost of operation or reimbursement for alterations necessitated.

"4. For injury to physical property rightfully in the street both the municipality and the private corporation are liable, even though, under the rules above stated, such injury may not be prevented by injunction."

HISTORY. James Westfield Thompson describes in the June *Illinois Law Review* (V. iii, p. 81) "Anti-Loyalist Legislation During the American Revolution." The article deals with a subject that has seldom been carefully treated and is of much interest. It is to be continued.

IMMIGRATION REGULATION. "L'Immigration aux Etats-Unis et la Loi du 20 Février 1907," by P. Goulé. *Revue de Droit International Privé et de Droit Pénal International* (V. iv, p. 372). Analyzing the provisions of the Act of Congress of February 20, 1907, regulating immigration to the United States. To be continued.

INTERNATIONAL LAW. "International Documents. A collection of International Conventions and Declarations of a Law-Making Kind." Edited with Introduction and Notes by E. A. Whittuck, B. C. L., Oxon., one of the Governors of the London School of Economics and Political Science. Longmans, Green & Co., London, 1908.

It contains copies of treaties in French and English in parallel columns. Part I contains the Declaration of Paris of 1856, the Geneva

Convention of 1864, and the Declaration of St. Petersburg; part II, the Hague Peace Conference of 1899 and the Geneva Conference of 1906; part III, the Hague Peace Conference of 1907. So far as could be ascertained from a necessarily brief examination, the texts are accurate, and the book should prove of value to all students of international law.

JUDGMENTS. "Revivor of Judgments," by M. J. Gorman. *Canadian Law Times and Review* (V. xxviii, p. 415).

LABOR QUESTION. "Labor Organizations in Legislation," by Jerome C. Knowlton. *Michigan Law Review* (V. vi, p. 609). Discussing the cases of *Loewe* v. *Lawlor*, 208 U. S. 274, known as the Hatter's case, and *Adair* v. *United States*, 208 U. S. 161, which have been severely criticised by labor leaders. The author agrees with the court's finding that the boycott is an unlawful conspiracy against interstate commerce and in violation of the Anti-Trust Act, and that a statute providing criminal punishment for discharging an employee because of his membership in a labor union is unconstitutional. He regards the decision as a pronounced recognition of individualism.

"During the past twenty-five years there has been a mad rush for organization and the rights of the individual have been trampled upon and then conceded, only on condition that he become a member of some organization of capital or labor, and both of these factors have been equally at fault in this direction. The decisions plainly indicate that the constitutional guarantees are for the individual as against classes and organizations incorporated or unincorporated, that individualism is to have a reasonable opportunity and is not to be crushed out through the power of organization in the use of questionable means and measures, or through legislative limitations on freedom of action."

LEGAL EDUCATION. "Legal Education in the United States," by H. L. Wilgers. *Michigan Law Review* (V. vi, p. 647). A careful review of the history of legal education in the United States and of its present situation. The author concludes that the time has arrived "which requires, for the best interest of all, a better preparation for the more complete mastery of the more intricate law applicable to the more complex situations arising daily." He believes the state universities in the central West will be justified by their constituencies in making such an advance by requiring a college education or two years in college before entering on the study of law.

LEGAL PROFESSION. "The Law — A Business or a Profession," by Champ S. Andrews. *Yale Law Journal* (V. xvii, p. 602). Purporting to be the record of a conversation between an eminent judge, a distinguished lawyer, and the son of the latter, a young law student. The older men frankly tell the young man how much cant and hypocrisy there is in the current talk about the professional dignity of the lawyer. The older men hold up a high ideal for the younger, but warn him that the struggle to maintain it is hard and that the many fail to do so.

LITERATURE. "True Stories of Crime," from the District Attorney's office, by Arthur Train. Illustrated. Chas. Scribner's Sons, New York, 1908.

This is a series of stories of interesting criminal cases which have passed under the eye of the author in his professional work. Many of them have previously appeared in periodical form. Mr. Train, of whom the hope has been expressed that he may yet prove our American Fielding, has already made a reputation by his direct and entertaining story-telling, and it need only be said that these stories maintain his previous high standard. The best of the group is the first one, entitled "The Woman in the Case."

MARRIAGE. "Marriage within Prohibited Degrees," by George S. Holmestead. *Canadian Law Times and Review* (V. xxviii, p. 426).

NEGOTIABLE INSTRUMENTS (Ownership of Checks). "When is a Bank the Bona Fide Owner of a Check Left for Deposit or Collection?" by Albert S. Bolles. *University of Pennsylvania Law Review and American Law Register* (V. lvi, p. 375). Discussing the principles involved and the conflicting cases as to ownership of a check credited to a depositor with the right to draw immediately against the credit. The author favors the view that "so long as a depositor checks against his actual cash deposit, he is not borrowing and the bank is not the bona fide purchaser of checks credited to him but not collected. When his

checks go beyond this line, then the bank becomes the owner either absolutely or to the extent of its lien."

PRACTICE. "Erroneous Decision on a Point of Law," by C. S. B. Aiyangar. *Allahabad Law Journal* (V. v, p. 169).

PRACTICE. "Modern Jury Trials and Advocates," 4th edition, containing forty condensed trials and specimens of forensic eloquence, by Judge J. W. Donovan. The Banks Law Publishing Co., New York, 1908. Price $4.50. This book is hardly the equal of Mr. Wellman's better known book, but contains some passages worth preserving from lawyers whose fame once brilliant is already growing dim.

PROPERTY. "Law of Survivorship among Native Christians," Anon. *Madras Law Journal* (V. xvii, p. 489).

PROPERTY. "A Problem in the Illinois Law of Descent," by Albert M. Kales. June *Illinois Law Review* (V. iii, p. 74).

PROPERTY. "Restrictions on Indian Lands," by Judge J. O. Davis. *Oklahoma Law Journal* (V. vi, p. 495).

RAILROADS. "Railroad Rate Regulation," by Herbert S. Hadley. *Law Register* (V. xxviii, p. 241).

TAXATION. "A Treatise on the Law of Taxation by Special Assessments," by C. H. Hamilton of the Milwaukee Bar. (Chicago, George I. Jones, 1907).

This is a painstaking treatment of the subject of special assessments as a separate topic. It goes into the origin of special assessments and their proper classification under the taxing power inherent in the several states; subject to the constitutional restraints that the power be exercised for a public purpose, a peculiar benefit, and with a reasonable apportionment of charge to benefits received. The provisions of the state constitutions expressly restricting their otherwise full power are catalogued, and the effect of the 14th Amendment to the Federal Constitution considered; the requirements of "due process of law" explained, and the word "taking" defined.

The various methods of apportionment by frontage, cost, area, valuation, etc., are discussed, with the conclusion that the true criterion in every case is the actual benefit received. The author advocates throughout his book the thesis that each person in a taxing district has a right not to be taxed in excess of the benefit to his own property from the improvement, and that he has a right to call upon the courts to pass upon this question. It may well be doubted whether this broad principle, if settled law, would not be a material judicial interference with a power distinctively legislative. To hold that the question of the relation of benefits to assessments is that of the benefit to the assessment district as a whole, rather than to each several property owner, and that the existence of this benefit to the district, and the determination of a fair scheme of apportioning the tax, is for the taxing power to decide, seems constitutionally the sounder view. While it is true that there might be a levy not exceeding the benefit to the taxing district and fairly distributed, of which one property owner's share might exceed his individual advantage, yet it may be better to recognize such a case as an illustration that the legislature may do an injustice which the judiciary cannot prevent, than to hold that the legislature can do nothing unless the courts agree as to its reasonableness. In case of any flagrant injustice, there is always the 14th Amendment.

The book contains several chapters on proceedings in making special assessments, and a chapter on remedies. A large number of cases are collected, and the book is more valuable as a compilation of authority than as an arrangement of a coherent system of the law of the subject.

TORTS. "Malicious Use of One's Property," by Robert L. McWilliams. *Central Law Journal* (V. lxvii, p. 23).

WATER RIGHTS. "Law of Water Rights," by William H. Hunt. *Yale Law Journal* (V. xvii, p. 585). Brief survey of the fundamental principles of the law of water rights in the far western states.

WORKMEN'S COMPENSATION ACTS (England). "La Loi Anglaise de 1906 sur les Accidents du Travail et les Etrangers," by C. M. Knowles. *Revue de Droit International Privé et de Droit Pénal International* (V. iv, p. 361). Commenting on the English Workmen's Compensation Act and arguing that its provisions apply to foreigners working in England and to their dependents, as well as to English citizens.

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.)

ATTORNEY AND CLIENT. (Presumption that Attorney's Services are Gratuitous.) N. J. Court of Err. & App. — The ancient presumption that a fee paid to an attorney is in the nature of an honorarium receives new support in Bently *v.* Fidelity & Deposit Co., 69 Atl. Rep. 202. Arrangements were made by a supposed agent of defendants for the services of plaintiffs and pleadings were forwarded to them by defendant's New York attorneys, but there was no proof of authority on the part of any of these persons to contract for the payment of attorney's fees and the Court of Errors and Appeals held that no recovery could be had without proof of such contract and that no liability arose from the simple fact of performance of services.

BANKRUPTCY. (Preferences.) (U. S. Cir. Ct. Mass.) — A very interesting question relating to the effect of a decree of the Massachusetts land court granting registration of title to land under Mass. Rev. Laws, c. 128, was raised in Morris *v.* Small et. al., 160 Fed. Rep. 142.

One Floyd, within four months before his bankruptcy, mortgaged the real estate in question to Small, for which conveyance Small paid no new consideration. At the time of the conveyance, Floyd was insolvent and Small had cause to believe him so. Small conveyed his rights to Hagar, who foreclosed under the power of sale contained in the mortgage and bought in the title on Small's behalf. Hagar afterwards conveyed to Ring, and Small in a suit in equity against Hagar and Ring obtained a decree directing Ring to convey to him upon an accounting. After Floyd was decreed a bankrupt, his trustee in bankruptcy brought a suit in equity against Small and others to have the title to the premises decreed to be in Small in trust for him and a conveyance made to him.

Small pleaded in bar that his title was derived from Hagar, in whose favor the land court of Massachusetts had rendered a decree declaring him entitled to the real estate, and that the trustee had due and sufficient notice of the proceedings in the land court. The court held that Small was not a bona fide purchaser in good faith in reliance on the registered title and that the degree of the land court did not bar the suit in equity by the trustee in bankruptcy to enforce a re-conveyance of the land on the ground that it had been conveyed by the bankrupt as a preference.

CARRIERS. (Injury to Passengers from Articles carried on car.) Colo. — In the case of Farrier *v.* Colorado Springs Rapid Transit Ry. Co., 95 Pac. Rep. 294 a very peculiar question arose in regard to the liability of a street railroad for injuries to a passenger. On the day of the accident the defendant was running from Colorado Springs to Manitou a train of cars consisting of a motor and an open trailer car. The attachment between the two cars was an automatic coupler which allowed a play of about an inch. When the cars were in motion there was a space of about eight inches between the hood or projecting top of the rear end of the motor car and the same part of the front end of the trailer car.

A man carrying a long-handled hoe got on the car, taking a seat upon the front bench of the trailer. He put the hoe so that it rested upon the floor and the top of the handle rested against the front end or hood of the trailer, projecting several inches above the same.

In the rocking motion of the cars caused by the rough tracks the handle was caught under the hood of the front car and broken, a piece thereof flying backwards through the trailer car, striking and inflicting injuries to plaintiff, a passenger who sat about the center of the car.

It appeared that the conductor knew of the position of the hoe but did not request the owner to place it in any other position. The court held that the question whether the conductor's failure to cause the passenger to place his hoe on the floor or to carry it in some other position was negligence was for the jury.

An interesting application of the doctrine that a carrier of passengers must take the utmost possible care to a case where the particular result was hardly foreseeable.

J.H.B.

CARRIERS. (Right to be carried on Chartered Train.) S. C. — Among the perplexing questions arising as to the rights and liabilities of carriers of passengers, one is found in Kirkland *v.* Charleston & W. C. Ry. Co., 60 S. E. Rep. 668, 79 P. C. 273, which is rather novel. Plaintiff boarded one of defendant's trains at a regular station and tendered the legal fare to his destination, claiming that the ticket office was not open in reasonable time to allow him to procure a ticket. His tender was refused by the conductor and a payment considerably larger demanded. Upon declining to pay the excess he was ejected. The testimony went to show that the train was one chartered for an excursion and that no tickets were sold for it or fares collected other than at the instance of the one chartering it. Plaintiff testified that he was ignorant of that fact, however, until near his destination and supposed it to be a regular train. The court held, following the case of Harmon *v.* Railway, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686, that the railroad could not, by charter, divest itself of duties to the public, and that not having in any way apprised plaintiff of the character of the train before entering, it was bound to carry him for the regular fare.

CONSTITUTIONAL LAW. (Delegation of Legislative Power.) U. S. Sup. Ct. — The federal safety appliance act of March 2, 1893, 27 Stat., p. 531, c. 196 [U. S. Comp. St. 190, p. 3174] came before the United States Supreme Court for construction and determination as to its validity in St. Louis, I. M. & S. Ry. Co. *v.* Taylor, 28 Sup. Ct. Rep. 1616. Section 5 of the act gave power to the American Railway Association to designate a standard height for drawbars on freight cars. It was contended that this was an unconstitutional delegation of power, but the Supreme Court, following the decision in Buttfield *v.* Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. 349, held the law valid.

CONSTITUTIONAL LAW. (Government by Commission). Ia. — The case of Eckerman *v.* City of Des Moines, 115 N. W. Rep. 177, is of exceptional interest from many points of veiw. The general assembly of Iowa recently provided means by which cities of a certain class might adopt a system of government modeled somewhat on the plan of that known as the Galveston System. The law provides for a main governing board consisting of a mayor and four councilmen, to be chosen at general election. Their powers and duties are exercised through a department of public works under direction of the mayor and four other departments, each under the supervision of one of the councilmen. A method of recall of officers after election is also provided. The validity of the law was attacked from almost every conceivable standpoint. It was claimed to violate the provision of the Constitution of the United States which guarantees a republican form of government to each state. It was alleged to be in contravention of the state constitution, Art. 3, § 1, making distribution of governmental functions and prohibiting the exercise by an officer of department of powers properly belonging to another; of Art. 3, § 30. forbidding incorporation of cities by special law; Art. 1, § 6, providing that all laws of general nature shall have uniform operation; Art. 3, § 20, relating to removal of officers; Art. 2, §1, granting and regulating the right of suffrage and Art. 3, § 1, placing all legislative power in the general assembly. It would be useless to here attempt to set out in detail the points discussed in the thirty-two paragraphs of headnotes. Suffice it to say that the act was held valid as against every objection urged.

These constitutional objections to "government by commission" cannot be sustained, unless the particular form of government involves the breach of some special provision of a local constitution. The initiative and referendum, attacked as contrary to a republican form of government, are a return to democratic government as practiced in New England, and constitutional. In re Pfahler, 150 Cal. 71. The other objections have in general no force. Com. v. Plaisted, 148 Mass. 375; Com. v. Moir, 199 Pa. 534. Occasionally some special provision of a local constitution will be violated by novel charter provisions. Rathbone v. Wirth, 150 N. Y. 459; Ex parte Lewis, 45 Tex. Cr. 1. J.H.B.

CORPORATIONS. (Issue of Stock.) Tex. Sup. Ct. — The meaning of Sec. 6 of Art. 12 of the state constitution of Texas was up for determination by the supreme court of that state in O'Bear-Nester Glass Co. *v.* Antiexplo Co. et. al. 108 S. W. Rep. 967. A corporation was organized for the manufacture and sale of a compound manufactured from an unpatented formula. The owners of the formula were granted a certain portion of of the stock of the corporation in exchange for the formula. Later the corporation became insolvent and the creditors sought to hold these stockholders liable for the debts of the corporation on the ground that they had not paid for their stock. Sec. 6 of Art. 12 of the constitution referred to above provided that no corporation should issue stocks or bonds except for money paid, labor done or property actually received. The court stated that the purpose of this provi-

sion was to secure creditors as well as stockholders of corporations against the practice of issuing fictitious stock and stock upon an insufficient consideration whereby the actual capital was much less than the amount represented by the shares issued and sold and that the assets of the corporation should be something substantial and of such a character as to be subjected to the payment of claims against it, as well as to secure the stockholders in their rights in the capital stock.

The court held that the secret formula was not property within the terms of the constitution, and therefore the issuance of stock on the consideration of its transfer to the corporation was contrary to the constitution and those who received the stock must be held responsible to the creditors of the corporation for the face value of the shares received by them.

DEAD BODIES. (**Civil Liability for Mutilation of.**) **N. C. Sup. Ct.** — The question of the civil liability of a railroad corporation for the mutilation of the body of a person found dead on its tracks was before the supreme court of North Carolina in Kyles *v.* Southern Ry. Co., 61 S. E. Rep. 278. The husband of plaintiff was killed on the track of the defendant railroad and the body badly mutilated. After the discovery of the body the employees of the railroad, on the plea that they did not think they had a right to touch the body until the arrival of the coroner, allowed it to remain where it was between the rails so that a dozen or more trains passed over it going in both directions. The court held that the evidence was insufficient to show that the employees willfully, wantonly and brutally allowed the body to be mutilated, but states that if they did negligently permit it to be exposed on the track and failed to properly care for it the railroad was liable in damages for the physical and mental suffering of the widow of the deceased caused by the knowledge thereof and if they refused to remove the remains from a willful, wanton or malicious motive, punitive damages were allowable in the discretion of the jury.

DEPOSITIONS. (**Suppression of Unsigned Duplicates.**) **N. Y. Sup. Ct.** — In Decauville Auto Co. *v.* Metropolitan Bank, 108 N. Y. Supp. 1027, it was shown that an order for a commission had been issued for examination of certain witnesses in France, and that the tesimony had been acually taken and the depositions subscribed. The witnesses refused, however, to turn them over to the attorneys unless a stipulation should be given that they should not be used in any litigation that might arise against their employer, a French corporation. Plaintiff refused to so stipulate and defendant then sought to introduce unsigned duplicates of the depositions. The appellate division of the New York Supreme Court held that under the New York statute it had no authority to do this, but directed the lower court to issue an order for a commission to take testimony on interrogatories if they could be so framed as to exclude the matter to which the witnesses objected and if this could not be done that letters rogatory issue unless plaintiff agree to the admission of the unsigned duplicates.

DESCENT AND DISTRIBUTION. (**Rights of Murderer to Inherit from Victim.**) **Mo. Sup. Ct.** — The Supreme Court of Missouri, in its opinion in Perry *v.* Strawbridge, 108 S. W. Rep. 641, very justly characterizes the case as " an exceedingly interesting one," and while stating that the views therein expressed are not in harmony with the majority of similar cases, perhaps most people will agree that the result reached is favorable to the highest regard for life and public policy. The action was instituted for partition of real estate formerly owned by a Mrs. Evans. She was murdered by her husband and he committed suicide shortly afterward. Two of the parties in the suit were daughters of Evans by a former wife and claimed as his heirs on the ground that he inherited a one-half interest from his murdered wife. The court gives a learned and somewhat lengthy discussion of the similar reported cases and comes to the conclusion that although the most of them hold that murder will not bar the right of inheritance from the victim by the murderer, a proper regard for safety and public policy points the other way; that Evans took no interest in his wife's estate when he murdered her and of course his daughters therefore inherited nothing from it.

FRAUD. (**Illegal Marriage.**) (**N. Y. Sup. Ct.**) — The question of the civil liability of parties to an illegal marriage was before the Supreme Court of New York in the case of Colt *v.* O'Connor et al., 109 N. Y. Supp. 689. It appeared that Mrs. Colt, a widow, was married to O'Connor's testator while he had another wife living. She did not know of the existence of the other wife or that her own marriage was in any way rendered invalid. After the marriage she nursed her husband through a long illness and at his request kept their marriage a secret for nearly two years, although he was almost constantly at her home. The court held that she was entitled to damages against testator for the injury caused by marrying her while his other wife was living.

INSURANCE. (**Mother of Insured as Member of his Family.**) **Mo. Ct. of App.** — Is the mother of an insured who is married, a member of his

family while not living with him nor dependent on him for support? The Missouri Court of Appeals says, in Western Commercial Travelers' Association *v.* Tennent, 106 S. W. Rep. 1073, that she is not. In that case her husband, who was an able-bodied man, was living with her and the court said she could not be a member of two families at the same time.

LANDLORD AND TENANT. (Constructive Eviction.) **N. Y. Sup. Ct.** — Apartment house dwellers will find an interesting discussion of some of their rights in Jackson *v.* Paterno, 108 N. Y. Supp. 1073. Plaintiff leased an apartment from defendant. There was no stipulation in the lease as to heat, but the court held that a covenant for quiet enjoyment would be implied and that it would be construed as including an agreement to furnish heat where all the heating apparatus was in control of the landlord. It was also said that failure to furnish heat under such circumstances would constitute a constructive eviction if the tenant elected to so treat it and moved out, but that no eviction could be claimed if the tenant remained in occupancy.

MUNICIPAL CORPORATIONS. (Right to stand in Street.) **Mo. Sup. Ct.** — Has a citizen a right to stand for a considerable length of time on the street of a city, so long as he does not obstruct the traffic or interfere with the rights of others? This question was passed upon by the Supreme Court of Missouri in the case of City of St. Louis *v.* Gloner, 109 S. W. Rep. 30. The city had passed an ordinance making it a misdemeanor for any person to lounge or stand around or about street corners or other public places. Defendant was doing "picket duty" in the street of the city near a clothing house where the employees were on a strike, and was arrested and prosecuted for violating the above ordinance. The evidence showed that each morning and evening he, together with others, spent considerable time in the street and on the walks near the clothing house talking with the employees. The court held that the ordinance was in violation of Art. 2, § 4 of the Constitution which guaranteed every citizen the right of personal liberty and that defendant had the right to stop and remain in the street so long as he conducted himself properly and did not interfere with the use of the street by others.

This is a questionable decision. At common law, the right of the public in a highway is simply a right to pass and repass. It is illegal for one of the public to use a highway for pasturing cattle (Dovaston v. Payne, 2 H. Bl. 527), for hunting (Queen v. Pratt, 4 E. &. B. 860), for interference with another's lawful hunting, though with the laudable design of preventing cruelty (Harrison v. Duke of Rutland, 1893, 1 Q. B. 142), or for standing in it and uttering abuse of a neighbor (State v. Davis, 80 N. C. 351). This being the doctrine of the common law, it is a perverted notion of the personal liberty clause that it gives a citizen the liberty of doing an unlawful act; and it is surely within the police power to regulate the use of highways in accordance with the common law. Such regulations are not uncommon, and have always been sustained. 28 Cyc. 910. J.H.B.

NEGLIGENCE. (Landlord and Tenant.) **Mich.** — The duty of a landlord toward an ill person in the home of his janitor was the question for determination in Tucker *v.* Burt, 115 N. W. Rep. 722. Plaintiff's son-in-law was janitor of an apartment building owned by defendant and lived in rooms in the basement. While plaintiff's boy was there in charge of her daughter he was taken ill. It was arranged that the boy should remain there and while plaintiff was taking care of him she was taken ill with erysipelas. Defendant having learned of plaintiff's illness and the infectious character of it, notified her son-in-law that he must take her out of the building and on the following forenoon told him that he must do so at noon or he would bring an officer to put them all out, whereupon plaintiff left. The plaintiff claimed damages for aggravation of the illness consequent on her leaving. The court held that the janitor was not a tenant, but merely an employee of the defendant and as such had no right to bring into his employer's house to reside with him any one without his employer's assent and that since the defendant had not invited plaintiff to his house or authorized his employee to do so and the disease was infectious and dangerous to the tenants in the house, he was under no obligation to keep her there if she could be removed without danger of serious injury and violated no duty to her in causing her removal.

NEGLIGENCE. (Theaters.) **R. I.** — In Brown *v.* Batchellor, 69 Atl. Rep. 295, damages are claimed as the result of an accident at a theatrical entertainment. A part of the performance consisted in an exhibition of bicycle riding, in the doing of which one of the riders went over the edge of the platform and against plaintiff, who occupied a front seat. The lower court sustained a demurrer to the declaration on the ground that it was not the duty of defendant to erect barriers as alleged therein and for the further reason that it failed to set out in what the alleged negligence consisted. The Supreme

Court reversed this decision and said that the mere happening of the accident called for an explanation and that a slight and almost invisible barrier might have been provided.

PATENTS. (Rights of Master and Servant.) Mass.—Two or three interesting questions relating to patents are discussed in American Circular Loom Co. *v.* Wilson, 84 N. E. Rep. 133. One of defendants, while in the employ of plaintiff, invented certain machinery and acquired by assignment certain other inventions, all of which were put to use by plaintiff with defendant's acquiescence. Plaintiff sought to require defendant to assign to it all rights in all the patents. The court held that there was no breach of duty by defendant in securing a patent to his own invention but that the assigned patents, secured while acting as plaintiff's superintendent, should be decreed as being held in trust. Plaintiff was held, however, to be estopped by its own acts from claiming the beneficial interest in one of these.

PRIVACY. (Statute restraining Publication of Photograph.) N. Y. Sup. Ct. — In Moser *v.* Press Pub. Co., 109 N. Y. Sup. 963, the Supreme Court, Special Term, construes Laws 1903, p. 308, c. 132 authorizing any person, whose name or portrait is used for the purposes of trade without his written consent, to restrain the use thereof, and concludes that it has no application to the publication of a person's photograph without his consent in a daily newspaper in connection with items of news not in any way libelous. In the course of the decision, the court says that while it may be that the statute is broad enough to give a cause of action to a person whose portrait was unauthorizedly published or used in a newspaper continuously, day after day, in connection with the advertisement of some patent medicine or some other commodity which the advertiser was interested in selling, and for the purpose of trade, it did not think it was ever intended by the Legislature that a newspaper could be prohibited from using or publishing in a single issue the name and portrait of a person without his consent having first been obtained.

RAILROADS. (Acquisition of Control of Other Corporation.) Mass. — In the case of Attorney-General *v.* New York, N. H. & H. R. Co., 84 N. E. Rep. 737, the Supreme Judicial Court of Massachusetts was called upon to determine whether the defendant corporation, which was organized under the statutes of both Connecticut and Massachusetts, had the power to hold stock in street railroad companies. The statutes of Massachusetts forbid railroad companies from directly or indirectly taking or holding the stock or bonds of other corporations, but the claim was made that on account of being incorporated under the laws of Connecticut this provision would not apply to defendant. The court held that notwithstanding the organization under the statutes of both states it remained a domestic corporation subject to the laws of Massachusetts.

TAXATION. (Interstate Commerce.) N. J. Ct. of Err. & App. — If a coal company sends its product into another state than that in which it was mined, to be there stored and held under its own control to await shipment to subsequent purchasers, does the property thereby become exempt from state taxation as being the subject matter of interstate commerce? This question was involved in Lehigh & Wilkes-Barre Coal Co. *v.* Borough of Junction, 68 Atl. Rep. 806, a certiorari proceeding to compel the setting aside of an assessment, by the New Jersey authorities, on coal brought from Pennsylvania. The court held the property not exempt and refused to set the assessment aside.

This is quite in accordance with the authorities. Pittsburg and S. Coal Co. v. Bates, 156 U. S. 577. Such a tax is not an interference with interstate commerce. There appears to be a distinction in the case of imports from foreign countries; to tax them while in the original packages awaiting a first sale is to tax imports. Brown v. Maryland, 12 Wheat. 419; May v. New Orleans, 178 U. S. 496. J.H.B.

TRADE UNIONS. (Unlawful Acts of Strikers.) Mass.— The Supreme Judicial Court of Massachusetts rendered a sweeping decree against promoters of a strike in Reynolds *v.* Davis, 84 N. E. Rep. 457. An injunction was sought by several firms and individuals to restrain a number of unincorporated associations and persons from in any way interfering with the business of complainants by inciting or furthering a strike against them. Complainants had formerly had agreements with the various unions but had decided to adopt the "open shop" policy. Defendants thereupon began to interfere with the business of complainants and tried to compel them to adopt rules referring all questions involving disputes with employees to an executive board with which defendants were affiliated. The court held the object of the strike illegal and issued an injunction "restraining defendants from combining together to further the strike in question and from doing any acts whatever, peaceful or otherwise, in furtherance thereof, including payment of strike benefits and putting the plaintiffs on an unfair list."

THE LIGHTER SIDE

Poetic Licence.— There was unearthed at the Registry of Deeds at Ossipee, N. H., a while ago rather a curious document. " Bill Fox " was a well known character in Northern New Hampshire thirty or forty years since, and gave this deed for some small favor granted; but it was thought too good to be lost and is duly recorded at Ossipee.

Deed of Mount Chocorua.

Know all men, Lords, esquires, and peasants,
And know all women by these presents, —
In short, let all creation know,
That I, Bill Fox of Wolfboro,
State of New Hampshire, County Carroll,
A yoeman bald unused to hair oil,
In duplicate consideration
Of good will towards my blood relation,
And two bears' feet most oleaginous
(Ungrateful let no man imagine us,)
To me in hand before enditing,
Or ever thought of, was this writing
(And which I, bound for land o'Canaan,
Will daily rub upon my cranium,)
Delivered by one Witt De Carter,
A true descended Son of Sparta,
And ward ad litem of old Nimrod,
The Tutelar saint of gun and ramrod —
Of Ossipee in State aforesaid,
And county ditto (be no more said
Of that venue for tattlers gossipy,
Enough will tell of " righteous " Ossipee,)
Do thus remise, release, and quitclaim,
Nor to myself henceforth one whit claim,
So long as I am reckoned vital,
To said De Witt all right and title
Which I or my male tail descendant,
Can claim or hope to claim or covet,
While glitters gold and misers love it,
In and unto a certain parcel
Or piece of land (don't deem it farce all,)
In Sam's dominions situated
Containing as 'twas estimated
By actual measurement and survey
Of engineers (now dead with scurvy,)
Five million acres nine square perches,
Besides the Intervale of Birches,
Including mountains, hills, and hollows,
And bounded and described as follows,
To wit: Begin at Whiteface School-house,
And running tow'rds McGaffey's tool-house,
Thence where two highways fork and spangle,
Jog off upon the sin'ster angle
To Dave Rowe's cabin hospitable,
Thence where the d——l you are able,
Keeping in close perambulation
Within the metes of Yankee nation, —
Remembering when at last you've done it,
To leave off at the bounds begun at:
Hereby both meaning and intending
(That litigation it may'nt end in)
The said grantee shall be invested
With all Chocorua granite crested,
Whereon grim Bruin growls in glory,
From verdant base to summit hoary, —
To have and hold the same forever,
Provided he be the longest liver,
To him, his heirs, assigns, successors, —
A chain of undisturbed possessors, —
With each appurtenance and privilege
Thereto belonging — in a civil age,
And I do covenant with said Carter,
While earth is land and two thirds water,
And I am spared by rueful Nemesis
To warrant and defend the premises,
To him and his from parchment blunder,
And scamps under me claiming under;
But not to warrant and defend 'em
When Ursa Majors seek to rend 'em,
But rightful lords and lawless squatters
For title then to trust their trotters,
In witness whereof, super Vellum,
I set my manum et sigillum,
Year eighteen hundred six and sixty,
September third, O Deed, I fixed ye, —
May Simis ne'er in wrath o'erwhelm us:
Subscripse.

Vulpus Gulielmus [Seal]

Acknowledgement et ceteranum
Justitias at pacisque quanum

Received Sept. 22d, 1866, examined by
LOAMI HARDY, *Recorder*

A true copy of Record, Attest
JAMES O. GERRY, *Register of Deeds*

Recorded in Carroll County N. H. Registry of Deeds, Book 49, page 167.

Justice Stumbled. — During the recent trial of J. B. Lipscomb, a former policeman, for alleged assault, an incident occurred in the criminal court which, it is thought, gave the defense a slight advantage. Assistant United States Attorney Turner was only too glad to ridicule the claim of the defense that the policeman stumbled while pursuing the man who was shot and that the shot was accidentally fired.

"Why should he have stumbled?" Mr. Turner asked. "Almost an impossibility."

It became necessary for the prosecuting officer to walk over to the judge's bench, and before reaching the judge he stumbled, the only thing keeping him from falling being the lack of space.

"There," said Attorney Carrington, "the learned district attorney has stumbled.

Mr. Turner had to admit that he had stumbled, although two of the jurors declared they had not witnessed the incident.

"And the failure of you two gentlemen to see it," the defendant's counsel argued, "is in line with the testimony. If the jurors didn't see Mr. Turner stumble at such close range, is it not possible that the witnesses who were so far away from Lipscomb didn't see what happened?"

There was no answer to his argument, and Lipscomb was acquitted. — *Washington Star.*

Circuity of Action. — In suit to enjoin trespass by neighbor's hens court says:

Without aiming to detract from the dignity and importance of the Iowa hen it would be intolerable to require of this plaintiff that he sue separately for the damage done by each cackling hen and stately rooster upon the occasion of each predatory excursion across the fateful road.

Law Language. — The following clipping from the *Christian Advocate*, while greatly exaggerating the subject, yet contains much truth:

"If I were to give you an orange," said Judge Foote of Topeka to D. G. McCray, "I would simply say, 'I give you this orange,' but should the transaction be intrusted to a lawyer to put in writing he would adopt this form: 'I hereby give, grant and convey to you all my interest, right, title and advantage of and in said orange, together with its rind, skin, juice, pulp and pits and all rights and advantage therein, with full power to bite, suck or otherwise eat the same, or give away with or without the rind, skin, juice, pulp or pits, anything hereinbefore, or in any other deed or deeds, instruments of any nature or kind whatsoever, to the contrary in anywise notwithstanding.'"

Integral Calculus. — The court officer who brought in the prisoner was a new man, and not familiar with the technical language of the law, so when the Judge asked:

"What is this man accused of, Mr. Officer?" he replied with some hesitation, "Bigotry, your Honor?"

"What?" said the Judge, "Bigotry? I didn't know that was a crime in Massachusetts. What has he been doing?"

"He's married *three* women, your Honor."

"Oh, married *three* women! Why that isn't bigotry, that's *trigonometry.*

The Doctor. — Lord Bramwell, a notable wit of the English bench, was once sitting in a case where the prisoner was accused of shoplifting, "My lord, my client is not a common thief," urged the barrister for the defence. "He is suffering from kleptomania." "That is exactly the disease I am here to cure," replied Lord Bramwell, blandly.

Satisfaction. — He had been asked, on cross-examination, a lot of useless questions, among others whether or not he was born in Ireland, which last he had truthfully answered in the affirmative. Then he was asked to explain the meaning of some of the words he had used; all for the purpose of confusing him before the real point was reached. Then counsel went on:

"When you said you were 'satisfied' just now, you meant, I suppose, that you were *content?*"

"I did not."

"Well, satisfied and content are just the same are they not?"

"They are not."

"Well, suppose you explain to the Court and jury what the difference is."

"Sure, I will. Now, for instance, I might be *satisfied* that it was you I saw out behind the barn kissing my wife, Nora, but I'd be far from being *content.*"

Something of a Lawyer. — "Well, yes," replied the landlord of the tavern at Polkville, Ark., "when an attorney, appearing for a bloated railroad corporation in the face of a jury composed exclusively of middle-aged farmers, can prove, in a case wherein a widow lady — and a pretty blamed middlin' good-looking widow lady, at that — sues for the value of a calf that was run over and killed by the train, right dab in the middle of the town at high noon, with half the population beholding the slaughter; that the calf did not stop, look and listen, as warned by the sign at the crossing; that the engine did not hit the animal at all, except nominally; that the calf really died, if at all, of some obscure Latin calf-disease or other; that the company, by its faithful servant, the engineer, did an act of pure philanthrophy in killing the calf, as, instead of being a valuable possession in the hands of the widow, as alleged, it was really an incubus, in that it was engaged in eating its fair mistress out of house and home; and, lastly, that the fair plaintiff, herself, despite her tears, had once been a lady book agent — when he can achieve all that and win the case, as the colonel shorely did, no longer than a week before last, I sh'u'd presume to say that he is pretty considerable of a lawyer!" — *Puck.*

Familiar. — "It was this way Judgie," said a culprit before a New York magistrate. Whereupon the magistrate laughed, and exclaimed: "Well, if that doesn't remind me of home: That's what may wife calls me." And the fine was only $1. Still, it is not a safe precedent.

Over Oath and Under. — J. Thomas Heflin, a distinguished member of the Alabama delegation in Congress, maintains that his State is the most chivalrous in the country. "Nowhere," he recently remarked, "is this more to be observed than in those least chivalrous of places, the courts of law. Not long ago one of our best-known judges, famed for his severity and his uncompromising loyalty to the traditions of procedure, had to try a case in which one of the witnesses happened to be an actress of no small popularity in the South. It chanced that the nature of her evidence was such that the usual question about her age was not likely to be omitted, so when she came to the stand his honor told the court-clerk to suspend action for a moment; then, turning to the actress, he demanded:

"'Madam, how old are you?'

"'Twenty-six,' replied the witness, who is thirty-six if she is a day.

"'Very well,' said the Judge, politely. 'I asked you that question because, if I hadn't it would surely have been asked you when the attorney for the defense cross-examined you. And, now that you have told us your age, do you swear to tell the truth, the whole truth, and nothing but the truth?'" — *Saturday Evening Post.*

Sentence Suspended. — "You are charged with having registered illegally."

"Well, your Honor," responded the prisoner, "perhaps I did, but they were trying so hard to beat you that I just got desperate." — *Philadelphia Ledger.*

Competent. — *Congressman O'Connell* (cross-examining plaintiff an aged man whose mental capacity is the question in the case). "Have you voted?"

Plaintiff. — "Sure, I have,— for forty years."

Mr. O'Connell. — "Did you vote at the last election?"

Plaintiff. — "I did that, and I voted for *you.*"

Plaintiff's counsel. — "Your Honor, I ask to have that last stricken out as irresponsive."

Mr. O'Connell. — "Your Honor, I insist that it remain in. It shows the intelligence of the witness."

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, whi'e I only meet them at luncheon." To which the barrister dryly replied: "Your Lordship sees them at their best." — *Law Notes.*

Tears Produced in Court. — In a case recently tried in Fall River before Judge Bell, Dr. George L. Walton of Boston appeared as a witness for the defence.

The plaintiff claimed that he had been severely injured by a car leaving the rails, and that he had suffered as a result of this injury for over two years and was still suffering.

Dr. Walton testified that he had examined the plaintiff, and that in his opinion the symptoms that the plaintiff complained of were within his own control and were not genuine.

Upon cross-examination Waldo Reed of Fall River took each sympton separately and made each into a question which ended with, "Do you believe that to be a genuine symptom doctor?" and to each question Dr. Walton said "No."

The star question was reached and Reed's voice trembled with emotion as he asked, "Dr. Walton when pressure was applied to this man's back between his shoulder blades tears came to his eyes; do you believe this to be a genuine symptom?"

"No," said Walton.

Dr. Walton, can a man make tears come to his eyes without cause?"

"Hum," said Walton, "I've seen lawyers do it in court."—*Daily Law Journal.*

Dog Day Law.— In Pittsburg a woman recently died and left a thousand dollars by her will to her kioodle, Spot by name. The probate court intimated that the bequest could not be carried out, as a dog could not legally hold property, and therefore could not inherit it.

Thereupon Jaggers, with a sooty coach dog at his heels, arose and said: "Your Honor, I appear as attorney for the dog, Spot, the same which is now at bar. I beg to say that the court does not fully understand this question. While it is true that a dog cannot hold property, yet a trustee can. And in this instance this dog Spot stands in its relation to the court as an incompetent person, and I now request that I be appointed trustee for the person of the beneficiary and be allowed to give bonds for the faithful performance of my duty. This dog requires care, education, maintenance and at times, medical attendance, and I stand ready to carry out the wishes of the deceased."

The Court here seemingly lost his temper and blurted out, "No dog, or attorney for a dog, has any standing in this court. I ask that counsel and his client kinsman will make room for the next case. Out damned Spot — out I say! One, two — hell is murky — out!" — *The Phillistine.*

Not Law. — In a jury tria 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.*

The Ingenous Counsel.

The trial it progressed and to it he bore
His zeal, his skill, his learning of law and lore;
His evidence cumulated, yet his witnesses swore and swore
To everything he wanted and to more and more and more.
But, Alas! Each a different tale did unfold
And no two of them the same story told.
The defense rested then his procedure he did elect
And moved the wondering Court, a verdict to direct.
"Direct a verdict?" His Honor cried with zest,
"Your motion counsellor is surely made in jest,
This evidence here a unanimity most decidedly lacks,
Each witness has testified to a different state of facts."
"That I know," the ingenious counsel urbanely replied,
"For upon that circumstance have I purposely relied,
A similarity of recital to avoid, I diligently sought,
Fearing the monotony, would tire the learned Court."

Louis Heft.

Fortunate. — A notorious mountain moonshiner, familiarly known as "Wild Bill," was recently tried before a Federal court in Georgia, and was adjudged guilty. Before pronouncing sentence the judge lectured the prisoner on his long criminal record, and at last, informing him that the court entertained no feeling of anger toward him, but felt only unmixt pity, sentenced him to spend six years in the Federal prison at Atlanta.

Bill stolidly shifted the quid of tobacco in his mouth, and turned to leave the court room with the marshal. Once outside, the only thing he said was this:

"Well, I suah am glad he wa'n't mad at me!" — *Cleveland Leader.*

His Informal Way. — The following anecdote, after remaining in storage many years, has been recently dusted and brought to light.

A young and afterward distinguished attorney from an up-country district of New York state was arguing his first appeal in the old general term of supreme court. He had been in many legal scrimmages in justices' courts at home, but had never stood in the awesome presence of five sedate and learned judges of the supreme court, in general term assembled. His embarrassment was great. He repeated himself and misplaced his words so often that it was quite evident that he must soon be routed by his own confusion unless something should occur to break the spell. Finally, and just as he was floundering the deepest in a chaotic jumble of language and ideas, the presiding judge interrupted with the following remark:

"Mr. Smithers, I believe it will be a great relief to yourself and to the court if you will address us in the same free and informal way that you doubtless use in addressing your local justice of the peace."

"Well, then," replied Smithers, "I wish that while I am busy alleviating your honor's dense ignorance of the law you would keep your d—d mouth shut!" The court laughed heartily and waved for him to proceed. He grew eloquent, and won his case in the midst of hearty applause. — *Bohemian.*

More Hubbard Stories. — The late Judge Hubbard of Iowa was known in his age and generation for telling the most cutting things in court and out of court. The following was told in the heat of a law suit against an old client, for which the judge had no use. The witness had been on the stand in cross-examination all day, when the judge adjourned court for a few minutes. The witness pulled out a red bandana to wipe his brow, when Judge Hubbard piped out in a shrill voice, saying: "It makes you sweat to tell the truth, John, don't it?" This cutting remark was never forgiven or forgotten by the aged banker, John Ware. Another time a very talkative lawyer, who was getting the worst of it in the law suit with the judge, stated: "I was once judge in the state of Nebraska, and ought to know something about the law." The judge replied: "Well, you mean you kept the seat of the judge warm while he had gone for dinner, don't you?" At another time the judge opposed an ex-governor of the state in a fierce law-suit, where the ex-governor received no mercy at the hands of this old man, and finally to remind the judge he said: "You have evidently forgotten that I appointed you judge while governor of this state." The judge replied in a sarcastic tone saying: "Yes, I am aware of that, and it is the only decent thing you did while you were governor."

Professional Ethics. — "You'll have to send for another doctor," said the one who had been called, after a glance at the patient.

"Am I so sick as that?" gasped the sufferer.

"I don't know just how sick you are," replied the man of medicine, "but I know you're the lawyer who cross-examined me when I appeared as an expert witness. My conscience won't let me kill you, and I'll be hanged if I want to cure you. Good-day." — *Philadelphia Ledger.*

Explained. — "You state in one place that you were born in 1884?"

"Yes, sir."

"And in another that you were born in 1885?"

"Yes, sir."

"Isn't that inconsistent?"

"Oh, no," smiled the witness. "I was born in 1884, and just stayed born. Why, I'm born yet."

Then the great lawyer had to recognize that a novelty had been sprung on him.

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THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

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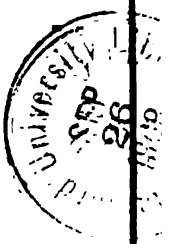

CONTENTS

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STIMSON

HIS POINT OF VIEW

Curiously, none of the books, heretofore published on this subject, has given more than passing notice to that phase of the constitution having to do with PERSONAL LIBERTY, while the state constitutions have never been systematically treated. Upon this neglected field Professor Stimson has now entered.

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It will thus be seen that the book covers a much broader ground than the ordinary treatise on a master's liability to his servants.

Our Contributors.

Mr. E. J. Moore received the degrees of Bachelor of Arts and Bachelor of Law at London, and is a barrister in practice at Harold's Cross, Dublin. In the belief that the subject of his sketch would prove of special interest to American lawyers of Irish descent, he decided to publish it in America.

We are particularly fortunate in this issue in being able to print the address recently delivered before the Virginia Bar Association by Honorable William H. Taft. The candidacy for our highest executive office of one who has been eminent in our profession, and who has shown his appreciation of the pressing importance of reforms in our practice and procedure, makes his address of peculiar importance to the Bar.

Donald Richberg is a graduate of the Harvard Law School and is a member of the firm of Richberg & Richberg of Chicago, who has previously favored us with contributions both serious and entertaining. We publish in this number an after-dinner speech recently delivered by him in Chicago.

William G. Hastings is Professor of Law in the Law School of the University of Nebraska. His article is a refreshing rejoinder to the somewhat sensational utterances with which we have been recently favored on the right of our courts to declare acts of legislature unconstitutional.

Mr. Blythe of the Harvard Law School found time this summer to rummage among its dusty tomes and prove that his sense of humor can find expression in prose as well as in verse.

The Green Bag

Vol. XX. No. 9 BOSTON September, 1908

LORD O'HAGAN[1]

By E. J. Moore

THOMAS O'HAGAN was born on the 29th of May, 1812. His father was Edward O'Hagan, a small trader; his mother was Mary, daughter of Captain Bell. When the time came to think about his education, he was first put under the care of Dr. Montgomery, after which he was placed in the famous Belfast Academical Institution. The head master was then Dr. Hicks, a Protestant clergyman of high renown for his scholarship. Sheridan Knowles was O'Hagan's teacher, and among his schoolmates were to be found Cairns, afterwards Lord Chancellor of England; Napier, afterwards Lord Chancellor of Ireland; and numbers of others destined for distinction in various walks of life. The school was remarkable in many respects. The prizes were awarded on the votes of the scholars themselves. The plan seems to have answered very well in O'Hagan's case: although he was the only Catholic in the school, prize after prize in various subjects was voted to him. There was also an academic debating society attached to the school, which gave O'Hagan full opportunity to display his powers as an orator. He gave a particularly stirring address as president of this society, which attracted great attention to his abilities. When the time came for him to choose his walk in life, it was decided that he should go to the bar. At the commencement of Michaelmas term, 1831, he entered his name at the King's Inns, Dublin, the certificate for his admission being signed by Daniel O'Connell. It was the practice in those days for candidates for the Irish bar to spend a part of the time of their probation in London. Thomas Chitty, the special pleader, was a noted coach for such candidates, and O'Hagan became his pupil. In Hilary, 1836, when O'Hagan was not yet 24, he was called to the bar of Ireland, and chose the Northeast Circuit. During his earlier years he was a contributor to the press both of London and Ireland, especially the *Newry Examiner*. But even as a barrister he rose rapidly into notice. Like most young lawyers, he won his early successes in defending prisoners. Some men had been tried, convicted, and executed in Armagh for an agrarian murder. The jury had been packed according to the system then prevalent, not one Catholic being permitted to serve on it. The *Belfast Vindicator* protested against this unfairness, and a criminal information was laid against Mr. Duffy (afterwards Sir Charles Gavan Duffy), the editor. His counsel were Mr. O'Connell, Mr. O'Hagan, and Sir Colman O'Loghlen, who had then been scarcely a year at the bar. O'Connell was unexpectedly detained in London, and the speech for Mr. Duffy fell to O'Hagan. His defense was so masterly that the young lawyer at once acquired a splendid reputation. Of course Mr. Duffy was found guilty, and Mr. O'Hagan distinguished himself on a new trial motion by a most telling and effective

[1] Our facts are drawn from the obituary notices immediately after the death of Lord O'Hagan in the *Times* and in all the Dublin daily papers: the *Law Times*, the *Irish Law Times*, the *Tablet*, the *Annual Register*; also Burke's "Peerage," Oliver Burke's "Lord Chancellors of Ireland," Lampson's "Ireland in the Nineteenth Century," "The Dictionary of National Biography," etc.

speech, exposing the unfairness and irregularity which had marked the former trial. In 1843 O'Hagan became a member of the Loyal National Repeal Association. Not that he believed in repeal himself; his inclination was rather towards some form of federation; but he wished to identify himself with the cause of the country, and this seemed to him the best way of doing so.

In 1844 he formed one of the band of barristers to whom the defense of O'Connell and his fellow traversers was intrusted: the crime alleged was conspiracy. O'Connell and the others were found guilty and sent to prison accordingly, but they appealed to the House of Lords; and it was O'Hagan who brought down the news (there were no telegraphs then) that the Lords had reversed the decision of the Irish Queen's Bench, thus setting O'Connell and his party at liberty.

In 1847, while still a junior, he was appointed assistant barrister for County Longford. While engaged in this office, he did his best to bring under the notice of the authorities the question of the better treatment of criminals. Even at this time he was the confidential adviser of the bishops in all matters relating to Catholic interests. In 1849, O'Hagan took silk, and in 1855 he defended Father Petcherine, a Roman Catholic priest of Russian birth, who had been conducting a mission in the Roman Catholic church at Kingstown. There was no evidence that Father Petcherine was guilty of the misdemeanour (of burning the Bible) for which he was tried. To this he probably owed his discharge. Mr. O'Hagan's eloquent defense of the Catholic Church was, however, published in France, Germany, and Spain, in faithful translations.

In 1856 O'Hagan was removed from the chairmanship of County Longford to that of County Dublin. On the 15th of October, 1857, it fell to him to present the statue of Tom Moore to the Lord Mayor and Corporation on behalf of the citizens of Dublin. The chair was taken by the Earl of Charlemont. There were also present Lord Carlisle (the Lord Lieutenant), the Lord Mayor and Corporation, and a distinguished assembly besides. O'Hagan, in the course of an eloquent speech, made the remark that statues, equestrian and others, of foreigners were to be found in plenty, but not one erected to the memory of an Irishman. In 1858 he was chosen to defend O'Donovan Rossa and the other members of the Phœnix conspiracy. It will be remembered that this conspiracy was started at Skibbereen by a few young men, of whom the chief was Jeremiah Donovan, who afterwards styled himself O'Donovan Rossa. Their headquarters at Skibbereen was the Phœnix National and Literary Society. Among their most dangerous members was a man named Stephens, one of the rebels of 1848, who had been plotting mischief ever since. Stephens, by holding out assurances of American support, persuaded these men to prepare for a rising which was to deal a fatal blow to the supremacy of England. On the 3rd of December, 1858, a vice-regal proclamation was issued warning the country of a dangerous conspiracy. The conspirators were captured, and, after a brilliant defense by O'Hagan, one of the culprits was sentenced to ten years' penal servitude; the others, including O'Donovan Rossa, were released on their own recognizances. We have only to add that Stephens fled to America and died in obscurity.

In 1859 O'Hagan was made third sergeant and a bencher of the King's Inns. In 1860 he was appointed Solicitor General for Ireland by Lord Palmerston, who was then in power, and for the present politics formed a part of his concerns. In 1861 he was appointed Attorney-General for Ireland, and naturally this made him anxious for a seat in the House of Commons. At first he tried for County Cork, but he found the feeling so strong against him in consequence of his being in office that he gave up the attempt, and went in for Tralee, where he

succeeded, in 1863, in getting a seat. For the next two years we find him unremitting in his attendance on Parliament. He was a strong supporter of national education, of which he was a commissioner. To Mr. O'Hagan's exertions we are indebted for the abolition of special or private bailiffs and the substitution of sheriffs' bailiffs in the execution of writs issuing from the county courts. He also, in 1864, brought in a measure for reforming the practice of the Court of Chancery in Ireland. Mr. Whiteside opposed the measure, though he admitted that "the Attorney-General for Ireland had given the House a clear and able statement," and it was lost for the present, though it was passed later on by a Conservative government. On the 26th of January, 1865, Mr. O'Hagan was elevated to the bench as a judge of the Court of Common Pleas, and of course for a time he left Parliament. But he left it with a grand reputation. In 1867 he was elected president by the Statistical Society in succession to Archbishop Whately and Judge Longfield. In the same year, at the meeting of the Social Science Congress at Belfast, he again dealt with the subject of our criminal classes. A reference to the Brehon Code naturally led up to the neglect of the Irish language in the Queen's Colleges. Mr. O'Hagan's labors on the Marriage Law Commission are well known to the world; they resulted in all distinctions between Catholic and Protestant clergy marrying Catholics and Protestants being swept away. From the 6th of July, 1866, to the 8th of December, 1868, the Conservatives were in power. But on the 9th of December, 1868, Mr. Gladstone came in, and took the opportunity of promoting O'Hagan to be Lord High Chancellor of Ireland. This was rendered possible by the Obnoxious Oaths Act (30 and 31 Victoria, Chap. 75) being passed in 1867 through the energy of Sir John Gray. The measure had been brought in by Sir Colman O'Loghlen. Its object was to repeal the restrictions which debarred Roman Catholics from holding the offices of Lord Lieutenant and Lord Chancellor of Ireland; also to enable Roman Catholic mayors and judges to attend their own places of worship in their robes of office, and further to substitute for the oaths required of Roman Catholics on taking office the same oath as is taken by members of Parliament of that persuasion. That part of the measure relieving the Lord Lieutenant from these restrictions was disallowed by both Houses, but in other respects the measure passed. It is impossible to conceive the emotion which was felt on hearing of the appointment of O'Hagan as Chancellor. One hundred and seventy-seven years had passed away since a Roman Catholic Chancellor held the Great Seal of Ireland. Probably Sir Alexander Fitton and O'Hagan were the only Roman Catholic Chancellors since the Reformation. The scene on Monday, the twelfth of January, 1869, when the new Chancellor took his seat for the first time, will probably never be forgotten. The bar seats, the gallery, the side passages, were filled to overflowing. The bar seats, indeed, were filled by ladies. The *Irish Times* says: "The moment His Lordship appeared in Court, loud cheers were heard for several minutes."

In the Court of Equity the new chancellor exhibited the ability which had distinguished him in the Court of Common Law. Among the cases which he dealt with, probably none is more remarkable than the great and romantic case of *Croker* v. *Croker*. In this case there are three important characters, a father, a sort of Sir Anthony Absolute; a son, so weak and impressionable that the father could bend him like wax to his will; and a solicitor, supposed to advise the son, but overawed by the imperious father. The question was whether the deeds prepared by this solicitor and signed by the son were to stand. The Vice-Chancellor said "Yes"; the Court of Appeal, presided over by Lord Chancellor O'Hagan, said "No." Another case which

showed the integrity of O'Hagan was what is called *Meade's Minors*. In this case an attempt was made by Catholic relatives to interfere with the parental rights of the father, who happened to be a Protestant. O'Hagan said, and every lawyer must agree with him, that the father alone was responsible for the religious education of his children.

We have now to record a very sad event in the Lord Chancellor's life. He had married in 1836, immediately after being called to the bar, Mary, the daughter of Charles Hamilton Teeling of Belfast. One child by this marriage is still living, having married in 1865 Mr. John O'Hagan, Q. C., afterwards Mr. Justice O'Hagan, who died in 1900. The widow now lives abroad. Soon after his elevation to the Chancellorship, Mrs. O'Hagan died, and for some years the Chancellor was a widower. In 1870 he was promoted to the Peerage of the United Kingdom, as Lord O'Hagan of Tullahogue. This was what is often called "the golden age of Liberalism." A bill of the utmost consequence to Ireland, the Irish Church Disestablishment Bill, had been already passed in 1869. The immediate business for which Lord O'Hagan's services were required was doubtless the Irish Land Bill. It was thought that a man of such well-known eloquence would give great assistance when the bill came to the House of Lords. Accordingly on the 8th of June, 1870, it was announced in the *Daily News*, then the premier English Liberal newspaper, that it was Her Majesty's pleasure to raise the Chancellor to the Peerage of the United Kingdom, as Lord O'Hagan of Tullahogue. Probably this does not convey much to the ordinary reader, but to some it meant a great deal. Tullahogue was celebrated as the seat of the O'Hagans in remote times, when the O'Neills were kings and the O'Hagan acted as Chief Brehon. All this came to an end at the "Flight of the Earls," early in the time of James the First, and Tullahogue passed into the hands of a patentee. We learn with some amusement that a letter of remonstrance was sent by the descendant of this patentee against an O'Hagan taking his title from Tullahogue, considering that the confiscated territories of the O'Hagans were granted by patent to his predecessor as far back as the time of James the First. Of course, however, Lord O'Hagan was allowed to vindicate the rights of his clan, athough he had no desire and no possibility of getting back their lands. On the 23rd of June, fifteen days afterwards, Lord O'Hagan was in his place in the House of Lords, speaking on the Irish Land Bill, which he described as "a happy reversal of the policy of the past, a great attempt at reparation for wrongs inflicted and endured, and a bright augury for a better future for that country to which he was bound by every tie." The Land Act passed, and Lord O'Hagan's opinion on it was thus expressed to the Statistical Society on the 17th of November of the same year: "This Act gives the tenant farmer protection not in Ulster only, but throughout the country, more ample than in times gone by he ever dreamed of possessing. The Irish tenant who, by toil and thrift, has accumulated a little money, may look forward with fair anticipation of bettering his social position and lifting his family to a higher station in the world. The good landlord will not really feel the measure hard upon him, for it requires him to do very much as he had done hitherto, and as his own kindly instinct and sound judgment would have led him always to do without legal pressure." In 1871 Lord O'Hagan was instrumental in the passing of the celebrated Jury Act, 34-35 Vic. Cap. 65. The main object of this Act was to prevent partiality; but by altering the qualification it admitted a class hardly suitable. The Lunacy Act, the Local Government Act, and the Charitable Donations Act were passed in the session of 1871. In connection with all these Acts Lord O'Hagan

gave great assistance, though the last two of them did not refer to Ireland. The Lunacy Act has in many instances simplified and cheapened the procedure.

In February, 1874, Gladstone's Ministry came to an end, and on the 22nd of that month Lord O'Hagan sat apparently for the last time in the Court of Chancery. After the business of the day was concluded the Solicitor General made a short but eloquent reference to Lord O'Hagan's imminent retirement, to which the Lord Chancellor, who was much affected, made a suitable reply. The entire bar rising from their seats greeted his speech with loud applause, which continued until after he had left the court. After he had quitted the Chancellorship he was nearly always to be found in the House of Lords hearing appeal cases.

In 1874 Lord O'Hagan also presided over the economic section of the British Association; and one of his special services about that time was the exercise of his great personal influence in composing a dispute which had caused a strike in the staple trade of his native town of Belfast.

In 1875 he was selected to deliver the inaugural address on the occasion of the O'Connell centenary, but owing to the illness of a relative in the North he was not able to be present, and gave the speech to the Lord Mayor to do what he liked with. At least so we read in all the daily papers of the next day. The *Freeman's Journal*, however, of the 2nd of February, 1885, in its obituary notice makes these remarks: "As a politician, he (Lord O'Hagan) had passed through an age of insincerity, and it was almost impossible for him to remain proof against the prizes which beckoned him to Whiggery. The people, seeing that he had climbed on their shoulders to place and power, were not slow to express their sense of his want of staunchness. His selection to deliver the inaugural address on the occasion of the O'Connell centenary was an ill-advised one, and resulted in a scene, and in the address being either delivered in dumb show or not being delivered at all. If Lord O'Hagan had died shortly after his elevation, the melancholy event would have excited different feelings from those which it awakened in a new era of national life and at a time when Whiggery is the most detested name in Ireland, and the Whig section most effete, epicene, and worthless."

On referring back to the papers of the day, we find on the 9th of August, 1875, the *Freeman's Journal* saying: "Lord O'Hagan, who was unavoidably prevented from being present on Friday, owing to the dangerous illness of a member of his family, having been invited to deliver the oration, has kindly forwarded to us the following address, which he prepared for the occasion." (Then follows the address.) On referring back to the *Freeman's Journal* of the 7th of August, 1875, we find the Lord Mayor (McSwiney) described as addressing the assembly thus: "There is a subject on which I have a few words to say before this magnificent assemblage separates. Your glorious procession to-day was, as you know, to have been concluded by an address from Lord O'Hagan in honor of O'Connell [hear, hear, and counter demonstrations by the Amnesty Association, who violently waved their bannerets]. Unhappily Lord O'Hagan is unable to be here: he is detained in the North of Ireland by the serious illness of a very near relative. The cause of his absence must command our sincere sympathy. We regret the absence itself. When the selection was entrusted to me of an orator to handle fitly so great a theme, I naturally turned to Thomas O'Hagan [hear, and groans, and clanking of chains by the Amnesty Association]. In early manhood, he was the attached friend of O'Connell. In mature age he completed a brilliant career by being the first Catholic Lord Chancellor since the reign of William the Third. He thus seemed to me to embody the glorious conquest achieved by O'Connell

[hear, hear, and counter demonstrations], when he flung open to all his fellow-countrymen the paths of honorable ambition, which lead to the highest rank and dignity. Lord O'Hagan would, I am sure, have charmed us by his eloquence, and roused still more (if that were possible) our enthusiasm for the great hero of this celebration. As it is, however, he did not leave undone what he had undertaken. I hold in my hand the address which Lord O'Hagan prepared for delivery, and which will be given to you to-morrow morning through the columns of the pubilc press, in the very words which he would himself have spoken. And our regret for his absence will be mitigated when we remember to how few of you the actual hearing of the oration would have been physically possible, few even among the myriads I see before me, and mere units in comparison with the millions and millions of our countrymen in Ireland, England, Scotland, America, Australia, and everywhere over the habitable globe, whom the labors of the press will make partakers of the joy and glory of this day." The Lord Mayor said that Lord O'Hagan had commissioned him to read the address or any portion of it he chose [hear, hear, and cries of "Butt" and "Home Rule"]. His Lordship remarked he would not trouble them by repeating the address at that late hour of the evening [hear, hear, cries of "Butt"]. He held in his hand an address which he had received from Canada on the subject of the centenary [cries of "Read it," and "Butt," "Butt," "hear Butt"].

In 1876 the Grattan monument facing Trinity College was unveiled, and Lord O'Hagan was one of the principal speakers. In August, 1877, he delivered at Antwerp an address at the opening of the fifth annual conference for the reform and codification of the Law of Nations, to which subject he had given great attention. In October of the same year Lord O'Hagan made an eloquent speech on the opening of the Letterkenny Institute in the county of Donegal, in which he gave such a brilliant description of their landscapes, and also their traditions, as must long remain among their most cherished memories. His speech in 1878 in support of the Intermediate Education Bill was a masterpiece of eloquence. We regret that we have only space for the peroration: "My Lords, if the fair promises of this bill be realized, we shall yet see the Irish people self-reliant and self-respecting, redeemed by the power of an awakened intelligence. Too many of them have mourned lapsed opportunities and baffled hopes. Too many have passed from childhood to adolescence, and from youth to age, and gone to the grave without the culture which would have enabled them to rise to the level of their own capacities, and improve and exalt their country. A brighter day has dawned; a happier prospect opens before them. Legislation like this will rouse them from their mental torpor, and inspire them with courage for the battle of life. The pool of Bethesda was sluggish until an angel stirred it and a healing grace descended on its waters. The bones were dry and formless in the vision of the prophet, but the spirit moved upon them, and they grew to shapes of strength and beauty; and with God's blessing, the influence of this measure and those which may succeed it — with as sound a principle and as wise an end — will launch Ireland on a great career, and help her to pursue it with hope and energy."

It was said above that O'Hagan made a fine speech when Tom Moore's statue was unveiled in 1856. It is not therefore surprising that in 1879, on the occasion of the Moore centenary, Lord O'Hagan was requested by the committee to make a speech on the subject in the Exhibition Building.

When Gladstone retired in 1874, Disraeli came into power; but the swing of the pendulum again brought the Liberals into office in 1880. Mr. Gladstone was again Prime Minister, and Lord O'Hagan was

again appointed Lord High Chancellor for Ireland, but owing to failing health he resigned finally in 1881. There was no such demonstration on his resuming the Chancellorship as occurred when he first took the office, but on his retiring the same graceful amenities as marked his earlier retirement were to be witnessed. From 1881 Lord O'Hagan's health gradually sank. He tried Biarritz, but in vain, and died in London on the first of February, 1885, in his 73rd year, surrounded by his family. He was unconscious for some time before death. He died on a Sunday, a fitting day for the passing into his eternal rest of this great and good man. As we gently close the door on the chamber of death, we cannot but remember the estimate of his character left by one who knew him well: "Pure and noble in his private life, he met with great sorrows as with great prosperity,—sorrow he bore with resignation, prosperity without pride." After he had retired for the second time from the Chancellorship he was made a Knight Companion of St. Patrick, being the first lawyer who ever wore the ribbon of this order. He was also made an honorary bencher of Gray's Inn. He was already a Commissioner of National Education, a Commissioner of Charitable Donations and Bequests, a Privy Councillor for Ireland, Senator of Queen's University, and Vice Chancellor of the Royal University, of Ireland. Lord O'Hagan lies buried at Glasnevin. There is a fine oil painting of him in the King's Inns dining room, and a noble statue by Farrell in the Central Hall of the Four Courts. In 1871 Lord O'Hagan had remarried, this time to Alice Mary, youngest daughter and co-heiress of Colonel Towneley, by whom he had several children, one of whom is the present Lord O'Hagan. The Towneleys were zealous upholders of the Catholic faith even during the severity of the Penal Laws. Lord O'Hagan, on account of his courtly manner and persuasive style, was known as "Silken Thomas," a name already familiar to readers of Irish history, though for a very different reason, as the *sobriquet* of Lord Thomas Fitzgerald. The title was not undeserved by O'Hagan. The patience with which he bore the unremitting attacks of Lord Justice Christian, during his first Chancellorship, would entitle him without more to this somewhat whimsical appellation. Lord O'Hagan was a distinguished patron and friend of the Law Students' Debating Society of Ireland. For ten years he gave the gold and silver medals for oratory, which have been continued under his name up to this date. The *Law Times* in reviewing his life makes these remarks:

"The career of Lord O'Hagan, rightly read, is pregnant with lessons to the most bitterly prejudiced of our compatriots in Ireland. He was a Roman Catholic, he identified himself with the Repeal Association, he defended O'Connell when he and others were indicted for conspiracy, he defended Father Petcherine against the prosecution of the Crown, he defended the Phœnix conspirators who were the precursors of the Fenians. Notwithstanding all this, he passed from one high office to another, until he at length found himself one of the very few Roman Catholic Peers in the kingdom who had been created since the Emancipation Act. All this is natural and proper. There is no government in the world which recognizes more clearly than England that a man is not to be punished but rather rewarded for fearless conduct in his professional career. But there is a certain nobility in the recognition which in this case is conspicuous and exemplary; and it would not be amiss if Irishmen were taught to appreciate what is in England regarded as a matter of course, the fact that administrations honor substantially no less than cordially professional excellence, irrespective of the cause in which it is displayed."

We may mention also that O'Hagan's early experience is a proof of the generosity of his fellow scholars, who, far

from annoying him, were proud of him, and by a self-denying ordinance passed numbers of prizes to him which no doubt he deserved but which they need not have given. Again Lord O'Hagan's political friends, as we all know, were the Liberals, among whom the most ardent and determined were the Protestant Dissenters. Surely it ought to speak for them with every unprejudiced Catholic that they saw Lord O'Hagan's merits and so generously rewarded them; and it should be borne in mind that these very Protestant Dissenters are the successors of the Puritans, of whom Cromwell was notoriously one. In another three or four years we shall be coming to the centenary of Lord O'Hagan's birth, and we have no doubt it will be seen that Protestant Belfast is as willing to do honor to a Catholic son who has done her credit as the boys of the Belfast school were to do honor to a Catholic fellow-student whose abilities they recognized.

DUBLIN, IRELAND, August, 1908.

INEQUALITIES IN THE ADMINISTRATION OF JUSTICE

By Hon. William H. Taft

THE chief reason why the state devotes so much time and effort to the administration of justice is to promote the cause of peace and tranquillity in the community. Speaking theoretically and ideally, of course our aim is to secure equal and exact justice; but practically the object sought is peace.

The most recent instance of this was set forth most succinctly and forcibly in the able report of Governor Montague as to the progress in the establishment of a permanent tribunal at The Hague to settle international difficulties. While in theory this is to secure exact justice between the nations, practically its purpose is to avoid war.

In a republic like ours, under popular control, with the dual form of government between the states and the United States, politico-legal questions which might tend to bring on conflict between parties and factions among the people were, first, the distribution of power under the federal Constitution between the national government and the state governments; second, the division between the executive, the legislative, and the judicial branches of the government; and, third, the limitations upon governmental action either through the national government or the state government, in respect to the rights of individuals. Under our fundamental compact and its subsequent construction by the judicial branch there was introduced a new and most effective instrument for the promotion of the peaceable settlement of these great governmental political controversies. The decisions in the cases of Marbury *v.* Madison and Cohen *v.* Virginia, which in their personal aspect took on the phase of a fundamental difference of opinion between two great Virginians, established the principle in this country, which has never been departed from, that the ultimate arbiter in respect to such great political and legal issues was and is the Supreme Court of the United States. It is true that this unique feature did not save us from the greatest civil war of modern times; but no one at all familiar with the history of the country can deny that this function of the Supreme Court of the United States and a similar one within the sphere of their jurisdiction of the Supreme Courts of the states ultimately to decide upon the limitations of legislative and executive power have greatly contributed to the peace and tranquillity of our community. This peculiar power of courts with us has carried their usefulness for the peaceful settlement of controversies beyond anything attempted in other countries. Of course, the exercise of this power must rest on the existence of a written constitution. Without it there would be no guide for the courts except indefinite traditions that could hardly be made the basis for judicial decision. The power of the courts to declare invalid laws of the legislature we know was not adopted without very bitter opposition; but I think the controversy was settled now so long ago that we generally agree that it has much contributed to the smooth working of our Constitution and to the supremacy of law and order in our community, and offers great advantages over the methods of settling a similar class of questions in other countries.

While we may properly felicitate ourselves on this widened function of our courts, enabling us to avoid less peaceable methods of settling important politico-legal questions, have we the right to say that our present administration of justice generally insures continued popular satisfaction with its results? I think not. It may be true that down to the present time it has supplied a means of settling controversies between individuals and of bringing to punishment those who offend against the criminal laws sufficient to prevent a general disturbance

of the peace and to keep the dissatisfied from violent manifestation against the government and our present social system.

There are, however, abundant evidences that the prosecution of criminals has not been certain and thorough to the point of preventing popular protest. The existence of lynching in many parts of the country is directly traceable to this lack of uniformity and thoroughness in the enforcement of our criminal laws. This is a defect which must be remedied or it will ultimately destroy the republic.

I shall not delay you this morning, however, with a discussion as to the reforms which ought to be adopted in the criminal branch of our jurisprudence. I have attempted this in an address on another occasion. I wish to confine myself to the delays and inequalities in the administration of justice in controversies between private persons, including, of course, corporations.

The present is a time when all our institutions are being subjected to close scrutiny with a view to the determination whether we have not now tried the institutions upon which modern society rests to the point of proving that some of them should be radically changed. The chief attack is on the institution of private property and is based upon the inequalities in the distribution of wealth and of human happiness that are apparent in our present system. As I have had occasion in other places to say frequently, I believe that among human institutions that of private property, next to personal liberty, has had most to do with the uplifting and the physical and moral improvement of the whole human race, but that it is not inconsistent with the rights of private property to impose limitations upon its uses for unlawful purposes, and that this is the remedy for reform rather than the abolition of the institution itself. But this scrutiny of our institutions, this increasing disposition to try experiments, to see whether there is not some method by which human happiness may be more equally distributed than it is, ought to make those of us who really believe in our institutions as essential to further progress anxious to remove real and just grounds for criticism in our present system.

I venture to think that one evil which has not attracted the attention of the community at large, but which is likely to grow in importance, as the inequality between the poor and the rich in our civilization is studied, is in the delays in the administration of justice between individuals. As between two wealthy corporations, or two wealthy individual litigants, where the subject-matter of the litigation reaches to tens and hundreds of thousands of dollars, where each party litigant is able to pay the expenses of litigation, large fees to counsel, and to undergo for the time being the loss of interest on the capital involved, our present system, while not perfect, is not so far from proper results as to call for anxiety. The judges of the country, both state and national, are good men. Venality in our judges is very rare; and while the standard of judicial ability may not always be as high as we should like to see it, the provisions for review and for free and impartial hearing are such as generally to give just final judgments. The inequality that exists in our present administration of justice, and that sooner or later is certain to rise and trouble us, and to call for popular condemnation and reform, is in the unequal burden which the delays and expenses of litigation under our system impose on the poor litigant. In some communities, I know, delays in litigation have induced merchants and commercial men to avoid courts altogether and to settle their controversies, by arbitration, and to this extent the courts have been relieved; but such boards of arbitration are only possible as between those litigants that are members of the same commercial body, and are in a sense associates. They offer no relief to the litigant of little means who finds himself engaged in a controversy with a wealthy

opponent, whether individual or corporation.

The reform, if it is to come, must be reached through the improvement in our judicial procedure. In the first place, the codes of procedure are generally much too elaborate. It is possible to have a code of procedure simple and effective. This is shown by the present procedure in the English courts, most of which is framed by rules of court. The code of the state of New York is staggering in the number of its sections. A similar defect exists in some civil law countries. The elaborate Spanish code of procedure that we found in the Philippines when we first went there could be used by a dilatory defendant to keep the plaintiff stamping in the vestibule of justice until time had made justice impossible. Every additional tecnicality, every additional rule of procedure adds to the expense of litigation. It is inevitable that with an elaborate code, the expense of a suit involving a small sum is in proportion far greater than that involving a large sum. Hence it results that cost of justice to the poor is always greater than it is to the rich, assuming that the poor are more often interested in small cases than the rich in large ones — a fairly reasonable assumption.

I listened with much pleasure to the discussion yesterday in respect to the proposed amendment to your procedure in Virginia, and I was reminded of a discussion of the same subject by that great lawyer, Mr. James C. Carter, of New York. He was the leader of the opposition to the New York code, and had to meet Mr. David Dudley Field, who was its chief supporter. Mr. Carter impressed me with having, in that particular discussion the better side. He showed that under the Massachusetts procedure (which is, I fancy, not unlike yours in Virginia, to wit, a retention of the common law forms of action, together with the division between law and equity, with modifications to dispense with the old technical niceties of common law and equity pleading), the decisions on questions of practice and pleading in Massachusetts were not one-tenth of those arising under the code of New York, and his argument was a fairly strong one in support of the contention which I heard here yesterday, that it was better to retain the old system and avoid its evils by amendment than to attempt a complete reform. However, it is to be said that a study of the English system, consisting of a few general principles laid down in the practice act, and supplemented by rules of court to be adopted by the high court of judicature, has worked with great benefit to the litigant, and has secured much expedition in the settlement of controversies, and has practically eliminated the discussion of points of practice and pleading in the appelate courts. My impression is that if the judges of the court of last resort were charged with the responsibility within general lines defined by the legislature for providing a system in which the hearings on appeal should be as far as possible with respect to the merits and not with respect to procedure, and which should make for expedition, they are about as well qualified to do this as any body to whom the matter can be delegated.

This system of delegating questions of procedure to courts has a precedent of long standing in the Supreme Court of the United States, for under the Federal statutes that court has to frame the rules of equity to govern procedure in equity in the Federal courts of first instance. I may say incidentally that with deference to that great court, it has not given particular attention to the simplification of equity procedure and to the speeding of litigation in Federal courts which might well be brought about by a radical change in the rules of equity prescribed by it. It may be and probably is the fact that under the constitutional provision, Congress could not do away with the separation of law and

equity cases as has been done in the codes of many of the States. I regret this because such a change makes for simplicity and expedition in the settlement of judicial controversies. It is clear, however, that the old equity practice could be greatly simplified. It has been done in England, and it ought to be done in the Federal courts.

One reason for delay in the lower courts is the disposition of judges to wait an undue length of time in the writing of their opinions or judgments. I speak with confidence on this point, for I have been one of the sinners myself. In English courts the ordinary practice is for the judge to deliver judgment immediately upon the close of the argument, and this is the practice that ought to be enforced as far as possible in our courts of first instance. It is almost of as much importance that the court of first instance should decide promptly as that it should decide right. If judges had to do so, they would become much more attentive to the argument during its presentation and much more likely on the whole to decide right when the evidence and arguments are fresh in their mind. In the Philippines we have adopted the system of refusing a judge his regular monthly stipend unless he can file a certificate, with his receipt for his salary, in which he certifies on honor that he has disposed of all the business submitted to him within the previous sixty days. This has had a marvelously good effect in keeping the dockets of the court clear.

It may be asserted as a general proposition, to which many legislatures seem to be oblivious, that everything which tends to prolong or delay litigation between individuals, or between individuals and corporations, is a great advantage for that litigant who has the longer purse. The man whose all is involved in the decision of the lawsuit is much prejudiced in a fight through the courts, if his opponent is able, by reason of his means, to prolong the litigation and keep him for years out of what really belongs to him. The wealthy defendant can almost always secure a compromise or yielding of lawful rights because of the necessities of the poor plaintiff. Many people who give the subject hasty consideration regard the system of appeals, by which a suit can be brought in a justice of the peace court and carried through the other courts to the Supreme Court, as the acme of human wisdom. The question is asked: "Shall the poor man be denied the opportunity to have his case re-examined in the highest tribunal in the land?" Generally the argument has been successful. In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must be given to the other and wealthier party, of carrying the litigation to the court of last resort, which generally means, two, three, and four years of litigation. Could any greater opportunity be put in the hands of powerful corporations to fight off just claims, to defeat, injure or modify the legal rights of poor litigants, than to hold these litigants off from what is their just due by a lawsuit for such a period, with all the legal expenses incident to such a controversy? Every change of procedure that limits the right of appeal works for the benefit in the end of the poor litigant and puts him more on an equality with a wealthy opponent. It is probably true that the disposition of the litigation in the end is more likely to be just when three tribunals have passed upon it than when only one or two have settled it; but the injustice which meantime has been done by the delay to the party originally entitled to the judgment generally exceeds the advantage that he has had in ultimately winning the case. Generally in every system of courts there is a court of first instance, an intermediate court of appeals and a court of last resort. The court of first instance and the intermediate appellate court should be for the purpose of finally disposing in a just and prompt way of all controversies

between litigants. So far as the litigant is concerned, one appeal is all that he should be entitled to. The community at large is not interested in his having more than one. The function of the court of last resort should not primarily be for the purpose of securing a second review or appeal to the particular litigants whose case is carried to that court. It is true that the court can only act in concrete cases between particular litigants, and so incidentally it does furnish another review to the litigants, in that case; but the real reason for granting the review should be to enable the Supreme Court to lay down general principles of law for the benefit and guidance of the community at large. Therefore, the appellate jurisdiction of the court of last resort should be limited to those cases which are typical and which give to it in its judgment an opportunity to cover the whole field of the law. This may be done by limiting the cases within its cognizance to those involving a large sum of money, or to the construction of the Constitution of the United States, or the States, or their statutes. The great body of the litigation which it is important to dispose of, to end the particular controversies, should be confined to the courts of first instance and the intermediate appellate courts. It is better that the cases be all decided promptly, even if a few are wrongly decided.

In our supreme courts the business is disposed of with perhaps as great promptness as is consistent with the purpose of their jurisdiction. The criticism that courts of last resort are too much given to technicality has, I believe, some merit in it. Codes might be drawn, however, giving the courts of review more discretion in this matter than they now have by requiring the party complaining of an error in the trial court to show affirmatively that the result would have been different if the error had not been committed. The difference in importance between an error in the hurly-burly of the actual trial and in the calm of a court of review under the urgent argument of counsel for plaintiff in error and the microscopic vision of an analytical but technical mind on the supreme bench is very great.

The complaints that the courts are made for the rich and not for the poor have no foundation in fact in the attitude of the courts upon the merits of any controversy which may come before them, for the judges of this country are as free from prejudice in this respect as it is possible to be. But the inevitable effect of the delays incident to the machinery now required in the settlement of controversies in judicial tribunals is to oppress and put at a disadvantage the poor litigant and give great advantage to his wealthy opponent. I do not mean to say that it is possible, humanly speaking, to put them on an exact equality in regard to litigation; but it is certainly possible to reduce greatly the disadvantage under which the man of little means labors in vindicating or defending his rights in court under the existing system, and courts and legislatures could devote themselves to no higher purpose than the elimination from the present system of those of its provisions which tend to prolong the time in which judicial controversies are disposed of. The shortening of the time will reduce the expense because, first, the fees of the lawyers must be less if the time taken is not so great; second, the incidental court fees and costs would be less.

Again, I believe that a great reform might be effected, certainly in the federal courts, and I think too in the state courts, by a mandatory reduction of the court costs and fees. In the interest of public economy we have generally adopted a fee system by which the officers of the courts are paid. Human nature has operated as it might have been expected to operate, and the court officers, the clerk and the marshal, have not failed, especially in the federal courts, to make the litigation as expensive as possible, with a view to making certain the

earning of a sufficient amount to pay their salaries. The compensation of the officers of the court and the fees charged ought to be entirely separate considerations. The losses which the government may have to suffer through the lack of energy in the collection of costs and fees should be remedied in some other way. The salaries of the court officers should be fixed and should be paid out of the treasury of the county, state, or national government, as the case may be, and fees should be reduced to as low a figure as possible consistent with a reasonable discouragement of groundless and unnecessary litigation. I believe it is sufficiently in the interest of the public at large to promote equality between litigants, to take upon the government much more than has already been done the burden of private litigation. What I have said has peculiar application to the federal courts. The feeling with respect to their jurisdiction has been that limited as it is now to cases involving not less than $2000, the litigation must of course be between men better able to undergo its expense than in causes involving a less amount, and therefore that high fees and costs are not so objectionable in those courts as in the state courts. I think this has been a very unfortunate view and has been one of the several grounds for creating the prejudice that has undoubtedly existed in popular estimation against the federal courts as rich men's courts. In those courts suits for damages for personal injury, of which many are there by removal of defendant, are generally brought by poor persons. Then the expense of litigation in patent cases is almost prohibitive for a poor inventor. It forces him into contracts that largely deprive him of the benefit of his invention. In respect to patent cases much might be done by the supreme courts reforming the equity procedure and the bill of costs.

I think another step in the direction of the dispatch of litigation would be the requirement of higher qualifications for those judges who sit to hear the cases, involving a small pecuniary amount. The system by which the justices of the peace who have to do with smaller cases are nonprofessional men and not apt in the disposition of business is hardly a wise feature of the present system. The poor should have the benefit of as acute and able judges as the rich, and the money saved in the smaller salaries of the judges of the inferior courts is not an economy in the interest of the public. Under able, educated, and well-paid judges who understand the purpose of the law in creating them, I am quite sure that the people's courts as they are called could be made much more effective than they are for the final settlement of controversies.

Another method by which the irritation at the inequalities in our administration of justice may be reduced is by the introduction of a system for the settling of damage suits brought by employees against public service corporations through official arbitration and without resort to jury trials. Such a system is working in England, as I am informed. Under the statute limitations are imposed upon the recovery of the employee or his representatives proportioned to his earning capacity. The hearing is prompt and the payment of the award equally prompt, and in this way a large mass of litigation that now blocks our courts would be taken out of our judicial tribunals and be settled with dispatch. Of course it would not be proper or possible to prevent the plaintiff litigant from resorting to a jury trial if he chooses, but I believe that the result would be very largely to reduce the character of such litigation. The truth is that these suits for damages for injuries to employees and passengers and to trespassers and licensees have grown to be such a very large part of the litigation in each court, both in courts of first instance and in courts of appeal, and involve so much time because of the necessity for a jury trial, that they may be properly treated as a class

and special statutory provision for their settlement by arbitration or otherwise be made. These are the cases which create most irritation against the courts among the poor. This is peculiarly true in such cases in the federal courts.

No one can have sat upon the Federal Bench as I did for eight or nine years and not realize how defective the administration of justice in these cases must have seemed to the defeated plaintiff, whether he was the legless or armless employee himself or his personal representative. A non-resident railway corporation had removed the case which had been brought in the local court of the county in which the injured employee lived to the federal court, held, it may be, at a town forty or one hundred miles away. To this place at great expense the plaintiff was obliged to carry his witnesses. The case came on for trial, the evidence was produced, and under the strict federal rule as to contributory negligence or as to non-liability for the negligence of fellow-servants, the judge was obliged to direct the jury to return a verdict for the defendant. Then the plaintiff's lawyer had to explain to him that if he had been able to remain in the state court a different rule of liability of the company would have obtained and he would have recovered a verdict. How could a litigant thus defeated, after incurring the heavy expenses incident to litigation in the federal court, with nothing to show for it, have any other feeling than that the federal courts were instruments of injustice and not justice, and that they were organized to defend corporations and not to help the poor to their rights. I am glad to be able to say that under the Interstate Commerce Employers' Liability Act much of this occasion for bitterness against the federal courts and their administration of justice will be removed, and I believe it would greatly add to the popular confidence in the federal courts if a federal statute were enacted by which under proper limitations official arbitration could be provided for settling the awards to employees so desiring in such cases as arise in the carrying on of interstate commerce. We cannot of course dispense with the jury system. It is that which makes the people a part of the administration of justice and prevents the possibility of government oppression; but every means by which in civil cases litigants may be induced voluntarily to avoid the expense, delay, and burden of jury trials ought to be encouraged, because in this way the general administration of justice can be greatly facilitated and the expense incident to delay in litigation can be greatly reduced.

I listened with professional pride yesterday, as every lawyer must have done, to the deserved encomiums which Senator Lindsay paid to the members of our profession and their willing sacrifices in every crisis in our country's history. Certainly no one has a profounder admiration than I have for the important part which the members of our profession must play in making a permanent success of self-government. I venture to suggest, however, that in respect to these details of our profession, these technicalities out of which can grow real abuses, there is sometimes a disposition on the part of the members of our profession to treat litigants as made for the courts and the lawyers, and not the courts and lawyers as made for litigants. As it is lawyers who in judicial committees of the legislature draft the codes of procedure, there is not as strong an impelling force as there ought to be to make the final disposition of cases as short as possible.

There is a story among the traditions of our Ohio bar that a Mr. Nash, who had written a book generally used to aid practitioners in Ohio before the adoption of the code of procedure in 1851, was very indignant at the enactment of that new measure, and he severely condemned it. He said that the code was a barbarous arrangement under which a suit could be brought against one man, judgment taken against another, and an execution issued upon that judgment against any good man in the state of Ohio. Now our

profession is naturally conservative. It is our natural disposition to have things done in an orderly way and to believe that the way in which things have been done should not be departed from until we clearly see an opportunity for improvement. I do not object to this spirit. Especially in this country, I think there will be progressive movements sufficient to prevent such conservatism from being a real obstruction to our general progress. I venture to think, however, that in the matter of procedure and in the adoption of special methods and systems for the settling of classes of controversies we ought to be careful that this professional conservatism does not keep us, with the power that we necessarily exercise in respect to technical legal legislation, from adopting the reforms which are in the interest of equalizing the administration of justice as far as possible between the rich and the poor.

HOT SPRINGS, VA., August, 1908.

A BILL IN EQUITY

By Donald Richberg

THOUGH properly grateful for the toastmaster's kindly introduction, I must confess myself also slightly disappointed. I had hoped that he, perceiving the melancholy aroused by the prospect of "youth's sweet scented manuscript," devoted to a most ponderous text, would attempt to lighten the anticipatory gloom by mentioning my prospective authorship of several valuable legal works, including a monograph on "Direct Appeal to the Supreme Court in Cases Involving a Contingent Fee," a subject of keen interest to all young lawyers, a treatise on "How to Come into Equity with Clean Hands—in Chicago," and a comprehensive study of court calendars, entitled "The Need for Restraints on Passed Cases under the Rule against Perpetuities." He might have referred also to my recent reappointment by the Governor for a second term in that non-lucrative but highly honorable office of notary public. Such tactful references by the Chair, forearming me with an established reputation, would have relieved me of the necessity of discussing my subject at all, whereat your gratitude would have been exceeded only by mine. Of course it *is* a serious subject, but I have noted a recent tendency towards postprandial discussion of most weighty affairs — as for example that banquet which was gladdened with the intoxicating treat of hearing Indiana's favorite Beveridge recite "Crossing the Bar." The occasion, by the way, was commemorated musically in that popular ditty entitled "The Tale of a Cocktail on the Fairbanks of the Wabash far away."

Emboldened therefore by precedents, which gradually take the place of vertebræ in the spine of a lawyer, I shall endeavor to speak to you tonight with all the nervous solemnity of the valedictorian.

For the benefit of the ladies present, perhaps I had best venture at the outset to define my subject, which may also serve to save their respective escorts the embarrassment of similar attempts. A bill in equity is a petition presented to a court, wherein it is urged that the petitioner is a good and noble man who would not harm a vagrant kitten but dearly loves his fellowmen and has always tried to live within the law of the land; that unfortunately he is in a situation where the defendants, who are persons very little above the level of pickpockets and porch-climbers, have an advantage of him, which, sad to relate, the strict letter of the law upholds; that, however, right and justice, as distinguished from law, which is merely a rule of conduct, are on his side; wherefore he asks the aid of a Court of Equity, where the chancellor has the reputation of being short on law but long on justice.

One of the most pleasing and accommodating features of a bill in equity is service by publication, whereby it is possible to settle the rights of any number of persons in one suit without their knowledge, whereby they are saved the expense of employing lawyers, who, as a matter of professional etiquette, would disagree with each other as to every step taken in the cause, although perhaps in entire harmony as to the result desired. To avoid all this fuss it is only necessary to make affidavit that the parties on due inquiry cannot be found. A notice to them is then set up in the smallest known type and inserted in a newspaper of general circulation. A newspaper of general circulation is one which publishes a judicial opinion now and then, a few advertisements and four to ten pages of legal notices and is read exclusively by office boys. It being well recognized that Sunday newspapers are read quite thoroughly, publication on Sunday has been held improper, as is also

publication in a German newspaper, probably on account of the Teutonic habit of reading a paper from the front page straight through the want ads. It must be obvious, however, that the newspaper of general circulation, as first defined, fulfills the needs of the situation completely, since any one informed by palmistry or astrology of the pendency of litigation affecting his interests, commenced by a tall blond gentleman, knows just where to look for a more concrete statement of time and place. In the absence, however, of any such supernatural opposition, complainant's solicitors normally are enabled to sublet the defense of a few friendly defendants, default the rest on service by publication, and proceed stealthily to final decree under cover of darkness such as Egypt never knew.

Now it may be the impression of some of those present that I am endeavoring to discredit this valuable practice. Far be that from my purpose. On the contrary, I wish to propose an extension of the procedure. It seems to me that the necessity of notifying parties defendant has been a barrier to the advancement of equity up the mountain-side toward the summit of poetic justice. I would advocate the practical elimination of defense by treating all defendants as unknown owners. Why not simply state, without mentioning names, that all persons having any interest in such and such property or situation shall appear on a certain day or forever hold their peace? If a man does not know what his interests are, he ought to lose them. If ignorance of the law, contained in several thousand reports and several hundred statutes, is no excuse, certainly ignorance as to one's own property rights should not be permitted to delay justice.

This extension of equity's sway would permit the wronged individual or outraged community to check speedily the abuses of undefined masses of men and capital. Think of the wondrous relief to be afforded by an injunction restraining anyone from raising the price of any food-stuff without permission of the Court! Think of the ease of trust-busting were it possible to enjoin, once and for all, past and future combinations in restraint of trade, leaving the fear of contempt hanging, like the sword of Damocles, over the entire business world!

Were such procedure established there is one bill which I would like to have a part in drawing and filing. The cause would be entitled "The Lawyers of the United States *vs.* Clients in General." The bill would state, as our grievance, that we, the lawyers aforesaid, have, ever since the adoption of the Constitution, striven manfully to protect and defend the interests of our clients; that we have, in their behalf, devised and created, annulled and abrogated laws, decisions, fundamental rights and privileges; that we have forsaken the family fireside, the card-table, the golf-links, and even the churches, have deprived ourselves of the companionship of wives, children, sweethearts, and friends of boyhood days to hasten to the aid of our clients when in distress, in custody of the law, under cloud of injunction, or in pressing need of voluntary bankruptcy; that we have been loyal and faithful to our trusts and other wicked corporations; that we have done all of these things in the interests of justice, humanity, righteousness, and a small reward, to wit, a fee; that, therefore, what we have done has been done for others — whereby we should be known as the amalgamated altruists of the world and our clients should have been grateful and pleased with the services rendered and have said no more.

The bill would go on to show that nevertheless our ingrate clients often charge that we draw documents, pleadings, and other legal papers in language so obscure and indecisive that they cannot tell what the papers which they have signed mean and must employ other lawyers and finally appeal to the courts for information; and that they often charge that we use tricks and strange devices to sustain bad cases; to

which we, the complainants, would reply by stating that as a matter of fact we are forced to refuse at every term of court to attempt to defend the indefensible, sustain the invalid, and prove the unprovable, and that it is not an uncommon experience for a lawyer to be asked by these same complaining clients that documents should be drawn in fitting language so that should their interests change in the course of succeeding years these documents could be interpreted in whatever light might be deemed advisable.

In the interrogating part of the bill inquiry would be made of clients in general as to whether they have not furnished a plaintiff for every bad case and a defendant for every unjust defense; whether they do not frequently furnish a great many witnesses to prove a fact which is, to speak euphoniously, speculative; whether they do not frequently tell one story in a lawyer's office and another on the witness stand and then allege that the attorney lost the case; whether they have not, in the entire history of the law, individually furnished the motive, encouragement, and reward for every action of a lawyer of which collectively they have subsequently complained. The bill would conclude with a prayer for temporary injunction restraining clients from casting any more of their sins upon the lawyer whom they employ, until the further hearing of the cause, to be held on the day after the Day of Judgment.

Viewed seriously, of course such an expansion of chancery would appeal to all as absurd, but would it not more nearly serve the ends of justice than such restrictions of equity powers as are being urged by many tongues today, particularly as to the process of injunction? Is this not a proper time for members of the bar to re-examine the history of equity jurisdiction and in its light see whether the present protest is intelligent or whether it springs from ignorance and shortsighted self-interest?

In the first place we know well that the spread of chancery authority was caused by the need, arising largely from the oppressions of wealth and power, for a judicial tribunal whose jurisdiction could not be marked by metes and bounds.

Yet today the bitterest cry against the free-handed power of the chancellor is raised by those for whom his jurisdiction was created, by those for whose greatest benefit it should always operate — by those broadly described as commoners. It is a reiteration of that mistake as old as government itself — revolt against the institution, regardless of its vice or virtue, bred from antagonism to the actions of individuals.

Do those who would chain the arm of the chancellor recognize that, in civil actions, he is the modern wielder of the pardoning power of the executive? In a brief historical survey it will be recalled that the Chancellor was originally the King's Secretary, an office antedating the Conquest. Litigants, helpless against the rigor of the common law, naturally addressed petitions to the King, Council and Parliament, which were referred to the Chancellor with such regularity that in time the custom arose of addressing them to him directly. During the reign of Edward II the Chancellor's Court gradually became a separate institution, and on precedents growing out of this establishment is based modern equity jurisprudence. Therefore, while the executive today personally retains the pardoning power as to life and liberty, equity, unhampered by statute, represents executive clemency applied to rights of property. Whom shall this power natually operate most to relieve — the wealthy and powerful or the oppressed, the unfortunate, and the downtrodden? Is it not altogether fitting that members of the bar, remembering that one step backward presages many more, should with one accord warn those who seek to confine equity that they are merely attempting to restrict the freedom of appeal to executive discretion for relief

from the injustice or inadequacy of inflexible law? The present attack on equity is, furthermore, an attack upon a fundamental principle of our government. Be it ever so cunningly hidden, arbitrary limits for the judicial enforcement of law can mean but one thing in the last analysis — the substitution of the principle of a privileged class for the present constitutional requirement of equal protection. Let those who seek to establish a privileged class beware lest they be not the chosen ones! To shackle the hands of the court is to challenge its impartiality. If a judge is open to that charge the court should not be deprived of power — the man should be deprived of office. As long as the court is sitting to administer justice let the substantive laws be changed as you will, but insist that law enforcement be not put into manacled hands — insist that the law, whatever it may be, shall be enforced in the same manner against every man, of whatsoever class or condition of life!

CHICAGO, ILL., August, 1908.

IS IT USURPATION TO HOLD AS VOID UNCONSTITUTIONAL LAWS?

By William G. Hastings.

APPARENTLY from a desire to discredit the Federal Supreme Court and diminish its influence there have been many recent denials of its original authority to hold an act of Congress void, as being unconstitutional. Of course the same question has at some time arisen in each state, unless, as most of them have not, it has unequivocally conferred such powers on its Supreme Court. Ever since constitution making and construing began on this side of the Atlantic it has invariably been solved as Marshall solved it. Probably nearly everyone supposed the question was put to rest long ago and that Professor Thayer's paper before the Chicago Congress of Jurisprudence in 1893, published in the *Harvard Law Review* (Vol. vii, p. 129), had said the final word on that subject.

The Chief Justice of North Carolina, however, in the *Independent* for September 26th last, in a signed article declares that it is a flat usurpation, though now perhaps so firmly established as to be irremovable. The dean of the law school of Dickinson College, Pennsylvania, in the *North American Review* for the 16th of the same month, more cautiously pronounced the intention to grant such a power as doubtful, and proceeded to give a number of grounds which convince him that no such power was meant to be given.

When a governor of a Western state a few years ago declared that the power of the Federal Supreme Court to overturn an Act of Congress was a mere usurpation of John Marshall's without warrant or even countenance in the Constitution, it merely caused a ripple of amused comment as an ebullition of personal eccentricity. The utterances above mentioned are by accredited professional and official expounders of the law. They have been widely circulated and commented upon by the public press. A still more notable, perhaps, though different one, was President E. J. James's address at Jamestown as representative of this state, and its university, on Illinois Day. He did not hesitate to declare the whole mass of judicial interpretation of the Federal Constitution since Marbury *v.* Madison was decided in 1803 to be artificial in character and dictated by the necessities of the Federal Government. He declared that it had distorted the Constitution beyond recognition by its makers; and that to preserve respect for law and the courts such interpretation must stop. He thought that with the present instrument, stopping the process of modification would be suicidal and that the only alternative is a new one. This official declaration by a representative of a great state on an important public occasion, with the others, indicates that the relation of the Supreme Court to Congress and the people is, at this time, a matter of live public interest.

Dean Trickett and Judge Clark have suggested laying the axe to the root of all our constitutional interpretation by denying any such function to the court, or rather by asserting that it was never really bestowed. They each, however, admit that the uniform practice and decisions of the entire country are, and always have been, against them. Their discussion would be entirely academic were it not that the most important question as to any decision of the courts is always, Has it been ratified and submitted to by public opinion and the parties concerned? If decisions are to be of value they must have that kind of an *imprimatur* as well as the official one.

To the getting of such a ratification for any conclusion of our Federal Supreme Court it is manifestly necessary that its determination be not generally regarded as an exercise of usurped power. If the charge of usurpation is not well founded, and the intention, on the part of the members of the federal convention who proposed, and of the state convention which adopted, the Constitution, and of their constituents who put it in practice, to confer this power upon the court can be clearly shown, it ought to be done.

It is necessary, also, to meet this new discussion because it takes somewhat different ground from that where Marshall, in Marbury *v.* Madison, following the 78th paper of the *Federalist*, put the question. The present discussion, as embodied by Judge Clark and Professor Trickett, assails Marshall's and Hamilton's assumption that written constitutions are laws, supreme laws, and therefore, of course, to be recognized as such by the courts where they are involved in the determination of private rights of genuine litigants. The constitutions purport to be laws; the judges swear to maintain and support them, and of course must give effect to them in their judgments when private rights under them are asserted. This "simple and severe line of argument," as Professor Thayer called it, had prevailed in all the states where the question had arisen before 1788, is used by Hamilton in the *Federalist*, controlled the intervening decisions till applied by Marshall in Marbury *v.* Madison, and has universally prevailed ever since throughout this country. Not so, however, in other countries, except as they have imitated us.

Of course, as Marshall pointed out in Marbury *v.* Madison, the Federal Constitution does declare that it and laws and treaties made in pursuance of it "shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the laws or constitution of any state to the contrary notwithstanding." This, says Marshall, expressly includes the Constitution and mentions it first among laws, and by another clause, jurisdiction is extended to all cases arising under it. His claim, that this does give express authority to the judges to apply the Constitution to acts of Congress, when it is involved in one of the "cases," is seldom much discussed by his opponents and not at all by the recent ones.

The other ground, however, for the assumption that American constitutions are law for the courts as well as political rules for the guidance of legislatures and peoples, namely, that such a character is inseparable from written constitutions, must be given up. Too many such constitutions are now in the world which claim no such legal character, which are wholly political, and upon which the courts predicate no action. So far as the argument of Marshall is drawn from the nature of written constitutions, it is now recognized as question begging. Evidently, to admit that the courts get their powers from the constitutions, and then in addition that the Constitution is silent as to the power, is to concede the power away, as Chief Justice Gibson showed in 1827, in Eakin *v.* Raub, 12 S. R. 330.

Gibson just as definitely begs the question on the other side by assuming that only a definite and express bestowal of such a power in unequivocal terms could convey it; and that we must refuse to admit the possibility of its being conveyed by merely establishing courts, authorizing them to pass upon claims of private right, and then enacting constitutional provisions expressly for the protection of such rights against the legislature. It is by no means surprising, in view of the fact that the early state constitutions were made during the attempt of the colonies to assert rights against the legislation of the Imperial Parliament; and the Federal Constitution so quickly followed that struggle that Gibson's assumption has never been accepted by professional opinion in this country, nor by unprofessional opinion except when smarting under

some particularly disliked decision. Both assumptions ignore the real question of fact: Were these constitutional provisions intended as mere political rules or as laws to guide the courts?

The recent objections take the new line, an entirely legitimate one, of seeking to show, as a matter of fact, by contemporary and subsequent utterances and acts of the Federal Convention and its members that it could not have been the intention of the framers and adopters of the Federal Constitution to give the Supreme Court any such power. If this can be done the ground has gone from under Hamilton, Marshall, and Gibson, all three, and their whole discussion left in the air.

If Professor Trickett and Judge Clark can show clearly as a historical fact that the intention to give this power was not in the general public mind, even if some persons did entertain it, there is enough uncertainty in the words of the Constitution so that the "parole evidence" of the surrounding circumstances and of contemporary interpretation should be taken.

The clause of the Constitution given above is not very explicit as to anything but power over state legislation. If circumstances enough to conclusively show that the intention was only to give power over state legislation can be brought forward, it should be done even after the one hundred and four years since Marshall's decision.

Judge Gibson said in 1827 in his dissenting opinion in Eakin *v.* Raub, above cited, that if he could overcome Marshall's argument he should rest content in the belief that no one could make a stronger one. Probably Judge Clark and Professor Trickett would neither of them claim that they have exhausted their side of the contention, but both may be assumed to have put forth their strongest facts. If there is, in truth, nothing stronger to be urged against the court's continuing to hold laws to be void when they are unconstitutional than they have brought forward, it is thought that Marshall's interpretation is by no means overthrown.

The question to be considered from this purely historical standpoint is simply: Did the proposers and adopters of the Constitution and their constituents who put it in practice intend that the Supreme Court in passing upon questions of private right should treat it as a body of paramount law so far as it concerned such questions and congressional legislation affecting them, or should treat it as a body of political rules whose conflict or harmony with congressional acts would in no way concern the court. It is doubtful if either Judge Clark or Professor Trickett will venture to assert the second alternative, but in this instance it seems that one or the other must be taken. They are attacking a hundred-year long interpretation on the ground that it is clearly wrong. It is for them to leave it at rest, unless they can show that the Constitution was not meant for "law" to control judicial action, but as rules for political guidance.

That the great indirect political effect of legal use of the Constitution was not fully realized then, and frequently is not even now, need not be denied. That some, who best understood it said little about it, may be granted; but the proofs offered by its assailants are far from showing that the legal power itself was not intended to be given.

Judge Clark's proofs may be first considered. Aside from his bitter complaint as to practical results they are two, the four times voting down of the proposition to associate the judiciary with the executive in the veto power, and the extent to which the court is left dependent for its actual power upon Congressional legislation. He says that not a line of the Constitution can be cited for the power which the court exercises of holding laws to be unconstitutional, and that the four votes upon the veto propositions were all refusals to confer it.

If his proposition were true that on June 5, June 6, July 21, and August 15 the Federal Convention refused to give this power, which was subsequently assumed, the express terms in the Constitution are not strong enough to meet his argument. It is not, however, true. The votes on June 4, June 6, July 21, and August 15 were upon a quite different proposition, and the debate on them conclusively shows that, so far as the Constitutional Convention was concerned, the judicial power to pass on the constitutionality of acts of Congress was intended and believed to have been conferred.

"The Documentary History of the Federal Constitution" published by the Department of State in 1900: is within the reach of the humblest library. Its Volume iii, is a reprint with all erasures and interlineations of Madison's Journal of the Debates in the Convention. The citations below are to Vol. iii, of this official publication.

No proposal resembling the one described by Judge Clark was made on June 5, but on June 4, 1787, Sec. 8 of Randolph's proposals for a Federal Constitution came up for consideration in committee of the whole. Doc. Hist. III, p. 54. It appears on page 18 of the same volume. It was substantially unchanged on the three subsequent occasions mentioned by Judge Clark when it came before the Convention. It reads as follows:

"8. Res'd, that the Executive and a convenient number of the National Judiciary ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate and every act of a particular legislature before a negative thereon shall be final and that the dissent of the said Council shall amount to a rejection unless the act of the National Legislature be again passed, or that of the particular legislature be again negatived by ——— of the members of each branch."

This "proposal" coming up on June 4, Committee of the Whole, on motion of Gerry of Massachusetts, was postponed by vote of six states to four, in order to take up a substitute offered by him that the executive alone be given such powers. This proposition also failed. In the debate Gerry said, "In some states the Judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation. It was quite foreign to the nature of the office to make them judges of the policy of public measures." Doc. Hist. III, p. 55.

As appears from page 76 of the same volume, on June 6 James Wilson moved a reconsideration of this postponement of Sec. 8. He was supported warmly by Madison, as was quite natural, the proposition being supposed to have really emanated from Madison. The latter has preserved his own speech, p. 77. It seeks to meet the objections, first, that such participation in making the laws will bias the judges in passing on them; and, second, that the departments of government should be kept distinct. The functions of passing on the Constitution as on other laws was assumed throughout, and his effort was to show that this proposed veto power would not interfere with that function.

July 21st, Wilson again brought forward the same proposition as an amendment to a later clause of Randolph's plan and as an additional means for the judges to preserve the independence of the Judiciary. Madison's account of the debate, pp. 390–399, is extremely interesting. It shows conclusively that both those who favored and those who opposed the proposition regarded it as something wholly distinct and different from the ordinary functions of a judge. Both sides agree that as judges they will have a negative on the constitutionality of legislation when it comes up in cases before them. (See especially Martin's speech, p. 395 and Mason's, p. 397.)

Mason, the Virginia planter, seems es-

pecially able to point out to our modern jurists the difference between a direct voice in all legislation by sharing the executive veto, and merely passing upon the conformity of such legislation to the Constitution, when a claim of private right brings up the question.

Madison himself, finally, brought up the same proposition for the fourth time on Aug. 15th merely adding the proportion of members of each house who should be required to pass legislation over such veto. All the states but Maryland, Delaware, and Virginia voted against it though Gouverneur Morris earnestly supported it. How Mr. Trickett can claim Morris for a disbeliever in the court's power to hold laws void if contrary to the Constitution is hard to see in view of this debate, "He could not agree that the Judiciary should be bound to say that a direct violation of the Constitution was law," p. 538.

Dickinson thinks, indeed, that no such power "ought to exist" but was "at the same time at a loss what expedient to substitute," p. 538. Pinckney opposed the proposition because "it will involve them in parties (i.e., the judges) and give a previous tincture to their opinions." Mercer "heartily approved the motion." He "disapproved that the judges as expositors of the Constitution should have authority to declare a law void; laws ought to be well and cautiously made and then uncontrollable." Was this thing that he heartily approved the same that he disapproved? Do his efforts to arrange things so that the laws should be "well made and then uncontrollable" indicate that he thought them uncontrollable as they were? Does Dickinson's dislike of this power and anxiety to "substitute" something else for it indicate a doubt of its existence?

No judicial function was in question in this discussion and it is clear that it was so understood, and that Sec. 8 of Randolph's proposals was rejected for that reason. All parties assume that the Constitution is to be law and applied as such by the courts. Neither those who wanted more power for the judges, nor those who feared what they had, questioned their right and duty to apply the Constitution as supreme law.

Madison urged a people's ratification for the Constitution in order to make it a "law" and not a "treaty," precisely in order for the courts to enforce it. "A law violating a constitution established by the people themselves would be considered by the judges null and void." Doc. Hist. III, 411, As Patterson said, by the People's ratification it would become "legally paramount." Id. 156.

Wilson's opinion as clearly appears in the debates of the Convention when he was urging this proposition for a council of revision to include the Judges, Doc. Hist. III, p. 390, as it does from his lectures of 1792. Works, vol. i, p. 189. On the former occasion he wanted his council of revision among other reasons, because, "The Judges as expositors of the law would have an opportunity of defending their constitutional rights. But this power of the Judges did not go far enough. Laws may be unjust, unwise and dangerous; and yet may not be so unconstitutional as to justify the Judges in refusing to carry them into effect. Let them have a share in the revisionary power, etc."

Hamilton apparently did not touch upon this subject in the Convention; but he did in recommending its work to the people for adoption, in the 78th paper of the Federalist, where he anticipated almost completely the argument of Marbury *v.* Madison. Only one statement from the Federalist needs to be cited now, and that merely because no one dreamed of disputing it then. "A constitution *is in fact* and must be regarded by the judges as *a fundamental law.*" Lodge Edition, p. 485. There was no seeking on his part to cajole people with the idea of adopting a body of political maxims.

There is neither space nor need to go over the history of the adoption of the Constitution and the discussions in the State Conventions. The popular conception was always and everywhere the one so brusquely declared by Hamilton above. No other conception was possible to a people which had just carried through triumphantly a struggle, for what they, perhaps mistakenly, regarded as constitutional rights, against the imperial parliament of Great Britain. That struggle began, as John Adams declares, with Otis's argument in 1761 against any constitutional right in Parliament to authorize the writs of assistance and his effort to have the act, if construed as authorizing them, held void. For that victorious people any rule, that the constitutional courts might not award litigants their constitutional rights because of danger of conflict with the legislature, would have been impossible. Their history and conditions had made the constitutions in America so far as they affect private rights, bodies of law, whatever they may be elsewhere. Hamilton recognized this. So, he apparently thought, did everybody else, and there was only need for the brief and emphatic declaration above quoted from the *Federalist*.

What would Judge Clark say as to that North Carolinian "Hu Williamson" who appeared as that State's delegate on the day of assembling, stayed stoutly through all the work of the Convention and put his strong signature to the proposed Federal Constitution when it was done? Did Williamson think these four refusals to admit the judges into a share in making all laws, to pass upon their policy, as well as their constitutional legality, were four denials of the latter power? After all four of these votes had been taken, on August 22, in debating the proposed forbidding of *ex post facto* laws, when Wilson said there was no need, that such laws violated the first principles of legislation and would never be proposed, Williamson declared: "Such a prohibitory clause is in the constitution of North Carolina, and, though it has been violated, it has done good there and may do good here, *because the judges can take hold of it.*" The italics are the present writer's, not Madison's. The matter was too much a matter of course for even such silent comment at that time. Doc. Hist. Vol. III, p. 593.

The discussion on the four votes on Randolph's Sec. 8 has so fully shown the minds of the framers that it seems only necessary to appeal to what has been said as an answer to the other arguments advanced by Mr. Trickett as well as by Judge Clark, that if they had meant to clothe the court with such a power they would not have left it so dependent on Congress for its organization, jurisdiction, and emoluments, and the judges subject to impeachment by Congress. The argument is utterly inconclusive. It may be urged with at least equal force that, perceiving the latent political effect of the power in question, they meant to guard against its political development by placing the judges under the power of Congress, as Morris warned them they had done.

President James's complaint in his Jamestown address is precisely that the court has gone too far in supporting Congressional legislation instead of overturning it; that it has departed too greatly from the letter of the Constitution already, and will totally lose the respect of the people by going farther, if a new Constitution is not made. His objection is not that too much power was given the court, but that, while nominally a check upon Congress, in fact it has not been one. Mr. Trickett and Judge Clark seem inconsistent with themselves in their claim that the political weakness of the court, its subjection to legislation as to its appellate jurisdiction and as to its organization, and the liability to impeachment by Congress shows that there could not have been any intention to give the power to judicially annul legislation. The

answer is that the power and the weakness were both considered in the debates over Randolph's proposition, and the power deliberately left as it was.

While the other two are crying out against an excessive power in the court, "not needed and not known in any other country," President James's trouble is that the court has not done and cannot do more to adapt a constitution, made for scattered states, to the needs of the industrial and commercial empire for which Congress now legislates; and that the effort to do so has overlaid the instrument with interpretation like a disguise. Everything has the defects of its good qualities. A new constitution if made would be like the old one, a bundle of compromises. It must be admitted that constitutional compromises when brought into court are likely to show their seams; but so they do on the hustings and in legislative halls. The new constitution would have to be made legal or purely political. The courts would have to be given the duty to construe it or told not to do so. There is not likely to be found any one bold enough to propose the latter alternative. It is submitted that to start in with a new course of judicial interpretation on a fresh bundle of compromises would be throwing away a century's time and effort.

But a serious proposition to furnish a new constitution deserves a whole article to itself, and indeed many articles. It is referred to here to show how inconsistent is President James's line of objection with the other claim of excessive usurped authority in the court. If the power to pass judicially upon the constitutionality of a law is usurped, then in the language of a friend from the Emerald Isle, "Sure it may be, but anyhow it was all provided for and acquiesced in more than fifteen years before it happened."

LINCOLN, NEB., August, 1908.

ODDITIES OF THE CODE INSCRUTABLE

By Harry Randolph Blythe

SOME things are meant to be humorous and are humorous. Law has little to do with such things. They would not appear to advantage in the Digests or Reports. The solemn and the frivolous always were incompatible companions.

Other things are meant to be humorous and are *not* humorous. These things, likewise, do not flourish in a legal atmosphere. The lawyer who introduces them into court has made a serious mistake in profession; he really ought to edit a comic weekly where pathetic things are appropriate.

Again, still other things are *not* meant to be humorous and *are* humorous. And all the calf-bound volumes of the world shelter a few of these things because they cannot help it. The lawgivers who send their exalted phrases sounding down to posterity are as helpless to guard against posterity's smile as you and I, in our dreams, are powerless to say that the things we see are not realities. In each case there is no corrective faculty; neither the dreamer nor the humor is self-conscious.

Judged by their time and the customs of the people, the excerpts set forth in this article are serious and sublime enough. But lapse of time, change of place, and difference of custom draw sharp effects. When anything is untimely, out of place, or in conflict with custom it is sure to be odd and liable to be humorous.

We smile at the Puritan blue laws. These, however, are comparatively recent and once governed our own country. If, passing these by, one goes to the laws of a country peopled by a different race, professing a different religion and with a history computed not in centuries but in cycles, so that the laws still retain the dust of great antiquity, the absurd effects are not only more numerous but more delicious. We can then laugh without the thought that our grandfathers' grandfathers displayed characteristics somewhat suggestive of an ass.

Two volumes, looking very much as though they were derelicts on the legal ocean, came to my desk recently. One was a large, pretentious-looking creature with a style that marched so stately I surmised the editor might have had military training. Fact proves otherwise, however, for Sir William Jones was one of the greatest scholars England ever produced; he mastered thirteen languages and was conversant in twenty-eight others. This, the last book of his career, bears the date, Calcutta, 1794, and labors under the inscrutable title, "Menu Laws." Before I turned the stiff, crackling pages I half believed it might be a code suitable for persual only by stewards, cooks, and society matrons who give ambitious dinners. I was shortly enlightened, as you will be presently.

The other was small and gloomy looking, with time-bitten binding but withal possessed of an aristocratic personality. On the inside of the front cover, still undimmed by the onslaughts of a century, was pasted an excellent cut of the Porchester coat of arms. Just how that emblem of greatness came to be placed there I will reserve for your fancy. Again I was faced by an inscrutable title, "Gentoo Laws," by Mr. Nathanial Brassey Halhed. It bears the date, London, 1777, and, though the author failed to climb into the encyclopædias, yet he must have been scholarly (or judged his generation so), for he saw fit in his preface to promulgate an essay on the Sanskrit language, setting forth several pages of the original for the reader's edification and delight.

I was not slow to determine that each of these volumes contained a code of the laws of

India. When I say "code" do not imagine a modern code. I use the word in a very restricted meaning; the laws of the four great castes of India, to say nothing of the three hundred lesser ones, are far too unsettled and numerous to admit of being codified. Code here means a collection of a *few* of the laws and customs of the four great castes, principally of the Brahman or priestly class which rules India. The Brahman caste, according to tradition, derive their laws and religious customs from Menu (or Manu), the first created man and the holiest of legislators. It was these laws as they stood in 1794 that Sir William Jones translated from the original Sanskrit. *Gentoo* literally taken means mankind, but Europeans have always translated it *Hindu*. Mr. Halhed took his material from the Persian, a learned Brahman having effected the translation into that language from the Sanskrit. The influence of Menu is sufficiently dominant in Mr. Halhed's text that I may, for my purposes, refer to both translations as a code of Menu laws. The excerpts to follow are taken indiscriminately without reference to either translator.

I might mention that Mr. Warren Hastings, in 1772, was responsible for the first glimpse of Brahman laws in English, as he was Mr. Halhed's patron. But as the purpose of this article is not to deal seriously with the laws of India but merely to point out a few odd passages in this very imperfect and incomplete collection, I will not further delay my purpose.

Sir William Jones in his preface to his translation of "Menu Laws" says:

"The work now presented to the European world contains an abundance of curious matter extremely interesting both to speculative lawyers and antiquaries, with many beauties which need not be pointed out and with many blemishes which cannot be justified or palliated. It is a system of despotism and priest-craft, both, indeed, limited by law, but artfully conspiring to give mutual checks. It is filled with strange conceits in metaphysics and natural philosophy, with idle superstitions . . . with minute childish formalities, but with a style that sounds like the language of legislation and extorts a respectful awe."

All of this is very true, but unfortunately, as Mr. Halhed remarks, indecency is a word unknown to the law, and good taste prevents the great majority of these strange conceits from appearing in an article in the English language. Such others as are admissible I will give, with as much unity as is possible under the circumstances.

Almost every race has a figure of speech which conveys its idea of Justice. It will be obvious that the Hindu simile is logical, since the cow and the bull with them are sacred animals. The code runs:

"The divine form of justice is represented as a bull, and the gods consider him who violates justice as one who slays a bull: let the king, therefore, and his judges beware of violating justice."

The only infallible friend of mankind is justice, for —

"The only firm friend who follows men even after death is justice; all others are extinct with the body."

The effect of injustice was far-reaching. Who shall deny the wisdom of this?"

"Of injustice in decisions, one fourth falls on the party in the cause, one fourth on his witnesses, one fourth on all the judges and one fourth on the king. Of that king who stupidly looks on while an unworthy judge decides causes, the kingdom itself shall be embarrassed like a cow in deep mire."

If our own judges were faced by the following fate for miscarriage of justice the standard of the bench might be faultless. In this passage, however, it is probable that the destruction referred to is to come after death.

"Where justice is destroyed by iniquity and truth by false evidence, the judges who basely look on without giving redress shall also be destroyed."

"It must be remembered that the penalties

attached to a crime are none the less real to the Hindu because they are in the future life. The fact is, he trembles more at the thought of such punishment than he does at anything which could be inflicted upon him in his present existence. The average Hindu implicitly believes in every article of his religion. Unusually severe, then, are the rewards of perjury:"

"The witness who speaks falsely shall be fast bound under water in the snaky cords of Varuna (the Lord of punishment) and be wholly deprived of power to escape torment during a hundred transmigrations; let mankind, therefore, give no false testimony.

"Headlong, in utter darkness, shall the impious wretch tumble into hell, who, being interrogated in a judicial inquiry, answers one question falsely.

"By speaking falsely in a cause concerning gold, he kills the born and the unborn; by speaking falsely concerning land be kills everything animated; beware then of speaking falsely in a cause concerning land."

The greatest crime known to Gentoo laws was the murder of a Brahman. Still, the person committing this offense was not the most sinful wretch in the world, for according to this paragraph,

"He who describes himself to worthy men in a manner contrary to truth is the most sinful wretch in the world; he is the worst of thieves, a stealer of minds."

But it remains for another part of the Code to yield even better curiosities. Let it be borne in mind that the compilers who, under Mr. Hastings' authority, gathered the laws of Menu, were the most learned men in India; that only one of them was below the age of thirty-five and that the majority approached eighty, while one exceeded that figure. It is essential to remember this, by way of apology for the observations they have selected and the censures they have passed on the conduct and merits of woman. The feminine question is no less eternal in our age than it was in Solomon's. What the wise men of India had to say, therefore, may have an intrinsic value apart from the purpose for which it is here given.

"A man, both day and night, must keep his wife so much in subjection, that she by no means be mistress of her own actions: if the wife have her own free will, notwithstanding she be sprung from a superior caste, she will yet behave amiss.

"If a man by confinement and threats cannot guard his wife, he shall give her a large sum of money, and make her mistress of her income and expenses and appoint her to dress victuals for the Deity."

In the following one might easily imagine Solomon speaking:

"A woman is never satisfied with man, no more than fire is satisfied with burning fuel, or the main ocean with receiving the rivers, or the empire of death with the dying of men and animals; in this case therefore a woman is not to be relied on.

"Women have six qualities; the first, an inordinate desire for jewels and fine furniture, handsome clothes and nice victuals; the second, immoderate lust; the third, violent anger; the fourth, deep resentment, i.e. no person knows the sentiments concealed in their heart; the fifth, another person's good appears evil in their eyes; the sixth, they commit bad actions."

It is consoling to find that centuries ago good advice was looked upon as something to be endured, and that henpecked husbands are not modern

"A woman who always abuses her husband shall be treated with good advice for the space of one year; if she does not amend with one year's advice and does not leave off abusing her husband, he shall no longer hold any communication with her, nor keep her any longer near him, but shall provide her with food and clothes."

Some of the things a woman was forbidden to do are:

"A woman shall never go out of the house without the consent of her husband and shall always have some clothes on her bosom; she shall never hold discourse with a strange

man; but may converse with a Brahman who is under vows of pilgrimage, a hermit, or an old man; she shall not laugh without drawing her veil before her face; she shall not eat till she has served her guests with victuals (if it is physic she may take it before they eat), a woman also shall never go to a stranger's house, and shall not stand at the door, and must never look out of a window."

There are six things which are declared to be disgraceful to a woman. The majority of these are disgraceful, even in America, yes, even in New York. But the fifth is surely a strange one, and if American law were to declare it disgraceful, how many of the fair ones would be respectable?

"Six things are disgraceful to a woman; first, to drink wine and eat conserves or any such inebriating things. Second, to keep company with a man of bad principles. Third, to remain separate from her husband. Fourth, to go to a stranger's house without good cause. Fifth, to sleep in the daytime. Sixth, to remain in a stranger's house."

Two more curious passages concerning women are to be found in the code. The first may well serve as a suggestion to all proud fathers. Regarding the second, it seems a pity a more appropriate simile could not be found for the walk of the maiden. If the kangaroo were only native to India! — but this would be countenancing modern slang, and I fear the staid lawyer of to-day is not familiar with the beauties of the kangaroo walk which the maids of the "younger set" have affected more or less in the last decade.

"The names of women should be agreeable, soft, clear, captivating the fancy, auspicious, ending in long vowels, resembling words of benediction.

" Let the student of the Gentoo scriptures not marry a girl with reddish hair; nor one immoderately talkative; nor one with inflamed eyes. Let him choose for his wife a girl whose form has no defect, who has an agreeable name, and who walks gracefully, like a phenicopteros or like a young elephant."

It will be seen that these quotations touch but slightly on legal principles. They deal rather with religious custom. In India, however, religious custom is practically law. They have their dry legal principles but these refuse to keep company with humor. The strict legalities are interesting in themselves and deserve study; we know altogether too little of them. The best authorities on the laws of India are Morley and Macnaghten.

The laws collected by Sir William Jones go at great length in laying down rules as to how a Brahmin shall attain perfection. Almost a quarter of the volume is rules concerning the conduct of a student of theology. One or two of these deserve mention. Anyone interested in longevity would do well to take this to heart:

" If the student of theology seeks long life he should eat with his face to the east, if exalted fame, to the south, if prosperity, to the west, if truth and its reward, to the north.

" Let him take his food having sprinkled his feet with water; but never let him sleep with his feet wet; he who takes his food with his feet so sprinkled will attain long life.

" Excessive eating is prejudicial to health, to fame, and to future bliss in heaven; it is injurious to virtue and odious among men; he must for these reasons by all means avoid it."

Many a Brahmin when caught in a rainstorm must have got drenched by obeying the following "settled" rule; also he probably never experienced the novelty of tripping over a rope to which a calf is tied or of imitating Psyche's famous act in looking into the pool, for —

" Over a string to which a calf is tied let him not step; nor let him run while it rains; nor let him look on his own image in water; this is a settled rule."

It makes one wonder, from this last curious rule which I shall quote, whether

in the antiquity of India an odium was attached to the color yellow.

"Let him not wash his feet in a pan of mixed yellow metal; nor let him eat from a broken dish; nor where his mind is disturbed with anxious apprehension."

Mr. Halhed, in his preface to his translation, summarizes his opinion of the Gentoo laws in scholarly, almost eloquent style: "They will deserve the consideration of the politician, the judge, the divine, and the philosopher, as they contain the genuine sentiments of a great and flourishing people . . . upon subjects in which all mankind have a common interest; as they abound with maxims of general policy and justice, which no particularity of manners or diversity of religious opinions can alter."

I have closed these two quaint volumes and to-morrow will put them back in their cells of loneliness on the shelves. They may not be disturbed again for years. Some day, time, the implacable foe of all of us, will conquer them. The principles they contain, however, time can never conquer. Cycles are behind them and cycles before them. They declare the laws of a race which seems to have vitality immortal and customs well-nigh immutable. While that race has lived silently on, many a great empire has driven its chariots over western Europe, but one no longer sees Grecian or Roman or Spanish drivers. Many peoples have marched successively through the papyrus leaves and calf-bound volumes, yet the antiquity of their records, compared to India, is as a day to a decade. We are highly civilized; the rich legacy of English legal experience is ours and we may well say our customs are the fittest survivors of the trial of time. We smile at the oddities in the customs of India. Well and good, that is only natural. But there is a possibility, a few thousand years hence, of some Hindu author writing an essay on the absurdities of the laws and customs of a nation once called America.

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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 HAND OF ESAU AND THE VOICE OF JACOB

The fine which startled those with capital and tickled those without it has ceased for the moment to be the standard penalty. Three learned judges of the Court of Appeals of the Sixth Circuit have handed down a decision which is also charged with political electricity. Recognizing the popular interest in the decision and the feeling that such a fine is a blow in a battle of the many against a monopoly, it asserts with vigor the vested rights of property and chastises the judge of the lower court in language which to the unbiased reader seems as intemperate as anything Judge Landis said or did. And now the law officers of the Federal Government in solemn conference assembled under the spot light of campaign journalism announce their determination to press for a review of this decision by the highest court of the land.

In spite of the almost universal chorus of editorial approval, inspired in part, one suspects, by the chastening influence of the recent panic, the result of the present appeal seems not beyond question. The reaffirmation of the inviolability of property rights all will heartily endorse. The rebuke to spectacular punishment, if deserved, is equally to be commended. Is the question so free from doubt, however, as to justify the reviewing court in emerging from its judicial calm and dignity? Courts of equal eminence have not failed to recognize that the technical relation of corporation and stockholder which was developed by judges out of the artificial mediæval conceptions of eccleslastical institutions to satisfy a business demand of three generations ago does not always satisfy today the needs of the same public for which it was created. How far courts will strike beyond the legal fiction of artificial personality is a serious question of public policy. The decisions of the courts already have recognized this and have made it a question of law, and the vagueness and uncertainty of the boundaries they have advanced make it one of the most perplexing questions with which lawyers now have to deal, for one of the elementary definitions they learned at school seems to have been undermined. If ever a case can be presented of a legal fiction shielding an offender, it is that of the Indiana corporation impersonating the New Jersey corporation in Indiana which the verdict of the jury found guilty of a crime. If the courts can ever go behind the artificial personality created by the state for the public benefit and reach its components who are really responsible for its acts, this case is an example. For the public as well as for the profession, this question transcends in importance any question of guilt or fine. It affords an opportunity to make definite the limitations of a new development of the common law, and it is to be hoped that the Supreme Court of the United States will determine the law on this point for our future guidance.

PROFESSIONAL ORGANIZATION IN ENGLAND

There is much to be said in favor of a separation of advocates from advisers in this country, in the way in which the profession has long been divided in England. Indeed it may well be believed that nothing would tend more to that expedition in trials which the public now vainly demands than the development in our trial courts of a corps of trained lawyers and the elimination of the delays caused by the inexperienced. Since we have always supposed that the distinction was at least of such merit as to be assured of permanence in that country, it is somewhat

startling to read in the recent issue of the London *Law Journal* that, at a meeting of the Law Society, amalgamation of the two branches of the profession, at least as far as practice in the county courts is concerned, was seriously discussed. Apparently no little support was obtained for the proposal from the fact that solicitors' apparel at present makes it impossible to distinguish them from ushers of the court, and it is sagely suggested that a distinctive wig or head dress would solve the problem. A subject perhaps more important which was discussed at the same meeting was the establishment of a general school of law. For a generation this has been advocated by the most eminent barristers and it is said that it is now blocked only by opposition of one powerful member of one of the Inns of Court, and that the realization of this much needed reform awaits simply the death of that individual. What satisfaction can be obtained from such eminence?

A BARRISTER AS PREMIER

The English weeklies remind us of a fact, which most of our readers will recall with surprise, that the elevation or Mr. Asquith to the post of Prime Minister of England is the first time that a barrister in the front rank of his profession has risen to the highest political honor. The importance of the event was celebrated with a banquet of the Bar in the hall of the Inner Temple, which was an enthusiastic tribute to the force of intellect and character of the new Premier. Mr. Asquith modestly insisted upon the impersonal character of the event and described the comradeship of the profession in the following happy phrase: "The arduous struggle, the blows given and received, the exultation of victory, and the sting of defeat, which are our daily experience, far from breeding division and ill-will, only bind us more closely together by the ties of a comradeship for which you would look in vain to any other arena of the ambitions and rivalries of men."

WITNESSES

Lord Justice Buckley in a recent decision attempted a classification of witnesses. There are, he said, four classes of witnessses — (1) the timid witness, who is afraid to say too much and therefore seldom comes up to his proof; (2) the enthusiastic witness, who always exaggerates, however unwittingly; (3) the witness who is neither nervous nor given to exaggeration, and tells a plain and straightforward story; (4) the witness who tells the truth, but not the whole truth, and keeps back something. "A fifth class" says the *Law Times*, "ought to be added, whose existence the Lord Justice's kindly nature has seemingly led him to ignore — namely, the witness who does not shrink from deliberately saying whatever suits his purpose, if he thinks that he can do so with advantage and impunity. He is more frequently met with than would be the case if juries did not show a strange reluctance to convict on charges of perjury, which discourages judges from exercising their power of committing a perjured witness for trial."

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.

A practical article of merit and much present-day interest reviewed this month is that on the subject of the union label by W. A. Martin. A question of considerable importance is discussed by L. Oppenheim in his article on the meaning of coasting trade, and his criticism of the action of the United States in declaring commerce with our far-distant island possessions to be coasting-trade seems correct in holding that it implies a great change in the meaning of that term. Lovers of theoretical jurisprudence will be interested in Thomas Baty's article on the theory of private international law put forth by Dr. Jitta.

BILLS OF LADING. "What Liability does a Bank Assume as to the Quality and Quantity of the Goods Described in a Bill of Lading Indorsed by It?" by J. T. Woodruff, *Central Law Journal* (V. xlvii, p. 105).

BIOGRAPHY. "The Victorian Chancellors," Volume II, by J. B. Atlay; Smith, Elder & Co., London; Little, Brown & Co., Boston, 1908. With the lives of Lords St. Leonards, Cranworth, Chelmsford, Campbell, Westbury, Cairns, Hatherley, Selborne, Halsbury and Herschell, Mr. Atlay concludes the work so admirably begun in volume one. In the selection of material, avoidance of partisanship, sympathetic treatment and brilliant portrayal the author has reached very happy results, fully sustaining the high standard set by the first volume, and given a series of vivid pen and ink pictures of Victorian politics and statesmen. The long and wavering struggle for reform in the practice and procedure of the common law and equity courts is of particular interest, while the many glimpses of personal ambition, foibles and frailties add that human interest so essential to successful biography.

The life of Lord Campbell comprises the best chapters of this volume, due largely to the subject himself. His "Lives of the Lord Chancellors," which caused his contemporaries to remark that Campbell had "added a new sting to Death," and particularly his autobiography, had provided such a wealth of material, had thrown such a glare of too high, or false, lights upon the men of his times that the task confronting Mr. Atlay was greatly increased.

Less racey, but more concise, more evenly sustained, better balanced and infinitely more accurate, than the "Lives of the Lord Chancellors," "The Victorian Chancellors," will rank among the best legal and political contributions to biographical literature.

COASTING-TRADE. "The Meaning of Coasting-Trade in Commercial Treaties," by L. Oppenheim. *Law Quarterly Review* (V. xxiv, p. 328).

"After having acquired, in 1898 and 1899, the Philippines, the Hawaian Islands, and the Islands of Porto Rico, the United States of America has declared trade between any of her ports and these islands to be *coasting-trade*, and has exclusively reserved it for American vessels. Russia has by Ukase of 1897, operating from 1900, enacted that trade between any of her ports and that of Vladivostock is to be considered as *coasting-trade*, and therefore to be exclusively reserved for Russian vessels. At the first and the second Colonial Conference, held in London in 1902 and 1907 respectively, the question has been raised whether Great Britain would be justified in following these examples set by America and Russia, and in giving the term coasting-trade, as used in British commercial treaties, such an extension of definition as would allow her to exclude foreign shipping entirely from the carrying trade between the United Kingdom and Australia, India, South Africa, and other

parts of the Empire, as well as between any of these parts."

The meaning of coasting-trade in international law generally becomes apparent through its synonym *cabotage*, a nautical term of Spanish origin signifying navigating from cape to cape along the coast without going out into the open sea. Coasting-trade means navigating and trading along a coast between the ports thereof. This original meaning has been extended so as to include navigation and trade between two ports of the same territory whether they are on the same coast or on different coasts, as between French Atlantic and Mediterranean ports. And the United States has always considered trade between her Atlantic and Pacific ports coasting-trade and exclusively reserved for her own subjects even when the carriage takes place not exclusively by sea around Cape Horn but partly by sea and partly by land through the Isthmus of Panama.

The author contends that coasting-trade as used in commercial treaties is defined as follows:

"Sea-trade between any two ports of the same country whether on the same coast or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of Colonial dependencies of such country."

Regardless of this definition the United States has declared trade between her ports and those of the recently acquired islands to be coasting-trade and therefore reserved exclusively for American vessels. This is as yet the only country which has so extended the meaning of the term.

"Should the requirement be dropped that the country between the ports of which trade is called coasting-trade must be a political and geographical unit, the distinction between coasting-trade and Colonial trade would become void. The latest American extension of the meaning of coasting-trade is therefore inadmissible and comprises a violation of the treaty rights of the parties which have concluded such commercial treaties with the United Stattes as stipulate freedom of trading, coasting-trade excepted. I do not know whether any of these parties has raised a protest, but however that may be, the United States adheres to her interpretation, and there is no sign that she will in the future alter her attitude. Under these circumstances all those States which now conclude commercial treaties with her will have to accept that construction upon the meaning of coasting-trade which it has pleased her since 1898 to apply. And should other countries follow the American lead and apply the term coasting-trade indiscriminately for trade along their coasts and for their Colonial trade, the meaning of the word would then become trade between any two ports which are under the sovereignty of the same power, and it would then, as pointed out above, be no longer synonymous with *cabotage*."

CONFLICT OF LAWS. (A New Theory). "A modern *Jus Gentium*," by Th. Baty, *The Juridical Review* (V. xx, p. 109). A discussion of a work by Dr. Josephus Jitta, Professor of International Law in the University of Amsterdam, developing a theory of private international law which abandons, in principle, the attempt to find rules for discriminating between competing laws altogether.

"Imbued by a spirit of genuine cosmopolitanism, he ceases to regard the various nations as living in separate compartments, and private rights as the exclusive creature of national law. 'Le droit privé national,' he declares, 'est une des faces du droit privé universel.' Nothing could be further from Austin's conception of law as a command. And it follows in consequence that any given private relation is not regulated primarily by this or that municipal law, but first and foremost by the general sentiment of the civilised world. It is possible and probable that this general sentiment may, in a given instance, refer the matter to some municipal law. That does not affect the principle. The universal juridical consciousness remains in the background, supporting the local law when applicable and ready to supply a reasonable rule in all cases which are not definitely local."

. . . . . .

"But it is not easy to say where the applications of such a system are to stop. It amounts

to a repudiation of the inveterate plan of making a selection among competing laws, and a virtual return to the Roman system of *jus gentium*. In the case of a transaction which is exclusively national, of course the professor does not propose to substitute this rarefied spirit of law for the law of the land. Nor does he do so in the case of transactions which are by a decisive element intimately bound up with the local life of a particular country. These, he admits, the *droit commun international* deliberately leaves to local regulation, and it seems to us a weak spot in his theory: for the line which divides the transactions of which it can from those of which it cannot be said that they are attached by a preponderant element to the local life of a given country is naturally thin. Professor Jitta devotes the major portion of his work to the elaborate and careful discussion of the place where the line should be drawn in each particular variety of obligation."

Mr. Baty's criticism of this theory is that it is too good. It is comparatively easy to pick out one from a heap of definite municipal systems. It is hard legislative labor to elaborate a *jus gentium*, which the theory would seem to require. "It is the system of the future. Increasing cosmopolitanism appears to the present writer to demand a return to the *jus gentium* sooner or later. The present system is a survival of the time of tribal or racial law, when a person's liabilities were estimated according to his membership of a given community. But the system of the future is *ipso facto* a counsel of perfection for the present."

CONFLICT OF LAWS (Source). "Le Droit Commun International comme Source du Droit International Privé," by D. Josephus Jitta, *Revue de Droit International Prive et de Droit Penal International*, (V. iv, p. 553). Beginning an exposition of the author's conception of private international law, referred to in Mr. Baty's article on "A Modern Jus Gentium" noticed above. To be continued.

CONFLICT OF LAWS (Marriage). "Mariage à l'étranger des Déserteurs et des Insoumis," by Camille Jordan, *Revue de Droit International Prive et de Droit Penal International* (V. iv, p. 571). Discussing the law of Italy in regard to the marriage abroad of deserters and evaders of Italian military service and the marriage in Italy of such people from foreign countries. Former sections have treated of the French and Belgian laws and others are to follow.

CONTEMPT OF COURT (Libel by a Stranger) "The King *v.* Almon. II," by John Charles Fox, *Law Quarterly Review* (V. xxiv, p. 266). Conclusion of an article the first part of which was noticed in this department in the June GREEN BAG.

"The development of the summary jurisdiction to punish contempts, so far as it can be gathered from the authorities cited above, may be shortly and tentatively stated as follows. Originally the superior courts of common law had jurisdiction to punish disobedience to the King's writ summarily by fine and imprisonment upon attachment, and probably also a disciplinary jurisdiction over their own officers exercisable summarily. The Court of King's Bench had jurisdiction on indictment or bill, to punish contempts *in facie*, obstructions to the service of process, other obstructions to the administration of justice, as by libelling the court or a judge, or assaulting a party on his way to the court, and deceit or collusion in connexion with pending proceedings. In later times — perhaps in or after the Tudor period — the common law courts gradually established a summary jurisdiction over most of those contempts which had been formerly the subject of indictment or bill, but this did not extend to libels on the court or judges which were still punished by indictment or by proceedings in the Star Chamber, and upon the abolition of that court, by information or indictment in the King's Bench. The Council or the Star Chamber as representing the Council, had always exercised a concurrent jurisdiction to punish contempts of other Courts, and, as the Star Chamber records show, had exercised it largely. Upon the abolition of that court a large portion of its jurisdiction devolved upon the King's Bench, and libels, including libels upon courts and judges, were punished by information or indictment down to the early part of the eighteenth century. In 1720 is to be found the earliest recorded case of libel or slander on the court or a judge by

a stranger, unconnected with the service of process, being punished by attachment.

"Whether the Court of Chancery exercised the jurisdiction to punish libels by summary process before the time of Lord Talbot (1733–7) is open to doubt. If that court did possess such a power it devolved upon each branch of the High Court of Justice when the Judicature Acts came into operation, and thereby became exercisable by the King's Bench Division; but the object of this paper has been to show that such a jurisdiction cannot be founded upon the case of Rex *v.* Almon. The judgment in that case seems to have been based rather upon what the court considered the practice ought logically to be than upon what it actually was; the principle upon which it is based could not be supported on the ground of immemorial usage — but only by reëstablishing the jurisdiction of the Star Chamber to try without a jury, which the common law judges had not claimed to exercise until eighty years after the court had ceased to exist."

CONTRABAND OF WAR. "History of Contraband of War," by H. J. Randall, *Law Quarterly Review* (V. xxiv, p. 316). Beginning a study of the development of the doctrine and of certain allied doctrines from the War of the Austrian Succession to the Declaration of Paris. To be continued.

CONTRACTS. "The Pass-book and Forgery," by W. F. Chipman, *Canadian Law Times and Review* (V. xxviii, p. 527).

CONVEYANCING (England). "Amendment of the Land Transfer Acts," by James Edward Hogg, *Law Quarterly Review* (V. xxiv, p. 290). Proposing a scheme of title registration in England.

COURTS (Federal). "How to Bring the Federal Courts Closer to the Common People," by James M. Gray, *American Law Review* (V. xlii, p. 500).

CRIMINAL LAW (Prevention). "The Prevention of Crime," by Marcus Dods. *The Juridical Review* (V. xx, p. 160). Discussing the subject with relation to a bill introduced in Parliament by Mr. Gladstone.

CRIMINAL LAW (Procedure). "The Criminal Law," by Charles H. Grosvenor, *Ohio Law Bulletin* (V. liii, p. 276). An address at the annual meeting of the State Bar Association of Ohio, July 9, 1908. Dealing especially with the administration of criminal law in Ohio, and laying particular emphasis on the necessity of the Supreme Court's giving the reasons for its decisions, that the prisoner may know the ground for his conviction and the bar and the people may know the law.

DIPLOMACY. "Relations between Canada, Great Britain and the United States," by Hon. Mr. Justice Longley, *Canadian Law Times and Review* (V. xxviii, p. 545).

DIVORCE (United States). "A Review of the Great Case of Haddock *v.* Haddock," by Marion Griffin, *Central Law Journal* (V. lxvii, p. 66).

EASEMENTS. "The Easements Act with special reference to alterations of the law made thereby," by R. B. Mitchell, *Madras Law Journal* (V. xviii, p. 165).

EASEMENTS (see Real Property).

ELECTION LAWS (England). "Errors of the Election Acts," by J. M. Lees, *The Juridical Review* (V. xx, p. 121).

EQUITY. "Loss of the Fiduciary Principle," by Thomas Nelson Page, *American Lawyer* (V. xvi, p. 202).

EVIDENCE (Privileged Communications). "'Confidentiality' in the Law of Evidence," by D. Oswald Dykes, *The Juridical Review* (V. xx, p. 140). Brief discussion of the rule in several countries.

FRAUDULENT CONVEYANCES. A treatise on the Law of Fraudulent Conveyances and Creditor's Remedies at Law and in Equity, including a consideration of the provisions of the bankruptcy law applicable to fraudulent transfers and the remedies therefor and the procedure of trustees in bankruptcy, in actions either in the state or Federal courts for the recovery of property fraudulently transferred by the bankrupt, by De Witt C. Moore (2 vols, price $12.00). Matthew Bender & Co., Albany, N.Y., 1908.

This is a painstaking work collecting all the cases and in most instances stating the propositions they decide clearly and accurately and without giving the impression of hopeless contradiction which is received from most encyclopedic text books. The subject of fraudulent conveyances, as the author well says, is one of the few topics in the law

of ancient origin which are increasingly important to-day. A just criticism of our legal remedies is that they are designed to right the wrongs of an age of force rather than those of an age of cunning, and it may well be expected that the subject of fraudulent conveyances is one that will receive constant development by our judges, so that lawyers must needs comprehend the fundamental principles and watch closely the new decisions. The reviewer has used Mr. Moore's book in his practice and found it eminently satisfactory.

FUTURE INTERESTS (Remainders). "A Modern Dialogue Between Doctor and Student on the Distinction Between Vested and Contingent Remainders," by Albert M. Kales, *Law Quarterly Review* (V. xxiv, p. 301).

HABEAS CORPUS (History). "The Writ of Habeas Corpus," by Clarence C. Crawford, *American Law Review* (V. xlii, p. 481). Outlining the principal changes through which the writ has passed to become the chief safeguard of personal liberty.

HISTORY (Suffrage in Rhode Island). "Suffrage Extension in Rhode Island down to 1842," by Edwin Maxey, *American Law Review* (V. xlii, p. 541).

HISTORY (English). "The House of Lords, Its History and Constitution, II," by C. R. A. Howden, *The Juridical Review* (V. xx, p. 146). Concluded.

INJUNCTIONS. In the August *North American Review* (V. 188, p. 273) Professor Francis M. Burdick writes a timely article on "Injunctions in Labor Disputes." He deprecates the current political agitation for a change in practice in issuing injunctions in labor disputes, reminding us that provision is always made for an early hearing, and that in no reported case has a strike been broken by issuing an injunction without notice. Far from finding evidences of abuse of judicial power, he insists that the reported cases are full of instances where judges have modified their original order in favor of the strikers. There must be some discretion as to the manner of issuing this writ to protect the public interest in cases like that of the Pullman strike. The contention that no injunction should issue in labor disputes because no property right can be had in the labor of another, he shows clearly is beside the point, for the property loss is not in deprivation of labor, but in the direct damage to the good will of the business. The fact that the act enjoined is usually a crime does not justify legislation which will distinguish strike violence from other crimes. The Supreme Court in the Debs case made plain that in enforcing contempt proceedings without a jury trial, the Courts are not dealing with the criminal law. The article on the whole does not impress one as entirely impartial.

INSURANCE. "Burdening the Insured," by Richard S. Harvey, *American Lawyer* (V. xvi, p. 293).

INTERNATIONAL LAW. (Author's Rights in Argentina). "Des Juridictions Compétentes en Matière de Droit d'Auteur dans la République Argentine et de la Validité des Traités de Montevideo," by Emile Leduc, *Revue de Droit International Prive et de Droit Penal International* (V. iv, p. 596).

INTERNATIONAL LAW (Immunity of Diplomats). "De l'Immunité de Juridiction des Agents Diplomatiques," by Maurice Leven, *Revue de Droit International Prive et de Droit Penal International* (V. iv, p. 580).

INTERNATIONAL LAW (see Coasting-Trade).

JURISPRUDENCE (Fusing Civil and Common Law). "Civil Law Rights and Common Law Remedies. A Résumé of the Progress of Legal Fusion in the Philippines," by Charles S. Lobingier, *The Juridical Review* (V. xx, p. 97). Commenting favorably on the success with which the Spanish substantive law, practically retained in the Philippines, is administered through what is substantially a common law system of procedure provided by the code.

JURY SYSTEM. "Jury Injustice," by C. E. Green, *The Juridical Review* (V. xx, p. 132). An argument against the jury system as wasteful and unsatisfactory, and unnecessary for the protection of liberty in modern times.

LEGAL EDUCATION. "The Advisability of a Longer Law School Course, and of a Higher Standard of Admission," by H. A. Bronson, *Central Law Journal* (V. lxvii, p. 85).

MARRIAGE BROKAGE (India). "Marriage Brocage Contracts," by S. Vaidyanath Iyer, *Bombay Law Reporter* (V. x, p. 113). A short review of the law in India.

MINING. "Mining Law and Land-Office Procedure with Statutes and Forms, by Theodore Martin, Bender-Moss Co., San Francisco, 1908. This book will prove of value to lawyers in the western states whose practice involves the highly specialized property law of mines, most of which is governed by statute. As the author says, "No effort has been made to make the work a treatise, but rather to state the law and tell where it can be found." For this purpose the book is well arranged and its value is enhanced by an admirable index.

MORTGAGES (England). "The Rights of Second Mortgagees Regarding Possession," by R. M. P. Willoughby, *Law Quarterly Review* (V. xxiv, p. 297). Discussing the disadvantage to a second mortgagee arising from the fact that he does not have the legal estate and therefore cannot recover possession of the land by any process short of foreclosure or redemption.

NAVAL TRIALS (Alleged Abuses). "Some Curious Features of the Naval Fleet's Trials," by George F. Ormsby, *Albany Law Journal* (V. lxx, p. 189). Protesting against alleged failures to furnish accused sailors with copies of the charges within ten days of arrest as required by law and against illegal adjournments of courts-martial. Charges are made of covering up of evils by high law officers of the navy in order to escape dismissal from office.

REAL PROPERTY (Easements). "The Creation of Easements," by T. Cyprian Williams, *Law Quarterly Review* (V. xxiv, p. 264). Answering some of Arthur Underhill's arguments advanced to prove that an easement may be granted in fee without words of inheritance and declaring that in the present state of the authorities it is the *duty* of a conveyancer to use such words.

REAL PROPERTY (Easements). "The True Nature of an Easement," by Charles Sweet, *Law Quarterly Review* (V. xxiv, p. 259). Acknowledging that Arthur Underhill's conclusion, in the previous number of the *Law Quarterly Review* (p. 199), that an easement can be granted in perpetuity without words of limitation is probably right, but maintaining that the question is not free from doubt and that the conveyancers' practice of using words of limitation is amply justified by the uncertainty.

REAL PROPERTY (Easements). "The Easement of Light and Air and its Limitations under English Law," by F. Y. R. Radcliffe, *Law Quarterly Review* (V. xxiv, p. 247). Conclusion of an extended discussion of the English law on the right to light and air.

REAL PROPERTY (Ottoman). "Ottoman Land Law in Cyprus," by Thos. W. Haycraft, *Law Quarterly Review* (V. xxiv, p. 279).

TAXATION. "Taxation under Proposed Constitutional Amendment," by Morrison R. Waite, *Ohio Law Bulletin* (V. liii, p. 312).

UNION LABELS (Protection). "Union Labels," by W. A. Martin, *American Law Review* (V. xlii, p. 511). A careful examination with numerous citations of cases bearing on the legal protection of the union label. The subject is discussed under five aspects:

"(1st) Whether it is a technical trade-mark and entitled to protection as such. (2d) Whether it is entitled to protection under Act of Congress, July 8th, 1870. (3rd) Whether entitled to protection when used by a member of the union on goods made and sold by him. (4th) Whether entitled to protection in absence of statute though not considered a technical trade-mark. (5th) The protection afforded by State legislation enacted for that purpose."

To the first two questions the answer is in the negative. The decisions on the first are not harmonious but "a review of the decisions and a consideration of the elementary principles of trade-mark law, makes the conclusion necessary that the union not being the owner, manufacturer or seller of the goods to which the label is attached, the label is not a valid trade-mark nor entitled to protection as such."

The Act of Congress referred to under the second head provides — "that protection may be obtained for a lawful trade-mark by recording in the patent office a statement specifying the names of the parties, and their residence and place of business . . . the class

of merchandise, and the particular description of goods comprised in such a class, by which the trade-mark has been or is intended to be appropriated. This provision of the act, it has been said, clearly contemplates an actual business conducted by the person or persons named, the adoption of a trade-mark in that business, and its appropriation to a particular 'class of merchandise' produced or sold by the parties making the registration.

As to the third question, however, the answer is in the affirmative. Even though the label lacks the characteristics of a valid trade-mark and cannot be protected as such, a bill in equity will lie to enjoin the perpetration of a fraud which injures plaintiff's business and occasions him a pecuniary loss.

"The next question for consideration is whether a union label, though considered not a technical trade-mark, is entitled to protection in the absence of legislation expressly conferring it. It by no means follows that the label is not entitled to protection merely because the law for the protection of technical trade-marks cannot be invoked for that purpose. There are, however decisions which in effect so declare, and, it is believed, erroneously."

Consideration of the various arguments lead the author to conclude that "a court of equity should protect by injunction a union label shown or admitted to be of value, provided there is nothing in the contents of the label which amounts to an infraction of the rules of morality or public policy."

This valuable paper concludes with a discussion of legislation, in a number of states passed to protect the label from infringement. The constitutionality of such legislation, which has uniformly been upheld, and various questions in regard to enforcement are treated under this head.

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.)

ADMINISTRATIVE LAW. (Discharge of Soldiers without Honor.) U. S. D. C., N. Y.— The case of New York in Reid *v.* United States, 161 Fed. Rep. 469, sustains the President in discharging "without honor" the soldiers of the Twenty-Fifth Infantry, and holds that the discharge, being in the exercise of his discretion, was not subject to review by the courts. The contract of the discharged soldier, complainant in the suit, was to serve "for the period of three years unless sooner discharged by proper authority." Such a contract, it is stated, was terminable by the government at will by an officer having proper authority. The fourth article of war, Rev. St., § 1342 (U. S. Comp. St. 1901, p. 945), providing that no discharge shall be given to any enlisted man before his term of service has expired, except by orders of the President, the Secretary of War, etc., confers the authority on, or recognizes it as existing in, the President of the United States. The article, it is noted, has remained unchanged since 1806, and clearly assumes that discharges may be granted before expiration of service.

This decision is unquestionably right. The President, as constitutional commander-in-chief, has the obvious executive power of removal. Without such power always in reserve military discipline in emergencies would be lacking altogether. It is hardly to be questioned that over all civil officers the President, as chief executive, has the power of removal which must accompany a centralized administration; but as to the military power as chief in command under the Constitution there can be no doubt. B. W.

ALIENS. (Expatriation of American-born Women.) U. S. D. C., Penn.— In re Martorana, 159 Fed. Rep. p. 1010, rejected the wife of the petitioner for naturalization, as being incompetent to act as a witness under Act June 29, 1906, requiring the vouchers to the petition to be citizens of the United States. It appeared at the hearing that Mrs. Martorana was born in the United States and had resided here all her life. The court in determining her citizenship cites Act Cong. March 2, 1907, c. 2534, 34 Stat. 1228 [U. S. Comp. St. Supp. 1907, p. 381], providing that any American woman who marries a foreigner shall take the nationality of her husband, and holds that it settles definitely the citizenship of married women, and that by marrying aliens they become aliens, though continuing to reside in the United States.

ATTACHMENT. (Hearing on Nominal Attachment.) Maine.— The sheriff's return of a writ of attachment recited that he had attached a chip, the property of defendants. Upon the petition by the sheriff to amend the writ to allow the insertion of certain words, the defendants requested that there be a hearing and evidence as to what the sheriff in fact did, and that the sheriff give his testimony and they have an opportunity to examine him in relation thereto. The Supreme Judicial Court of Maine decided in the case of Swift *v.* Hawkens et al., 69 Atl. Rep. 620, that a hearing as to the physical fact of attaching a chip as the property of defendants would be an idle ceremony. It was a legal fiction which could not be denied when stated in the return.

ATTORNEY AND CLIENT. (Disbarment.) Minn.— The case of State Board of Examiners in Law *v.* Hart, 116 N. W. Rep. 212, is interesting not only because of the subject matter of the decision but also on account of the manner in which the court rendering it was constituted. The proceeding was instituted for the purpose of having defendant disbarred because of certain alleged misconduct and disrespect toward the Minnesota Supreme Court. Defendant, who had been attorney for the defeated parties in certain litigation, wrote and addressed a letter to the Chief Justice by name and title in which he severely criticised the court for its decisions and in another letter to the Governor suggested impeachment of the judges for participation therein. Copies of these letters were given out to newspapers and parts of them published extensively throughout the country. In the letter to the Chief Justice three decisions were discussed and the following

language used: "Is a proper motive for the decision discoverable short of assigning to the court emasculated intelligence, or a constipation of morals and faithfulness to duty?" and in the one to the Governor, "It goes to the integrity and stability of the state if the members of the court cannot be 'men learned in the law' as required by the constitution, or honest, as required by good morals." There was also much other matter of a similar character in each letter. The members of the Supreme Court feeling that they were disqualified to sit in judgment where their own acts were drawn in question, the Governor, acting under a provision of the state constitution, appointed five judges of the district courts to sit in their stead and it was by this tribunal that the decision was handed down. While denominating the letter to the Governor and the publication of the other as reprehensible the court says the matter did not arise in any pending litigation, and states that no reported case has been discovered where an attorney was disbarred "for any utterance written or spoken concerning a decision or ruling of a judge in a cause after its final determination and not addressed to the judge in person."

It held, however, that the letter addressed to the Chief Justice constituted a breach of professional conduct warranting a suspension from practice for a period of six months.

BAILMENT. (Breach of Contract to Return Goods at Specified Time.) N. Y. Sup. Ct. — In Carll *v.* Goldberg, 110 N. Y. Supp. p. 318, it appeared that plaintiff left his overcoat with defendant to be cleaned and returned by a specified time. Defendant failed to return the coat as agreed. After the time for its return defendant's shop was burglarized and the coat stolen. Defendant was not negligent so far as the burglary was concerned. Plaintiff sued for "breach of contract" in failing to return the coat on the day specified. The court holds that defendant was guilty of breach of contract in failing to return the coat, and was liable for its value.

CONFLICT OF LAWS. (River Boundary.) Oregon. — A case of especial importance to those states separated from neighboring commonwealths by navigable streams was recently decided by the Supreme Court of Oregon and published at page 720 of 95 Pacific Reporter under the title State *v.* Nielsen. Defendant was convicted of illegal fishing on the Washington side of the Columbia River in violation of the laws of Oregon. The laws of the former state permit fishing in the manner in which he was engaged and for the doing of which he was convicted, and he had a license from that state giving him the required permission.

The laws of Oregon are, however, more stringent and there seemed no question but that he was guilty of their violation if subject to their operation. Section two of the Act of Congress admitting Oregon to statehood (Act Feb. 14, 1859, c. 33, 11 Stat. 383) provided that it should have concurrent jurisdiction on the Columbia River so far as it should form a boundary with any other state or territory. It was claimed that by this was meant that assent must be given by both jurisdictions to any legislation affecting the river, but the court held that such was not its purport and that whenever the law of one of the states was more stringent than that of the other, the one imposing the greater restrictions should apply.

CORPORATIONS. (Rescission of Sale to Company by Promoters.) U. S. Sup. Ct. — The question of the right of a corporation to rescind a sale of property to it by promoters is discussed by the Supreme Court of the United States in Old Dominion Copper Min. and S. Co. *v.* Lewisohn, 28 Sup. Ct. Rep. 635. Lewisohn and another person named Bigelow formed the plaintiff corporation for the purpose of carrying out their plans. All other directors seem to have been mere dummies. Very soon after organization of the company its capital stock was increased and all but 20,000 shares exchanged for property in which the promoters were interested. These remaining shares were then offered for sale to the public and purchased by persons who knew nothing of the profits made by the promoters in selling the property to the corporation. The court held that if there was any fraud it must have been in inducing the subscriptions by the public without divulging the facts regarding the purchase of the property by the corporation and that as Lewisohn and Bigelow owned all the corporate stock at the time of the transaction complained of it was but a taking of money out of one pocket to put in the other and could not constitute a fraud on the corporation nor on subsequent purchasers of stock.

CORPORATIONS. (Power to Insure Life of Officer.) N. C. — A stockholder, in Victor *v.* Louise Cotton Mills, 61 S. E. Rep. 648, sought to restrain the directors from paying insurance premiums on the life of a former president of the company. The services which the president performed were of great and peculiar value to the company, and at the request of the directors his life was insured for a large amount payable to his executors or assigns and the policy was immediately assigned to the company, which paid the premiums. The

policy was a 20-payment life. Several yearly premiums had been paid and the president had resigned. The suit was to enjoin the directors from making further payments from the funds of the company. The company was chartered as a manufacturing corporation with the powers usually conferred for the purposes of its creation. The court after reviewing the provisions of the charter finds no expressed power to enter into such a contract, and holds that such a corporation has no implied power to insure the life of its president, at least beyond the period of his connection with the company.

This decision is probably correct. The law that corporate funds can only be devoted to the operation of the business of the company which it is empowered by its charter to carry on is of course fundamental. And yet both the managers of corporations and people dealing with them have to be reminded of this law very often. A railroad cannot subscribe to an exposition project, a steel corporation cannot contribute to campaign funds — but both of these have been done at request. The only way to support this contract is to find that it really was a business bargain for the officer's services.

B. W.

CORPORATIONS. (Stockholder's Liability.) Mass. — The liability of a stockholder of a corporation which had never fully complied with the statute under which it was organized was one of the questions for determination by the Supreme Judicial Court of Massachusetts in the case of Bearse *v.* Mabie, 84 N. E. Rep. 1015. Defendant Mabie purchased stock from a South Dakota corporation for which it was shown he impliedly agreed to pay but had never done so. In an action brought by Bearse to enforce Mabie's statutory liability as a stockholder, Mabie contended that he was not a stockholder because no by-law was ever adopted authorizing the issuing of shares before they were paid for.

The court holds, in an opinion by Judge Loring, that notwithstanding the fact that the state could have instituted proceedings to avoid the stock because of the failure of the corporation to comply with the law and that by the terms of the act under which the company was incorporated its complete powers come to an end on the expiration of a year for lack of proper organization, the defendant's status as a stockholder was not thereby affected but that he was liable as such under the statute since parties cannot set up their failure to comply with the statutory requirements to escape the result of what they do when they have a right to do what they do by complying with the statute.

CRIMINAL LAW. (Negligence of Captain of Vessel.) U. S. C. C. A., N. Y. — The case of Van Schaick *v.* United States, 159 Fed. Rep. 847, is interesting on account of the facts rather than the law. It is the sequel of the dreadful holocaust known as the " Slocum disaster " in which something like a thousand people lost their lives by the burning of the vessel the " General Slocum " while carrying a picnic party on East River, New York, June 15, 1904. Defendant, who was master of the vessel, was convicted of manslaughter by violation of the statutes of the United States providing punishment for failure to exercise proper care in providing life preservers, means of prevention of fire, etc., and appealed to the Circuit Court of Appeals. That tribunal reviews the history of the disaster and affirms the decision of the Circuit Court.

EQUITY. (Enjoining Strikes.) U. S. C. C., N. Y. — The case of Delaware, Lackawanna & Western Railroad Co. *v.* Switchman's Union *et al.*, 158 Fed. Rep. 541, arises out of an attempt of the plaintiff to have defendants restrained from enticing a strike. A temporary restraining order had been granted and the decision of Judge Hazel was on motion to have it continued *pendente lite*. It seemed that a poll of the members of defendant union had been taken favorable to a strike but that to make it effective it was necessary to have the sanction of defendant Hawley, president of the organization. The court held that the fact that he might give such consent did not constitute such an inducement or incitement to strike as to warrant continuance of the injunction.

DISCOVERY. (Inspection of Instruments.) N. Y. Sup. Ct. — In Riddle *v.* Blackburne, 110 New York Supplement, 748, the plaintiff sought to obtain a discovery of an instrument alleged to be a libel. The application was denied because it would compel defendant to furnish evidence that might be used against him in a criminal prosecution. The objection was taken on the application, and the court holds that it was properly taken then, as the opposition to the motion was the only opportunity defendant had to object to being compelled to furnish such evidence.

EQUITY. (Multiplicity of Suits.) U. S. C. C. A. Ind. — In Utz *v.* Wolf, 159 Fed. Rep. 696, it appeared that complainants agreed to print the names of merchants purchasing stamps in an automobile stamp directory and authorized the merchants to exchange for each directory containing 100 stamps a ticket entitling the holder, on the merchant's performance of the contract, to one

fractional interest in an automobile. Each contract provided that complainants could make similar contracts with other merchants and that persons receiving tickets from the merchants complying with their contracts should have equal interest in the automobile. The merchants repudiated their contracts before the stamps were issued. The court held that complainant could not maintain a bill against all the merchants on the theory that the automobile was involved in all the contracts and that as there were no ticket holders the merchants were entitled to it, and since it could not be given, or its value credited to each merchant in an action at law, all the merchants became subject to one equitable suit, in which the automobile could be tendered to them jointly.

EQUITY. (Restraining Use of Judgment as Evidence.) N. Y. Sup. Ct.—A rather novel though not entirely new branch of equity jurisdiction is involved in Matthews *v.* Carman, 107 New York Supplement, 694, where it is sought to set aside an order in summary proceedings as being obtained by fraud and to restrain its use as evidence. The Supreme Court held such relief available in a proper case, but as the facts in this instance showed that the justice's court in which the judgment was rendered had no jurisdiction it was subject to collateral attack as being the determination of a court not of record and could be objected to when offered in evidence. Equitable relief was therefore denied.

JUDGMENT. (Constitutional Law.) U. S. Sup. Ct. — According to the statement of facts in the case of Brown *v.* Fletcher, 28 Sup. Ct. Rep. 702, while certain litigation was pending against Fletcher in one of the courts of Massachusetts the parties to the action entered into a stipulation for arbitration which was not to be dissolved by death of either party. Fletcher died before final award and letters testamentary were issued in Michigan where the main part of his property was situated and an administrator with will annexed appointed in Massachusetts. The principal suit was then revived, the ancillary administrator appeared, and notice was served on the executor in Michigan.

The attorneys of Fletcher withdrew their appearance and the executor made no appearance. The arbitration proceeded, an award was made against Fletcher's representatives, and the judgment was subsequently presented as a claim against Fletcher's estate in Michigan and disallowed by the probate court. Its judgment was affirmed by the Supreme Court of Michigan and the case in the United States Court was on appeal from this affirmance. It was contended that the judgment of the Massachusetts court was, under the full faith and credit clause of the constitution, entitled to recognition in Michigan, but the court held that as there was no appearance by the executor he could not be bound by a judgment rendered against the ancillary administrator.

LIMITATION OF ACTIONS. (Application of Part Payments.) Minn.—The Minnesota Supreme Court decided an interesting question on the effect of part payment of debts barred by limitation in the case of Anderson *v.* Nystrom, 114 N. W. Rep. 742. The father of defendants being indebted to plaintiff gave him three promissory notes therefor and after all of them had become barred by limitation sent a part payment to him without any direction as to its application. Plaintiff indorsed one-half the amount paid on each of two of the notes. After Nystrom's death his sons executed a note to plaintiff in satisfaction of the three held against their father under agreement with plaintiff that he would "make no trouble on account of them." Suit was subsequently brought on the sons' note and the question arose as to the effect of the indorsements of payment made by plaintiff. The court held that where payment is made on claims not barred, without direction as to its application, the creditor may split it up and by indorsement on the different obligations prevent the running of the statute but that this rule will not apply to claims already barred.

MASTER AND SERVANT. (Government Inspection.) U. S. C. C. A. Tex.—The case of O'Connor *v.* Armour Packing Co., 158 Fed. Rep. 241, presents some unusual questions as to a master's duty to his servant. Plaintiff was in the employ of defendant engaged in the removal of hides from animals slaughtered at one of defendant's plants and sent to Fort Worth, Texas, where plaintiff's work was performed, and the animals thereafter sold to local retail butchers. It appeared that plaintiff became afflicted with some kind of malady which was diagnosed by his physician and treated as charbon or anthrax, which he alleged was contracted from the diseased carcass of a calf while skinning it and that defendant was guilty of negligence in failing to properly inspect the carcass and prevent its handling in the same manner as was pursued with healthy animals. Defendant claimed that an adequate government inspection was made, but the court held that the duty was one which could not be thus delegated so as to relieve defendant without showing that it had been actually and properly done. The judgment of the lower court

on a directed verdict for defendant was reversed by the Circuit Court of Appeals.

NEGLIGENCE. (Turntable Doctrine.) W. Va. — The Supreme Court of Appeals of West Virginia in Conrad *v.* Baltimore & O. R. Co., 61 S. E. Rep. 44, joins in following the lead of the recently noted cases from Ohio and Pennsylvania against the doctrine of the "turntable cases" as first announced in Railroad Co. *v.* Stout, 17 Wall. 657, 21 L. Ed. 745. Willie Conrad, a boy twelve years old, was injured while playing at turntable located in a thickly settled portion of a small town. Judgment was recovered in the lower court for his injuries and defendant appealed. The Supreme Court of Appeals refers to the statement sometimes made that turntables are "attractive nuisances" as unjustifiable and says: "A turntable is a useful and lawful machine affixed to the owner's real estate, and incapable of doing any manner of harm to any person off of the land. It is immobile, not unsightly, not obstructive, not offensive in any sense. Nobody can be injured by it unless he come upon the land and set the machine in motion himself, to his own injury." A distinction is drawn between turntable and spring gun and trap cases and the judgment of the lower court reversed.

While not a turntable case, a very similar principle is involved in Martin *v.* Louisville and J. Bridge Co., 84 N. E. Rep. 360, decided by the Appellete Court of Indiana. In this case an attempt was made to recover for injuries received by falling into an unguarded excavation across a path which had been habitually used by the public for a considerable time prior thereto. The court maintains the doctrine that an owner of property is under a duty to protect anyone coming thereon by invitation but that "mere passive acquiescence in the use of lands by others is not sufficient to make the appellees liable for injuries received by appellant under the facts alleged."

TAXATION. (Policy Loans by Insurance Companies.) U. S. C. C. La. — Whether so called "policy loans" by insurance companies constitute "taxable credits" was recently decided. An interesting statement is given as to the method pursued in making these loans and the provisions for their repayment. The court says that they really constitute part payments of debts before maturity and that the term "policy loan" is a misnomer.

The conclusion is reached that they do not constitute credits of the company and that they are therefore not taxable. The title of the case is New York Life Ins. Co. *v.* Board of Assessors. It is reported in 158 Fed. Rep. 462.

TORTS. (Unfair Competition.) U. S. C. C. Ill. — In Sperry & Hutchinson Co. *v.* Louis Weber & Company, 161 Fed. Rep. 219, the question of the right of a trading stamp company to restrain interference with its business was passed upon.

The company asking the injunction had embarked in a business in which they made contracts with merchants whereby they furnished green trading stamps to be given to customers on making purchases for cash. These stamps were to be kept in a book by the recipient and when he had a certain number they were redeemable in merchandise of the stamp company. By the terms of the agreement the stamps were not transferable and the title to the same remained in the stamp company, only the right to redeem being transferred by the merchant to his customers. The defendant company sought to interfere with this business by buying up the stamp books from the holders thereof and giving them in return their own stamps. The first company had expended considerable money and effort in advertising the wares of the merchants who used its stamps. The court held, in an opinion by Judge Kohlsaat, that the interference with the business was unlawful and should be restrained.

TRUSTS. (Deposit of Public Officer.) Okl. — In the case of Watts *v.* Board of Com'rs of Cleveland County, 95 Pac. Rep. 771, the question before the Supreme Court of Oklahoma was the right of a county to recover funds deposited by its treasurer in a bank which had subsequently to the time of the deposit become insolvent and gone into the hands of a receiver.

The treasurer of Cleveland County prior to the passage of any law providing for the designation of county depositories deposited funds of the county in a bank in his name as treasurer. Subsequently and before the funds were withdrawn the bank became insolvent and a receiver was appointed. The question then arose as to the rights of the county in the funds in the hands of the receiver. The court held, in an opinion by Judge Kane, that the money belonging to the county and deposited by its treasurer in the bank constituted a trust fund which the county might follow into the hands of the receiver after its failure; that the title to the money deposited did not pass to the bank so as to establish the relation of debtor and creditor between the bank and the county, as is the case with the ordinary deposit, although there was no agreement that the identical money should be returned to the treasurer and that hence the county was entitled to recover an equal amount from the receiver of the bank prior to the payment of the general depositors.

WAYS. (Use of Streets in Moving Building.) Mich. — The respective rights of a telephone company and a house mover as to cutting of wires crossing streets are considered by the Michigan Supreme Court in Kibbie Telephone Co. *v.* Landphere, 115 N. W. Rep. 244. The telephone company had offered to make the necessary changes in its wires to afford an opportunity to move a building along the street if defendant would pay the cost of so doing. This offer was declined and notice given to plaintiff that the building would be removed on a certain date and that such wires as might be in the way would be torn down. Proceedings were then instituted to enjoin the carrying out of such threat. Defendant claimed that under the Michigan statute providing for the use of streets by telephone companies so as to "not injuriously interfere with other public uses" he was entitled to proceed without regard to any supposed rights of plaintiff, but the court held that the moving of buildings was not a usual use of street within the terms of the statute and directed that a demurrer to the complaint be overruled. Northwestern Telephone Co. *v.* Anderson, 12 N. D. 585, 28 N. W. 706, 65 L. R. A. 771, 102 Am. St. Rep. 580; Williams *v.* Citizens' Ry. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201; Dickson *v.* El. Lt. & M. Co., 53 Ill. App. 379; Millville Traction Co. *v.* Goodwin, 53 N. J. Eq. 448, 32 Atl. 263, and Taylor *v.* St. Ry., 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216, are cited as authority for the conclusion reached.

THE LIGHTER SIDE

Good News.— An amusing story is told at the expense of a prominent Baltimore lawyer, who, like most young attorneys, got his first case by assignment from the bench. His client had been indicted for murder, and his conviction was a foregone conclusion, as his guilt was unquestionable.

The result of the trial was a sentence to be hanged; but the man made an appeal to the Governor for a pardon, and was anxiously awaiting a reply thereto when his lawyer visited him in his cell.

"I got good news for you — very good news!" the young lawyer said, grasping the man's hand.

"Did the Governor —— Is it a pardon?" the man exclaimed, joyously.

"Well — no. The fact is the Governor refuses to interfere. But an uncle of yours has died and left you two hundred dollars, and you will have the satisfaction of knowing that your lawyer got paid, you know," was the comforting explanation. — *Harper's Weekly.*

Sentence Suspended. — "You are charged with having registered illegally."

"Well, your Honor," responded the prisoner, "perhaps I did, but they were trying so hard to beat you that I just got desperate." — *Philadelphia Ledger.*

Laissez Faire.— A short time ago an old negro was up before a judge in Dawson City, charged with some trival offence.

"Haven't you a lawyer, old man?" inquired the judge.

"No, sah."

"Can't you get one?"

"No, sah."

"Don't you want me to appoint one to defend you?"

"No, sah; I jes' tho't I'd leab de case to de ign'ance ob de co't." — *Philadelphia Public Ledger.*

Outwitting Her Lawyer.— "Still, there are occasions when a lawyer isn't the chief beneficiary of a suit," said Mrs. Stonewall Jackson. "I know of one instance. A friend of mine in Virginia sued a railroad company for damages and secured a verdict for $50,000, which was paid, and the whole amount is now in bank subject to her order. Her counsel didn't get a penny of it."

"How was that?"

"She found the only way of outwitting him — she married the lawyer."

The Far Limit— The lawyer said sadly to his wife on his return home one night: "People seem very suspicious of me. You know old Jones? Well, I did some work for him last month, and when he asked me for the bill this morning, I told him out of friendship that I wouldn't charge him anything. He thanked me cordially, but said he'd like a receipt." — *National Farmer.*

"O, You're Killing Me!" — O, you're killing me!" cried a male voice, 'Have you no pity?'" said Senator Foraker, telling his story of a seaside hotel to illustrate hasty verdicts.

"There followed a series of awful groans. Then:

"'Stop! You are murdering me! I'm dying.'

"For a little while the crowd outside heard feeble grunts and moans. Then a wild shriek rang forth.

"'Murder! You've done it at last. You've killed me. O, I'm dying.'

"'What deed is going on in there?'

"There was a smothered laugh within, the door was opened instantly, and a young and pretty woman appeared.

"'Did the noise alarm you?' she said. I've just been peeling off the shirt from my husband's sunburnt arms.'" — *Philadelphia Record.*

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THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

S. R. WRIGHTINGTON: Editor
WALTER F. WYMAN: Manager

CONTENTS

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Our Contributors.

HONORABLE JACOB KLEIN is the senior member of the firm of Klein & Hough and one of the leading lawyers of St. Louis. He received his degree from the Harvard Law School in 1871 and before the formation of his present firm was for many years Circuit Judge in Missouri. He has taken an active interest in the work of the American Bar Association and was called upon to preside over the meeting at which the Code of Ethics was adopted.

JUDGE JACOB M. DICKINSON, the retiring president of the American Bar Association, is so well known to our readers through the appreciative sketch by Mr. S. S. Gregory of Chicago which we printed last October that he needs no further introduction.

HONORABLE WILLIAM SCHOFIELD is a graduate of Harvard college and the Harvard Law School. After serving for a time as instructor in the latter institution he practiced in Boston until he was appointed Judge of the Superior Court in Massachusetts a few years ago. He has found time since he has been on the bench to contribute occasional articles to legal periodicals. The manuscript which we print in this number was an address delivered by him before the section on legal education of the American Bar Association at Seattle in August.

WALLACE R. LANE is a native of Massachusetts and a graduate of Brown college and the Yale Law School. After a short period of practice in Fitchburg, Mass., he settled in Des Moines, Iowa, in 1901, where as the junior member of the firm of Orwig & Lane he has since specialized in patent law, for which his scientific and mechanical studies at Brown especially prepared him. He is a member of the Chicago and the Washington Patent Bar Associations and lecturer on patents at Drake University and the University of Nebraska. His article was read before the section on patent and copyright laws.

We print in this number the text of the Code of Ethics adopted by the American Bar Association at its annual meeting, together with a photograph of the active members of the committee in session at Washington while at work on the draft of the code last winter. The importance of this instrument seemed to merit special treatment in this issue.

KARL VON LEWINSKI is a graduate of the Universities of Munich and Breslau and for the last three years has been a member of the Prussian department of justice, serving as Amtsrichter, or county court judge, in Berlin. He has been in this country on a leave of absence studying some subjects of American law on which he will write in an international work to be published in Germany under government auspices. The paper which we publish in this number was read by him before the section on legal education at the meeting of the American Bar Association at Seattle.

F. W. Lehmann

The Green Bag

Vol. XX. No. 10 BOSTON October, 1908

FREDERICK W. LEHMANN

By Jacob Klein

THE new president of the American Bar Association, Mr. Frederick W. Lehmann, was born in Germany February 28, 1853, but came to this country in early childhood. He first lived in Cincinnati, where he attended the common schools. He later removed to Indiana and finally completed his education at Taber College in southwestern Iowa, from which he graduated in 1873. During his college course he had studied law in the office of J. L. Mitchell in Forrest County, Iowa, where he first practiced. His early practice also included Nebraska City, just across the river in Nebraska. In 1876 he moved to Des Moines, where in December, 1879, he married Miss Nora Stark. The following year he went to St. Louis, Missouri, to become General Attorney of the Wabash Railroad. He continued in this position till June, 1895, when the firm of Boyle, Priest and Lehmann was formed, in which his seniors were Wilbur F. Boyle, who formerly had been Circuit Judge in the city of St. Louis, and Henry S. Priest, who had been Judge of the United States District Court. This firm continued till 1905, when Mr. Lehmann retired to form with his son Sears the firm of Lehmann & Lehmann, of which another son, Frederick W. Lehmann is now a member. Mr. Lehmann in 1907 received from Missouri State University the degree of LL. D. He has been president of the St. Louis Bar Association, and during the last year was president of the General Council of the American Bar Association.

During the eighteen years that Mr. Lehmann has lived in St. Louis he has become distinguished not only in his profession, in which he has achieved a standing in the first rank of a very able Bar, but also as a public spirited citizen of high ideals and honest and pure purposes. He was a Director of and one of the leading spirits who made the great Louisiana Purchase Exposition possible, and as Chairman of the Committee of the Board on Ethnology and on International Congresses of Arts and Sciences, including the Universal Congress of Lawyers and Jurists, held in September, 1904, under the joint auspices of the Exposition and of the American Bar Association, he not only rendered signal service, but attained noteworthy success.

Since then he has been chosen and acted as President of the Board of Trustees of the Public Library of St. Louis, and assisted in procuring the Carnegie gift for the construction and maintenance of the new Central Public Library and branch libraries in St. Louis. Under his immediate supervision three of the branch libraries have been located and erected, and the fourth, as well as the imposing Central library, occupying the equivalent of four ordinary city blocks, is now in course of construction.

Mr. Lehmann is a man of culture and wide reading, possessing in a high degree the gifts of oratory, and his addresses are scholarly, thoughtful and embellished by his intimate knowledge of literature. Broad and sympathetic, he is, like Abou Ben Ahdem, a lover of his fellowmen. Honest in his mental operations, pure in mind and in heart, he is regarded by his fellow citizens and especially by his professional brethren, as a fine type and example of a self-made man.

Mr. Lehmann's literary tastes have led him to become a collector of books. He has gathered together what is probably the finest collection of rare and beautiful books in St. Louis. There is one more costly and richer in valuable manuscripts, but his is the library of a booklover collecting with care and judgment. This has led him also to the study not only of the printer's art, but of the gems of literature, and so he is always ready with interesting allusions from some "quaint and curious volume of forgotten lore."

As a lawyer he has achieved more than local renown. In the trial of cases at *nisi prius* he depends upon a fair presentation of the facts and an honest but earnest appeal to the jury for the right. In the higher courts his briefs are clear, concise, and convincing statements of the proposition he maintains, supported by a keen and honest logic which compels attention and conviction. His short speech at the dinner of the Association at Seattle was indicative of his breadth of mind and strength of character. It may be safely predicted that Mr. Lehmann will rank high in the list of distinguished men who have been presidents of the American Bar Association.

ST. LOUIS, MO., September, 1908.

THE PRESIDENT'S ADDRESS

By Jacob M. Dickinson

MONTESQUIEU described the ideal legislator as one who "perceives ancient wrongs and the way to correct them, but sees also the evils the correction may produce, who leaves the evil fearing something worse, leaves what is good if doubtful as to what may be better, looks only at the part in order to judge the whole, and examines all the causes in order that he may foresee all the results."

This most aptly describes the wisdom and conservatism of those who, in breaking away from English rule and creating a new nation, did not establish a revolution in the laws simply because they were bringing about a revolution in the government, but held to the old, only making changes as the necessity for them became apparent. Much of the spirit of modern legislation is the very antipodes of all this. A wrong often exaggerated in importance becomes manifest, and straightway it is assailed with the bludgeon, and the blows frequently create more devastation than does the object which provokes the assault. A good, sometimes of fanciful value, is perceived, and its attainment is sought without regard to the intervening destruction it may bring. Ill-considered legislation is sometimes like the heedless impulse of a child, which attracted by a gaudy flower in his eagerness to grasp it tramples down a bed of roses. The vices of legislation engaged the attention and were the principal theme of many of my predecessors. Their scathing criticisms and profound disquisitions which will forever enrich our literature, would have cured, or at least have moderated, a less inveterate evil. Against the passion of the American people for legislation as a panacea, there is no defense. Each of those learned juridical philosophers who essayed it, seeing the futility of his effort, might have warned those entering the same lists, saying:

si Pergama dextra
Defendi possent, etiam hac defensa fuissent.

The trouble is inherent in the nature of our institutions. With the conditions as they exist the evil is incurable. While youth, inexperience and ignorance constitute no legal bar to political preferment, while manhood suffrage is the source of all governmental power, while so many of those most capable of ruling prefer selfishly their personal pleasures and private interests to the general welfare, so long will we suffer the maximum of burdens that come from unwise and unskilled legislation. The most fertile fields for the culture of the pathogenic germ which we may classify as the legislative microbe, are the brains of fledglings, who are gifted with a facility for speech which is often an open sesame to popular favor, luxuriate in a scanty knowledge of law, especially that which is statute, are opulent in an independence which comes from freedom from all family cares and business responsibility, and above all are fired with an ambition to do something which, while it may incidentally confer a blessing upon their country, is primarily intended for their own promotion. Some measures must be fathered by them, the more sensational the better. Knowing but little of the trend of events, and the correlation of economic questions, they scan the recent statutes of other states, and without much regard for climate, environment, traditions, population, the great questions that enter into the development and conservation of the commerce of a country, and the conditions of their own state, forthwith reproduce them if they look formidable and are explosive in character, and proudly send them forth with their imprimatur.

While such legislative evil is incurable, and like a disease is inherited from age to age, happily the law-maker sometimes reforms. Time and experience may broaden him, and after much expense to his country he may rise to a height from which he deplores the folly of those upon whom his mantle has fallen. If we could educate legislators, and keep them in office at least until the country could profit from their training and experience, or have them bequeath their heads to their successors, as Mirabeau lamented he could not do, in many instances we would not grudge the cost of the tuition. But, like the weeds that with each recurrent year come up in the spring, a new crop of embryo statesmen, with no inherited experience, is always terrifying the country.

This is a part of the price for our institutions. We must take the evil with the good. If we cannot get the good at a less price then it is not too much to pay. If we could erect effective safeguards against such legislation this would no longer be a government "of the people, by the people, for the people," but a government of the aristocracy. As these conditions will not in our time materially change, we may as well view the situation with patience and in a philosophic vein, with no great hope of stopping the annual flow of unnecessary and unwise legislation. Like the brook, it will go on forever, or at least as long as our present form of government survives. The best that we can hope to accomplish is to bring about, as we have been doing with marked success, the enactment of uniform legislation in the several states. Our work will in the main be constructive. We can accomplish practically nothing in the way of restraint.

Much of our modern legislation is the outcome of a departure from principles which we have always regarded as fundamental.

Carl Schurz, in an interview with Bismarck in 1868, said that "the American people would hardly have become the self-reliant, energetic, progressive people they were, had there been a privy-counsellor or a police captain standing at every mud puddle in America to keep people from stepping into it," and that "in a democracy with little government things might go badly in detail but well on the whole, while in a monarchy with much and omnipresent government things might go very pleasingly in detail, but poorly on the whole." This was forty years ago. From the least governed people in the world we are rapidly becoming the most governed people in the world. Our increasing commissions for almost every department of public affairs are making our government, state and national, the most comprehensive system of bureaucracy ever known. The complex conditions of our times in each of their diversified forms are given special treatment and administration. This is a prolific source of legislation, much of it in flagrant disregard of the best sanctioned and most venerated doctrines.

The administration of justice should be by the courts alone. It is subversive of every idea of Anglican civil liberty for the judge to commit himself in any way to an opinion until the cause shall have been presented according to law. This is the distinguishing feature between the accusatorial and the inquisitorial trial, in which the judge inquires, becomes the prosecutor, and at the same time is theoretically the protector of the arraigned, "thus uniting a triad of functions within himself which amounts to a psychological incongruity."

It is demanding an impossibility of human nature, to expect one to try, with the proper judicial temperament, a cause first brought to his attention by an *ex parte* complaint, to which he has so far inclined his mind upon a preliminary showing as to institute an investigation, and upon which after such investigation, upon proceedings initiated by his sanction, he sits in judgment. One might as well expect the hunter who, with toil and skill has

tracked and started his game, when his blood is stirred and his whole being is aroused by the spirit of pursuit, to sit down calmly and deliberate whether or not it is right to destroy life for the sake of mere sport. Wrongs, great, flagrant, voluminous and inveterate, stirred to action. In a spirit of passion wrought upon by demagogues for selfish purposes, the people sought an expeditious remedy. Judicial, legislative and executive functions were hopelessly confused and consolidated. The offices of informer, prosecutor, judge and jury were combined in the same persons. The most astute and experienced mind could not contrive a better system for defeating justice. Mr. Webster said:

"If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them is the fundamental idea in the creation of all our constitutions; and doubtless, the continuance of regulated liberty depends on maintaining these boundaries."

The American people will not perpetuate a system so foreign to the principles which have been the foundation and safeguard of their prosperity, property rights and civil liberty. Their sense of justice, when a full understanding comes, will not sanction its continuance. While there may be commissions, the judicial function will be exercised either by bodies distinct from those which investigate and prosecute, or by the courts.

Much recent legislation of doubtful constitutionality, congressional and state, has been practically enforced by provisions for minatory, heavy and cumulative fines and imprisonment, devised in some cases expressly for the purpose of preventing a resort to the courts for relief. When the highest courts of the land, not exceptionally, but with a frequency that almost makes it normal, divide on constitutional questions, often determining the result by a bare majority, a lawyer will rarely, especially when the question is new, advise a client to pursue a course, which, by subjecting him to the possibility of paying cumulative daily fines, and to imprisonment, may destroy him. Though strongly persuaded, if not entirely convinced, that the acts if contested would be unconstitutional, he may counsel submission to what he regards as a taking of property without due process of law and an imposition of an oppressive and confiscatory burden, rather than incur the hazard of financial ruin. A statute framed purposely to create such a dilemma is tyranny worthy of draconian renown. No government can with impunity continue to exercise such oppression. It is a "hold-up" by the government itself, under the forms of law. If pursued it would pervert all sense of justice and accustom the minds of the people to the sanction of wrong as a practice of government. The vice thus implanted would take on new forms of legalized plunder and surely destroy the integrity of our institutions.

A recent state statute establishing the compensation to be charged by railroads for the transportation of passengers fixed the penalties at such an amount for each overcharge that, if the railroad companies contested the validity of the rates and failed to establish their contention, they would have run the hazard of forfeiture to the state within a year of the entire railroad property within the state. The decision of the Supreme Court of the United States in *Ex parte Young* that "when the penalties for disobedience are by fine so enormous and inprisonment so severe as to intimidate the company and its officers from resorting to the courts to

test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights," and that "the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those acts," will either bring legislators to a fairer treatment of the evils which they seek to remedy or will tax their ingenuity to devise some new method to evade federal restraint.

* * * * * * *

In our zeal to have the law symmetrical, wise and clear we may unconsciously assume the critical rather than the judicial attitude toward legislation and thus have our attention arrested more by its shortcomings than by its excellences. If too many laws are passed we must not overlook that but few are enacted in comparison with those that are rejected. Though some are the offspring of prejudice and passion, it must not be forgotten that often they are provoked by wrongs that arouse a just resentment. While adroit schemes for political patronage and graft are successfully contrived, yet the vast majority of legislation is conceived for the general welfare. No one can examine all the statutes of the states and of congress for any one year, without being profoundly impressed by the deep, earnest, alert purpose, generally manifested, to promote the public good, and without reaching a conclusion that, at no time in our history, has a higher moral sense or a more enlightened patriotism prevailed. Never have humanitarian considerations been so dominant in legislation, as is manifested by the recent laws to secure pure foods, to prevent the sale of noxious drugs, to limit the abuses of liquor, to care for and reform homeless, dependent and erring children, to ameliorate the condition of prisoners, to abate the spread of tuberculosis and other diseases and promote education. One who rises from the review of all the legislation of a year without a sense of general satisfaction and stimulated hope, and impressed, not by all the good that is manifest, but mainly by the crudities, the blemishes and the wrongs, and with a feeling of despondency for the future of the country, must be a hopeless pessimist.

The President of the United States in October, 1906, said:

"The instinct for self-government among the people of the United States is too strong to permit them long to respect any one's rights to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control would better be exercised in particular instances by the government of the states but the people will have the control they need either from the states or from the national government, and if the states fail to furnish it in due measure sooner or later constructions of the Constitution will be found to vest the power where it will be exercised in the national government."

While the constitutional doctrine thus promulgated, so shocking to any one who holds that the states have the right to exercise or not exercise without danger of losing them, powers which under the Constitution of the United States belong to the states, independently of whether they exercise them or not, did not arouse any serious apprehension on the part of the states; it came at a time when the inaction and apparent indifference of many of the states to the welfare of their helpless citizens, and their own future dependent upon the character of their citzenship, was painfully manifest.

Senator Beveridge introduced a bill putting a prohibition upon interstate commerce in products manufactured by labor of children under a specified age. This bill was reported as unconstitutional.

The subject attracted wide attention. The generous, the patriotic and the altruistic enlisted in the cause and supplemented the work of the national association organized for the purpose of securing state legislation limiting child labor within proper bounds. New laws regulating child labor or amending existing laws were passed in 1907 in twelve states, and since our last meeting Louisiana, Kentucky, Mississippi, Ohio and Virginia have passed like statutes. We can bear with much equanimity constitutional heresies which if they do no real harm are in their indirect result so beneficent.

* * * * * * *

Having conferred with several members of the Association whom you have honored with your confidence, I submit for your consideration some suggestions as to the Association acquiring and exerting greater strength.

We have a membership of 3,376, which is small in comparison with the number of those who are eligible. The census shows that in 1900 there were 114,460 lawyers in the United States. Allowing for deaths, retirement, and the further fact that many by courtesy are enumerated as lawyers who are not in the practice, we may, considering the normal increase of eight years, fairly estimate that there are not less than 80,000 in the United States engaged in the practice of the law.

While many of them bring dishonor to the profession, and are a public nuisance that should be abated, the vast majority are worthy of admission to our Association. Our constitution provides that any person to be eligible to membership shall be, and shall for five years next preceding have been, a member in good standing of the bar of any state. This was fixed as a sufficient safeguard by the founders of the Association, and nothing in our experience has demonstrated the necessity for more rigid requirements. While we have at our annual meetings an attendance of a few hundred, there were present at the recent reunion of the American Medical Association more than 8,000. There are about 130,000 legally qualified physicians in the United States. The membership of the American Medical Association is 32,000, but through its system of organization it, by direct representation through allied state and county bodies, is the recognized head of nearly 80,000 physicians and surgeons.

We would be loath to admit it, if it were a fact, and happily we know that it is not, that there is a higher social or ethical standard in other professions than there is in the law. It should not be more desirable to members of any profession to unite with their national association, either looking to the pleasures derivable from social intercourse, or the benefits that are conferred by co-operation. Can it be that the companionship of lawyers, who are usually accounted by others as the princes of good fellows, is duller, or that their interchange of professional ideas and experiences is less instructive? It is certain that either our reunions are in themselves less attractive, or we have taken less pains to enlist the interest of our brethren. The very profession of the law is coy, at least with those who maintain a proper ideal. In our practice we are like the maiden who, however expectant and willing, must wait and be asked. This cultivates a habit of reserve in professional relations. I found from efforts to increase our membership, that lawyers, in every way an ornament to the profession, had not joined because they had not been invited. They were restrained by a fine sense of delicacy from suggesting their own election. It is a pity that a modicum of the same restraining influence could not be injected into some of those who are rampant for judicial preferment. I

know that some members whose opinions I value entertain an idea of exclusiveness, and hold the Association in such esteem that they consider it derogatory to its prestige to solicit membership. The first article of our constitution declares that our object "shall 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." How are we to encourage cordial intercourse if we hold ourselves aloof, and do not endeavor to draw into our circle those with whom it would be agreeable to establish cordial relations? How can we put forth the strength of the profession for advancing its aims, if we do not enlist it in our ranks? We can best realize its ideals by reaching the intelligence and stimulating the activities of those from whom the bench which administers justice, and the legislature which alone can enact uniform laws, are recruited. If they are of us, then, whether they attend our annual meetings or not, they are imbued with the same purposes, instructed by the same teachings, and in close sympathy with all our efforts, and do not need to be appealed to and convinced, but with well-founded convictions, act upon their own initiative in promoting our just endeavors. Much has been accomplished and our record is without a blemish. The Association has brought about a higher standard in legal education and for admission to the bar, the enactment of uniform laws in many states has stimulated the formation and activity of state bar associations in states judicial districts, counties and towns, and in many other ways not necessary to recapitulate has justified its existence. The results attained would have been realized more speedily, and with greater facility, if we had evolved all the potentiality which we might have possessed. For years we have deplored in terms of eloquence the lowering of the standard of the profession, and have arraigned with stinging rebuke those who have brought it into disrepute, and even now we have under consideration a code of ethics which has for a long time been an object of our deep solicitude. It is not intended to be exclusive and applicable only to the members of this Association. It is for the profession at large. If adopted, we indulge the expectation that it will be accepted not only by the bar associations of the several states, but will, at least in substance, be enacted into law by many of the states. How much firmer will be the ground for such hope if we have the co-operation of members of every bar? The majority of the lawyers of every state are a credit to our profession, and are worthy of our fellowship. If that be not true, then it is a waste of time and energy to consider any system of ethics for their guidance. It is futile to frame canons for professional conduct which do not appeal to the majority of the profession. They are useless alike to the impeccable and the depraved. I stand for broadening our Association and recruiting its membership by active, systematic and constant effort. We should from year to year, as they become eligible, gather into our ranks, the younger members of the bar, who constitute its hope for the future, that they may develop their professional character under the ideals that this Association always maintains, partake of the generous intellectual feasts which are spread, and that the Association in all of its endeavors to fulfill its high destiny, may at every time and place where a contest is to be waged, mobilize a formidable array of earnest and aggressive members, who will give it loyal support.

It is desirable to establish closer relations with the bar associations of the several states. This was recommended by Mr. Manderson, Acting President in 1899, and again by him as President in 1900. At present, they are authorized to send dele-

gates to our meetings, but the relationship thus established is purely formal, of a social character, and has, so far as I know, resulted in nothing appreciable. It is a weakness in our organization that the attendance at the meetings, and upon the sessions, is voluntary upon the part of individual members, and that no sense of obligation or responsibility to others is imposed. On more than one occasion important questions, which would commit the Association on grave matters of doubtful constitutionality, have been brought forward at periods when only a small number of those attending upon the meeting were present. It would seem that prudence would suggest an adequate safeguard against committing the Association, representing as it does, actually a large number of lawyers of America and in the minds of the public generally the American bar, except upon a more representative vote. If the general idea here suggested shall be regarded as worthy of consideration it would be well to investigate the system adopted by the American Medical Association. It has established direct relations with state associations, which are represented by elected delegates, the number being based upon the ratio of membership in the state societies. This is the governing body. It deals with all of the larger and general problems. The number being limited to 150, opportunity is afforded for full debate without the necessity for tabling propositions under consideration. This system prevents the states near the place of meeting from exercising a controlling influence. The body is thoroughly representative of all the states. Special work of the Association is done in sections. A member of a state association is not *ipso facto* a member of the national association. He becomes a member by individual connection. All members of the association are free to attend upon the meetings. The scientific work is divided up and disposed of by sections. Through this organization the Association is in constant and personal relations not only with each state society, but with every member thereof. The result is that it wields a power in the profession, and over the profession, in enforcing a standard of ethics, and in bringing about the enactment of laws promotive of public health, that is incomparably greater than that exercised by it when its organization was somewhat similar to ours. With annual dues of $5.00 it has been able to bear, on account of its large membership, not only the ordinary expenses of the Association, but to employ a secretary who devotes his entire time to the work, and publish a journal which is unrivaled in the medical world. The state societies have, under the influence of the national association, taken on new activity, responsibility and dignity. The general plan of the American Medical Association has substantially the same objects in view that we have. It has been thus expressed:

"The three objects of paramount importance to be accomplished by medical organization are: *a*, the promotion of direct personal and social intercourse between physicians, by which mutual respect, personal friendship and unity of sentiment are greatly promoted; *b*, the more rapid increase and diffusion of medical knowledge, scientific and practical; and, *c*, the developing, unifying, concentrating and giving efficient practical expression of the sentiments, wishes and policy of the profession, concerning its educational, legal and sanitary welfare and the relations of the latter to the community as a whole."

The results obtained through its change of organization are so satisfactory to its members that they merit at least a careful consideration on our part. If the American Bar Association can have at least one officer devoting his entire time to its work and promoting its interests, and establish a law journal worthy of its great prestige, who can doubt that its influence will be vastly increased and that its great purposes

will be more surely and speedily attained? I do not suggest any hasty action, but I earnestly recommend that a committee be appointed to confer and report upon the question at our next meeting.

Whether we pursue old or new methods, we will hold steadfastly to the ideals that have always been cherished. There have been war periods when the demand for service to the country by the individual lawyer, in his capacity of citizen, has been more acute, but never has the American Bar been confronted with a more serious patriotic duty. For a long time, next preceding recent years, judgments of courts, especially those of final resort, were received with the greatest respect. The passions aroused by cases of such political significance as the Chisholm and Dred Scott cases were temporary. They never disturbed the general confidence in the courts, nor provoked a general assault upon them. Throughout the land there was in the minds of the American people a profound regard for the judicial department of government. If decisions were publicly criticised, the criticism was generally temperate, addressed to the particular questions, and was not of such character as to break down in the minds of the people respect for the judiciary. In various ways in recent times, and from sources too influential with public opinion to be ignored, the very foundations have been assailed upon which the stability of the courts rests. Judicial judgments are not accorded the same reception as formerly. Individual judges should be assailed if they are corrupt, or incompetent. It is no assault upon the institution to attack them for such causes in a proper way. The condition would become unwholesome and intolerable, and the system would decay of itself if this could not be done. While impeachment should not be lightly invoked, yet it is an indispensable safeguard. The impeachment of judges properly pursued would not undermine the confidence in the institution, any more than would unfrocking a priest destroy reverence for the priesthood. The condition that now exists is general in its tendencies. Not a court, but the courts, are frequently and fiercely attacked. Political parties of all creeds have bowed their heads in recognition of a discontent which if not general, at least bears the appearance of potentiality. All of this tends to destroy confidence in the courts and to make a subservient judiciary. The people have been led away from the principle that the independence of the judiciary is one of the mainstays of civil liberty under self-government, which is based on mutual self-restraint, and the belief that it is no less important than the principle of representation itself. We might profit from the utterances of despotic governments. The Supreme Court of the Kingdom of Prussia ordered to be framed and hung up in its hall a letter from Frederick the Second enjoining its members to be faithful to their oath, and to do justice in spite of royal demand. In 1499 Louis XII of France ordained that the law should always be followed by the high courts of justice in spite of royal orders which importunities may have wrung from the monarch.

It does not lie alone within the province of monarchical government to overawe judges. The majority in a democracy has and may again, become despotic. "Why did you not tell Judge Marshall that the people of America demanded a conviction?" was the question put to Wirt after the Burr trial. "Tell *him* that!" was the reply. "I would as soon have gone to Herschel and told him that the people of America insisted that the moon had horns, as a reason why he should draw her with them." Perhaps the judges are not altogether free from blame. When in the decision of cases of great public importance, upon which the attention of the whole country is centered, they assail opposing opinions as subversive

of the constitution and fraught with direst evils for the future of the country, it is not surprising if such reiteration will in time undermine the public confidence in at least the wisdom of the courts. Have American lawyers exerted themselves as they should to oppose these evil tendencies? They above all others know the imminence and scope of the peril, and the necessity for averting it if our form of government is to endure. It is not for them a question of political action. It rises higher than the duty to any political party.

The evil exists in public opinion and the remedy must come through public opinion. While the trouble may have arisen to some extent from the conduct of some of the courts we can confidently assert that there is nothing in the history of the bench to justify the attitude assumed so frequently by so many people toward the judiciary. American judges as a body have a record of which we are justly proud. The threatening attitude to which I refer, while it may largely have had its inception in discontent arising from special incidents, has assumed a wider field of criticism.

Lawyers did more than all others to create our system of government, founded upon a separation and an independence of the Executive, Legislative and Judicial Departments. The Constitution thus formed has maintained the liberties of all classes for more than a century. We will drift into a disregard of the rights of the minority and of the weak if this equilibrium shall ever be destroyed. American lawyers can do more than all others to regenerate in the minds of the people that faith in our institutions which is essential to the existence of our present form of government. The duties of the American lawyer are broad, and touch every phase of human affairs, but in no field of service is there a more imperative demand for his patriotic efforts than in preserving the independence and integrity of the courts and respect for them as an essential part of our government.

CHICAGO, ILL., August, 1908.

THE RELATION OF THE LAW SCHOOL TO THE COURTS

By William Schofield

THE rise and growth of law schools in the United States during the last century seem destined to mark an epoch in the history of the common law. Most of that growth has taken place since 1870, the year in which Professor Langdell began his career as a teacher in the law school of Harvard University. There are good grounds for the belief that this growth is permanent. According to the valuable report of the committee on legal education to the American Bar Association in 1907 there were then in the United States 119 law schools attended by about 17,200 students. Thirty-one of the law schools own the buildings in which their work is conducted. Valuable libraries have been collected and a good beginning has been made in the establishment of endowment funds.[1] The legal professon and the community are in sympathy with the schools. It is now taken for granted that the proper place to begin the study of law is in a law school. The graduates have demonstrated their capacity for usefulness, and frequently obtain employment in large offices immediately after graduation as the first step in their professional life. The law school has established itself as the regular, if not the exclusive, avenue to the bar.

It is generally conceded that the law school graduates come out with a good equipment in the law. Not infrequently, however, one can hear in conversation among lawyers and judges and occasionally see in print adverse comment to the effect that while they know the law, the young law school graduates are deficient in knowledge of facts and of practical life.[2] One of the principal means by which the law schools exert their influence upon the law is through the work of their graduates at the bar. Any serious criticism of their work or equipment is worthy of careful consideration.

When a young man leaves the law school, he quickly learns that he has entered a new world. In the law school his entire attention is directed to the law. At the bar, knowledge of facts, ability to deal with facts, and knowledge of human nature are of great importance. When the young graduate in law goes into court he finds that the amount of time and effort which must be spent upon questions of fact is very large in comparison with the amount required for questions of law. This applies not only to his own work as an attorney but to the work of the judges. In administering justice, the work of the court is divisible into two parts, the ascertainment of the facts and the application of the law to the facts. Ordinarily the law is clear. The difficulty usually is to determine the true facts and then to apply correctly the right rules of law to the facts.

This twofold duty performed by our courts is so familiar to us that it is difficult to comprehend how a lawsuit could be conducted in any other way. It may be worth while to note that in the Roman law for a period extending over centuries a widely different system prevailed. During

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[1] 31 American Bar Association Reports, 536, 538 *et seq.*

[2] "There is only one trouble, Professor Langdell and that is that they know altogether too much. They know it all. And there are none of us old men in the law who cannot learn a great deal from them. But it is their misfortune that at the outset they are top-heavy. And it is only when, after six months or a year of running about our streets they have learned that the legs are quite as important to the young lawyer as the brain, that they make themselves really as useful as you intended them to be." From Mr. Joseph H. Choate's address before Harvard Law School Association, 65. (1895).

the classical period, so called, a Roman lawsuit was divided into two stages. The first was before the prætor, a magistrate with official power, who settled the terms of the formula. The second was before the *judex*, a mere private citizen who need not be a lawyer and usually was not, and whose sole duty it was to decide the questions of fact referred to him by the formula, and acquit or condemn according to his instructions.[1]

It is manifest that our system requires on the part of the judges wide knowledge of facts and of life and insight in dealing with them in order to do their work well. If a judge is trying a case without a jury, and the issue is upon the sudden automatic starting of a loom or a printing press or a steam engine, some knowledge of machinery will be useful in enabling him to understand the evidence and reach a true finding. If he is trying the case with a jury, such knowledge will aid him in ruling upon the evidence offered and in instructing the jury, if fortunately he is in a state where the presiding judge retains his common law powers in the trial. The practical result to the parties in every case, the justice or injustice of the result reached by the court, will depend quite as much upon the intelligence and judgment used by the court in disposing of the questions of fact as upon the application of the rules of law. This is true also of courts of last resort. Indeed, in the highest courts, where the law is stated with binding authority, a large knowledge of facts on the part of the judges is even more important than in the trial courts. Appellate courts do not determine the truth of facts, except in special cases. A large part of their labor, however, must be devoted to ascertaining from the record what are the concrete facts in each case, and deciding upon the legal value of facts, as to whether they do or do not affect the rights of the parties. A distinguished French writer says, "We commonly use the expression, Force of law. The law obtains that force only by its perfect adaptation to the needs of the society which it governs."[1] From the nature of their work and the requirements of their office, judges are to some extent shut off from contact with business life, and are in danger of falling into error from that cause. They are also exposed to criticism upon that side of their work. For example, so candid and able a writer as John Stuart Mill, in speaking of the action of juries in certain cases, said, "While the judges, with that extraordinary want of knowledge of human nature and life which continually astonishes us in English lawyers, often help to mislead them."[2] In all that important part of their work which relates to facts the judges are especially in need of aid, and their principal aid must come from the bar.

What can the law school do to teach a student how to master the facts of a case and the evidence? Quickness of perception would be a highly useful quality for that work, but the law school cannot teach quickness of perception. Early training has much influence in the making of a lawyer. Life in the public schools, work on a farm, or on board ship, or in a factory or counting room, in short, every kind of experience which brings one in close contact with men is useful in giving that quickness and accuracy of perception and knowledge of human nature required to deal effectively and powerfully with facts. It has been finely said that "the sparks of all the sciences in the world are taken up in the ashes of the law."[3] The best fruit of a lawyer's entire education and experience, the result to which all his education and experience contribute, is that quality which is sum-

[1] Sohm's Institutes (Ledlie's trans.), 148–152.

[1] M. Albert Sorel, in Le Code Civil, Livre du Centenaire, Vol. I, Introduction, p. xxv.

[2] Essay on Liberty, London, 1859, p. 123, note.

[3] Lord Nottingham. Cited by Mr. Alfred Hemenway, Annual Address (1905). 28 A. B. A. R. 394.

marized in the expression, a sound judgment. It implies and requires in a lawyer a deep and accurate knowledge of the law and the capacity to see the true proportions and relations of all the facts in a case. A lawyer with this quality always selects the right course of action, and is the safe adviser of clients and the trusted counsellor of courts.

Sound judgment cannot be taught in schools. It is the result of natural gifts combined with experience. The whole subject of the comparative inability of law school men to deal effectively with facts immediately after graduation would merit but slight consideration were it not true that facts are of vast importance in the administration of the law. Everything should be done which law schools can do to impress this truth upon students. While the law schools cannot teach rhetoric or oratory, they should guard the students from acquiring a contempt for questions of fact, or a dislike to engage in the trial of facts in either civil or criminal cases. Such a feeling of contempt and dislike did exist among Roman lawyers. Cicero records it, although he resents it. In his time the professional lawyer or jurisconsult did not go before the judges in public or private causes to engage in the trial of questions of fact. That work was left for the advocate or orator. The jurisconsult merely gave advice upon questions of law. Cicero relates that when a client brought to Aquilius Gallus, author of the Aquilian stipulation, a question of fact, he answered impatiently, "There's no law in that. Take that to Cicero." Professor Ihering says it shows the fine discrimination of the Romans that they gave less respect and consideration to the calling of the advocate than to that of the jurisconsult.[1] We must not forget, however, that the American lawyer is expected to do the work of both the Roman jurisconsult and the Roman advocate. He cannot send questions of fact to Cicero, but must try them himself. Only after years of experience in contests over facts can be hope to reach the lofty position of chamber counsel and practice the law by giving advice only.

The Romans were doubtless right in preferring the jurisconsult before the advocate, but the power to deal with facts effectively before court or jury is worthy of diligent care. Lord Chief Justice Russell said that Daniel Webster was the greatest forensic figure in the world. Is not Webster's argument to the jury upon the facts in the trial for the murder of Captain Joseph White worthy to rank among his highest forensic efforts? A mind which can see clearly into the relation of facts, and state facts with power, is quite likely to see clearly and reason powerfully upon questions of law. In support of this statement, one might cite the names of nearly all the eminent lawyers and judges who have adorned the common law.

Papers which have been read before this association and discussions which have taken place here prove that the law schools have given attention to this part of their work. Club courts, moot courts, trial courts, or practice courts exist in many if not in all of the schools.[1] Among the different methods of instruction in use the case system seems to me to be the one adapted to give the students the best training in dealing with facts. The correct and orderly statement of the facts by the students in the cases discussed in the class room cannot fail to impress upon them the importance of facts. If kept up systematically and made a part of the work of the course, any student who gives real attention to it must find that he is a gainer in clearness of thought and skill in the arrangement and presentation of facts.

[1] Ihering, Geist. des Rom. R. (Leipzig, 1880), sec. 42, pp. 411, 412, notes 566, 566a. Roby, Introduction to Digest, CIX. Forsyth, Hortensius, 99 *et seq.*

[1] See 28 A. B. A. R. 549 *et seq.*; 22 A. B. A. R. 494 *et seq.*

Next after a sound judgment the most valuable quality of a lawyer as an aid to the courts is the power of clear and accurate statement. The case system furnishes the means for an admirable exercise to develop this power, both orally, as above stated, and also in writing. The books of cases are always printed without head-notes. If a student should be required to write a head-note for each case as a part of the course, that work alone, if faithfully done, would give a training in the art of brief and accurate statement both of facts and of law which cannot be surpassed. Any student, without the aid of the instructor, can employ this method by himself. The head-note in the regular report will furnish a model by which he can test his work. Some of the reporter's head-notes, as is well known, are the work of men who afterwards attained eminence on the bench. The head-notes written by Judge Curtis in his edition of the Decisions of the Supreme Court often bring out the points of the case in the clearest light. The work of preparing them probably had some influence in bringing to perfection that power of statement which is seen and admired in his opening statement for the defence in the impeachment trial of President Johnson.

Another subject upon which the law schools can render important aid to the courts is that of statute law. A law student spending his first vacation in a lawyer's office was directed to investigate a question in a case pending in the probate court. The student inquired whether the question depended upon statute law or common law. "I can always tell a law school man by that question," said the lawyer. "It makes no difference whether it is common law or statute law. They are both law, and I want to know the law applicable to that case." In the law school attention is given principally to the decisions of the courts, for the reason that until recent times almost the entire body of our private law was judge-made law. The first volume of Blackstone's Commentaries was published in 1765. Professor Dicey says that an intelligent reader of Blackstone "is astonished at the slightness of the reference made by the commentator to statutes."[1] Since that time legislation has modified the private law profoundly, both in England and in the United States. Now one can hardly be sure that he knows the law upon any subject until he has searched the statutes to see if any changes have been made by the legislature.

The activity of legislatures in making laws has attracted much attention. This activity is due in part to the great industrial and social changes which have taken place. Powerful interests have been affected by those changes and are petitioning the legislatures for new laws. It is not unlikely that statutes affecting private law will be more numerous in the future than they have keen in the past. To refer to one title out of many, industrial reorganization has brought on a contest between the right of association or combination on the one hand and the right to freedom of action by each individual on the other. This contest is going on in the courts and in the legislatures. A ferment of thought is in progress which will result probably in a new statement of the law. Whether that statement shall be made finally by the courts or by the legislature, or partly by the courts and partly by the legislature, is not now clear. That the courts may proceed safely and wisely in this matter, they need the aid of lawyers well informed not only in the principles of statutory construction and in the relation of the common law to statute law, but also of lawyers well grounded as to the boundaries between legislative and judicial power.

That the law must change is a proposition which few will deny, and which the most eminent common law judges have asserted. Lord Bowen, describing law in the reign of Victoria, says: "There is and can be no such

[1] Law and Opinion, 165, note 1.

thing as finality about the administration of the law. It changes, it must change, it ought to change, with the broadening wants and requirements of a growing country, and with the gradual illumination of the public conscience."[1] He speaks of the whole body of law, both common and statute. Mr. Justice Holmes, writing as a contributor in the *Harvard Law Review* says, "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics."[2] Again: "Every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must he found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants."[3] At the last meeting of this Association, Professor Pound in an interesting paper added another voice to these declarations in favor of a progressive jurisprudence.[4]

This spirit is not confined to our own country. In France, the Code Civil, enacted in 1804, was based in part upon the principle of absolute, or nearly absolute, individual freedom. The experience of a century has shown in France that under the régime of individual freedom many individuals, unable to hold their own in the fierce competition which that principle permits, require the protection of society. In a valuable work published as a memorial in honor of the one hundredth anniversary of the Code Civil, some of the learned jurists of France express this view. Professor Saleilles of the Law Faculty of the University of Paris says: "The law, then, is never absolutely individualistic; and we should add, what the socialists are unable to see, that it is never absolutely socialistic. It is the resultant of social life in combination with the life of the individual. And consequently, in proportion as the expansion of the individual is necessary to the progress and welfare of society, society owes protection to the individual; not to the individual as an abstraction, considered with reference to his potential development, but to the concrete and living individuals of which society is composed, and to those especially who are poorly armed to live and play their part in the world. It is because there is a portion of individual right in the right of society that men, taken as a whole, owe protection to the individual; and it is because there is a portion of social right in every individual right that the juridical sphere of the individual always remains conditioned and limited by the collective interest of the group."[1] There are signs that our law is changing, and that the dominant sentiment of collectivism (not to speak of other sentiments) is making its way into the law, not only by legislation, but by judicial action. Mr. Beven, author of the English work on Negligence, says that since 1877 not merely a change in the law but an absolute reversal of the law in regard to the meaning of *volenti non fit injuria* "has been brought about by public opinion operating on the judicial mind."[2] If that is true, it is pertinent to inquire what are the principles or rules which define the authority of the courts to change the common law. The legislature may properly enact laws designed to correct evil tendencies and to change the progress and

[1] The Reign of Victoria, vol. 1, 329. Select Essays in Anglo-American Legal History, vol. I, 557.

[2] 10 H. L. R. 474.

[3] 12 H. L. R. 452.

[4] 31 A. B. A. R. 911. The Need of a Sociological Jurisprudence.

[1] Le Code Civil, Livre du Centenaire, 110.

[2] Journal Comp. Jurisprudence, vol. XVIII, N. S. 190, 192.

course of society. Have the courts the same or a similar power, or are they strictly confined to the duty of applying established principles and rules to new cases as they arise, leaving the introduction of new principles to the legislature? Professor Sohm says that the Roman prætor in dealing with rules of mere customary law was justified within certain limits in exercising his free discretion, but the authority of a *lex* was irrefragably binding upon him.[1] Have our courts a similar discretion in regard to the common law? These questions and other similar questions which are suggested by the sentiment favoring changes in the law, whether under the name of a sociological jurisprudence or by whatever name they may be described, seem to me to be of deep importance. They call for careful study of the relations of the courts to the legislatures, and for a determination of the true provinces of written and unwritten laws, not as a question of abstract jurisprudence, but as a concrete problem in the administration of justice in the United States. The importance of the subject was clearly recognized by Mr. James C. Carter, a lawyer whose opinion upon any subject connected with the law deserves respectful attention. In his will he gave a large sum of money to the President and Fellows of Harvard College, "which," he said, "I now wish may be applied to the establishment and maintenance in the Law School of the University of a professorship of General Jurisprudence for the special cultivation and teaching of the distinctions between the provinces of the written and the unwritten law."[2] One safe reliance of the courts upon this subject is an able and learned bar. General public opinion, which is of the highest value as a guide upon ordinary public questions, where it is clearly manifested, is misleading here. The average citizen is interested in good government. He looks for that result, and if it is attained, is comparatively indifferent as to how it is attained If a riot should break out, he desires that the mob shall be quelled and public order restored. It is practically immaterial to him whether the mob is put down by the police or by an injunction, that is, by the executive branch of the government or by the courts. The average citizen wishes to have the right to manage his private business in his own way without interference or control by third persons. If the law grants him this right, he does not care whether it is conferred by statute or declared by the courts. But in the working of American constitutional government it is of supreme importance that each branch of the government shall at all times be prompt and vigorous in the discharge of the duties entrusted to it, and refrain from attempts to perform duties imposed by the constitution upon the other coördinate branches. The construction of statutes, the just enforcement of constitutional enactments of the legislative branch of the government, seem to me to be likely in the future to put the wisdom and firmness of the American judiciary, both state and federal, to a severe and searching test. The law schools can do no better service than by sending out young men well qualified to aid the courts in performing this important part of their work.

There is another reason why this subject is important. Within a few years after graduation many of the law students will be members of the legislatures in the various states. A large share of responsibility for the draftsmanship shown in the statutes rests upon the lawyers who are members of a legislative body. In regard to those statutes which modify or affect the common law, almost the entire responsibility, both as to substance and form, rests upon the lawyers in the legislatures. If such a statute miscarries by reason of want of knowledge of the common law or want of

[1] Sohm, Institutes (Ledlie's trans.), 28.

[2] Law: its Growth and Functions, Preface, viii.

art in drafting the statute, the blame rests principally upon the lawyers. The quality of the statutes in each state is not a bad index to the average quality of the bar in that state. To draw a statute modifying the common law in such language as to effect exactly the result intended is one of the most difficult achievements of legal skill. Modern and ancient instances of signal failures of such statutes can easily be cited. If the graduates of law schools are thoroughly instructed in the rules of statutory construction and in the relation of the common law to statute law, their usefulness and capacity for leadership in the legislatures will be increased.

In addition to the influence which law schools may exert through their graduates, there is another way in which they can aid the courts and affect powerfully the development of the law. Prof. Dicey says, "The development of English law has depended, more than many students perceive, on the writings of the authors who have produced the best books." He refers as examples to Stephenon the Principles, of Pleading and Story on the Conflict of Laws. Story's book appeared in 1834, and Prof. Dicey says of it that though the work of an American lawyer, it "forthwith systematized, one might almost say created, a whole branch of the law of England.[1] The teaching of law, ever since Blackstone delivered his lectures as Vinerian professor, has been a fruitful source of legal text-books. Kent's Commentaries on American Law are the result of his lectures as professor of law in Columbia College. Reeves' Domestic Relations and Gould on Pleading owe their origin to the famous law school at Litchfield, Connecticut. Swift's Digest, another famous law-book, is due to the author's teaching of law.[2] In 1832 Judge Story, in connection with his work as Dane Professor of Law in the Harvard Law School, began his phenomenal career as a writer with the publication of his treatise on Bailments. His example has been followed by many teachers both living and dead who have given valuable books to the profession. It may be said that the law schools are the natural source from which one would expect the best text-books. Teachers of law have the best facilities for doing the required work. By going over the same ground year after year, aided by the suggestions of successive classes of students, they can acquire a knowledge, both analytical and historical, of their respective subjects which other writers, working under less favorable circumstances, can rarely equal. In this respect the law schools of the United States have already shown a resemblance to the universities of Europe, where valuable treatises have always come from the professors of law. Professor Windscheid says that the first impulse to the preparation of his treatise on the Pandektenrecht, which had a great influence in Germany, was given by the needs of his lectures.[1] Anything which tends to extend the influence of text-books tends indirectly to increase the power and influence of law schools.

There are two facts which render it probable that text-books will in the future acquire a wider use and have greater authority in the common law than they have had hitherto. One of these facts is the remarkable increase of case-law, or precedents. As long ago as 1856 Sir Henry Maine said that the accumulation of case-law conveyed a menace to English jurisprudence.[2] Full of enthusiasm for the Roman law, he then saw a great destiny in the United States for the Civil Code of Louisiana. Apparently he expected to see the spread of the Roman or civil law in the new western states. After half a century only three or four states have adopted codes of their substantive law, and the Roman or

[1] Law and Opinion, 363.

[2] 2 Great American Lawyers, 140, 142, 481, 484–5.

[1] Windscheid, Lehrbuch, Preface (7th ed.), p. v.

[2] Cambridge Essays (1856) 1, 10.

civil law in North America remains confined as in 1856 substantially to the province of Quebec and the state of Louisiana. Sir Henry Maine's vision of the new grandeur of the Roman law has vanished, but he was right in saying that the accumulation of case-law conveyed a menace of revolution. It threatens to-day the disintegration of the common law. Independent legislatures and independent courts are busy all over the common law world in sending out new statutes and decisions. In 1901 Professor Maitland said mournfully, "Unity of law is precarious. The power of the parliament of the United Kingdom to legislate for the colonies is fast receding into the ghostly company of legal fictions." As to the possible unifying power of the jurisdiction of the Privy Council he says, "It seems to me idle to believe that distant parts of the earth will supply a tribunal at Westminster with enough work to secure uniformity."[1] In the United States forty-six state legislatures and the national Congress are enacting statutes and the highest courts of the several states are pouring out new cases. No industry can cope with this mass of matter. It is becoming more difficult every year to read thoroughly the decisions of any jurisdiction except one's own. Nothing that the ingenuity of law publishers can devise will ever remove or much abate the difficulty. Nothing can stop it except stopping the decisions or the reports. As Burke said, "To put an end to the reports is to put an end to the law of England."[2] The courts of each state will have to rely more and more upon the labors of other men to keep informed as to the course of decisions in other jurisdictions and the general development of the law. That means a greater reliance upon text-books. The text-books should be of a new kind. In the middle ages, after the Glossators had overlaid the Roman law with commentaries, a reaction set in and a new school arose with the war-cry, "Back to the texts."[1] In our time the common law world is ready for the cry, "Back to the principles," or rather, since the movement is a forward movement, perhaps the war-cry should be, "On to the principles." Books which shall state the principles of law in the form of well-reasoned treatises, developing the principles analytically, systematically, and historically, not as mere indexes to the cases, are much needed and will be welcomed. To produce such books will require patient labor, but their influence will be great. The need for them is the opportunity of the law schools.

One of the advantages which will result from them is brevity in the statement fo the law. Another is that they will tend, probably, to uniformity of law and to avert the menace of disintegration. Professors expound the law as a science, and it is the nature of all science to be general and universal. There will undoubtedly be contradictory theories and opinions expressed by different writers upon various doctrines, just as in the Roman law the jurists were divided for centuries into the rival schools of Sabinians and Proculians, but as a body the professors and teachers of law are likely to stand for uniformity of law. A general consensus of opinion among them would be a valuable aid to the courts in their efforts to establish uniform rules.

The other fact favorable to the influence of law schools is the change which is going on in the law in the effort to adjust it to new industrial conditions and the demands of new social ideals. The capacity of the common law to adapt itself to new conditions through the action of the courts is being put to the test. That there is in the courts a power to mould the law to conform to new conditions of society is generally conceded. Many examples of the exercise

[1] English Law and the Renaissance, 33.

[2] Report from committee to inspect the Lords' Journals, cited by Maitland, English Law and Renaissance, p. 78, n. 50.

[1] Maitland, *ut supra*, 40, note 8.

of this power exist in the law of Torts, but one of the most striking is in the law of Contracts. In 1773 Lord Mansfield introduced the doctrine of implied dependency of mutual covenants and promises, which has been accepted and acted upon by the courts and the profession ever since, although not a trace of it was to be found in the law before his time.[1] It was an innovation which in effect, as Professor Langdell says, overruled a long line of decisions. This act of Lord Mansfield can properly be described as an act of judicial legislation, in the sense in which that term is used in relation to the courts. It wrought a change in the common law. It was acquiesced in without question because it was reasonable and just and in harmony with the prevailing standard of justice.

In the United States from the Declaration of Independence the courts have often used the power which they undoubtedly possess to depart from established principles of the English common law and to introduce new rules. This power has been used in so many instances that the author of the leading English treatise on the Law of Negligence in his last edition abandons the attempt to present the law of the United States side by side with the English law, and says it is now plain, what he before suspected, "that though of the same parentage as ours, American law has been developing along divergent lines and accepts principles widely applicable that are to us not only novel, but fundamentally unsound." He cites three cases in support of his assertion. Although he condemns each case cited, he generously says in conclusion, "Yet the Americans have a genius for law; and the learning and brilliancy of the judgments found in Johnson's or Metcalfe's or indeed in any of the best American reports on the historical development of the common law is such that no English writer can afford to neglect them."[1] It is not likely that American courts will turn backward in their course of innovation. They are more likely to go forward. To advance safely they must advance slowly and by short steps. Each new step should be justifiable upon sound legal principles, to secure a consistent development of the law. At this point the courts can obtain valuable aid from the law schools. The progress of the courts is limited by facts. A court can decide in any case only so much of the law as the facts of the case require. As Mr. Justice Hammond of Massachusetts said, "It frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which the line must run."[2] Teachers of law in expounding a subject are not confined to the concrete facts of a case. To apply the illustration used by the learned judge, the law professor in a lecture or text-book is at liberty to collect the points established by the courts and draw the line through them, and extend it to new and imaginary cases, and show the completed figure when constructed according to sound principles of jurisprudence. In this way the law schools of the country, when the views of the professors become easily accessible in print, will be useful as a guide to the courts, without detracting in the slightest degree from their power or authority. The influence of precedent in the common law in the future seems likely to decline and the use of original reasoning from principle to increase, but the power of the courts is not likely to suffer any diminution. Their

[1] Langdell, Summary of Contracts (1st. ed.) secs. 139–143.

[1] Beven, Negligence (3d ed. 1907) Preface, vii–viii.

[2] Martell *v.* White, 185 Mass. 255, 258, 9. (1904),

judgments will shine with new splendor and win increased respect and confidence from the public when formed not only after argument from the bar but in the new light of jurisprudence that will radiate from the law schools.

Whether the law schools shall enjoy all the influence of which they are capable, will depend very much upon the policy which they pursue. In the first place, they must adhere to the doctrine that law is a science. It would be well, also, if the teaching of law should be established and recognized as an independent calling, distinct from that of a lawyer or a judge. Such seems to have been the ideal of Professor Langdell. At the festival in honor of the two hundred and fiftieth anniversary of the founding of Harvard College he said: "I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes,—not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman prætor, still less of the Roman procurator, but the experience of the Roman jurisconsult."[1] It is not necessary and probably never will be the fact that all teachers of law shall be of the description here suggested, but Professor Langdell's conception seems to me to be fundamentally sound. The influence of a body of men looking upon the law and teaching the law as a science in the different law schools will be felt far and wide, and will be useful to the courts, the legislatures, and the public.

A curious question arises as to the effect which the publication of text-books by professors will be likely to have upon the attendance of students at their lectures. One cannot imagine that students would care to attend lectures by Blackstone very long after he had completed the publication of his Commentaries. Judge Baldwin says that the Litchfield Law School began to decline quite rapidly from 1826, which was the year of the publication of the first volume of Kent's Commentaries. He says: "The publication of Swift's Digest and Kent's Commentaries made its whole theory of instruction antiquated."[1] Under a system of instruction by lectures the professors who publish their lectures would naturally lose the attendance of their students, unless they constantly revised their lectures or made new ones. Under the case system Professor Langdell published a treatise on Contracts and a treatise on Equity Pleading, each as a companion to a collection of cases, without diminishing the interest of his students in the exercises of the class-room. If anything, his treatises gave new zest to the study of the cases, to see if the professor's reading of them gave their true meaning and effect.

To sum up all that I have said, with the rise of the law schools a new and I believe a glorious era is opening before the common law in the United States. That vast system of law, founded on English common law and equity, may be described as an inheritance and a trust. Without arrogating anything to themselves, but simply acknowledging the responsibilities of their respective positions, the judges, lawyers, and teachers of law of the United States may look upon themselves as the trustees of that great trust. The beneficiaries are the people of the entire country. By mutual co-operation in the effort to realize a great ideal, and in that way only, the inheritance will be preserved and increased and transmitted. The ideal which I propose is, a uniform system of American law,

[1] Report of Harvard Law School Association, p. 50, 1887.

[1] 2 Great American Lawyers, 486

founded upon the common law and equity systems of England, modified and expanded in accordance with the principles of legal science "to meet the broadening wants and requirements of a growing country and the gradual illumination of the public conscience."

BOSTON, MASS., September, 1908.

THE OLD AND THE NEW

BY HARRY RANDOLPH BLYTHE

"T. Bardinelly, Counsellor
At Law," — this single line
Hangs out above a dingy door
Upon a board of pine.

And in the winds of forty springs,
There in that squalid street
The sign has swung and still it swings
The passersby to greet.

Yet none are seen to enter in
To ask the unknown sage
How they might cover up a sin
Or hide a secret page.

And Bardinelly, gaunt and grey,
Behind the times ten years,
Reads legal tomes the livelong day
And smokes away his fears.

The cob-webs clutch about his room,
Rust lies upon his pen,
He dwells apart there in his gloom
Out of the world of men.

But way down town in buildings high,
The law firms, great with greed,
Eat up all business on the fly
And don't have time to read.

CAMBRIDGE, MASS., September, 1908.

DILATORY PATENT PROCEDURE

By Wallace R. Lane

In 1788 the Constitution of the United States granted to Congress "the power to promote the progress of useful arts by securing for limited times to inventors the exclusive right to their discoveries."

Under Sections 4883 and 4884 of the Revised Statutes the patentee has a "grant" of the exclusive right to make, use and vend the invention or discovery throughout the United States and Territories thereof for the term of seventeen years.

Daniel Webster has said that

"The American Constitution does not attempt to give an inventor a right to his invention, or an author a right to his composition. It recognizes an original pre-existing inherent right of property in the invention, and authorizes Congress to secure to inventors the enjoyment of that right, but the right exists before the Constitution and above the Constitution, and is, as a natural right, more than that which a man can assert in almost any other kind of property."

And Judge Baker, speaking for the Circuit Court of Appeals in the case of The Victor Talking Machine *v.* The Fair, 123 Fed. 426, says:

"*Within his domain the patentee is Czar.* The people must take the invention on the terms he dictates or let it alone for seventeen years. This is a necessity from the nature of the grant. Cries of restriction of trade and impairment of the freedom of sales are unavailing because for the promotion of the useful arts, the constitution authorizes this very monopoly."

The Supreme Court has also expressed similar opinions. In view of the unmistakable terms used by these eminent authorities, it would seem that the inventor who has gone through the ordeal and oft-times extremely arduous task of obtaining a patent for his invention should have a *prima facie* right to the exclusive use of the invention described and claimed in his patent such as would enable him to assert this right immediately whenever manufacturers see fit to appropriate to their own use the patented device for sale throughout the United States.

Let me, however, call attention to the procedure and various appeals provided by the United States Statutes for the inventor in procuring a patent, whether opposed simply by the Patent Office (if we can term the work of this office opposition to the grant) or whether there is an interference contest between the inventor and a rival claimant for the honor of inventorship.

Sections 4909 to 4911, inclusive, provide for appeals —

First. From the Primary Examiner to the Examiners in chief in the Patent Office.

Second. From the Examiners in chief to the Commissioner in person.

Third. From the Commissioner to the Court of Appeals of the District of Columbia.

In the event the applicant for a patent is unable to secure his *ex parte* or contested (by interference) grant through the medium of the foregoing appellate procedure, Section 4915 of the Revised Statutes provides for a bill in equity being filed in the proper Circuit Court of the United States asking for "an adjudication holding him entitled to the patent, and if the adjudication is favorable, the Commissioner is authorized to issue such patent, after certain requirements have been complied with."

From an adverse decision by the Circuit Court in such case the applicant has his appeal to the Circuit Court of Appeals within the circuit where the decision was rendered, and the matter might possibly be taken to the Supreme Court of the United States on

certiorari. Thus every applicant for a patent may have seven tribunals pass on the question of whether or not he is entitled to a patent before he is definitely certain that he has secured the *prima facie* rights to which he is entitled. And the government, out of its very fairness in providing so many courts by whom the applicant may be heard before he is precluded from his grant, has provided such an expensive machine that it is impossible for the average inventor to take advantage of it and it puts in the hands of a strong financial institution owning an application a decided advantage disastrous to the person of limited means.

Assuming that the patentee has been able to traverse the entire course of procedure open to him and has been held entitled to the broad claim for which he is contending, by the tribunal to which he last appeals in his efforts to obtain his rights, and that the matter is a contested one between rival claimants for the title to inventorship, the applicant has his application for a patent again subjected to re-examination, and new references may be cited by the Patent Office, as anticipating the invention claimed, and if the reference is a pertinent one, the entire procedure may be repeated, leaving, in theory at least, no final termination to the matter until the applicant has exhausted his energies and finances.

Within my personal experience, an applicant whom we were representing was ruled adversely to, in an interference case, by the three tribunals of the Patent Office, and on appeal to the Court of Appeals of the District of Columbia the entire action of the Patent Office was reversed by a ruling that we were entitled to a decision of priority of invention on a technical question of reduction to practice.

In this particular case this ended the interference proceeding, but upon presenting the application to the Examiner for re-examination prior to the allowance of the patent, new references were brought out, undiscovered during the preliminary examination and interference proceeding upon which the case was again rejected, necessitating a further expensive proceeding.

After the patentee has gone through the long procedure sometimes necessary in procuring a patent, what is his *prima facie* right?

Normally, under the Statutes and court rulings set out at the commencement of this article, the patentee and his heirs have the *exclusive* right to make, use, and vend the invention or discovery throughout the United States and its territories for a period of seventeen years under government grant.

It will be seen from the above language, and particularly from the decision of Judge Baker, above referred to, that the patentee has, as a basis of his *prima facie* privileges, the right to advertise, sell, license, fix prices, and control the sale of his article, in an almost unlimited way, even to the entire restriction of the sale, whether the patent is valid or invalid, for he is, in the language of Judge Baker, "Czar for these purposes"; but in the usual patent case, and assuming that he is trying to obtain immediate relief against infringers by applying for a temporary injunction, we find that this same Czar has a very narrow realm and peculiarly limited powers within that realm. In other words, he is a power for injury to others and to the community but is impotent for legitimate good to himself.

In the courts this *prima facie* right of the patentee seems to be largely limited to his right to bring an action at law, or a suit in equity, for infringement against any one who makes, sells, or uses the device covered by his claims. It allows him the privilege of using the United States courts for this purpose, and if at the end of an extremely long and harassing litigation his patent is held valid and infringed, by the Circuit Court or Circuit Court of Appeals, he has usually established a prima facie right which enables him to secure a comparatively quick relief against an infringer making substantially the same device, assuming

that no new substantial defense is found by alleged infringers.

It seems to me absolutely imperative that we should have some foundation, some prefatory step taken at the Patent office, by which the inventor can secure an immediate right of relief against the users of his patented thing.

I advocate strongly an amendment to the patent laws simplifying the interference procedure, as well as the procuring of a patent, by eliminating and abolishing some of the appeals now permitted. If the Examiners in chief are properly selected, this body of men, who under the Revised Statutes, Section 482, are required to be "persons of competent legal knowledge and scientific ability" and "a permanent board," might as well be made a final tribunal, so far as procedure at the Patent Office is concerned, to determine the rights of an inventor to a patent, and as to the rights between parties to an interference proceeding in determining questions of priority. If the salaries were made sufficiently large to warrant men of broad experience and of exceptional ability filling the position of Examiner in chief (with perhaps a different title), there could be no doubt but that as fair and just a decision could be reached by these men as by having it passed on to the Commissioner of Patents (a political appointee, not required to be of legal knowledge or scientific ability), and from him to the Court of Appeals of the District of Columbia, not necessarily qualified for this work.

The system which I have here outlined was contemplated in the Patent Act of 1836. At that time the Commissioner of Patents was acting very much as the present Examiners are; that is, the Commissioner with a few assistants passed in the first instance on whether or not an applicant was entitled to his patent. This act provided for a direct appeal to a board of three examiners appointed by the Secretary of State, "one of whom at least was to be selected, if practical and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appertains."

From this original statute relative to appeals, and owing to the large growth of the Patent Office, the present appellate procedure has slowly emanated into a very expensive and cumbersome one, which should be materially cut down by limiting the applicant to one appeal within the Patent Office.

If this were done and the present equitable action allowed, permitting equity rights being raised in the United States courts, which are without the jurisdiction of the Patent Office, more satisfactory, direct, and quicker results would be had in the securing of a patent and determining the rights of the alleged inventor to his patent whether contested or non-contested.

I strongly urge abolishing entirely the appeals from the Examiners in chief to the Commissioner of Patents, and from the Commissioner to the Court of Appeals for the District of Columbia, and leaving in force, *in duly modified form*, the present statutes which provide for the equitable relief through the United States courts in the event of a seemingly unjust decision by the Examiners in chief.

This would leave the Commissioner of Patents free to attend to the executive duties incident to the running of the Patent Office, sufficient for any commissioner to attend to, without the burden of passing upon the question of invention and priority of rights in a given inventor. Incidentally, I think the Commissioner's salary should be increased.

I would suggest that the salaries of the Examiners in chief, under this arrangement, be increased from the present salary of three thousand dollars to that of the Circuit judges, and have them appointed by the President of the United States and confirmed by the Senate in the same manner as federal judges are appointed.

In my judgment, they should hold their positions during good behavior and a retiring age should be fixed under arrangements similar to those now provided for in the federal judiciary. They should have plenary jurisdiction to look up questions of novelty and investigate public use in contested cases.

This appellate tribunal should have final jurisdiction in the Patent Office, allowing, however, the equitable relief provided for by the Revised Statutes, Section 4915.

Among the reasons for such suggested change are:

First. Lightening the work of the Commissioner and allowing him to give his entire time to management of office and determining questions of practice in the office.

Second. Reducing expense of securing final adjudication on the part of the patentee.

Third. Divorcing the executive from the judicial department of the office.

Fourth. Quick determination of inventorship by a tribunal in the Patent Office qualified to determine invention in the patentee which should establish a *prima facie* right on the part of a patentee to protect himself immediately against infringers.

When the inventor has appealed from the Primary Examiner to this tribunal of Patent Office appeals, and his claims have been ruled favorably upon, the question of *prima facie* validity should be definitely settled in such a manner as to enable the Circuit Court to feel warranted in granting a temporary injunction based on this patent, provided infringement be clear, and unless positive proof is furnished by the alleged infringer that the patent was invalid, because of prior uses or references which had not been considered by the Patent Office, thus shifting the burden from the patentee, where it now is in such cases, to the alleged infringer, where it properly belongs, provided due care is taken in issuing the patent.

It might be advisable, and I throw it out merely as a suggestion, to have the claims of the patent published for a period of from thirty to sixty days prior to its issuance, in the *Patent Office Gazette*, and thus enable any parties who might think themselves injured by the issuance of the patent to file opposition to the grant by a procedure somewhat similar to the opposition now in vogue in regard to the registering of trade marks.

The British system now in vogue might advantageously be considered in connection with this suggested change of publishing the patent prior to its issuance in the *Patent Office Gazette*.

This additional precaution in issuing a patent would, in my judgment, curtail the grant of a large number of patents which form the basis of prolonged litigation, which in a large percentage of the cases tried results in the destruction of the patent and destroys confidence in the Patent Office, in the courts and in our patent system generally, and would secure to the real inventor compensation for his endeavors.

Such procedure as I have outlined should curtail the practice in vogue in patent litigation of filing demurrers directed to the patentability of the invention, and should obviate illegitimate advertising, based upon patents without merit, detrimentally affecting legitimate manufacturing industries and enterprises.

I feel that such of the decisions as have sustained demurrers directed to the patentability of inventions have been largely brought about by the great percentage of patents held void for want of patentable invention upon final hearing, upon pleadings and proofs, due to the practice of granting minor patents of questionable utility and novelty upon slight and extremely questionable improvements over the art disclosed by the Patent Office at the time of considering the application for the patent.

Judge Townsend has said: "Such patents instead of promoting the progress of ths useful arts, seriously retard their development, and the resulting injury far exceeds

the consideration furnished by the patentees. They should not be permitted to consume the time of the court or impose on it and defendants the burden and expense of patent litigation." This view finds support in Atlantic Works *v.* Brady, 107 U. S. 200.

From a somewhat careful consideration, I feel that the remedial procedure which I have outlined herein of limiting the number of appeals at the Patent Office, and providing a thoroughly competent tribunal of Patent Office appeals with plenary jurisdiction and powers, would be exceedingly beneficial in cutting down the large number of trifling patents issued; particularly if the courts of our country see fit to grant temporary injunctions on patents passed upon by this tribunal, where the case of infringement is clear, and unless there is very clear evidence that the same device as called for by the patent has been disclosed fully in the prior art.

Such a procedure would remedy, to a very large extent, "the unsatisfactory and constantly changing condition of the law and practice as to temporary injunctions and appeals therefrom and the variance in its application in different circuits of the United States."

If the plan last year endorsed by the Committee on Patent Law of the American Bar Association for a single court of last resort in patent causes which should consist of judges chosen by the Supreme Court from judges of the various circuits, to hold tenure during a certain period of time should be enacted, the patentee could receive speedy action on the merits of his patent, and we would also have a uniformity of practice in regard to the grant of temporary injunctions based on the procedure of the Patent Office outlined herein.

DES MOINES, IA., August, 1908.

STETSON PECK BREWER TUCKER PARKER ALEXANDER HUBBARD BROWN DICKINSON THAYER JONES

THE AMERICAN BAR ASSOCIATION COMMITTEE DRAFTING CODE OF PROFESSIONAL ETHICS, IN SESSION IN WASHINGTON, MARCH 30 TO APRIL 1, 1908.

AMERICAN BAR ASSOCIATION CANONS OF ETHICS

I

Preamble

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

II

The Canons of Ethics.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

1. *The Duty of the Lawyer to the Courts.* It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. *The Selection of Judges.* It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. *Attempts to Exert Personal Influence on the Court.* Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive, and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. *When Counsel for an Indigent Pri-*

soner. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. *The Defence or Prosecution of Those Accused of Crime.* It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. *Adverse Influences and Conflicting Interests.* It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. *Professional Colleagues and Conflicts of Opinion.* A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in anyway to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. *Advising Upon the Merits of a Client's Cause.* A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. *Negotiations with Opposite Party.* A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. *Acquiring Interest in Litigation.* The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. *Dealing with Trust Property.* Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

12. *Fixing the Amount of the Fee.* In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his property may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: 1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; 2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; 3) the customary charges of the Bar for similar services; 4) the amount involved in the controversy and the benefits resulting to the client from the services; 5) the contingency or the certainty of the compensation; and 6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. *Contingent Fees.* Contingent fees where sanctioned by law should be under the supervision of the Court in order that clients may be protected from unjust charges.

14. *Suing a Client for a Fee.* Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. *How Far a Lawyer May Go in Supporting a Client's Cause.* Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the

maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. *Restraining Clients from Improprieties.* A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

17. *Ill Feeling and Personalities Between Advocates.* Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. *Treatment of Witnesses and Litigants.* A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. *Appearance of Lawyer as Witness for His Client.* When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

20. *Newspaper Discussion of Pending Litigation.* Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. *Punctuality and Expedition.* It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. *Candor and Fairness.* The conduct of the lawyer before the Court and with others lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer

knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. *Attitude Toward Jury.* All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. *Right of a Lawyer to Control the Incidents of the Trial.* As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension, of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. *Taking Technical Advantage of Opposite Counsel; Agreements With Him.* A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. *Professional Advocacy Other Than Before Courts.* A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

27. *Advertising, Direct or Indirect.* The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the

establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional.

It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer.

Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyers' positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling and are intolerable.

28. *Stirring up Litigation, Directly or Through Agents.* It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attaches* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

29. *Upholding the Honor of the Profession.* Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. *Justifiable and Unjustifiable Litigations.* The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his clients' claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. *Responsibility for Litigation.* No law-

yer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. *The Lawyer's Duty in Its Last Analysis.* No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

III

Oath of Admission

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other States of the Union[1]—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of .....;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

We commend this form of oath for adoption by the proper authorities in all the States and Territories.

[1] Alabama, California, Georgia, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wisconsin. The oaths administered on admission to the Bar in all the other States require the observance of the highest moral principle in the practice of the profession, but the duties of the lawyer are not as specifically defined by law as in the States named.

THE EDUCATION OF THE GERMAN LAWYER

By Karl von Lewinski

DO not expect that I will in this short time offer to you a scientific and comprehensive statement of all the laws, provisions and rules, produced by German Parliaments and Governments to regulate legal education in Germany. I merely intend to give you a short general picture of the development and life of the average German law students. A lawyer remains a student all his life. That is true in Germany as well as in America, but I will not go so far — I shall confine my picture to the time of preparation for the three different aims which a German lawyer may reach in the usual course of affairs. That means, I will describe his development until he is appointed Judge or State Attorney or until he is admitted to the bar as Counsellor at Law.

I will say immediately that the two principal careers of a German lawyer, Bench and Bar, are not connected in the same way as in this country. Here the Judges are taken from the Bar. Only members of the Bar of much experience are elected or appointed Judges. The Bench is founded, is built on the foundation of the Bar. This is entirely different in Germany, where the two careers do not follow each other but are parallel to each other. The tree begins to grow in two separate parts as soon as it is above the ground of preparatory education which education however is common to both parts.

The development of the German lawyer really begins with the so-called gymnasium course, — not gymnasium in the American sense of the word, a gymnasium being a school where the work not only covers the American High School course but also claims to cover at least the first two years of an American average college. Without exception everybody has to graduate from this school who intends to serve mankind in a scientific way be it medicine, philosophy, philology, theology or jurisprudence. He has to enter the gymnasium when not less than nine years old, after passing through a preparatory course of three years in a grammar school, and has to remain there for a full nine years. He is at least eighteen, on the average nineteen years old when he passes his final examination. He is now ready to enter the University.

The University is the second necessary step in the German lawyer's development. It is impossible for him to follow the legal profession without visiting the University and studying law there for a period of at least three years, — in some states, as for instance in Bavaria, for a period of four years.

Colleges in the American sense are unknown in Germany. We have only Universities. The general education provided for in the American colleges is supposed to be given partly in the gymnasium and partly in the University, there combined with some specific study. There is no student in Germany who is simply a "student," swimming in the broad stream of general knowledge. The German student has to decide immediately whether he is to be lawyer, physician, clergyman, etc. His preparation for the study of law is limited to what his historical instructor in the gymnasium has taught him. He knows that Drakon gave to the Greeks the most cruel laws which ever existed. He knows that the Romans were a people of Legislators and that the Emperor Justinian made a famous compilation of the Roman law. But he does not know anything about the contents of these laws. He looks at them only from a historical not from a legal standpoint.

On the whole the German student has not so much to guide him in making a choice of

his profession as an American student. For while the latter by means of the colleges has the chance perhaps to learn a little about the subject of law in a general way and is thus enabled to follow his inclinations somewhat, the German student is irrevocably embarked on his high sea of law from the beginning. It will be easily understood that in most cases he does not write the watchword "Jurisprudence" on his flag himself. The decision is mostly left to the parents, and as tradition is of great influence in the old German country, the young student becomes in many cases a law student merely because his father and grandfather have been judges or counsellors at law.

It appears that this tradition alone is seldom sufficient to produce in the young man an enthusiasm for the study of such a dry science as theoretical Jurisprudence. So it has happened rather often and some time ago, had become merely a custom that the law student in the first year of his university course is not very anxious to listen to the wisdom of the professors. Many prefer to live a real happy and lazy student's life, — drinking, singing, fencing and amusing themselves, careless and free as only a German student can be.

He is enabled to do this because of the almost entire want of control, due to recognition of the principle of students' freedom in Germany. We have no dormitories, no obligations to attend lectures, no roll-calls, no records of attendance, no general and no special control. Nobody watches the diligence of the young people. They may stay at home in their flats or sit in their club-houses or leave the University for days and weeks; nobody cares. They are left to their own responsibility — they are free to study and at liberty not to study in the happy, sometimes too happy university life.

There is no doubt that a great percentage always have availed themselves of the latter opportunity. This has been true to such an extent that the professors have lately introduced a more severe control over their pupils' industry. This new control consists first, in the provision that every student must deliver every half year a certain number of written discussions of legal questions given by the professors. The control consists, secondly, in the institution of so-called seminars, which are lectures for a limited number of more advanced students with whom the professor discusses single cases, using them as paths to the explanation of general legal principals and rules. You see here an application of the Harvard Case System, while generally the lectures are delivered after the manner of simply reading a paper without the question and answer system.

The student is obliged to hear a number of lectures on certain subjects which are deemed to be necessary for his systematic training. The decision as to which these lectures shall be is made by the Government and the Board of the University. The student has to "hear" these lectures — that means, in the light of what has been said, not that he has to attend them but merely that he has to announce his intended participation and to pay the fee. These facts are proved by the entry of the same in a registry book, which the student has to keep carefully and to enclose later with his application for admission to the final examination.

The student is on principle free to hear these lectures offered by the University in whichever order he wishes. But of course, he is advised by printed study plans published by the Government or the Board of the University to proceed in a reasonable course from the simplest and most general subjects to the more difficult and special matters, and he follows these plans almost without exception.

He generally hears, in his first half year, lectures called "introduction into the science of law." These lectures deal in a purely scientific way with the origin, the necessity, the importance and the meaning of law, with the definition of the different provinces of Jurisprudence as public and private

law — primary rights and remedies — substantive law and procedure — criminal and civil law, etc. These lectures are like a map, showing to the student all the different ways, high roads and side trips which he will have to take not only during his university course but through his entire life as a lawyer. At the same time he is guided to the main street entering the Kingdom of European Continental Jurisprudence by two courses of lectures — one in the history of Roman law and one on the fundamental principals of Roman law. He comes to know and to admire, in these lectures the most striking and — at least for the European continent — the most important creation which mankind has ever produced in the province of Jurisprudence. The admirable system of Roman Law and the clear everlasting truth of its general principles are the good sharp tools with which the German student has to erect and to work out the building of his knowledge, and which help him to understand, to revive and to systematize the seemingly dead letters of codes and statutes.

The student has finally to cover in this half year a general course on the history of German law, that is, the historical development of the specific German principles which have not been extirpated by the powerful invasion of the Roman law, — the history of this invasion itself, and the modern process of codification. These historical lectures are usually accompanied by a description of the general principles of German law as they have been developed either out of the old pure German rules or by the reception and modification of the Roman law.

The second and third half year are devoted almost entirely to the exact study of the new German civil code. In the third half year the student may attend also lectures on civil procedure and continue this most important subject in the following semester. This and the two last half years are devoted chiefly to the study of the other divisions of the public law as bankruptcy, criminal law, criminal procedure, administrative law, ecclesiastical law, international law, and to the remaining subjects of private law not regulated by the civil code — as commercial law, negotiable instruments and maritime law.

Besides his specific juridical studies, the student hears in his University course lectures on Psychology, Logic and especially on Economics, to which subject great attention is paid by the Government and the Boards of the Universities.

All these lectures are presented in a merely theoretical, scientific way, without reading cases and without question and answer.

Outside these theoretical lectures, the student has to hear in his last three or four semesters seminars on the German civil code on civil procedure, penal law, and criminal procedure.

In the great majority of the German states there are no examinations between the several half years. Freely and without trouble the student passes from one to the other. If he likes the professors of his first university he may remain there for the entire time of study; if not, he may move from Heidelberg to Berlin, from Koenigsberg to Bonn, as he pleases. Only in one important state (Bavaria) a so-called *zwischenexamen* — intermediate examination — takes place after the third half year, the subject of which is chiefly Roman Law and the general principles of German Private Law.

Outside of the regular course many students use their not at all over-filled university time to obtain the degree of Doctor at Law. This degree is merely a title not necessary and of no importance for the lawyer's career. I think this fact is often misunderstood in America, where the German doctor's degree seems to be sometimes considered as the special proof of having gone through the University. This idea is wrong for as I have said before every law student has to visit the University for a period of at least three years. The Doctor's degree is in fact no more than a superfluous ornament to a man's name. Its almost only practical

value is for a man who does not pass the regular examinations but discontinues the study of law and enters into business or private life. He is in this case not entitled to call himself a lawyer and so he can only show by his doctor's degree that he listened to the wisdom of the professors for some time.

This degree is obtained by writing a short treatise on some legal question — the so-called "Dissertation," and by undergoing an oral examination given by the faculty. No special course is demanded.

After finishing the three-years course the student has to apply for admission to the final examination and is as a rule admitted if his registry book shows the proper number of semesters and of lectures and seminars. The examination is given by a commission appointed by the Government and consisting of professors and practical lawyers, judges as well as counsellors at law.

It is remarkable that this commission is not a Board of the University, which as such does not require a final examination.

The outline of the examination in the majority of the German states is as follows:

After admission the candidate first must write upon a given subject some question out of an important province of the German Law, mostly interwoven with short practical cases. He has a six-weeks period in which to handle the subject in a written treatise, using all resources of knowledge at his command. Some weeks after the delivery of this essay the student is summoned for an oral examination before three members of the commission already referred to. He is examined for a period of about five hours and in the course of the examination all branches of law which are taught in the university are touched upon. So he has to have at his command on this one day all his knowledge. The examination is in a few states preceded by written examination papers in a closed room under supervision, an institution which has been lately introduced also in the most important German state — Prussia.

In six states these written examination papers under supervision are the only written examination, the so-called scientific treatise there being abolished.

The unsuccessful candidate is allowed to attempt the examination another time but not earlier than half a year later. Upon a second failure he must discontinue his career in law.

The successful candidate obtains from the government the degree of "Referendar," which is a title perhaps similar to the American Bachelor of Law, not at all the key-stone of the legal education but merely indicating a certain stage reached in the lawyer's development.

Now an entirely new period of legal education begins, which is of the greatest importance for the lawyer's *practical* development. While the student has dealt with nothing but theory at the university, he enters now upon the study of the courts and of the counsellor's work. His educators are the persons best qualified for this work—judges and counsellors at law.

To understand this period of legal education in Germany it is necessary to have a glimpse of the general running of the German Courts.

The ordinary jurisdiction in Germany is exercised by a system of four grades of courts, viz: The County Courts (Amtsgerichte), Superior Courts (Landgerichte), Courts of Appeal (Oberlandesgerichte), and the Supreme Court (Reichsgericht). Each of these courts has its special district of jurisdiction and its special work.

First, I will consider the County Courts. The County is divided into about fifteen hundred districts of these courts, thus allowing a small district for each. The population in these several districts may be vastly different. The district of the Amtsgericht, at Berlin Centre for instance, has a population of more than one million, while some county court districts in the less densely populated

eastern parts of Germany include not more than ten thousand people. According to this difference, the work done by the County Courts varies greatly in amount as is shown by the different number of judges. Berlin Centre has about one hundred County Court judges, those eastern districts mostly one or two.

The kind of work is the same in all County Courts. They have jurisdiction:

1. In civil proceedings of every kind if the matter in controversy is not more than seventy-five dollars' worth.

2. In bankruptcy proceedings without limitation.

3. In criminal matters, including all police contraventions and a number of misdemeanors.

4. In matters of the so-called non-contentious jurisdiction, which ranks near the first in importance of the work done by these courts. In this respect they may be compared to the English American Probate Courts; although their work is much more comprehensive and covers many matters attended to by administrative officials in America.

I can mention here only the principal subjects of this non-contentious jurisdiction; they are:

1. Registration of real rights, as of conveyances and mortagages on real property.

2. Matters of guardianship.

3. Probate Court matters, as precautionary steps for the administration of the estate, opening and publication of wills, procedure on partition of estates among co-heirs.

4. Registration for different purposes, as of marriage settlements, commercial matters, mines and ships.

5. Judicial authentication of instruments, etc.

The second class of German Courts are the Superior Courts (Landgerichte). The country is divided into about one hundred and sixty districts of such courts, which include a certain number of county court districts. The Superior Courts are collegiate courts, composed of a president and a number of associate judges. The number of these corresponds to the density of the population in their districts. All decisions are given by at least three, in some cases by five judges. The superior courts have original jurisdiction over all civil proceedings if the amount in controversy is more than $75.00; secondly, in criminal matters, over the remaining misdemeanors and all crimes; they have, thirdly, appellate jurisdiction over the appeals from the County Courts in civil and criminal proceedings and in some matters of the non-contentious jurisdiction.

The Courts of Appeal, the number of which is about twenty, have jurisdiction of appeals from the Superior Courts in civil and in some criminal matters. They are collegiate courts, divided into civil and criminal senates. At the head of the court stands a President.

The Supreme Court has jurisdiction of appeals from the Courts of Appeals in civil matters and of appeals from the Superior Courts in some criminal matters. I may say immediately that the latter court has nothing to do with the education of the German lawyer.

Now to continue our theme.

The plan as to the further education of the law student, now called "Referendar," is to let him go gradually through all the different kinds of courts under the guidance of a judge and to let him see and study all sorts of court work from the Bench sitting near his guide. As the number of judges in Germany is nearly the same as the number of Referendars, it is possible to put each young lawyer under the guidance of one judge.

Besides his court work the student has the opportunity to see the work of the state attorney and the business of the Counsellor at Law.

The period during which he has to study in the several courts differs in the several German states although the differences are not very great. I refer to the largest

state — Prussia, the system of which is followed by most of the other States.

The Referendar is sent first to one of the smaller County Courts and as the burden of business is usually not very heavy there, the judge has time enough to introduce the young man into his work and to teach him how to use his theoretical knowledge in practice. The judge is obliged to do this. It is one of his most severe duties. The young man has to attend all sittings in open court and in chambers; he has to keep the records in civil and criminal proceedings; he has to listen to the wisdom of his master sitting on the Bench, and — to prove the results — he has to draft the writs, decrees and decisions which are issued and rendered by the Court. These drafts are examined, talked over and corrected by the judge. The Referendar has finally to deal personally with the people who come to the court in matters of non-contentious jurisdiction and some other cases, as for instance, with guardians, co-heirs, conveyors, mortgagees, bankrupts, administrators, receivers, etc.

In this way he makes a survey of almost all provinces of law as handled in a court of general jurisdiction, and he has, besides, the opportunity to get a certain knowledge of human life and human nature. As to this latter subject it is important that the young lawyer is sent first to a small place, where he soon comes to know personally the inhabitants, their customs and their troubles.

After nine months spent in the County Court he proceeds to a Superior Court and stays there for one year. This time is divided between the practical study of civil and of criminal proceedings, while in the County Courts the non-contentious jurisdiction furnished his prevailing occupation.

The education is usually arranged in the following way:

The Referendar is for four to five months within the control of a judge who deals with criminal matters and for the remaining time under the guidance of a judge who deals with civil proceedings. His education proceeds as follows:

If the judge thinks a civil case interesting and instructive, some weeks or days before the trial he hands the Referendar the record of the case which is much more comprehensive in Germany than in this country and which in civil matters almost invariably contains the evidence usually obtained before the trial by deposition. The young lawyer has to deliver a written opinion, which is corrected and discussed by the judge. In the trial itself he has to pay attention to the pleadings and all utterances of the Court and the parties, and after the decision is rendered by the court he has the work of writing down the reasons of the judgment so given. These "reasons" must in Germany always be worked out by the judge or — in the collegiate courts by a member of the court. The writing of the Referendar of course is only a sketch, which is corrected and talked over again by the judge.

In criminal cases it would be impossible to deliver an opinion before the trial because the evidence does not appear previously. Therefore, the young lawyer's work is confined here to drafting the reasons of the judgment after its delivery. Besides the Referendars are used in this time to keep the records in the civil and criminal trials, for the official stenographer is unknown in German Courts. Outside these records the entire work of the young man is studying and always studying. He never acts on his own responsibility; everything that he works out is only a sketch for the use of the court. Here is possibly a fault in the method of our education. We remain too long under the guidance above us and learn too late to feel our own responsibility.

After this year in the Superior Court is finished the Referendar is sent for a period of four months to a state attorney to study his line of work, which is the prosecution of criminals.

The next step is a six-months course in the office of a counsellor at law. He has

to learn there how to prepare a case before it reaches the Court, how to deal with clients, in short the whole business of an experienced practising lawyer. The counsellors at Law are bound to give every opportunity to the Referendar to see, to work and to learn. It is usual for the lawyer to send the young man as often as possible to the courts to plead there, in civil proceedings of a small importance and few difficulties.

Now the Referendars return to the County Court, not as in the beginning to a small one, but to a court in a large city, where the running of the business, of course, is quite different. He has to stay there for a year and is supposed to use this time not only for his work in court, which is guided in the same way as before, but also to complete his theoretical knowledge. In this respect he is assisted by permanent theoretical lectures on civil law and civil procedure, which are continually delivered to the Referendars by especially qualified judges. In this period the young man has the first opportunity to act on his own responsibility. He may be appointed by his guiding judge substitute judge in occasional matters of non-contentious jurisdiction, and deal with the parties without oversight. This appointment, however, is never made in cases of much importance.

The last step in this period of education is a nine-months course in an Appelate Court. Here also the Referendar must study the records before the trial, must deliver a carefully worked out opinion and after judgment is rendered must draft the reasons.

Now the education of the German lawyer is deemed complete and he must show the results in a second severe examination.

The Government of each state in Germany has appointed a commission for the purpose of examining the Referendars in the individual states. The commissions consist of lawyers of high standing, as members of the departments of justice, judges of the appelate courts, and counsellors at law of extensive experience.

The candidates are required to deliver two written treatises in the same way as in the first examination; that is, they have to work them out at home, with liberty to avail themselves of every source of assistance except communication or reference in any way to other people. The first essay, for which six weeks' time is given, is a treatment of a scientific theoretical question; the second is an opinion and the draft of a judgment with reasons in a civil case; the time allowed for the completion of this work is three weeks from the delivery of the record in the case.

After this the Referendar has to undergo an oral examination before the Commission, which embraces all branches of legal knowledge considered from a more practical standpoint. The severity of this examination is proved by the fact that about 20 per cent of the candidates fail.

The unsuccessful candidate is allowed but one more trial; if unsuccessful again, he cannot ever become a lawyer in spite of all his preparation for this career.

The successful candidate is given the title of Assessor. When the young lawyer reaches this point he is on the average 27 to 28 years old. Until this time he has in almost all German states never received any compensation for his work.

The Assessor now has the choice between the career of a Counsellor at law, that of State Attorney and that of a Judge. If he chooses the first, he applies for admission to the Bar. On his admission, the application for which is always granted provided there is no objection to the character of the applicant, his title "Assessor" is changed to that of "Rechtsanwalt." His work can easily be understood by you, as it is about the same as that of an American Counsellor at Law.

If the young lawyer decides not to practise law as a Counsellor but to strive for a place on the Bench or for the office of a State

Attorney, he must stay in official positions as "assistant-judge" or "assistant state attorney" generally for not less than four or five years, receiving a compensation of fifty dollars per month for his services. After this time he may apply for an appointment as Judge or State Attorney, and he may be appointed by the Crown if he has proved in this period to be a practical, reasonable and well-educated lawyer. If not he must wait until his experience is deemed sufficient, and as sometimes this time never arrives, owing to the unfitness of the applicant for his calling, it may happen that his applications will be steadily dismissed. In this case he still has the chance of changing and becoming counsellor at law.

This system of legal education has been in force in Germany for about thirty years. We venture to say that it has generally stood the test. There are some faults however which should be remedied.

I only mention the want of industry in the first university time, the excessive importance given to theoretical knowledge and a certain ignorance of the judges as to business life. The German Governments are earnestly endeavoring to find a way which will save the advantages of the present system and avoid its faults. We hope to increase the student's diligence by introducing another examination which would take place after the first three semesters, a plan which is passionately fought against by the admirers of students' freedom. To make the student more interested in the study and to give more practical direction to the entire education we are considering the plan of letting the student work for one year as a clerk in a County Court before he enters the university. Another idea is to send the young lawyer in a more advanced stage of his development to some business establishment such as a bank or a great factory or a counting house of a merchant of high standing. All these ideas however are still under consideration.

One of my aims in visiting America was to find something which would assist us in the reformation which we hope to bring about in Germany. I can say from my experiences so far that perhaps our young horses could be held in harness a little better on their first trip out from home by a system of examinations somewhat similar to the yearly examinations for promotion in America.

On the other side, I think many American students would appreciate the advantages to be gained from the systematic course of practice under competent guidance as persued in Germany.

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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.

EDITORIAL.

The first annual meeting of the American Bar Association to be held on the Pacific coast was successfully conducted at Seattle, Washington, from August 25 to 28. It was preceded as usual by the Conference of Commissioners on Uniform State Laws, who devoted most of their time to the perfection of the act to make uniform the laws relating to certificates of stock, and by the meeting of the Association of American Law Schools. The Washington State Bar Association also held its meetings immediately before those of the National Association, and assisted in bringing to the city a large number of members of the State Bar who later participated in the meetings of the American Bar Association. To President Dickinson is largely due the credit for the decision to venture so far from the accustomed meeting places of the American Association, and the striking success of the meeting should be a source of great gratification to him. Thanks are also due for the work of the lawyers of Seattle, and for their generous hospitality, which made the social features of the gathering especially enjoyable. Whether or not it was due to the inspiration of the material activity of the city and the frequent evidences of its energy and daring, the meetings of the American Association, which for the first time occupied four days instead of three, seem to have been unusually effective in positive accomplishment. It may be that this result was aided by the very fact of the remoteness of the meeting place, which resulted in the absence of some trouble-makers who are usually conspicuous in criticising the work of committees. But certain it is that the usual tradition of postponement of important committee reports was for once abandoned. Attention was concentrated on the two most important reports: that of the committee appointed to draft a code of professional ethics, and that of the committee on reform in judicial procedure.

The meeting was also unusual in that its debates were interesting and pointed; whereas the meetings of the section on legal education, and also of the Association of American Law Schools, were almost entirely without discussion. This is a decided reversal of the usual proportion. On the whole, the papers read at the meetings were of a high order of excellence, but those read before the sections seemed more skillfully prepared than those delivered before the general association. They were also more limited in scope, and for these reasons we have selected the best of them for publication in this issue, which as usual we have devoted to the proceedings of these meetings. The paper by Judge Farrar of New Orleans before the association on "The Extension of Admiralty Jurisdiction by Judicial Interpretation" was the most lawyer-like paper read at any of the meetings, but it was far too long to be printed in this number, and was also open to the criticism that it dealt with a subject that has apparently been settled by the courts adversely to the speaker's contention. The address of Mr. Frederick Bausman of Seattle on "The Increase of Crime in the United States" which was delivered entirely without notes and in a most spirited manner was perhaps the most interesting. As it was not in writing, however, it was impossible to reproduce it here, and the statistics upon which it is based are in the main familiar to our readers. The remedy advocated by Mr. Bausman, viz.: the repression of excessive sentimentality of the American people with reference to criminals and their punishment, and the simplification of criminal procedure will command general acquiescence.

The annual address by Ex-Senator Turner was heard with difficulty by many of the

audience, but as it contained an account of the history of our acquisition of jurisdiction over the great Northwest country, it proved exceedingly interesting to those within hearing distance. As it dealt only indirectly with topics of especial legal interest, we decided not to publish it in this issue. The annual address of the retiring president of the association, as might be expected from the temperament of the writer, was unusually sunny and optimistic. Devouring our annual discharge of statutes, state and federal, as required by the constitution of the association in preparation for the presidential address, usually produces a dyspeptic melancholy from which this address is a welcome change. Owing to its length, we were obliged to cut this address somewhat, but have preserved the parts which we think will most interest our readers.

The final draft of the code of professional ethics was adopted with only slight changes in the clause relating to contingent fees. As expected, this subject provoked the only serious debate in the consideration of the code. The discussion fully covered the subject, and was clarified by the reading of a very well written paper in opposition to the canon prepared by a member of the Seattle Bar. The clause as finally adopted may be criticised as being vague and non-committal. It recommends, as a check on the admitted abuses of the practice, the only satisfactory remedy yet proposed — control by the courts; it leaves the method of applying the remedy to be determined in accordance with the public sentiment of each jurisdiction. This on the whole is a fair expression of the present sentiment of the Bar, which seems hopelessly divided on the general question of the wisdom of permitting contingent fees. It leaves it in effect to the sentiment of a given community to determine the limitations on such fees. This is just, for the demand for contingent fees comes less from the Bar than from the public, and it does not come alone from the indigent public, which is supposed chiefly to benefit from them. The speculative spirit that pervades American life, frequently insists that compensation for professional service should be a hazard. Business men of standing desire to place cases on such a basis, at least when they are themselves plaintiffs. The practice of permitting such fees is simply an expression in our profession of a national characteristic. Until public sentiment can be crystallized in another form, any drastic prohibition of contingent fees will be evaded and ignored. Indeed, it was suggested with some force that the question is not properly an ethical one, but rather a subject for legislation, one that has past beyond the domain of conscience alone. Despite some skepticism as to the positive benefit that may accrue from the adoption of this code in the elevation of our profession, it should be welcome at least as a visible expression of a desire for moral elevation. It will express publicly our ideals, so that detractors of the profession need have no doubt of their existence. It will serve as a basis from which further advance may be made. While possible to criticise the code in form, it evidently represents the average opinion of the profession on the subjects with which it deals.

The other important work of the meetings was the adoption of most of the recommendations of the special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary costs in litigation. This committee determined in its first year to confine its work to appeals at law in the Federal Courts, and recommended a series of amendments to the Revised Statutes, of which the following were endorsed by the association:

"No judgment shall be set aside, or new trial granted, by any court of the United States, 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 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."—1 U. S. Comp. Stat. 715.

"No writ of error shall be issued in any criminal case unless a justice of the Supreme Court shall certify that there is probable cause to believe that the defendant was unjustly convicted."—1 U. S. Comp. Stat. 575.

"No such appeal shall be taken unless a justice of the Supreme Court has certified that there is probable cause to believe that the petitioner in such *habeas corpus* proceeding is unjustly deprived of his liberty."—1 U. S. Comp. Stat. 595.

"Such writ of error in criminal cases shall only be allowed by a judge of the Circuit Court and shall not issue until he has certified that there is probable cause to believe that the defendant was unjustly convicted."—29 Stat. 492; 1 U. S. Comp. Stat. 549.

"No writ of error returnable to the Supreme Court shall be issued in any criminal case, unless a justice of the Supreme Court shall certify that there is probable cause to believe that the defendant was unjustly convicted."—26 Stat. 827; 29 Stat. 492; 1 U. S. Comp. Stat. 549.

All of these amendments tend to restrict the right to appeal for trivial reasons, and accord with the prevailing opinion of the profession. The remaining amendment recommended by the committee seemed somewhat more radical, and aroused much discussion, based apparently on a misapprehension as to the effect of the clause as now phrased. The proposed amendment reads as follows:

"The trial judge shall, in all cases, submit to the jury the issues of fact arising upon the pleadings, reserving any questions of law arising in the case for subsequent argument and decision, and he, and any court to which the case shall thereafter be taken on writ of error, shall have power to direct judgment to be entered for either party *non obstante veredicto*."—1 U. S. Comp. Stat. 525.

It was, therefore, re-committed for further consideration. It is said, however, that Pennsylvania has recently adopted a statute similarly worded, which has proved entirely satisfactory in its operation. Although it is really a reversion to old common law practice, it differs so much from the modern practice to which we are accustomed that it may be well that it should be given further consideration, and that the meaning of the clause should be made unmistakeable. The work of this important committee commences auspiciously, and it is to be hoped that a busy Congress may be stimulated by it to commence a sensible simplification of our antiquated and expensive federal judicial machinery.

The annual dinner was held on Friday evening, at the New Washington Hotel where the meetings had been conducted and owing to the excessive length of some of the after-dinner speeches, the purpose of which the authors had evidently mistaken, was prolonged to a late hour. The speeches of Congressman Cushman of Tacoma, and of Mr. Woods of Portland, Oregon, with the admirably brief address of the incoming president, Mr. Lehmann, and the charming speech of Mr. Bedwell, the representative of the British Columbia Bar, were of a high order. A pleasant feature of the dinner was the presentation to the energetic treasurer, Mr. Wadhams, of a loving cup by Judge Crosby of Iowa, on behalf of the members of the association and their guests, who enjoyed the delightful journey by special train through the Canadian Mountains on their way to the meetings, for the comforts and conveniences of which they were indebted to Mr. Wadhams and his faithful assistants.

At the close of the meetings, many members enjoyed a two-days excursion by steamer on Puget Sound, to Victoria, B. C. Here the party were guests of the lawyers of British Columbia. They were met by carriages and taken for a drive through the capital of the Province. In the evening an informal reception enlivened by singing and speech-making closed the festivities. On the following Monday, those who were returning through Portland, Oregon, were most hospitably entertained by the members of the Bar in that city at the Commercial Club.

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.

In Mr. Baty's article on Professor Westlake's views on war we find a clever use of the philosophy of Mr. Dooley to drive home a legal argument, and learning and humor make a strong team. Another article deserving of special notice this month is Mr. Maurice W. Richmond's analysis of the effect of some important Privy Council decisions on the interpretation of the Torrens System in New Zealand.

AIRSHIP LAW. "Aerial Navigation," by Charles C. Moore, *Law Notes* (V. xii, p. 108). A timely reprint of an article published in *Law Notes* for August, 1900, suggesting some problems likely to arise when airships become common.

ATTORNEYS. "Rules Relating to the Admission of Attorneys in Madras," editorial, *Madras Law Times* (V. iv, p. 9).

BIOGRAPHY. "Hubert De Burgh, Judge and Statesman," by Charles Morse, *The Canadian Law Times and Review* (V. xxviii, pp. 579 and 689). Appreciative study of the Chief Justiciar of King John and Henry III.

CONSTITUTIONAL LAW (Police Power). "Validity of a Statute Providing that Acceptance from Relief Association shall be no Bar to an Action for Damages," by F. A. Beecher, *Central Law Journal* (V. lxvii, p. 143).

"In a recent case in Iowa (McGuire *v.* Chicago, etc., R. Co., 108 N. W., Rep. 102) where a statute providing that under certain circumstances railroad companies shall be liable in damages to its employees, and that in such case no contract of insurance, relief, benefit, or indemnity, shall be available to the company as a defense to an action by the employee for the recovery of such damages, the court held that it operated equally on all railroad companies within the state, that it constituted a proper subject of classification, and therefore was not unconstitutional, as a violation of the equality clause of the federal constitution, and that it was a proper exercise of the police power of the legislature, and therefore was not objectionable as an unconstitutional restriction on the railroad's liberty of contract.

In Shaver *v.* Pennsylvania Co., "where a similar statute was involved, the court held the contract valid and the statute void. The facts in both cases are similar."

The article discusses the principles involved, giving numerous citations, and points to the conclusion that such statutes are a valid exercise of the police power.

CRIME. "Heredity, Education and Crime," by Lex, *Law Magazine and Review* (V. xxxiii, p. 412). A review and commentary upon a recent book by Albert Wilson, M.D., entitled "Education, Personality and Crime."

CRIMINAL LAW (Blasphemy). "The English Law of Blasphemy," by Francis Watt, *Bombay Law Reporter* (V. x, p. 137). Discussing the present uncertain state of the English law of blasphemy and expressing the hope that the following principle will be recognized as the law:

"If a religious discussion either provokes or obviously tends to provoke, in fact not in theory, a breach of the peace, or public disorder of any kind, let it be put down, and let those who caused it receive proper punishment, but let the reason of that punishment be made perfectly clear. Discussion, even on the most solemn subject, should be encouraged rather than suppressed."

CRIMINAL LAW (History). "The Development of the Administration of Law in England," *Canadian Law Times and Review* (V. xxviii, p. 596). Criminal procedure is described in this installment.

CRIMINAL LAW (Probation). "The Probation of Offenders, Act 1907: An Appreciation and a Criticism," by Hugh R. P. Gamon, *Law Magazine and Review* (V. xxxiii, p. 433).

EMINENT DOMAIN. "The Effect upon the Exercise of the Right of Eminent Domain of the Intermingling of a Private with a Public Use," by Robert L. McWilliams, *Central Law Journal* (V. lxvii, p. 199).

EMPLOYER'S LIABILITY. "The Employers' Liability Acts and the Assumption of Risks in New York, Massachusetts, Indiana, Alabama, Pennsylvania, Colorado, England; and including the Federal Act," by Frank F. Dresser, A.M., of the Massachusetts Bar, 8vo. (V. ii, pp. vi, 630), The Keefe-Davidson Company, St. Paul, Minnesota, 1908. In recent years tort litigation has increased enormously; and at the present day it threatens to engage the attention of the law courts almost to the exclusion of every other class of business. A considerable part of the tort litigation consists of cases brought against employers of labor by employees who have been injured in the course of their work. Statutes are being passed, and existing statutes are being amended, further to insure the rights of employees; and decisions of the highest courts are constantly adding to the body of the law. Mr. Dresser's book at its publication in 1902 was one of the earliest and most useful of the legal text books covering this expanding subject, and it made a recognized place for itself. But in a branch of the law such as that of employers' liability which is constantly expanding and enlarging, a book to remain useful must frequently be brought to date. This has been done with Dresser's "Employer's Liability" by the compilation of a new volume called volume two. It cannot be called a second edition. The text of the first edition has been left unchanged. The plan of the author is, by using the same section and page numbers, to make available for users of the original work the decisions and changes in the law since 1902. Volume two, therefore, is in the nature of notes to volume one. The scheme has been well carried out. An examination shows that the cases down to January, 1907, have been carefully collected and written into the text. By the use of the two volumes the practitioner may be tolerably sure that he has covered the cases within the field of employer's liability. It is to be hoped, however, that the learned author will find time amid his active professional labors to rewrite the whole work within a few years, combining what he has done, and giving the profession the benefit of his judgment and opinion on the law as it is to-day. S. H. E. F.

INTERNATIONAL LAW (War). "Professor Westlake on War," by Thomas Baty, *Law Magazine and Review* (V. xxxiii, p. 451). Disagreeing with Professor Westlake's theory put forth in "International Law, Part II, War," that to constitute war there must be an intent to make war, on the part of at least one party. By this theory no acts of unlawful violence are in themselves war and the seizure by Russia of Bessarabia "as a material guarantee" is expressly instanced. Mr. Baty says:

"Would anyone, not an international lawyer, think that one country can forcibly invade the territories of another, occupy its cities, and expel its garrisons, without being at war with it? Would it on the other hand enter into the mind of anybody to conceive that Russia, in such a case, was not intending to 'contend' with Turkey 'by force?' When Louis XIV invaded the Palatinate, '*sans que la paix soit rompue de notre part*,' no such hypocritical expressions of intention to keep the peace could be supposed to outweigh the obvious fact that he was breaking it.

"This heresy, which perhaps may be styled the Ludovican (and which has gained much support of late years), of admitting that so long as a state disclaims the idea of going to war it may do what it likes without being at war, unless and until the worm on which it has trodden turns, is particularly dangerous. It is unjust to the assailant — for it brands as brutal violence what should have been lawful war. It is unjust to the assailed — for it gives the assailant all the advantages of neutrality and all the benefits of belligerency. It is unjust to the neutral — for it throws on him the impossible duty of examining the real intentions of his neighbours. Is it replied that the assailed state can declare war, or by open resistance begin it? It can, if it prefers annihilation to the infliction of indefinite damage. What is such a privilege worth? An astute

assailant will always trade on the unlikelihood of its being used. There is no need, and there is grave danger in trying, to amend the definition of Grotius by a reference to the special aims of the assailant. The plain fact that he is interfering with his neighbour's territory, and avowedly prepared to overcome any resistance by force of arms, constitutes the *status per vim certantium*, however little he wishes or supposes that actual physical conflict will be the outcome."

In enforcing his argument Mr. Baty quotes Mr. Dooley:

"Th' dillygate fr'm Chiny arose, an' says he: 'I'd like to know what war is. What is war anyhow? . . . Is it war to shoot my aunt?' says th' dillygate fr'm Chiny. Cries of 'No! no! 'Is it war to hook my father's best hat that he left behind him when he bashfully hurried away to escape th' attintions iv Europeen sojery?' he says. 'Is robbery war?' says he . . . 'I'd like to go back home an' tell them what war really is. A few years back ye sint a lot iv young men over to our part iv th' worruld an' without sayin' with ye'er leave or by ye'er leave they shot us an' hung us up by our psyche knots, an' they burned down our little bamboo houses. Thin they wint up to Pekin, set fire to th' town an' stole ivrything in sight. I just got out at th' back dure in time to escape a jab in th' spine fr'm a German that I never see before. . . . Was that war, or wasn't it?' he says. 'It was an expedition,' says th' dillygate fr'm England, 'to serve th' high moral juties iv Christian civvylization.' 'Thin,' says th' dillygate fr'm Chiny, puttin' on his hat, 'I'm f'r war,' he says. 'It aint so rough,' he says. An' he wint home."

JURISPRUDENCE (Mussulman). "Influence of Custom on Mussulman Jurisprudence," by S. Vencatachariar, *Allahabad Law Journal* (V. v, p. 217, continued from p. 207).

JURISPRUDENCE (India). "Chanakya's Arthasastra," by R. Shama Sastry, *Mysore Review* (V. iv, p. 344). Giving the law of inheritance and buildings.

LAW'S DELAY. "The Law's Delays," by W. Bourke Cockran, *Ohio Law Bulletin* (V. liii, p. 351).

LEGAL ETHICS. "Modern Municipal Conditions and the Lawyers' Responsibility," by A. Leo Weil, *Albany Law Journal* (V. lxx, p. 193). This paper read before the Pennsylvania Bar Association at Cape May, June 24, is a plan for a higher standard of responsibility toward the community on the part of eminent counsel for public service corporations, and calls for professional condemnation of those who devote their talents to enabling such corporations to get franchises of enormous value without compensation to the community.

MECHANICS' LIENS (Jamestown Exposition). "Will a Mechanic's Lien Lie Against the Property of the Jamestown Exposition Company?" by Thomas W. Shelton, *Central Law Journal* (V. lxvii, p. 163). Discussing the point raised that such a lien will not lie because the exposition company is a private corporation.

PRACTICE. "Organization of a Legal Business. XII. Collection Department," by R. V. Harris, *The Canadian Law Times and Review* (V. xxviii, p. 605).

PRACTICE (Right of Appeal). "Reversals for Technical Reasons," by Thomas J. Johnston, *Law Notes* (V. xii, p. 105). Examining statistics from several widely distributed states and from the federal courts, Mr. Johnston shows that of 145,500 cases there were 3,000 appeals which resulted in 750 reversals, the percentage of appeals and of reversals being respectively 2.13 and 0.518. From these figures Mr. Johnston concludes that the outcry against reversals for "technical reasons," of which a good deal has been heard lately and which was embodied in one of President Roosevelt's messages to Congress, is all moonshine, the utterance of well-meaning but ignorant persons and of demagogues. Mr. Johnston declares the remedy for the law's delays is not to be found in restriction of the right of appeal. He finds the real evils to be:

"Crowding of calendars by unnecessary motions; appeals on practice questions, leading to long delays; a foolish rigidity of practice, fixed by statute; stays of the action of one judge obtained from another, sometimes by false pretences, and the like, are practical denials of justice. Our federal courts, left substantially to make their own practice upon certain broad lines, transact with relatively few judges a large business, and are up with

their calendars when the long vacation arrives; a jury case put on the calendar is tried in three months or so. Our state courts, bound hand and foot by statute, like a man set to play tennis in a plaster cast, are years behind; about twenty-seven months between issue and trial. These are the things to remedy; enable the courts to transact more business, and cease the attacks upon them; these do no good whatever, and undeniably they do immense harm."

PRACTICE. "The Organization of a Law Office," by R. V. Harris, *Canadian Law Times and Review* (V. xxviii, p. 705).

PROCEDURE (Federal). "Some Misapprehensions as to Federal Procedure and Jurisdiction," by Henry C. McDowell, *Virginia Law Register* (V. xiv, p. 321). A paper of much practical value to lawyers in all states, although primarily intended for Virginia practitioners.

REAL PROPERTY (Effect of Torrens System). "The Indefeasibility of Registered Proprietorship," by Maurice A. Richmond, *Commonwealth Law Review* (V. v, p. 193). This article is an analysis of the Privy Council case of *The Assets Company, Ltd., v.* Mere Rohi ([1905] A. C. 176), and two other cases decided by the same judgment, of importance to all interested in the Torrens System. These cases must be taken to have finally settled some exceedingly important questions as to the effects of registration of title under the Torrens Acts in force in the Australasian colonies. The complication of facts in each case, the number of points raised, the special technicalities of New Zealand native land law involved, are carefully explained and the author's view of the effects of the decisions is summarized as follows:

"1. In order to impeach a title registered under the Torrens Act on the ground of fraud, it is necessary to show actual fraud (*i.e.*, dishonesty of some sort, as distinguished from constructive or equitable fraud) on the part of the person whose title is attached or of his agents ([1905] A. C. 210, 212), or actual fraud on the part of an earlier registered proprietor (or of his agents) from whom the title attacked has been derived by a voluntary transaction or transmission, or by a series of transactions or transmissions, none of which has been *bona fide* for value."

The latter part of this proposition is not derived from the decisions reviewed, but follows from the express provisions of the acts and from plain principle. A *bona fide* purchaser for value of registered land must have the power of giving a good title either to a purchaser for value or to a volunteer even if the latter has knowledge of the prior fraud. "Otherwise the indefeasibility of his title would be largely unreal and its value largely destroyed."

"2. The rule stated in the last paragraph applies (so far as it is in terms applicable) to the case of the first holder of a certificate of title under the act (at all events if he is himself a purchaser for value), as fully as it does to a registered purchaser for value from a prior registered proprietor ([1905] A. C. 202, 210).

"3. The fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he bought from a prior registered proprietor or is himself the first holder of a certificate of title, must be brought home to the person whose registered title is impeached, or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, fraud may properly be ascribed to him ([1905] A. C. 210). And the effect is the same, of course, if there is similar conduct on the part of his agents.

"4. Where a document is produced to the registrar, which is upon the face of it a good statutory authority for bringing land under the act and issuing a certificate of title (in lieu of Crown grant) to the person producing it, and the person producing it honestly believes it to be a genuine document which can be properly acted upon, and the registrar brings the land under the act and issues a certificate of title accordingly, the registered title so obtained cannot be impeached (even as against the first holder of the certificate) on the ground that the document produced as authority was in fact void for non-compliance

with statutory conditions precedent to its issue ([1905] A. C. 201–5). It cannot, at all events, be impeached on that ground at the suit of a rival claimant merely. It may, perhaps, be impeached at the instance of the Crown or in an action to which the Crown is a party (*ibid.* 202–3).

" 5. Where land held under a particular class of title is already under the act, and an instrument, executed by the registered proprietor and purporting to be a memorandum of transfer of his interest, is produced to the registrar for registration, and the person in whose favor it is made and who produces it for registration honestly believes it to be a genuine document which can properly be acted upon, and the registrar acts upon it and registers it, the registered title so obtained cannot be impeached (even as against the immediate transferee) on the ground that the memorandum of transfer was, under a statute regulating the alienation of land of that particular class of title, a void instrument, and ought not, therefore, to have been registered ([1905] A. C. 206, 211–12).

" 6. Where land has been *de facto* brought under the provisions of the act under such circumstances as those stated in paragraph 4, it is ' land under the provisions of the act ' within the meaning of the sections protecting the estate of the registered proprietor of ' land under the provisions of the act.' The registered proprietor cannot, in such a case, be deprived of the benefit of registration on the ground that the land is not ' land under the provisions of the act ' within the meaning of those sections, not being *de jure* under the act, or not having been validly brought under the act ([1905] A. C. 202).

" 7. Neither in the case stated in paragraph 4 nor in the case stated in paragraph 5 can the person obtaining the registered title be treated as a trustee for the persons who would be entitled if he were not registered. To treat him as a trustee would be to do the very thing which registration was designed to prevent ([1905] A. C. 204–5).

REMINISCENCES. " Some Reminiscences of a Court Reporter," by A. H. Crawford, *Canadian Law Times and Review* (V. xxviii, p. 728).

SALES (Scotland). " Some Recent Developments in the Scottish Law of Sale," by Richard Brown, *Law Magazine and Review* (V. xxxiii, p. 428).

SURETYSHIP. " Liabilities of Heirs and Estate of Co-Sureties for Breach of Bond," by John Hipp, *Central Law Journal* (V. lxvii, p. 124).

TELEGRAPH COMPANIES (Liability for Mistakes). " Regulation of Telegraph Companies," by M. J. Gorman, *Canadian Law Times and Review* (V. xxviii, p. 675). Summarizing the English, Canadian and American.

TORTS (Misrepresentation). " Liability for Misrepresentation," by George S. Holmested, *Canada Law Journal* (V. xliv, p. 513). Discussing the English and Canadian cases on the subject.

TRUSTS (Perquisites). " The Perquisites of a Trustee," by A. J. P. Menzies, *Scottish Law Review* (V. xxiv, p. 171). Examining the Scotch and English law.

TRUSTS (Common Law Remedy). " Trust Bursting Under the Common Law," by George D. Talbot, *Central Law Journal* (V. lxvii, p. 181). Describing the recent complaint of the attorney general of Colorado brought under the common law against a combination of manufacturers, wholesalers and retailers, the object of which was to fix the prices of certain food products. The defendants' demurrers were overruled and a permanent injunction issued. The writer is of the opinion that the common law provides a more efficacious remedy in such cases than statutes, often carelessly and inartificially drawn.

UNIVERSITIES (England). " The Law of the Universities. II. Prerogative and Legislation," by James Williams, *Law Magazine and Review* (V. xxxiii, p. 399).

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.)

ACTION. (**Splitting Causes of Action.**) **U. S. C. C. Mass.**— Plaintiff in Flanders *v.* Canada, A. & P. S. S. Co., 161 Fed. Rep. 378, was employed by defendant as general agent for a period of five years at a salary of $3000 per year. After serving for a little over six months he was discharged. Soon thereafter he brought action for such damages as he had then sustained and such as might accrue up to the time of trial "but without prejudice to his right to bring subsequent suit or suits for damages accruing after the trial of this cause." Counsel agreed as to the amount of damages if plaintiff should be held entitled to recover at all on the theory of the complaint that the action was for wages and interest thereon to time of verdict. Judgment was rendered in favor of plaintiff and he thereafter brought another action similar to the first for wages subsequent to verdict in the first suit. It was contended by defendant that there originally existed but one cause of action which could not be divided and that plaintiff's first judgment was a bar to further relief. The court said that as defendants had raised no objection to the theory of divisibility of causes of action in the former suit it would not be sustained in the second.

AGRICULTURE. (**Destruction of Infected Fruit.**) **Wash.** — The decision of the Washington Supreme Court in Shafford *v.* Brown et al., 95 Pac. Rep. 270, though short and concise, disposes of some questions of especial interest to fruit growers. Plaintiffs were the successors in interest to the owners of apples which defendant Brown, acting as county fruit inspector, and defendant Huntley, as state commissioner of horticulture, had ordered destroyed because of being infected with pests alleged to be dangerous to the fruit interests of the state. It was conceded that the statute under which Brown acted was unconstitutional, but the court said he doubtless acted on the supposition that it was valid, and as the owners of the fruit appealed from his decision, they evidently thought the same; that the affirmative defense to which demurrer was interposed alleged the infection and necessity of destruction; that assuming such to be the facts, the owners could not have been injured by Brown's act, as there was no question as to the authority of Huntley, who also condemned the fruit. The judgment overruling the demurrer to the answer was therefore affirmed.

APPRENTICES. (**Construction of Contract of Apprenticeship.**) **Colo.** — A contract binding out an apprentice is construed in Denver Engineering Works Company *v.* Newman, 95 Pac. Rep. 175, in an opinion by the Colorado Supreme Court. The contract provided for services by defendant in error at varying rates during an apprenticeship of four years and thirty days and for the payment of a hundred dollars additional at the expiration of the term of service. Each year was to consist of 300 days of 10 hours each, thus making a total of 12,300 hours. After having worked 11,539½ hours, a part of which was at a salary which the company had voluntarily increased above the contract price, defendant in error was told that his time of apprenticeship had expired but that on account of the increase in his wages he was not entitled to the promised payment of a hundred dollars extra, specified in his contract. Later on he was told that a mistake had been made and that his time had not expired. It was shown that he had been at the company's shops for four years and two months and performed all services required of him. It was contended, however, that the contract was entire, so far as the number of hours' service was concerned, and that it could only be discharged by performance of the full 12,300 hours. The court said that such a construction would enable the company to prolong the contract indefinitely by limiting the number of hours per day, and that having been at the place of business and ready to perform during the period stated, the performance was complete. The increase of wages, having been voluntarily made, was held to not affect the right to the extra hundred dollars.

ATTORNEY AND CLIENT. (**Contempt of Court.**) **Mich.** — The failure of attorneys to appear at the time set for trial was held by the

Supreme Court of Michigan to constitute contempt of court under the circumstances of the case in *In Re* McHugh *et al.*, 116 N. W. Rep. 459. Defendants were employed for the defense in a murder trial and on denial of an application for postponement were told that the case must be tried at that term and that they must be ready to proceed at a day mentioned less than a week later. Neither of them at first appeared on that day, but subsequently one of them came and argued a motion for continuance, which was denied, though they were allowed three days more time. Instead of appearing in court at the latter date set for trial, defendants went to Canada. An order was then issued for their arrest for contempt. A few days later they voluntarily appeared in court and offered testimony to explain their absence. The trial court held their excuse insufficient and imposed a fine of $250 on each with an additional punishment of 30 days in jail for one of them. The Supreme Court affirmed the decision of the lower court.

This case is clearly right on principle and is in accord with the decided weight of authority, much of which is referred to by the court in its decision. The principle is similar to that which underlies the power of a court to punish summarily for certain classes of contempts, the fact that the act so dealt with may also be a crime and punishable as such, being immaterial. (2 Bish. New Cr. L. § 241). The power to preserve the orderly administration of the law and the power to see that officers of the court so intimately associated with the administration of the law as are attorneys, are properly qualified, morally and otherwise, for the exercise of their duties, are inherent in the courts. A statute would have to be extremely clear to vest in another department of government the right to affect the exercise of such necessary and salutary control.

H. A. B.

ATTORNEY AND CLIENT. (Pardon of Attorney — Effect on Disbarment.) Ky. — M. C. Nelson, an attorney practicing in the Kentucky courts, was indicted for forgery and plead guilty. Very shortly thereafter he was pardoned by the governor. On filing his pardon in court he was ordered released from custody, but at the same time was cited to appear and show cause why he should not be disbarred. He then refiled the pardon, claiming to be absolved thereby from all results of his conviction. The trial court held the pardom no defense, and he appealed to the Court of Appeals. The decision of that tribunal affirming the judgment of the lower court is reported in 109 S. W. Rep. 337, under the title Nelson *v.* Commonwealth. The court said that honesty and good character being requisites to the right to practice law were not restored by pardon, and as the court had power independently of statute to disbar attorneys practicing therein, the disbarment was not conditioned on conviction of crime and was not affected by the pardon. Several other disbarment cases and decisions involving the effect of pardons are cited in the opinion of the court.

CARRIERS. (Injuries to Passenger — Res Ipsa Loquitur.) Utah. — The meaning and application of the doctrine of *res ipsa loquitur* is rather puzzling at times. It is discussed by the Utah Supreme Court in Paul *v.* Salt Lake City R. Co., 95 Pac. Rep. 363, in connection with an action for injuries to a passenger alighting from a street car. Counsel for plaintiff contended that under the doctrine referred to all that was necessary to prove in order to make out a prima facie case were the facts that plaintiff was a passenger and that she was injured while alighting. The court declined to go that far, but said that if it were proved that she was injured by the moving of the car while alighting, the presumption would arise that the movement was due to the negligence of the company. The general rule is stated to be as follows: "To show merely that an accident occurred and that an injury was sustained by a passenger is not enough. It must further be made to appear that the injury was caused by something which, at the time it occurred, was in the care, custody, or under control of the carrier, or in some way connected with or related to his business in the transportation of passengers." A former opinion in the same case reported in 83 Pac. Rep. 563, and the cases of Dearden *v.* S. P., L. A. & S. L. R. Co. (Utah), 93 Pac. 271, and Price *v.* St. L. I. M. & S. Ry. Co., 75 Ark. 491, 88 S. W. 578, 112 Am. St. Rep. 79, are cited as upholding the doctrine as above enunciated.

The doctrine of Res Ipsa Loquitur has been the subject of much contention, and has been widely discussed by the Massachusetts Court. The language in Feital v. Middlesex Railroad Company, 109 Mass. 398, seems to be the basis of the later opinions, and we find the doctrine gradually developed in the following cases:

Graham v. Badger, 164 Mass. 42. 41 N. E. 61.
Harriman v. Reading, etc., Ry. Co., 173 Mass. 78. 53 N. E. 156.
Buckland v. N.Y., N.H. & H. R.R. Co., 181 Mass. 3. 62 N. E. 955.
Savage v. Marlboro' St. Ry. Co., 186 Mass. 203. 71 N. E. 531.
Hebblethwaite v. Old Colony St. Ry. Co., 192 Mass. 295.
Magee v. N.Y., N.H. & H. R.R. Co., 195 Mass. 111.
Minihan v. Boston Elevated Ry. Co., 197 Mass. 367.

Comparing the language of the court in the Utah case above quoted with the doctrine of our own Commonwealth it would seem that the Western state had gone much too far. The so-called " elevated space " cases

Willworth v. Boston Elevated Ry. Co., 188 Mass. 220,
Hilborn v. Boston Elevated Ry. Co., 191 Mass. 14,
Hawes v. Boston Elevated Ry. Co., 192 Mass. 324,

cannot possibly be reconciled under such a doctrine, yet those decisions have met with repeated approval. The " jerk, jar and jolt " cases which have been so frequently before the Full Bench are entirely inconsistent with the theory of the Utah Bench.

Byron v. Lynn & Boston St. Ry. Co., 177 Mass. 303. 58 N. E. 1015.
Timms v. Old Colony St. Ry. Co., 183 Mass. 193. 66 N. E. 197.
Weinschenk v. N.Y., N.H. & H. R.R. Co., 190 Mass. 250.
Foley v. Boston & Maine R.R., 193 Mass. 332.
Jameson v. Boston Elevated Ry. Co., 193 Mass. 560.
Sanderson v. Boston Elevated Ry. Co., 194 Mass. 337.

In the cases above cited the whole situation was under the care, custody or control of the carrier, or was caused by something connected with or related to the transportation of passengers, but the court held that there was not enough evidence to make out a prima facie case.

Res Ipsa Loquitur applies only where the entire situation is under the exclusive care, custody and control of the carrier *plus the fact* that the accident is of a kind such as does not commonly happen except in consequence of negligence. It must be shown that some appliance failed to do that which it was expected to do, that some employee failed in the performance of a duty, or that conditions were improper for the work being done.

Graham v. Badger, 164 Mass. 42. 41 N. E. 61.
Magee v. N.Y., N.H. & H. R.R. Co., 195 Mass. 111.

To say that a prima facie case had been made out if it merely appears that an accident occurred, and that an injury was sustained by a passenger, and " that the injury was caused by something which at the time it occurred was in the care, custody or control of the carrier, or in some way connected with or related to his business in the transportation of passengers " would go so far as to make the carrier an insurer of its passengers.

H. J. H.

COMMERCE. (Freight Rates on Goods Shipped from Foreign Country.) **Wash.** — The validity of a special agreement relating to freight rates on goods shipped from Norway to Seattle came up in Fisher *v.* Great Northern Ry. Co., 95 Pac. Rep. 77. The railroad company published a schedule of rates required by the interstate commerce act in which the charges on canned goods from Stavanger, Norway, to Seattle were placed at $1.31 per 100 pounds. Coupled with this was the statement that such rate would only be protected when the ocean charges were such as to leave a minimum of 75 cents per hundred to be properly apportioned among the railroads transporting from the seaboard to Seattle. While this schedule was posted, the defendant company entered into a special agreement with plaintiff for carriage of canned goods between the points named at a rate of 85 cents per hundred pound. When the goods arrived delivery was refused unless plaintiff would pay charges amounting to $1.137 per hundred, being 75 cents plus an ocean rate of 38.7 cents which was claimed to be the best that could be obtained, and that under the interstate commerce act the published rate would prevail over any special agreement. The court held that the agreement was not necessarily in violation of the statute and in the absence of proof that ocean competition did not justify it, would be upheld.

CONSTITUTIONAL LAW. (Due Process of Law in Assessment for Public Improvements.) **U. S. Sup. Ct.** — An important decision on the constitutional requirements of proceedings for public improvements and the assessment of expenses thereof was handed down by the United States Supreme Court in Londoner *v.* Denver, 28 Sup. Ct. Rep. 708. Proceeding under the Denver city charter, the board of public works transmitted to the city council a resolution and form of ordinance authorizing certain improvements. The ordinance was thereupon enacted and by its terms undertook to determine in substance that a proper petition had been filed and necessary preliminary proceedings had. The city charter makes such a determination as to preliminary petition conclusive. After completion of the work, notice that objections would be heard if filed within thirty days was published but no place or time of hearing was specified. Written objections were filed in accordance with the notice. The council acting as a board of equalization thereafter met and proved the apportionment of the assessments, and later on, sitting as a council, passed an assessment ordinance. No hearing was given to the property owners at any stage of the proceedings other than on the written objections referred to above, and there was no opportunity for argument or oral proof. The Supreme Court of Colorado had held the proceedings valid in Denver *v.* Kennedy, 33 Colo. 80, 80 Pac. Rep. 122, 467, and Denver *v.* Dumars,

33 Colo. 94, 80 Pac. Rep. 114. The United States Supreme Court held that there was no constitutional objection to the law making the decision of the council conclusive on the question of the sufficiency of the preliminary petition, but that at some stage of the proceedings property owners must be given opportunity to appear and be heard, and that failure in this regard rendered the assessment invalid.

COPYRIGHTS. (Infringement.) U. S. Sup. Ct. — Publishers and the general reading public will find matters of interest in the opinion of the United States Supreme Court in Bobbs-Merrill Co. *v.* Straus, 28 Sup Ct. Rep. 722. Plaintiffs were publishers of a copyrighted book in which they inserted immediately below the copyright notice the following: " The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright. The Bobbs-Merrill Company."

Defendants purchased copies of the book from wholesale dealers with knowledge of the above notice but without agreeing to be bound thereby.

They then sold them at 89 cents each. Plaintiffs sought to restrain continuation of the sales, but their bill was dismissed by the circuit court and its decree affirmed by the circuit court of appeals. They then appealed to the Supreme Court, but were again unsuccessful. The court said that while the right to multiply and sell copies in the first instance was secured by the copyright law, the right to " vend " given by section 4952 of the Revised Statutes could not be construed as attaching to the book after title had passed from the owner of the copyright nor could such an effect be brought about by the notice above referred to.

CRIMINAL LAW. (Exclusion of Witnesses.) Cal. Ct. of App. —The California Court of Appeals in People *v.* Oliver, 95 Pac. Rep. 172, holds that it is entirely proper for the trial court in a criminal prosecution to refuse to exclude from the court room a witness who is an officer active in the prosecution and who remains for the purpose of advising the prosecuting attorney as to the facts and interest and character of witnesses.

DEATH. (Right of Alien Widow and Children to Maintain Action.) U. S. C. C., Wash. — The statute of Washington giving a right of action for wrongful death is construed by the United States Circuit Court for the Northern Division of the Northern District of Washington in Roberts *v.* Great Northern Ry. Co., 161 Fed. Rep. 239, with reference to its application to an action for the benefit of a non-resident alien widow. The court remarks on the conflict of authorities and cites and follows McMillan *v.* Spider Lake S. & L. Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947, holding that no recovery can be had.

DEEDS. (Restrictions against Conveyance to Colored Persons.) Va. — Is a corporation organized to establish and carry on an amusement park exclusively for colored people within the restriction in a deed providing that " The title to this land never to vest in a person or persons of African descent"? The Virginia Supreme Court of Appeals was called upon to answer the above question in People's Pleasure Park Co *v.* Rohleder, 61 S. E. Rep. 794. The court refers to the rule of construction against favoring conditions subsequent and to the legal entity of a corporation as distinguished from its membership, and decides that the restriction is not violated.

This is an interesting instance of the common rule that a corporation, whatever its membership, is a legal entity. It is no more extreme than that English case where it was held that vessels belonging to a corporation organized under English laws could be registered as belonging to British owners although all the stockholders were residents of Holland.

ELECTION. (Jurisdiction of Election Contest.) Idaho. — In Toncray *v.* Budge, 95 Pac. Rep. 26, the Idaho Supreme Court was called upon to determine a number of knotty questions relative to the validity of an election contest law of that state. The proceeding was instituted in the district court by an elector to test the right of defendant to hold the office of district judge on the ground of alleged constitutional ineligibility. Defendant demurred to the complaint on the grounds of lack of jurisdiction in the district court and of failure to state facts sufficient to constitute a cause of action. Under the statutes of the state, jurisdiction in contests of election of district judges is vested in the Supreme Court, but the constitution states that " district courts have original jurisdiction in all cases both at law and equity," and complainant claimed that if the jurisdiction conferred upon the Supreme Court was meant to be exclusive, the statute would be in conflict with this constitutional provision. The court held, however, that an election contest is a proceeding of entirely statutory origin and not necessarily nor innately of a judicial nature. That being true, it followed that when the right was created by the legislature that body had the power to designate what tribunal or board should exercise jurisdiction. Another claim of complainant was to the effect that a constitutional

question was involved which the legislature had no authority to take out of the hands of the duly constituted judicial tribunals. As against that contention, the court held that as a means of determining the right to office by proceeding on information was also provided and constitutional questions might be litigated therein, there was no objection to allowing the question of eligibility of candidates for office to be passed upon in a contest before a tribunal other than one in which jurisdiction was vested by the constitution, but declined to express any opinion as to the conclusiveness of such a determination.

GARNISHMENT. (Liability of Married Women.) U. S. C. C. Ark. — A question of some interest as to the liability of a married woman to garnishment by a creditor of her husband, under the statute of Arkansas, is discussed in Allen-West Commission Company *v.* Grumbles, 161 Fed. Rep. 461. The original action was one against the husband of the garnishee. The garnishment proceeding was instituted under Section 379 of Kirby's Dig., which reads as follows:

" Upon the service of the summons upon any garnishee, or after his failure to make a disclosure satisfactory to the plaintiff, the latter may proceed in an action against him by filing a complaint verified as in other cases, and causing a summons to be issued upon it; and thereupon such proceeding may be had as in other actions, and judgment rendered in favor of plaintiff to subject the property of the defendants in the hands of the garnishee, or for what shall appear to be owing to the defendant by the garnishee. The judgment may be enforced by execution or other proper means." As may be readily seen, the statute makes no exception relative to married women. The court says that the decisive question of the case is whether a personal judgment can be rendered against a married woman garnisheed for her husband's debt. Numerous cases are cited, and the conclusion reached that, notwithstanding the particular language of the statute, it cannot be considered as enlarging the common-law liability of married women, and that consequently the proceeding should not be maintained.

LICENSES. (Hotels and Restaurants.) —The Court of Appeals of Kentucky in New Galt House *v.* City of Louisville, 111 S. W. Rep. 351, holds that under an ordinance imposing license taxes on hotels and restaurants a hotel furnishing meals on the " European plan " is not subject to both licenses. Meals had formerly been served on the " American plan " and a hotel license was regularly paid. After changing to the " European plan," the city attempted to enforce payment of an additional license fee on the ground that the furnishing meals to all comers to be paid for as ordered constituted the keeping of a restaurant. The Court of Appeals held that this should be considered as a mere incident of the hotel keeping and not a separate business and that only the regular hotel license fee should be charged.

Though an inn must furnish both food and lodging, yet the innkeeper is acting within his trade in supplying a guest with either kind of entertainment without the other. So long as he professes readiness to lodge guests who eat, he is none the less an innkeeper because the guest does not call for lodging. J. H. B.

LIFE ESTATES. (Estimating Value.) Tenn. — The interesting question of the manner in which the value of a life estate may be determined and what matters are admissible as evidence to show its value arose in Tennessee in Holt *v.* Hamlin *et al.*, 111 S. W. Rep. 241. The action was brought by the guardian *ad litem* of an infant to have certain property partitioned among those having life estates and remainder interests therein. The guardian objected to the use of annuity or life tables in determining the value of the life estate, since the life tenant being young the greater part of the property would be allotted to him to the damage of the remaindermen.

The court held that the tables were not to be used exclusively for the purpose suggested but that they could only be referred to as evidence of the value of the estate; that the estate should be estimated according to its market value determined by considering not only the probable duration of the life tenant's existence as shown by the life tables, but the nature of the property, his age, habits and health, the fact that he may not live out the expectancy affecting the salability of the estate, that taxes must be paid from year to year, that the conduct of any business is not wholly a certain matter but depends upon many contingencies and chances, and that the life tenant, after partition, is relieved of any duty to the remaindermen in the care and preservation of the property.

MUNICIPAL CORPORATIONS. (Power to Levy License Tax on Vehicles.) Ill. Sup. Ct. — In the case of Harder's Fireproof Storage and Van Co. *v.* City of Chicago, decided by the Illinois Supreme Court and reported in 85 N. E. Rep. 245, the validity of an ordinance of the city of Chicago imposing a so-called " wheel tax " on vehicles used on streets is drawn in question. The statute authorizing the enactment of the ordinance is also claimed to be invalid. Plaintiff was engaged in the teaming and moving business and sought

to restrain enforcement of taxes on its vans and wagons on the ground that the right to use the streets was a privilege which was not taxable. The Supreme Court cites and quotes several cases involving somewhat similar questions to those in this one and comes to the conclusion that the statute and ordinance are both valid.

It is quite clear that the power to exact a license fee which is no more than a fair return for a special municipal service rendered to an individual is not the taxing power, and can be conferred on cities. The right to use streets ought not to be held taxable; but a fee might be exacted, for instance, to pay the expense of enforcing the rule of the road on a crowded thoroughfare, or of protecting pedestrians at crossings. These are made necessary by the use of wagons in city streets. J. H. B.

NEGLIGENCE. (Turntable Doctrine). Mo. Ct. of App. — The St. Louis Court of Appeals in O'Hara *v.* Laclede Gaslight Co., 110 S. W. Rep. 642, indicates an inclination to stand by the doctrine announced in the "turntable cases" as against the recent tendency on the part of several courts to break away from it. The action was one by a parent to recover for death of a child alleged to have resulted from the negligence of defendant in leaving large gas pipes lying in such position as to be easily moved by children in play. Deceased was sent on an errand by his parents, and the evidence tended to show that while in the middle of the street the pipe, put in motion by some playing children, rolled over him and caused his death. It was claimed that the cause of the accident was the starting of the pipe to roll and not the act of leaving it in the street, but court denominates it a "death trap for children playing upon the street" and refers to the turntable doctrine in support of a judgment for plaintiff.

Apparently "The Turn Table Cases" are to be without an end, so long as children are let loose and machinery is left unguarded. There is very little legal justification for the many decisions holding the owner liable to those who meddle with his property however innocent they may be. To say that the owner of the machinery invites the infant population to his property is absurd. It is hardly too much to say that unconscious sympathy for the injured party has had much to do with the apparent establishment of the doctrine in the face of continual decisions to the contrary.

PHYSICIANS. (Practice of Medicine.) Ga. Ct. of App. — The right of a "magic healer" to recover damages for an alleged malicious prosecution for "practicing medicine" without license occupied the attention of the Court of Appeals of Georgia in Bennett *v.* Ware, 61 S. E. Rep. 546. Plaintiff claimed the power of healing as a direct gift from God. He used no medicine but simply placed his hands over the part of the body affected by pain. The political Code of Georgia has the following provision: "The words 'practice medicine' shall mean to suggest, recommend, prescribe or direct for the use of any person, any drug, medicine, appliance, apparatus, or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body." Other provisions require the taking out of license to practice, and provide penalties for practicing without so doing. The court discusses the meaning of the language at considerable length and comes to the conclusion that the acts of plaintiff did not fall within the statute but that the question was sufficiently in doubt to indicate good faith on the part of the physician who had him arrested, and affirmed a judgment sustaining a demurrer to the petition.

PROPERTY. (Unpublished Manuscripts.) Eng. — It was recently decided in England in Mansell *v.* The Valley Printing Co. that the author of an unpublished work has a property right in it at common law entitling him not only to an injunction against publication by others but also to damages for a publication as for a conversion. In other words, a full right of property exists in the idea when detached from the manuscript or canvas.

RAILROADS. (Accidents at Crossings.) Mich. — An interesting ruling as to the admissibility of evidence in an action for injuries received at a railroad crossing was made in Woodworth *v.* Detroit United Ry., 116 N. W. Rep. 549. It appeared that the wagon of plaintiff's decedent was caught between the rail of the track and the planking of a diagonal crossing so that a car ran into it and caused the death of the decedent, for which recovery was sought. Plaintiff was permitted to prove by one of defendant's employees that at least a dozen rigs had been stuck in the crossing in question in the same way as that of plaintiff's intestate during the last two years.

The court held, overruling Gregory *v.* Detroit United Ry., 138 Mich. 368, 101 N. W. 546, that the evidence was properly allowed, although the defendant admitted full knowledge of the actual condition of the crossing for six months prior to the accident in question; that the question in issue was the condition of the street and whether its condition was due to negligence, and for the purpose of showing this the evidence of former accidents at the same place was properly admitted.

SCHOOLS. (Vaccination of Pupils.) Ill. Sup. Ct. — The authority to compel vaccination of school children is a matter which has received considerable attention within the past few years. One of the recent pronouncements of the courts on the subject is found in People *ex rel.* Jenkins *v.* Board of Education, 84 N. E. Rep. 1046. Relator, a child of six years, applied for admission to one of the schools in Chicago, but her application was denied on the ground that she had not been vaccinated. Mandamus to the board of education was then asked to compel her enro lment. Defendant's answer did not deny the facts alleged in the petition, but set up in justification of its action a city ordinance prohibiting the allowance of attendance at school of any child not vaccinated within seven years next preceding. Relator demurred to the answer on the ground that the ordinance was unconstitutional. The demurrer was overruled by the trial court. Relator electing to stand thereon, appealed to the Supreme Court. That tribunal held that the right to education given by the constitution could not be thus restricted and that the general police power of the city was not broad enough to include authority to enact such an ordinance. It should be noticed that this ordinance was not restricted to times of danger from epidemics, and there seems reason to believe from some things said in the opinion that if it had it would not have been declared invalid.

THE LIGHTER SIDE

A Good Judge of Color.— Joseph H. Choate, the famous lawyer, tells of a striking case in which a workman claimed to have lost the sight of his left eye by an explosion.

"There was no doubt that the man's eye had been injured, but the doctor claimed he could see out of it, while he declared that the sight was utterly destroyed.

"The judge heard all the evidence *pro* and *con*. Then, sending the workman from the courtroom, he said:

"'Get a blackboard and write a sentence on it with green chalk. Also get a pair of spectacles with ordinary clear glass for the left eye and with red glass for the right.'

"This, in the course of an hour or so, was done. Then the workman was brought back and he was ordered to put the queer glasses on.

"He put them on and the judge said to him:

"'Turn the blackboard round and see if you can read what is written.'

"The man read the sentence without hesitation, whereupon the judge said to him sternly:

"'Your case is dismissed. You are an imposter. You must have read that sentence with your left eye, for the red glass over the right one turned the green writing black and made it quite invisible on the blackboard.'" — *Cincinnati Inquirer.*

Condonation. — Lady (entering breathless): "I want to stop my divorce suit."

Lawyer: "Why you said your husband was an abominable, beastly brute, and you wanted to be rid of him."

Lady: "Oh! yes, I know; but an automobile has just run over him and I want you to start a suit for heavy damages."

Where There's a Will. — Tommy was stubborn, and his teacher was having a hard time explaining a small point in the geography lesson.

"Tommy," teacher began, "you can learn this if you make up your mind. It's not one bit smart to appear dull. I know," she continued, coaxingly, "that you are just as bright as any boy in the class. Remember, Tommy, where there's a will there's——"

"Aw," broke in Tommy, "I know all dat, I do. Me fadder's a lawyer, he is, an' I've heard him say it lots ' times."

"You should not have interrupted me," reprimanded the teacher, "but I am glad that your father has taught you the old adage. Can you repeat it to me?"

"Sure," said Tommy confidently. "Me fadder says where der's a will—der's always a bunch o' poor relations."

The Lawyer's Price. — It is said that every man has his price. If this is true, it is pleasng to know that even in the present state of the money market lawyers are still maintaining a high standard, as is shown by the following bit of testimony. "What was said about the three hundred dollars?"

"I told him he could leave the money with the lawyer till I brought in the deed, and it would be safe, because no lawyer would steal *such a small sum as that.*"

Financial Difficulties.—He was a respectable looking old negro who had knocked timidly at the office door and now stood hat in hand before my desk.

"Boss," he said, respectfully, "is you a lawyer?"

"Yes, that is my profession."

"I'm in trouble and, Sah, I want your advice."

"What kind of trouble?"

"Trouble with my wife, Sah; financial trouble. Every time I come home she wants money. Now it's fifty cents, now it's a dollar and sometimes she wants a dollar and a half or two dollars."

"What does she do with all this money?"

"I don't know. I haven't given her any yet."

Simplicity.—In the course of a recent trial, the Judge remarked to one of the counsel:

"Mr. H———, if *I* could look as innocent as you do, I think I could succeed infinitely better in the law than I have ever done. How do you do it?"

"It is perfectly simple," replied Mr. H———. All you have to do is to be as innocent as I am."

Fair Trial. — The losing party never believes that there is any weakness in his case, but always blames the Court for an adverse decision. The following is from the cross-examination of a woman in the Masschusetts Superior Court:

"As Mr. Jones is not here, I want to ask you one question: You brought suit against Mr. Jones and it was tried out in the courts of Massachusetts?"

"It was tried in a way, but it wasn't tried out."

"Well, I mean in the way they try them in Massachusetts. I don't mean to say it was tried well."

The Court: "As I tried it, perhaps you had better not assume it was tried well."

"I mean tried in the way they try them in Massachusetts."

"It was decided according to the way Mr. Jones put it. The judge gave him the decision."

A Distrust. — When a husband and wife produced certain property the title to which was taken in the wife's name without any fraud or mistake but with the husband's knowledge and acquiescence and he made no objection thereto for several years thereafter the fact that such title was taken by reason of the wife's alleged imperious temper and that the husband had been unduly subjected to her demands was insufficient to establish a constructive trust of the land in the husband's favor. Cline *v.* Cline, 204 Ill. 130.

His Attorney. — A man arrested for murder was assigned a shyster whose crude appearance caused the unfortunate prisoner to ask the judge:

"Is this my lawyer?"

"Yes," replied his Honor.

"Is he going to defend me?"

"Yes."

"If he should die, could I have another?"

"Yes."

"Can I see him alone in the back room for a few minutes?"— *Short Stories.*

Stringency in the Market. — A Kentucky lawyer wanted a railroad ticket, and had only a $2 bill. It required $3 to get the ticket. He took the $2 bill to a pawnshop and pawned if for $1.50. On his way back to the station he met a friend, to whom he sold the pawn ticket for $1.50. That gave him $3. Now, who's out that dollar? — *The Bar.*

A Cause for Thanks. — "Ah, my dear Mr. Briefless," said Mr. Hardcash, seizing the young barrister's hand and shaking it warmly, "I am so immensely obliged to you. That case the other day, you know — I won it."

"Thanks," replied Briefless, "but did I represent you?"

"No, my dear fellow," replied Hardcash; "you represented the other man."— *Home Herald.*

A Witty Irish Judge. — Mr. Doherty, who was chief justice of the Irish court of common pleas from 1830 till his death in 1846, was famed for his wit. The gossip in the hall of the four courts, which of course reached the bench, was that one of the judges had been somewhat excited by wine at an entertainment in Dublin castle on the previous evening. "Is it true," the chief justice was asked, "that Judge — danced at the castle ball last night?" "Well," replied Doherty, "I certainly can say that I saw him in a reel."

"As I came along the quay," remarked one of the offices of the court whose face was remarkably hatchet shaped, "the wind was cutting my face." "Upon my honor," replied the chief justice, "I think the wind had the worst of it."— *London Law Notes.*

Reputation and Character. — Lawyer (examining jury) — Do you understand the difference between character and reputation? Juror — Reputation is the name your neighbors give you; character is the one they take from you. — *Judge.*

Onward! — Client: "Didn't you make a mistake in going into law instead of the army?' Lawyer: "Why?" "By the way you charge there would be little left of the enemy." *Sacred Heart Review.*

THE PUBLISHERS' DEPARTMENT

HOW ARE YOU TO VOTE?

Thoughtful Citizens Cannot Afford to Overlook

Stimson's Federal and State Constitutions

Curiously, none of the books, heretofore published on this subject, has given more than passing notice to that phase of the constitution having to do with PERSONAL LIBERTY, while the state constitutions have never been systematically treated. Upon this neglected field Professor Stimson has now entered.

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Vol. XX, No. 11 NOVEMBER, 1908

THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

S. R. WRIGHTINGTON: Editor
WALTER F. WYMAN: Manager

CONTENTS

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Our Contributors.

We publish in this issue the second of our series of intimate personal sketches of contemporary English judges by a prominent English practitioner who for obvious reasons prefers to remain anonymous. The portrait of Mr. Justice Hawkins and his favorite dog which accompanies the article shows his Honor in characteristic atmosphere.

The verse which we publish in this number was composed last winter in a Boston jury room by a weary juryman who was accustomed to more intellectual surroundings. The lines have recently come to light and seem to deserve publicity.

ANDREW ALEXANDER BRUCE is Dean of the Law School of the University of North Dakota. His early experience in practice in Illinois brought him into contact with pressing modern economic problems in the legal aspects of which he has since made such sympathetic studies. He has previously been a contributor to our magazine, and delivered an address before the Association of American Law Schools at Seattle last August. He was recently the candidate of the "Progressives" for the Republican nomination for United States Senator.

JOSEPH M. SULLIVAN is a member of the Boston bar who has been a frequent contributor to THE GREEN BAG.

We publish in this number another of MR. ADAMS' veracious accounts of the legal reasoning of the famous Iowa Justice.

SIR HENRY HAWKINS

The Green Bag

Vol. XX. No. 11 BOSTON November, 1908

MR. JUSTICE HAWKINS (LORD BRAMPTON)[1]

By A Practicing Lawyer

IN the trial of Edward Gould for murder in 1768 the following piece of cross-examination is said to have taken place: —

Prisoner's Counsel — "How can you be sure that the man on the horse was Mr. Gould, when as you say it was past midnight?"

Witness for the Prosecution — "Sir, the full moon shone on him."

Counsel — "The full moon was shining you assert?"

Witness — "Yes, your honor. I saw his face by the clear moonlight."

"Pass me a calendar," said the Judge.

Almanacs were not plentiful one hundred and thirty years ago, and no one present possessed one. Then prisoner's counsel addressed the Judge —

"I had one yesterday, and put it, I believe, in my overcoat pocket — if your Lordship will send the apparitor for it."

The calendar was produced. There was no moon on the night of the murder. The evidence against the prisoner broke down, and he was acquitted.

The prisoner's counsel the previous day had purchased an almanac, removed the sheets containing the month (in which the murder was committed) and those preceding and following it, and had had the calendar reprinted, altering the moons, so that there might be none on the night in question.

The story rests entirely on tradition, but the tradition lived both at Lew Trenchard and at Ashburton. The Rev. Baring Gould, the Rector of Lew Trenchard, tells us this striking anecdote in his *Devonshire Characters* (p. 622). The well-known author is connected in his own person with both prisoner and counsel. The counsel was John Dunning, the first Lord Ashburton, a title which was subsequently taken by his brother-in-law Baring, the negotiator of the Ashburton Treaty with the United States. There is no inherent improbability in the story. Prisoners were so severely dealt with in the eighteenth century that humane judges strictly observed every rule of the game that gave the accused a chance of escape. *Judex damnatur, cum nocens absolvitur* did not apply to the Old Bailey. Lord Shelburne, the Prime Minister (whose Solicitor General John Dunning was) writes of him — "All parties allowed him to be at the head of the Bar." It is, therefore, no disparagement to Sir Henry Hawkins to say that the tradition about John Dunning reminds us of many stories that passed current about him when at the Bar. Henry Hawkins, to whom so many prisoners owed their acquittal, was a cousin of Anthony Hope Hawkins, whose charming *Prisoner of Zenda* has made the name of Anthony Hope a household word. The Judge and the novelist each attained the goal, in golfing phrase, from a very different "approach." The Judge had benefited little by his education, when in 1843 he was called to the Bar. If the Judge was not the fine classical scholar that the novelist is, he at least rivaled him in his powers of observation and expression. Seventy years ago the Common Law Bar was no place for retiring merit, nor were Common Law Counsel in those days, in general culture, the equals of

[1] The Reminiscences of Sir Henry Hawkins (Baron Brampton), edited by Richard Harris, K.C. Two volumes. Edward Arnold.

their brethren at the Chancery Bar. But if they were not quite on a par in culture, they were more than their equals in knowledge of the law of evidence and of the art of cross-examination. Their addresses to juries were bright and to the point. A Common Law Q. C. in those days was rarely tedious. The exception proves the rule. A Leader on Mr. Hawkins's own Circuit (the Western Circuit), who died many years ago, was addressing the Court for the defense, with repetitions, many and oft, when the stage whisper of the prisoner was heard through the Court — "Who is that d——d dreamy duffer?" This anecdote is so entirely in keeping with Lord Brampton's *Reminiscences* that it may be recorded here.

He was himself a past master in the art of managing a jury, and of cross-examining the other side. He tells us how he was brought into the Court of the Master of the Rolls (Lord Romilly) and how ungracious a welcome he received from his Leader, Mr. Jessell, Q. C., who subsequently succeeded Lord Romilly at the Rolls and became one of the greatest chancery judges of the nineteenth century. Mr. Hawkins proceeded with his cross-examination (undismayed by his Leader's sneers) with the result that he not only won the case for his clients but caused Lord Romilly to say — "Little as I value cross-examination generally, I must say that the cross-examination of Mr. Hawkins much struck me." Where did he learn to be so consummate an advocate? Let that question be answered by himself —

"The Criminal Court was the best school in which to learn your work of cross-examination and examination-in-chief, while the Courts of Equity were probably the worst."

"If you would know the world," writes Lord Brampton, "you must not confine yourself to its virtues." No one can accuse Lord Brampton of having made that mistake. The prize fight on Frimley Common is recorded by him. The victorious pugilist killed his opponent and was indicted for manslaughter. He was fortunate enough to secure Mr. Hawkins as his counsel, and was acquitted. The case was tried before Mr. Justice Parke. We are only interested in quoting Lord Brampton's comment on the result: "Parke did his utmost to obtain a conviction, but reason and good sense were too much for him." Instead of "reason and good sense" Lord Brampton should have written "Mr. Hawkins was too much for him."

The Socialists are fond of using the phrase "the idle rich." It is not a charitable nor an accurate expression, but it becomes less inaccurate when we couple it with "the idle poor." The idle rich and the idle poor have much in common, and may fairly be called the pillars of that mighty institution — the Turf. In this connection they may be called "the great Twin Brethren." It is difficult for a foreigner to appreciate the large place that racing fills in the minds of the upper and lower classes. In 1894 the Prime Minister of the United Kingdom, and the owner of the winner of the Derby (Ladas) were one and the same person. The Derby happened to be run that year two days after the Fourth of June, the great holiday in the Eton Calendar. The Provost of Eton wished the most distinguished of Old Etonians present (Lord Rosebery) "success in his recreations and his pleasures as well as in his severer labors." That the Head of the most famous school in England should congratulate the Prime Minister on the possession of a "four-legged gambling machine" surprised many (including the owner of Ladas), but it proves the hold which the Turf and its triumphs have on the upper classes.

So many cases come before the Courts that are in some way connected with a horse, that the tradition ran that one judge on the Common Law side at Westminster owed his appointment to his knowledge of horseflesh. If Mr. Hawkins was as quick to seize all the weak points of a horse as he was of a man, he must indeed have stood in the front rank of sportsmen. The only book he is reported to have studied in his leisure hours was *The*

Racing Calendar; the only recreation which he dearly loved was the Turf, and the only club of which he was proud to be a member, was the Jockey Club. American readers should be informed that the Jockey Club is one of the most exclusive clubs in London.

Within the limits of an article it is impossible to give anything more than a slight sketch of the prosecution of Arthur Orton for perjury, and yet in writing of Henry Hawkins it is impossible to pass over in silence his greatest achievement. The heir to the Tichborne baronetcy and estates was shipwrecked while on board the *Bella*, and drowned in 1854. In 1865 a butcher of Wagga Wagga, in Australia, assumed the title and claimed the estates. This man — Arthur Orton — returned to England and brought an action for ejectment at Westminster before Chief Justice Bovill. His leading counsel were Serjeant Ballantine and Mr. Giffard (since Lord Chancellor Halsbury). The counsel for the Trustees of the Estate (that is the real heir) were the Solicitor General Coleridge (afterwards Lord Chief Justice of England), Mr. Hawkins and Mr. Bowen (afterwards Lord Justice of Appeal). Lord Brampton contends that his predecessors had so bungled their cross-examination of the claimant, that by their questions they had furnished him with information to carry on his imposture. He also contends that he was brought in to lead for the defense, but that owing to his junior at the Bar, Mr. Coleridge, being appointed Solicitor General, by a well recognized rule, Sir John Coleridge as a "Law Officer of the Crown" led for the defense. According to Lord Brampton, the whole case from the commencement of the Chancery proceedings (and Lord Brampton is always severe on Equity Counsel) was nothing but a comedy of blunders. Mr. Hawkins did, however, some execution in the trial before Bovill, because he was allowed by his Leader (Coleridge) to cross-examine some of the witnesses, and the long spun out trial ended at last in a verdict for the defendants and the order for the prosecution of the claimant for perjury.

By this time the claimant had (on the principle of the snowball) accumulated an enormous amount of false evidence as well as a multitude of loyal friends. We are told that Sir John Coleridge "would a second time have deprived the country of the services of Mr. Hawkins, but higher influences prevailed," and Mr. Hawkins was appointed to lead for the Crown. No wonder Lord Brampton describes this trial as "the greatest effort of my life." It lasted one hundred and eighty-eight days and occupied the attention of the English-speaking world.

Mr. Hawkins's opening speech was confined to six days, his reply to nine. Mr. Hawkins was a most concise and pungent speaker, and absolutely fearless in the discharge of his duty to his client. He writes that when he rose to reply, he "felt as one about to plunge into a boundless ocean, with the certain knowledge that everything depended upon my own unaided efforts as to whether I should sink or swim." "Bravo! Bravo, Hawkins!" said the presiding Lord Chief Justice Cockburn, as Mr. Hawkins was passing near him in leaving the Court after the finish of his reply. "I have not heard a piece of oratory like that for many a long day." The conviction of Arthur Orton for perjury after Mr. Hawkins's cross-examination and advocacy was a foregone conclusion. A Parliamentary return showed the total costs of the Tichborne prosecution to have been £60,074 19s 4d, of which £23,676 17s 0d went in counsel's fees.

On November 2, 1876, Mr. Manisty and Mr. Hawkins were sworn in as judges. No greater contrast could be imagined than these two counsel, yet both proved useful public servants.

Mr. Justice Manisty began life as a solicitor, and his patience, courtesy and learning made him a first-class judge in civil actions, just as Mr. Justice Hawkins was an ideal judge in criminal actions. We may apply to both the words used by Lord Brampton of

two other judges — "These men were not waifs and strays of the political world provided for by Judgeships."

The late Sir Henry Hawkins had, like all of us, his limitations. A judge has civil cases to try as well as criminal. Mr. Justice Hawkins did not interest himself in civil actions, although while at the Bar he had a large and lucrative practice in compensation cases. It is recorded of him, that, as a judge, he treated his work on circuit as a concertina player uses his instrument. He pulled it out and enjoyed playing it while he was employed on the criminal side; he shut it up and put it aside when he was on the civil side. As a result he did not give the same satisfaction to the public in one class of cases as in the other. He summed up in Kitson *v.* Playfair when the jury awarded £10,000 as damages against the late Dr. Playfair for breach of professional confidence. The damages were in the opinion of impartial persons most excessive, and were reduced to £8,000 by the Court of Appeal. The jury were under the wand of a magician, Mr. Lawson Walton, Q. C. (the late Attorney General). The trial is memorable because Sir Frank Lockwood, Q. C., led for Dr. Playfair. Sir Frank Lockwood was one of the wittiest advocates of Queen Victoria's reign. He was then approaching his death. He was deeply chagrined by the result and said that he would only be remembered as the counsel for the defendant against whom the heaviest damages on record had been recovered. It is the old, old story of the priest who serves the altar until he grows old, when a younger one than he slays him and steps into the vacant place until he in turn yields to a younger or to death.

We would also tell another anecdote for which the reader will search in vain in these *Reminiscences*. A veterinary surgeon sued the eldest son of a duke (both now dead) for the keep of and attendance on a horse left at his stables by the defendant. No letters had been written by the defendant to the plaintiff. The defendant pleaded that the horse was not his. The plaintiff's solicitor succeeded in producing an unimpeachable witness, who proved that the horse (in respect of which the action was brought) belonged to the defendant. The defendant's counsel said that after that evidence he would not waste the time of the Court. The judge (Mr. Justice Hawkins) then directed the jury to find a verdict for the plaintiff for the amount claimed with costs. This was a case in which one would have thought the less said about the defendant, the better, but Mr. Justice Hawkins decided otherwise. "The jury would agree with him," he added, "that the defendant had acted throughout as a perfect gentleman." Listeners could only exclaim —

> "That in the Captain 's but a choleric word,
> Which in the soldier is flat blasphemy."

There is at least one anecdote recorded in these *Reminiscences*, which places the judge in as unfavorable a light as the foregoing incident. We will not repeat it here. It is our desire to pay Lord Brampton the tribute due to him as a criminal judge. It is a mistake to suppose that criminal judges and counsel have only to deal with thieves and murderers. They have to unravel cases more difficult even than trials in which they grope their way by the uncertain guide of circumstantial evidence. Regina *v.* Bottomley and others is a case in point. Promoters are an unpopular class. Judges, therefore, who have to try promoters, should specially guard themselves against even the appearance of partiality. Mr. Horatio Bottomley (now M. P.) was and is a promoter. In 1893 Mr. Justice Hawkins conducted his trial with conspicuous fairness. Mr. Bottomley defended himself. Sir John Rigby, Q. C. (then Solicitor General and afterwards Lord Justice) led for the prosecution. Sir John Rigby was a counsel of immense learning and ability, but his practice was at the Chancery Bar. To place him in absolutely new surrounding- and put him against a quick-witted defends ant, like Mr. Bottomley, was nothing more or less than cruelty. We are told that the

judge was vastly tickled at seeing the famous Equity lawyer floundering at the Old Bailey. He did not appreciate legal learning at its proper worth, while he put an excessive value on the art of cross-examination, of which he was *facile princeps*. But within his limits the late Mr. Justice Hawkins was a valuable public servant. He was no orator in the sense that Erskine and Russell were; as a Common Law Judge he stood in quite a different category to Maule, Blackburn and Bramwell; but he was a famous advocate, and in criminal trials the leading judge of his time.

LONDON, ENGLAND, October, 1908.

THE MODERN PATRIOT

BY "A JUROR"

Listen, my children, and you shall hear
Of the wonderful jury gathered here.
On the very first vote it was seven to five.
Hardly a man is now alive
Who has anything left of the ***drum*** of his ear.

'Twas a fine, fine day when the jury went out,
And apparently all knew what they were about.
With Billy and Denny as their body-guard,
They were sent to the room where the chairs were hard,
And there they wrangled and vainly tried
To get all the jurors upon one side.
They argued and coaxed and put votes in a hat,
Though some of the jurors in silence sat.
And so the hours went slipping by,
Until everybody was ready to die,
And when seven o'clock was drawing near
They went to a house named for Paul Revere,
And in gloomy silence they ate full well,
And were then marched back to a dungeon cell.

Once more they talked and talked and talked,
Yet still the five of the jurors balked.
They stolidly sat more dead than alive,
Yet once an hour came "Seven to five."
Some cursed their fate, some silent sat;
One man woke only when passing the hat.
The jurors were firm, too firm, God knows;
And the outcome was, they slept in their clothes.
When morning dawned they were at it still,
So the officers marched them down the hill.
Back again they came, through snowdrifts white,
For six feet of snow had come in the night.
And now they are here, and it's plain to see
This stubborn jury can never agree.
But every one felt he had earned his pay
And ought to go home to sleep through the day.

To serve one's country is truly great,
But God save us all from this jury's fate.

BOSTON, MASS., October, 1908.

LAISSEZ FAIRE AND THE SUPREME COURT OF THE UNITED STATES

By Andrew Alexander Bruce

"WHAT is the use of the law," says Count Tolstoi? "Are there criminal statutes? Are there prisons in the family? Is not society, is not the Nation but a larger family? Is it not love which is after all supreme?"

"I have noticed the herds of wild deer in Siberia," says Prince Kropotkin. "I have seen them as they were crossing a stream and were exposed to the attacks of the wolves. The stags formed themselves into an advance guard, into a rear guard, and circled around the flanks. In the center were the weak, the females and the young. To reach them it was necessary that the wolves should break through the outer circle. There was no law, there were no gendarmes, no Cossacks, no jails. There was the instinct of love, of service and of protection. Are men and women less chivalrous, less loving than the beasts of the field?"

These are the protests of the Russian Revolutionist. Not, however, of the bomb-thrower nor of the terrorist. One indeed is the protest of a follower of the non-resistant philosophy — the protest of one who, though a scientific anarchist, that is to say a person who is unable to see the necessity of any law, utterly repudiates the gospel of force and holds firmly to the doctrine that, "If one smite thee on the right cheek, thou shouldst turn to him the other also." They are both, however, the protests of men who have seen the government, the police, the army and the courts used as instruments of tyranny and oppression, rather than of helpfulness. They are both the protests of men who have seen the law manifested in the jail and in the club of the policeman, but have not seen the police rescuing men and women from the wheels and hoofs of the on-rushing traffic, nor seen government manifested in schools and hospitals and asylums. They are above all the protests of men who have lived under a government which has been superimposed, which has emanated from above and not from beneath, whose aim has been to intrench the strong, not to protect and help the weak.

It is the *laissez faire* doctrine of Russia. It in all ages has been the doctrine of the submerged, and this even in Asia where, although power has always been venerated, law has never been appreciated or respected. It was the doctrine everywhere prevalent among the French masses, at the time of the French Revolution. It was no doubt found among the lower strata of Englishmen of the same period, who in spite of a great increase in popular liberty by the force of precedent and custom and the growing power of parliament, had for a long time been accustomed to look upon government as the property of and the machinery of the strong for the maintenance of their power. Nor was it unshared in by the common people in America. The colonists were as a rule without fortune, ancestry, or social or political standing. They had come from countries where the opportunities of the poor man were but few, and where individual initiative among the lower classes was everywhere restricted by an arbitrary government for purposes of its own, and for the benefit of its own members. They were familiar with the regulation of wages by statute, or by police magistrates who themselves belonged to the employing classes. They were familiar with the monopolies granted by the crown of almost all of the necessities of life. They were familiar with the mercantile restrictions, which sought to crush out the commerce of Scotland and Ireland and of the American colonies in order that the merchant

princes and wealthy trade guilds of London might become the wealthier. They were familiar with the English criminal code which in its ruthless desire to protect the vested interests and the owners of property made one hundred and sixty offenses punishable by death. They lived in a time when in England a man could be hung for shooting a hare or stealing a sheep or for begging on the streets, but when human life was so cheapened that it was considered perfectly legitimate to drive little children of seven or eight years of age from their beds to work for sixteen hours a day in the factories and in the mines, and to harness almost naked women to the ore-trucks in the coal pits. Their immediate desire could only have been that the restrictions of the past should be removed. Nor must we assume that the antagonism to government control was to be found only among the laboring classes. In this respect, in spite of the different attitude of the Anglo-Saxon and the Frenchman on the question of the province and sphere of local government, the history of France and of America has from the beginning been very similar. Prior to the French Revolution, burdensome and often purposely prohibitive restrictions and impositions were placed by the central government upon commerce of all kinds. In America, the navigation acts, the trade regulations and the arbitrary searches and seizures which were enforced by the British Government were directly aimed at the trade, which was the life of the Colonies. The French Revolution was in its beginning and ultimate effects essentially an economic revolution. The third estate was composed largely of business men, who, although they could call to their support large numbers of the laboring and the agricultural classes who only saw in the central government an agency for the enforcement of a cruel criminal code, as far as they themselves were concerned, were mainly interested in liberating trade and commerce from the arbitrary restrictions and impositions of the past. With the success of the revolutionary movement and the overthrow of the throne and the feudal aristocracy, the bourgeoisie accomplished its objects. Its members bothered themselves but little with the welfare of those less fortunate than themselves, with popular education, the extension of the suffrage, or the betterment of the social condition of the poorer classes. With the removal of the restrictions of the past, prosperity came, and the business classes grew in wealth and power, and it is not surprising that they should have become individualists, and more and more firmly imbued with the *laissez faire* idea, with the desire to run their own businesses as they saw fit, with the gospel of an absolute freedom of contract, and with the theory that the central government should be a policeman merely and should only interfere for the protection of property and life. Soon after the French Revolution, however, a protest against these ideas was registered on behalf of the lower classes of France, and resulted at first in the socialism of St. Simon and Karl Marx, and when free thought was sought to be restrained and the Russian government itself became anarchistic, in the anarchism and terrorism of Bakunin. In England they found their expression in the factory acts of the last century, and the social legislation which has followed them. It was found indeed both in England and in France, that the laboring classes had been benefited but little by the overthrow of feudalism; that in its place there had been ushered in the reign of capitalism; that labor had become a mere commodity, and that in this new era land monopoly and the factory system were grinding heavily upon the workers. "This neglect to provide a proper position in the state for the manufacturing population," wrote Dr. Arnold in 1838, "is encouraged by one of the falsest maxims which ever pandered to human selfishness under the name of political wisdom — I mean the maxim that civil society ought to leave its members alone, each to look after their several interests, provided they do not employ direct fraud

or force against their neighbors. That is, knowing full well that they were not equal in natural powers, and that still less have they ever within historical memory started with equal artificial advantages, knowing also that power of every sort has a tendency to increase itself, we stand by and let this most unequal race take its course, forgetting that the very name of society implies that it shall not be a mere race, but that its object is to provide for the common good of all, by restraining the power of the strong, and protecting the helplessness of the weak." The result, as we have before said, were the factory acts and the social legislation of recent years. "Scratch an Englishman," says Professor Dicey, "and you will find a socialist."

In America the *laissez faire* idea has been much more deeply rooted than in England, and it is natural that it should have been. The large amount of public land gave an opportunity to the wage earner, which was not to be found in England or in France, and the era of the factory and of the large manufacturing centers was further in the distance. The agricultural population was much greater, and until recently almost anyone could be a landed proprietor. There was to be found especially among the puritans of New England a militant individualism, for it is to be noted that the teachings of Calvin were almost as much social and political as they were religious, and in them the right of self government and the freedom of the church and of the locality from governmental interference was everywhere emphasized. The birth throes of the new country were a protest against navigation acts, searches and seizures and governmental restraints of all kinds. So, too, class lines have never been as closely drawn here as in Europe, and the business classes have been constantly recruited from the laboring and the agricultural. Added to this was the individualism of the frontier, which everywhere chafes at control and at the restraints which collectivism thrusts upon it. The right of governmental interference in social and industrial matters and of a state paternalism was, however, early asserted in Massachusetts, where the barrenness of the soil, the lack of a western domain, and an abundance of water power forced an industrial development along manufacturing lines as far back as the colonial era. There the crowding of population and the poverty and abject condition of the factory employees early emphasized the necessity of some governmental supervision and served as an offset to the optimistic theory (based upon fact where the country was new and the land was within reach of all) of universal and equal opportunity. There, too, an enlightened puritanism early taught the doctrine of the equality of man and early led to a realization of the value of the individual, to a knowledge that a state could be no stronger than the sum of the strength of its individual citizens, to the belief that religion and morality were necessary to every free state, and to the founding of public schools and to compulsory education, which could only mean paternalism. New England, also, and Pennsylvania were above all benefited by the system of protection, which could only be justified as a popular measure on the theory that it bettered the condition of both the wage earner and the manufacturer. The policy of popular education and of a protective tariff once adopted, the theory that the government could only properly be used as a taxing or a fiscal agency, and as a guardian of the public peace could no longer be insisted upon, and the transition was easy to the idea that it had great social duties to perform, among which were the betterment of the condition of the individual citizen and the furnishing to him of aid in the industrial struggle where equality of opportunity was not present.

But though this democratic and humane theory was a logical consequence of protection, governmental interference for the protection of the wage earner was in the minds of but few of its advocates. Protection was a commercial theory merely. It was adopted

as a governmental policy to conciliate and win the support of the business classes. It is true that the Republican party gathered for a while at the beginning of the Civil War a great fervor of democracy, and that President Lincoln argued that he was merely leading the people back to the principles of Jefferson and of Jackson, but with the death of Lincoln the commercial idea became paramount and the support of the commercial classes was not only courted but looked upon more and more as necessary to the stability of the government. In this we were passing through the same stages that the French republic has also passed, and through which the Republic of Mexico is now passing. There has, as we have before seen, always been an individualism in the United States, but it has consisted less in a solicitude on the part of those in control for the freedom of others, and in the belief that their welfare would be subserved thereby, than in a desire that our own freedom of action and of acquiring wealth should be unrestrained. We have subscribed to a sort of "a free fight," "survival of the fittest" theory, and have only thought of helping a contestant when he has been "put down and out." We have always been ready to furnish the palliative because we have always been humane. It is only recently that we have thought of preventives, because, perhaps, we have lacked in true democracy, in solicitude and love, perhaps have failed to realize any necessity therefor.. The feeling is well evidenced by a comparison of our poor houses and of our hospitals and asylums and of our treatment and provision for the inmates of each. We, as a people, have abundant sympathy for the blind and the insane, and provide lavishly for their comfort. We, on the other hand, however, look upon poverty and the inability to earn a livelihood almost as a crime, and when we are compelled to support poorhouses, support them grudgingly and in a niggardly manner. The belief that everyone has an equal chance in America has become deeply rooted in the minds of our successful upper classes, and has been reflected everywhere in the opinions of our courts, whose judges, if not coming from the upper classes, have themselves succeeded and passed their social lives with those who have. This individualism was from an early time especially noticeable in the South, where social structure and economic development seemed to make a protective policy unwise and unnecessary. Its leaders were at first drawn from the large landed proprietors whose ancestors were the English cavaliers and country gentry, and who had but little in common with the masses of the people. So, too, even the lower classes of whites who may be said to have won the West for the American union were in a large measure composed of and in thought and action followed in a large measure the leadership of the Scotch-Irish pioneers, who bringing with them the individualism of Knox and of Calvin with all of its impatience at governmental control pushed into the wilderness, and without aid, except that derived from their own axes and their own rifles, cleared and settled the land, admitted their own associates. Far away from central government and control they established their own social customs, framed their own governments, provided for their own defense, and fought for the homes and the social institutions which they themselves had created. Just as to the old Anglo-Saxon chief the King was a mere war-lord, raised to his position solely for military purposes, and with no conceded rights of social or political interference, so, too, by the average western settler, central government was looked upon largely as a war device or at best as a means to preserve the freedom of commerce and not as something which should interfere with social and industrial customs or the freedom of industrial contracts. These earlier times, it is true, had in them none of the factory development of to-day, but even after that began and great masses of people became crowded into the industrial centers, removed from the land, subject to the demands of their employers and their labor the subject

of barter and trade and regulated by the law of supply and demand, the great majority of the voters still belonged to the farming classes whose ownership of land and employment of labor cultivated in them too a deep-rooted, if not militant, individualism. But chief of all the causes of American individualism has been the fact that for so many years opportunities for growth and advancement have everywhere been so plentiful that it has been hard for any of those who themselves have prospered to believe that governmental interference is necessary to protect anyone, or that there is not in all matters a perfect equality of opportunity and of contractual ability.

The result of all this has been shown in the decisions of the courts and in the interpretation by them of the terms "due process of law," "equal protection of the laws," and "life, liberty and property," as found in the State and Federal Constitutions. Until quite recently, indeed, there was but little, if any, remedial legislation as far as the worker was concerned, and still less which was sustained by the courts. In passing upon a statute which sought to regulate the contract of employment, the Supreme Court of Pennsylvania said, "The act is an infringement alike of the rights of the employer and the employee. More than this it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void. It is a species of sumptuary legislation which has been universally condemned as an attempt to degrade the intelligence, virtue and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a tyrant and the laborer is an imbecile. Theoretically, there is no inferior class, other than that of those degraded by crime or other vicious indulgences of the passions, among our citizens. Those who are entitled to exercise the elective franchise are deemed equal before the law, and it is not admissible to arbitrarily brand by statute one class of them, without reference to and wholly irrespective of their actual good or bad behavior, as too unscrupulous, and the other class as too imbecile or timid and weak, to exercise that freedom in contracting which is allowed to all others. Were the object of the act to protect the public health and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited; but the act before us is not of such a character. In selecting a subject for the exercise of the police power, the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must use his own so as not to injure others, and so as not to interfere with or injure the public health, safety, morals or general welfare. How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law, that purports to be an exercise of the police power be such in reality, when it has for its only object, not the protection of others, or the public health, safety, morals, or general welfare of him whose act is prohibited, when, if committed, it will injure him who commits it and him only? The maxim does not read, 'So use your own right or property as not to injure yourself or your own property.'"[1] And these words met with judicial approval for a time all over the United States.[2] They reflected the opti-

[1] Godcharles *v.* Wegiman, 113 Pa. St. 431, 6 Atl. 354.

[2] In re Morgan, 26 Colo. 415; Ritchie *v.* People, 155 Ill. 58; State *v.* Goodwillie, 33 W. Va. 179; Fraser *v.* People, 144 Ill. 171; Braceville Coal Co. *v.* People, 147 Ill. 66.

mistic belief in equal opportunity of the successful man. They were in a line with the theory advanced by Professor Tiedeman[1] and other writers that the state could have no concern with private vices, and that as long as a person did not annoy the public at large he could by the use of liquor, opium, or by any other means, debauch his own life and ruin his own vitality and power. The consequence has been a long line of decisions in which have been held unconstitutional acts which have sought to regulate the hours of labor and the terms of employment. The only exceptions have been in cases where women and children have been concerned, and even in these the exceptions have been based on the theory that these persons have for a long time been under legislative tutelage and deprived of contractual ability.

Chief among the courts which have adhered to this old time individualism have been the courts of Illinois, Pennsylvania and Colorado,[2] and chief among the judges have been Mr. Justice Peckham and Mr. Justice Brewer of the Supreme Court of the United States.[3] Mr. Justice Harlan [4] has been an individualist in so far as the state and national governments are concerned, and the prerogative of the Federal Courts in setting aside state statutes as being unconstitutional; in other words he has adhered in a large and logical manner to the doctrines of state sovereignty and of local home rule, but has not questioned the right of the state to protect the individual citizen, even from his own folly, and by that means to insure a citizenship which shall be strong and virtuous. The majority of the court, indeed, have recently with but one exception[5] leant in the direction of collectivism and paternalism rather than in that of individualism. "The whole," says Mr. Justice Brown in an opinion sustaining a statute of Utah which, on the grounds of the health of the employee, forbade the employment of working-men in the mines for more than eight hours a day,[1] "is not greater than the sum of all of its parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer. . . . The fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be." And in two suggestive cases the majority of the court has held, even where wages and not health are the subjects of regulation, that where there is constant friction between vast numbers of employees and their employers, and that constant friction results in bloodshed and public disorder so that the troops are called upon and the aid of the courts is constantly invoked, the legislatures may on broad grounds of public policy step in and settle these controversies, may regulate if necessary the terms of employment and settle once and for all the questions in dispute. They have held on principle that if the legislature of Pennsylvania had desired to settle by statute the controversies involved in the recent anthracite coal strike, it would have been competent for it so to do. They have upheld the right to protect the laborer by statute from fraudulent and unfair terms of employment and have refused to recognize as an established fact, that there is a perfect equality of contractual ability and volition as between consolidated wealth and the laboring man. They have practically held that there is nothing in the old cry that a man's business is his own and that the public have no right

[1] Tiedeman-State and Federal Control of Persons and Property.

[2] Fraser *v.* People, 141 Ill. 171; Ritchie *v.* People, 155 Ill. 98; Godcharles *v.* Wigeman, 113 Pa. St. 431; In re Morgan, 26 Colo. 415.

[3] See Holden *v.* Hardy, 169 U. S. 366; Knoxville Iron Co. *v.* Harbison, 183 U. S. 13; Lockner *v.* New York, 25 Sup. Ct. Rep. 539.

[4] See cases in Note 5, and Collins *v.* New Hampshire, 18 Sup. Ct. Rep. 768.

[5] Lochner *v.* New York, 25 Sup. Ct. Rep. 539.

[1] Holden *v.* Hardy, 169 U. S. 366. See also Harbison *v.* Knoxville Iron Co., 183 U. S. 13.

to interfere with it. They have taken the position that every man is dependent in the main upon the community as a whole. They realize that unless the police protect the property of, and unless the courts enforce the contracts of, a business man or of a business corporation, no business man or business corporation can carry on any business at all. They realize that back of the courts and back of their mandates are the strong right arms and the bayonets, if necessary, of organized society, and that when a man depends on organized society for his protection and his business success, he must yield to that organized society the right to some measure of regulation and control.[1] They have also within the last few years taken more and more positive steps in emphasizing and enforcing the old doctrine of what may be termed "the business affected with a public interest" — the old doctrine that if the business is one in which the public is really interested, is one which is absolutely necessary to the commercial or moral existence of a community, that the public has the right to regulate the same. They have held in recent years that the railroad, the bank, the warehouse, the gas company, the elevator and the monopoly of every kind belong to this class. If men create a monopoly, they must run the risk of governmental regulation. The courts are extending the number of businesses included in this list every day. In fact they hold that where any community grows up, is settled and adapts its business organization on the basis of continuance of privileges and rights in railroads, and elevators and other institutions, where the business of the community is made dependent and organized on the basis of these facilities, the public has the right to supervise, control and regulate the same, and in a large measure to insist upon their continuance. So, too, on the question of the trade and labor combinations the courts have recently come closer and closer together and are gradually announcing a settled policy. They are in fact trying to sustain the legislatures in this age of combination in what might be termed their last stand against socialism, their last fight for individualism. The public and the courts have come to understand that in many instances we must either regulate and control or else we must own. If we cannot control the elevators and the railroads and the agencies of production which are now being monopolized, we must own them. They fully realize that the individualist Anglo-Saxon and Northman shrinks from this ownership, and in thus interfering with individual liberty and the unrestricted use of property the courts can hardly be said to be socialistic. Rather, as we have before suggested, they may be said to be making a last stand against socialism. They appear rather to be actuated by the belief that legislative interference is necessary in order that individualism may survive, in order that the health and morals of our citizens may be safeguarded, and in order that a capitalistic, monopolistic socialism may be warded off. Mr. Debs has said and done many foolish things, but he was wise, and even expressed the judicial thought of to-day, when he said, "Better government ownership of railroads than railroad ownership of government."

From the opinions in these cases Mr. Justice Brewer and Mr. Justice Peckham have almost always dissented and have adhered to the old capitalistic individualism of which we have spoken. In fact, in not a few of the cases the court has been divided in the ratio of five to four. That this should have been the case is of course not to be wondered at. The average constitutional question, especially if it arises under the fourteenth amendment to the Federal Constitution, is hardly ever a question of law at all. It is a question of sociology, of political science, of political economy. When the court is called upon to decide how far governmental regulation of persons and of property can go, to what extent the com-

[1] Harbison *v.* Knoxville Iron Co., 183 U. S. 13; Peel Splinter Coal Co. *v.* State, 36 W. Va. 802.

plete freedom of the individual can and cannot be curtailed, as to the real meaning and scope that should be given to the words "liberty and property," as used in the Constitution, it necessarily decides these questions, not according to a formulated common law, for there is no common law which controls the constitution, but rather as questions of fact and of public policy, a public policy suited to a developing and growing age and which in the nature of things must be the policy which seems best to the particular judge in the light of his own social and political training and experience. And such being the case, a divergence of opinion is inevitable. Many agree on one or two, but few agree on many or all of the social and political theories and policies of the day. On these questions and issues, indeed, political parties, churches, and even families, are usually hopelessly divided. In the forming of a social theory the environment of the thinker is an all important factor. It was only yesterday that the writer asked a friend the nature of his politics and received the response, "I am a Southern gentleman and therefore a Democrat," and there can be no doubt that in the Supreme Court of the United States, and sometimes in the same man, we have represented the individualist and the collectivist, the nationalist and the home ruler, the aristocrat and the democrat. The only fact that is at all illogical or surprising is, that Mr. Justice Brewer, who in judicial opinions and public speeches has so eloquently pleaded the cause of local home rule and of state sovereignty, should have, whenever the contract of employment has been concerned, insisted upon the rights of the majority of the members of the Supreme Court of the United States, to oppose their individual judgment on social and economic questions and questions of state industrial public policy to the judgment of the state courts and state legislatures.

Nor has this protest against the *laissez faire* idea, this protest against capitalism, been confined to the laboring classes alone, or been reflected alone in decisions which deal with the conflict between capital and labor. The support of President Roosevelt, indeed, and his enormous popularity does not come from the laboring classes alone, but from the farmer and the small business man. Just as in England, the burgeoisie are becoming divided among themselves, or perhaps it would be better to say that the great trust magnates are coming to be looked upon in much the same light and in a large measure to take the place of the old feudal aristocracy who through their own individual power, or by means of monopolies granted by the Crown, crushed out competitive industry or levied tribute upon it. It matters little indeed how a monopoly is obtained as long as it is a monopoly, whether it be by royal grant or by the power of accumulated and combined capital under the sanction or protection of a *laissez faire* constitutional construction. As a matter of fact the protests against rate discriminations, rebating and the standard oil monopoly have come rather from the small producer and business man than from the laborer. Both in England and in America we have passed through a cycle of politico-legal thought. In England, formerly, practically all combinations and almost all of the modern forms of commercial organization were unlawful. The business of the middle man was unlawful; the business of the modern wholesale grocer was unlawful. It was a criminal offense to buy food or victuals which were on their way to the market for the purpose of reselling them, or to buy, for purpose of resale, large quantities of food at any time. This, however, was before the days of the rise of capitalism. It was at a time when the laws of England were in the hands of the gentry, the land holding, or military classes. It was for the interest of these to oppose combination in every form. They were jealous of the growing power of the business man. It was for their interest to make, as they did make, both the trade combination and the labor combination or

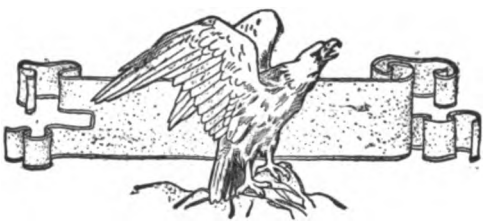
union criminal conspiracies. But at the beginning of the last century a change came. The war with France had been fought and won; the fleets of both the French and the Dutch had been practically swept from the seas; the foreign markets which once belonged to the French and the Dutch, now belonged to England; the cotton gin had been invented; steam had been utilized; the mines had been uncovered; all that was necessary for England was to manufacture and the markets of the world were open to her. At the same time the suffrage had been largely extended and the business man had come into political power, and above all, capital had become diffused through the establishment of banks and the accumulated resources of the country made capable of utilization. There was immediately a clamor on all sides for the overthrow of the restrictions of the past. In order to compete in the markets of the world and to take advantage of the opportunities for wealth which the foreign trade afforded, ships had to be built and chartered, trading posts established, and factories built, and combinations of capital were found absolutely necessary. It was no longer for the interests of the employer that the rates of wages should be regulated by law, nor that the laborer should be tied to the land. The manufacturer wanted the opportunity to offer extra wages, because at times he wished to work his factories night and day, so that he might get his goods rapidly upon the market. He did not want any restrictions on the hours of labor. In the past law and custom had so operated that no one could become a master mechanic or manufacturer who did not belong to one of the powerful trade guilds and who had not served an apprenticeship. In this new age of capitalism and of democracy — for it was both a capitalistic and a democratic uprising — men wished to become employers, business men and manufacturers on the strength of their brains and their capital alone. The consequence was that the restrictive laws of the past were repealed. The old hide bound judicial decisions were reversed. The labor union and, to a large extent, the combination of capital were legitimized. "The lid was taken off." It was lawful to pursue to almost any length the war of competition.[1] It was at this time that the industries in America began to really take their form; that our great commercial development began. For years both in England and in America we have gone on in this same unchecked way; we have preached everywhere the doctrine of *laissez faire, laissez passer.* For years the man who would have advocated any checking, any governmental interference would have been and was branded as a dangerous character. Twenty years ago, we might say even ten years ago, Folk, La Follette, Cummings and Roosevelt would all have been branded as socialists — as anarchists — for the average man does not know the difference between an anarchist and a socialist. We were and still are to a large extent afraid to regulate and to restrict for fear that we might retard our industrial development. We all remember the bitter antagonism to the child labor reforms of Lord Shaftesbury, and the oft-repeated fear that they would result in the destruction of the commercial supremacy of England. We remember the reply of Mr. James Hill to the criticism that in operating his road he had not sufficiently considered the welfare and needs of the farmers of Minnesota and North Dakota, through which his road ran, and that it was that he was looking for larger game; that he was seeking to open up for America the trade of the Orient, and that the opening up of that trade would benefit everyone, the farmer of North Dakota and of Minnesota, as well as the manufacturer of the East, and what was a merger or two compared with this. We have in recent years, however, come to believe as a people, small business men and farmers and laboring men alike, that this freedom has gone too far; and everywhere we find a tendency towards

[1] McGregor *v.* Steamship Co.

restrictive legislation, and more and more the courts are sustaining that legislation and reviving the old legal doctrines which had their origin before the on-rush of modern democracy and modern capitalism. The burdens cast upon the courts in this respect are enormous, for it is for them to judge in the great struggle between individualism and collectivism, to say how far the state and federal governments shall interfere with individual initiative and activity and how far not. It is for them to decide upon and formulate our great industrial and social policies. That they have so far done this with supreme wisdom, few will deny. Nor can we deny that many of the decisions are conflicting and many confusing. In this the courts merely reflect the popular opinion. To use the language of Professor Dicey in his admirable article, "The Combination Laws as Illustrating the Relations between Law and Opinion in England during the Nineteenth Century," which recently appeared in the *Harvard Law Review*,[1] "The very confusion of the present state of the law corresponds with and illustrates a confused state of opinion. We all of us in England still fancy at least that we believe in the blessings of freedom, yet, to quote an expression which has become proverbial, 'To-day we are all of us socialists.' The confusion reaches much deeper than a mere opposition between the beliefs of different classes. Let each man according to the advice of preachers look within. He will find that inconsistent social theories are battling in his own mind for victory. Lord Bramwell, the most convinced of individualists, became before his death an impressive and interesting survival of the beliefs of a past age; yet Lord Bramwell himself writes to a friend, 'I am something of a socialist.' If then the law is confused, it all the more accurately reflects the spirit of the times."

GRAND FORKS, N. DAK., October, 1908.

[1] Vol. XVII, p. 532.



THE ANCIENT IRISH LAW OF TANISTRY

By Joseph M. Sullivan

MILESIAN conquerers at some unknown period divided Ireland into five kingdoms, Ulster, Munster, Leinster, Connaught, and Meath. Historians have been unable to determine at what exact time the country was united under a single monarch. These kingdoms were again subdivided into separate principalities, inhabited by distinct septs and each ruled by its own chieftain. The election of the chieftains of these different septs was regulated by the law of tanistry, which had existed among the Irish from very ancient times.

Legally defined, tanistry was a tenure of family lands by which the proprietor had only a life estate to which he was admitted by election. Tanistry limited the hereditary right to the family but not to the individual. The selection of the chieftains was confined wholly to those of noble birth, but there was not a member of any royal or noble family who might not become a candidate for the office of tanist or chieftain-elect. The custom was to elect the tanist or chieftain-elect immediately after the accession of the chief, otherwise the love of offspring would probably have induced the chief to limit the right of succession to his immediate descendants, but under the system of tanistry described above such a thing was impossible. The primitive intention seems to have been that the inheritance should descend to the oldest or most worthy of the name of the deceased. This was in reality giving it to the strongest, and the practice of it often occasioned bloody feuds in families, for which reason it was abolished under James I.

This system produced civil war and great misery. The chiefs looked with revengeful eyes on those who only waited for their death to attain the rank of princes; and the tanists or chieftains-elect very often conspired to accelerate the advent of their own succession by open war or secret assassination.

This heir or chieftain-elect was called "Tainiste," from the name of the ring finger, and as this finger by its place and length is next to the middle one, so that prince was next to the monarch in rank, dignity, and power. From this antiquarians give the name "tanistry" to the law governing the succession to the crown of Ireland.

The particular regard to this finger is of high antiquity. It has been honored with the golden token and pledge of matrimony preferable to any other finger, not as Levinius Lemnius in his "Occult Miracles of Nature" tells us, because there is a nerve as some thought, but because a small artery runs from the heart to this finger, the motion of which in women may be perceived by the touch of the index finger.

This peculiar manner of succession according to the law of tanistry is still in force among the Tuareg Arabs of the Sahara desert at the present day.

The tanist was obliged to prove his origin by the registries of his family and the Psalter of Tara, which induced the Milesians to preserve the genealogies of their families with as much care and precision as the Hebrews.

Besides his birth, the tanist should be a knight of the golden chain, called *eques torquatus*, from a chain of gold which was worn on the neck. The knight of the golden chain above described resembled the *Equites torquates* of a later age, who wore a glas, or chain of gold, around their necks. These decorations were known as "numtorcs" when designed to encircle the necks, and "failghe" when worn as armlets or leg bangles. A very celebrated collar was the one mentioned in Irish annals as the "Iodhain Morain," which was so termed

from the Prime Minister or Chief Justice of King Feredach, A. D. 96, and was fabled to warn the wearer by its increased pressure when about to pronounce an erroneous judgment. This custom of wearing the collar of gold is gracefully alluded to by the poet Thomas Moore in one of his Irish Melodies.

Let Erin remember the days of old,
Ere her faithless sons betrayed her,
When Malachi wore the collar of gold,
Which he won from a proud invader.

This order was instituted by King Munemore and was the only title of honor used by the Milesians after that of king. The modern degrees of royalty such as duke. marquis, and earl were unknown to the Milesians.

The distribution of the shares of land was a duty entrusted to the ruler, and each district was deemed the common property of the entire sept. The tillers had no property in the soil, and cultivation of the different tracts had no charms for them. The tanists alone were assigned an inalienable portion of the mesnal land; all the others were tenants at will of the chieftain and removable without the formality of a notice. This state of affairs caused frequent bloodshed and internal disorder. Election of tanists, accessions of new chiefs, banishment of members of the sept, reception of new members, kept the land in a constant state of fluctuation, and gavel-kind tenure prolonged and perpetuated the evil.

This feudal system of assigning to the dignitaries of the tribe certain portions of the demesne land was borrowed from the Hebrews. An example of the same custom is found in the fourth chapter of the Book of Genesis.

A good illustration of the Irish law of tenure and tanistry is very clearly laid down in an inquisition taken at Mallow on October 25, 1594, before Sir T. Norris, vice-president of Munster, W. Saxey, Esq., and J. Gould, Esq., justices of said province, by virtue of a commission from the Lord Deputy and council dated the preceding 26th of June. It is found among other things, "That Conogher O'Callaghan, alias the O'Callaghan, was and is seized of several large territories in the inquisition recited in his demesne, as lord and chieftain of Poble O'Callaghan by the Irish custom time out of mind used; that as O'Callaghan aforesaid is lord of the said country so then is a tanist who is Teig O'Callaghan, and the said Teig is seized as tanist by the said custom of several plough-lands in the inquisition mentioned, which also finds that the custom is further, that every kinsman of the O'Callaghan had a parcel of land to live upon, and yet that no estate passed thereby; but that the lord and the O'Callaghan for the time being, by custom time out of mind, may remove the said kinsman to other lands: and the inquisition further finds, that O'Callaghan MacDermod, Irrelagh O'Callaghan, Teig MacCahir O'Callaghan, Donogh MacThomas O'Callaghan, Cormon Genkagh O'Callaghan, Dermod Bane O'Callaghan, and Shane MacTeige O'Callaghan, were seized of several plough-lands according to said custom, subject, nevertheless, to certain seigniories and duties payable to the O'Callaghan, and were removable by him to other lands at his pleasure."

From a study of the foregoing, the reader will perceive that government by the chieftain of the clan was a decided success. The members of the clan paid to the chief every homage due his high station, and he in return carefully guarded their humble interest.

BOSTON, MASS., October, 1908.

SQUIRE ATTOM'S DECISIONS

UNDER THE TWELVE OR FOURTEEN MAXIMS OF EQUITY

As Specially Edited by Herbert J. Adams

MAXIM IX.

Equity Regards that as Done which Ought to be Done.

Note: — In a manuscript volume of law-school lectures loaned him by the city attorney, the special editor gropingly stumbled these words: "Without the application of this maxim it would in most cases be almost impossible to have property in equity." This may be the turning point in his life, for he has never had any luck with property in equity, never having heard of the important part this maxim plays in its acquirement. The maxim for him every time.

STILLSON *vs.* WORDSWORTH

Lately, Intervenor.

Appealing strongly to the Court in view of the peculiar methods of working up business in vogue in Squire Higgin's jurisdiction.

Equity of the Case: — Where the trial court, for the purpose of settling contention arising in the progress of the trial, has occasion to announce some well-known principle, *held*, it may deviate from the exact phrasing of even the highest authority, especially where the jury might otherwise be influenced to passion, to be seriously aggravated by their condition of duress.

Where complainant, in the first instance, offers no proof of his grounds of attachment, yet if the situation of the parties at the trial is obviously such as, and the evidence of the merits, tend to prove the right, *held*, that it is no injustice to defendant that he be not brought in personally; certainly, when he is filling a long-felt want in jail; for if he were in court, Equity would regard him as incapacitated in the hands of the constable with costs.

Statement of the Case.

Attachment, levied upon barber chair and outfit to enforce contract by defendant to sell same. The complainant, Stillson, barber and principal haranger of the Golden Silence Club, paid $10.00 earnest money, claiming right of possession at the end of two months. One, T.O.O. Lately, intervenes claiming the property under a similar contract, $15.00 cash, possession in a month. At time of levy, when both contracts were due to be complied with, defendant was in jail at the instance of a patron whose beard he had shaved too short. Defendant at first refused to give up the key to the shop, but acquiesced when our constable showed him how.

The scene opens with attempt of complainant's counsel to cajole defendant's landlord, who was present with his rent claim of $4.50, to submit himself to the court's eye and oath, on pain, etc.

Witness, Bierschnickit, first subpoenaed, tendered his fee, heard to swear, regularly on behalf of complainant, and irregularly on his own behalf, shown the witness stand, took the chair indicated, and looked sorry that the seat was not a back one.

Q. Have you ever heard defendant speak?

A. We heered him talkin' pretty much all the time. He said he wass goin' to have a tonsorrel parlor, and he mofed in, and when I come back he had a parber shop. We didn't like that.

Q. — about his business affairs?

A. Yess, he said he wass goin' out of pisness. A feller said he would gif him funftsen dollars, and —

Q. When did this take place?

A. Some day when I wass in der. You, see I set in der and wait for my rent. I read the paper.

Q. State how he came to speak about it?

A. He didn't come. I come der. He didn't like his pisniss any more, yet. He said "always lather from one punch off mugs onto anodder punch of mugs," — he said to me.

Defendant's counsel: Your Honor, we must insist-er-er-

Complainant's counsel: May it please the court, I think we will be able soon to show the alleged payment.

The Court: The court will see that what ought to be done is done. Constable, rap for order!

A. He didn't like his pisiniss. He said yoost lately he had a homely gustomer. He had to use four diff — kinds — shapes off raissors to get ofer his face.

Q. Now, Mr. Bierschnickit, please state as near as you can, the conversation you had with defendant about the $15.00 you spoke of.

A. It was not a gonfersations. He did it all. When the gustomer went away, why denn the parber keep right on and talk to the chair. This time he said, if this feller would giff him funftsen dollars he would giff the odder feller pack his tsen dollars, and that funf dollars would be felfet.

The jury, upon failure to come to timely agreement were, by consent, discharged. Defendant, through the courtesy of the turnkey, communicating by 'phone without leaving his apartments, agreed with the other parties to submit the cause to the court. Judgment as of possession in favor of the complainant, the formality of a decree being dispensed with, subject to payment of balance due on the barber outfit, and to the rent due; the constable to make the costs against defendant at once by garnishment of complainant.

HUGH MOROUS, *Attorney for Complainant.*
WILL DOOLITTLE, *Attorney for Defendant.*
B. E. HONEYZUCKLE, *Attorney for Intervenor.*

OPINION, BY ATTOM, J. P. 1. The trial court was right. In a learned exposition of the maxim in question, one so nicely poised in phrase, and so applicable to the case under consideration, is found a fine specimen of tautology, at the hands of Mr. P. Brevity and great respect requires that we refrain from spelling out so well-known an authority. The court suggests the dictum that the words "and treats that as done," following the first "done," are unnecessary in view of the word "regards." The authority cited probably never realized that the maxim in the form given in this case was already pretty well done.

2. One attribute of the maxim is that it is quick acting. It does not wait till it is applied to the facts by a court. It has done its duty, and only awaits the court's sanction. Intervenor was too late and is asking too much of even this court; for it cannot hold in its original situation the outfit involved for barter and sale with view to a better deal, for the character and proprietorship of the subject matter of the contract at once changed their nature to the parties respectively. If it could the personalty might as well be handed over to any party who would give 'steen down for it. Under the maxim the goods were complainant's from the moment of the conditional contract until he should make default in completion. How? On the same theory that an alien, incapacitated from devising land, may nevertheless dispose of it by will directing its sale, whereby the beneficiary to receive the purchase money is simply the fortunate legatee instead of a devisee. It's all the same in Dutch. In the present case the complainant's filthy lucre, paid and to be paid, was turned into a talk shop. The price was to him the shop, the only thing he thought of. He became simply the trustee of the price for the defendant who, on the other hand, had turned his shop into money, the only thing he thought of. If you can see the out-buildings in a fog you can see this.

3. It is not necessary to caution the constable to look sharp for the costs.

Question Settled by UNANIMOUS OPINION.

DAVENPORT, IOWA, October, 1908.

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.

THE COURTS IN POLITICS.

Seldom in our history has a Presidential campaign been of as deep interest to the legal profession as the one which is now closing as we go to press. The success of the labor unions in forcing to the front, in the platforms of each of the leading political parties, a declaration of policy regarding the use of injunctions by Courts of Equity, and the attempt of the Democratic party to make political capital out of the fact that the Republican candidate during his judicial career decided cases, which became important precedents, on the rights of employers and employees, has concentrated attention still further upon this issue. To many conservatives, the very fact of this agitation is seriously disturbing, but we believe that out of it will come a better understanding, by the members of the unions, of the history and purpose of the writ of injunction, and that they will come to realize that any attempt to curtail its use in the interest of any one class would establish a precedent of far greater danger to them than the maintenance of the existing law. On the question whether notice to the opposing parties should be required before an injunction issues, opinions may well differ, and it is not in any sense improper that it should be made a political issue and the policy of our Courts in this respect determined by legislation. But apart from this minor change, it is to be hoped that the legislators who advocate the claims of Mr. Gompers will not attempt to attain their object by meddling with the established procedure of the Courts, but will proceed frankly to a determination of the right to strike and to boycott, leaving to the Courts the enforcement of the rights and liabilities thus established.

In still another respect the profession is interested in the Presidential election, for it is openly stated that the probability that the next President will have an opportunity to appoint several justices of the Supreme Court entitles us to urge the election of a President whose appointments are likely to be satisfactory to the majority. This is indeed a frank recognition of the position in our system of government which the Supreme Court has come to occupy since the adoption of the 14th Amendment, and if we are satisfied to permit our highest judicial tribunal to determine our future economic development, it must inevitably follow that the possibility of changing its personel will become an important political issue. For, while even this control over the decisions of the Court is remote and not necessarily effective, it is not at all unlikely that we shall hereafter witness campaigns in which the Presidential candidate will pledge himself to the nomination as judges of public men whose views are too definitely known to the voters to admit of subsequent change. There are few lawyers who will not regret the prospect of seeing their highest judicial body thus dragged into the arena of political discussion, but no remedy now appears unless some division of the labors of the court could be devised whereby one bench would pass upon purely legal, and the other upon constitutional questions.

COPYRIGHT AND CONVERSION.

It has long been decided, says the London *Law Journal*, that the author of an original work, be it of literature or art, or a lecture or a letter, has in it a certain common-law right of property until it is published to the world. And such cases as Caird *v.* Sime and Prince Albert *v.* Strange established that the right was

maintained until publication by or with the consent of the author, and that any other person publishing the work or infringing the author's exclusive privilege was liable to an injunction and to an order for delivery up of the pirated copies or infringements. But now, in addition to this, the Court of Appeal, affirming Mr. Justice Swinfen-Eady's decision in Mansell *v.* The Valley Printing Company, has held that the common-law right of the author is a full and complete right of property entitling him not only to equitable relief but also to damages against an innocent person who publishes not the work itself but a pirated copy of the author's unpublished work. In other words, there is a full right of property in the idea when "detached from the manuscript or canvas or any other physical existence whatsoever," as complete as the right in a personal chattel. Lord Blackburn defined conversion in the leading case of Hollins *v.* Fowler as "any act which is an interference with the dominion and right of property of the plaintiff," and now it seems that conversion is applicable to incorporeal rights as well as to physical property, and that the owner of an unpublished work has the same right to damages from any person, however innocent, interfering with his dominion as the owner of a registered copyright to which the statute has expressly attached the full rights of property. The extension of the author's property rights is unexceptionable in point of law, and, viewed from the ground of public policy, it may be commended in these days, when there are so many attempts made by the unscrupulous to appropriate original works under the rather thin excuse of making them popular while really enriching themselves at the expense of the authors.

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.

All lawyers interested in constitutional law — and who is not? — should give attention to the article by Clarence R. Martin on a recent decision of the Indiana Supreme Court holding that the Supreme Court will consider the constitutionality of an act although neither presented nor argued in the lower or in the appellate court. The review of Massachusetts labor decisions, by Arthur March Brown, also stands out as a timely and important article.

BILLS AND NOTES. "The Holder for Collection of a Bill of Exchange subject to the Provincial Law of Agency," by Walter S. Johnson, *Canadian Law Times and Review* (V. xxviii, p. 812).

BILLS AND NOTES. "The Negotiable Instruments Law with Comments and Criticisms," by James Barr Ames, Lyman D. Brewster and Charles L. McKeehan, annotated by Joseph Doddridge Brannan, Harvard Law School Association, Cambridge, 1908, price $3.00.

This book contains the text of the Negotiable Instruments Law prepared by the Conference of Commissioners on Uniform State Laws and adopted in most of the states, with references to similar sections of the English Bills of Exchange Act and tables of variations, followed by reprints of a series of controversial articles published in legal periodicals when the law was first codified criticising certain of its provisions. This series throws much light on the meaning of some clauses and calls attention to changes from the common law. In one appendix is collected references to or abstracts of all the cases decided under the Bills of Exchange Act, in another those decided under the Negotiable Instruments Law. These cases are as yet not very numerous (which is perhaps a compliment to the Code), but as the subject is one which enters into every lawyer's practise, this book will prove of real assistance.

BILLS AND NOTES. "Three Checque Cases," by J. S. Ewart, *Canadian Law Times and Review* (V. xxviii, p. 787).

BIOGRAPHY. "James Boswell, Advocate," by "R. A. B.," *Scottish Law Review* (V. xxiv, p. 222).

BIOGRAPHY. "Cornelius Van Bynkershoek," by Coleman Philipson, *Journal of the Society of Comparative Legislation* (N. S., V. ix, p. 27). This sketch of a Dutch jurist of the 17th and 18th centuries is the ninth in a series on, "The Great Jurists of the World." A careful summary of Van Bynkershoek's contributions to international law is given.

BRITISH EMPIRE. "The Legal Relations of the Several States of the Empire," by Harrison Moore, *Journal of the Society of Comparative Legislation* (N. S., V. ix, p. 113).

CONSTITUTIONAL LAW (Procedure and Definition of "Local and Special"). "A Notable Decision," by Clarence R. Martin, *American Law Review* (V. xlii, p. 641).

"The Supreme Court of Indiana recently handed down a decision by which two apparently well and long established rules — one of procedure and one of law — are reversed. This is the case of Milton Krauss *v.* Israel J. Lehman, et al., which holds (1), that the Supreme Court will consider and decide the constitutionality of an act although it is neither presented nor argued by the parties either in the trial court or in that court."

The first point was nowhere more firmly established than in Indiana and Kraus *v.* Lehman has overthrown the authority of at least eighteen cases in that state, says Mr. Martin. He approves the court's action, however, as follows:

"Something may be said in support of the Indiana decision. It has torn down the barrier of custom and has stepped into a new highway that modern conditions and sentiment may demand. Upon the decisions of our Supreme Courts upholding or denying the constitutionality of legislative enactment much

depends . . . it is most important that such decision be given at the earliest moment possible. If the law is void, there is no tenable reason why the court of last resort should not take the initiative and declare it so, even though the point is not discussed in the printed arguments presented by counsel. The former policy of deciding a case on a constitutional question only as a last resort left the avoided constitutional question unsettled and often wrongfully permitted the statute to bear the form of authority until finally it was questioned in a case where discussion and decision of its validity could not be avoided. The advantages of the new practices are obvious and will doubtless lead to a general conviction that the new rule has been announced only after due consideration and that the Indiana Supreme Court has done well in ignoring precedent and in declaring the new doctrine.

" One thing can, however, be said in criticism of the decision, or rather the procedure of the court. Counsel on neither side were given an opportunity to argue the constitutional question. A better procedure would have been to notify them of the court's desire to be further advised and then to set the case down for argument on such propositions (as is the practice in the United States Supreme Court). In a case where all the members of the court are agreed that the law is unconstitutional there may be small chance for a change of opinion by such argument, but it would seem that fairness and courtesy to counsel would demand that it be given.

" The other new principle of law laid down by the case declares that a section of the statute ' concerning the construction of court houses in counties having a population of more than 25,000 ' is violative of the provisions of the state constitution: ' The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . regulating county and township business,' and ' in all the cases enumerated in the preceding section and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.'

" The court proceeds to point out that by the act the ninety-two counties of the state were divided into two classes — twenty-eight counties having a population of more than 25,000 and sixty-four having a population of less than that number. It is shown that the difference of population in some of the counties within the first class exceeded some of the counties of the second class by only a few hundred. ' Certainly, in the need or necessity of a court house,' says the court, ' there can be no real difference between a county of 24,000 and one of 26,000.' The rule is stated that a reason or necessity for classification ' must inhere in the subject matter and must be natural and not artificial '; and that no such distinction exists in this case, the classification of which is purely arbitrary. The statute being ' effectively local ' it was held unconstitutional.

" Classification according to differences in population has always been considered proper and indeed it has been stated to be the *only* proper classification." Cases declaring this are very numerous, and the author cites a great many, relating to cities, townships, and counties. Indiana has followed this rule also heretofore, " and the entire cities and town act as well as many more laws of Indiana are based upon just such classifications as have just been declared unconstitutional.

" While the reasoning of the Indiana court in declaring the classification an arbitrary selection appears sound and logical it cannot but leave us with the question: What valid classification *can* the legislature make which will be upon a reasonable basis?"

CONSTITUTIONAL LAW. " The New Question of States' Rights," by Thomas W. Martin, *Central Law Journal* (V. lxvi, p. 281).

CONSTITUTIONAL LAW. " Passing of State Autonomy," by H. M. Cox, *Central Law Journal* (V. lxvii, p. 279).

CONSTITUTIONAL LAW. " Recent Legislation and Constitutional Decisions in Illinois," by James M. Matheny. Address before Illinois State Bar Association, October *Illinois Law Review* (V. iii, p. 131).

CONTRACTS. " Some Aspects of Business by Telegram," by W. F. Chipman, *Canadian Law Times and Review* (V. xxviii, p. 817).

CONTRACTS. " Freedom of Trade," by B. A. Ross, *Commonwealth Law Review* (V. v, p. 241).

ECONOMICS (African Trade). "The Market in African Law and Custom," by Northcote W. Thomas, *Journal of the Society of Comparative Legislation* (U. S., V. ix, p. 90).

EDUCATION. "A Defect in Law School Curricula," by Charles C. Moore, *Law Notes* (V. xii, p. 126).

EQUITY (Injunctions). "The Rationale of the Injunction," by William Trickett, *American Law Review* (V. xlii, p. 687). Criticising severely the trial of contempt cases without a jury and by the judge whose command has been violated.

HISTORY. "Anti-Loyalist Legislation During the American Revolution (Continued)," by James Westfall Thompson, October *Illinois Law Review* (V. iii, p. 147).

HISTORY. "Sources of Hindu Law," by S. N. Ray, *Allahabad Law Journal* (V. v, p. 249).

INTERNATIONAL LAW (Domicile). "Trade Domicile in War," by T. Baty, *Journal of the Society of Comparative Legislation* (U. S., V. ix, p. 157).

"It has never been clear to us why modern writers introduce into the complicated subject of domicile the fresh complication which arises from the use of the term 'commercial domicile.' Prior to quite recent times a continuous catena of authorities — writers and judges — have asserted that the secondary criterion of enemy character in war time (enemy nationality being a primary and conclusive criterion), is domicile in the enemy country. They add that the carrying on of business in the enemy country will have the same result, *quoad* the business and the property connected with it.

"Now, does 'domicile' here mean anything but what it means when used in the sense in which we are familiar with it as the criterion of the personal law of an individual — namely, permanent residence in a given country?"

Mr. Baty discusses the views of eminent international law writers, including Westlake, Phillimore, Foote, Wharton, Dicey, Stowell, Wheaton, Marshall, Story and Lushington and various cases, reaching the following conclusion:

"In so far as the term 'domicile' is used to denote the possession of a house of trade, with or without residence, prolonged or brief, it has nothing in common with private-law domicile, and has only been accidentally and improperly employed to designate the state of affairs. But in its ordinary and proper sense it is, notwithstanding, a criterion of enemy (though not of neutral) character, whether the party be a trader or otherwise. And this ordinary and proper sense is its normal sense in prize matters as in others.

"So that when Lindley, L. J., says that 'The subject of a state at war with this country who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on . . . his real domicile, but on the place or places in which he carries on his business or businesses,' we are led to express a respectful doubt. We venture to think that it is his real domicile which will be decisive, if the leading cases are not a maze of confused thought and more confused expression.

"The only author who in recent years has firmly grasped the essential fact that commercial domicile is none other than civil domicile in a peculiar aspect is Twiss. Here, as so often, the strong good sense of that illustrious jurist supplies an invaluable beacon-light in navigating the sea of confusion.

"'It has been sometimes said' (vol. ii, p. 306) 'that there is a peculiarity about domicile in time of war, as distinguished from domicile in time of peace; and that as a person may have establishments in two countries for commercial purposes, he may have in time of war for commercial purposes both a neutral Domicile and a belligerent Domicile. . . . [But] an individual can only have one personal Domicile for international purposes, in the sense in which Domicile is a criterion of a person being a friend or an enemy, for no person can be at the same time both a friend and an enemy under the Law of Nations.' He adds: 'The more philosophical view would rather seem to be that which does not admit the Domicile of the owner to be conclusive of the immunity of his property . . . but only allows it to found a presumption of immunity, which may be rebutted . . .' *e.g.* by its being embarked in the enemy's trade. But in general, 'all natural-born subjects of a belligerent power who may have abandoned their native country

and acquired a domicile in a neutral country before hostilities have commenced, will have effectually clothed themselves with the character of neutral subjects; precisely as every natural-born subject of a neutral power will have clothed himself with the character of an enemy subject by long-continued residence, coupled with the intention of remaining, in the enemy's territory ' (p. 300)."

INTERNATIONAL LAW. "The Sanction of International Law," by Elihu Root, *Central Law Journal* (V. lxvii, p. 217).

INTERSTATE COMMERCE. "The Standard Oil Rebate Case," by R. M. Benjamin, *Central Law Journal* (V. lxvii, p. 236).

INTERSTATE COMMERCE. "Recent Developments in the Law Relating to Interstate Commerce," by Morris M. Cohn, *American Law Review* (V. xlii, p. 666). A brief statement of recent congressional legislation, with a comparison of the law previous to these enactments and discussion of the principles upon which the legislation is upheld.

JURISPRUDENCE. "The *Laws* of Plato," by Edward Manson, *Journal of the Society of Comparative Legislation* (N. S., V. ix, p. 50).

LABOR DECISIONS (Mass.). "Labor Questions in the Courts of Massachusetts," by Arthur March Brown, *American Law Review* (V. xlii, p. 706). An exhaustive analysis of the Massachusetts decisions on industrial disputes, from the first in 1827 down to April 2d of the present year. The author in conclusion says:

"Where, then, do they leave the labor organizations of Massachusetts? Their right to exist and act as organized bodies has been put beyond question. Their right to strike to secure ends coming within the scope of competition, as judicially defined, is unassailable. Their right to the exclusive use of distinctive labels to mark the products of union labor is fully protected against infringement. But this is as far as the affirmative propositions go. The negative list is longer. They are not permitted to strike to compel men to join the union. They are not permitted in even a lawful strike to employ pickets to persuade men not to take employment as strike-breakers, nor to maintain banners before an establishment giving notice of a strike in progress there. They are not permitted to enter upon a merely sympathetic strike against employers with whom they have no trade dispute, and a strike to secure to the union the right to pass upon grievances between individual members and their employers is considered a sympathetic strike. They are not permitted to exact by a strike the payment of a penalty by an employer for violation of union regulations. They will not be accorded judicial aid, either as organizations or as individuals, to prevent blacklisting by a combination of employers.

"These are the limits judicially laid down. As to the future, who will venture a forecast? There was pith in the retort of the eminent member of the Massachusetts Bar, whose proposition of law the court thought untenable. 'That,' thundered the judge, 'is not the law!' 'It was,' came the courteous reply from the advocate, sure of his ground, 'until your Honor spoke.' In like manner, as their Honors speak from time to time, there will be modification to be noted, in one direction or the other, in the legal status of organized labor. But the successive decisions which we have passed in review speak with a cumulative force from which it will be hard for the trade-unionist to escape except through the medium of legislation."

LAND LAW. "French and English Land Law," by James Edward Hogg, *Journal of the Society of Comparative Legislation* (N. S., V. ix, p. 64). Commenting on the differences between the two systems, with special reference to the New Hebrides convention between France and Great Britain. The author finds an immense superiority in the form of the French law.

LANDLORD AND TENANT. "The Massachusetts Law of Landlord and Tenant," by Prescott F. Hall. The second edition, Little Brown & Co., Boston, 1908, price $6.00 net.

Mr. Hall's book in its first edition proved one of the most satisfactory local text books which Massachusetts has ever had. The subject was so frequently involved in our early decisions that it is possible to cover it very completely in a local book, and because the law was thoroughly settled by the earlier decisions there have been few changes to make in this edition from the author's original statement. We are always glad, however, to be

able to cite the most recent decisions, and this new edition which includes references to the statutes and decisions since the first edition of ten years ago will be promptly welcomed. The author has re-arranged much of the text and has subdivided and re-numbered the headings, adding many new titles as an aid to clearness. As before, the book has an elaborate and well-arranged index.

LEGISLATION (India). "The Indian Code of Civil Procedure," by Sir Lewis Tupper, *Journal of the Society of Comparative Legislation* (U. S., V. ix, p. 69). Completing a narrative begun by an anonymous writer of the passage of the bill to amend the Indian Code of Civil Procedure which goes into effect January 1, 1909.

MONOPOLIES. "So-Called Trusts or Big Corporations," by Judge P. S. Grosscup, *The Brief* (V. viii, p. 129).

NEGOTIABLE INSTRUMENTS (Germany). "The New German Statute as to Cheques," by Ernest J. Schuster, *Journal of the Society of Comparative Legislation* (U. S., V. ix, p. 79). Analysis and comparison with British law of the new German statutes which it is hoped will popularize the use of checks as means of payment, a custom which exists to a much less extent in Germany than in England and the United States.

PATENTS. "Implied Warranty Against Infringement," by C. Schuyler Davis, *Albany Law Journal* (V. lxx, p. 244).

PHILOSOPHY (Social). "Hobbes and Locke: The Social Contract in English Political Philosophy," by Sir Frederick Pollock, *Journal of the Society of Comparative Legislation* (U. S., V. ix, p. 107).

PRACTICE. "The Organization of a Law Office — xiv. Filing System," by R. V. Harris, *Canadian Law Times and Review* (V. xxviii, p. 807).

PRACTICE. "A Few Suggestions as to Brief-Making," by John C. Myers, *Bench and Bar* (V. xiv, p. 97).

PRACTICE. "The English Barrister: A Mediaeval Figure," by Rupert Sargent Holland, *American Law Review* (V. xlii, p. 735). Entertaining description of a picturesque profession.

PROPERTY. "The Land Question in New Zealand," by T. F. Martin, *Commonwealth Law Review* (V. v, p. 247).

PUBLIC SERVICE COMPANIES. "Regulation of Rates to be Charged by Public Service Corporations — I. Miscellaneous Enterprises Affected with a Public Interest," by O. H. Myrick, *Central Law Journal* (V. lxvii, p. 299).

SETTLEMENTS (Mohammedan). "Wakf as Family Settlement among the Mohammedans," by Syed A. Majid, *Journal of the Society of Comparative Legislation* (N. S., V. ix, p. 122). History and explanation of a form of family settlement known in Moslem law. The word "wakf" means, literally, detention, or tying up.

"In its legal aspect wakf has been regarded in two different ways. Abu Hanifa defines it as detention of ain, *i.e. corpus*, in the property of the wakif, *e.g.* dedicator or settlor, and the giving away of the use or the usufruct for the benefit of the poor or for some good object like things given by way of commodatum or loan. On the other hand, the two disciples, Abu Yusuf and Mohammed, hold that it is the detention of ain, *i.e. corpus*, in the employed property as that of God, the Almighty, in such a manner that the use or usufruct reverts to human beings, and that ownership is absolute and can neither be *sold* nor *given* nor *inherited*. This latter view is more approved than the former."

STARE DECISIS. "The Law of the Case," by James M. Kerr, *Central Law Journal* (V. lxvii, p. 255).

WAYS. "Once a Highway, always a Highway," by F. W. Wegenast, *Canadian Law Times and Review* (V. xxviii, p. 792).

YEAR BOOKS. "Some Ancient Reporters and an Ancient Action," by George F. Deiser. University of Pennsylvania Law Review and American Law Register (V. lvii, p. 1). Interesting observations upon the Year Books as pictures of the times with special reference to the action of Novel Disseisin.

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.)

ADOPTION. (Adoption by Husband without Wife Joining therein.) **Pa.** — What is the effect of the adoption of a child by a husband without the wife taking any part in the adoption proceedings? This question arose in the case of *In re* Carroll's Estate, 68 Atl. Rep. 1038. The wife having died, the adopted child laid claim to an interest in her estate. The court held that the proceedings by the husband created no liability on the part of the wife and that the claim could not be upheld.

AGENCY. (Automobiles.) **N. Y. Sup.** — In Cunningham *v.* Castle, 111 New York Supplement 1057, it appeared that plaintiff was injured by an automobile belonging to defendant and operated by his chauffeur. The evidence went to show that defendant and the chauffeur had been out together in the evening and on return to defendant's apartment, the chauffeur obtained permission to use the machine for a short time for his own pleasure. While thus engaged, plaintiff was run over and injured. He brought action against the owner and recovered judgment in the lower court. On appeal to the appellate division, the judgment was reversed on the ground that the chauffeur was not engaged in any business of defendant at the time of the injury. Two of the judges dissented on the theory that the use of the machine was a mere deviation, by consent, from his course in returning it to the garage. The most vital reason for difference of opinion seemed to be on the question of the effect of the consent of the owner, the majority claiming that it made no difference as to his liability and the minority that it furnished a reason for charging him.

CARRIERS. (Duty of Passenger to Read Ticket.) **Mass.** — The Supreme Judicial Court of Massachusetts, in French *v.* Merchants' & Miners' Transportation Co., 85 N. E. Rep. 424, passes on the liability of a carrier as affected by limitations in the ticket which the passenger has failed to read. The action was brought for destruction of plaintiff's baggage by fire while in possession of defendant. The defense set out a limitation in the ticket directly releasing the company from liability for such losses. Plaintiff contended that her eyesight was poor, and that she was unable to read the ticket. The court held that this fact could not increase the liability of defendant, and that plaintiff should have procured someone else to read her ticket to her in case she was unable to read it herself.

CARRIERS. (Validity of State Railroad Rate Laws.) **U. S. C. C., Ala.** — Judge Jones, in an opinion rendered in the case of Central of Georgia Ry. Cy. *v.* Railroad Commission of Alabama, 161 Fed. Rep. 925, held the group of statutes enacted by the Alabama Legislature in 1907, for the regulation of freight and passenger rates on intrastate business, invalid as attaching such heavy penalties as to constitute denial of due process of law. The proceeding was one instituted to enjoin the state officers from enforcing the legislation referred to and the defense was urged that the action was substantially one against the state and therefore beyond the jurisdiction of the federal courts. There is quite an extended discussion of this point resulting in a conclusion to the contrary. In a note at the end of the case the court said that the opinion was prepared before the decisions in *Ex parte* Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. — and Hunter *v.* Wood, 209 U. S. 205, 28 Sup. Ct. 472; 52 L. Ed. — that otherwise these cases would merely have been cited without discussion of the points which they decided.

CONTEMPT. (Death of Offender.) **U. S. C. C. A.** — The effect of the death of one found guilty of civil contempt is discussed by the United States Circuit Court of Appeals in Wasserman *v.* United States, 161 Fed. Rep. 722. In a suit in equity brought by the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. *v.* Wasserman, *et al.*, to prevent alleged injury to the business of plaintiff by sale of non-transferable reduced rate tickets, a preliminary injunction was issued against defendants. Wasserman disobeyed the order of

the court, was found guilty of contempt, and a fine of $500 assessed as his punishment. He sued out a writ of error to reverse this judgment, but died before the case was submitted to the higher court. His death was suggested and the contention made that the proceedings thereupon abated, and that the fine was not recoverable against his estate. The court said that the order violated was merely an interlocutory one in a suit in equity; that the original action did not abate, and the fine should be considered as a charge against the estate in the hands of the personal representatives.

CONSTITUTIONAL LAW. (Unreasonable Penalties.) **Wis.** — The Wisconsin Tenement House Act (Laws 1907, p. 910, c. 269) is declared unconstitutional in Bonnett *v.* Vallier, 116 N. W. Rep. 885 for unreasonableness both in its requirements as to the structure of buildings and in the penalties imposed for its violation. It is condemned because of its provisions that lot line courts reaching from the street must be six feet wide for all buildings four stories or less in height, and that every tenement house must be equipped with substantially all the ordinary modern improvements as to water supply common to cities having public water and sewer systems. Its penal clause that every person who shall violate the act, or fail to comply with its provisions, or who shall resist its enforcement, shall be subject to fine or imprisonment, is characterized as indefensible from any point of view. The specifications and details enumerated in the act are so numerous that the court fear an ordinary person would be quite liable to be intimidated into surrendering his right to use his real estate for tenement house or lodging house purposes rather than take the chances, or if he did not make such surrender be intimidated into submitting to the demands of those charged with the enforcement of the law. The effect of enforcing such penalties as are imposed would be to take property without due process of law.

This decision is one of many which adhere to the proposition that the question of reasonableness is a judicial and not a legislative question. The other side of the contention is well expressed by the Supreme Court of Nebraska in the case of Wenham v. State, 91 N. W. 421, when on page 424 it says: "The members of the legislature come from no particular class. They are elected from every portion of the state, and come from every avocation and from all the walks of life. They have observed the conditions with which they are surrounded, and know from experience what laws are necessary to be enacted for the welfare of the communities in which they reside." The Wisconsin court has throughout its history always showed a distrust of both legislatures and juries and a desire to check their seeming licenses — the distrust which the trained mind so often has of the untrained. It has in fact upheld but few police regulations, and perhaps has gone further than any other court in making the question of negligence and contributory negligence one of law for the court rather than one of fact for the jury. It must be admitted, however, by every one that the statute in this case is extreme and unreasonable. It for instance applies to all cities and villages of the state whether possessing waterworks and sewerage systems or not, and practically forbids the building of even the modest two-story tenement in the small town and in the outskirts of the cities.

ANDREW A. BRUCE.

CORPORATIONS. (Forfeiture of Franchise.) **U. S. Sup. Ct.** — In Delmar Jockey Club *v.* Missouri, 28 Sup. Ct. Rep. 732, the jurisdiction of the United States Supreme Court is invoked to set aside the decision of the Missouri Supreme Court revoking the franchise of plaintiff in error. The objects set forth in the articles of incorporation were the promotion of agriculture and improvement of stock by public exhibitions of agricultural products, holding of fairs and races, and the doing of other things incidental thereto. In answer to an information in *quo warranto* the club entered a general denial followed by certain allegations, which the Missouri Supreme Court held to constitute a plea in confession and avoidance destroying the effect of the general denial and insufficient as a defense. Judgment of ouster was granted on motion for judgment on the pleadings. On writ of error to the United States Supreme Court it was claimed that the decision of the state court violated the federal constitution as finding defendant guilty of violation of its franchise without trial, but the contention was held to be so frivolous that the writ of error was dismissed.

COURTS. (Conflicting Jurisdiction of Bankruptcy Courts.) **U. S. D. C., Ala.** — A sharp conflict as to claim to jurisdiction as between Judges Jones and Hundley, both District Judges in the United States Court in Alabama, is disclosed in the two decisions of *In re* Steele, 156 Fed. Rep. 853, and 161 Fed. Rep. 886. It appeared that on November 1, 1907, while Judge Hundley was holding court in the Northern District of Alabama he appointed petitioner Steele as Referee in Bankruptcy for certain counties of the district. A few days later Steele qualified

by taking oath and giving bond. On the 5th of November, 1907, Judge Jones came from his home in the Middle District of Alabama into the Northern District and had an order entered removing petitioner from his office as referee. This order of removal was made in the absence of petitioner and without notice to him or to Judge Hundley, Judge Jones claiming that he was a Judge for the Northern District, having equal authority with Judge Hundley; that where there is more than one district judge in a district the majority constitute the court and that in matters of appointment of permanent officers one judge cannot act without the consent of the other. On the matter being brought to the attention of Judge Hundley by petitioner Steele, he issued an order vacating the order of Judge Jones and holding that it had been improperly granted without warrant of law; that a bankruptcy court is not migratory and that so long as he was the only judge holding court in the district he alone had authority to make the appointment. Under date of May 30, 1908, an order was made by Judge Jones, who was then not within the Northern District, appointing one Alexander Birch as referee and directing a division of the cases between Birch and Steele. A couple of days later Judge Jones came into the Northern District for a few hours and there issued an order ratifying the former one without consultation with Judge Hundley. Petitioner attacked this order on the ground that it was made without authority and that it deprived him of certain emoluments to which he was entitled under his appointment by Judge Hundley. Judge Hundley discusses these later orders in the case reported in 161 Fed. Rep. 886, and again asserts his right to exercise jurisdiction in the Northern District untrammeled by the action of Judge Jones; and directs the revocation of the appointment of Birch.

EQUITY. (Jurisdiction—Specific Performance.) **Mass.** — The jurisdiction of a court of equity to specifically enforce a compromise agreement between heirs is considered by the Supreme Judicial Court of Massachusetts in Blount *v.* Dillaway, 85 N. E. Rep. 477. Plaintiff's mother left a will by which practically the entire estate was given to the brother of plaintiff, the two being the only heirs. On being informed of this fact by her brother, plaintiff entered into an agreement with him by which she was to receive one-third of the estate in consideration of not contesting the will. The will was duly probated and no contest made. Subsequently the brother indicated an intention not to be bound by the compromise agreement. Plaintiff then asked the aid of a court of equity for specific performance as against the executor and to compel him to pay over the one-third interest. The statute of Massachusetts gives to a will contestant a standing in the probate court to enforce compromise agreements. This was held, however, not to prevent equity taking jurisdiction under the circumstances disclosed in the present case.

EVIDENCE. (Admissibility of Telephonic Conversation.) **Minn.** — The subject of the admission in evidence of a conversation over telephone is discussed in Barrett *v.* Magner, 117 N. W. Rep. 245. A witness testified that he secured telephone connection with the place of business of a party; that some one answered and stated the person wanted was not in, but would be called, and that soon thereafter another voice answered and a conversation took place respecting a business transaction. The conversation was admitted in evidence in view of the fact that the witness further stated that the talk over the telephone was of the same character as occurred a few days previous in a personal conversation between the same parties.

The decision in this case seems thoroughly sound. The fact that Zimmerman, the person asked for, apparently came to the telephone and held the conversation seems sufficient by itself to identify him. Wigmore, Evidence, § 2155. The chances of Zimmerman being impersonated are too slight to be regarded when the need of being able to prove such conversations is considered. It seems unfortunate therefore that the court should have expressed the opinion, quite unnecessarily, that the above fact alone would be insufficient. The distinction suggested by the court between calling up an office and calling up an individual seems unsound. The nature of the evidence of identity is the same in both cases. The danger of an impostor replying seems practically as great in the office case as in the individual case. Indeed Wigmore (Evidence, § 2155 (c)) expresses the opinion that the office case contains the greater danger. But, disregarding the dicta of the court, the decision is clearly sound in considering the evidence of the prior similar conversation sufficiently corroborative. C. B. W.

EXTRADITION. (Sufficiency of Accusation.) **U. S. Sup. Ct.** — The Constitution of the United States provides for extradition of persons accused of "treason, felony, or other crime." This clause is construed by the Supreme Court of the United States in Pierce *v.* Creecy, 28 Sup. Ct. Rep., 714, a habeas corpus proceeding on behalf of H. Clay Pierce, president of the Waters-Pierce

Oil Co. to prevent his removal to Texas to answer a charge of false swearing. His counsel contended that the indictment attached to the requisition was insufficient and that no crime was charged by it. The court said that it was not necessary that the accusation on which extradition was asked should be good as a criminal pleading but that it need only show that a crime had been committed. The fact that it appeared on the face of the indictment that prosecution was barred by limitation was held not to be a proper question for consideration in the habeas corpus proceeding. The judgment of the circuit court refusing to discharge the prisoner was affirmed.

INFANTS. (Guardianship of, at Places of Entertainment.) N. Y. Sup. Ct. — One of the decisive questions in People *v.* Samwick, 111 New York Supplement, 11, was as to the meaning of the term "guardian," as used in the statute, forbidding the admission to certain places of entertainment and amusement of children under 16 years of age, unless accompanied by parent or "guardian." The court said that the word should not be restricted to apply only to a guardian in the sense of one appointed by court, but that the law would be complied with if a child should be accompanied by its elder brother or sister, neighbor, or friend.

NEGLIGENCE. (Hospital Nurse.) Ia. — In a case appealed to the Iowa Supreme Court it was shown that plaintiff was injured by falling down an open elevator shaft at a hospital just after having been operated on by the defendants. One of the members of defendant firm, being called to plaintiff's home in a professional capacity, determined a surgical operation necessary and took plaintiff to a nearby hospital for its performance. After the operation was over and while plaintiff was still under the influence of an anæsthetic, she was taken by a nurse and the junior member of defendant firm to the elevator for the purpose of being removed to the room assigned her. The door of the shaft was open and the elevator was somewhere below. Both the nurse and physician left plaintiff while trying to make some arrangement to get the elevator up, and during this time the car or stretcher on which she was lying was by some means started (probably by an involuntary movement on the part of plaintiff while still unconscious), and ran into the open shaft, causing the injuries complained of. It was contended that the movement of the car was something not to have reasonably been foreseen and that the act of leaving it in the exposed position could not be considered the proximate cause of the injury. The court came to the opposite conclusion and upheld a verdict and judgment for plaintiff. The title of the case is Haase *v.* Morton & Morton. It is reported in 115 N. W. Rep. 923.

NEGLIGENCE. (Res Ipsa Loquitur.) N. Y. Sup. Ct. — Plaintiff, in Moglia *v.* Nassau Elec. R. Co., 111 New York Supplement, 70 was injured by an electric shock received from one of the poles of defendant's trolley system. Defendant offered no evidence and the trial court instructed the jury that the fact of the accident called for an explanation, and that, as none was offered by defendant, the verdict should be given for plaintiff, the only question being as to the amount of damages. It was contended on the part of defendant that the jury was not bound to believe plaintiff, but should be left free to determine whether in fact he was injured in the manner shown by his testimony, and that even if the doctrine of *res ipsa loquitur* was applicable, the inference of negligence to be drawn therefrom was one for the jury. The Appellate Division held that a *prima facie* case was made out and the trial court committed no error in failing to submit the issue of negligence to the jury.

PATENTS. (Effect of Nonuser.) U. S. Sup. Ct. — Will the fact that the owner of a patent fails to put the invention to any practical use bar his right to enjoin its infringement? The Supreme Court of the United States passed by this question in Continental Paper Bag Co. *v.* Eastern Paper Bag Co., 28 Sup. Ct. Rep. 748. Defendant claimed that public policy demanded that an inventor to whom had been granted the monopoly accorded by the patent law owed the duty of giving to the world the benefits of his invention and that unless there was some good excuse for not doing so equity ought not to interpose to protect him. In this case it appeared that the holder of the patent made no use of it because of the cost of changing from its old machinery. There was no proof that by reason thereof the cost of their product was increased or the output diminished. The court held the nonuser not unreasonable under the circumstances and granted an injunction. It did not, however, really decide the question which the case was supposed to raise.

PRACTICE. (Writ of Protection — Insane Person.) U. S. C. C. A. — In point of novelty as to facts and legal questions involved, the case of Chanler *v.* Sherman, 162 Fed. Rep. 19, is perhaps one of the most interesting of recent years. In 1897 petitioner was adjudged insane by the Supreme Court of New York and ordered committed to an asylum in that state. Two years later an order was made by the same court appoint-

ing a committee of his person and property. In 1900 he escaped from custody and went to Virginia, where he has since resided. In 1901, upon application made to a county court of the latter state, he was adjudged sane and capable of managing his affairs. In 1904 he instituted an action to which the present proceedings are ancillary, averring his sanity, setting up the decree of the Virginia court, and demanding damages from his committee in New York for conversion of his property. Defendant in the main action set up the decree of the New York court and alleged also that the petitioner was in fact insane and that the judgment of the Virginia court was collusive and void. Petitioner alleged that it was necessary that he should be present in New York at the time of trial of the main action, but that if he should go there he would be in immediate danger of reincarceration in the asylum, notwithstanding the Virginia decree. He therefore asked an order protecting him while in attendance at trial and for reasonable time to return. It was claimed that interference on the part of the Federal Court would practically amount to enjoining proceedings in the state court. To this it was replied that the order of the state court for committment of petitioner had been complied with, and that any further incarceration would be accomplished by action of hospital attendants or police officers; that the only other proceedings in New York were those in which the committee was appointed, and that they would in no wise be stayed by a protective order, because their object was not to commit petitioner to the asylum, as he was already there at the time the proceedings were instituted. The court referred to the peculiar predicament in which petitioner was placed and that unless relief were granted he must either abandon his action for a quarter of a million dollars or run the risk of losing his liberty. The Circuit Court was instructed to issue a writ of protection prohibiting apprehension of petitioner during the time necessary for him to be in New York in connection with his trial on condition that he should submit himself to the custody of one or more United States marshals during his stay and pay the expense of their employment. The order was also conditioned on the issues of the case remaining as above indicated and should not be operative if they should so be changed as to avoid the necessity of petitioner's presence at the trial of his main action.

PRIVACY. (**Restraining Publication of Photograph.**) **N. Y. Sup. Ct.** — In 1903 a statute went into force in New York prohibiting the use for advertising purposes, of the portrait or picture of any living person without first having obtained his written consent, or if the person whose picture was desired to be used should be a minor, the consent of the parent or guardian. The construction of this statute occupies the attention of the New York Supreme Court at Special Term in Wyatt *v.* Wanamaker, 110 New York Supplement, 900. Plaintiff alleged minority and that defendant had been using her name and portrait for several weeks without the consent of herself or guardian and asked for damages and an injunction. Defendant, in addition to a general denial, alleged on information and belief that the original of the picture had been taken by a photographer in consideration of a reduction in price under an agreement that he should have the right to sell or otherwise use copies of the picture, and a custom among photographers to furnish photographs at what are known as "professional rates" to actors, actresses, etc., with right of publication, and that the original photograph in question was obtained by plaintiff under representations that she was known to the public as a professional. The court held those defenses insufficient, saying private parties could not thus evade the plain provisions of the statute requiring written permission from the parent or guardian of a minor.

PROPERTY. (**Church Funds.**) **U. S. Sup. Ct.** — Among the questions arising as a result of the Spanish American War there were, perhaps, few more difficult of solution than that involving the property rights of the Catholic Church. The Municipality of Ponce, in Porto Rico, laid claim to a church edifice, claiming that it was constructed with municipal funds and that there was no showing that the church had any existence as a corporate entity so as to enable it to hold property. Both contentions were decided in favor of the church by the Supreme Court of Porto Rico and the municipality appealed to the United States Supreme Court. Its decision is reported in 28 Sup. Ct. Rep. 737, under the title Municipality of Ponce *v.* Roman Catholic Apostolic Church and the judgment of the Supreme Court of Porto Rico affirmed. It was held that whereever the funds for construction of the building came from, they were irrevocably donated to the church and the gift could not be annulled; that the church had, for centuries, been recognized as a legal entity; that its rights as such had been acknowledged in the treaty of Paris and in concordats between Spain and the papacy and could not be denied at this late a date.

SPECIFIC PERFORMANCE. (**Enforcement of Oral Contract to Convey Land.**) **Kan.** — In Bichel *v.* Oliver, 95 Pac. Rep. 396, it appeared

that a husband and his wife, who had no children, orally agreed that in consideration of a young girl becoming a member of their family and giving to them love, obedience and service, they would, at their death, leave her all of their property.

The girl fully and faithfully performed her part of the contract and was in possession of the land in controversy, when it was conveyed to a third person by the husband shortly before his death.

The court held that such an agreement would be enforced in equity, there being no circumstances or conditions which would render enforcement inequitable.

STATUTES. (Construction.) Ind. Sup. Ct. — The extreme caution which courts exercise in striving to avoid any imputation of invasion of the province of the legislative department is illustrated by the decision of the Indiana Supreme Court in State *v.* Squibb, 84 N. E. Rep. 969. Indictments were returned against defendant for a violation of certain food laws relating to sale of impure milk. The later statute, which was held to impliedly repeal the former one on the same subject, provides that "no person, either by his servant or agent, or as the servant or agent of another person, shall sell, exchange or deliver, or have in his custody or possession with intent to sell, exchange or deliver . . . milk produced from cows which have been fed on the refuse of distilleries." The indictments in the case under discussion charged defendant with unlawfully and knowingly having in her possession milk of the character referred to in the statute. It was contended that the law did not apply because there was no allegation that the possession was either "by his servant or agent, or as the servant or agent of another." As against the claim of the attorney-general that the act evidently meant to include possession by a principal himself as well as through his servant or agent, the court said the language was unmistakably plain and nothing could be read into it which the legislature had not seen fit to include.

TORTS. (Boycotts.) Mont. — The subject of restraining boycotts by labor organizations is again discussed in Lindsay & Co. *v.* Montana Federation of Labor, 96 Pac. Rep. 127.

The principal ground of complaint against the organization was the adoption of a resolution declaring plaintiffs unfair, and the publication and distribution of a circular urging all laboring men and persons in sympathy with organized labor to withhold patronage from plaintiffs. In this the court find nothing illegal, because plaintiffs had no property right in the trade of any particular person. They say that there can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes, by some sort of legerdemain, criminal when done by two or more persons acting in concert, and this on the theory that the concerted action amounts to a conspiracy. With such doctrine the court does not agree, and asserts that if an individual be clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. The conclusion is that a labor organization may employ the boycott in furtherance of the objects of its existence. But if the means by which it enforces the boycott are illegal, it may render its members amenable to the law; if not, the courts cannot assist the persons boycotted, though financial loss results as the direct consequence of the boycott.

THE LIGHTER SIDE

Damnum Absque Injuria? — A few years ago a man residing in Boston obtained a situation in New York City. While seeking a home for his family he visited an apartment house on the Upper East Side. Two apartments were vacant on the third floor, one on each side of the hallway. There appeared to be no difference between them and he selected the one on the right. As his household goods were to be shipped by boat and he was not certain when they would arrive he engaged the apartment from the first of the following month, a few days off. His arrangements for renting the apartment were made with the janitor. The day following his visit a plumber was engaged to make some repairs both in the apartment engaged and also in the one across the hallway. About the third day after the order was given him the plumber and his helper came and did the repairs in the latter apartment first. When the end of the day came, as they were about to quit, the plumber concealed his tools in the cupboard in this apartment and told his helper to carry their gasoline torch back to the shop as he did not care to risk its being stolen. He left before the helper did. The latter not wanting to return to the shop, it being not where he would pass it going home, concealed the torch in the oven of the kitchen range, expecting he would be first on the job in the morning, and his boss would be none the wiser. The furniture arrived that evening after they had left. So did the tenant's wife. Because of the fitting of the carpets she chose, with the janitor's consent, to occupy the apartment wherein the plumbers had been at work. The janitor knew nothing about the tools being left in the apartment. As it was late in the evening when the furniture arrived, and the tenant and his family had already eaten dinner at a restaurant, no fire was lighted in the range that evening. The next morning the family lay late in bed. A little before 8 o'clock on the said morning the plumber, who had no knowledge the night before that any tenant was expected so soon, came and found the apartment occupied and asked permission to get his tools. The helper had not yet arrived. He was granted permission, as the tools had been noticed in the cupboard. He went with his tools to the other apartment. Later on, the helper came and also asked permission to get tools. He was informed that the tools had already been obtained by another man. During the conversation with the person at the door he observed that a woman was just in the act of starting a fire in the kitchen range. Greatly excited he tried to force his way past the person whom he was addressing to get to the range. So wrought up was he, he could not make himself understood to that person and he was forced back into the hallway and the door shut in his face. The tenants were foreigners with an imperfect knowledge of the English language. A few moments later there was an explosion and the woman who made the fire was badly burned. Suit was subsequently brought against both the landlord and the plumber. As it has been finally settled and disposed of without a trial the writer would like to know who was legally responsible for the accident. — *H. W. Dilg.*

"J'Accuse." — Many so-called lawyers entertain strong prejudices against the reading of court reports for the mere entertainment which they may afford. It is even asserted that law books are nothing more than the lawyer's tools, to be displayed conspicuously, in splendid cases, about his office, for the edification of clients, and to be taken out of their repository only when an examination of them — which must always be hasty and superficial — will aid Mr. Attorney to ensnare a few paltry dollars into his poverty-stricken exchequer. If we would indulge in profitable mental recreation, there are the newspapers and magazines and reviews and periodicals, having as the very reason of existence our enlightenment and consequent amusement, but who, possessed of his right mind, would ever contemplate trying to while away an idle hour poring over a dusty, musty law report?

The idea seems to prevail, more generally among laymen, nowadays, I confess, that all legal treatises are exceedingly technical and dry; that they expound deep, abstruse legal

principles, intelligible to none except "learned counsel;" that the Court, speaking through its decisions and thereby establishing precedents as regards matters juridical, must, of necessity, couch its ponderous thoughts in the most elegant terms supplied by our good old Anglo-Saxon tongue, thus giving to the world, in every opinion rendered, a literary gem which will be recognized by future generations as a classic of our literature. In this connection, an opinion handed down, several years ago, by the late Justice Breese, one of the ablest lawyers who ever sat on the Illinois Supreme Bench, deserves special mention. Considering the illustrious name which Judge Breese made for himself as a jurist, a gentle, decorous, little laugh at his expense cannot possibly work any harm, though it may cheer some struggling, ambitious young practitioner to greater efforts; however, facts are facts and rumor has it that facts are what lawyers cry for. Certainly, this characteristic of the legal mind was fully appreciated by the Court, opinion from Breese, J., in the case of Chase v. The People, 40 Ill, 352. They tell us that some poor unfortunate, by the name of Chase, suffered terrible persecution at the hands of The People of the State of Illinois for committing a murder over in Will County and — but why not let the Court explain, in its own, inimitable way, just what happened to Brother Chase? Hear ye! Hear ye!

"The homicide was charged to have been committed on the eighteenth day of April, 1864, on one Joseph Clark.

"It appeared in evidence that, at the time of the killing, Clark was deputy warden in the penitentiary, and Taylor, one of the guard, went to the hall adjacent to the kitchen in the prison, and took therefrom four convicts, of whom the prisoner was one, and locked them in the cell house. The deceased then unlocked a cupboard containing handcuffs, the guard took a pair, and went to the cell door where the prisoner was, and told the prisoner deceased wanted to see him. The prisoner stepped out and asked to see the chaplain, when deceased replied, the chaplain was not there. The prisoner then threw a stone which struck deceased on the left side of his head. The deceased had a revolver. The prisoner clenched deceased, who threw his pistol from him, calling to the guard to get it. The prisoner got the revolver first, and shot at deceased. He fired it five times. Deceased then got the pistol and placing it at prisoner's head, fired. Prisoner threw up his arms, exclaiming 'you've murdered me.' The guard then handcuffed him." — It need only be explained, in conclusion, that this case "went up" to the reviewing tribunal by a process called writ of error. — *C. R. S.*

The Whistle Blew. — A noted Iowa wit and orator having a case in court involving Union Labor where it had been intimated during the case that nothing could now be done on account of Union Labor and that whenever the whistle blew, the men would be all off their work and drop a brick to the pavement instead of putting it in place on the building. To counteract this accusation, the lawyer replied in a very eloquent address as follows: — "To stop work when the whistle blows reminds me of a story in my native town, through which runs a very wide and deep river. Two Swedes were walking along a bridge when one happened to fall off into the water. Ole knew that Hans could swim in the old country, and he was not at all excited, and as soon as he had gone down, he came up and commenced to swim to shore all right. Before he got ashore the whistle blew and my friend Ole, belonging to a Labor Union, being so accustomed to stop when the whistle blew, that he even stopped swimming and sank to the bottom without even attempting to make a move to save himself. The whistle to him had become a sort of a reflex action, and either on work or off work it made no difference; his nervous system refused to call his muscles into play, even at the risk of saving his own life."

Judicial Dignity. — A gentleman member of the Iowa bar, who even in a prohibition state is inclined to take a drop for his stomach's sake, dropped into a town one day where the mulct law is operated and took a drink or two, and from that time he knew but very little. At about seven o'clock in the evening the man about a feed barn ordered to close up and the hostler found a stranger covered up in the hay mow. He pulled at him, told him to get up, but no use, so he turned a hose on him and gave him a good ducking. The cold water coming in

contact the sleeper's body on a hot day wakened him up, and he arose with all the dignity of a judge, dressed in a Prince Albert coat, a white shirt, a standing up collar of the old kind, with timothy seed sticking to him closer than bees to a bungle hole in the fall of the year, and he said with all his power of speech as though he was addressing a jury in a criminal case, " Sir, I came into this place a gentleman, I am a gentleman, and now I go out of here like a blamed old raggety fool."

" I shall most certainly bring an action for damages against this establishment for such an ill treatment of the first gentleman in this county."

The hostler when he saw the straight, well-dressed gentleman covered from head to foot with straw and chaff, and listening to the irate speech of the sobered jurist, took to his heels and never returned to the establishment again, believing in his heart that by the use of a hose on a well dressed gentleman, he had ruined the establishment, and bankrupted his employer. — *B. L. Wick.*

Common Law Marriage. — In one of the first cases on record in English courts, the question arose whether or not the child of a deceased Quaker could inherit property, the father having been married according to the order of Quakers then in force. The case was brought in the Court of Assizes in Nottingham in 1661, Judge Archer presiding. There being a jury, Judge Archer argued as follows: " Summing up the case, there was a marriage in Paradise when Adam took Eve and Eve took Adam, and it was the consent of the parties that made a marriage." And for the Quakers, he added: " he did not know their opinions, but he did not believe that they went together as brute beasts, as had been said of them, but as Christians, and therefore he did believe the marriage was lawful, and the child of such union was a lawful heir to the estate of his father and not a bastard."

It is also stated further that to satisfy the jury more fully he adduced a case in point, where a marriage performed by the simple declaration of the parties before witnesses that they took each other to be husband and wife had been questioned, but its validity and lawfulness had been affirmed by the Bishops as well as Judges.

Up to this time much trouble had arisen in the Society regarding the marriage of members of this denomination outside of the Church of England, and when questions arose as to property rights and as to the legal standing of the parties, these questions were decided one time for all time, for Judge Archer and a jury satisfied forever the mooted question of the methods of marriage, and that the church could not claim, that although a marriage was contrary to law in some respects, that it was no marriage or that the marriage was invalid. — *See Journal of Friends Historical Society.* (Vol. iii, July, 1908.) *B. L. W.*

Anecdotes of Allison.— The late Senator Allison of Iowa was for many years in active law practice at Dubuque, Iowa, and although not an orator or a jury man, he was generally a very safe counsellor. He was so careful in uttering opinions frequently that he did err on the wrong side if at all. It was told that Senator Allison would never give anyone an affirmative reply. At one time they asked him, having driven out in the country, as to the color of certain sheep he had seen on the road way, and by putting this question to him, they thought there could be no two answers.

They asked the Senator on return whether the flock was white or black, and he replied by saying, " They appeared white from where I was standing." At another time Senator Allison had helped to appoint one of his friends to be postmaster of his home town in Iowa, and a number of the friends of both were sitting in a Dubuque office awaiting the announcement when the Senator came in, already knowing who was to have the coveted place. The friends talked about the qualifications of the would-be postmaster, and said he was a good fellow, and fully competent for the place. The Senator smiled and said, " I think the would-be postmaster will fully agree with you in what has been said in regard to his qualifications."

At another time, Senator Allison was telling a number of friends about an experience he had in Germany where a dude had pulled up a window and was smoking a cigar in an apartment of Senator Allison and his wife, who was an invalid. The wife complained about the cold draft, and still the big German sat there

smoking his cigar, minding nothing. This was too much for the peace loving Senator, and he stepped up in front of the irate occupant and pulled the window down, and intimated in strong English that he expected him to have it remain there. The friends, after hearing the story, asked the Senator how he dared to do that in a foreign country, and shock the sensibility of a citizen of such a country. The Senator replied, saying, "I had thought all that out, and stood ready in case he offered me any further insult to pull the nothbremse, and test my rights under German law right there."

No Arguments Left. — "Have you," asked the judge of a recently convicted man, "anything to offer the court before sentence is passed?"

"No, your honor," replied the prisoner, "my lawyer took my last cent." — *Stray Stories.*

A MODERN WISE MAN.

There was a man in our town
  And he was wondrous wise,
He bought a busted traction line
  And boomed it to the skies.
And when he pushed it double par
  He sold it out, and then
He hammered it into the ground
  And bought it back again.
He played the game for years and years,
  Till he was wearied quite,
For though it knew it had to lose
  The crowd would always bite.
At last he bought another line
  And quickly merged the two,
He turned his hose upon the stock
  And soaked it through and through.
The crowd that made a rush for that
  You couldn't see for dust;
He loaded it and sat around
  To see the thing "go bust;"
And when it did he volunteered
  To help reorganize;
In payment he received a block
  Of stock of goodly size,
The game of boom and sell it out
  And watch its certain fall,
Then buy it back, he played until
  Once more he owned it all.

All this was many years ago,
  But you can safely bet
That if his health is fairly good
  He plays the old game yet.

Justice.— A lawyer once asked a man who had at various times sat on several juries, "Who influenced you most — the lawyers, the witnesses, or the judge?" He expected to get some useful and interesting information from so inexperienced a juryman. This was the man's reply: "I'll tell yer, sir, 'ow I makes up my mind. I'm a plain man, and a reasoning man, and I ain't influenced by anything the lawyers say, nor by what the witnesses say, no, nor by what the judge says. I just looks at the man in the docks and I says, 'If he ain't done nothing, why's he there?' And I brings 'em all in guilty." — *Christian Register.*

Who Came Out Ahead? — Judge Longworth, of Cincinnati, the father of Nicholas Longworth, was very fond of talking with the "sons of toil." While driving through Eden Park one day in his dog-cart, Judge Longworth stopped a plodding laborer and asked him if he wanted a lift. The Irishman accepted, and once in the cart, the Judge said:

"Well, Pat, you'd be a long time in Ireland before you would be driving with a judge."

"Yes, sir," replied the Judge's guest. "And you'd be manny a day in Ireland before they'd make ye a judge."

One Way. — A story, said to be characteristic is told of an Arkansas judge. It seems that when he convened court at one of the towns on his circuit it was found that no pens, ink, or paper had been provided, and, upon inquiry, it developed that no county funds were available for this purpose. The judge expressed himself somewhat forcefully, then drew some money from his own pocket. He was about to hand this to the clerk, when a visiting lawyer, a high-priced, imported article, brought on to defend a case of some importance spoke up, in an aside plainly audible over the room.

"Well," he remarked, with infinite contempt, "I've seen some pretty bad courts, but this — well, this is the limit!"

The old judge flushed darkly.

"You are fined $25 for contempt, sir! Hand the money to the clerk!" he said; and when the pompous visitor had humbly complied, he continued:

"Now, Mr. Clerk, go out and get what pens, ink, and paper the Court may require, and if there is anything left over, you can give the gentleman his change."

Gold Defended Silver on Charge of Stealing Brass. — A trial, unique in its nature, was held before Justice of the Peace Moyer last Tuesday. A man whose name is Silver, with others, was charged with the larceny of a lot of brass which it was claimed belonged to the Southern Railway Company. Mr. Silver was represented in the trial by Attorney Thomas J. Gold of High Point. In other words, Silver was defended by Gold for stealing brass. This would be called by metallic experts as trymetalism. There was not sufficient evidence to hold him and Silver was made "free."

The Legal Mind in Politics. — The recent discussion in Parliament on the King's visit to Russia furnished a striking exemplification of the workings of the legal mind in dealing with political questions. Mr. Keir Hardie, having bluntly charged the Czar and his Ministers with responsibility for the recent atrocities in Russia, was threatened with suspension by the Deputy-Speaker if he did not withdraw the offensive words. The Prime Minister intervened with the suggestion that it was not out of order "to describe a particular set of facts compendiously as atrocities or atrocious or a series of crimes or what we hold to be a series of crimes," and the only point being whether in describing the direct responsibility of a foreign government he should apply the term "atrocious" or "atrocities," the honorable member might reasonably respond to the appeal to withdraw "and distinguish between the two things." The honorable member availed himself of the lawyer-like suggestion, and the debate was allowed to proceed. Mr. Asquith's refinement on "atrocious or atrocities" recalls the classical instance recorded in Busch's Diary of a distinction made by his hero, Bismarck, in his law-student days at the university, which saved the future Chancellor from something worse than suspension. "I remember," said Bismarck, "at Gottingen I once called a student a 'dummer Junge' (silly youngster) — the recognised form of offense when it is intended to provoke to a duel. On his sending me his challenge, I said I had not wished to offend him by the remark that he was a silly youngster, but merely to express my conviction." The legal habit of drawing fine distinctions is worth a great deal, after all, in the rough-and-tumble of practical life and politics.

Staggered Webster. — In the somewhat famous case of Mrs. Bodgen's will, which was tried in the Massachusetts Supreme Court many years ago, Daniel Webster appeared as counselor for the appellant. Mrs. Greenough, wife of the Rev. William Greenough of West Newton, was a very self-possessed witness. Notwithstanding Mr. Webster's repeated efforts to disconcert her she pursued the even tenor of her way until Webster, becoming quite fearful of the result, arose, apparently in great agitation, and, drawing out his large snuffbox, thrust his thumb and finger to the very bottom and, carrying a deep pinch to both nostrils, drew it up with gusto, and then, extracting from his pocket a very large handkerchief, he blew his nose with a report that rang distinct and loud through the crowded hall.

He then asked, "Mrs. Greenough, was Mrs. Bodgen a neat woman?"

"I cannot give you full information as to that, sir. She had one very dirty trick," replied the witness.

"What was that, madam?"

"She took snuff."

His Antecedents. — While Lawyer W. H. Lewis was trying a case in one of the sessions of the Superior Court the other day, he called to the stand as a witness a negro of the purest ebony hue. The opposing counsel questioned this witness sharply on the cross-examination, winding up with: —

"Where do you live now?"

"At the house of correction."

"What are you there for?"

"Assaulting a man."

"I am trying," said counsel to Lewis, "to establish this man's antecedents."

"Go ahead," said Lewis, "when you get through, I'll establish his antecedents, too."

When the lawyer had finished his cross-examination Lewis asked: —

"Where were you born?"

"In Ireland."

"Where in Ireland?"

"In Dublin."

"Where in Dublin?"

"On Chapel street, between Coffin and Cradle."

"So you are an Irishman, are you?"

"Yes, sir?"

BU$INE$$ MANAGER'$ $ONG.

How dear to my heart
I$ the ca$h of ubcription,
When the generou$ ubcriber
Preent it to view;
But the one who won't pay
I refrain from de$cription,
For that one, gentle reader,
That one may be you. — *Ex.*

Ladylike. — "You say you acted like a perfect lady throughout?"

"Sure, yer honor; when he tips his hat to me and me not knowin' him, I ups with a rock an' caves in his face." — *Houston Post.*

Cheap Sentiment. — *Mrs. Dewtell.* I do think Mr. Hankinson is the meanest man I ever heard of, without exception.

Mrs. Jenkins. "Why, what's he been doing?"

Mrs. Dewtell. "Sued a man for alienation of his wife's affections and set the damages at only $10." —*Judge.*

Too Long. — *Judge* (to prisoner). "We are now going to read you a list of your former convictions."

Prisoner. "In that case, perhaps your lordship will allow me to sit down." *Saturday Evening Post.*

A Cause for Thanks.— "Ah, my dear Mr. Briefless," said Mr. Hardcash, seizing the young barrister's hand and shaking it warmly, "I am so immensely obliged to you. That case the other day, you know — I won it."

"Thanks," replied Briefless, "but did I represent you?"

"No, my dear fellow," replied Hardcash; "you represented the other man." — *Home Herald.*

TO A LADY LAWYER.

A Declaration.

Now comes the plaintiff in his suit,
And says that heretofore,
To wit: at divers dates and times —
(Of which he is not sure),
He did possess, to wit: he had,
A fine large heart (a copy
Of which is hereunto annexed),
The color of a poppy;
Said heart, hereinbefore described,
Defendant has converted,
And plaintiff has been damnified.
To wit: he has been hurted.

The Answer.

Now comes defendant in response
To plaintiff's declaration,
And says that if the plaintiff prove
Aforesaid allegation,
Then she avers said heart is held
By her in rightful pledge,
To wit: she is bailee of same;
And further doth allege
Said bailment to be duly made
For good consideration,
To wit: *her* heart; which plaintiff has
By fair hypothecation. — *M. L. Church.*

Another High-paid Author. — "Wunst I got a dollar a word."

"G'wan!"

"Fact. For talking back to a judge. — *Louisville Courier-Journal.*

Willing to Oblige. — Several years ago an affray in a western mining town resulted in murder; but Senator Thurston of Nebraska, believing the man who was accused to have had innocent intention, took up his case and had the punishment lightened. Six months afterward a man, armed to the teeth, appeared in the Senator's office.

"Are you Squire Thurston?" he roared.

"Yes," said the Senator.

"And are you the fellow that helped Jack Hurley at court?"

The Senator, thinking that his time had come, again said "Yes."

"Well," said the man with the guns and bowie knives, "I'm Hurley's pardner, an' I've come to pay you. I haven't any money, but

I'm a man of honor. Anybody in town you don't like? "

The Senator assured him that there was not; but the man looked incredulous and said, " Put on your hat, Squire, and take a walk down the street with me. See anybody you don't like, just throw up your thumb, an' I'll pop him." — *The Bar.*

Dead as She Ever Will Be. — An Ohio lawyer tells of a client of his — a German farmer, a hard-working, plain, blunt man who lost his wife not long ago. The lawyer had sought him out to express his sympathy; but to his consternation the Teuton laconically observed:

" But I am again married."

" You don't tell me! " exclaimed the legal light. " Why, it has been but a week or two since you buried your wife! "

" Dot's so, my frent; but she is as dead as effer she vill be."

Economy of the Unwritten Law. — " I thought your son was going in a lawyer's office to study? "

" No; he has decided to practice the Unwritten Law; it is the least expensive course."

Hungary Justice. — An Englishman was travelling in a wild part of Hungary, and made an application to a town magistrate, asking to hear how justice was conducted.

The magistrate, gorgeous in a magnificent Magyar costume, received him cordially, and sent for any case which might be awaiting trial. A gigantic gendarme in an immense cocked hat ushered in a prisoner, a plaintiff, and a witness. The prisoner was accused of stealing the plaintiff's goose.

" Well, sir," said the magistrate to the accuser, " what have you to say? "

" Please, your high mightiness, the prisoner stole my goose."

The magistrate turned to the witness.

" What have you to say? "

" Please, your high mightiness, I saw the prisoner steal the goose."

The magistrate then delivered the sentence.

" I give you a fortnight in prison," he said to the accused " for stealing the goose." To the plaintiff he said, " I give you a fortnight in prison for not looking after your goose," and turning to the witness, " You shall have a fortnight in prison for not minding your own business." — *Ohio Law Bulletin.*

Comity in Justice 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."

The Drama of the Law. — " C'est toute la tragédie, toute la comédie humaine que met en scène sous nos yeux l'histoire de nos lois." This motto, fitly chosen by Maitland for his edition of the Year-books, is well exemplified in the posthumous volume of the great legal historian's work which has just been issued by the Selden Society. Here we have, indeed, all the tragedy and all the comedy of life displayed before our eyes, and much of the moving interest which attends the unfolding of the drama. There is, for instance, the typical case of *Gyse v. Baudewyn*, brought by an outraged husband for the recovery of his wife pursuant to the provision of the Statute of Westminster II. — an enactment which reflects the lawless spirit pervading society after the Baron's war which struck at the very heart of domestic life. It sounds odd, though, to find the defendant pleading that " the statute gives a suit to the husband only in respect of the chattels taken with his wife . . . and we came to such a place, and there found her dressed in the clothes that we had given her, and she followed us." Then there is the action for trespass, *Petstede v. Marreys*, brought by a lady to whom the third part of the beasts in a park had been assigned in dower by A, who afterwards came " with force and arms " and took and carried away the third part belonging to her dower, and the overruling of the attempt to abate the writ, on

the ground that damages could not be recovered for a chattel held in common and not severed, with the judgment of the Chief Justice (Brabazon) that "the demandant is seised of the third part of the profit through and through (*parmi et partout*), and can be aided by no other writ than this." Notable, too, as showing the independence of the Bench even in those days, was the outburst of another Chief Justice (Beresford) against the Bishop of Hereford, who, having been attached to answer a plea for the taking of the plaintiff's beasts upon his lands, which had been released to him by the bishop's predecessor, with the assent of the Chapter, avowed that he was not bound by the release, whereupon the judge said: "It is a dishonorable thing for an honest man to demand that which his predecessor released. . . . The men of Holy Church have a wonderful way! If they get a foot on to a man's land, they will have their whole body there. For the love of God, the bishop is a shrewd fellow!" They had a short way with juries, too, even in civil cases, for in a writ of entry *sur desseisin*, where issue was joined and the jury could not agree, the judge (one Hervey of Staunton, who, by the way, was a clerk in holy orders) said: "Good people, you cannot agree?" and (to John Allan, his marshal), "Go and put them in a house until Monday, and let them not eat or drink." The perils of the professional man were considerable also in those times, for in *Brothe v. Tallard* we find the same judge on a wife's writ of dower against C, who came into court by attorney, addressing the man of law thus: "Fair friend, have you sued a writ?" and on the attorney saying that he had but had delivered the bill which witnessed it to his client and praying a *postea*, Staunton, J., broke out thus: "You wicked rascal, you shall not have it! But because to delay the woman from her dower, you have vouched and have not sued a writ to summon your warrantor, this Court awards that you go to prison. . . . We will have no *mainprise*, but stay in gaol till you are well chastised." These are from the records of just six hundred years ago, but they seem to find echoes in our courts even at the present day. — *The Law Journal.*

Breaking the Liquor Traffic. — The following actual occurrence on one of our western railroads was sent us by the General Solicitor of its rival:

"A general superindent of a certain western railroad wrote his state solicitor that he believed shipments of liquor were being handled as baggage at certain stations in that prohibition state and asked how he could handle to break up the practice. The solicitor answered, "Handle as you do other baggage."

Faith in Confessions. — "Why did George Washington own up to chopping the cherry tree?"

"Perhaps," replied the western lawyer, "his judicial mind enabled him to foresee the reluctance that has been developed about putting any faith in confessions."

Where He was Hurt. — The prosecuting witness in the damage suit against the city was giving in his testimony.

"Now, then, Mr. Bleedem," said his lawyer, "you will please tell the jury where you were injured."

"On my knee, in my feelings, and right in front of the city hall," rapidly answered the witness, fearing an objection on the part of the other attorney.

Vol. XX, No. 12 DECEMBER, 1908

THE GREEN BAG

A MONTHLY ILLUSTRATED MAGAZINE COVERING THE HIGHER AND THE LIGHTER LITERATURE PERTAINING TO THE LAW

S. R. WRIGHTINGTON: Editor
WALTER F. WYMAN: Manager

CONTENTS

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LIBERIAN LAW REPORTS, Vol. I.

We are now putting through the press, and will very shortly have ready the first volume of the decisions of the Supreme Court of the Republic of Liberia.

These reports cover a period from 1861 to 1907. They were prepared for the press by Mr. Justice Dossen, under authority of the Legislature of Liberia.

The Legislature of Liberia early enacted that "such parts of the common law set forth in Blackstone's Commentaries as may be applicable to the situation of the people, except as changed by the laws now in force, and such as may be hereafter enacted, shall be the civil code of laws of the Republic." In 1860, this was amended to read that Blackstone's Commentaries as revised and modified by Chitty or Wendell, and the works referred to as the sources of the municipal or common law in the first volume of Kent's Commentaries should be the civil and criminal code of laws.

It must be remembered that Liberia is a negro republic and that its bench and bar had access to but few books. In this volume there are but five citations to outside reports, and none to the decisions of its own Supreme Court prior to 1875. There are numerous citations to Bouvier's Law Dictionary. In fact, the court seems to rely on that to solve the questions presented to it.

This volume of reports possesses value and interest as illustrating the spread of the common law into the Dark Continent. The court shows considerable ingenuity in applying the doctrines of the old writers to the peculiar conditions existing in Africa.

As only a very small edition will be printed, it would be well to place orders with us without delay.

The price of Liberian Law Reports, Vol. 1, is $15.00.

FRENCH CIVIL CODE IN ENGLISH.

We have just received **The French Civil Code,** as amended up to 1906, translated into English, with notes explanatory and historical, and comparative references to English law, by Hon. E. Blackwood Wright. (Cloth, 1908, $6.50.)

To quote from the preface: —

"This work is an attempt to make the Code Napoléon comprehensible to English officials who are not of French origin. It is the result of three years' work while Chief Justice of Seychelles. I hope it may assist my fellow countrymen in avoiding some of the pitfalls that an Englishman might fall into, owing to the nature of the language used in the Code, which is at times technical and at others popular.

"This translation is, I believe, the first made by a person more familiar with English than French law, if I may judge from the internal evidence contained in previous translations. It is the only translation which gives the Code as amended up to date, and containing notes from the works of the leading French commentators, and which are explanatory of French legal terms. Occasionally I have been tempted to make comparisons between English and French law."

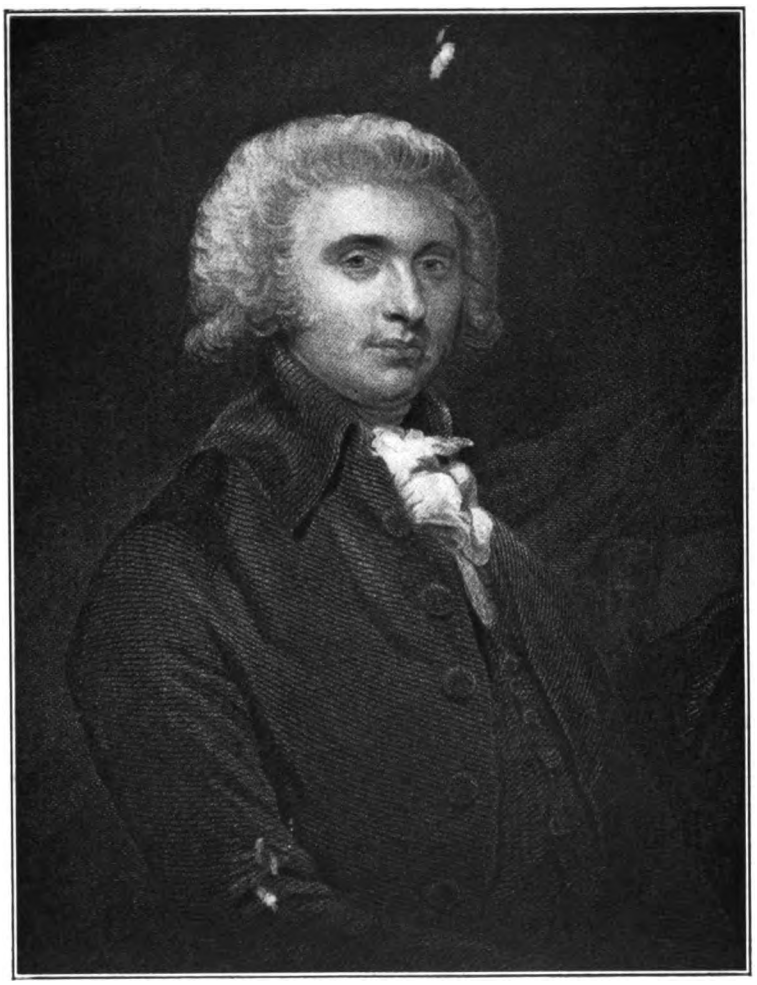
Our Contributors.

HON. EMORY SPEER was born in Culloden, Georgia, in 1848, and graduated from the University of Georgia in 1869. In the same year he was admitted to the bar. He has served as Solicitor-General of Georgia and as United States District Attorney and was twice elected to Congress. Since 1885 he has been United States District Judge for the Southern District of Georgia. The address on Lord Erskine was delivered by him at the banquet of the American Bar Association at Seattle last August.

HON. CHARLES E. LITTLEFIELD was born in Lebanon, Maine, in 1851. He practiced in Rockland from 1876, also serving in the Maine Legislature and as Attorney-General of the State. Since 1899 he has attained national prominence as a member of Congress. He recently declined re-election and has entered upon practice in New York City with his son under the firm name of Littlefield & Littlefield. The paper which we publish in this number was delivered before the Illinois State Bar Association last summer.

JOHN KING, K. C., is senior member of the firm of King & Sinclair in Toronto, Canada. He is the author of King on Defamation and has previously contributed to our pages.

ARTHUR W. BLAKEMORE is a graduate of Harvard College and Harvard Law School in practice in Boston. He is the author of several text-books, but has not before published any studies in the law relating to Trade Unions. The recent decision of the Supreme Court of Massachusetts which he discusses in this number is one which will command general attention.



THOMAS LORD ERSKINE

The Green Bag

Vol. XX. No. 12 BOSTON December, 1908

THE FORENSIC ELOQUENCE OF THOMAS LORD ERSKINE

By Emory Speer, LL. D.

THE invincible D'Artagnan, Dumas' hero whom Thackeray declared the most fascinating of all characters in fiction, is made to exclaim, "The times are always good when we are young." Retrospective contemplation may therefore be too optimistic of the past and too pessimistic of the present. The poet has said in substance, "Memory stands side-ways, half covered with flowers, and betrays every rose, but secretes every thorn."

It is perhaps ascribable to this delusive attribute of memory that I have fallen into the possibly erroneous conclusion that we do not hear the fascinating, persuasive, melodious oratory in the courts which our fathers, and some of us in our youth, heard with instruction and exceeding delight. Let each ripe member of this body (and none of us are overripe) reflect upon the advocacy of the great lawyers who, in his own state, charmed his young manhood, and then determine if a word in season may not be said to our young brothers not yet ripe — brothers who may yet with safety "tarry in Jericho until their beards be grown" and who are to maintain the noblesse of the robe in the generation we may not know. May we not urge upon them the study of that "Power above power of Heavenly Eloquence, that with the strong rein of commanding words doth master, sway, and move the eminence of men's affections."

It is said by the historian Hume that he who would teach eloquence must do it chiefly by example. The brevity essential to this occasion compels me to restrict my suggestions to one example, — to that illustrious member of the English bar who yet maintains leadership in the noble profession of advocacy. "As an advocate in the forum," said Lord Campbell, "I hold him to be without an equal in ancient or modern times. He had no less power with the court than with the jury." I mean the Right Honorable Thomas Lord Erskine, Lord Chancellor.

A complete life of this master of forensic eloquence has not yet been written. In this neglect he has shared, it is true, the common fate of many eminent lawyers, the best and greatest of whom, Nottingham, Somers and many in our own land, have failed to obtain a faithful or enthusiastic chronicler. His ancestors for four hundred years had performed the highest duties of the subject, but his father, Henry David Erskine, Earl of Buc-an, had an income no greater than two hundred pounds a year. It followed that the future leader of the English Bar could not be regularly trained for either of the learned professions. He received the rudiments of classical education at the High School of Edinburgh and the University of St. Andrews. In 1764 he went to see as a Midshipman in a ship commanded by a nephew of Lord Mansfield, then Chief Justice of England.

His ship having been paid off, at the age of eighteen Erskine obtained a commission as Ensign in the "Royals" or First Regiment of Foot. Two years later, he committed what some have termed an act of

improvidence, but which the better informed ever regard as a felicitous consummation, essential to the development of genius. He married a young woman of good family, but of no fortune. It seems essential to rapid and continuous movement toward eminence at the Bar, that the young lawyer, like the terrapin, "must have a coal of fire on his back." I use this figure of speech to typify merely the ardent and stimulating effect of judicious matrimony, and, of course, exclude altogether the incinerating or scarifying thought the mind of malevolence might suggest. His wife having died just before he attained the Lord Chancellorship, he recorded on her tombstone that she was the most faithful and most affectionate of women. Later in life he remarried, and this time a Miss Sarah Buck, who, as her maiden name might import, was not altogether so manageable (?) To this infelicitous alliance Sheridan applied the lines of Dryden,

> "When men like Erskine go astray,
> The stars are more at fault than they."

While stationed at Minorca, in affectionate association with the wife of his youth, he entered on the systematic study of English literature. It is probable that no two years were ever better spent toward enhancing native gifts of eloquence. He read largely in prose, but, said Lord Brougham, "he was more familiar with Shakespeare than almost any man of his age, and Milton he had nearly by heart. The works of Dryden and Pope were read and committed to memory, with the avidity of a refined and well-formed taste."

It may be interesting to recall that my honored predecessor in the station I hold, Judge John Erskine, was of the same family of the great advocate of whom we speak. In early manhood he too had been a sailor, and had spent several years before the mast. When he first held court at Savannah, where then, as now, certain member of the Bar, at intervals, are concerned with questions of Admiralty, the proctors in a particular case attempted to elucidate to the new Judge the rigging and tackle of a ship. He listened patiently and deferentially, while, with much detail, they explained all about the masts, the running rigging, etc. Finally they proposed a short recess, and the old sailor quietly remarked, "Gentlemen, I presume you will retire to 'splice the mainbrace'; "Be quite sure that you do not 'bowse the jib.'" I perceive that the Admiralty, as contended yesterday by our eminent brother from New Orleans, Mr Farrar, has so extended its jurisdiction that these expressions, at least, are not wholly misunderstood.

It is said by some that mere accident directed Erskine's attention to the Bar. He had been in the army about six years. Stationed in a country town, where the Assizes were being held, he strolled into court one day and Lord Mansfield, who presided, observing his uniform, asked his name. Finding that he was the boy whom he had ten years before assisted in going to sea, the young officer was at once invited to a seat on the Bench. His Lordship stated the principal points of the case on trial. Erskine listened with the liveliest interest. The counsel were veterans, but it occurred to him how much more clearly and forcibly he could have presented certain points, and urged them on the minds of the jury. Lord Mansfield invited him to dinner and was delighted with his charming conversation. Erskine, at the close of the evening, trembling with commingled apprehension and hope, asked the famous jurist the momentous question, "Is it impossible for me to become a lawyer?" The Chief Justice did not wholly discourage him. His mother, who was a woman of strong character, eagerly encouraged his elevated ambition. After two years of study, in July, 1778, when 28 years of age, he was admitted to that profession, of

which almost instantly he was to become the most distinguished ornament. Erskine was doubtless excited to this daring by the success of a brother, Henry, or "Harry" Erskine, as he was called, who had for some years been the brightest and wittiest member of the Scottish Bar. Of the latter I have somewhere read this anecdote: A maiden lady, of an uncertain age, of the name of Tickell, had brought suit against Donald and McLean. Henry Erskine appeared for the autumnal virgin. "Who are the parties in this case, Mr. Erskine?" inquired the crusty old Scotch Judge. Reversing the order for the sake of the joke, Erskine brightly replied, "Donald and McLean, the defendants, Tickell, the plaintiff, my Lord." Roars of laughter followed, when the Judge said, "Tickle her yourself, Harry, ye can do it as well as I." This was a ticklish case and obviously must not be regarded as a precedent by the younger members of this association.

Thomas Erskine was soon to be at the end of his difficulties and privations. "I had scarcely a shilling in my pocket," he said, "when I got my first retainer." "It was sent me by Captain Baillie of the Navy, who held an office at the Board of Greenwich Hospital, and I was to make answer in the Michaelmas Term, to an order calling on him to show cause why a criminal information for a libel, reflecting on Lord Sandwich's conduct as Governor in that charity, should not be filed against him. I had met during the long vacation this Captain Baillie at a friend's table, and after dinner, I expressed myself with some warmth, probably with some eloquence, on the corruption of Lord Sandwich as First Lord of the Admiralty, and then adverted to the scandalous practices imputed to him with regard to Greenwich Hospital. Baillie nudged the person who sat next to him and asked who I was. Being told that I had just been called to the bar, and had been formerly in the Navy, Baillie exclaimed with an oath, 'Then I'll have him for my counsel!' I trudged down to Westminster Hall when I got the brief, and being the junior of five, who would be heard before me, never dreamt that the court would hear me at all. The argument came on. Hargrave, who led, was unwell. Lord Mansfield said that the remaining counsel should be heard the next morning . . . I had the whole night to arrange, in my chambers, what I had to say." Another account states that "the next morning the court was crowded and the Solicitor General was expected to speak in support of the rule, and just as Lord Mansfield was about to call upon him to proceed, Erskine arose, unknown to every individual in the room, except His Lordship, and said in a mild but firm tone, 'My Lord, I am also of counsel for the author of this supposed libel and when a British subject is brought before a court of justice only for having ventured to attack abuses which owe their continuance to the danger of attacking them, . . . I cannot relinquish the privilege of doing justice to such merit, I will not give up even my share of the honor of repelling and exposing so odious a prosecution." The whole audience was hushed into a pin-fall silence. After an argument of amazing eloquence he concluded: "If he keeps this injured man suspended, or dares to turn that suspension into a removal, I shall then not scruple to declare him a shameless oppressor, a disgrace to his rank and a traitor to his trust. . . . Fine and imprisonment! The man deserves a palace instead of a prison who prevents the palace, built by the public bounty of his country, from being converted into a dungeon, and who sacrifices his own security to the interests of humanity and virtue." It is not surprising that Lord Campbell should have pronounced this "the most wonderful forensic effort which we have in our annals." The decision was for Erskine's client. The rule was dismissed with costs. It is probably true that never did a single speech so completely insure professional success.

Some one asked Erskine later in life how he dared to face Lord Mansfield when he was clearly of a different way. He beautifully replied, "I thought of my children as plucking me by the robe and saying, 'Now, father, is the time to get us bread!'" His business went on rapidly increasing until he had an income of £12,000 ($60,000) a year.

In maintaining the rights of juries in the great case of the Dean of St. Asaph, to which our learned and great-hearted President, Mr. Lehman, alluded a few evenings ago, Lord Campbell declares that Erskine's addresses to the court, in moving, and afterwards in supporting his rule, display beyond all comparison the most perfect union of argument and eloquence ever exhibited in Westminster Hall.

Of his speech in defense of Stockdale, said the *Edinburgh Review*: "Whether we regard the wonderful skill with which the argument is conducted — the soundness of his principles laid down, and their happy application to the case — the exquisite fancy with which they are embellished and illustrated — or the powerful and touching language in which they are conveyed, it is justly regarded by all English lawyers as a consummate specimen of the art of addressing a jury."

Erskine made few mistakes in the conduct of his cause. Never would he have committed the blunder of Lord Denmam, when, after his magnificent defense of the chastity of Queen Caroline against the cruel persecution of her husband, George the Fourth, in the last sentence he implored for her the compassion accorded by the Saviour to Magdalen. That he had his detractors, is true. "He wins no friends, who wins no foes." "Woe unto you," saith the Scripture, "when all men speak well of you."

In that class of cases, — alas, too frequent then as now, — in which the cruel and unprincipled rive the bond of matrimony, lay waste the happiness of homes, and drive hope from faithful hearts, his indignant eloquence wrung from the jurors of England damages in the most astonishing punitive amounts. Holding that the rights he sought to vindicate were incalculably more valuable than all property, and that no adequate return in money could be made, he was constantly awarded verdicts in pounds sterling, amounting to twenty-five, forty, and even fifty thousand dollars. In such cases, scenes of domestic endearment and felicity, which had been blotted from existence, were described with the utmost delicacy and tenderness, and with the most fiery indignation was his invective directed upon those who had ruthlessly invaded and destroyed them. In the case of Dunning *v.* Sir Thomas Turton, where a loving husband was the victim, Erskine depicted the emotions of the agonized soul in colors which will endure forever. He pronounced the passage from Othello with all the thrilling and winning effect of his musical accents: "But oh, what damned minutes tells he o'er, — who dotes, yet doubts, suspects, yet fondly loves." And continuing, he exclaimed: "When suspicion is realized into certainty, and his dishonor is placed beyond the reach of doubt, despair assumes her dominion over the afflicted man," and well might he exclaim from the same page: —

> "Had it pleased Heaven
> To try me with affliction; had He rain'd
> All kinds of sores and shames on my bare head;
> Steeped me in poverty to the very lips;
> Given to captivity me and my utmost hopes; —
> I should have found in some place in my soul
> A drop of patience. But alas! — "

He stopped, and the effect in sympathetic tears was visible in every eye in court. Nor was his recourse to that unfailing treasury of the orator inspired, the sacred Scriptures, one whit less felicitous. "It is not an enemy that hath done me this dishonor, for then I could have borne it. Neither was it mine adversary that did magnify himself against me; for then, per-

adventure, I would have hid myself from him; but it was even thou, my companion, my guide, mine own familiar friend."

It may be well for those who aspire to high rank in advocacy to reflect that Erskine, who ordinarily spoke extemporaneously, wrote down word for word the rhythmical passages of most of his famous speeches. It is true, ever true, that no pronounced and permanent effect is made upon the minds of men by public speech save as the result of much thinking or generally much careful writing. Cicero declared that he who will undertake to instruct a public audience without first instructing himself is guilty of impudence. After Sheridan's death, from his commonplace books it was discovered that those marvelous witticisms which had convulsed his contemporaries, and many of which yet survive, had been carefully considered, written out, rewritten, and rearranged, so that at the proper time they might produce the most charming appearance of original and spontaneous humor. Lord Bacon declared that "Reading maketh a full man; conference, a ready man; and writing, an accurate man." It is true that there are a few men with such amazing powers of self-concentration that they can think out almost verbatim the discourses with which they will subsequently arouse, charm, persuade, or convince. Such an orator was our Ben Hill of Georgia. In my college days I have seen him sit for hours in rapt contemplation, utterly oblivious of the conversation of his family and the varied sounds of the household. In a few days, perhaps the next day, the result of this concentrated thought would appear in a powerful discourse before some great popular assembly trembling for the safety of all that men hold dear, in a lucid but unanswerable argument on some intricate legal topic involving thousands, in one of those irresistible appeals to a jury in which he was scarcely surpassed by Erskine himself, or in those Notes on the Situation, written for an agonized people, which imperiously demanded that they should "call their ancient thoughts from banishment." The late Associate Justice L. Q. C. Lamar whose oration on Sumner will never be forgotten, once told me that it was his custom to think out with precise verbal accuracy the speech he designed to make, and then to write it out precisely as he had thought it out. The task would seem impossible, but no man could question the intellectual honesty or fidelity of that great son of Georgia.

But I may not detain you. I have said enough — perhaps more than enough — to indicate where you may find deep waters of "the well of English undefiled."

Well may we paraphrase the rare and ancient verse:

> "Some strains of eloquence, which hung
> In ancient times on Tully's tongue;
> But which, conceal'd and lost, had lain,
> Till Erskine found them out again."

Will you not, my young friends, endowed with the powers and privileges of his noble profession, seek to emulate the lofty accomplishments, the patriotic labors, the unselfish and fearless devotion of its accomplished chief. Far from the scene of his triumphs, in Westminster Hall, his sacred ashes repose in the ancient family vault, "where Scotia's grandeur springs." But the members of the Bar the world around adore his memory. A statue stands to his honor in Lincoln's Inn Hall, where he mastered the rudiments of his profession. In historic Holland House, whose high born inmates through successive generations have ever consecrated their hereditary powers to the maintenance of liberty and the confusion of intolerance, there stands a bust of him with the noble inscription, "*Nostræ eloquentiæ facilè princeps.*" These marble memorials may endure for ages, but long after they have crumbled to dust, and as long as the language of his matchless forensic orations survives, therein will also survive

the enduring monuments of his eloquence and power in defense of innocence and in advocacy of right.

And shall his wand be forever broken, and shall its fragments lie forever scattered on his grave? May not it be said of you, my young brethren, members of his own profession, in this land more favored than his, in its clime more congenial to free speech, on its richer soil, doubly consecrated to the genius of universal freedom, those shining words, which were said of him, and said of yore to Philip Sidney:

"We listen, it is true, to others, but we give up our hearts to thee."

MT. AIRY, GA., August, 1908.

CHIEF JUSTICE MARSHALL

BY HARRY RANDOLPH BLYTHE

As one whose vision seemed inspired, he
Looked out across the centuries and saw
The Great Republic. In what pride and awe
He must have held the mighty years to be,
Else how could he have planned so deep, so free,
So all encompassing? From scant and raw
Supply he shaped the highways of our law
Whereon the millions tramp their destiny.
O, great Chief Justice! Could the pioneers
Who deemed thy concept of our State too vast
Look now adown the vista of the years,
Would they not stand in silence, all aghast,
Seeing thy dream's fulfillment, and thy name
Brighter and dearer, hallowing with fame?

CAMBRIDGE, MASS., November, 1908.

THE SHERMAN ANTI-TRUST LAW AND THE PROPOSED AMENDMENT THERETO

By Charles E. Littlefield

THIS statute has been the subject of a great deal of controversy and debate. There seems to be a widespread difference of opinion as to its scope and purpose. It has been persistently claimed and is now claimed by the representatives of labor organizations that the law was not originally intended to include within its scope organizations of that character.

This claim is based in a very large degree, if not wholly, upon alleged understandings or upon conversations between men who were more or less actively engaged in the construction of the legislation. Many of the persons who are directly referred to as giving individual opinions as to the scope and purpose of the act are now dead, and it is impossible to verify the accuracy of the recollection of those who rely upon that source as the basis for their opinions.

The legislative history of the act itself is, I think, absolutely clear with reference to that question, and an examination of this history will demonstrate beyond all cavil that labor organizations were specifically intended to be included within its provisions.

It ought to be said that the act was not the result of hasty or ill-considered legislation. It was debated more or less in the last session of the Fiftieth Congress, and very much more extensively during the first session of the Fifty-first Congress. The debate upon this question occupies in the neighborhood of 150 pages of the Congressional Record, extending over this whole period of time. There are very few acts of Congress that have received as much careful and deliberate investigation and consideration as has the Sherman Anti-Trust law.

Introduced into the Senate as the first bill in the Fifty-first Congress, on the 4th day of December, 1889, it was referred to the Finance committee, of which its author, Mr. Sherman, was chairman. It was reported by that committee to the Senate and after considerable debate and the introduction of quite a variety of amendments, the following amendment on the 25th day of March, 1890, was introduced and adopted by the committee of the whole on the part of the Senate:

"*Provided*, that this act shall not be construed to apply to any arrangements, agreements or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."

The amendment was offered by Mr. Sherman. While it may be said that it was treated with reasonable seriousness, the fact that it was specifically exempting a certain class of people, as distinguished from the great mass of people that the legislation was intended to operate upon, is quite clear from the debate. At the very time the amendment was pending it was suggested by Senator Blair that the bill ought to exempt persons engaged in the cod fisheries and in the manufacture of of boots and shoes. And so far as anything appears by way of argument there is just as much reason for the exemption of those industries as there was for the exemption of persons engaged in horticulture or agriculture. It was jocosely suggested by Mr. Platt of Connecticut, who was opposed to the legislation, that the

wool growers of Ohio ought also to have the same exemption.

While the bill was pending before the Senate, having been reported from the committee of the whole to the Senate, a successful effort was made to refer it to the Judiciary Committee, it having been encumbered in the committee of the whole by a large variety of amendments, a great deal of doubt being expressed as to what would be its proper construction.

Pending the adoption in the Senate of the amendment already quoted, which had been adopted in the committee of the whole, Senator Edmunds, who was easily one of the greatest if not the greatest lawyer in the Senate at that time, and one of the greatest lawyers the Senate ever had in its membership, took occasion to discuss this particular amendment. His discussion and his opinions are extremely significant, because, as will appear later, the bill was finally, after the debate in which he participated, referred to the Committee on the Judiciary, of which he was the chairman. In referring to this particular amendment he said:

"However, the whole thing is wrong, as it appears to me; and so I think the amendment is wrong in the same way, which says that while the capital and the plant in any enterprise shall not combine to defend and protect itself, to increase the price of the product of that capital and plant, the labor which is essential to the production of that plant may combine to increase the price of the product of that capital and plant, the labor which is essential to the production of that plant may combine to increase the price of the work that is to be done to make the production of that enterprise." . . .

And again:

"*The fact is that this matter of capital, as it is called, of business and of labor, is an equation, and you cannot disturb one side of the equation without disturbing the other.* If it costs for labor 50 per cent more to produce a ton of iron, that 50 per cent more goes into what that iron must sell for, or some part of it. I take it everybody will agree to that. . . . *Neither speeches nor laws nor judgments of courts nor anything else can change it, and therefore I say to provide on one side of that equation that there may be combinations, and on the other side that there shall not, is contrary to the very inherent principle upon which such business must depend. If we are to have equality, as we ought to have, if the combination on the one side is to be prohibited, the combination on the other side must be prohibited, or there will be certain destruction in the end*"

This is a very clear and concise statement of the precise business proposition involved in this legislation. The only answer attempted to be made to this argument of Senator Edmunds was the suggestion by Senator Hoar, who said, in undertaking to differentiate the employee from the other factors upon which the legislation was intended to operate:

"The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standard of wages is engaged in an occupation the success of which makes republican government itself possible, and without which the Republic cannot in substance, however it may nominally do it in form, continue to exist.

"I hold, therefore, that, as legislators, we may constitutionally, properly and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side. When we are permitting and even encouraging that we are permitting and encouraging what is not only lawful, wise and profitable, but absolutely essential to the existence of the Commonwealth itself."

While we might all agree with Senator Hoar as to the essential importance of the

welfare of the laborers and their associations, it is quite obvious that it is equally essential to maintain the existence of capital in order that the laborer whose welfare is so essential should continue to be employed. It is absolutely impossible for the one to exist without the other. Senator Hoar did not suggest, nor can there be suggested, any line of differentiation or distinction with reference to the effect of either upon the welfare or prosperity of the Republic. To these suggestions Senator Edmunds made this reply:

"*On the one side you say that is a crime, and on the other you say it is a valuable and proper undertaking. That will not do, Mr. President. You cannot get on in that way. It is impossible to separate them; and the principle of it therefore is that if one side, no matter which it is, is authorized to combine, the other side must be authorized to combine, or the thing will break and there will be universal bankruptcy.* (Vol. 21, p. 2729.)

To this remark of Senator Edmunds a careful reading of the debate from that time on shows that no attempt was ever made to reply. After having thus stated that the amendment made is a crime for one set of men to do what was lawful for another set of men to do, and that it was impossible to separate the two factors of the great equation, the Sherman anti trust bill, with all pending amendments, was referred to the Judiciary Committee, of which Senator Edmunds was chairman.

It was reported back by that committee on the second day of April, 1890, with an amendment, which is the Sherman anti-trust law as it reads today, without the dotting of an "i" or the crossing of a "t," because after it was reported from the Senate committee it was not amended in any particular but became a law precisely in the language of that report.

It is hardly necessary to suggest that after the statements made by Senator Edmunds no bill would be reported by him that either directly or indirectly exempted labor organizations from its operations when he had himself declared that it was impossible to construct legislation upon that basis.

The bill went through all the various stages of conference reports, and amendments of various characters were from time to time suggested. It was taken up on the floor of the House, referred to and reported from the Judiciary Committee, and debated somewhat extensively upon the floor, but in no part of the debate and in no part of the proceedings was any effort made, after the conclusive and unanswerable statement of Senator Edmunds, to engraft upon the act any provision excepting labor organizations or men engaged in labor controversies therefrom.

We not only have this clear history, which is an unanswerable demonstration of the fact that the act was intended to cover employees and employers in interstate commerce, but in addition we have the statement made by Senator Edmunds, published in the Chicago *Inter-Ocean*, November 21, 1892, in which he said, referring to the Sherman anti trust law:

"It is intended and I think will cover every form of combination that seeks to in any way interfere with or restrain free competition, whether it be capital in the form of trusts, combinations, railroad pools or agreements, or labor through the form of boycotting organizations that say a man shall not earn his bread unless he joins this or that society. Both are wrong; both are crimes, and indictable under the anti trust law."

He further stated that it was the intention of the committee "to cover all such cases."

The Scope of the Sherman Anti-trust Law.

I think it can be made clearly to appear that there is a profound misconception as to the legal scope of this statute. The common law applies to two well-defined and thoroughly understood conditions — con-

tracts in restraint of trade, upon which is predicated the element of reasonable or unreasonable, which are contracts between two individuals, by virtue of which one contracts himself out of trade, and combinations or conspiracies tending to the monopoly of trade upon which the idea of reasonable or unreasonable never yet had been predicated by any well-considered decision. As to contracts in restraint of trade as just defined, the Supreme Court of the United States held in the case of Cincinnati Packet Company *v.* Bay (200 U. S. 184) that they were not within its scope, saying:

"There has been no intimation from any one, we believe, that such a contract made as a part of the sale of a business and not as a device to control commerce, would fall within the act and . . . it would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the same effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed."

The Sherman anti trust law proceeds upon the theory that there are contracts and agreements monopolistic in their character which are in restraint of interstate trade and commerce. It is aimed throughout at contracts and agreements that tend to monopoly. That is its generic character.

Section 1 provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," etc., and "Every person who shall make any such contract or engage in any such combination or conspiracy," etc.

Section 2 provides that "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations," etc.

Section 3 provides that "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce," etc., and "every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty," etc.

Section 6 provides that "any property owned under any contract or by any combination, or pursuant to any conspiracy" (and being the subject thereof) "may be condemned." While the literal language of this act might include what is known at common law as contracts in restraint of trade, it is very clear that the dominating controlling purpose is to prevent contracts, agreements, combinations and conspiracies resulting in or attempting to create monopoly. It is because the words "in restraint of trade or commerce" are used that the idea has obtained that the qualification of reasonableness or unreasonableness should be imported into this statute by construction.

It is very ably suggested by Mr. Justice White in his dissenting opinion in the Trans-Missouri case, that the Sherman anti-trust law should be construed upon the basis as to whether or not the combinations or conditions that it undertakes to attack are or are not reasonable or unreasonable, and it has been suggested by distinguished men since that the law is open to that criticism. It was suggested — I heard a distinguished gentleman in another tribunal the other day say — that it was intended by the framers of that law to subject it to the test as to whether the conditions attacked were reasonable or unreasonable. I beg leave to submit that such a construction cannot be sustained. There is a contract in restraint of trade at common law. A contract in restraint of trade at common law is a contract by vir-

tue of which a man disables himself from engaging in a particular occupation, business or profession. He agrees not to practice his profession or engage in his business for a certain number of years or within a certain locality, or a corporation agrees not to sell its goods within a certain locality or during a certain time, or, as the note in Angier *v.* Webbar (92 Am. Dec. 751) puts it, "Contracts which impose an unreasonable restraint upon the exercise of a business, trade or profession are void, but contracts in reasonable restraint thereof are valid."

Now, that is the common-law contract in restraint of trade. But there are other conditions that disturb us vastly more than these contracts in restraint of trade, because contracts in restraint of trade at common law were simply constructively against public policy and very few of them ever did any appreciable injury. The combinations and conspiracies that tend to monopoly and therefore increase the price of a product are an entirely distinct legal proposition. They are the evils against which the Sherman anti-trust law is aimed. It is contracts and combinations in the form of trusts or otherwise or conspiracies, not contracts that restrain one individual from engaging in a profession or in a business for a certain number of years or in a certain locality, that are clearly within the intention of that statute.

Now, I wish to call attention to this fact: that at common law and under the decision of the courts, from the days of the early common law down even until now, the idea of reasonableness or unreasonableness has never been predicated upon a combination or conspiracy that tends to monopoly. It is always and only predicated upon contracts technically in restraint of trade, or that tend to exclude a man for a certain number of years or within a certain space. Every case referred to by the distinguished Justice of the Supreme Court who dissented in the Trans-Missouri case as sustaining the view that reasonableness or unreasonableness should, under the Sherman anti-trust law, be the test, is a case at the common law where the court were passing upon a contract technically in restraint of trade. No single case that he refers to involves contracts or agreements or conditions that tended to monopoly. In that respect his citations were foreign to the controlling purpose of that statute.

There are two distinct legal propositions — contracts in restraint of trade and combinations and conspiracies that tend to monopolies. I think I can safely say that from the time when monopolies were first discussed the books do not contain a single case based upon contracts or agreements or conspiracies that tend to monopoly, and therefore improperly and unduly increasing the price of a product, in which the term "reasonable" or "unreasonable" is predicated upon that condition — no case where that is relied upon as an element under such circumstances. On the other hand, where the facts satisfy the court that the condition tends to monopoly it is held unlawful without qualifications or limitations. While the term "restraint of trade" is used in defining the offense in the Sherman anti-trust law, it is evidently used upon the theory that a monopoly or an attempt to monopolize trade would operate as a restraint upon interstate and foreign commerce, rather than in the artificial sense that a contract between two individuals that impaired the right of one to engage in trade for a certain time or within a certain locality would be a restraint of that commerce. The definition is inaptly in part based upon the common-law term "restraint of trade," while the act is not intended to apply to such contract but to such contracts and combinations as tend to monopoly.

This whole question was discussed in a very able and exhaustive opinion by Hon. William H. Taft, circuit judge, sitting in the circuit court of appeals in the case of the United States *v.* Addyston Pipe and Steel Company *et al.* (85 F. R. 271, 302). He says:

"The very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. . . . But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopolize and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

He says further:

"It is true that there are some cases in which the Courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, *have set sail on a sea of doubt* and have assumed that the power to say that in respect to contracts, which have *no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not.*"

That is to say that whenever the courts have departed from the original contracts in restraint of trade *per se* as to which the contracting out of trade is simply ancillary, and undertaken to apply to a combination and conspiracy tending to monopoly the element of reasonableness or unreasonableness, they have set sail on a "sea of doubt" and assumed a power which they cannot legitimately exercise.

And again, in applying the authorities to the particular case in hand he said:

"Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, *because in restraint of trade and tending to a monopoly.*"

And while it was attempted from the facts to show that although there was a combination or conspiracy in that case tending to monop ly, it was reasonable in its character, he held:

"We do not think the issue an important one, because as already stated, *we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract.* Its tendency was certainly to give defendants the power to charge unreasonable prices had they chosen to do so."

Here the learned judge distinctly holds that the element of reasonableness is not predicable upon a combination or conspiracy tending to the monop ly of trade. It follows from this that the attempt that is made by the so called "Hepburn amendment" to the Sherman anti trust law to import the element of unreasonableness into that statute has no foundation in the common law and is in direct violation of the well-considered legal distinction that has always existed between contracts *per se* in restraint of trade, where one individual contracts with another to contract himself out of trade, and combinations and conspiracies tending to the monop ly of trade.

These legal considerations disclose very

clearly the cases that Mr. Justice Brewer had in mind in his concurring opinion in the Northern Securities case (193 U. S. 361) where he said in referring to his concurrence in the Joint Traffic Association case (171 U. S. 505):

"This act as appears from its title was leveled only at 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld."

The only "long course of decisions at common law" affirming contracts in restraint of trade to be reasonable are the contracts where individuals were contracting themselves out of trade — where the contract to remain out of trade was ancillary to the main contract.

Mr. Justice Holmes also had this distinction very clearly in mind in his dissenting opinion in that case when he says (p. 403):

"The words hit two classes of cases and only two — *contracts in restraint of trade and combinations or conspiracies in restraint of trade* — and we have to consider what these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. *They are contracts with a stranger to the contractor's business, although in some cases carrying on a similar one, which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would.* The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England.

"There was no objection to such combinations merely as in restraint of trade or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, *were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.*"

Mr. Justice Holmes proceeds:

"*Combinations or conspiracies in restraint of trade*, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their *supposed consequent effect upon the public at large.* In other words, they were regarded as contrary to public policy because they *monopolized or attempted to monopolize some portion of the trade or commerce of the realm.*"

The remarks of Mr. Justice Holmes very clearly suggest the profound and underlying distinction between the two conditions; as to the contracts that restricted the freedom of the contractor in carrying out that business as otherwise he would, and combinations and conspiracies in restraint of trade, the distinction is profound and fundamental. Upon the first the element of reasonableness or unreasonableness can be properly predicated; upon the second, which is made a crime under the Sherman anti-trust law, the element of reasonableness or unreasonableness cannot with propriety be predicated.

Bearing in mind these legal suggestions with reference to the rationale of the Sherman anti trust law, I will now enter upon the discussion of what is known as the Hepburn amendment to the Sherman anti-trust law.

In the discussion of some of the salient and vital features of the proposed legislation I shall confine myself to the substitute which, according to their view, represented clearly and adequately the views entertained by the gentlemen who collaborated in the preparation of the measure. I cannot quote the amendment, as it is too long, but will, if it is thought desirable, furnish it as an appendix.

I will take up first features which relate to labor organizations. Section 3 of the

substitute appears in a different order from section 3 of the original bill, and is intended, I have no doubt, to be a substantial modification of the original section 3.

No legal discussion of section 3 was ever presented to the committee. The original section was objected to on the ground that it very clearly exempted labor organizations from the operation of the Sherman anti-trust law, to all intents and purposes legalized an interstate boycott, and practically neutralized the effect of the decision in the Loewe *v.* Lawlor case, announced February 3, 1908, and known as the "Danbury hat case."

The first provision in this section provides that nothing in the Sherman anti trust act should be enforced so as to interfere with a "strike for any purpose not unlawful at common law."

Just exactly what the parties responsible for this legislation mean by this language I do not know. If it was meant to apply to interstate commerce all the principles of common law relating to combinations, it would then make the Sherman anti-trust law very much more drastic and oppressive than it is now with reference to labor organizations.

If, on the other hand, it was only intended to wipe out the Sherman anti-trust law as to labor organizations and leave them subject to only such inhibitions as were "unlawful at common law," then the legislation would be absolutely meaningless and ineffective, because, as is thoroughly well known, there is no federal common criminal law, and if common-law principles with reference to combinations in restraint of trade applied to interstate transportation, the enactment of the Sherman anti-trust law would be the work of supererogation and entirely unnecessary.

Which one of these meanings was intended by the astute legal gentlemen responsible for the language of this section I do not undertake to say. If the first, clearly it would be extremely offensive to the labor organizations and would not meet with the approval of the committee. If the second. it was an insidious effort to absolutely destroy the operations of the Sherman anti trust law as to labor organizations, thus by indirection, without clearly disclosing upon its surface, accomplishing a result that was certainly not intended, if the statements of Mr. Low and Mr. Jenks, who were the principal promoters of the legislation before the committee, can be relied upon, because they distinctly said that under no circumstances did they wish any legislation passed that would legalize or authorize such a boycott as was denounced by the Supreme Court of the United States in the Danbury hat case.

The further language of this substitute, however, presented and urged by them very clearly, in my judgment, did authorize just exactly such a boycott, because it provided that the provisions of the act should not be enforced where there was a combination of employees "for the purpose of obtaining from employers *peaceably* or by any means not unlawful at common law, satisfactory terms," etc.

It will be noted that this does not confine the purpose to means unlawful at common law, because by the very language of the section the phrase "by any means not unlawful at common law" is alternative and not used as synonymous with "obtaining from employers peaceably."

Now, the fact is that in the Danbury hat case the results accomplished, which were clearly subject to the prohibition of the Sherman anti trust law, according to the decision of the Supreme Court of the United States, were in every instance *peaceable*. It was specifically and distinctly a *peaceable boycott*. It was an attempt on the part of employees to get from their employers, "*peaceably*," satisfactory terms.

So also was the boycott denounced by Mr. Justice Gould in his decision in the Bucks Stove and Range Company case.

That was specifically and distinctly a case where the employees were seeking to obtain from their employers, "*peaceably*," satisfactory terms, and so forth.

There can be no question, in my judgment, but that the language of section 3 of the substitute was deliberately intended to legalize and authorize an interstate boycott in the teeth of the decision of the court in the Danbury hat case. I called the attention of Mr. Jenks to what I believe to be the obvious construction, and he suggested that their attorneys insisted that such was not the proper construction. In answer to that suggestion he was requested to furnish to the committee the opinion of the counsel for the gentlemen responsible for the promotion of the legislation, differentiating the language used in section 3 from the conditions involved in the Danbury hat case and the Bucks Stove and Range case, or what would be more satisfactory to the committee, to have their counsel present, so that they could be examined and the matter discussed for the purpose of ascertaining what were the true construction, effect, and intent of this ingenious language in section 3.

Not only did he fail to present his counsel before the committee, but he utterly failed to present from his counsel, whoever they may be, the slightest suggestion or discussion undertaking in any way to differentiate the language criticised from the facts passed upon by the court in these two cases. And, in the absence of this, after the chairman of the committee specifically insisted that the language was so intended and susceptible of no other construction, I think I am entirely safe in saying that section 3 discloses a deliberate purpose to exempt labor organizations from the operations of the Sherman anti-trust law, and to defeat the effect of the decision in the Danbury hat case.

The labor organizations are not entirely satisfied with this construction that has been placed on this language, and they insisted, through Mr. Gompers, that what is known as the "Wilson bill" should be made an amendment to the substitute in order to protect, as they said, the rights of labor organizations. The express purpose of the Wilson bill was to exempt labor organizations and persons engaged in agriculture and horticulture from the operation of the Sherman anti trust law.

That the legislation proposed, without this amendment, would be, to the last degree, unsatisfactory to the labor organizations is, perhaps, too obvious for discussion. This amendment would make what is now criminal conduct in all persons lawful for an arbitrarily selected class of persons though acting under the same conditions and producing the same results, a proposition that ought to be abhorrent to every right thinking person. It would make it perfectly possible to duplicate without limit conspiracies that in the language of Secretary Taft in the Phelan case (62 F. R. 803) would "*stagger the imagination.*" This amendment is in my judgment unconstitutional as a deprivation of the "equal protection of the law." This raises the extremely and vitally important question whether the Congress of the United States is subject to the same constitutional inhibition in enacting legislation as now applies without question, by virtue of the specific provisions of the fourteenth amendment, to the states.

There can be no question under the provisions of the fourteenth amendment to the Constitution of the United States — which provides that *no state* shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" — that legislation of this character would be clearly unconstitutional if enacted by a state.

If a state legislature undertook to control the judicial power of a court of equity so that it could exercise its protecting power to conserve the safety of persons and

property in all cases except labor controversies, it would be clearly the exercise of class legislation, partial in its character. It would deny to the plaintiff whose property was threatend by a labor conspiracy the protection of the law guaranteed by the Constitution, while giving that protection to every other litigant in connection with every other controversy. The state courts, as well as the courts of the United States, when confronted with such an attempt to deprive the citizen of the equal protection of the law, would wipe such a law from the statute book as quickly as hoar frost vanishes before the morning sun. The fifth amendment to the Constitution of the United States guarantees to every person that he shall not be deprived of life, liberty, or property without the due process of law, and the fourteenth amendment contains precisely the same language applied to the state, with the additional clause declaring that the state shall not "deny to any person with its jurisdiction the equal protection of the laws." It is a serious and interesting question as to whether, in the absence of such a specific provision in the fifth amendment, there is a guaranty of the equal protection of the law, so far as Congressional legislation is concerned, by virtue of the provisions of the fifth amendment to the Constitution guaranteeing due process of law. I think I can establish the proposition that the Congress of the United States, under the fifth amendment, is bound by the fundamental principles of eternal right and has no power to deprive any person of the equal protection of the law.

In the case of Budd *v.* The State (3 Humphries, 483) the question was whether a statute of the state of Tennessee could be sustained that made it a felony on the part of the officers and agents of a certain bank to do certain acts that were not made felonies when done by officers of other banks in Tennessee; that made one law for the officers of the Union Bank of the state of Tennessee and another for the officers and agents of other banking corporations in the state.

It was contended by the counsel for the respondent that the statute in question was in contravention of the constitution of Tennessee, which provides that no man shall be disseized or imprisoned, etc., but "by the judgment of his peers or the law of the land," practically a quotation from Magna Charta, and made a part of the constitution of Tennessee.

Upon this question the court said, the opinion being drawn by Judge Reese, whom I understand to have been a man of high character and great legal ability:

"If the felony affected only all the clerks of all the merchants of Nashville, or of Davidson county, or of middle Tennessee, would that in either case be 'the law of the land'? It is believed none would so contend. And why not? Simply because *the law of the land* is a rule *alike embracing and equally affecting all persons in general*, or all persons who exist or may come into the *like state and circumstances*. A *partial law*, on the contrary, embraces only a portion of those persons who exist in the same state and are surrounded by like circumstances. If peculiar felonies affecting all the people, or certain of the public officers of East Tennessee only, were held to be 'the law of the land' it would be difficult to say for what object that clause was inserted in the Bill of Rights. One of its objects has been stated in various adjudications in our state to have been to protect *the feeble and the obnoxious* from the injury and the injustice of *the strong and the powerful* and, in general, to protect *minorities* from the *wrongful action of majorities*. This being its scope and purpose, would it not interdict the legislature from passing such an act as is last above referred to, for instance, creating certain acts of nonfeasance or malfeasance of the register of the western district, although a public officer, a felony, leaving the register of

middle Tennessee, East Tennessee, etc., unaffected by it? Certainly it would. And why? Because the law would not *treat similarly all who were in like circumstances.* It would therefore *be partial* and of course not *the law of the land.*"

And the court held that this statute was unconstitutional because it did not operate equally upon all. In other words, it was a deprivation "of the equal protection of the law."

The significance of this decision is that it was rendered in 1842, twenty-six years before the fourteenth amendment, expressly prohibiting a state from denying to any person the equal protection of the law, was adopted, and was therefore entirely independent of the provisions of the fourteenth amendment. It is a specific determination of a highly respected court that under a constitution guaranteeing the protection of the "law of the land" legislation that deprives any person of the equal protection of the law, or that is partial in its operation, is unconstitutional and void.

That the "law of the land" is synonymous with "due process of law" is well settled. The Supreme Court of the United States in the case of Dent *v.* West Virginia (129 U. S. 114), in a unanimous opinion drawn by Mr. Justice Field, certainly one of the ablest and most distinguished members of the court, said:

"As we have said on more than one occasion, it may be difficult, if not impossible, to give to the term 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. *They were deemed to be equivalent to the 'law of the land.'* In this country the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any *arbitrary deprivation of his rights*, whether relating to his life, liberty or his property. . . . It is sufficient for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, *if it be general in its operation* upon the subject to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters — that is, by process or proceedings adapted to the nature of the case. *The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of a citizen.*"

Here, then, we have, first, the court of Tennessee holding that under "the law of the land" no person can be deprived of "the equal protection of the law" and that legislation partial in its character is unconstitutional; and in the case of Dent *v.* West Virginia the unanimous opinion of the Supreme Court holding that "due process of law" is synonymous with "the law of the land" and that the law must be general in its operation upon the subject to which it relates. Many other authorities establishing this identity of meaning could be cited.

Under these authorities no legislation can stand the constitutional test that is partial in its operation or that undertakes to deprive any person of his rights in particular instances when other persons have accorded to them the full enjoyment of the same rights under similar circumstances.

I think it will be conceded that Hon. Thomas M. Cooley was in his time what Blackstone and Kent were in theirs as an authority upon the law, and no text writer is entitled to or has received greater respect from the profession and the courts. In his edition of Story on the Constitution he discusses the fourteenth amendment and

reaches conclusions that are entirely in harmony with and support the position which I have taken. Among other things he says:

"And the same may be said of the like distinctions under laws establishing public schools, preëmption laws, exemption laws and the like; the rules which exclude persons from their benefits must be *uniform and not partial;* the individual citizen is always entitled to the benefits of the general laws which govern society. (Sec. 1934.)

And quoting from Webster's argument in the Dartmouth College case he said:

"By the *law of the land* is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall have his life, liberty, property and immunities under the protection of the *general rules* which govern society." "As to the words from Magna Charta, says another eminent jurist, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." (Sec. 1944.)

And again:

"The provision that no state 'shall deny to any person within its jurisdiction the equal protection of the laws' would not seem to call for much remark. Unquestionably every person — all being now free men — *is entitled to the equal protection of the laws without any such express declaration.* But with the power in Congress to enforce this provision by 'appropriate legislation' it becomes a matter of no little importance to determine in what consists the equal protection of the laws and what amounts to a denial thereof. (Sec. 1959.)

"It is to be observed first, that this clause, of its own force, neither confers rights nor gives privileges; its sole office is to insure impartial legal protection to such as under the laws may exist. It is a formal declaration of the great principle that has been justly said to pervade and animate the whole spirit of our constitution of government, that all are equal before the law." (Sec. 1960.)

I am one of those who believe that the proposition set forth in the noble and resounding phrase of the great Declaration for the verification of which our fathers pledged their lives, their fortunes, and their sacred honor, is a vital and fundamental principle of our institutions. It reads: "We hold these truths to be self-evident, 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, and that to *secure these ends*, governments are instituted among men." This does not mean to me that men were created with equal capacities, with equal ability or even with equal opportunities, but it does mean to me that they were created equal before the law, with equal rights and equal privileges, and that under our system of government, in harmony with these fundamental eternal principles, it is not competent for any legislative power, either state or federal, to enact any legislation that will deprive any person of the equal protection of the law."

This, in my judgment, is the stone that builders not only did not reject, but which they made, and which now is and always will remain, "the head of the corner." It is the inviolable bed rock, fundamental and eternal, upon which our institutions are builded. It is the great inspiring and dominating principle that characterizes every governmental activity and is reflected in every branch and feature of our constitutional government. It is the vital principle which makes "a government of the people, for the people and by the people" a "government of laws and not of men."

The bitter hostility of the American

Federation of Labor to the Sherman anti-trust law is manifest when it is remembered that in their petition to intervene in the Danbury hat case they declared that a decision in favor of the plaintiff "would seriously *obstruct and hinder*" it "in carrying out the *purposes for which it was organized*" and that its constitution "makes special provision for the prosecution of boycotts." Mr. Gompers has stated its effect in the quotation, "You might as well take from me my life as take from me the means whereby I live," and in their annual convention at Pittsburg in 1908 they described the boycotts as follows:

"The committee on boycotts made the following report and recommendations, which was adopted by the convention: 'We must recognize the fact that a boycott means war, and to successfully carry on a war we must adopt the tactics that history has shown are most successful in war. The greatest master of war said that war was the *trade of a barbarian*, and that the secret of success was to concentrate all your forces upon one point of the enemy, the weakest if possible. In view of these facts the committee recommends that the State Federations and central bodies lay aside minor grievances and concentrate their efforts and energies upon the least number of unfair parties or places in their jurisdiction. One would be preferable."

This is certainly a frank and explicit statement of the spirit that animates this organization, and I am not prepared to say that it does not fitly characterize the boycott as "the trade of a barbarian."

This Hepburn amendment is said to have two great objects: first, it requires all corporations or individuals who seek to get the benefit of its provisions to register themselves with the Bureau of Corporations, and in the case of corporations to file such information concerning the organization of such corporation, its financial condition, its contracts, and its corporate proceedings as may be prescribed by general regulations from time to time to be made by the President pursuant to this act, the purpose being to procure from the corporations availing themselves of the provision of the act information which would give to the public the measure of publicity which is understood to be desirable in connection with their operation and control, not only for the purpose of informing the Congress as to the needs of future legislation, but for the purpose of giving to the public such information as would so far as may be protect them in connection with the operations of, and their investments in, organizations of that character.

Second, corporations thus registering themselves for the purpose of getting the benefit of the provisions of this act were to have conferred upon them privileges that do not now exist under the law.

It was proposed to engraft upon this statute, without reference to the question as to whether the qualification would relate to contracts in restraint of trade at common law, or combinations and conspiracies, the element of reasonableness or unreasonableness, and a most ingenious scheme was devised for the purpose of putting into operation or making an application of these qualifying terms.

It is provided by the specific terms of the proposed amendment that these contracts and agreements would be subject to the determination of the Commissioner; that the Commissioner, if of the opinion, after an examination, that the contract or combination was in unreasonable restraint of trade, should so order, stating in his order his reasons therefor; and it was further provided, if the Commissioner made no such order within thirty days from the date of the filing of the contract or agreement, that after the expiration of that time such contracts and agreements would become valid by the simple lapse of time and should be held to be *prima facie* reasonable. So that it would be incumbent upon the government, in a prosecution of the

parties to such contract and agreement thus held by lapse of time to be reasonable, to show that it was an unreasonable restraint of trade.

The right of the government to attack such contracts or agreements as unreasonable was merely technical and unsubstantial, since the memorandum filed with the committee by the Commissioner of Corporations discloses the fact that the determination of the Commissioner or his failure to determine was intended by that bureau to be final and conclusive. On this point this memorandum which he was instructed by the President to prepare says, among other things:

"Within thirty days he will thus find out either that his contract is believed to be contrary to public policy and may be attacked by the Government, in which case he would thereafter enter upon it at his own very proper risk, or he would learn, on the other hand, that *the Government saw no prima facie reason to disapprove it and he would then know that he could go ahead and base his operations upon it*, and that so long as it was not against public policy it could not be attacked under the Sherman anti-trust law; and this would be all the average business man would care to know."

Now, bear in mind the fact that whether or not it was against public policy was reached in one of two ways: first, by a specific determination of the Commissioner that the contract was in unreasonable restraint of trade, and, second, by the failure of the Commissioner to determine at all when after the lapse of thirty days, by the simple lapse of time, the contract and agreement would be held to be reasonable. So that the action or inaction of the Commissioner resulted in the determination of whether or not the contract was against public policy, and if it was inaction upon the part of the Commissioner, it gave to the corporation the knowledge that they could go ahead and base "their operations upon it." That this was the distinct understanding of the Commissioner of Corporations as to the manner in which this legislation, if it became a law, was to be enforced, more clearly appears from his further statement in the same memorandum in which he says:

'It should be so that the Government can by legal and regular methods make its election as to the kind of contract which it will prosecute or will not prosecute, and to be able so to advise the parties to that contract that they may act upon definite knowledge.

"In essence this section provides merely a regular procedure, available for all parties for exercising that discretion as to enforcement of law which is an inseparable part of administrative functions."

This suggestion, in his memorandum made by the authority of the President, I take to be an authoritative declaration that a decision by his Bureau, either by action or inaction, would be accepted and acted upon by the Department of Justice: Whenever then, by the operation of thirty days' time, a contract thus filed became reasonable, the corporations interested therein could feel satisfied that although technically still open to attack in the courts, they need have no apprehension, because the Department of Justice would take this negative determination by the lapse of time as the rule by which they were to be governed in the enforcement of the provisions of the Sherman anti-trust law, and no action would be brought thereunder for the purpose of assailing any contract thus determined by indirection not to be in unreasonable restraint of trade.

Although the substitute provided more or less complicated machinery for appeal it is very clear that, so far as the Government is concerned, if the Commissioner of Corporations correctly apprehends the intent of the legislation, this determination simply by the lapse of time would be for all practical purposes conclusive upon the Government, because the Department of

Justice would take its cue therefrom and never bring any action in relation thereto.

Now, then, it is to be observed that this would enable any great combination to practically determine for itself what should and should not be a reasonable contract in restraint of trade. It is very clear that there can be no contract or agreement entered into by a manufacturing or industrial corporation which is not bound to be ultimately reflected in the price to the consumer; and the question as to whether or not a contract or a combination between it and another corporation is or is not in reasonable restraint of trade must ultimately be determined by the question as to whether or not such contract or combination does or does not unduly increase the price to the consumer, and the price to the consumer is beyond all question the final test of the reasonableness or unreasonableness, according to the theory of the proposed amendment.

I may say here that I am at all times and under all circumstances, unalterably opposed to placing in the hands of any administrative bureau the power to pass upon the price of products to the consumer and the power to supervise and regulate and control the business of 87,000,000 of people.

Mr. Smith, the commissioner who appeared before the subcommittee, admitted that in case a contract or agreement was submitted to him for decision it would be necessary, in order to ascertain whether or not it was in unreasonable restraint of trade, to ascertain and determine what was the cost of producing the product. He said, as he was practically compelled to say, that the examination to be made by his Bureau would not be perfunctory and formal and of a rubber-stamp variety, but that there would be intelligent and careful investigations for the purpose of developing the facts. That being the case, it is obvious that as to a large number of combinations in this country it would be impossible to determine within thirty days' time whether the proposed contracts or agreements were or were not reasonable, involving an investigation of the cost of producing the product, the question of their capitalization, which are all involved legitimately in the question of determining what could be properly charged in order to produce a fair return to the parties engaged in the prosecution of the business. The great bulk of the large corporations would thus be able to file any contract or agreement that they saw fit to file and have it validated by the simple lapse of thirty days' time, during which it would be physically impossible for the Bureau of Corporations to pass even in the most perfunctory manner upon the question as to whether or not the contract or agreement in question was in unreasonable restraint of trade.

The result is that this ingenious scheme would result in the validation of substantially every contract and agreement that would be filed by the great combinations in the country, and place entirely within their control the consumers who are interested in the price of their product, and would have provided a wholesa'e immunity bath on an immense scale for every large and vicious combination in the country — self-devised, self-prepared, and self-administered.

No one came before the committee to even intimate or suggest the kind of contracts contemplated, the purpose to be accomplished, the way in which it would be accomplished, and the effect upon the consumers of the country.

I have no hesitation in saying, so far as I am concerned, that in connection with the propriety of submitting the business of 87,000 000 people to one bureau officer, I should decline under any and all circumstances to submit such a question by statute until I knew first what sort of a combination it was desired to have legalized and second, upon what principles of law the determination was to be reached. The hearings before the subcommittee, so far as

these two questions are concerned, are an entire and absolute blank, and for that reason, if for no other, I should under no circumstances recommend this legislation. I was not prepared to turn over an interstate business aggregating say $16,000,000,000 annually, bound hand and foot to the tender mercies of combinations of labor on the one hand and the rapacity of combinations of capital on the other.

It is to be further observed that a combination or conspiracy tending to monopolize trade is beyond all question illegal at common law, and a combination or conspiracy to restrain interstate trade is also a criminal conspiracy or combination under the provisions of the Sherman anti trust law. I have never yet seen or heard of a legal proposition that would justify the efforts to make a crime reasonable, which would be the effect of this amendment to the Sherman law if it were adopted, because it expressly provides that combinations and conspiracies in restraint of interstate trade, if reasonable, will be valid. A reasonable crime, in my judgment, is unthinkable, and I do not believe that it is sound to undertake to predicate upon a conceded criminal condition the element of reasonableness for the purpose of exempting such supposed condition from criminality.

Mr. Andrew Carnegie suggested that railroad companies and steel manufacturers ought to be allowed to agree upon a "common rate." He couldn't think of "any other article of which this could be so clearly said," and in ninety-nine cases out of a hundred he said the object would "undoubtedly be to rob the community of its right to the benefits of free competition." If this is true we are safer as we are.

The probably insurmountable practical difficulty in the whole matter is the inability to define by any specific and definite standard what would be a reasonable contract, combination, or conspiracy in restraint of trade.

The inherent legal difficulty undoubtedly is that the law never yet had undertaken to qualify as reasonable or unreasonable combinations and conspiracies tending to monopolize trade because they are unlawful *per se*.

The case of Hopkins *v.* The United States (171 U. S. 592) shows in detail a large variety of business arrangements and agreements that are not within the scope of the Sherman anti trust law, which I haven't time to quote. Under these definitions very many of the difficulties suggested by the parties promoting this legislation are eliminated as elements of controversy.

It is interesting to note upon its practical phase that this matter is completely covered by Secretary Taft in his opinion in the Addyston pipe case, where he says, among other things:

"The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it."

And again:

"We think the cases hereafter cited show that the common-law rule against restraining trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its individual members."

Inasmuch as Mr. Secretary Taft is of the opinion that the alleged standard proposed to be introduced by this amendment is shifting, vague, and indeterminate, I think I may safely assume that he would be opposed to the enactment of any legislation of this character.

Mr. Lord Justice Bowen, in Mogul Steamship Co. *v.* McGregor (L. R. 23 Q. B. Div. 598) agrees with the Secretary as he said:

"This seems to assume that . . . there is some natural standard of fairness or reasonableness (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go.

There seems to be no authority and, I think, with submission, that there is no sufficient reason for such a proposition."

The Amendment would Destroy the Act as a Penal Statute.

To my mind the most serious legal objection to this proposed amendment is the fact that the introduction of the element of reasonableness or unreasonableness would entirely invalidate the penal character of the act. If this was invalidated, there would not be enough of the act left for any extended discussion.

From all the authorities submitted by the opponents of the bill, with the answers thereto on the part of the Hon. Herbert Knox Smith, my judgment is that there is very little question that such would be the result of the adoption of the proposed amendment. I do not go so far as to say that the gentlemen actively promoting the legislation contemplated or intended such a result. Nor am I certain that the legal gentlemen whose names were not disclosed, who were apparently responsible for the peculiar provisions of the act, contemplated such a result. I think it quite probable that they were undertaking to accomplish results that they thought might be advantageous to the interests that they represented, without taking into account the question as to what the effect of the amendment proposed would be upon the act itself.

Upon this question, the following authorities, in my judgment, are conclusive:

In 26 Indiana App. 279, the court was passing upon an act of the legislature which provided:

"It shall not be lawful for any person to haul over any turnpike or gravel roads at any time when the same is (are) thawing through or is (are), by reason of wet weather, in condition to be cut up and injured by heavy hauling, a load on a narrow-tired wagon of more than 2,500 pounds."

The court held that the act was invalid on the ground that it was indeterminate and uncertain, saying:

"There must be some certain standard by which to determine whether an act is a crime or not, otherwise cases in all respects similar, tried before different juries, might rightfully be decided differently, and a person might properly be convicted in one county for hauling over a turnpike in that county, and acquitted in an adjoining county of a charge of hauling the same load on the same wagon over a turnpike in like condition in the latter county, because of the difference of conclusion of different judges and juries based upon their individual views of what should be the standard of comparison of tires, derived from their varying experiences in the opinions of witnesses as to what difference of width of tires would constitute one wagon a narrow-tired wagon and another a broad-tired wagon."

In the case of the Chicago and Northwestern Railroad Company *v.* Dey, et al (35 Fed. Rep. 866), the opinion by Mr. Justice Brewer, the court says:

"The next proposition of complaint is that the law is a penal one; that it imposes enormous penalties without clearly defining the offenses. It will be observed that section 2 requires that all charges shall be reasonable and just. . . . Now the contention of complaint is that the substance of the provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what the fact is, or what any jury will find to be, a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In Tozer *v.* The United States (53 F. R. 17) the facts are stated as follows:

"George K. Tozer was indicted for a violation of the interstate commerce act prohibiting undue preferences. The Court sustained a demurrer to the fourth count, and the defendant was convicted under the second and third counts. The court subsequently denied defendant's motion for a new trial and an arrest of judgment, and from the judgment of conviction the defendant brings error."

Mr. Justice Brewer in delivering the opinion of the Court, said:

"But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Chicago and Northwestern Railroad Company *v.* Dey (52 Fed. Rep.) I had occasion to discuss this matter, and I quote therefrom as follows:"

The court then quoted the part of the Dey case that I have already cited, and said:

"'Applying that doctrine in this case and eliminating the idea that the through rate is a standard of comparison of the local rate there is nothing to justify a verdict of guilty against the defendant.'"

In the case of Louisville and Nashville Railroad Company *v.* Commonwealth (99 Ky. 133), Judge Hazelrigg, delivering the opinion of the court, said:

"The indictment in this case charges that the appellant did unlawfully charge, collect and receive . . . *more than a just and reasonable compensation therefor* contrary to the form of the statute, etc.

"A conviction followed and from the judgment on the verdict of the jury for the sum of $500, the company has appealed. . . .

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' can not be denied and that different juries might reach different conclusions on the same testimony as to whether or not an offence has been committed must also be conceded.

"The criminality of the carrier's act, therefore, depends upon the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements. . . .

"There is no standard whatever fixed by the statute or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends not upon any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest and as from it nothing can be known until after the commission of the crime.

"If the inflictions of the penalties prescribed by this statute would not be the taking of the property without due process of law and in violation of both State and Federal constitutions, we are not able to comprehend the force of our organic laws. . . .

"When we look to the other side of the question we find the contention of the State supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused."

It is to be noticed that this case is predicated upon language substantially identical with that which it is proposed to inject into the Sherman anti-trust law by this amendment.

The same question was considered by the court in the case of Commonwealth *v.* Louisville and Nashville Railroad Company (46 S. W. Rep. 700) where a statute prohibited a corporation from giving any undue or unreasonable preference or ad-

vantage to any particular persons or localities, and the court said:

"It seems to us the opinion of this court in the case of Louisville and Nashville Railroad *v.* Commonwealth (35 S. W. 129) is decisive of this, for 'undue or unreasonable preference or advantage to any particu'ar person or locality' is just as indefinite and uncertain as the phrase 'just and reasonable rate' of toll or compensation."

In the case of McChord *v.* The Louisville and Nashville Railroad Company (183 U. S. 498) after quoting the Kentucky case (99 Ky. 133), the Supreme Court of the United States said that the former law under which that decision was rendered having been found defective, had been amended by later acts which established a definite standard, and sustained the statute for that reason, approving at the same time the reasoning of the court in the other cases.

In the case of Czarra *v.* Board of Medical Supervisors (25 App. Cases, D. C., p. 450) the court, holding a statute invalid that was indefinite in its terms providing for the revoking of a physician's license "for unprofessional or dishonorable conduct," said:

"But when the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite, as that it may embrace within its comprehension not only the acts commonly recognized as reprehensible, but others also which it is unreasonable to presume were intended to be made criminal, the courts possess no arbitrary discretion to discriminate between those which were and those which were not intended to be made unlawful, and can do nothing else than declare the statute void for its uncertainty."

In the case of *ex parte* Andrew Jackson (45 Ark.) the court held a Federal statute void for indefiniteness and uncertainty, which made it a crime for anybody to commit an offense "against good mora's," for precisely the same reasons and upon the same ground laid down by the courts in the citations to which I have already called attention.

Upon this point the committee were presented with a very interesting and somewhat extraordinary discussion of the law from the Commissioner of Corporations. In the memorandum filed by the Hon. Herbert Knox Smith, he discusses this question of the effect of the amendment, taking the ground that the authorities did not justify the conclusion to which I have heretofore arrived. His first legal suggestion in connection with this question, which is entitled to consideration, is:

"The only case at all analogous which is opposed to this view (that is his view) is that of United States *v.* Tozer (52 Fed. Rep. 917) where it was held that there can be no conviction under the provisions of an act prohibiting undue preference in a case where the jury is required to determine whether the preference is reasonable or unreasonable."

As to this suggestion of the Commissioner, it is to be said that a representative of his office was in attendance upon the committee at every one of its hearings, taking notes for the use of the Commissioner, and that all of the cases to which I have called attention in this speech were specifically presented to the committee and discussed in the presence of this representative of the Commissioner of Corporations, so that at least a representative of the Commissioner had definite and specific knowledge that the case of the United States *v.* Tozer was not the only case at all analogous, but he had definite and specific information that there were not only other cases analogous, but that there were several cases specifically and precisely in point against the contention made by the Commissioner. Instead of the case of United States *v.* Tozer being the only case at all analogous, the following cases, the most of which are in point, and all of them, beyond all question analogous, had been cited and discussed:

26 Ind. Appeals, 279.
35 Fed. Rep. 866.
45 Ark.
46 S. W. 700.
99 Ky. 133.
8 Am. and Eng. Enc. of Law, 935.
183 U. S. 498.

How the Commissioner came to make this statement I am not advised.

Further continuing the discussion, the Commissioner says, of the case of Czarra *v.* Board of Medical Supervisors, (25 App. Cases, D. C., 443):

"The medical practitioner *was convicted* under the act of Congress approved June 3, 1896, of 'unprofessional and dishonorable conduct.' The point considered by the court was whether these words were sufficient to satisfy the sixth amendment, which preserves the right of the accused in all criminal prosecutions to be informed of the nature and cause of the accusation against them. In this case the court said:

"'This obvious duty must be performed by the legislature itself and cannot be delegated to the judiciary. It may doubtless be accomplished by the use of words or terms of settled meaning or which indicate offenses well known to and defined by the common law. Reasonable certainty in view of the conditions is all that is required, and liberal effect is always to be given to the legislative intent when possible.'"

This immediately precedes the quotation from that case which I have just made.

This is all the Commissioner does say about that case, its effect, and what was decided therein. If the English language is given its ordinary and usual signification, in view of the fact that the Commissioner saw fit to italicize the words "was convicted," this statement of the Czarra case is equivalent to the assertion on the part of the Commissioner that there was a conviction that was sustained, and that notwithstanding the indefiniteness of the language the court sustained the validity of the statute. That this statement of the Commissioner in his typewritten memorandum is not an inadvertence, appears very clearly from the fact that the Commissioner appeared before the committee more than a week before he submitted his written memorandum, and in his address upon that occasion made, in substance, the same statement with reference to the Czarra case that appears in his memorandum.

I hold in my hand the Czarra case. In the first place, there was no conviction under the statute. The statute provided a penalty for practicing medicine after the revocation of a license and authorized the Commissioners to revoke the license for unprofessional or dishonorable conduct.

The license had been revoked. Nothing else had been done although it is quite true that the revoking of the license laid the foundation for a criminal prosecution, provided Czarra continued to practice his profession, so that there was no conviction; and in the next place, instead of sustaining the statute and the action of the Commissioners in revoking the license, the court said:

"For the reasons heretofore given, we are of the opininon that the order appealed from must be reversed with costs and the cause remanded with directions to dismiss the complaint."

The "reasons" were that the statute was too indefinite and uncertain.

So that this case instead of sustaining the contention of the distinguished Commissioner of Corporations, is a specific and direct authority in opposition thereto, and his statement of it is a complete misstatement.

In the next case, Johnson *v.* Southern Pacific Company, (117 Feb. Rep. 469) by which the Commissioner proposed to sustain his contention he is equally unfortunate in his ability to accurately state the law. He said:

"The act of March 2, 1893, known as the 'safety appliance law' makes it unlawful for any common carrier engaged in interstate commerce to run any train in such

traffic that has not a 'sufficient number of cars in it so equipped with power or train brakes that the engineer of the locomotive drawing such train can control its speed without requiring a brakeman to use the common hand brakes for that purpose.' (Sec. 1).

"A number or convictions have been had under this act, and the point of indefiniteness had never been successfully raised, if raised at all. In Johnson *v.* Southern Pacific Company, (117 Feb: Rep. 469) the court said referring to this act:

"'The act of March 2, 1893, is a penal statute . . . its terms are plain and free from doubt and its meaning is clear.'"

The Commissioner in this citation and his comments thereon evidently relies upon the fact that here was a statute requiring a "sufficient number" an indefinite and uncertain term, and then leaves the impression, or in fact specifically states that this provision of that statute had been sustained and a number of convictions had under it, and that in relation thereto the point of indefiniteness had never been successfully raised.

Section 1 of the act of 1893, to which the Commissioner refers, reads:

"That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its lines any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake sytsem, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

This, it will be observed, contains two propositions, the first specific and definite, prohibiting a common carrier from using any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train-brake system; the second prohibiting it from running any train that has not a "sufficient number of cars in it so equipped with power or train brakes, etc."

The second proposition in the section containing the indefinite and indeterminate language "sufficient number" upon which the Commissioner of Corporations realize to sustain his contention that language as indefinite as the term unreasonable has already been incorporated in legislation and been sustained by the courts.

Having these two propositions in mind, let me call attention to the portion of the opinion from which the Commissioner of Corporations quoted, and it will presently appear that the quotation that he made was a deliberate misquotation, because the court was not, at that stage of the opinion, discussing the second proposition in the statute containing the indefinite phrase "sufficient number."

The opinion reads:

"The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty recoverable by the Government. Its terms are plain and free from doubt and its meaning is clear."

Now follows the portion of the statute upon which the language of the court was predicated. The court says:

"It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped."

An examination of the opinion discloses the fact, first that the case was not a criminal prosecution, but was a civil action to recover damages for personal injury. The question was: Did sections, 1, 2, 6 and 8 of the act of 1893 relieve the plaintiff of the assumption of risk, so that he was entitled

to recover, although he knew of the negligent condition in which the cars were being operated?

The portion of section 1 which the court quoted in its opinion as applicable to the controversy pending before it, contains only the first proposition to which I have alluded. The court quotes this much only of the section:

"Sec. 1. That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in removing interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system."

The court stopped there, leaving out of consideration entirely the second proposition, which included the element of a "sufficient number" referred to by the Commissioner in his memorandum, and the language used by the court quoted by the Commissioner of Corporations, instead of being applicable to the proposition in the section including the indefinite term "sufficient number" applied, and applied only to the first proposition in the statute, and had no relation whatever to a construction of this indefinite and indeterminate language.

The portion of the statute to which the court referred when it said, "Its terms are plain and free from doubt and its meaning is clear" is not the portion quoted in the Commissioner's memorandum, but is the portion which declared that it was unlawful for a common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system.

The case does not justify the conclusion attempted to be drawn by the Commissioner in his memorandum. The court did not directly or indirectly, by inference or otherwise, undertake to construe the term "sufficient number." If the Commissioner had quoted all of the opinion relating to the question there discussed and considered, that fact would have been too obvious for discussion. The Commissioner asserts that a number of convictions have been had under this act and that the point of indefiniteness has never been successfully raised. Not having been able to find any convictions, before I decided to discuss or comment upon this statement of the Commissioner, I called the attention of his bureau to the fact that I had not been able to find any convictions, to say nothing of a number, and asked it to furnish me the facts upon which the Commissioner based his statement.

In answer to my inquiry, I was advised "that the statement was evidently made inadvertently," and was enclosed a memorandum furnished it by the Secretary of the Interstate Commerce Commission

The memorandum of the Interstate Commerce Commission stated, "There have never been any convictions under the so-called 'Safety Appliance' law in the sense that they are criminal prosecutions." "There has never been any case brought where the charge was that there was not a 'sufficient number' of cars so equipped with train brakes." "The law was amended, March 2, 1903, for the very reason that it was believed that this was so indefinite that a prosecution under this section would have been almost impossible."

I can understand how it may have been an inadvertence in a paper prepared with deliberation for the purpose of sustaining the contention of the Commissioner of Corporations to state that a number of convictions have been had under this act, intending to be understood that they were had under that provision of it relating to a "sufficient number" although there were none. But how it could have been an inadvertence to assert that the point of indefiniteness had never been successfully raised giving the inference that it had been

raised unsuccessfully in a number of cases, where there were no such cases, is not quite clear to me.

Let us sincerely hope that the conclusions of the Commissioner of Corporation reached as a result of the multitudinous and continuous investigations in which his bureau is or has been engaged, are not characterized by the same painful inadvertence as appears in this vigorous effort to promote the passage of legislation that would vest in his bureau this tremendous power. If unhappily, they should be so characterized, it may be doubted whether they are not wholly without value for any practical purpose.

I have felt bound to call attention to these unfortunate statements for the reason that this memorandum, I imagine, is to be circulated throughout the country for the purpose of demonstrating the propriety as well as the validity of the proposed amendments to the Sherman anti-trust law. When it becomes necessary to sustain a piece of proposed legislation by that method of handling authorities, it does not commend itself to my judgment.

The distinguished publicists who are altruistically urging this amendment seem to have an abiding impression that it is practically impossible to carry on business on a scale adequate to existing exigencies without making and carrying out agreements that are illegal. If they are correct, the law is being violated every day and hundreds of times every year. They think that business men are very much disturbed by the fear that they are facing a prison cell for doing business under modern methods. I do not think that this apprehension has any reasonable foundation. Senator Lodge in his speech at the Republican Convention said, "The President has enforced the laws as he found them on the statute book." The platform says, "First and foremost a brave and impartial enforcement of the law, the prosecution of illegal trusts and monopolies, etc."

I think the results indicate that this enforcement has been more a matter of proclamation than performance. Here is the record for eighteen years:

SUMMARY OF CASES UNDER ANTI-TRUST LAWS.

President Harrison's Administration, 1889–1893.

4 bills in equity:
- 3 injunctions granted.
- 1 dismissed.

3 indictments:
- 1 quashed.
- 1 demurrer sustained.
- 1 discontinued.

President Cleveland's Second Administration, 1893–1897.

4 bills in equity:
- 3 injunctions granted.
- 1 dismissed.

2 informations (for contempt in violating injunctions):
- 1 quashed.
- 1 conviction.

2 indictments:
- 1 quashed.
- 1 dismissed.

President McKinley's Administration, 1897–1901 (*September* 14).

3 bills in equity:
- 2 injunctions granted.
- 1 dismissed.

President Roosevelt's Administration, *September* 14, 1901, *to June*, 1908.

Summary of Civil Cases —

18 bills in equity:
- 8 injunctions granted.
- 10 pending.
- 1 forfeiture proceeding: Pending.

Summary of Criminal Cases —

23 indictments:
- 7 convictions.
- 1 plea in bar sustained.
- 1 demurrer sustained.
- 14 pending.

2 proceedings for contempt in refusing to testify before Grand Jury: Convictions.

Total fines imposed, $96,000.

In 1907 the Government had in its service 271 District and Assistant District Attorneys. This little army of lawyers cost the Government in salaries and expenses $735,612.03 in addition to the salaries of the Department of Justice of $270,965.58. In the exercise of due diligence they secured 9741 convictions for violations of the law. The average number of convictions for violation of the Sherman anti-trust law during the last six years is a little more than one a year, only seven since September 14, 1901. In order to get the full significance of this record it should be borne in mind that during this period the Government has had available for its use for the enforcement of this special statute at its election $500,000 in 1904 and $250,000 in 1908. Since September 14, 1901, with 8 injunctions and 7 convictions, $386,242.88 has been expended for this special purpose, resulting in fines of only $96,000. For a condition where the violations are claimed to be flagrant and the facts obvious, the results are practically infinitesimal. They are hardly commensurate with the expenditure and the efforts involved. *Res ipsa loquitor*. It may be that the predatory rich are lurking in every corner and that the malefactors of great wealth abound. We have been frequently so informed. If this be true and they have been going about continuously "seeking whom they may devour," the extent to which the wicked have thus far gone unwhipped of justice borders upon the grotesque. No doubt the mountain has labored, but the results are inconspicuous. They are in marked inverse proportion to the zeal and enthusiasm proclaimed in the enforcement of the law. If the claims are based upon information rather than upon imagination, then the old Scotch couplet might well apply:

Woe to the coward that ever he was born,
That did not draw the sword before he blew the horn.

New York, N. Y., June, 1908.

PUBLISHING FALSE NEWS

By John King, K. C.

THE old common law offense of spreading false news or tales, which is akin to that of libel, is set forth, in a modified form, in that part of the revised criminal code of Canada which relates to seditious offenses. Every one is guilty of an indictable offense and liable to one years' imprisonment, who wilfully and knowingly publishes any false news or tale whereby injury or mischief is, or is likely to be, occasioned to any public interest.[1] The offense has been defined as "citing or publishing any false news or tales, whereby discord, or occasion of discord or slander, may grow between the Queen and her people, or the great men of the realm (or which may produce other mischiefs)."[2] Mr. Justice Stephen, the author of the definition, refers to some authorities,[3] but states that the definition is very vague and the doctrine exceedingly doubtful.

The precise common law limit of the offense of spreading false news is not easy to determine, but it seems to have been originally an offense against the sovereign and government and their protection and safety, and to have been extended to the stirring up of quarrels among the people. During the trial of a cause, in 1680, Scroggs, C. J., said: "It is not long since that all the judges met by the King's command, as they did sometime before, too, and they both times declared unanimously that all persons that do write, or print, or sell, any pamphlet that is either scandalous to public or private persons, such books may be seized, and the persons punished by law; that all books which are scandalous to the government may be seized, and all persons so exposing them may be punished. And, further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or the state, yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account."[1]

Some old English statutes were enacted in aid of the common law, and to give it a more equitable operation. The first of these is the Statute Westminster I, 3 Edward I, c. 34 (1275) as follows: "Forasmuch as there have been oftentimes found in the country devisors of tales whereby discord, or occasion of discord, hath many times arisen between the King and his people, or great men of the realm, for the damage that hath and may thereof ensue, it is commanded, that, from henceforth, none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander, may grow between the King and his people, or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the Court which was the first author of the tale."

According to Lord Coke (2 Inst. 226, 227) there were, prior to this enactment, in the reign of Henry III, two classes of persons who were the authors, in two several degrees, of great discord and scandal. The first were the inventors, and the second the propagators, of false rumors which frequently kindled discord and scandal, sometimes between the King and his commons, and at other times between the King and his nobles, the great men of the realm, and so, by causing private discontent, produced the public discord and scandal mentioned in the statute. This scandal and discord appeared in many parliaments, and especially in the two parliaments of 21 Henry III, when Magna Charta was confirmed, and of 42 Henry III, held at Oxford, "which,

[1] R. S. C., 1906, c. 146, s. 136.

[2] Steph. Dig. C. L., 3d. Ed., Art. 95, p. 66.

[3] R. *v.* Burdett (1820), 4 B. & A. 95; R. *v.* Harvey (1823), 2 B. & C. 257; 3 Edw. I, c. 34; Starkie on Slander, by Folkard, 670-2.

[1] R. *v.* Harris (1680), 7 How. St. Tr. 929.

in story, is called *insanum parliamentum*," and "did oftentimes, in the reign of that King, break out into fearful and bloody wars and rebellions." King Edward I, having found by experience the direful effects of such false rumors, and knowing that the sovereign's position was better secured by the real love of his subjects than by the dread of rigorous laws, had this statute passed to remedy the invention and propagation of such rumors, in a mild and temperate manner, both with respect to the practice and the punishment, "rather leaving the same to the censure of the common law (which all men willingly obey) than by inflicting any new devised punishment." Coke adds, that the King's moderation in leaving the punishment to fine and imprisonment was the greater, because "the ancient law of England before the Conquest was much more severe and rigorous."

These comments of Lord Coke indicate the reasons for the statute of Edward, and the mode of punishing the offense at common law. The statute proceeds on the idea that, by the common law, as well understood at the time, and enforced by the courts, the author or inventor of the false tale was punishable by indictment — as undoubtedly was the propagator of it also — and the statute merely provided a means by which he should be effectually discovered and brought to justice.

The enactment of Edward I was supplemented by the statute of 2 Richard II, stat. 1, c. 5 (1378). It recited in effect, that there being "devisors of false news and of horrible and false lies" concerning prelates, nobles and great men of the realm, and also concerning officers of the King's house, justices and other great officers of the realm, with respect to things which by them "were never spoken, done nor thought," to their great slander, and whereby discords might arise between them, or between the lords and the commons, "great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided." It thereupon enacted, "that, from henceforth, none be so hardy to devise, speak, or to tell, any false news, lies, or other such false things of prelates, lords, and of others aforesaid, whereof discord or any slander might arise within the same realm; and he that doth the same shall incur and have the pain another time ordained thereof by the statute of Westminster the First (*i.e.*, 3 Edw. I., c. 34) which will, that he be taken and imprisoned till he have found him of whom the word was moved." There was also the statute of 12 Richard II, c. 11 (1389), which was directed against reporters of lies concerning prelates, nobles, justices and "other great officers of the realm," and made the offenders punishable by the Council. Other statutes for the same purpose, in aid of the common law, were passed in the reigns of Philip and Mary and Elizabeth.[1]

The statutes of Edward and Richard, which indicate the ancient origin of the enactment in the Canadian Code, were known as the *Scandalum Magnatum* Statutes. They gave both a civil and criminal remedy (denied to ordinary subjects) to persons of rank and dignity, peers, judges, or any of the great officers of the Crown, of whom derogatory words were published, even without proof, in civil cases, of special damage; but they became obsolete long before they were repealed, the ordinary process of action, indictment, or information, affording ample means of redress in every case. They were repealed by a statute passed in the reign of the late Queen.[2]

A learned commentator, well known in the United States and Canada, referring to these old English statutes and Coke's comments, remarks that "on principle, and as matter addressing itself to the legislative discretion, if not to the judicial, the political

[1] 1 & 2 Phil. & M., c. 3 (1554–5) and 1 Eliz., c. 6 (1558).

[2] The Statute Law Revision Act, 1887, (50–51 Vict., c. 59).

falsehoods, as they are called, whereby men in office and candidates for office, and private persons who seek to influence men in respect to their votes, are made to speak, do and intend what they never dreamed of, and their real views and purposes are perverted — falsehoods with respect to the views and purposes and declarations of men regarding public affairs — are among the highest crimes, next to treason itself, of which any persons can be guilty. Such falsehoods have wrought in our day the same mischiefs which are described by Lord Coke, only on a larger scale."[1] And commenting elsewhere on "this old English doctrine" the same writer says: "Plainly enough, properly limited, it is adapted to our institutions, circumstances and needs. But it has long been practically unused. Lying, in print and with the naked tongue, to the detriment alike of individuals and the public, lying in every possible pernicious form, has been so long and with so great eclat practiced among us, and so immense would seem the scandal of requiring writers and speakers to confine themselves to the truth, that judges might hesitate to enforce the doctrine."[2]

In 1778, Alexander Scott was indicted at the Old Bailey, "for that he, on the 23rd of April last, unlawfully, wickedly and maliciously, did publish false news, whereby discord, or occasion of discord, might grow between our lord the King and his people, or the great men of the realm, by publishing a certain printed paper containing such false news; which said printed paper is of the tenor following: 'In pursuance of His Majesty's order in council, to me directed, these are to give public notice that war with France will be proclaimed on Friday next, the 24th instant, at the palace royal, St. James, at one of the clock, of which all heralds and pursuivants at arms are to take notice, and give their attendance accordingly. Given under my hand this 22nd day of April, 1778. Effingham, D.M.'" The defendant was a bill sticker; and it appearing on the trial that he had been imposed upon, and induced to stick up the bill containing the false matter believing it to be true, whereas the bill itself was a forgery, he was acquitted. There does not seem to have been any doubt entertained that the act with which he was charged was indictable.[1]

Every publication is intrinsically illegal which tends to produce any public inconvenience or calamity. And, from early times, it has been considered as an offense at common law to attempt, by means of false rumors, to raise the price of provisions or other necessaries of life;[2] or to diminish the price of any staple commodity, to the prejudice of the dealers in general.[3] And in Mich. Term, 39–40 Eliz., it was, after conference and mature deliberation, resolved by all the justices, that every practice or device, by act, conspiracy, words, or news, to enhance the price of provisions, or other merchandise, was punishable by law as being prejudicial to trade and commerce, and injurious to the public in general.[4] Practices of this kind came under the notion of forestalling; which anciently comprehended, in its signification, regrating and ingrossing, and all other offenses of the like nature.[5] Spreading false rumors, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offenses of this kind.[6] Also, if a person within the realm bought any merchandise in gross and sold the same again in gross, it was considered an offense of this nature, on the ground that the price must be thereby enhanced, as each person through whose

[1] Bishop's Crim. Law, 4th Ed., s. 929.
[2] Bishop's New Crim. Law, s. 477.

[1] Scott's Case, 5 New Newgate Calendar, 284.
[2] 43 Ass. pl. 38; 3 Ins., 196.
[3] 43 Ass. pl. 38.
[4] 3 Inst. 196; Bro. Ind. pl. 40; Bac. Abr. tit Forestalling.
[5] 3 Inst. 195; Bac. Abr. tit. Forestalling (A)
[6] I Hawk. P. C., c. 80, s. 1.

hands it passed would endeavor to make his profit of it.[1] So the bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, was an offense at the common law; for, if such practices were allowed, a rich man might ingross into his hands a whole commodity, and then sell it at what price he should think fit.[2] It is said that the common law offenses of ingrossing and regrating extended only to the necessaries of life.[3] The attempt by false reports to enhance or abate the price of native commodities was punishable by fine and ransom at common law.[4] And when certain persons came to Coteswald, and said, in deceit of the people, that there were such wars beyond the seas that wool could not pass or be carried beyond sea, whereby the price of wools was abated; and presentment thereof being made, the defendants, having appeared, were, upon their confession, put to fine and ransom.[5]

In one reported case[6] the defendant was charged, in two counts of a criminal information, with spreading rumors, with intent to enhance the price of hops, in the hearing of hop planters, dealers and others, that the present stock of hops was nearly exhausted and would be exhausted before the present crop could be brought into market; and that there would soon be a scarcity of hops; with intent to induce dealers not to bring their hops to market for sale for a long time, and thereby greatly enhance the price. There were other counts charging an intent to enhance the price by unlawfully ingrossing (*i.e.*, monopolizing) large quantities of hops so as to resell the same for an unreasonable profit, and by various other means. All the offenses are charged as offenses at common law. The rumors mentioned in the first two counts are not described as "false" rumors, nor does the court appear to have given, nor to have been required to give, an express opinion upon the indictable quality of the offense set forth in those counts. The judgment proceeds upon the other charges, which were deemed sufficient, the defendant being adjudged to pay a fine of £500, and to be imprisoned for one month.[1] The case was decided by Kenyon, C. J., and Lord Campbell, who did not admire Kenyon, comments upon it very disparagingly in his Lives of the Chief Justices (vol. 4, p. 84, of Am. Ed.). But he cites no authorities *contra*, and he admits that the doctrines enunciated were at the time highly popular, and contributed to enhance Kenyon's reputation as a great judge.

It is noticeable that this decision by Kenyon, C. J., must have been under what he believed to be the common law, the statutes against forestalling, etc., having been previously repealed by the Act 12 Geo. 3, c. 71 (1772), as being detrimental, according to the preamble of the Act, to the supply of the laboring and manufacturing poor. Any doubts upon the subject were subsequently removed by the Act 7–8 Vict., c. 24, s. (1844), which expressly abolished forestalling, regrating and ingrossing, both as common law and statutory offenses. By section 4 of that Act, however, nothing contained in the Act "shall be construed to apply to the offense of knowingly and fraudulently spreading, or conspiring to spread, any false rumor,

[1] 3 Inst., 196; Bac. Abr. tit. Forestalling (A); I Hawk. P. C., c. 80, s. 3. But it was held that any merchant, whether subject or foreigner, bringing victuals or any other merchandise into the realm, may sell it in gross. 3 Inst., 196.

[2] I Hawk. P. C., c. 80, s. 3; 3 Inst., 196. See, also, 4 Bl. Com., 158; R. *v.* Davies, I Rol. II; R. *v.* Waddington, *infra*; R. *v.* Webb (1811), 14 East, 406; Pratt *v.* Hutchinson (1812), 15 East, 511; R. *v.* Rusby (1800), Peake Addl. Cas., 189. According to a note in Peake, the case last named is the same case which Chitty mentions under the name of Rex *v.* Rushby, 2 Chit. Crim. Law, 536, where the form of the indictment appears.

[3] Pettamberdass *v.* Thackoorseydass (1850), 7 Moore P. C., 239, 262.

[4] 3 Inst. 196, referring to 23 Edw. 3, c. 6; 13 Rich. 2, c. 8, *Inter leges Ethelstani*, c. 12.

[5] 43 Ass. pl. 38, 3 Inst., 196.

[6] Rex *v.* Waddington (1800), 1 East, 142.

[1] Another similar case against the same defendant is reported in 1 East, 167. See, also, R. *v.* Gilbert (1801), 1 East, 582.

with intent to enhance or decry the price of any goods or merchandise, or to the offense of preventing, or endeavoring to prevent, by force or threats, any goods, wares, or merchandise, being brought to any fair or market, but that every such offense may be enquired of, tried and punished, as if this Act had not been made." There can be no doubt that the offenses excepted by this section are punishable in England like other common law misdemeanors.[1]

There is no enactment in Canada precisely similar to section 4 (*supra*) of the English statute, but there are enactments in the Code designed to serve the same or a similar purpose. The first offense mentioned in the English Act (s. 4) would apparently be covered by the Code, if the price of any goods or merchandise were enhanced or decried by the wilful and knowing publication of any false news or tale. Then in that part of the Code dealing with offenses connected with trade — Every one is guilty of an offense punishable on indictment, or on summary conviction before two justices, and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labor, who (*a*) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling, or otherwise disposing of, any wheat or other grain, flour, meal, malt, or potatoes, or other produce or goods, in any market or other place; or (*b*) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt, or potatoes, while on the way to or from any city, market, town or other place, with intent to stop the conveyance of the same.

So, also, by section 498 of the Code — Everyone is guilty of an indictable offense and liable to a penalty not exceeding four thousand dollars, and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, or transportation company, (*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or (*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or (*c*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of any such article or commodity, or in the price of insurance upon person or property.

Under sub-section (*d*) of this section two incorporated trade associations were indicted and convicted, at Toronto, of conspiracy in restraint of trade, and a penalty of $5000 imposed upon each of the defendants.[1]

In an instructive treatise on "State Control of Trade and Commerce," by Mr. Albert Stickney of the New York Bar, the writer doubts the soundness of the decision (*supra*) in the *Waddington Case*. He says that no authority exists, so far as he could discover, for the decision; that it is singular that the original statutes creating the offenses should have been passed if the offenses existed already; and that it is also clear, that the lawyers who drafted the repealing Act would have abolished the offenses, if they had supposed that the offenses still continued to exist at common law. Some recent opinions of the English judges are opposed to this view. In the *Mogul Steamship Company v. McGregor, Gow & Co.*,[2] Lord Justice Fry expressed the opinion that the offenses mentioned were offenses at common law. "The ancient common law of this

[1] 1 Russ., 6th Ed., 476.

[1] Rex *v.* Master Plumbers and Steam Fitters Co-operative Association, Limited, *et al.* (1907), 14 O. L. R., 295.

[2] (1889) L. R., 23 Q. B. D., at p. 628.

country," he says, "and the statutes with reference to the acts known as badgering, forestalling, regrating and engrossing, indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public; they were held criminal accordingly." Referring to the repeal of the penal statutes by the statute of George III, he says "the common law was left to its unaided operation," and that subsequently the statute 7–8 Vict., c. 24 (*supra*) had "altered the common law" by abolishing the offenses named. And he adds, that "the comparison of the operative part of the statute with this proviso (*i.e.*, section 4 (*supra*) of the Act) goes far to draw the line between lawful and unlawful interference with the ordinary course of trade or of the market."

It is said to have been resolved by all the judges, that all writers of false news[1] are indictable and punishable. And, even at this day, the fabrication and publication of false news, producing any serious public detriment, would probably be regarded as criminal and punishable.[2] During Britain's war with the first Napoleon, in 1814, several persons were charged with conspiring to raise the price of the public funds by means of a false rumor that the French Emperor was dead. The intent, it was alleged, was to injure and aggrieve all the subjects of the King who should, on the day of spreading the rumor, purchase any share in the public Government funds. The act charged was held to be indictable, the end as well as the means being illegal.[3]

In discussing the question whether the offenses referred to are part of the law of the United States,[4] the commentator already mentioned has the following pertinent observations:

"It is reasonably plain that the common law of our states has not adopted these offenses in terms as thus defined [*i.e.*, the offenses of forestalling, etc., as defined by Blackstone, who simply reproduces the statutory definitions from 5–6 Edw., 6, c. 14]. Yet it does not follow that the principle from which the law proceeded has not become an inheritance with us. Modified, therefore, and thus adapted to our altered situation and circumstances, there is ground for deeming them criminal offenses in States that recognize common law crimes.[1] . . . If we accept these offenses as pertaining to our unwritten law, their modified form will adopt itself to the suppression of present evils — evils obvious even to superficial observation. And thus modified, the English law of this subject, prevailing when our colonies were settled, seems as well adapted to our circumstances as it was to those of the mother country. Therefore, in just principle, they are a part of our common law wherever statutes have not provided to the contrary.[2] . . . The only old statute which much concerns us is 5–6 Edw. 6, c. 14, which must be deemed common law with us as far as applicable. . . . Where in this country this Act has not been repealed, we have not the same occasion for doubt whether these are common law offenses, but we have doubt as to their precise extent and nature. In reason, forestalling, considered apart from ingrossing and regrating, seems to be committed wherever a man by false news, or by any deception, gets into his hands a controlling quantity of any one article of merchandise and holds it for an undue profit, thereby creating a perturbation in what pertains to the public interests. If he circulates the false news, or uses the other deception to enable others to operate in

[1] 4 Read. St. L. 154; Digest Law Lib. 23.

[2] Folkard's Law of S. & L., 7th Ed. 727.

[3] Rex *v.* De Berenger, *et al.* (1814), 3 M. & S. 67.

[4] English statutes, which were in force prior to the date of the declaration of independence, seem to be recognized by United States jurists as common law generally in the states. Bishop, C. L., vol. 1, s. 520.

[1] Referring to remarks of Campbell, J., in Raymond *v.* Leavitt (1881), 46 Mich. 447; 41 Am. R. 170.

[2] Quoting 7 Dane Abr. 39, *et seq.*

this way, or to operate himself, but fails, still he has committed, if not the full offense, at least the criminal attempt."[1]

Under the Code the "false news or tale" must be published "wilfully and knowingly." The meaning of particular words in a statute, in the absence of express definition, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained.[2] The word "wilful," as applied to the action or default of a person, amounts to nothing more than this, that he knows what he is doing, and is a free agent.[3] "Wilful misconduct" is misconduct to which the will is a party: it is something opposed to accidental or negligent; the *mis* part of it, not the conduct, must be wilful.[4] It has been said that the legal meaning of "wilfully" is purposely, without reference to *bona fides* or collusion;[5] and to "wilfully neglect to do a thing" is intentionally or purposely to omit to do it.[6] An offense implies intention in the offender; and "wilfully" is, in general, equivalent to "knowingly and fraudulently."[7] "Wilfully and falsely," under 21–22 Vict., c. 90, s. 40 (Imp.), which imposes a penalty for "wilfully and falsely" pretending to a medical title, means wilful falsity, not mere incorrectness. Pollock, C. B., said, "wilfully" cannot here mean merely "intentionally" as opposed to "accidentally" (which is the meaning it sometimes has), for a man cannot accidentally call himself a Doctor of Medicine; and, therefore, the section must be read as pointing to wilful falsity.[1]

The word "wilfully," in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.[2] It is frequently understood as signifying an evil intent without justifiable excuse.[3] Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination, with a bad intent, to do it or omit doing it.[4] On the general principles of construction, a statute which makes in unqualified terms an act criminal or penal, would be understood as not applying where the act was excusable or justifiable on grounds generally recognized by law. For example, the sheriff who arrests under a warrant the driver of the mails, is not indictable for knowingly and wilfully obstructing and retarding the mail.[5]

The importance of the presence, or absence, of the word "knowingly," in statutory definitions of offenses, is discussed in a number of cases.[6] From the

[1] I Bishop's New Crim. Law, ss. 520, 522, 524–56, citing 2 Chit. Crim. Law, 527 *et seq*; Godson on Patents, 16 *et seq*; and other authorities.

[2] *Per* Abbot, C. J., in R. *v.* Hall (1822) I. B. & C. 136; approved in the case of the Lion, 6 Moo. P. C. C. N. S. 163, 171; 2 L. R. P. C. 525; 38 L. J. Adm. 51.

[3] *Per* Bowen, L. J., Re Young & Harston (1885), 31 Ch. D. 174; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245.

[4] *Per* Bramwell, L. J., in Lewis *v.* G. W. Ry. (1877), 47 L. J. Q. B. 135; 3 Q. B D. 195.

[5] *In arg.* in Hutchinson *v.* Manchester, Bury & Rossendale Ry. (1846), 15 L. J. Ex. 295; 15 M. & W. 314, citing R. *v.* Price (1840), 11 A. & E. 727; 9 L. J. M. C. 49.

[6] *Per* Mellor, J., in R. *v.* Downes (1875) 45 L. J. M. C. 8; I Q. B. D. 25; 39 J. P. 760.

[7] *Per* Erle, J. in R. *v.* Badger (1856) 6 El. & Bl. 137; 25 L. J. M. C. 85; and see *per* Lord Campbell, C. J., *Ibid.* 90. See, also, R. *v.* Bent (1845) I Den. C.C. 157, 159; Hudson *v.* McRae (1863) 33 L. J. M. C. 65.

[1] Ellis *v.* Kelly (1860), 30 L. J. M. C. 35; 6 H. & N. 222; 25 J. P. 279.

[2] *Per* Shaw, C. J., in Commonwealth *v.* Kneeland) (1838), 20 Pick. (Mass.) 220.

[3] Bishop's C. L. 428. See, also, Carpenter *v.* Mason (1840), 4 Per. & Dav. 439; 12 Ad. & E. 629.

[4] Felton *v.* United States (1877), 6 Otto (U. S. S. C. R.) 702.

[5] U. S. *v.* Kirby (1868), 7 Wallace (U. S. S. C. R.), 482.

[6] See Mullins *v.* Collins (1874), 43 L. J. M. C. 67; L. R. 9 Q. B. 292; Cundy *v.* Le Cocq (1884) 53 L. J. M. C. 125; 13 Q. B. D. 207, and cases cited therein; R. *v.* Tolson (1889), 16 Cox C. C. 629; 23 Q. B. D. 168; Warb. Lead. Cas. 72. The last named case settled one of the qualifications of the definition of bigamy as set forth in sec. 307 of the Canadian Code.

remarks of Stephen, J., in one of these cases (*Cundy v. Le Cocq*, *supra*), it would seem that the maxim, *Actus non facit reum nisi mens sit rea*, is not nearly as robust as it once was. "The Act of Parliament," he says, "must be looked at to see what knowledge is necessary to complete the criminal act." And, in another of these cases (*R. v. Tolson*, *supra*), the same learned writer makes the following observations: — "Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words 'maliciously,' 'fraudulently,' 'negligently,' or 'knowingly' (should he not have added 'wilfully'?). But it is the general, — I might, I think, say the invariable, — practice of the Legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion, are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined." "Knowingly issuing" a fraudulent prospectus means intentionally issuing it, under the English Companies' Act, 1867, Section 38.[1] The word "knowingly" or "well knowing," in an indictment, will supply the place of a positive averment that the defendant knew the facts subsequently stated.[2] It is absolutely necessary to constitute guilt, as in indictments for uttering forged tokens, or other attempts to defraud, or for receiving stolen goods, and offenses of a similar description; but, if notice or knowledge be unnecessarily stated, the allegations may be rejected as surplusage.[3]

Unlike the articles in the Canadian Criminal Code as to libel, there is nothing in this section (s. 136) to indicate what will constitute a "publishing" of false news within the meaning of the section. The words used in 3 Edward I, c. 34, are, "tell or publish any false news or tales," and in the criminal information in the *Waddington Case* (*supra*), the expression is, "did spread divers rumours and reports by . . . in the presence and hearing . . . declaring and publishing," etc. This follows the form in Chitty's Criminal Law (Vol. 2, p. 527), which is evidently intended for an oral or written or printed publication. It is reasonably plain that either would be sufficient. Publishing a libel, according to the Canadian Code (s. 318), is exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person.

There is only one case on record in Canada of a prosecution under this section (s. 136) of the Code. It is a conviction made by a judge of the Supreme Court of the Northwest Territories. The charge was, that the accused, "on or about the nineteenth day of March, 1907, did wilfully and knowingly publish a false tale, to wit: 'Americans not wanted in Canada; investigate before buying land or taking homesteads in this country;' by means whereof an injury was likely to be occasioned to a public interest, namely, the immigration of Americans into Canada." The accused had made copies of the following announcement (Exhibit A) on store wrapping paper, and posted them up in his store windows. He had also taken a copy to a printing office and ordered five hundred posters from same: "Closing out sale. We have decided to leave Canada. We will now offer our entire stock for sale at the actual wholesale cost. Americans not wanted in Canada. Investigate before buying lands and taking homesteads in this country. Ten thousand dollars' worth

[1] Twycross *v.* Grant (1877), 2 C. P. D. 469; 46 L. J. C. P. 636.

[2] 2 Stra. 904; Com. Dig. Indictment, G. 6. See Russ. & Ry. 317; 1 Stark, 390.

[3] See remarks of the court in Williamson *v.* Allison (1802), 2 East, 445, as to charging a *scienter* in an action for a breach of a warranty for goods.

of new goods arriving. Men's clothing, women's skirts. All kinds of dry goods. Everything will be sold at actual cost, Cash Buyer's Union, Taber, Alberta." Harvey, J., in delivering judgment, said that he thought the offense "sufficiently proved under the Act by the taking of Exhibit A to the publisher. It is also apparent it was intended to give considerable circulation to it — the printing of 500, which would no doubt have been circulated, — and the circulation which was accomplished by the notices in the window show that it was intended to give some publicity to it. There did not appear to be any particular reason for it except what was hinted at — that a prosecution had taken place for an infraction of something under the Inland Revenue law. That might have caused a feeling of irritation which would result in something of this sort being published. The words themselves, under certain circumstances, would not amount to an offense. If a newspaper, in discussing the public policy of the country, stated that it did not think it was in the interest of Canada that citizens of the United States should come in here, I do not think that would be a matter which would be properly dealt with under this section of the Code. If, under proper conditions, it was pointed out that people coming in should investigate before buying land or taking homesteads, I do not think it would be a matter that any objection could be taken to. But, in this case, it is the connection of the circumstances — "We have decided to leave Canada" — it appears to me the reasonable conclusion to be drawn from that statement is, that "We are leaving Canada because Americans are not wanted here, and we are going to sell out all we have and go away, and we will advise all people who are coming in to investigate before buying lands or taking up homesteads;" the innuendo being that, if they investigate, they will find conditions such as to prevent them investing and taking up homesteads. I think that comes within the provisions of the section, and the evidence shows that any one who knows anything about the conditions in this country knows that great efforts are being made to induce settlers from the United States, who are commonly known as Americans, to come into Canada. Consequently there is no doubt about this being false, and it appears to me that, this being the policy of the country, to have such a statement as this published among people, who we believe would be affected by it, would be against the public interest. Evidence was given on that point, too.

It is very common for merchants, in trying to sell out old goods, to make statements which are not altogether in accordance with the facts, such as they are leaving the place, and in this case, if that were by itself, no exception could be taken to it. There is nothing in the notice itself, if the words "Americans not wanted, etc.," were left out, that any one could take exception to. I think I am bound to enter a conviction. The sentence will be a fine of $200, or in default three months' imprisonment." (The King *v.* Hoaglin (1907) 12 C. C. C. 226).

The publication of the false news or tale, aimed at by the Code, is apparently such a notification of it to the public at large, either orally, or by writing or printing, as has caused, or is likely to cause, harm, loss or damage, in a material degree, to anything which is for the public good or benefit. "Thy tongue deviseth mischief," saith the Psalmist, and the publisher, by tongue, print, or pen, of such news or tale, would be, as Dryden says, "a worker of mischief," working, in such cases, "divisions which hinder the common interest and public good."

TORONTO, CANADA, November, 1908.

INTIMIDATION BY FINES IN LABOR DISPUTES[1]

By Arthur W. Blakemore

In case of a justifiable strike has a contractor the right to invoke the aid of the court to prevent a labor union from imposing a fine, or threatening to impose one, upon one or more of its members under its rules to induce them to leave the contractor's employ without breaking any contract with him? That is the question which the Massachusetts Supreme Court has recently decided in the affirmative.[2]

The strength of the court at the present time, the public interest in the decision, its probable effect on labor unions as militant organizations, the comparative novelty of the doctrine laid down, and the able and elaborate dissenting opinion, have all combined to create a disturbance in the placid current of the law whose ripples will not die away for many a day.

Let us first see what the court did decide. The suit was a bill in equity brought by an employer against certain officers and members of certain labor unions. It appeared that the labor unions were conducting a strike against the plaintiff for higher wages and a shorter day, and that certain of their members working by the day and not under contract, persisted in working notwithstanding the strike. The agents of the unions ordered these men to cease working and threatened them with the imposition of a heavy fine under union rules on their refusal. A preliminary injunction was issued. The full court has now ordered a decree enjoining the defendants, their agents and servants, from intimidating by the imposition of a fine, or by a threat of such fine, any person or persons from entering into the employ of the plaintiff or remaining therein.

There is a dissenting opinion by Sheldon, J. in which the Chief Justice concurs, and Loring J. in a separate opinion, expresses his conviction that the majority is wrong but that he feels bound by the prior decision of the court in Martell *v.* White.[1] He says that the principle of *stare decisis* should govern the courts wherever injustice does not result and that no injustice can result to the labor unions through the decision of the majority, as they can properly accomplish the same result aimed at by fines by expelling members and demanding money as a condition for reinstatement. The majority state on this point that if the expulsion and subsequent initiation fee are part of one and the same transaction, then there may be a strong reason for treating the procedure as a fine.

The course of the argument between the majority and the minority is clean cut. Hammond J., who writes the majority opinion, begins by designating the plaintiff's right as the common law right to a reasonably free labor market, arising not out of contract or statute, but the nature of things. The minority replies that this right exists, to be sure, but is subject to the defendants' right to curtail and restrict it by combining in a lawful strike for the improvement of their conditions and, if they can do so without resorting to wrongful means, by wholly stopping the free flow of labor to the plaintiff.

The majority opinion admits the laborer's right to combine to obtain higher wages, and for the purpose of strengthening the organization, to make appropriate by-laws for its internal management, and to enforce these by-laws by fines and penalties. The majority, however, observes that neither the employer's right to a free labor market or the employee's right of combination is absolute, but both are only relative

[1] See learned article by Hon. Jeremiah Smith in 20 Harvard Law Review, 253, 345, 429.

[2] Willcutt *v.* Bricklayers Union, October 24, 1908.

[1] 185 Mass. 255.

rights and the only question is on which side of the line the coercive fine shall stand. The minority tacitly admits this.

The majority opinion then proceeds to lay down the case against strike fines as lucidly and forcibly as it can be expressed. Mr. Justice Hammond treats the officers of labor unions like third parties who have no right by intimidation to interfere with the freedom of contract of members who wish to work. He says that the rule of freedom of contract is founded upon principles of public policy and that it can make no difference to the public or to the employer that the person intimidated is or is not a member of the society intimidating.

The minority replies that the right to combine and the right of such combinations to regulate the conduct of their members towards third parties by suitable penalties cannot be objectionable. The minority adds that the law against labor unions cannot be more stringent than is applicable to other organizations established for proper purposes.

We may take breath at this point long enough to recollect, however, that the majority can in no sense be accused of animus towards labor unions as such. The only question in this, the Willcutt case, is whether the principle of the Martell case that coercive fines are illegal when levied by a combination of employers to the damage of a third person is applicable to such fines levied by a combination of employees. The only question is whether the labor unions shall be subject to the same restrictions as the employers' unions if we stand on the majority platform that the Martell case was correctly decided.

The minority opinion goes on to enlarge on the voluntary character of labor unions and remarks that persons who do not agree with the wisdom of their aims or methods may drop their membership. The majority reply that practically speaking this is not so — that most laborers must join unions or starve. The majority remarks that the fact that the laborer has a choice to join a union or not is not decisive, as in almost all cases of coercion there is a choice, as a traveler stopped by a highwayman has a choice to give up his life or his purse. The minority replies, "The situation of one who finds himself compelled to choose between two alternatives, however distasteful, which he has brought upon himself and neither of which is unlawful, is no way comparable to that of one who is compelled by wrongful force to elect between submitting to one of two alternative injuries, both of which are unlawful."

Does not the majority opinion amount to an attack on the laborer's right of combination? The situation really is this. A body of peaceable men have organized and voluntarily entered into contractual relations with each other to act together in securing certain lawful ends. Each member of the union is under a contractual duty to obey the will of the majority enforced under the rules of the union. In denying the right to enforce these rules the employer does not really object to the fine on the individual as such, but to the concerted action of the employees as enforced under their agreement — hence he is really attacking the agreement to abide by the will of the the majority.

One result of this view of the case is that we observe clearly that the only contract right concerned is that of the employees with each other. The employer had no contract right to have his men continue to work in the Willcutt case, while the fellows of the men who worked did have a contract right that they should obey the union rules. The men who worked were under contract to leave and under no contract to stay. The injunction issued protected a breach of contract at the suit of a third party and for his benefit enjoined the enforcement of the very penalty for that breach which had been agreed upon by the parties to the contract. Injunctions are often issued to restrain a breach of con-

tract, but here is one issued to protect a breach, issued not to enforce a contract right but to take away one. The right of the majority to impose a fine is a contract right and it is wiped out by the injunction. Why is not the employer himself in the position of the third party who is attempting to force a person under contract with another to break that contract?

The case seems to resolve itself into a question whether there are two parties or three concerned in the problem. One fundamental difficulty with the position of the majority is that it persists in regarding the members of the union as separate individuals, and the act of the union officials as the act of a third party when there are many authorities to the effect that the laborers have a right to combine and be treated as a unit.[1] Mr. Justice Sheldon remarks that the law will not do so vain a thing as to declare the right of labor unions to carry on a justifiable strike and then refuse them the use of the only practicable means by which their acknowledged rights can be secured.

The majority emphasizes the tremendous power of labor organizations. The minority replies: "Gloomy vaticinations of injurious results to be apprehended from the excessive power which labor unions may acquire by their combination of many individuals into one body do not greatly impress us. The power of capital hitherto has not been found insufficient to prevent other than proper advantages from being gained by the representatives of labor, nor does it seem likely to be insufficient in the future. If it shall appear that there is such a danger, yet we cannot alter the law by denying to labor unions the right and powers which the law gives to all lawful associations."

This last remark by Mr. Justice Sheldon is of very deep significance. Is not the whole question legislative rather than judicial? When the court discusses the relative powers of capital and labor and the probable result of their conflict, is it not treating of a legislative question?

The ancient common law had some good points which we may be drifting away from. The Anglo Saxons who made the common law were a sturdy race given to working out their own problems without asking the aid of the courts. The only matters with which the common law policeman concerned himself were crimes of violence. The failure of the common law to punish thievery by trick or illicit intercourse are familiar examples of this. When the people were vexed with commercial abuses and labor troubles, when they wanted to preserve a free market for merchandise or labor, they went, not to the courts, but to the legislature and the statutes against engrossing, forestalling[1] and regrating and the statutes of laborers[2] are well known examples of this activity. The English courts are following these lines today. The cases of the Mogul Steamship Company[3] and Allen *v.* Flood[4] clearly exhibit the tendency to leave to Parliament questions of commercial expediency.[5]

Is not the English and common law rule more consonant with our frame of government? We have legislatures with broad powers to correct abuses and these powers have been frequently exercised. The courts are to administer laws, not to make them. Is it not wiser for popular

[1] 20 Harvard Law Review, 349, 350.

[1] St. 5 and 6 Edw. VI. c. 14. Forestalling is said to be also a crime at common law, 1 Hawk. P. C. 234. See Ordinance for bakers, etc. c. 10, reprinted in Beale's Cases on Criminal Law, p. 816. See also Coke, 3rd Inst. 196 reprinted in Beale's Cases on Criminal Law, p. 818. The statutes against engrossing, forestalling and regrating were repealed by 7 and 8 Vict. c. 24, s. 1, 4.

[2] 23 Ed. 3, c. 1, 2; 5 Eliz. c. 4, s. 5, 6. See further the English Combination statutes, 40 George 3, c. 106; 5 George 4, c. 95; 6 George 4, c. 129; 34 and 35 Vict. c. 31; 38 and 39 Vict. c. 8.6; 39 and 40 Vict. c. 22, discussed in 17 *Harvard Law Review*, 511–532.

[3] 23 Q. B. D. 598.

[4] L. R. A. C (1898) 1.

[5] See however Temperton v. Russell (1893) 1 Q. B. 715.

representatives to frame an anti-trust law or a railroad rate law after popular discussion and agitation than for the courts to interfere? The Massachusetts legislature has recently passed statutes to preserve the open market[1] and the Supreme Court has upheld them.[2] When an alleged right is on the border line of *damnum absque injuria*, when the precedents for judicial interference are slim and the theory of the law is admittedly in a "nebulous" stage, when all the learning and research of counsel and court together cannot unearth a precedent for judicial action fifty years old although labor unions are centuries old, when the question is of general public interest of which the legislature properly could take cognizance and with which it will certainly be asked to deal, why should the court interfere?

[1] St. 1901 c. 478; R. L. c. 56 s. 1. St. 1907 c. 469.

[2] Comm. *v.* Strauss, 191 Mass. 545. Opinion of the Justices, 193 Mass. 605.

We must not forget that the Willcutt case we have been discussing was a case of a lawful strike by an orderly body of men, that no question of breach of contract with the employer was involved and that the only authority outside the state to sustain the court is a common law action in Vermont based on considerably different facts.[1]

The Willcutt case cannot be the last word on the subject, even in Massachusetts. The court must go forward or back. The apparent conflict between the majority and Mr. Justice Loring on the question whether a union in the same situation as that presented in the Willcutt case can expel a member and charge him a fee for reinstatement may well be the next question to come before the court.

BOSTON, MASS., November, 1908.

[1] Boutwell *v.* Marr, 71 Vt. 1.

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, facetiæ, and anecdotes.

A RESPONSIBLE NATIONAL ORGANIZATION.

The recommendation of President Dickinson at Seattle, that a committee be appointed to consider the advisability of a reorganization of the American Bar Association, will command general approval. Whether or not the present plan should be radically changed, it is evident, as we have often insisted, that the results now are unsatisfactory. Although many eminent lawyers are enrolled in the Association, and several are faithful in attendance at the meetings, it must be admitted that the proportion of these who make a practice of attending is very low, that the debates are frequently unprofitable, and that matters of vital importance to the profession are often determined by small and wholly unrepresentative assemblages, or by large and unwieldy meetings in which the members of the local bar predominate. Committee reports when given full consideration are usually postponed after the meeting is exhausted by protracted discussion by self-constituted and ill-informed critics, many of them moved to speech by a desire for a fleeting notoriety. The underlying causes of this condition are first that the voters lack real responsibility; second, that their number is not well regulated. In sharp contrast with this is the orderly and efficient work done by the Conference of Commissioners on Uniform State Laws. Their number is definitely limited, they feel a responsibility to the state they represent, and they employ experts to advise them on special topics. On the other hand, no one would contend that the Bar Association should reduce its membership or even the attendance at the annual meetings. Its aim should be to extend not contract its influence.

Previous to 1901, the American Medical Association was a loosely organized body, similar to ours. As the number of delegates increased, they encountered the same difficulties we have described above. In addition to the legislative work of the Association, there was important scientific work, transacted largely in sections. The meetings of these sections conflicted with the general meetings and withdrew the ablest men. Dissatisfaction resulted in a series of committee reports recommending a reorganization, but it was not until 1901 that the difficulties of the old system had become so serious that radical changes were imperative. In that year the present system was established, based on that adopted by most fraternal orders. It consists briefly in separating the scientific from the legislative work, and reducing the size of the legislative body. Members of the Association are primarily members of sections; each section is devoted to the study of some particular division of medicine or surgery. The House of Delegates was created to legislate on matters of professional practice. It represents the state medical societies in proportion to their numbers. In addition it contains one delegate from each section. It consists of not more that one hundred and fifty members and holds its session at the same time as the sections. Whenever the delegates exceed one hundred and fifty, there is to be a reapportionment. All the general officers of the Association are elected by the House of Delegates, but no member of the House is eligible to any such office. No one can be elected to any office who is not present at the annual meeting, at which such election occurs. After effecting this radical reorganization, the national Association began a campaign to persuade the state and county societies to reorganize on the same plan, and the success of this step was an important element in the scheme. An organizer was employed to travel throughout the country enlisting the support of subor-

dinate sccieties, and his work still continues. A journal is published by the Association and has a large circulation.

The success of this plan has been marked. The program of the 1908 meeting at Chicago is a thick volume. The order of business of the House of Delegates consists chiefly of action on reports of committees and the election of officers. Many social festivities are provided for members and their ladies. The most striking feature of the program, however, is the work of the various sections. Each of these held three afternoon sessions, at which were read numerous short papers frequently limited to ten minutes, and a morning session for the election of officers. A leader of the discussion was designated to criticise each paper. In all, three hundred and thirty-nine papers were read at the meeting. Some portions of this plan would doubtless prove unfit for our use, but in the main it seems a perfect solution of our present difficulties.

L'ENVOI

To those who read aright the tokens, the practice of the law, most conservative of all occupations, is approaching a silent revolution. Profound dissatisfaction with the administration of justice has aroused, at last, searching criticism within the profession, and a demand is audible for the excision of antiquated technicalities, simplification and acceleration of procedure, and a reduction of litigation. The election of Mr. Taft insures consideration by Congress, and probably by the country at large, of the reform of the more obvious anachronisms. Less obvious but hardly less certain are two other tendencies. The necessity imposed by the Constitution on our courts of determining the economic development of the country will force us in time to some separation of judicial functions which as yet can hardly be foreshadowed or will make the courts the center of a social revolution. The other tendency is at present even less noticed by lawyers, but its outlines are already more definite. The influence of modern science on judicial procedure is now received through the discredited method of expert testimony. That it is forging for us a keener weapon is shown by the interest of students in the application of their learning to the administration of justice. This is illustrated by two recent publications. We have frequently noticed the essays by Professor Münsterberg on the application of experimental psychology to the detection and punishment of crime. "The Principles of Anthropology and Sociology in their Relation to Criminal Procedure," by Maurice Parmelee (Macmillan Company, New York, 1908), sets forth the work of Lombroso and his Italian and French co-workers, whose patient collection of data is now being rewarded by the acceptance of their deductions regarding the influence of physical conditions, heredity, and environment on the various types of criminals. Our whole system of detection, conviction, and punishment of criminals may become scientifically accurate instead of empirical and uncertain. The project of Arthur MacDonald of Washington for the establishment of a laboratory of criminal anthropology in this country is a striking feature of this tendency. It would be interesting, if space permitted, to trace more fully the outlines of these coming changes, for it has been the desire of the present management of this paper to bring to the attention of the profession the indications of the future development of the law. We have tried during the four years of our service to make THE GREEN BAG an effective influence for the better organization of the profession and the reform of the law.

The lawyer to-day, like his brother in all callings, lacks leisure for reflection. Our bodies and our minds are not yet adjusted to the revolution in the transmission of power and the means of communication which began over a century ago and is not yet concluded. If, therefore, amid the pressure of practice, the efforts of the editor have been appreciated by a few, we have our reward, and with grateful acknowledgments to friends who have aided us often at great sacrifice, and to the publishers for unfailing sympathy and consideration, we will close our last volume.

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.

AGENCY. "General and Special Agents — Is there any Distinction as to Liability?" by R. L. McWilliams, *Central Law Journal* (V. lxvii, p. 377).

CONFLICT OF LAWS. "The Nationality of a Juristic Personality," by E. Hilton Young, *Harvard Law Review* (V. xxii, p. 1).

"The object of this article is to discuss the various answers which have been proposed to the question, What is the essential difference between a foreign and a domestic juristic person? or to state the question in a more practical manner, What test must be applied to distinguish between a foreign and a domestic juristic person?"

The word "nationality" is used to imply only "purely legal consequence — that to the juristic person in question the rules of law of a certain state must be applied as its personal law." Much divergence of opinion has existed about this matter, which is discussed at length. A review of all the theories is impossible within the limits of this department, but we may note the one now "widely accepted, that the true test of the nationality of a juristic personality is, not its place of origin, nor any other matter but its domicile, which is the permanent center of its affairs. It is perhaps in the United States alone that this theory has found no favor." Here we still hold that it is domestic in the country by the law of which its fictitious personality is created.

Three theories have been advanced as to the true situation of the domicile of a juristic person: (1) That it is at the place where it discharges its functions; (2) at that place at which it is fixed by its charter or other constitutive documents as its seat; (3) at the place at which the center of its administrative business is situated. This last is now the most favored opinion.

CONSTITUTIONAL LAW (Treaty-Making Power). "An Organic Conception of the Treaty-Making Power *v.* State Rights as Applicable to the United States," by Charles S. Clancy, *Michigan Law Review* (V. vii, p. 19).

CONSTITUTIONAL LAW (see Rate Regulation).

COURTS. "The Supreme Court of the United States and the Enforcement of State Law by State Courts," by Henry Schofield, *Illinois Law Review* (V. iii, p. 195).

COURTS. "The Congestion of the Special Sessions Calendar," by Hon. Willard H. Olmstead, *Bench and Bar* (V. xv, p. 14).

CORPORATIONS. "A Treatise on the Modern Law of Corporations with Reference to Formation and Operation under General Laws," by Arthur W. Machen, Jr., 2 vols., $12 net, Little, Brown & Co., Boston, 1908.

As precedents multiply it becomes increasingly important to subdivide our classifications and eliminate from a text-book all cases that can properly be relegated to another topic. The last original work on corporations expanded to three fat columns. It was evidently time to swarm. From this new work of Mr. Machen's are omitted, or treated only incidentally, many subjects we are accustomed to seek in such a work, such as its relations to the state, dissolution and reorganization and *ultra vires*. On the other hand it presents now in accessible form the cases relating to newly developed topics, such as incorporating under general law, underwriting, one-man companies, bonds and mortgages. The text is clearly arranged and the cases in the notes usually are briefly identified. There are no signs of the publisher's padding which has infested some recent editions to make us tolerate three volumes. The author's exposition of principles and discussion of cases are convincing, and as far as the reviewer could ascertain, accurate. He does not simply line up cohorts of contradictory decisions as equally authori-

tative. Indeed no book since Wigmore on Evidence evinced such originality and cogent reasoning.

CORPORATIONS (see Conflict of Laws).

CRIMINAL LAW. "A Treatise on the Law Governing Indictments," by Howard C. Joyce, Matthew Bender & Co., Albany, 1908. This is a well-arranged thousand-page volume covering, with copious citations, the law relating to the finding, requisites, and sufficiency of accusations of crime by grand juries. The general rules and principles and those relating to such topics as federal and state constitutional rights of accused persons are concisely stated, often in the language of a leading case. About a fourth of the work is devoted to a very complete set of forms "which have either received express judicial approval or have been used in cases where their validity has not been questioned." They include forms charging violations of the Sherman Anti-Trust Act, the National Banking Act, the Elkins Act, and those used in a number of important and well-known cases.

While the work, almost necessarily, attempts little that is new in the field of theory, it is a manual of much practical value. The questions here treated, even under the simpler statutory requirements of to-day, are often of first importance, and the law relating to them has not infrequently been difficult to get at with promptness and certainty. Being a treatise as well as a form book the work stands alone in its field. While it will, of course, be of chief importance to prosecuting officers and judges, it will be a great aid to all lawyers undertaking criminal causes. It is somewhat to be regretted that in a work where the text is so spread out the index does not give references to pages instead of to sections. A. A. B.

CRIMINAL LAW. "Vergleichende Darstellung des Deutschen und Aus'ändischen Strefrechts," V. iii, by Dr. Karl *v.* Birkmeyer and others, Otto Liebmann, Berlin, 1908.

DIVORCE. "Is a Cause of Action for Divorce Affected by Repentance and Promises of Reform on the Part of the Wrong-Doer?" by H. C. Freerks, *Central Law Journal* (V. lxvii, p. 335).

EMPLOYERS' LIABILITY (Federal Act of 1908). "The Federal Employers' Liability Act of 1908 — Is It Constitutional?" by Frank W. Hackett, *Harvard Law Review* (V. xxii, p. 38). This article briefly considers and answers in the negative these two questions:

"1. Has Congress the power to prescribe a rule of liability in a suit brought by an employee against his employer for an injury received while engaged in interstate commerce?

"2. Has the Supreme Court of the United States decided that this power exists in Congress?"

EQUITY (see Injunctions).

FACTS. "Moore on Facts." Edward Thompson Co., Northport, L.I, N.Y., 1908. That a book, in this book-glutted age, should, upon appearance, assume a province of the law as its own and leave little to be desired in filling it, is a pleasing literary performance. Such a book is "Moore on Facts." This two-volume work is destined to become a classic as Ram on Facts was a classic and for much the same reason. The profession needs a work on *facts* — and here it is.

To get into the precise field of this treatise at all is a matter of no small difficulty. No heading or series of headings in a legal encyclopædia or digest covers its scope or any considerable portion of it. Only a man who has read a very large number of cases for another purpose could possibly have gathered the materials herein contained within the limits of any reasonable expenditure of time. Now that it is accomplished a unique juridical and philosophical value has been created.

Before speaking of this, with reluctant brevity and conscious lack both of precision and fullness, a line or two may be spared to certain general features of this work which will be apt to attract attention. Perhaps the first is a certain sprightliness and vivacity of tone and touch which would make a much duller subject interesting. Litigation is full of dramatic feeling. The rules of law have often struck hard against human hearts. Mr. Moore is a *raconteur*, a good story-teller. He sees the striking, the picturesque. He knows and loves literature, — especially as it comes from the masters of the craft. Where jurisprudence fails to furnish the precise illustration needed, literature graciously and

acceptably undertakes to supply it. As a past master in that art, Mr. Moore presents to us all the advantages of the encyclopædic style of writing, — well exemplified in the publications of the Edward Thompson Company, — without the crudities which occasionally disfigure it in less expert hands. Mr. Moore's classification is both logical and minute. It enables the practitioner who has a definite proposition of fact committed to his handling to find with the minimum of effort precisely what he needs. A single instance must suffice. A large and increasing proportion of litigation concerning accidents to passengers relates to vehicles operated by electricity. A paragraph each is given to "Noise of Electric Cars in General," "Noise of Electric Car on Up Grade," Noise of Electric Cars on Down Grade," "Noise of Electric Car Running Slowly," "Noise of Electric Cars at Night," "Noise of Vehicles Preventing Hearing Electric Car," "Noise of One Electric Car Preventing Hearing Another," "Wind and Rain Preventing Hearing Electric Car," and "Sound of Gong of Electric Car." Other subjects are treated in like detail; Distance, Speed, and Weather each have a chapter.

Among the elements which assist to constitute the unique value to which reference has been made, space permits the mention of but two: (1) segregation of fact from law; (2) steady insistence upon the forensic importance of psychology.

(1) The segregation of fact is, in one sense, impossible; in another, imperative. Facts broadly defined are mere *existences*. Propositions of substantive law, rules of procedure, customs of practice, canons of administration— all are facts. The practical exigencies of a mixed tribunal of judge and jury demand that some separation of fact from law be attempted; and on the completeness of this separation the social success of the divided form of tribunal (as much of the present and probably all of the future would count success), appears largely to depend.

The more complete the separation, the greater the probability that trial by jury will continue.

This same separation of law and fact conditions the scientific growth of the law itself. Present efforts to reduce American jurisprudence to a workable system, to introduce into "the gigantic bulk and bewildering difficulties of our own labyrinthine system"— as Salmond (Jurist, p. 11) rather tartly puts it — something in the nature of order, have assumed the form of digest paragraphs and their tabulation into encyclopædias. Clear-sighted, scientific treatment in terms of law of legal principles, by jurists of mature judgment and comprehensive range of vision who can use the facts which, in any case, are to be measured by the rule of law as externalized and objective illustrations, has fallen into abeyance.

In place of this, the effort is made to state the mass of facts in digests prepared from head-notes or in encyclopædias, and all by the aid of purely clerical assistants acting under a mechanical system. A weary desert of scientifically inert fact is provided, through which the traveler may wander, — at best, with but scant success. Thus the facts of litigation are tabulated under rules of substantive or procedural law where they but serve to increase enormously the difficulty of digesting and even of understanding the law. It is not denied that classifying the law according to *facts* or stating facts in terms of law is far preferable to no classification whatever. As compared with more rational methods, the plan is, however, enormously wasteful of effort and unproductive of result. It cannot indefinitely continue. Where, on the contrary, litigated facts are segregated from the law as in Mr. Moore's treatise, they speak in terms not of law but of *experience*. Here the long travail of litigation brings forth a most precious offspring. The thought of the past is at the service of the present.

Analogies gleaned from centuries of forensic contest are ready to the hand of all component members of the Court, — not with binding force of precedent but with helpful and stimulating suggestions in the search for truth. The judge, in commenting to the jury upon the evidence, or in shaping his own course, may find help in the careful thinking of other judges. Counsel seeking arguments to use with the Court or jury may find his range of selection broadened to cover England, Canada, and the United States. For example, a traveler's horse while crossing a bridge in Vermont becomes frightened and jumps into

the river with the driver and vehicle, *the bridge being destitute of a railing*. The town defendant argues that no ordinary railing would have restrained the horse anyhow. So, *cui bono?* argues the town's counsel. Reply: Railings are required "not merely to resist the force of the horse when terrified and unmanageable, but chiefly to guide the eye of the animal, and give it a sense of confinement within them." (1 Aiken (Vt.) at p. 860.) Every counsel with a similar case might not *sua sponte* think of that.

(2) Equally impressive is the steady insistence shown in the present work upon the juridical value of *psychology*. Much of our nomenclature, subtly guiding our thinking, savors of formality and materialism. The law of evidence is no exception. So excellent an authority as Stephen defines "evidence as the statements of witnesses or documents submitted to the judge's inspection."

We repeat the ancient formularies; say, with Greenleaf, that "Evidence is any *matter* of fact, the effect, tendency or design of which is to produce, etc." Really this is to repeat Aristotle and the Year Books. It is becoming more clearly realized that no statement in and of itself is truly "evidence" if it be a lying one; no declaration of a document is evidence if the declarant knew nothing as to what he was writing or perverted it all. Only as *mind* is present in the statement, as the subjective mental condition of the declarant adds probative force to his statement, is there "evidence." Proof presents a problem in psychology. Every question to a witness on direct or cross examination is an attempt to search his mind. The vocal sounds he makes, the characters he writes, even the demeanor he exhibits, are merely signs and tests of his mental state. Mr. Moore will help to make us see this. How the wondrous needle of attention grooves in mind stuff, or the cortex of the brain, its sense impressions; how once more, in memory, the needle may again be placed on these grooves and reproduce the same image; what makes the needle cut deeply, what causes it to make scarcely a mark or what forces it to diverge into cognate or false impressions, Mr. Moore has told us in his splendid chapters on Observations and Memory. Others, indeed, are working valiantly in this field; Prof. Münsterberg has, for example, in his very interesting "On the Witness Stand," sought to popularize the psychology of testimony. But, for the profession, Mr. Moore has the inestimable advantage that his psychology is not only that of James but also of the judges. In forensic practice, especially as an aid to cross examination, no psychologist can compare with the keenly alert, deeply interested, and thoroughly trained observers who sit, with or without a jury, for the trial of facts. The comments of these skilled watchers, practically for the first time and with exceptional fullness, Mr. Moore has placed before us. The ability to look at facts through the eyes and brain of a skillful trial judge is a privilege which any practitioner well may prize, and which a young one sorely needs.

Such are certain of the more leading reasons for feeling that "Moore on Facts" is to fill a permanent need, and, as we have ventured to predict, to become a classic.

CHARLES F. CHAMBERLAYNE.

HIGHWAYS. "Dedication and Vacation of Streets and Highways in Illinois," by Otto G. Ryden, *Illinois Law Review* (V. iii, p. 218).

HISTORY. "Select Essays in Anglo-American Legal History" by various authors, compiled and edited by a committee of the Association of American Law Schools, V. ii, Little, Brown & Co., Boston, 1908.

This reprint bears the same evidence of careful selection that marked the first volume, but since classified under particular topics lacks the impression of unity that gave. It deals with Sources, The Courts, their Organization and Jurisdiction, Procedure and Equity. The authors are various, beginning with a translation of an essay by the distinguished German historian of our law, Heinrich Brunner, revised by him especially for this purpose. The collection will do good service in educating us in the history of our law.

INJUNCTIONS. "Proper Use of the Writ of Injunction — From the Standpoint of Legal History," by Frederick W. Stevens, *Columbia Law Review* (V. viii, p. 561). A short historical sketch of the writ of injunction leads to the following conclusions:

"Unless statutes have prescribed other-

wise, injunctions issue only where the controversy concerns property, or property rights, including, of course, contract rights; and not always then. For some property and some property rights receive in the courts of law what is deemed adequate protection. Where such protection is afforded, equity does not interfere, except in the few instances where it is necessary to preserve the *status quo*, and the court in which the legal contest is pending, for some reason, cannot give the needed protection.

"Where the assistance of equity is invoked there may indeed be a question whether the subject-matter of the controversy is a property right or a contract right requiring equitable protection. Thus, there may be a question whether a man has a property right in his own features. If it be held that he has not the Court will not enjoin. If it be held that he has then the Court will. But this and similar questions are not really questions of injunction but of substantive right. If the right be established, the injunction goes as a matter of course and upon the principle upon which it issues in other cases."

INTERNATIONAL LAW. "The Revocation of Treaty Privileges to Alien-Subjects," by Mr. Justice Hodgins, *Canada Law Journal* (V. xliv, p. 633).

INTERNATIONAL LAW (Applied to the Russo-Japanese War, with the decisions of the Japanese Prize Courts), by Sakuyé Takahashi, New York, 1908, The Banks Law Publishing Company, pp. 18, 805.

Mr. Takahashi has for his task unusual qualifications. He has knowledge of International Law, both in its academic and its practical aspects, being Professor of International Law in the Imperial University of Tokyo, Vice-President of the International Law Association, London, Legal Adviser to the Japanese Fleet during the Chino-Japanese war; member of the Legal Committee in the Imperial Japanese Department for Foreign Affairs during the Russo-Japanese war; and the Author of the "Cases on International Law" during the Chino-Japanese war.

The work is divided into five parts: Part I, The Outbreak of War, and Its Effects; Part II, Laws and Customs of Land Warfare; Part III, Laws of Naval Warfare; Part IV, Neutrality; and Part V, New Cases on Prize Law Added by the Decisions of the Japanese Prize Courts.

Probably no single event has had so much influence in modifying, elaborating, restating, and establishing rules of International Law as the Russo-Japanese war.

The use of wireless telegraphy, the presence of war correspondents and war correspondents' ships, the increased steaming radius of war vessels, and the increased power of naval ordnance all produced new questions which had to be dealt with. It is safe to say that no question that became of international consequence has been passed over by Mr. Takahashi. He was in a position to get note of every instance, and he has collected all of them in his book. But Mr. Takahashi's close identification with the Imperial Japanese Department for Foreign Affairs, though of value to him in enabling him to get first-hand information and to give authoritative opinions, is also a source of weakness to him as an author. The war is still too recent, and feelings are still too easily stirred for one closely connected with the events which he records to treat them dispassionately. Recrimations were indulged in reciprocally by Japanese and by Russians, and Mr. Takahashi devotes much effort to justifying as an advocate Japan's acts on all controverted points of International Law and ethics.

It is only proper to say that in a majority of cases he shows strong ground for his position, and fairly proves his case; but his earnestness shows the deep feeling that has been roused by Russian charges and prevents the charges from being met in a calmly judicial spirit. On the other hand, we are given the opinion of one who was himself an adviser in the matters which he records, and that is almost invaluable, — in any event for future use.

Part V, containing the Decisions of the Japanese Prize Courts, is in effect a "volume of reports," which alone makes the volume indispensable to the student or practitioner of International Law in war time, for the decisions of the Japanese Prize Courts are of great importance in the development of Prize Law, and they are well arranged and presented in this part of the book.

The cases deal with Enemy Vessels, Contra-

band Persons, Countraband Goods, Blockade, Unneutral Services, and Released Vessels.

It would not be possible here to call attention to specific cases. To appreciate the value of this part of the work, the reader must examine it himself.

There are six appendices: I, Speech of Baron Komura on the Manchurian Question; II, The Memorandum of the Seven Professors; III, Diary of the War between Japan and Russia, 1904–1905 (an excellent brief chronological outline of events); IV, The Treaty of Peace; V, Japanese Regulations Governing Captures at Sea; VI, Complete List of the Vessels Captured.

Taken all in all, a thorough, well-arranged, able, and timely book.

INTERSTATE COMMERCE (Supervision by Taxation). "Federal Taxation of Interstate Commerce," by Simeon E. Baldwin, *Harvard Law Review* (V. xxii, p. 27). Suggesting, without expressing an opinion as to its expediency, that federal supervision of large corporations may be secured by taxation. "A statute of such a character would most naturally take the shape of a tax on the business of shipping goods from one state to another for a market, when conducted by an artificial person of a certain character and attaining large proportions." Such a statute, Judge Baldwin thinks, could be upheld.

JUDGMENTS. "Judgment Absolute on Reversal," by G. I. Wooley, *Bench and Bar* (V. xv, p. 18).

JURISPRUDENCE. "Aristotle on Legal Redress," by Paul Vinogradoff, *Columbia Law Review* (V. viii, p. 548).

JURISPRUDENCE. "The Science of Jurisprudence," by Hannis Taylor, The Macmillan Company, New York, 1908, price $3.50 net.

In this volume Dr. Taylor again gives evidence of his wide range of study and his familiarity with the history of institutions. As a disciple of the historical school he devotes the larger part of his work to summaries of the history of Roman and English law, chiefly their public law, for the purpose of arriving at an accurate conception of sovereignty and the sanction of laws. As an international lawyer he devotes his final chapters to Law by Analogy or International Law and International Rules to Prevent Conflict of Laws. One chapter is devoted to an analysis of Law Proper. The author calls to our attention the supremacy of English public law in the countries whose private law is Roman, and has a vision of a future common law of the nations in which the Roman element will predominate. The book will be chiefly useful as a popular comparative history of governmental and legal institutions.

LEGAL ETHICS. "The New American Code of Legal Ethics," by Simeon E. Baldwin, *Columbia Law Review* (V. viii, p. 541). Approving the code adopted by the American Bar Association.

"It might be too high praise to say that this code, as finally approved, could not have been made better. But the question for the American lawyer is not whether a more perfect one could be made. It is whether this code, having been framed after long deliberation and extensive correspondence by a capable committee representing all parts of the United States, and adopted with practical unanimity, after full opportunity for discussion, by the American Bar Association, ought not, as a whole, to receive his support.

"If this code is accepted by the Bar Associations of every State, as a fair general statement of the main duties of members of the legal profession, a great purpose will be well accomplished. An authoritative criterion will be supplied, by which every lawyer can be safely guided, when he is in doubt as to the conduct he should pursue in respect to any of the questions which oftenest prove a source of perplexity. The law student will have a mentor, always at hand. The courts will hesitate less in enforcing the discipline of the bar, since professional misconduct will be, more than ever before, a sinning against the light."

PLEADING. "The Theory of a Pleading," by Clarke B. Whittier, *Columbia Law Review* (V. viii, p. 523).

"It is an established rule of pleading that a complaint must proceed upon some definite theory and on that theory the plaintiff must succeed or not succeed at all. A complaint

cannot be made elastic so as to take form with the varying views of counsel."

This quotation from Mescall *v.* Tully (1883), 91 Ind. 96, 99, which takes one view of a disputed question, is the text of Mr. Whittier's article. It is not concerned with questions of amendment, but the question is whether, the pleading being drawn on one theory, the party may win by proving a right to succeed on another theory and without amending his pleading so as to make it conform to this new theory. If the new theory requires the proof of facts not alleged the plaintiff will fail. But when there are sufficient facts in the pleading to sustain the new theory, although alleged in aid of the real theory and not to make out the new one, the courts are divided.

"This distinct conflict of authority is not very surprising, since the arguments drawn from legal theory or substantial justice are evident and rather evenly balanced. For the Indiana view the argument of surprise is the chief one. And there are indications, especially in the New York case, that where the danger of surprise is small the Indiana rule will not be applied. For the view that one may depart from his theory it may be said that it avoids the deciding of cases on what will certainly appeal to a layman as a technical ground. If the facts are alleged in accordance with the provisions of the codes is these not a partial return to forms when it is required that the facts shall be stated in accordance with some particular theory? That the wrong theory is chosen will almost always be the fault of the lawyer rather than of the client. When technical errors of the attorney prove disastrous, the client is likely to hurl epithets at the law. Our procedure is already quite vulnerable to attack. The weak spots should not be increased. Perhaps to hold that, when the adoption of a theory by one party *has* in fact misled the other to his detriment, then the latter shall be entitled to such relief as will enable him to avoid the effects ot his misunderstanding, would be a satisfactory solution. Proper relief might consist of an order that the misleading pleading be amended and that the other party have a right to reply to it anew. In many cases, no doubt, any harm that had occurred could be remedied without making worthless so much of the proceedings that had already taken place. The reasoning of the Court in *Conaughty v. Nichols* that where the pleading is misleading the defendant should move to make it definite or to have the pleader elect between the possible theories, and that if he proceeds without doing so he is to be taken as fully understanding the pleading, seems very weak. If he in fact recognizes the ambiguity, the only situation in which he could move to have it corrected, then he is plainly not actually misled by it and would under the solution just suggested be entitled to no relief. If he does not recognize the ambiguity, the reasoning of the Court could be thought right only on the ground that he was at fault in not recognizing it. But the pleader himself was at fault in filing such a pleading and he was first in fault. Also to refuse all relief because of this error of the opposing party's attorney, is to again punish the client for his lawyer's fault with unnecessary severity; — a thing, as suggested above, likely to bring the law into disrepute. The disposition of costs may be used to adjust the burdens arising from a possible re-trial of the case as equitably as possible."

QUASI-CONTRACTS. "Recovery of Money Paid under Mistake of Law," by William P. Rogers, *Michigan Law Review* (V. vii, p. 1). Arguing, despite the many authorities to the contrary, for an affirmative answer to the question: "Can one recover from another money paid under mistake of law to which the payee is not entitled, and which he cannot in good conscience retain?"

PRACTICE. "On the Witness Stand," by Hugo Münsterberg, The McClure Company, New York, 1908. This is a reprint of a series of brilliant magazine articles on the application of the experimental methods of the modern psychologist to the detection and conviction of crime. These articles were reviewed editorially by us when they appeared. Lawyers who have not read them should do so, as they open a surprising vista and may betoken the coming of a radical change in our court practice. The change may be with us sooner than we now expect.

PROPERTY. "Are Natural Water Powers Public Property?" by W. A. Coutts, *Central Law Journal* (V. lxvii, p. 356).

RATE REGULATION. "Regulation of Rates to be Charged by Public Service Companies, II, Railroads," by O. H. Myrick, *Central Law Journal* (V. lxvii, p. 317).

RATE REGULATION. "Rate Regulation as Affected by the Distribution of Governmental Powers in the Constitutions," by Robert P. Reeder, *University of Pennsylvania Law Review and American Law Register* (V. lvii, p. 59).

This is an elaborate article with numerous citations and quotations attempting to show that "within their respective jurisdictions and within constitutional bounds, both Congress and the state legislatures may limit the charges for railroad transportation, either specifically or by definite general rules; and that if the legislative department of government establishes such rules it may empower a commission to name specific rates in accordance therewith; but that, on the other hand, such rules may be established only by the legislative department, and until they are so established no commission may constitutionally ordain specific rates." It furthermore considers the question whether the statutes which empower commissions to name specific rates do establish definite principles of which the commissions are simply called upon to state the specific applications or whether by those statutes the attempt is made to entrust to the commissions a discretion which is so broad as to be unconstitutional.

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.)

ASSOCIATIONS. (Right to exclusive use of badges.) **Mont.** — A Montana statute provided that a person not a member thereof who should wear the badge or insignia of any fraternal association should be guilty of a misdemeanor and subject to fine or imprisonment. The wives, daughters, sisters, and mothers of members were excepted in this provision. On the ground that it denied equal protection of the law, the statute was assailed in State *v.* Holland, 96 Pac. Rep. 719. Holding it unconstitutional for the reason alleged, the Supreme Court of Montana said: "The women who are excepted from the operation of this statute bear exactly the same relation towards the subject of the legislation as all other women in the community as well as men not members of any of these societies. There is no possible reason, except a sentimental one, why they should be exempted from the penalties of the law." It was held that no way exists to guarantee the societies exclusive rights to their badges except by patent or copyright.

This, surely, is the principle of equality gone mad. It is said the reason for the exemption is sentimental; but why should there not be in a sentimental statute a sentimental exemption quite in harmony with the spirit of the statute? The court gives another reason for holding the act invalid. The fact that the badges or insignia, the wearing of which is unlawful, must be determined by the association, involves an unconstitutional delegation of legislative power. On that principle all penal legislation for the protection of union labels would be invalid. The argument that the citizen may have no knowledge of the insignia, etc. (the act does not seem to provide for registration, and does not limit the choice of insignia), would be stronger if the act did not require that the use to be unlawful must be willful. The statute, like most of its kind, is neither well drawn nor perhaps wise, and its downfall will cause no regret; but the grounds relied upon for the decision illustrate the unjustifiable lengths to which constitutional limitations are carried by some courts.

The suggestion that the object of the act can be accomplished under the federal patent or copyright laws is quite in line with the rest of the opinion. E. F.

CARRIERS. (Damages for ejection.) **Miss.** — During a yellow fever epidemic two boys, in the last stages of consumption, bought through tickets from Memphis to Oxford, Miss. Arrangements had been made with health officers at Holly Springs, an intermediate point, for them to change cars. They had health certificates which they showed to the ticket agent and which one of them testified they showed to the conductor also. Before its arrival at Holly Springs the train was stopped by a quarantine officer of that place. The boys being too weak to protest and the conductor not doing so, they were put off. They were delayed 36 hours, and one of them died within three days. His administrator brought action for damages. The railroad company contended that the quarantine officer was acting under an ordinance and that the conductor was ignorant of the health certificates. The Supreme Court of Mississippi in St. Louis & S. F. R. Co. *v.* Roane, 46 So. Rep. 711, held that under the contract of passage the law gave to these passengers the right of full protection, and the company should not have allowed them to be put off the train, especially as the physical condition of deceased entitled him to the greatest consideration, but that compensatory and not exemplar damages should be allowed, and a judgment for $7500, should be reduced to $2500.

This is a doubtful decision. It would seem that the interposition of a public officer should excuse the carrier in such a case. The carrier is not liable for the wrongful arrest of a passenger or an officer.

CARRIERS. (Passengers.) **Me.** — Is an employee of a street railroad company who has paid his fare with a coupon constituting a part of his wages a passenger while going to his work? In Hebert *v.* Portland R. Co., 69 Atlantic Reporter, 266, it appeared that one who was employed as

" greaser," while being transported by his employer to his place of work, was injured by a derailment of the car. On the ground that he had paid his fare by a ticket given by the company and that he was going to his work it was contended that he was not a passenger. The Supreme Judicial Court of Maine held that although the ticket was given him by the company for that ride he had paid for it by his services. It was part of his wages and delivered to him as such. It could make no difference in his status as a passenger whether he paid his fare in cash or in tickets thus earned.

This is a plain case. The employee is accepted as a passenger without regard to the nature of the consideration. It is not the case of an employee on duty.

CONSTITUTIONAL LAW. (Initiative and Referendum.) Okl. — The initiative and referendum provisions of the Oklahoma Constitution are discussed in *Ex parte* Wagner, 95 Pac. Rep. 435. The relator was convicted on December 20, 1907, of violating an ordinance which was passed and officially published on December 12, but on December 18 a petition was presented to the Mayor demanding a referendum vote on the ordinance and requesting that it be held in abeyance until the election could be held. The legislation making effective the provisions of the constitution was not adopted until April, 1908. The question to be determined was whether the initiative and referendum provisions of the constitution were self executing. The Court concludes that they were not, and until they were made effective by legislation a petition for a referendum filed with the mayor was of no effect. The writ of habeas corpus presented by relator was consequently denied.

CONSTITUTIONAL LAW. (Police Power.) La. — An ordinance of New Orleans provides that all cows from which milk is sold shall be subjected to the tuberculin test by a health officer of the city and if such animals be incurable they shall be destroyed without compensation to the owner. In the case of City of New Orleans *v.* Charonleau, 46 So. Rep. 911, defendant refused to permit one of his cows to be subjected to the test for tuberculosis and was convicted under this ordinance. He contended that the city had no authority to pass such an ordinance; that the destruction of infected cows would be a taking of property without due process of law; that if the city had this power it could not be delegated to the board of health; that dairy cows afflicted with tuberculosis are not so serious a menace to the public health as to render them fit subjects for this extreme exercise of the police power; and lastly that he must be afforded a judicial hearing before his property could be condemned. The Supreme Court of Louisiana discussed each of these contentions, but upheld none of them.

COURTS. (Conflicting Jurisdiction.) U. S. Dist. Court. Ala. — Two opinions by Judge Hundley in *In re* Steele, 156 Fed. Rep. 853, and 161 Fed. Rep. 886, discussing a disagreement with Judge Jones as to appointment of referees in bankruptcy were recently noted in these columns. In an opinion reported in 162 Fed. Rep. 694, under the title *Ex parte* Steele and *Ex parte* Birch, Judge Jones states the reasons leading to his action revoking the appointment of Steele and appointing Birch. Underlying the whole contention is the question as to the construction to be placed on the Act of Congress approved February 25, 1907, providing for the appointment of a district judge for the Northern District of Alabama, but failing to expressly limit to the Middle District only the jurisdiction of Judge Jones, who was commissioned as judge of both the Northern and Middle districts. Then, assuming that Judge Jones still holds office as a judge of the Northern as well as Middle district, a further question arises as to the authority of one judge to act independently of the other in making appointments of court officers. Judge Jones stoutly maintains that he is still a judge for both districts and disavows any intention of interference with the orderly administration of justice. Portions of correspondence between himself and Judge Hundley are published indicating an attempt to arrive at some satisfactory agreement relative to appointments. He states that he had called the attention of Judge Hundley to the fact that the terms of office of two referees of the district were about to expire and had suggested that some agreement be reached relative to their successors, when Steele was appointed without his knowledge and without consulting his wishes. The opinion contains a very interesting discussion as to the rights of judges where there are more than one in office in a district.

CRIMINAL LAW. (Accessory to Suicide.) Tex. Cr. App. — The Penal Code of Texas provides that one causing the death of another by causing the latter with intent to murder, to take poison, shall be guilty of murder. It appeared in the case of Sanders *v.* State, 112 S. W. Rep. 68, that appellant had furnished carbolic acid to a girl with whom he had been intimate. Shortly thereafter her dead body was found with indications that she had taken the poison. Notwithstanding the fact that no evidence was introduced at the trial showing conclusively that appellant had done more than furnish the drug, he was con-

victed of murder. The Court of Criminal Appeals of Texas said: "Under our statutes the mere fact of administering poison from which a party dies is not necessarily homicide. . . . However wicked or malicious may have been the purposes or intent of the accused in administering the poison, yet if deceased took it voluntarily, knowing what the result might be, her death would not constitute culpable homicide." Since it is not a violation of law for a person to commit suicide, one furnishing another the means to the commission of suicide violates no law.

DISTRICT AND PROSECUTING ATTORNEYS. (Duty to read Reported Cases.) Cal. App. — In the case of People *v.* Maughs, 96 Pac. Rep. 407, an appeal from a judgment and order refusing a new trial to one convicted of murder, the Court of Appeal of California, criticising the failure of the prosecuting attorneys and the trial judge to familiarize themselves with a decision on a former appeal in the same case, said that had they read the opinions, even hastily, it would at least seem as if no such chances for a reversal of the present appeal would have been taken as are apparent from the slipshod course pursued; that although judges may have little time for reading decisions of higher courts, yet practicing lawyers are supposed to watch the reported cases, particularly where they dispose of questions with which they have to deal in impending trials; that it is the duty of the state's attorneys to apprise the judge of such decisions; and that if in these circumstances such conduct had been prejudicial to appellant's rights a reversal would be ordered without hesitation.

DIVORCE. (Connivance at Wife's Adultery.) Ct. Ch. of N. J. — Complainant, who sought a ground for divorce against his wife, employed a detective agency to secure evidence. Thereupon it sent one of its employees, a woman, to complainant's house who engaged board there. Having been there a few days she invited defendant to accompany her to New York. There they met two men provided by the agency, who accompanied them to the matinee, to a wine room, and finally to a hotel in Hoboken. Other members of the agency, having watched them, forced the door and found defendant in bed with one of the men. The Court of Chancery of New Jersey in Rademacher *v.* Rademacher, 70 Atl. Rep. 687, held that while this outrageous performance was not authorized by complainant himself, it was conducted in his interest by his agent, and he was not in a position to take advantage of a position brought about by his agent's acts.

DIVORCE. (Flirtation.) Fla. — A husband, in a suit for divorce, alleged that his wife had at various times and at various places entered into relations of the utmost intimacy with young men, such as love making, secret meetings, and correspondence, and that such intercourse was not pure, and was in violation of the moral standards which should govern married people. However, he failed to charge any specific act of criminality for lack of evidence. In the case of Hancock *v.* Hancock, 45 So. Rep. 1020, the Supreme Court of Florida holds that such allegations stripped of insinuations, intimations, and innuendoes, simply charged defendant in the most general way with indiscreet and imprudent conduct and relations with young men, all of which might be embraced under the term "flirting," and however reprehensible such conduct may be in a married woman, it does not constitute one of the grounds of divorce.

DIVORCE. (Repudiation of Decree.) Kans. — In Bledsoe *v.* Seaman, 95 Pac. Rep. 576, plaintiff sues for the alienation of the affections of a man from whom she has been divorced for seven years. Plaintiff's husband having acquired the affection of defendant, a spiritualist lecturer, and having been imbued by her with the doctrine of free love, abandoned his wife, took up his residence in South Dakota for the purpose of obtaining a divorce, and thereafter lived in adultery with defendant. When an action for divorce was commenced by the husband, plaintiff appeared and filed an answer and a cross-petition, in which she asked for a divorce, the custody of their child, and alimony. The judgment for alimony still stands in her favor. In the present action plaintiff contends that as her husband was never a *bona fide* resident of South Dakota, and had resided there less than six months, the court had not acquired jurisdiction in the divorce suit. The Supreme Court of Kansas held that a party having obtained the relief desired cannot repudiate the action of the court on the ground that it was without jurisdiction, and that when plaintiff procured the divorce, the defendant, having knowledge thereof, had a right to assume that plaintiff no longer had or claimed any right to the affections or society of her former husband and that any subsequent relations with him would not infringe on the right of plaintiff.

EQUITY. (Injunction — Secret Process.) N. J. Ct. Err. and App. — In a suit to restrain one from using secret processes the vice-chancellor refused to admit evidence as to the details of them or cross examination with reference thereto. The difficulty in this case was to afford adequate protection to a secret if any disclosure of it was required. It was necessary for the court to know whether an article of high repute owed its reputation to skill in manipulation acquired by experi-

ence or to some secret process. It is essential that before one can be enjoined he must know exactly what he is forbidden to do. In Taylor Iron and Steel Co. *v.* Nichols, 69 Atl. Rep. 186, the Court of Errors and Appeals of New Jersey held that the embodiment of the secret in the injunction is not necessary, but testimony taken *in camera* may be sealed, and used only when it becomes necessary to determine whether there has been a violation.

HUSBAND AND WIFE. (Alienation of Husband's Affection.) N. Y. Sup. Ct.— A youth of 18 years, without the knowledge of his parents, married a girl of the same age. They agreed to keep the marriage secret and not to live together until he attained the age of 21. When the father of the boy learned of this arrangement he sought to discourage him from seeking the society of his wife. The boy was sent away and upon his return he was arrested on a charge by his wife of failure to support her. Thereupon he promised to live with and support her. He took her to a scantily furnished room in an apartment provided by his parent. At night he suggested that he retire to a back room and sleep with a cousin. To this she objected. They lay on the bed without removing their clothes and talked all night. No provision had been made for food or for cooking. The next morning the wife returned to her mother and the husband made no further effort to live with her. In Cochran *v.* Cochran, 111 New York Supplement, 588, a suit by the wife against the father of her husband for the alienation of his affection, the Supreme Court of New York held that this young woman had been exposed to the loss of her marital rights, the respect and confidence of her friends and associates, and the temptations always incident to these unfortunate complications and that a verdict of $7500 was not grossly excessive.

INTOXICATING LIQUORS. (Locker-clubs.) U. S. Dist. Ct. Ga. — A most disgusting state of affairs is brought to the notice of the Grand Jury in the charge of the United States District Judge, 162 Federal Reporter, 736. It appears that so-called "locker-clubs" are conducted in Georgia by the permission of the municipality, under the theory that a tax by the state on these institutions justifies the granting of a license. The statute provides that it shall not be lawful for any person within the limits of this state to sell or barter for valuable consideration, either directly or indirectly, any alcoholic, spirituous, malt, or intoxicating liquors. The club in question was conducted in a room about 16 by 16. All the bar fixtures were present. A white woman was serving liquor to a crowd of negroes, some of whom were seated in the corners in bibulous unconsciousness. The only lockers were two or three small ones behind the bar. The Court, remarking that the law does not distinguish between the high and low estate of these locker-clubs, held that a municipal corporation cannot lawfully license or charter a club which in fact sells or furnishes liquors to its members and to them such illegal charter is no protection. Each one contributing to its support or maintenance is a retail liquor dealer within the internal revenue law, each being subject to a tax as such.

INTOXICATING LIQUORS. (Revocation of License.) La. — Ordinances of New Orleans prohibit the establishment of barrooms except upon written permission granted by the council, and provide that "no permit shall be granted to operate a barroom within 300 feet of a church or school," but that such places not having changed their identity since their establishment shall not be compelled to obtain permits. In Graziano *v.* City of New Orleans, 46 So. Rep. 566, it appeared that a barroom which had been operated prior to the establishment of a church 300 feet away had been rendered unfit for occupancy by fire. The church, seeking to have the license revoked, protested that closing for repairs had changed its identity, that upon reopening it had not secured a written permit, and that it was situated within 300 feet of a church. An ordinance was passed annuling the license. From a judgment perpetually enjoining the enforcement of the ordinance defendant appealed. The Supreme Court of Louisiana holding the proposition that the identity of the building was changed by reason of the facts stated untenable, affirmed the judgment.

INTOXICATING LIQUORS. (Owners of Real Estate.) Mass.— Petitioner in Moran *v.* Gallagher, 85 N. E. Rep. 579, sought to procure a license to sell intoxicating liquors to be drunk on the premises. The statute provides that an owner of real estate within 25 feet of the premises may object to the issuance of a license. The owner of real estate on the opposite side of the street was also the owner of the fee of the entire street in front of the property described in the application for a license, subject to an easement of the public to use it for travel. The Supreme Judicial Court of Massachusetts held that the existence of such an easement leaves the owner of the fee with such a title as is necessary to constitute him an owner of the real estate within the meaning of the statute, and he may prevent the granting of a license.

INTOXICATING LIQUORS. (What constitutes a "Conviction" under License Law.) N. Y.

Sup. Ct. — The decision in H. Koehler & Co. *v.* Clement, 111 New York Supplement, 151, illustrates the fact that frequently the disposition of a case depends on the meaning of a single word. The liquor tax law of New York provides for payment of rebates on surrender of licenses by persons "authorized to sell liquors under the provisions of the act." The right to traffic in liquors is forbidden to any person "convicted for a violation of this act, until three years from the date of such conviction." Relators' claim to a rebate as assignees of a certificate issued to one Levy was resisted on the ground that Levy had been so "convicted" within three years preceding the date of issuance of his license and was consequently not "authorized" to sell liquors. It appeared that he had been tried on such a charge and found guilty but sentence had been suspended and the time within which it might be imposed had expired. The court, following by analogy the case of People *v.* Fabian 111 N.Y. Supp. 140, involving the right to vote, decided that the conviction was complete so as to vitiate the certificate in the hands of Levy, and as he was not thereby authorized to engage in the liquor business, he would have no right to a rebate. The assignee's rights were held to be no greater than those of the original holder, and recovery was denied.

NEGLIGENCE. (Osteopaths.) Vt. — In an action for malpractice, against osteopaths, the Supreme Court of Vermont in Wilkins *v.* Brock, 70 Atl. Rep. 572, after giving the jury the rule as to the care defendants were bound to exercise if they treated the case as osteopaths, instructed them as to the rule applicable to the profession generally if they found defendants did not treat the case as osteopaths. This was held error, there being no evidence that they treated the case otherwise than as osteopaths, and osteopathy being a distinct school of practice, the treatment was to be tested by the principles and practice of that school, and not by the principles and practice of any other school, nor of the profession generally.

NEGLIGENCE. (Places Attractive to Children.) Cal. — The plaintiff in Cahill *v.* E. B. & A. L. Stone & Co., 96 Pac. Rep. 84, a youth 12 years of age, was injured by a push car left standing unguarded on a railroad track in the street. The Court, in reviewing the case, holds that it is not distinguishable from the "turntable cases," and affirms the doctrine that a person who places an attractive but dangerous contrivance in a place frequented by children, knowing, or having reason to believe, that they will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury, because he is charged with knowledge of the fact that children are likely to be attracted thereto, and are usually unable to foresee and avoid the danger into which he knowingly allures them.

NEGLIGENCE. (Railroad Hospital.) Mo. Sup. Ct. — In the case of Phillips *v.* St. Louis & S. F. R. Co., 111 S. W. Rep. 109, an action to recover for the negligent killing of plaintiff's husband, it appeared that the railroad company maintained a hospital for the benefit of its employees. The revenue for operating this institution came largely from small sums deducted from the salaries of the employees. Phillips had been treated there. One morning he was permitted to take passage, unattended, on one of defendant's trains bound for St. Louis, his home. This train arrived about seven o'clock that evening, and deceased left it. About nine o'clock that night, a man, partially dressed and in condition to retire, while lying across a street car line was run over and killed by a passing car. Two weeks later the body was exhumed and identified as that of Phillips. Two days after the death of decedent, but before either of these parties had learned of it, the chief surgeon of the hospital wrote to the general auditor in St. Louis, telling him that Phillips was mentally unbalanced and should be sent to an asylum for treatment. This letter was excluded by the trial judge. The Supreme Court of Missouri held that the hospital association was but an agent of defendant, and the negligence of these agents was the negligence of defendant. The letter was in the nature of an official report from one chief official of defendant to another, and should have been admitted.

NUISANCE. (Advertising Signs.) N. Y. Sup. Ct. — An interesting opinion affecting advertising was rendered by Judge Leventritt of the Supreme Court of New York in Fifth Avenue Coach Co. *v.* City of New York, 111 New York Supplement, 759. Plaintiff operated along Fifth Avenue a line of automobile stages on which were carried advertising signs of tobacco and cigarettes. These signs were painted in glaring colors in large letters, contrasted so as to attract attention, and not blended to produce a harmonious or artistic effect, the result being a disfigurement rather than an ornament. Defendant insisted that these signs constituted a nuisance. The court said: "These advertisements cannot be said to injure or endanger comfort, repose, health, or safety. They do not produce any describable physiological effect. At most, they are offensive to the eye and to the æsthetic taste. It would be a dangerous undertaking, said Judge Holmes in Bleistein *v.* Donaldson Lithographing

Co., 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460, for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. It is along Fifth Avenue, on Sunday, an avenue of churches, that this advertising panorama of brilliant signs and glaring billboards moves. It is this scheme of beauty which is sacrificed to the demands of modern commercialism. It is along the entrance to parks and along the parks themselves, preserved to attract lovers of nature and of the beautiful, that these unnatural and inartistic moving picture signs are displayed. But, out of place, disagreeable, and offensive though they are, both to civic pride and æsthetic taste, the ultimate fact remains that no authority now exists which will justify the legal conclusion that the signs constitute a nuisance."

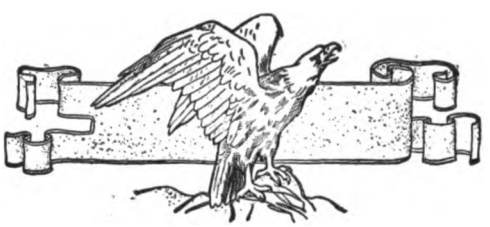
PRACTICE. (Exceptions.) Mo. Ct. of App. — The question whether a regular judge who had heard a case could sign a bill of exceptions at the time there was a special judge acting in his stead was decided in Ranney *v.* Hammond Packing Co., 110 S. W. Rep. 613. There is a statutory provision that if a judge who hears a cause shall "go out of office" before signing a bill of exceptions such bill may be signed by the succeeding or "acting judge." It appeared that Ramey, the regular judge, having heard the cause, was incapacitated by illness. Thereupon Rusk was elected special judge. Before Ramey reassumed his office he signed the bill of exceptions of a case he had heard, which upon presentation to the court at which Rusk sat was allowed. The Kansas City Court of Appeals held this bill not duly authenticated, saying that as there could be but one judge it was out of the power of Ramey to sign the bill, and that the expression "go out of office" need not be confined to death or resignation but should include the giving up of office in this case.

PROPERTY. (Escheat.) N. Y. Sup. Ct. — The case of Smith *v.* Doe, 111 New York Supplement, 525, illustrates the occasional hardship of general laws and leaves plaintiff with no apparent means of redress had not the legislature passed a special act giving her relief. Plaintiff's husband died, leaving one brother and herself surviving. Decedent's realty passed at once to the brother, subject to plaintiff's right of dower. Subsequently the brother died and the property then escheated to the state, subject to the dower right. The widow, being desirous of having her dower admeasured and paid in bulk, instituted proceedings for that purpose, making the state a party, and service of summons was acknowledged by the attorney-general.

Plaintiff recovered judgment and the premises were sold. The purchasers declined to complete their agreement on the ground that the state was not bound by the proceedings and that therefore the sale did not pass a clear title. The court upheld this contention and denied plaintiff's motion to compel acceptance of title, saying that there was no authority for making the state a party in proceedings for admeasurement of dower; that the appearance by the attorney-general was not binding and created no estoppel against bringing action to recover the property which had escheated to the state. A short time after this decision was rendered, the legislature passed an act ratifying the appearance by the attorney-general and confirming the sale.

SHIPPING. (Limitation of Liability.) U. S. Sup. Ct. — A foreign steamship company, as owner of the La Bourgogne, sunk in collision off the Atlantic coast in July, 1898, in Deslions *v.* La Compagnie Générale Transatlantique, 28 Sup. Ct. Rep. 664, sought to obtain the benefit of the laws of the United States limiting the liability of shipowners. It was claimed the collision was caused solely by the fault of the other vessel, but, even if the La Bourgogne was at fault, it was without the privity or knowledge of the company.

The United States Supreme Court, after a thorough discussion of the numerous and important contentions raised in the voluminous record, concludes that the petitioners were entitled to the benefit of the act limiting liability on making the surrender exacted by Rev. Stat. Sections 4282–4287 (U. S. Comp. Stat. 1901, pp. 2943, 2944).



THE LIGHTER SIDE

A Justifiable Desire.— Judge Dowling — "Have you anything to say against the verdict?"

Prisoner (who has received life-sentence)— "Only that if I don't live to serve it out I wish you would put my attorney in to finish it." — *Judge.*

Death Duties.— The race question on the Pacific slope is the mother of much curious litigation in which our Oriental laborers are involved. A Chinaman was fined under the California laws for removing the corpse of another Chinaman and shipping it back to China and a Federal court seriously decided that the corpse of a Chinaman which was shipped out of the country was not an export within the meaning of the Federal Constitutional provision prohibiting the laying of imposts or duties by a state upon exports.

Natural. — Before he was sworn the presiding magistrate directed that the usual question be put to the negro: "Do you know the nature of an oath?"

The old darky shifted himself from one foot to the other before replying. A sly grin crept into his face. "Well, Jedge," said he, "I cain't say how 'tis wid mos' folks; but, yo' Honah, I reckon it's sorter secon' nature wid me."

The Man on the Stand. — Miss Lydia Conley, a Wyandotte girl, is the only Indian woman lawyer in the world. She is a member of the Kansas bar. She tells this story of a man she put on the stand to testify in his own behalf concerning land that was filched from him. The other side had a finely doctored case.

"He, as soon as he was sworn, turned to the justice and said: 'Squire, I brought this suit, and yet the evidence, excepting my own, is all against me. Now, I don't accuse any one of lying, Squire, but these witnesses are the most mistaken lot of fellows I ever saw. You know me, Squire. Two years ago you got me a hoss for sound that was as blind as a bat. I made the deal and stuck to it, and this is the first time I have mentioned it. When you used to buy my grain, Squire, you stood on the scales when the empty wagon was weighed, but I never said a word. Now do you think I am the kind of a man to kick up a rumpus and sue a fellow unless he has done me a real wrong? Why, Squire, if you'll recall that sheep speculation you and me'—

"But at this point the squire, very red in the face, hastily decided the case in the plaintiff's favor." — *Rehoboth Sunday Herald.*

A Spelling Reform. — One of the witnesses in a lawsuit, who had just been sworn, was asked to give his name. He replied that it was Hinckley. Then the attorney for the prosecution requested him to give his name in full.

"Jeffrey Alias Hinckley."

"I am not asking you for your alias," said the lawyer, impatiently. "What is your real name?"

"Jeffrey Alias Hinckley."

"No trifling in this court, sir!" sternly spoke the judge. "Which is your right name — Jeffrey or Hinckley?"

"Both of 'em, your honor."

"Both of them? Which is your surname?"

"Hinckley."

"And Jeffrey is your given name?"

"Yes, your honor."

"Then what business have you with an alias?"

"I wish I knew, your honor," said the witness, ruefully. "It isn't my fault."

"What do you mean, sir?" demanded the judge, who was fast losing his temper.

"I mean your honor, that Alias is my middle name, for some reason which my parents never explained to me. I suppose they saw it in print somewhere, and rather liked the looks of it. I'd get rid of it if I could do so without the newspapers finding it out and joshing me about it."

"The Court suggests that hereafter the witness begin his middle name with an E instead of an A. Counsel will proceed with the examination," said the judge, coughing behind his handkerchief. — *Youth's Companion*