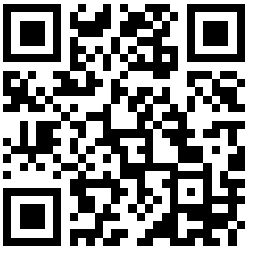

The green bag

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

THE GREEN BAG

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

EDITED BY THOS. TILESTON BALDWIN

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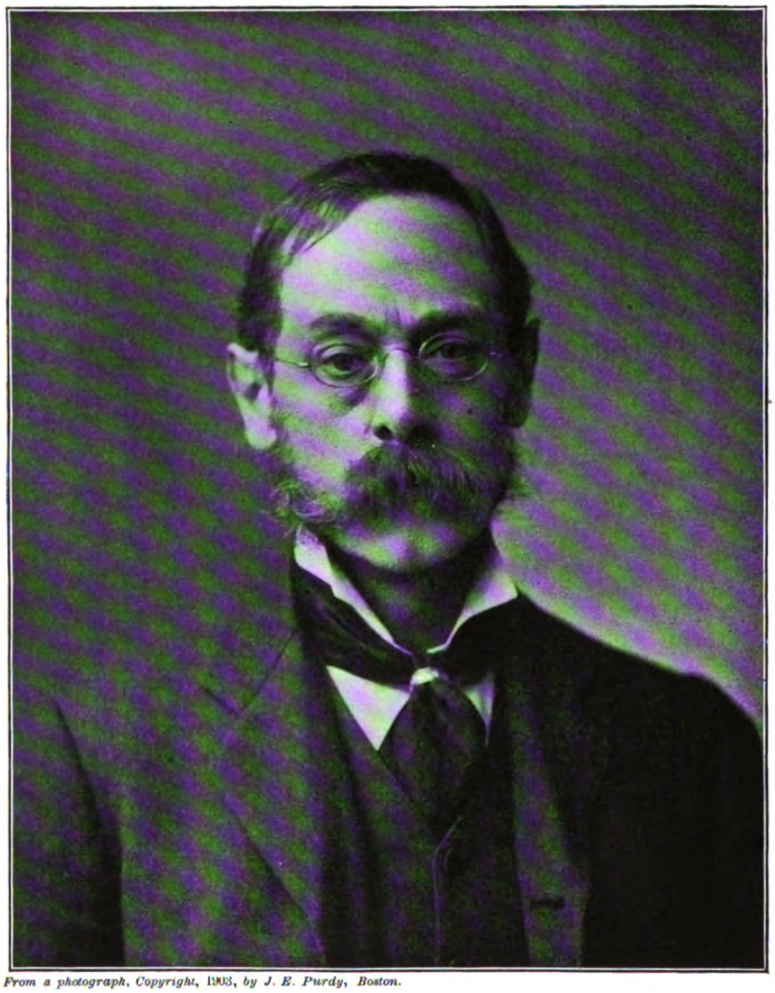

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SIR FREDERICK POLLOCK.

The Green Bag.

VOL. XVI. No. 1. BOSTON. JANUARY, 1904.

SIR FREDERICK POLLOCK.

BY FRANCIS R. JONES,

Of the Boston Bar.

IT is difficult to write acceptably or adequately of a living man. Sir Frederick Pollock, however, deserves of American lawyers more than a passing newspaper notice. He was the first English legal publicist to recognize the worth of the system of legal teaching evolved by Professor Langdell of Harvard, and of the consequent advantages enjoyed by the profession in the United States. His varied activities cover a wide range of thought. Alone they would challenge consideration. His support of the cause of legal reform has been constant. Consequently his career is of especial interest to those who, like his friend, Mr. Justice Holmes, believe in sweeping away the old landmarks of the law. Indeed, it is of importance to all men. Sir Frederick, however, has not gone as far in this direction as have many of his friends and disciples. His energies have been bent to the softening of the rigors of the common law, rather than to superseding it.

It seems unnecessary more than to touch upon the changes in the judicial system of England during the last sixty years. The coördination and amalgamation of the different courts, have been carried on through these years, until they have become complete. It is difficult for one who is not an English lawyer, to judge what, if any, influence or change upon the law as a science has been effected by this amalgamation. But it undoubtedly has been one of the manifestations of the times, one of the many evidences of change, or, if you will, of evolution, the undercurrent of which is still strong, carrying the science of jurisprudence to an unknown sea, there to sail in calm waters, or be wrecked upon a barren shore. Sir Frederick Pollock has felt this influence, has been swayed by it. In fact, it has been congenial to his temper, and he has brought his philosophical studies to aid the movement. If he has not ridden the whirlwind and controlled the storm, at least he has not opposed his strength vainly to it. He has not led a forlorn hope, a lost cause. He has taken the inexorable conditions as he found them, and, in sympathy with them, he has preached the gospel of broad views, of wide culture. He has maintained that no man could be a great lawyer, unless he was conversant with learned subjects other than law. Sir Henry Maine was his master and his friend. As his disciple he has carried on Sir Henry's work and thought. With all his activities, with his high place as Corpus Professor of Jurisprudence at Oxford, with all his published works, with his distinguished family, and his own modest and pleasing personality, it is more than strange that his influence and reputation should be greater in the United States than in England. It may be another instance of the old adage about a prophet not being without honor save in his own country.

Sir Frederick Pollock was born on

December 10th, 1845. His grandfather was the famous Chief Baron Pollock, and his uncle was the "Last of the Barons." He was educated at Eton and at Trinity College, Cambridge; became a fellow of Trinity in 1868; read for the Bar at Lincoln's Inn, and received his call in 1871. In 1873, he married at Calcutta, Miss Georgina Deffell, and succeeded to the baronetcy, which was created in 1866, as third baronet, upon the death of his father in 1888. He was professor of Jurisprudence at University College, London, in 1882 and 1883; professor of Common Law in the Inns of Court from 1884 to 1890; Corpus Professor of Jurisprudence at Oxford from 1883 to 1903; member of the Royal Labor Commission from 1891 to 1894; corresponding secretary of the Institute of France from 1894, and for some time was honorary librarian of the Alpine Club. He is a member of the Juridical Society of Berlin, and has received doctors' degrees from Harvard, Oxford, Edinburgh and Dublin. In 1876 he published his first book:—the Principles of Contract, which was followed in 1877 by his Digest of the Law of Partnership and his Leading Cases done into English verse; in 1880, by his Life and Philosophy of Spinoza; in 1882, by his Land Laws; in 1887, by his Law of Torts; in 1888, by his Possession in the Common Law, in collaboration with Mr. Justice Wright; in 1890, by his Introduction to the History of the Science of Politics; in 1892, by his chapter in Badminton, on The Early History of Mountaineering; in 1894, by his Law of Fraud in British India; in 1895, by his History of English Law, in collaboration with Professor F. W. Maitland; in 1896, by his First Book of Jurisprudence; in 1899, by The Etchingham Letters, in collaboration with Mr. E. Fuller Maitland; and he has been editor of the *Law Reports* since 1895. In addition to all this work, he has delivered lectures in India and more than once in the United States. For many years he has been a member of the Rabelais Club,—that congregation of actors, artists and literary men,—and a frequent contributor to its Proceedings. With all this, he has ever kept an active interest in sports and has been an enthusiastic climber of mountains. He is still one of the best amateur swordsmen in England, and an authority upon the forms and history of the sword.

I have purposely made the above catalogue of Sir Frederick's achievements and activities unadorned with any comment and unalleviated by any extraneous matter, in order that their extent may be brought home to the reader. Like Homer's list of the Hellenic host before Troy, it is dry, bald and appalling. It presents a really remarkable record, a marvellous amount of work. When you consider it, it seems impossible of achievement by any one man. Of course, not even a genius could combine talents of the first flight in law, philosophy and literature. But that one man should have been able to make so many and such acceptable contributions to the two former subjects is surely sufficient achievement, and is an admirable life's work. It may be thought by some unfortunate that Sir Frederick has not confined himself to his specialty. If he had, who can say that he would not have ranked in the same class with Sir Henry Maine? But, if he had, the world would have been without some entertaining books. The Etchingham Letters is, I venture to think, one of the bits of fiction of the last decade worthy of perusal.

I shall not undertake here to review his publications upon Jurisprudence. Most lawyers, who care for the science of their profession, have read them. But in regard to them I wish to point out that the man who wrote them had made a study not only of the Roman and the Civil law, not only of the English philosophers, like Hobbes, but was conversant with the continental schools of philosophic thought. And that brings me

to the consideration of how far the science of jurisprudence can be furthered or embellished by purely speculative cogitation. It is a large subject, and I shall attempt here to deal with it only in the briefest and most casual way. Philosophy is a system of thought, or, if you please, a search after the ultimate truth. The science of jurisprudence is the application of certain rules of human conduct to the facts of life, to the intercourse between man and man. That every branch of knowledge helps the realization of every other branch, that every study trains the mind to more adequately grasp another subject, no one, I fancy, will deny. But that does not seem to be the point. The question is whether abstract thinking does not more or less handicap and incapacitate a man for concrete thinking. Judged by results the evidence seems to favor an affirmative view. Bacon, perhaps, was an exception, and yet in its last analysis his philosophy is so materialistic that it can hardly be called abstract. Excepting him, I venture to believe that no really great lawyer, or statesman, for that matter, has ever been interested in abstract and abstruse philosophy. Indeed, there are today, two men who illustrate in a peculiarly distinguished manner what I mean. They have both reached the highest places in their vocations. The one is a lawmaker, the other a lawgiver. They both are philosophers first, and, on the one hand a judge, on the other hand a statesman, afterwards. Today no one who has watched their careers and is conversant with their achievements will care to deny that they have failed to acquit themselves as their talents and upbringing gave promise. This failure, I believe, is due primarily to their interest in philosophy. It unfits them for the practical affairs with which they must deal. Their equivocal good fortune in reaching the positions to which they have attained is due to the accidents of birth and to their admittedly great intellectual powers, rather than to any tangible success in their chosen vocations. No man can read much philosophy unless he is enamored of it. Philosophy, like the law, is a jealous mistress. No man can serve both satisfactorily. And so, if Sir Frederick Pollock's legal work has not been of the highest order, the blame must be put down more to his philosophical studies than to anything else. For, undoubtedly, philosophy has a great attraction for him. His admirable Life and Philosophy of Spinoza is proof of that, if any proof outside of his legal writings themselves were needed. And, of course, to those who are interested in philosophy, it is a valuable contribution.

Few men ever have had so rounded a life as Sir Frederick, a life touching and absorbing so many points of contact with his fellow men in thought and deed. He is an ardent Hellenist, admiring the sublime literature of the Greeks. Today he is studying Persian in his leisure moments. Where he gets those moments it is difficult for an ordinary man to surmise. Surely it is no wonder that he has resigned his Oxford professorship. The reason that he gave therefor is characteristic of him. He believed that twenty years was long enough for any one to dominate a course of study. But all these matters have not entirely consumed his time and his energy. For, in addition, he has taken an active interest in politics, and is the president of one of the London Liberal Unionist Committees, being driven from the Liberal party by Mr. Gladstone's Home Rule policy. Naturally the man, who has written on the science of politics and has given a course of Lowell Institute lectures upon the English publicists Hobbes and Hume, is a keen student of politics and of the philosophy thereof. Indeed, he seems to be a living refutation of his own *dictum*, that "it may be said, and truly, that the range of any one man's work, even the best, is limited."

LA BELLE DAME SANS MERCI.

(*D'après* Keats.)

Montague *v.* Benedict, 3 B. & C., 631.

By Charles Morse,

Associate Editor of the *Canada Law Journal.*

[Note.—It is a 'vulgar error,' traceable apparently to this case, that "jewels are not necessaries;" yet the case only decides that in view of the defendant's social and financial circumstances, and his wife's fortune, the trinkets supplied to the latter by the plaintiff could not be considered part of her necessary apparel. Where husband and wife are living together, the term 'necessaries' is defined by Willes, J., in Phillipson *v.* Hayter (L. R. 6 C. P. 38) as articles "really necessary and suitable to the style in which the husband chooses to live, in so far as they fall fairly within the domestic department which is ordinarily confided to the management of the wife." When they are living apart, the presumption that the wife has her husband's authority to purchase 'necessaries' does not always apply—but that, as Mr. Kipling says, is another story.]

O what can ail thee, Montague,
Alone and palely loitering?
The look is in thy hollow eye
Ill-hap doth bring.

O what can ail thee, man of pelf,
So haggard and so woe-begone?
For certes gold is to be had,
And patrons to be 'done.'

I see a paper in thy hand,
A judgment dight with stamp and seal.
It holds thee with a mystic spell,
Thy senses reel.

"A lady visited my shop,
A *feme covert*—but not my wooing—
Her eyes full bright, and purse full light,
Were my undoing.

"A golden dagger for her hair,
And bracelets, too, and jewelled zone,
I wrought for my fair customer—
Their price I moan.

"Her promises lulled me asleep,
Her lord would pay—ah, woe betide!
She looked at me as she spoke true
The while she lied.

"Eftsoons I haled him to King's Bench,
A fearsome thing—he practised there;
But Benedict his wife's smooth speech
Did straight forswear.

"Ah, me! my trinkets rich and rare
He neither purchased nor had seen;
His wife must dress in modest guise,
Not like a queen.

"To give her sixty pounds a year
Was all he might (my bill was more!)
Beyond her station were these gauds—
All this he swore.

" 'Twas vain I urged *'implied assent'*
And all the burden that it carries—
The Court adjudged my jewels were
Not *'necessaries.'*

"Then as they found no *'agency'*
Of wife for husband *re* my bill,
In law or fact, they handed down
A non-suit chill.

"And this the paper in my hand,
A judgment dight with stamp and seal;
It holds me with a mystic spell,
My senses reel."

THE RECOGNITION OF PANAMA AND ITS RESULTS.[1]

By Theodore S. Woolsey, LL. D.,

Professor of International Law in the Yale Law School.

THERE are two questions involved in our recent recognition of a new State of Panama, and in the negotiation of a canal treaty with that State. These are: First, whether the action of this government was correct, was according to law and precedent and in conformity to treaty; second, whether the newly recognized State is in such possession of sovereignty as to make its title to property which it may agree to convey good for anything. As Congress is called upon to pay ten millions of dollars for the canal concession, together with sundry other considerations, Panama's right to convey is a vital point in the contract. And the reputation of our country for dignity, fairness, and obedience to law is something which no administration and no good citizen would willingly see hazarded.

Up to the time of writing,[2] the essential history of this Panama outbreak is as follows:

Irritated by the failure of the republic of Colombia to ratify the Hay-Herran canal treaty, Panama, one of the States forming that union, seceded, and on the 3d of November last, declared its independence. The night before the revolution, the United States ship Nashville had arrived at Colon, *i. e.*, Aspinwall. By the use of its force the railway property was protected, and the few Colombian troops present at Colon prevented from giving trouble. Two days after the outbreak, these troops sailed for home. Other United States vessels were at once ordered to both sides of the Isthmus, amongst them the Dixie, with 400 marines on board. She reached Colon Nov. 5. On the 6th the new State of Panama was recognized by the United States as a *de facto* government,—that is, as the only government in sight capable of exercising the powers of statehood. A week later a diplomatic agent from Panama was received at Washington. This act worked recognition of Panama as an independent State, and accordingly five days more saw a new canal treaty signed. Meanwhile, there were rumors of an attempt by Colombia to reëstablish its authority, which called forth orders to our ships and the announcement to that government that its troops would not be permitted to land at any ports in Panama. To earnestly protest against all this Colombia sent commissioners to Washington, but without avail. The treaty was sent to Colon, ratified by the revolutionary representatives at Panama, returned to this country, and placed before the United States Senate. December 12 a minister to the new State was named, and the calling of a convention at Panama announced which should frame a constitution. For it should be borne in mind that the canal treaty was made and ratified under the authority of a Junta merely. Now a Junta, in the Latin-American sense, is a political committee of management, usually, as in this case, self-constituted.

With these facts in mind, let us look at the law governing the recognition of independence.

Briefly, the new government must establish its ability to perform all the duties and maintain the rights of a State. Also, in case of violent separation from another State, it must appear that the parent is making no effort, and is unlikely to make an effort in

[1] To avoid possible misconstruction, the author desires to state his belief, that in its preference for the Panama canal route over all others, our Government has made no mistake.

[2] December 19.

the near future, to coerce the revolutionary body. Thus time is the essence of the question,—time for testing the new State's stability, its popular backing, its freedom from outside control, its independence as an assured fact.

For instance, when the South American colonies revolted from Spain early in the last century, the United States government allowed twelve years to elapse before recognition of their independence.

In support of the rule for recognition given above it is hardly necessary to cite authorities. I mention one only, Snow's *Manual of International Law* (2d ed., pp. 10, 11), partly because his phrasing is very *apropos*, and partly because this manual was published by our government for the use of the navy so lately as 1898. It is therefore the rule which our naval officers would have followed in the case of Panama, had no special instructions superseded it.

"When a rebellious community has practically attained its end, which is independence, and the mother country has ceased military operations against it, then, if the government and institutions of the new State appear regular and stable, it is recognized by third States as an independent State and a member of the family of nations. . . . "

"The usage of International Law in reference to the recognition of the independence of a State is that when the war for its subjugation has practically ceased and that it has a stable government the proper time has arrived. The commencement of a State as a subject of international law dates from this recognition of independence by existing States. . . . "

"Cases have occurred where third States have recognized the independence of a rebellious community prematurely, but such recognition has been generally followed by a declaration of war by the parent State upon the ground that such action places the third State in the position of an ally to the rebellious community, and hence of an enemy to the parent State. The alliance of France and the United States in 1778 is a case in point. John Quincy Adams gives a safe rule when he says: 'The justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty.' To have sufficient claim, then, for recognition as a separate nationality a community should have the attributes of a sovereign State. It should possess and control a fixed territory, within which there is a definitely organized government, ruling in a civilized manner, controlling the obedience of its citizens or subjects and duly authorized by them to carry on dealings with the existing sovereign States."

Judged by this standard, its own standard, our government, by recognizing the new State of Panama within ten days of its secession, as possessed of sovereignty although *sans* a constitution, *sans* a government, *sans* a definite status, *sans* everything, gave to Colombia cause for war. Its further act forbidding and preventing, by show of force, the parent State from trying to coerce its rebellious portion, was an act of war, so far as the general principles of international law are in question.

So clear is this conclusion, that it is hardly necessary to give further attention to it. It is but beating the air. For the administration does not try to justify its action under general law, but rather by an appeal to specific treaty provision. This is contained in the thirty-fifth article of the treaty of 1846 with New Granada, to whose rights and duties the United States of Colombia has succeeded.

By this treaty, certain privileges of import and navigation were granted, in Articles 4, 5 and 6. In addition, by Article 35 the citizens, vessels and merchandise of the United

States were to enjoy in New Granadian ports, including those of Panama, "all the exemptions, privileges and immunities, concerning commerce and navigation, which are now or may hereafter be enjoyed by Granadian citizens, their vessels and merchandise; and that this equality of favors shall be made to extend to the passengers, correspondence and merchandise of the United States in their transit across the said territory, from one sea to the other. The government of New Granada guarantees to the government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the government and citizens of the United States." The article goes on to amplify this privilege by stating specifically that the citizens of the United States and their property should have in all respects the same transit rights as belonged to the citizens of New Granada. Thus whatever route for trade across the Isthmus the future might develop, whether highway, railway or canal, though the latter was particularly in mind, its use was to be granted on equal terms to our people.

This was the grant of a privilege, not reciprocal but unilateral, and therefore requiring a consideration. This consideration this same Article 35 goes on immediately to specify, in these terms:

"And in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages and for the favors they have acquired by the 4th, 5th and 6th articles of this treaty, the United States guarantee positively and efficaciously to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea, may not be interrupted or embarrassed in any future time while this treaty exists; and in consequence the United States also guarantees, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

Thus the United States pledged its own abstention, and also undertook the duty and burden of neutralizing the Isthmus and maintaining any future transit way free from injury, the burden, that is, of protection. For neutralization undertaken by a single State obviously means protection, since real neutralization implies a self-denying agreement on the part of all related powers, each for itself.[1] This stipulation did not take away New Granada's duty of preserving order, but supplemented it. So Mr. Cass declared in 1857, as quoted below. In the performance of this duty on a number of different occasions, to protect the peace and the property of the Panama railway, forces have been landed from United States ships. But see what this duty of protection is now construed to mean. The President's *apologia*, in his message to Congress of December 7, 1903, thus describes it:

"The treaty vested in the United States a substantial property right carved out of the rights of sovereignty and property which New Granada then had and possessed over the said territory."

By a complete confusion of ideas, a duty has changed into a property right. More than this, the asserted property right, existing originally under New Granadian sovereignty, is now construed as existing in derogation of, to the exclusion of, that sovereignty.

It is a well-known rule in the construction of treaties, that a provision inserted for the benefit of one of its contracting parties must be strictly construed, on the ground that the party for whose benefit it is inserted must see that a provision in its favor is expressed

[1] See Wharton's *Digest of the International Law of the United States*, § 145.

in terms so clear and unmistakable that no doubt as to its meaning can exist.

Does the President's argument accord with this rule? The message announces that after the new republic was started "the United States gave notice that it would permit the landing of no expeditionary force, the arrival of which would mean chaos and destruction along the line of the railway and of the proposed canal, and an interruption of transit as an inevitable consequence." In effect, he says that as the United States is bound to protect the Panama railway and the zone it traverses from injury, and as the re-establishment of Colombian authority over the rebellious Isthmus, including this zone, might jeopardize this railway, therefore Colombia shall be prevented from that primary exercise of a State's sovereignty, the right to put down insurrection.

Was the treaty provision inserted to limit Granadian sovereignty or to maintain that sovereignty? Was a property right clearly intended and stated to be granted in the treaty? Is the idea that an obligation to protect the property of a friendly State substitutes the rights of the protector for the rights of the sovereign, consonant with either law or common sense? Does any reasoning man believe that the President's construction of the treaty of 1846 can be written into it by any other hand than the mailed fist?

The message goes on to adduce authorities for its interpretation of the treaty. Let us examine them, remembering, however, that the opinions of Secretaries of State have no inherent judicial or legal value.

Secretary Cass in 1858 wrote of the narrow portion of Central America:

"While the rights of sovereignty of the States occupying this region should always be respected, we shall expect that these rights be exercised in a spirit befitting the occasion and wants and circumstances that have arisen. Sovereignty has its duties as well as its rights."

The quotation goes on at some length to declare that no local State would be permitted to bar intercourse or make it unduly burdensome. The letter (to Mr. Lamar) was aimed at exactions in the shape of port dues and tolls forbidden by treaty. Mr. Cass also deprecated European influences in that quarter, as well as local disturbance. The Panama railway was then part of our easiest route to California, and we were naturally sensitive as to its unobstructed use. The language of the letter is general and vague. It was far from having any such meaning as the President imagines. But it was explicitly insisted that the rights of sovereignty of the Central American States must be respected. It therefore condemns our recent action. Mr. Cass' deliberate opinion is expressed elsewhere. In 1857 he negotiated a claims convention with New Granada, providing (Art. 1) for the reference of claims "for damages which were caused by the riot at Panama on the 15th of April, 1856, for which the said government of New Granada acknowledges its liability, arising out of the privilege and obligation to preserve peace and good order along the transit route," a full acknowledgment of Granadian sovereignty and responsibility in the Isthmus.

The President next quotes Secretary Seward, in 1865:

"The United States have taken and will take no interest in any question of internal revolution in the State of Panama, or any State of the United States of Colombia, but will maintain a perfect neutrality in connection with such domestic altercations."

Can the President say as much? It is a queer citation for his purpose. Mr. Seward goes on to declare our right of protection under the treaty, and gives his interpretation of the ambiguous last phrase of the 35th article, which has been cited but not commented on above: "The purpose of the stipulation was to guarantee the Isthmus against seizure or invasion by a foreign power only."

But it is probable that the President, although citing this dubious support to his interpretation and action, does not after all base the justification of that action upon the 1846 treaty. He appeals rather to a variety of considerations which are of greater or less force, and which, taken together, are held to give the United States an equitable right to do what it will in the matter of Panama and a Panama canal, because what it wills is just. The argument in the President's message is substantially as follows:

A fair and even generous canal treaty was made last year with Colombia, a country oft disturbed by popular risings, and no better than it should be.

This treaty failed of the ratification by Colombia which it deserved, and would have had, had the government chosen.

In consequence, a revolution broke out at Panama, "and with astonishing unanimity the new republic was started."

To allow the landing of Colombian forces to quell this rebellion "would mean chaos and destruction along the line of the railway and of the proposed canal, and an interruption of transit as an inevitable consequence," hence it was forbidden.

Colombia being thus held incapable of recovering its power, the new State was recognized, and the parent advised in all friendliness to settle her differences with the triumphant rebel.

The "interests of civilization" demand that the Isthmus traffic shall not be disturbed any longer by unnecessary and wasteful civil wars.

Colombia alone is incapable of maintaining order on the Isthmus, and has constantly to fall back upon the aid of the United States.

When at last there was an opportunity to repay the United States for these many services, Colombia offensively refused.

Therefore it would be "folly and weakness" and "a crime against the nation" if we do not set up this puppet State, and thus carry out the great enterprise of building the interoceanic canal.

It is "a project colossal in its size, and of well-nigh incalculable possibilities for the good of this country and the nations of mankind."

This was the argument and the conclusion. Accordingly, without stopping to take breath, the administration made a canal treaty with Panama "better in its terms" than those with Nicaragua and Costa Rica or the one which Colombia rejected.

Translated into every-day speech—and every day one hears just such sentiments—we gave Colombia fair terms, she tried to "hold us up," we set up a State which we could manage, and now Colombia pays the penalty of overreaching herself.

This sort of argument will appeal to men differently. One or two facts are clear about it. One is, that it does not regard Colombia as a sovereign State under constitutional government. The charge that treaty ratification there is at the President's will; the idea that frequent revolutions in a State detract from its sovereignty; the denial to a State of the right to quell insurrection, are proofs of this.

Another fact is, that it is not a case where law enters, but only politics. The moving considerations are purely material. It is the interests of civilization that are appealed to, the world's need of a colossal public work, not the reign of law and the equality of States.

Old precedents have been disregarded and new ones made. These carry us far towards the theory that to the United States belongs such headship of the States on this continent as to make its own sense of justice, its own will, the only law. To claim such powers without being held to corresponding responsibilities for our weaker neighbors' actions is impossible.

There has been indecent and unnecessary haste, judged by our own or any other stan-

dards. The puppet State of Panama, with a population no larger than Milwaukee's, itself a hotbed of revolution, cannot stand alone. We must support it and be responsible for its conduct.

As already suggested, there are some who see nothing out of the way in such reasoning as this, and in the conclusions resulting.

There are others who have regard still for national honor, patience, obedience to law; who fear dangerous precedents; who would keep faith even with weak and treacherous neighbors.

But, such men will be asked, would you permit any State on academic grounds of equality and law to hinder this country from constructing a canal already too long delayed?

The answer is twofold. National reputation is more valuable than national progress. From a purely material standpoint, what our country may gain in ease of communication it may more than offset by awakening political mistrust.

And the second answer is, that no such choice as is contended was forced; that the President's way was bad diplomacy; that with a little more patience and a little more management, all that the United States has at heart could probably have been won. Fifty-three political disturbances, great and small, in Colombia are enumerated in the message, and the railway protected throughout. Why not endure a fifty-fourth? Why not have put down the Panama revolution as threatening the railway—an undoubted treaty right—instead of aiding it, first getting Colombia's pledge to deal fairly with a new treaty? We might have lost a year, but we should have saved our character and had a real State to deal with.

This suggests the second of the inquiries proposed at the outset. If our recognition of Panama was warranted neither by law nor by treaty, is it any the less a sovereign State for all that? And if a sovereign State, but under a Junta, are its contracts valid?

To the first part of this question the reply must be, that premature or wrongful recognition may violate the rights of the parent State, but nevertheless accomplishes its object. For recognition simply means, that, so far as the recognizing State is concerned, the new body is to be allowed to exercise towards it the rights of statehood. If unwarranted, it may be a cause of war with the parent, but does not affect third parties. They take their own line. They grant or withhold recognition at their own will. And so when A says that B's colony, C, is independent, A grants that colony external sovereignty as to A itself only, and takes the consequences.

But unfortunately, under our system of international law, a powerful wrongdoer cannot be brought to book by a feeble sufferer. Thus wrongful recognition may be a wrong without a penalty.

To give a single illustration: the recognition by the United States of the new government in Hawaii, which ousted the monarchy in 1894, was likewise premature. But the new State stayed independent and sovereign nevertheless; exchanged ministers with this country; after its government was established, made a treaty with this country; and other powers gradually followed suit, There the injury was to a ruling family and irremediable, not to a parent State retaining its right of coercion. The new State arose within the old limits, not by separation. But the principle involved in recognition is the same, that thereby a new sovereignty exists.

And now our final inquiry. Is our canal treaty, made with Panama under the Junta, valid, and title to property leased or ceded by it, good?

The rules which govern the validity of treaties relate to the State's capacity to contract, to the negotiating agents, to the object of the treaty, and its ratification.

A treaty is void if it contracts to do an unlawful act. It is a fair question, whether Panama's agreement to lease territory and cede property, which Colombia still claims, is not a contract to do an unlawful act. But the point is not pressed, as being precluded by our recognition subject to penalty.

The three other rules all depend upon the Constitution of each State. If semi-sovereign, it has not full capacity. Its agents who act in the name of the State must be empowered by its fundamental law; ratification must be done in accordance with the Constitution.

But suppose there is no Constitution. No popular vote has been taken; no head of the State chosen; no power of ratification lodged in any one's hands. Does the treaty-making power exist in such shape as to entitle other States to credit the action of persons thus unrepresentative and unauthorized?

It is not often, I fancy, that such speedy treaty making after revolution is attempted as to raise this point, and I do not find it directly settled by the publicists. If a State's independence is recognized by another, it has sovereignty enough to make treaties with that other. But to bind the new State, its agents of negotiation and ratification must be truly representative, in some way entitled to bind their country. Mere assumption of the right would seem a frail basis to build upon. Probably in the case in question, the United States would always claim and always have the power to enforce the Hay-Varilla agreement, as against other powers. Yet who will guarantee that a future Panama, pressed perhaps by future creditors, will not want a larger rental, and deny the validity of this contract on the ground that it was made by those who were unauthorized? In other words, there is enough doubt about the competence of Panama's agents to cast discredit upon the agreement. It will be good if we can always make it good, but not otherwise.

If this is sound logic, it should follow that to pay Panama as much for a doubtful title under a questionable contract as was to have been paid Colombia for a sound title, is very poor business. It is only done to save face. However, this defect in title under treaty can be and should be cured, by future reference to the proper body for ratification after a Constitution in Panama has been adopted.

Let us set together briefly the conclusions drawn from the considerations which have been presented.

(1) The hasty recognition of a new State in Panama was not in accordance with the law of nations.

(2) To justify it by the Treaty of 1846 requires a new and forced construction of that instrument.

(3) To prevent Colombia's coercion of Panama is an act of war.

(4) The "man in the street's" verdict, that our smart politics served Colombia right, disregards law, sets a dangerous precedent, detracts from the national dignity, and may injure our influence and trade amongst the Latin-American States.

(5) Our duty was and is to let Colombia recover Panama if she can; our policy, to use her troubles to get favorable canal action from the rightful sovereign.

(6) Our recognition, if persisted in, makes of Panama a treaty-making agent, but for ourselves only.

(7) The canal treaty, negotiated and ratified by the Junta, with no constitutional authority or other authorization, is of doubtful validity and the defect will need to be subsequently cured.

A TEMPORARY INJUNCTION.

By Edgar White.

WHEN Mike Brennan sold his town lots to a real estate syndicate there was a squabble over an old barn that stood on one of them. It was a ramshackley old structure, not good for much besides fuel, but the purchasing concern thought it had more right to it than Mike, and when he went there with a gang of house movers and began hauling it away, the syndicate got Circuit Judge Shelton to issue a temporary restraining order until the rights of property could be determined.

Constable Burke landed on Mike with his little paper while the moving was in progress.

"Phat's dot?" asked Mike.

"Temporary injunction," said the officer. "You're to stop moving that barn until the judge says who it belongs to."

Mike took the paper and ran into the house.

"Mary!" he bawled.

A rosy-cheeked girl of 17 came down stairs.

"Git yer dickshunary an' find out phat a toomperairy injunchshun is."

The girl hunted up the unabridged.

"'Temporary,'" she said, "means 'for a time.' 'Injunction, a command, an order.'"

"A arther, is it, 'fer a time.' All right."

"What's the matter, pap?" asked Mary, anxiously, seeing the officer down in the road.

"Niver yez moind, chile," responded her dad. "It's too dape fer gals like yez ter understhand."

Mike returned to the scene of operations, and handed the paper back to the constable, who supposed as a matter of course work would stop. He returned to town.

"B'ys," said Mike, "th' Coort has arthered us ter stop fer a time. Fill up yer poipes an' we'll sit 'round fer half an hour. It's th' law, yez know."

Not exactly comprehending the philosophy of it, but knowing their pay was running just the same, the men sat down on logs and boards, and whiled the time away telling yarns and smoking. The half hour up, Mike called time, and set them all to work again.

The barn movers were making pretty fair progress down the road toward Mike's farm, when the constable and another man drove up in a buggy. The new figure in the case was a lawyer, and he addressed Mike pretty roughly.

"What do you mean by disobeying the order of the Court in this way?" he demanded.

"Ain't dis'beying no arther of th' Court," said Mike.

"Didn't Burke here give you notice of a temporary injunction this morning?"

"Aye; he did thot."

"Don't you know what that means?"

"Who be you?" asked Mike.

"I'm the lawyer for the real estate company that bought your lots and barn, and if you don't stop moving that barn you'll have to go to jail for contempt of Court."

Mike advanced to the buggy threateningly.

"See here, Mister Lawyer," he said, "yez can't coom it over me with none of yer shenanagan. I know a thing or two as well as yez. Don't yez spose I know phat a toomperairy injunchshun is?"

"You don't act as if you do."

"Well, I do. It manes an' arther fer a time, an' we knocked off work a whole half hour this marning because of it. Yez needn't coom poking yer papers under my nose no more. We're going to move this barn."

Threats, expostulations and explanations were alike unavailing. Mike moved the barn where he wanted it, and paid off his men. Next day the constable arrested him and brought him before the judge. Mike cited his authority for his action from the "dickshunary." He construed "toomperairy" literally, and insisted he had shown no disrespect to the Court.

"Have you got $50 to pay your fine, Mr. Brennan?" asked the judge.

"Nary a red, your Grace," said Mike.

"Then I'm afraid I'll have to send you to jail—temporarily."

"If yer Grace's toomperarily ain't any longer than my toomperarily I'll not be afther coomplainin," said Mike.

The Court smiled.

"I guess we'll use your dictionary on 'temporary,' Mike, as far as the jail sentence is concerned," he said.

The syndicate withdrew proceedings before the term came on, and Mike was allowed undisturbed possession of his old barn.

THE ADVISABILITY OF REGISTERING NEGOTIABLE COUPON BONDS.

By John Philip Hill,

Of the Boston Bar.

The power to borrow money with which to carry out the purposes of its creation is generally held one of the inherent rights of a corporation. Where this power is present it is well settled that the corporation may issue its promise to pay in the form of a bond.[1]

Cook, in his treatise on the law of Corporations, defines a corporation bond as "an instrument executed under the seal of the corporation, acknowledging the loan and agreeing to repay the same upon terms set forth therein." (1 *Cook on Corporations*, sec. 14.) The most usual form is the bond that has promissory notes of the corporation attached in the shape of coupons, each of which is equal to the annual, semi-annual, or quarterly interest on the bond. Coupon bonds form a convenient mode of investment and of securing corporate loans, and are issued alike by municipal and private corporations; by the Federal, State and city governments, as well as by railroads, manufacturing, mining and nearly all other forms of incorporated enterprise.

Bonds issued by corporations in proper form are held to be negotiable, both by mercantile usage and judicial determination, in all respects with the exception of not being entitled to days of grace.[2]

The object of making bonds negotiable, is to secure convenience and freedom in circulation, and to secure for the *bona fide* holder a perfect title, protected from all claims or equities against his transferror. It is to the negotiable quality of coupon bonds that their prominence in the money market is largely to be ascribed. Coupons cut from bonds of corporations whose stability is assured are an immediately convertible asset, and the bonds themselves are of nearly equal transferability. So readily may they be transferred that the greatest care is requisite in their keeping, and they rank with bank notes in the esteem of the usual safe-breaker.

[1] Miller *v.* R. R., 8 Abb. Pr. (N. Y.), 431.

[2] Haven *v.* Grand Junction Company, 109 Mass. 88; 5 *Thompson on Corporations*, sec. 6064.

Where a permanent investment is sought, this ready negotiability has many disadvantages, danger from casual loss, theft, *etc.*, and a remedy has been sought in a simple method by which for the time being the negotiable quality may be withdrawn. This is effected by registration of title. Before considering the effect of registry it will be necessary to note some of the results that flow from the negotiability of coupon bonds.

Roughly speaking, negotiability means that the honest buyer of a bond will be protected in his interest. The general doctrine is that a *bona fide* purchaser, before maturity, of coupon bonds payable to bearer, takes them clear from all claims against the one from whom he purchased them, or any other prior holder, and the burden of proof is on him who assails the *bona fides* of such purchase.[1]

Mere handing over of the bonds for a price is sufficient to pass title. No record of transfer is requisite, but it is essential, as in all matters of negotiable instruments, that the transfer be before maturity, and that the purchase be in good faith.[2]

The usual legal *bona fides*,—ignorance and honesty,—is all that is required. Given these conditions, the buyer's title is unimpeachable. Negotiability presents many widely differing aspects, and to test its working it will be well to consider some of the results under various circumstances.

As a rule, in considering ordinary negotiable coupon bonds, two parties only are to be questioned, the maker and the holder. Where bonds are lost or stolen, there is doubt as to the identity of the legal holder, and the relations become more complicated. Viewed with regard to the rights of the holder or the alleged holder, questions concerning negotiable coupon bonds seem to fall roughly into two classes:—first, where there is an infirmity in the bond itself or in a prior holder; second, where there has been some improper treatment or mishap to the bonds. Examples of the first class are where a bond issue is *ultra vires* or fraudulent; where the bonds are forged, or the doctrine of *lis pendens* is invoked to cloud the title of the holder. The second class includes the questions that arise with regard to bonds that have been burned or otherwise destroyed, or lost, stolen or altered. Bonds that have been recalled for payment sometimes raise questions of this class. As a rule the holder of the negotiable bond is protected in his title in most of the relations that arise in the first class, and the maker is held liable, while in case of mishaps to the bonds or the holders, as in the second class, some *bona fide* claimant is forced to bear an unmerited loss.

Some of the most perplexing questions of the first class arise where bonds are issued without proper authority by a municipal corporation, or in excess of their power by the directors or officers of a private corporation. The views of text writers and courts do not agree in all points, and the circumstances of an improper bond issue are capable of so many variations that it is difficult to lay down any strict rules. There is again, on this subject a difference between municipal and private corporation bonds, and a somewhat more strict rule is applied to the former. It is agreed that where there is no authority for an issue of municipal bonds that the holder, however full of good faith, is not protected, and the bonds are void in all hands.[3]

Nor can the issue of such bonds give any right to the holder on the ground of estoppel. "The decision and certificate of the officers of a municipality do not bind the latter, except as to those matters which are within the jurisdiction conferred on them. Officers never have implied authority to bind the

[1] Gibson *v.* Lenhart, 101 Pa. St. 522; Kneeland *v.* Lawrence, 140 U. S. 209.

[2] Vermilye *v.* Adams Express Company, 21 Wall. 138.

[3] 2 *Daniel on Negotiable Instruments*, sec. 1502; *Simonton on Municipal Bonds* (1896), sec. 124.

municipality by their recital concerning matters of law, or facts which persons dealing with them must, according to the general rules of law, ascertain at their peril. Persons purchasing the bonds of a municipality must at their peril, ascertain the laws of the State which created it, and must see that the bonds are regular on their face."[1]

Where there is power to issue, the *bona fide* purchaser is usually protected, even if the issue were irregular and improper. It has been held that a *bona fide* purchaser was protected where a confirmatory vote had not been passed by a town meeting, as required by the statute that authorized the issue.[2]

Holdings of this kind rest on the doctrine of estoppel, and recitals in the bonds are considered to work an estoppel when made by authorized officers.[3]

On this principle a recital may estop a town to protest that it has issued in excess of statutory authority.[4]

Records of proceedings of the town, or other matters, as payment of interest, may also constitute an estoppel in all cases except where there is no power at all to issue.

In general the rule would seem to be the same in regard to private corporations. Where there is no power, express or implied, the act of the directors cannot be made obligatory on the corporation, but courts are more ready to find an estoppel in such a case than where a municipality is concerned, and in some instances have gone far in upholding improper issues. Thus, in State *v.* Cobb, 64 Ala. 127, the State endorsed bonds of a railroad, and they were then issued fraudulently. It was held that a *bona fide* purchaser obtained a title good both as against the State and the railroad. A case showing a similar doctrine is Hinckley *v.* Pfister, 83 Wis. 64, where the corporation had pledged its bonds in violation of a statute. It was held that there could be no action in equity for surrender and cancellation, without first tendering the amount due to the pledgee. It would seem that in nearly all cases where there has been an *ultra vires* issue, or dealing with the bonds, save where there was no authority, that the *bona fide* purchaser is protected.

The *bona fide* holder of a negotiable bond is not bound by equities that would cloud the title of a prior holder, nor is he affected by the doctrine of *lis pendens*. He is not chargeable with constructive notice of any suit in equity, action at law, or any decree or judgment rendered in them.[5]

Actual notice is required to harm his title, and this doctrine has been widely extended. It has been held even in the case of a purchaser after judgment in an action in which the bonds were declared void.[6]

A forged bond is not the bond of the alleged obligor, and he is not bound. Cases of hardship for the holder may arise, but he is not protected by the rules of negotiability. There has been no fault or representation by the maker, and the holder must bear the loss. Illustrations of this are found where the instrument is incomplete, and filled in by the thief,[7] or where the seal of corporation is forged by the thief, and afterward the bonds come to a *bona fide* purchaser.[8]

Some of the most important questions arise where the bonds were properly issued, and affected by no adverse claims, but where they have been subjected to some improper treatment or some casualty has occurred. A not infrequent occurrence, is the destruction of bonds by fire, or in some other way where the destruction can definitely be proved. It is necessary in such a case to

[1] 2 *Morawetz on Private Corporations* (1886), sec 614.

[2] Bank of Toledo *v.* Porter Township Trustees, 110 U. S. 608.

[3] *Harris on Municipal Bonds*, p. 173.

[4] Marcy *v.* Oswego, 92 U. S. 637.

[5] Scotland County *v.* Hill, 132 U. S. 107.

[6] Stewart *v.* Lansing, 104 U. S. 505.

[7] Ledwick *v.* McKim, 53 N. Y. 307.

Maas *v.* Railroad, 11 Hun. (N. Y.) 8.

protect the obligor from possible double liability, and to allow the right owner of the destroyed securities to obtain duplicates, and to collect his claim. In some States there are statutes providing that new negotiable instruments will be issued to replace the old upon the provision of proper indemnity.[1]

Such statutes are not frequent, and the Revised Laws of Massachusetts do not appear to provide for this. Law or equity, however, will usually give right to a new instrument, but there must generally be a tender of indemnity before issue of a new instrument, or payment of the old.[2]

Daniel (2 *Negotiable Ins.*, 5th Ed., sec. 1482) says that indemnity is dispensed with in case the instrument is clearly proved to have been destroyed, but there are a number of cases which require indemnity under these circumstances. These statutes and decisions generally cover cases of destroyed bonds, and vary in their provisions. Frequently it is troublesome to prove loss, and the obtaining of duplicates is attended with much difficulty, so that the holder of the ordinary negotiable bond is poorly protected where the bonds are destroyed.

In carrying bonds to and from places of deposit, in dealing with them in order to cut the coupons, and under many other circumstances, there is danger of casual loss of the instrument. The bonds being negotiable, the finder, although he has not proper title, will have a *prima facie* title, which will frequently be impossible to disprove. Frequently a holder has no record to show ownership, and the bond itself being payable to bearer, the true owner will have little chance of recovery. If the finder sells the lost property to an innocent purchaser, such purchaser can hold it against everyone, although he obtained it direct from the finder.[3]

As in case of destroyed bonds, the statutes make scant provision for the issue of new instruments. In most cases, however, new bonds may be obtained, on payment of a heavy indemnity. The owner of the lost bond is protected, after much trouble, only if the bond he has lost has come into the hands of an honest finder who returns it and does not sell to a purchaser without notice.

The law is very much the same where bonds have been stolen, and on this question there have been many decisions. The almost uniform holding is that the innocent holder, though a direct purchaser from the thief, obtains full title.[4]

Any other decision, says Chief Justice Beasley (City of Elizabeth *v.* Force, 29 N. J. Eq. 587, at 580) would be "greatly inconsistent with the legal principle that gives untrammeled negotiability to instruments of this kind." This rule holds good even if the number of the bond has been altered by the thief.[5]

There is no way the owner of a stolen bond can help himself, except by bringing notice to the purchaser, and this is a difficult thing to do,[6] for it is generally held that giving notice of the theft by publication will not of itself deprive the innocent holder of his right to recover.[7]

After actual knowledge of such a notice, it is the duty of bankers and others purchasing bonds, to keep a record of the stolen bonds,[8] and look out for them; but it is not the duty of a person to look in the newspaper for notices of stolen bonds.[9]

[1] *Annotated Code of Mississippi*, sec. 3512; *Revised Statutes of the United States*, sec. 3702.

[2] Almy *v.* Reed, 10 Cush. 421.

[3] *Simonton on Municipal Bonds* (1896), sec. 124a.

[4] Ditch *v.* Western National Bank, 79 Md. 192; Spooner *v.* Holmes, 102 Mass. 502; Dutchess Co. Mut. Ins. Co. *v.* Hatchfield, 73 N. Y. 226; Note and Athorities, 29 N. J. Eq. 587.

[5] Commonwealth *v.* Savings Bank, 98 Mass. 12; Morgan *v.* United States, 113 U. S., 476.

[6] 2 *Daniel on Negotiable Instruments*, sec. 1462.

[7] Murray *v.* Lardner, 2 Wall. 110.

[8] Vermilye *v.* Adams Express Company, 21 Wall. 138.

[9] Venables *v.* Baring (1892), 3 Ch. 527.

It is hard to prove a case of constructive notice. Even in a case where the corners of the bonds had been burned, it was held that this circumstance did not impose a duty of inquiry upon the bank.[1]

The general effect of negotiability is to give perfect title to the actual *bona fide* holder of bonds. There are some exceptions, as where the bonds were forged, or where power to issue was lacking, but in the main the *bona fide* purchaser is fully protected. This same quality of negotiability, therefore, frequently results in loss to the true owner, who by mischance has ceased to hold the bonds. The cases cited above show that the owner of lost or stolen bonds, has no protection, save the futile one of giving actual notice to all purchasers. The owner of bonds that have been destroyed has great difficulty in getting duplicates of his lost property. For the person who holds bonds as an investment, or as trustee for others, this is a particularly unfortunate condition, and registration has been provided to meet the defects that necessarily attend negotiability. Before examining the effects of registration in the before considered circumstances, and its possible effect in other conditions that concern bonds, it will be well to see precisely what registration is, and how it is effectuated.

A registered bond is defined by Cook in his book on corporations, as "one whose negotiability is temporarily withdrawn by a writing on the bond that it belongs to a specified person, and by a registry to that effect at an office specified by the company." (1 *Cook on Corporations*, sec. 14.) There is a class of State and municipal bonds that are by the terms of the law that authorizes them required to be registered with some one of the executive departments of the State or municipality before they are issued or negotiated.[2] This registration is a condition precedent to their validity. These are referred to as registered bonds, and this term has been applied to other forms of securities, but this discussion will deal only with that class of bonds which when properly issued are negotiable, and whose negotiability is cut off by registration.

There usually appears on the back of a bond capable of registration, some form like this: "No writing on this bond except by an officer of this company," with spaces in which the date of registry, the name of the person in whose name the bond is registered, and the signature of the treasurer or transfer officer, may be filled in.

This form is of almost invariable use today. These blanks are filled in by the proper officers, and entry made in the registry books of the municipality or corporation issuing the bonds, or in the books of some company that acts as agent in all the transfer business of such municipality or corporation. It is a matter of frequent occurrence, since transfer, payment of interest, *etc.*, have become so great in volume, for companies to devote themselves entirely to this work, and thus relieve the maker of the bonds.

Formerly, it was the custom with some corporations to register the coupons as well as the bonds, but this was attended by much inconvenience, and is now of infrequent occurrence. The United States Government employs a system that practically registers the coupons as well as the bonds, when it issues a certificate of ownership in exchange for the bond and attached coupons, and pays the interest thereafter by treasury check. These certificates are transferable before a designated officer of the treasury, or one of the national banks.

Before noting the effect of registration in special circumstances, as loss by fire or theft, it is necessary to consider the general results of registration. Simonton, in his treatise on Municipal Bonds, says: "Sometimes the ordinary negotiable bond has

[1] Manhattan Savings Institution *v.* New York National Exchange Bank, 170 N. Y. 58.

[2] *Dillon on Municipal Bonds*, sec. 543.

printed upon it blanks, to be filled in by the municipal authorities, so as to render the bond a registered one, at the request of the holder. Just what effect this mode of registration would have upon the rights of a *bona fide* holder has not been, so far as the writer knows, decided, but he is of the opinion that the registration, since the fact would appear on the bond, would be notice to all purchasers." (Simonton, *Municipal Bonds*, sec. 1115). This refers to municipal bonds, but the same is true of private corporation bonds. While there are not many decisions involving the point of registry, it seems that the learned writer is correct, and that this form of registry gives to a bond the full effect of a bond originally issued as registered and non-negotiable. Not only is such bond not negotiable, but it can usually be validly transferred only on the books of the corporation issuing it or by its transfer agent.[1]

Registration further has the effect of subjecting the bond to the claims of third parties. The purchaser of a registered bond takes it subject to all the equities against prior holders.[2]

Registered bonds are likewise subject to the results of the doctrine of *lis pendens*, and the subsequent holder takes subject to all prior judgments and attachments. The negotiability of bonds, as of other negotiable instruments, may be destroyed by extraneous stipulations in it, but it is to be noted that a provision in a bond by which it may be registered does not of itself have this effect. It is only upon exercise of the power that the bond loses its negotiable character.[3]

It is also to be noted that a registered bond may be made negotiable by filling up the form on the back with the name of the assignee in blank, if such transaction is properly entered on the books of the company.

Such are the general effects of registration. In certain specific cases, registration has a very beneficial effect for the person entitled to the bond. A conspicuous instance of this is where the registered bond is destroyed. It has been pointed out that in such case the holder of a negotiable bond is put to great inconvenience to gain inadequate protection. Although there are cases where a duplicate for a registered bond that has been destroyed is refused by the court,[4] it is the general rule by decision and statute, that a duplicate will be issued without such strict proof of loss as it required where the bond is negotiable, and frequently without the requirement of any indemnity bond.[5]

The Revised Statutes of the United States provide for an indemnity bond of twice the value of the principal and future interest of the destroyed bond, if negotiable, while if the bond destroyed is registered, the penal sum of the indemnity bond is required to be only equal to the amount of the missing bond and the interest.[6]

Where registered coupon railroad bonds were destroyed by the burning of a steamship, the railroad was forced to issue duplicates in the absence of statute, upon the giving of an indemnity bond only a little greater than the value of the destroyed bonds.[7]

In the case of loss, or theft, of registered bonds, the owner of the bonds is fully protected in his title. It is of no value in the hands of the finder or thief, and he cannot sell it. The purchaser cannot recover on it, because it is not negotiable. The owner retains title precisely as he does in any case

[1] Scollans *v.* Rollins, 173 Mass. 275 (originally registered bonds); *Lewis on Bonds and Stocks*, 158.

[2] Cronin *v.* Patrick Company, 4 Hughes 428 (U. S. Circuit Court.)

[3] *Jones on Corporate Bonds and Mortgages*, sec. 192; Savannah and M. Railroad *v.* Lanier, 62 Ala., 555.

[4] Hoddy *v.* Hoard, 2 Ind. (Carter), 474.

[5] Nagel *v.* Mignot, 8 Mart., 488.

[6] *Revised Statutes of United States*, secs 3702-5.

[7] Rogers *v.* Chicago, etc., Railroad, 6 Abb. N. Cas. (N. Y.), 253.

where his horse or other personal property is stolen.[1]

Another result of registration, that is attended with very practical benefits, is the fact that the holder of the bond is known, and can be notified of any important issue that arises in connection with the bonds. It may be that the holder is a proper party to a suit to test the validity of the issue, or is offered an advantageous option of exchange or redemption. It frequently happens that bonds are recalled by the company. The corporation, by a reserved right, chooses certain bonds that it is privileged to redeem on a certain set day. It gives notice that on that day the principal and interest will be paid, and thereafter no interest can be reckoned on the bond. The holder of a negotiable bond must rely on general notice of this, and it frequently happens that by not knowing of the call, he loses several months' interest. This danger is avoided by registry, for it is a frequent practice, and one which is coming more and more into favor, to notify the registered holder personally. Another result from this knowledge of the owner is the more ready detection of a thief or finder who attempts to collect the coupons, which are not themselves registered.

These are the obvious benefits of registration. There are many speculative advantages that may be suggested.

A negotiable county bond, that has been paid and cancelled, and then fraudulently taken from the files and put in circulation, has been held invalid even in the hands of a *bona fide* purchaser.[2]

Suppose such *bona fide* purchaser took the bond to the proper officer and had it registered in his name, and then sold it. Might it not be urged that the registration would operate as a recital by the registration officer that would act as an estoppel to keep the county from denying the validity of the bond? If the bond bore no notice of cancellation, this would clearly seem to be the result. In some places there are statutes providing for the fulfilment of certain formalities before bond issues by a municipality are valid. There is a Missouri statute of this sort, passed in 1872. It has been held that where bonds are fraudulently antedated to evade this statute, the *bona fide* purchaser was not protected.[3]

If one of these bonds were later registered by the proper offices, could the maker then deny its validity? Bonds that have been materially altered are not collectable by a *bona fide* purchaser. Suppose they are registered after such alteration. Does not the corporation by the registration assert that the bonds are the property of the person in whose name they are registered, and that such person has good title to the bonds? It would seem that in many cases a valid estoppel could be claimed to secure recovery on bonds otherwise not collectable.

There are weighty objections to registration, for registered bonds are subject to equities and to the application of the doctrine of *lis pendens*. Furthermore, the fact of registration is often a hindrance to speedy disposition that sometimes interferes with a profitable sale, or causes a diminution in the market value. Where bonds are registered in the names of several trustees, it frequently is difficult to secure a transfer. Examples of this are where the trustees reside in different States, or where one of them is out of the country. When compared, however, with the security and protection afforded by registration, it is submitted that the balance is in favor of registration, and that in the majority of cases it will prove a valuable right to the holder of negotiable bonds.

[1] *Simonton on Municipal Bonds*, sec. 115.

[2] Richardson *v.* Marshall, 100 Tenn., 346.

[3] Anthony *v.* County of Jasper, 101 U. S., 693 (1879.)

A CURIOUS CONNECTICUT TOBACCO LAW.

By Josbph M. Sullivan,

Of the Boston Bar.

IN the code of laws passed by the towns of Windsor, Hartford and Wethersfield in the years 1638-9, may be found the following on tobacco chewing: "For asmuch as it is observed that many abuses are crept in, and committed by the frequent taking of tobacko. It is ordered by the authority of this court that no person under the age of twenty-one years, nor any others that hath not already accustomed himselfe to the use thereof, shall take any tobacko until hee hath bought a certificate under the hands of some one who are approved for knowledge and skill in physicks, that is useful for him, and also that hee hath received a lycense from the courts for the same. And for the regulating of those, who either by theire former taking it, have, to theire own apprehensions, made it necessary to them, or upon due advice, are persuaded to the use thereof.—It is ordered that no man within this colonye, after the publication hereof, shall take any tobacko publiquely, in the streets, highways, or any barn-yardes, or upon training days, in any open places, under the penalty of six pence for each offence against this order, in any of the particulars thereof, to bee paid without gainsaying, uppon conviction by the testimony of one witness, that is, without just exception, before any one magistrate. And the constables in the several towns are required to make presentment to each particular courte, of such as they do understand, and can convict to be trangressors of this order."

The weed found in Daniel Webster an ardent champion and enthusiastic advocate. He found in its fragrant fumes a solace from care, and a haven of rest from the troubles and anxieties which are incident to the conduct and trial of law suits. In his early days he wrote thus concerning the good qualities of the weed:

"I have engaged a new auxiliary to support me under mortification; it is tobacco. Since using this great Catholicon, I suspect that Cato and John Rogers were not unacquainted with the virtues of the goodly leaf; else whence derived they this firmness? Oh, tobacco, how many hearts hast thou saved from the destructions of coquetry! How many throats of bankrupts hast thou preserved from their own pen-knives!

"Come then, tobacco, new found friend,
Come, and thy suppliant attend.
In each dull, lonely hour;
And though misfortunes lie around,
Thicker than hailstones on the ground,
I'll rest upon thy power;
Then, while the coxcomb, pert and proud,
The politician, learned and loud,
Keep one eternal clack,
I'll tread where silent nature smiles
Where solitude our woes beguiles
And chew thee, dear toback."

SIR NICHOLAS THROCKMORTON.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

I.

By Van Vechten Veeder,

Of the New York Bar.

THE bill of rights comprised in the first ten amendments to the Constitution of the United States is a tribute to the conservative instincts of a people who had watched the development of freedom as is slowly broadened out from precedent to precedent. In the constitution and distribution of governmental powers the founders followed, to a large extent, ideas which had been proved by experience. In their method of protecting individual liberty, however, they adopted a new and untried experiment. More than a century and a half earlier Lord Coke had sought to adjust the balance between King and Parliament by interposing the Judiciary as an arbiter. This plan was rejected; and after the ensuing civil war and revolution Parliament emerged in full possession of the unlimited power which had for centuries been claimed by the crown. Chatham delivered the highest possible eulogy upon the British constitution when he said: "The poorest man may, in his cottage, bid defiance to all the force of the crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter, but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." He could not go further and say that the Parliament might not enter; and to this day Parliament remains supreme. It remained for the founders of our institutions to protect the fundamental personal rights of the citizen, not only from abuse by governmental power, but against the passions of the people themselves. The framers of the Federal Constitution had for a long time been absorbed in considering the arbitrary encroachments of Crown and Parliament upon the liberty of the subject,[1] and were in substantial agreement upon the individual immunities necessary to the enjoyment of the inalienable rights of life, liberty, and the pursuit of happiness—freedom of the person, equality before the law, security of private property, freedom of opinion and its expression, and freedom of conscience. When, therefore, they had drawn up the Federal Constitution, although all interference within this sacred domain had already been prohibited to the States, and notwithstanding that specific provisions had in many instances been inserted in the body of the instrument, the people looked upon this feature of their work as a matter of such vital import that they demanded, as an additional precaution, that the limitations upon Federal power should be express, for fear that they might not be implied. The provisions of this bill of rights are brief and colorless—a mere skeleton of personal rights. But back of every one of the rights thus enumerated lies a long, eventful and absorbing story of struggle with arbitrary power. It may, therefore, be of interest to review this story in so far as it is recorded in the State trials of England.[2]

[1] See *Ex parte* Bain, 121 U. S. 12, *per* Miller J.

[2] The great collection of the English State Trials, commonly associated with the name of Howell, begins with the trial of Thomas Becket, in 1163. But the first volume, which extends to the seventeenth century, is mostly made up of brief extracts from old chronicles. It is not until after the middle of the sixteenth century that we begin to get anything like an accurate report. The reign of James I. is covered by volume 2; of Charles I., by volume three and part of four; the Commonwealth, by part of four and five; while the twenty-eight years from the Restoration to the Revolution require seven volumes. From about 1680 we have full and accurate reports of the actual proceedings. Including the new series, from 1820 to 1858, the State Trials comprise forty-two volumes, and contain the record of over nine hundred trials.

It is obviously impossible to cover fully so great a subject within the limits of a series of magazine articles; but by confining attention mainly to cases in which the conflict between the sovereign and the subject has been fought out in trials for treason and sedition and criminal libel, it will be possible, by confining explanatory matter and comment within narrow limits, to glance at the leading cases during the last four centuries. The sketch will be continued beyond the adoption of the Federal Constitution on account of the intrinsic interest of the later trials, and their instructive lessons in dealing with conditions which still prevail.

Liberty of opinion is the last and best fruit of just government. "Other liberties," as Erskine said in defence of Thomas Paine, "are held under governments, but the liberty of opinion keeps governments themselves in due subjection to their duties. This has produced the martyrdom of truth in every age; and the world has only been purged from ignorance with the innocent blood of those who have enlightened it." Milton truly said that it is not to be supposed that no grievance should arise in the commonwealth; "but when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that

ANNE BOLEYN.

wise men look for." In tracing the development of this great consummation in England the subject naturally falls into three divisions. During the first period, from Tudor times to the Revolution of 1688, treason was applied alike to enmity and to criticism. Whether by impeachment, by trial through legal forms, or by summary act of attainder, the penalty of disfavor was death. As long as the royal censorship of the press existed there could obviously be no occasion for the discussion of the doctrine and limits of freedom of expression. The second period extends from the Revolution of 1688 to the outbreak of the French Revolution, which was contemporary with the establishment of the Constitution of the United States. With the overthrow of the Stuarts there came an immediate change in the spirit of the administration of the criminal law. Good judges succeeded bad ones, and the barbarities of trial procedure were materially ameliorated. But the traditions of centuries of absolutism died slowly, and it was not until the close of

CARDINAL WOLSEY

this period that the vicious doctrine of constructive treason was successfully attacked. During this period the press, relieved of its fetters, made great strides in development. Its freedom was restrained, however, by doctrines inherited from the Star Chamber, and by oppressive stamp taxes. Toward the close of the period, when the people, deprived of representation in a corrupt Parliament, turned to the press as a means of combating the arbitrary designs of George III., the issue between individual liberty and arbitrary power was squarely raised. In the contest which ensued, the courage of John Wilkes, the brilliant advocacy of Erskine, and the statesmanship of Fox and Camden in the cause of freedom were victorious. But the progress thus made was soon arrested by the revolutionary excesses on the continent of Europe, which marks the beginning of a third period. During this period the government in alarm adopted every possible method of repression. This reaction was a severe blow to popular rights. Public opinion was beginning to supply through new channels the defects of narrow representation. Public meetings and popular organization for correspondence and concerted action were supplementing the influence of the press. But all these peaceable avenues of public opinion were now closed. The inevitable effect was to foster secret conspiracy and to invite open violence. At three crises in English affairs, in 1792, in 1816, and finally in the Chartist agitation near the middle of the century, we are furnished with instructive lessons in the futility and impolicy of attempting to suppress open discussion of public grievances.

FROM 1500 TO 1688.

By way of introduction to the treason trials of the first period, it may be well to refer briefly at the history of the law with respect to treason. In early times the king, like the ordinary freeman, came within the schedule of tariffs by which the value of human life was measured. But as the king's person, like the king's peace, developed in importance with the growth of the royal power, offenses against the king's person were at length punished by death. This was the starting point of the law of treason. The forfeitures resulting from cases of treason furnished an inducement to extend the law, and in 1348 it was applied in Sir John Gerbage's case to an act of highway robbery. The vague and undefined state of the law finally led to the enactment in 1352 of the Statute of Treasons of Edward III., which continued for centuries to be the fundamental statement of the English law of treason. But the limited scope of this act soon became apparent. While it sufficiently protected the personal security of the king, no provision was made for political conspiracy, short of open war, to depose the king, or for violence which did not amount to levying war. These omissions were supplied in various ways. Bills of attainder were used at an early date. The Tudor kings resorted to additional legislation; under Henry VIII. alone nine acts creating new treasons were adopted. But the favorite resort was to judicial construction, in accordance with which "imagining the king's death" was held include an intention of anything whatever which, under any circumstances, might possibly have a tendency, however remote, to expose the king to personal danger, or to the forcible deprivation of any part of the authority incidental to his station. Hence words spoken or written were, in certain cases, held to be overt acts. The term, "levying war," was given a similarly sweeping construction. The levying might, of course, be directly against the king's person; or it might be constructive, against his government. The true criterion as to whether an unlawful assemblage amounts to levying war undoubtedly is, with what purpose or intent did the parties assemble? For, to constitute treason, the object must be to effect by force something of public and general concern; acts of

private redress do not come within the term. Acting upon this logical distinction between general and particular purposes, but regardless of the fact that in a majority of cases there was an entire absence of any intention either to depose the sovereign or subvert his government, the judges held trifling insurrections for the purpose of destroying all

brothels, or pulling down all dissenting meeting houses, or to redress real or imaginary national grievances in which the insurgents had no special interest, were constructive levyings of war within the statute. Finally by the statute of 57 George III., c. 6, it was declared that if any person should within the realm or without, compass or intend death or bodily harm or restraint of the king, his heirs, *etc.*, and should express or declare such intention by publishing any printing or writing or by any overt act or deed, such person was guilty of treason. The act further declared that it should also be treason to compass or intend (such intention being expressed by writing, print or overt act) to depose the king, or to levy war within the realm in order by force to compel him to change his measures or counsels, or to overcome either house of Parliament, or to invite foreign invasion. Neither under this act, however, nor under any judicial construction, were spoken words, as distinguished from words written or published, held to amount to overt acts of treason, unless the words were direct counsellings in furtherance of

treasonable designs actually under way. Thus the treason law stood until 1848, when by the Treason-Felony act (11 and 12 Vict., c. 12), the portion of the statute of George III. not relating to the king's person was repealed, and the offenses therein enumerated were made felonies; but "open and advised speaking" was added to the other modes of compassing treason.

A word may also be added concerning procedure. Without distinguishing the special characteristics of the various tribunals—the Court of King's Bench, the Star Chamber, the Court of High Commission, and the High Court of Parliament—the procedure in State trials prior to the Revolution of 1688 generally began with the examination of the prisoner by the Privy Council. At the trial the crown lawyers opened the charges, which the prisoner answered as best he could. Every allegation of the prosecutors was in effect a question to the prisoner, and the trial was in fact a running argument between the prisoner and the counsel for the crown, in which the judges occasionally participated. The proof usually consisted of depositions, confessions of accomplices, and the like. In conclusion the judges repeated the discussion to the jury. In the greatest crimes, involving life or death, the prisoner

SIR THOMAS MORE.

was not allowed counsel. He was denied the sight of his indictment, and was often ignorant of the charges against him until he was arraigned at the bar. He had no power to compel the attendance of witnesses in his behalf, and if they appeared voluntarily they could not be sworn. The juries were selected by sheriffs whom the crown had named. With all these odds against him, the prisoner was required to battle for his life with an array of experienced and unprincipled lawyers, and generally against an obsequious and corrupt bench.

THOMAS CROMWELL, EARL OF ESSEX.

The wars of the Roses practically exterminated the power of the great barons who had hitherto stood between the Crown and the people. Over their graves the Tudors erected an absolute monarchy. Under the comparative peace and security which the power of the Tudors insured, the spirit of the nation was complaisant of wrongs which did not touch the masses, and the carnival of judicial murder which reigned in court circles proceeded without serious public protest or alarm.

The judicial murder of Empson and Dudley (1 St. Tr. 283), with which the reign of Henry VIII. opened, might be palliated by their offenses in the preceding reign; but the death of Suffolk and of Buckingham (1 St.

Tr. 287) was due simply to the fact that they were among the remnants of the old nobility, whom it was Wolsey's policy to exterminate. Buckingham was condemned upon the testimony of discharged servants, who had been kept in confinement, with death and the rack staring them in the face. At last in the course of retribution Wolsey himself fell. He might truly say that had he served God as diligently as he had served the king he would not have been given over in his gray hairs. Although Wolsey was far surpassed in iniquity by some of his successors in power, he received, as he confessed, his "just reward."

Anne Boleyn was murdered by a tribunal presided over by her uncle, the Duke of Norfolk; and Henry VIII., under the lead of Thomas Cromwell, started out, under the guise of reformation in religion, on his career of lust, confiscation and murder.

The martyrdom of More, Fisher and the monks of the Charter House (1 St. Tr. 385) would alone suffice to bury the reign in infamy. The real crime of Sir Thomas More and of Bishop Fisher was that their rectitude smote the conscience of the king and his guilty paramour. More was guilty of no seditious act, nor disloyal word. He and Fisher had been sent to the Tower for treason in not taking the oath as to the Act of Succession. More was willing to swear loyalty to the successors of Queen Anne, but refused to subscribe to the part of the act which declared Henry's subsequent marriage valid. Cromwell and several privy councillors examined More in prison, and tried in vain to induce him either to own the king's supremacy in direct terms or to deny it. Then the venal and lying solicitor-general, Rich, sought to trap him in private. The indictment charged him with refusing to answer directly whether he would accept the king as head of the church; with having written Fisher that "the act of Parliament was like a sword with two edges; if a man answered one way it would confound his soul, and if the other way, it would confound his body," and with having spoken treasonable words to Rich. On his trial the aged chancellor admitted that he had disliked the king's second marriage, and had told the king so when asked for his opinion. If it was an offense, he said, to answer the king truly, he had already been punished enough, for he had been fifteen months in prison and had lost all his estates. He asserted that he had done nothing against the act of Parliament; indeed, to avoid offense he had refused to say anything about it. Laws cannot punish for silence, he claimed; only for words or deeds. God alone could judge the secrets of the heart. In answer to the lying perversions of Rich, he replied in his dignified and impressive way: "If I were a man, my lords, that had no regard to my oath, I had no occasion to be here at this time (as is well known to everybody) as a criminal; and if this oath, Mr. Rich, which you have taken, be true, then I pray I may never see God's face, which, were it otherwise, is an imprecation I would not be guilty of to gain the whole world." But the noble old man's virtues condemned him.

Bishop Fisher, who was dying in the Tower with age and sickness, was trapped by Rich into a technical admission of guilt in saying that the king neither was nor could be supreme head of the church.

The Abbots who refused to surrender to the royal exactions and confiscations were exterminated in a manner thus described in Cromwell's notebook: "*Item*—The Abbot of Reading to be sent down to be tried and executed at Reading with his accomplices. *Item*—The Abbot of Glaston to be tried at Glaston and also to be executed there, with his accomplices. *Item*—To see that the evidence be well sorted and the indictments well drawn against the said Abbots and their accomplices. *Item*—To send Gendon to the Tower to be racked."

To further his savage plans and annul the last safeguard of liberty, Cromwell had obtained an opinion from the judges that an act of attainder would hold good even though the accused had not been heard. Under such an act, unheard, Cromwell himself died.

The murder of the brilliant soldier and poet, the Earl of Surrey (1 St. Tr. 451), was peculiarly atrocious. The chief proof of Surrey's treason was his assuming the arms of Edward the Confessor in the wrong quarter of his shield. His sister testified against him to the effect that he had bade her gain influence at court by flirting, like Anne Boleyn, with the king. His father, the Duke of Norfolk, himself a prisoner, also testified against him.

The remarkable thing about Lord Dacre's case is that it is an instance of an acquittal in a treason trial under Henry VIII. "The result," says an old chronicle, "the Commons exceedingly enjoyed and rejoiced of, insomuch as there was in the hall at these words 'not guilty' the greatest shout and cry of joy that the like no man living may remember that ever he heard."

In the short reign of Edward VI., the protector, the Duke of Somerset, after putting down Seymour's pretensions, himself succumbed. The Duke was condemned on the evidence of two servants, who were held in the Tower, and an informer who had to swear enough to save his own life. He had no opportunity of cross-examining the witnesses or of explaining their testimony. (See Coke's Inst., iii., 13.)

LORD CHIEF JUSTICE BROMLEY.

The frightful excesses of Mary's reign have justly associated the word bloody with her name. Law had, of course, nothing to do with the martyrdom of Cranmer, Latimer, Hooper and Ridley (1 St. Tr. 767).

A matter of more legal interest is the trial

of Sir Nicholas Throckmorton in 1554 (1 St. Tr. 869). The proposed marriage of Mary with Philip aroused great opposition, culminating in Wyatt's rebellion to prevent the marriage by force. Mary resolved to exterminate opposition in her usual bloodthirsty manner. Gibbets were erected all over London, and the Tower was so full of State prisoners that Cranmer, Ridley and Latimer had to be crowded into one cell. The rack was freely used to extort confessions. The shocking cruelty which characterized the queen's vengeance brought about a reaction in Throckmorton's case. Throckmorton did everything that the other rebels had done, save that he did not take the field with them. Yet he was acquitted. The report of his trial is the first we have that is full enough to give a fair idea of the procedure. The evidence against him consisted of the reading of alleged confessions wrung from other prisoners, some of whom had been executed. Only such parts of Throckmorton's own statement as told against him were read at the trial. To his request that the whole statement might be read, Sergeant Staunford pertinently replied that it would be a waste of time. On his request that the treason statute of Edward VI., upon which he relied, be read, Sir Nicholas Hare, the Master of the Rolls, observed that "it appertaineth not for us to provide books for you; neither sit we here to be taught by you." Throckmorton defended himself with presence of mind and with great energy. So warm became the running fight between the crown counsel and the prisoner that the former appealed to the court for protection. "I was never interrupted thus in my life," said the attorney-general, "nor I never knew any thus suffered to talk as this prisoner is suffered. Some of us will come no more to the bar an we be thus handled." Chief Justice Bromley finally summed up by reading to the jury all the evidence that bore against the prisoner and omitting all the prisoner's answers and explanations. Throckmorton closed with an earnest, pathetic address, full of texts. The jury returned a verdict of not guilty. Thereupon the chief justice said to them, "Remember yourselves better; have you considered substantially the whole evidence laid against the prisoner? The matter doth touch the Queen's highness and yourselves also; take good heed what you do." The jurors replied that they had found the prisoner not guilty agreeably to their consciences; whereupon they were committed to the Tower. Eight of their number, who stoutly refused to submit, were afterwards taken before the Star Chamber and heavily fined. This treatment evidently had the desired effect, for Throckmorton's brother was tried shortly afterwards on the same evidence and convicted. Sir Nicholas, though acquitted, was sent back to the Tower on the chief justice's statement that there were other charges against him.

HARMONY AT LAW.

By George O. Blume.

"IF you've sed all your goin' to say, we'll set down right here." This announcement was made by Lemuel Ryder, attorney-at-law, to opposing counsel, Henry Partridge, in the case of Whitby *v.* Slocum, which was an action of contract wherein the said Whitby sought to recover from defendant, Joel Slocum, forty dollars for gross misrepresentation of a sorrel horse which said Slocum sold one Jonathan Whitby expressly with intent to defraud.

The court-room at Colebrook Junction was crowded with anxious spectators eager to know just how this much-talked-of case would terminate. Trial Justice Hiram Thompson was on the bench and said, "D' yo rest, Hennery?" Being given to understand that he did, his honor addressed Mr. Ryder with, "an' you sed ez how you wuz through Lem;" and without waiting to have this confirmed continued, "Bein' ez how the two learned gentlemen fer the plaintiff an' defense hez got all done talking, I'll jest take a hand in this myself." Whereupon his honor shifted his cud around and wiping his glasses said, "Fust thing ter consider in this yere case is, ther motive. Ef Joel was out ter beat John, wuz it fer pure love of gain or was there a motive hitched to it? Joel says he hain't got nothin' agin John an' 'twas a fair trade. John says ther hoss hed the heaves an' was foundered. Now we all on us know what Joel is in a hoss trade, but thet ain't here nor ther; the question is, what wuz his motiff 'sides ther money end of it? 'Pears ter me ez near ez kin be found aout thet Joel an' John warn't on speakin' terms fer quite a spell afore this hoss trade. Then we find John goin' ter law an' tryin' ter mek Joel pay forty dollars fer misrepresentin' a sorrel hoss. This wuz what might be called a blood trade, ef John hed got the better of Joel he'd a been satisfied, but Joel beat John so John hollers fer the law on et. Well, comin' ter the motiff, strikes me thet 'bout three year ago or mebbe it wor three year an' a half, anyhow et wuz 'bout the time Joe Springer put ther new sills under his silo, John wuz helpin' me cut my fodder corn et the time, an' one mornin' long bout sun up John druv over and sed thet Joel's folks wuz down with ther whoopin' cough and that he an' Suse Ann wuz goin' to tend out on 'em. Well, et 'pears thet John an' his women folks mixed up a sort of soothing syrup by mistake and give et ter Joel an' his folks, 'fore the doctor got there, thet pretty nigh put 'em all out of business. Well, ever sense thet time, John an' Joel ain't sed nothin' but what wuz bad agin one 'nother.

"Now it strikes me thet Joel must have knowed thet John wuz doin' the best he could, but Joel held that John hed evil intent. Now this yere tribunal ain't here to duscuss family troubles, but ter say what's the right and wrong of it, so without goin' into ther details of this matter beyond what we think justifies the case et hand, the court finds that one person should harbour no ill will agin' a neighbor an' thet Jonathan Whitby is guilty of lack of common sense in not knowin' a heevy hoss, an' also et finds thet Joel Slocum is guilty of takin' advantage of same an' orders Joel to pay the cost of court an' ter trade back with John. 'Sides this findin'," hereupon Judge Thompson leaned back and stroked his chin whiskers, "this yere court would ask as a pussonel favor thet Jonathan an' Joel shake han's an' let bygones be bygones."

COURTING AND THE COURTS.

By Albert W. Gaines,

Of the Chattanooga, Tennessee, Bar.

IT does not occur to young people engaged in that most charmingly fascinating occupation—courting—generally looked upon as an interesting and entertaining pastime, that "old father antic, the law," has anything to do with the matter or any right to interfere—in short, courts are presumed to have nothing to do with courting.

But the truth is that, contrary to these presumptions, courtship often involves serious questions of the law, and, notwithstanding the poet's sentiment that

"Love rules the Court, the Camp, the Grove,
And men below, and saints above,"

Cupid is frequently summoned before Themis to receive the sentence of that stern Goddess of Justice.

If the courtship results in marriage, a pure question of fact arises, namely, Is marriage a failure? But, if the courtship does not reach as far as the altar; if, after engagement or conduct on the part of one or both of the parties from which an engagement may be inferred, one or the other breaches the contract, a liability to the other arises.

Although in early times in England specific performance of a contract to marry was decreed by the spiritual courts, compelling a celebration *in facie ecclesiae*, now, since Lord Hardwicke's Act, the only remedy is by suit for damages.

Ever since Margaret Gardyner and her daughter, Alice, brought what is reputed to have been the first breach of promise suit against John Keche of Yppswych, showing that he, the said John Keche, had received a sum of money on condition of his marrying the aforesaid Alice, and that he had married Joan Bloys, "ageyne all good reason and conscience," breach of promise suits have been recognized among all English-speaking peoples. Lord Holt enforced it at Common Law, holding that "the wounded spirit, the unmerited disgrace, and the probable solitude, which would be the probable consequence of desertion after a long courtship, were considered to be as legitimate claims for pecuniary damages as the loss of reputation by slander or the wounded pride in slight assaults and batteries."

These matrimonial contracts are *sui generis*. No grim-visaged lawyer draws up a formal contract to be executed; no notary pries into the intents and purposes of the parties and certifies the same under his official seal; no go-between Pandarus is present to hold the hands of Troilus and Cresida and solemnly pronounce:

"A bargain made; seal it, seal it; I'll be the witness."

No—in the vine-clad arbor, or behind the protecting screens of parlor walls, in some shady nook, or in the dim moonlight deep down some lonely dell, "far sunken from the healthy breath of morn and eve's one star," there these engagements are softly whispered and the contract sealed with a kiss.

For these reasons, while the making of the contract is a question of proof, it need not be proved *in totidem verbis*, and is often inferred from the actions, language and conduct of the parties, and it is difficult to tell under what circumstances the court would be justified in finding that a promise had been made. Many a young man, not fatally bent on matrimony, would sometimes be surprised to find that his language, intended only as a compliment to some charming dam-

sel, or his conduct, meant solely as an act of gallantry, is sufficient in the eyes of the law to support proof of a promise to marry.

In the light of the adjudicated cases, the verdict in the famous case of Bardell against Pickwick was probably justified. Mrs. Bardell's construction of Mr. Pickwick's earnest question as to whether it would be a greater expense, in her opinion, to keep two persons than to keep one; the fact that Mr. Pickwick asked the plaintiff's little boy how he would like to have another father, coupled with the very damaging testimony that Mr. Pickwick was discovered supporting the fainting lady in his arms, to say nothing of the covert allusions, according to Sergeant Buzfuz, veiled under those poetic effusions "chops" and "tomato sauce," made, at least, a *prima facie* case in favor of the plaintiff.

A gentleman once concluded that it would be a very elegant and a very funny thing to send to his dulcinea a newspaper article entitled "Love, the Conqueror," marking it: "Read this." The lady did read it, and when the funny gentleman declined to marry her, she brought suit against him and read the article to the jury, who gave her four thousand dollars damages. The Supreme Court of Illinois, sustaining the verdict, said: "The article may be regarded as the defendant's own letter; it doubtless contained sentiments, which he sanctioned, couched in language more choice than he could compose. It was his appeal for marriage—it foretold in clear and emphatic language his object and intent in his courtship with her. She doubtless placed this construction upon it, as she well might do, and laid it aside as *a rare treasure.*"

Perhaps there is no more wily suitor than the widower. He is no novice, and his experience should count for something. But that even the widower is not proof against folly was proved in a New York case, in which it was shown that the widower, a pious elder of fifty-three, soon after the death of his wife, visited the plaintiff, a maiden lady of thirty, and taking out a memorandum book, from which he read, or pretended to read, stated in a confidential way, that he had noted down some requests made by his wife four days before her death; that it was something he "could not tell her now," but that she (the maiden lady) "would know some day," darkly hinting, so the lady took it, that the deceased wife had requested the forlorn widower to lighten his grief by marrying the plaintiff. It was proved that after this confidential talk, there were rides and drives together, frequent visits extending till late in the evening, and, to cap the climax, the widower told the plaintiff that after the lapse of a year from the death of his wife (the widower's quarantine, it seems), he intended to marry, and he then entered into a minute description of the lady he wanted to marry, which description was an exact photograph of the plaintiff. While we cannot but admire the shrewd diplomacy of this wily widower, courting by dark insinuations and covert suggestions, and not committing himself by an open avowal, yet, as the sequel shows, he ran amuck of the doctrine of estoppel.

The sanctimonious Proteus forgot his Julia and found him another sweetheart, and, knowing that he had become somewhat involved in his affair with the plaintiff, and, seeming to have some faint notion of the legal maxim, *Vigilantibus et non dormientibus jura subserviunt*, he diplomatically undertook to checkmate the lady. He told her that he did not want her people to think that he was paying her the attentions of a lover so soon after the death of his wife, and, in order to allay that suspicion, he drew up a note, in which the plaintiff was made to say that she regarded his visits as "simply evidences of friendship and nothing more," and got her to sign it. The jury found in her favor and the Court of Appeals of New York upheld the verdict.

In a Connecticut case the defendant had been heard to remark on his happiness when

in plaintiff's company and his utter misery unless in her society. The parties had exchanged daguerreotypes, the defendant had taught the plaintiff's nephew to call him uncle, and had told the plaintiff's brother-in-law that "all the courting was done," little suspecting that the plaintiff would take a hand at "courting" in the presence of judge and jury.

The defendant afterward went on a voyage, and while on the sea he indited effusive love letters to the plaintiff, telling her how constantly he thought of her while awake and how he dreamed of her while asleep, touchingly adding: "While I am tossed to and fro on this wide ocean, I love thee still." The picture here presented is intensely dramatic, and is well calculated to inspire the belief that this was a case of mad infatuation. Those who had lived through a "tossing to and fro on a wide ocean," and who recall the exact state of their emotions, will readily subscribe to the belief that he who can, while the tossing is in active progress, write, "I love thee still," is more madly in love than was ever Romeo or Abelard.

Yet, notwithstanding all this, this mad lover broke off the engagement, thereby verifying the poet's observation that "Men have died from time to time and worms have eaten them—but not for love."

The plaintiff's "courting" was fully as successful as had been that of the defendant, for she recovered a judgment for $1,500.

In a Vermont case the plaintiff and defendant were neighbors, and the defendant paid neighborly visits to the plaintiff's family. It was shown that these visits were at first to the entire family, and that they were gradually narrowed until they were confined to the plaintiff alone. This fact, together with the proof that during the periods of the defendant's visits lights were frequently seen burning in the parlor on Saturday and Sunday evenings, and some other circumstances, led the jury to find for the plaintiff. Just how far the circumstantial evidence of the burning lights on Saturday and Sunday nights conduced to the verdict, the reported case does not state, but it may be safely asserted that if the defendant ever runs across those poetic lines—

"How silver-sweet sound lovers' tongues by night,
Like softest music to attending ears,"

he will scarcely appreciate the poetic beauty of the lines, having, as they naturally would, to his "attending ears," a sort of silvery jingle—pitiless reminder of the clinking specie paid by him at the instigation of a jury.

A very cruel case occurred in Michigan. A man, who, strange to relate, bore the name of Constant, while engaged in courting, had his financial eye open and borrowed money from the lady. On his last visit to her he renewed his notes for one and two years, and then went off and married the other girl. The court held that it was proper to allow proof of this money transaction, holding that "an engagement broken off suddenly and without warning would very naturally create more pain and mortification than if ended under any other circumstances, and, if a jury were to regard this conduct concerning money matters as calculated, under the circumstances, to have caused additional grounds of pain or grievance to the defendant in error, we think they would not be violating ordinary probabilities."

But slight evidence is necessary to prove the lady's acceptance. This is the law, not upon any presumption that ladies generally are easily persuaded—perish the thought,—but out of due deference to the modesty of the sex.

When we consider the touching delicacy of the contractual relation, affecting, as it does, the tenderest emotions of the human heart, it seems like gross inconsistency that

the courts should hold, as they do, that principles of *tender* do not apply; that it is enough without saying *obtulit se* at all, if the lady is *semper parata*. Coke says it is not to be expected that a lady should say to a gentleman: "I am ready to marry you; pray, marry me."

Where the defendant asked the hand of the lady in the presence of the latter's mother, who consented, and the lady said nothing, and the defendant thereupon gently took the hand of the mother and touchingly said: "Henceforth consider me as your son," it was held sufficient proof of the lady's consent; and in a New York case the lady was permitted to show that she had procured a wedding dress and had gone so far as to get a wedding cake, as showing her acceptance, while in Iowa the plaintiff was allowed to prove in support of her acceptance that she was making preparation for her marriage "piecing quilts and doing fancy work," and that when she heard of defendant's marriage, "she hated it awful bad."

While the law makes it easy to prove a proposal by the gentleman and equally easy to show that the lady accepted, when it comes to evidence showing a release on the part of the lady, then the proof must be strong to sustain the defence.

In one case a bachelor of fifty-three had been paying his respects to a maiden of forty-three summers for the unlucky period of thirteen years. During all this time she declared to others that she would never marry him and spoke of him in terms of derision and contempt. After thirteen years of courtship, the bachelor summoned sufficient courage to propose and was promptly accepted. After the engagement he heard of the double dealings of the maid and refused to marry her. The court held that it was no defence to the action, although it might go in mitigation of damages.

In a Pennsylvania case, the lady wrote the defendant a letter in which she said: "I don't want you, for I know that I would have a devil's life of it. If you were any kind of a gentleman, you would not act as you have. I pray night and day that you may never prosper in this world. I just pray for every hair in your head to come out." And yet she recovered a judgment for $2,000.

In looking beneath the surface for the reason for this verdict, it is quite evident that the jury believed that the lady was goaded to desperation by the attentions of her *fiancé* to her rival, and that she did not in fact mean to say that she did not want to marry him, and did not really desire that he lose all his hair, for in her letter she says cruelly of her rival: "Well, if I am poor, I do not wear the one hat for five or six years, like *she* does, and turn it hind part before, like *she* does."

True it is that "Hell hath no fury like a woman scorned."

Under the weight of authority, then, if a party does not want to find himself, in the eyes of the law, an engaged man, he must look well to his daily walk and conversation; for, if he has so conducted himself as to be estopped from denying the engagement, he will have a difficult problem to convince a judge and jury that the lady has duly released him. The maxim applicable seems to be *caveat amator*.

AN EXECUTION IN JAPAN.

By Andrew F. Sibbald.

IN the month of March, 1874, the last public execution took place in Japan, or at any rate in the neighborhood of the capital, Tokio, and as I had heard that it was to be the last, I determined to witness it, prompted it might have been partly by motives of morbid curiosity, and partly by a desire to see even the ghastly phases of a condition of national life which was then being gradually swept away forever by the wave of western civilization.

In the above-mentioned year the state of law in Japan as regards criminals was very much what it was in England during the Middle Ages. The sword reigned supreme, and an almost invariable accompaniment of the sword was torture. The prisons were veritable hells upon earth—foul, overcrowded, ill-ventilated, insanitary pesthouses, wherein festered without distinction of sex or crime every sort and condition of malefactor. All this has since been changed; even the sword has given way to the garrote, whilst torture is unknown, or at any rate illegal, the prisons are comparatively humane institutions, and the criminal law, which for centuries was of one character for the rich and another for the poor, has been completely reformed on the basis of the principal codes of European nations. This eventful March morning was cold and bright, and as I took my way along the narrow path leading up to the fatal plateau of Tobe, I could not refrain from drawing a contrast between the extreme loveliness of the scene, brightened by the sunshine of a cloudless blue sky, and the awfulness of the spectacle by which it was soon to be blurred. Tobe Hill was especially beautiful on this bright, fresh March morning. Around the space on three sides stretched trees and thickets, displaying that wealth of variety in shape and color which is so characteristic a feature of Japanese woodland scenery, and broken here and there by the red roof of a temple or the thatch of a humble cottage. On the four sides lay spread out a peerless panorama of the Bay of Yedo, with the line of the green hills which overlook the house-dotted Tocaido road trending away into indistinctness until they sank to the level of Kawasaki Point.

I have never felt before or since as I felt during the long two hours I waited for the tragedy to begin; I knew that the sight would be a horrible one and that it would affect me both mentally and bodily, yet I seemed bound to remain by a sort of fascination. The native crowd packed closely together, swarming on the trees and availing themselves of every point of advantage seemed to treat the matter as a holiday exhibition, provided for their entertainment; and laughed, chatted and smoked with the callous indifference bred by constant familiarity with such scenes.

In the middle of an open space some twelve yards square were five square holes a foot deep, the earth out of which was piled into neat heaps in front of each hole, just large enough to enable a man to squat on his heels. Behind the holes was a pile of coarse mats, such as the coolies use for rain coats, and near them a couple of pails of water and a camp stool, the whole being railed in by bamboo posts and cords.

At nine o'clock a murmur of more than usual intensity and unanimity announced the approach of some part of the procession, and I saw over the heads of the crowd a small body of officials and coolies coming up the pathway from the prison. The first arrival, a man attired in a burlesque of the French military undress uniform, seemed to be the

superintendent of the arrangements, for he proceeded to examine closely the holes, and the heaps, pointed out where alterations were needed, turning over the heap of mats, and finally, seated himself on the camp stool in the midst of the space, and gazed around at the crowd in the full consciousness of being for the time one of the most important personages in Yokohama. But his supremacy at once paled when no less an individual than the executioner arrived on the scene. This accomplished amidst a silence so absolute that I could almost hear my heart beat, the great man on the camp-stool rose, and unfolding a large document, read in a loud voice what I supposed to be a description of the crimes for which the poor fellows were to suffer and the process of condemnation and sentence. This was a very long business, and before it had nearly finished the native spectators were laughing and joking upon the appearance of the doomed men, with that callousness to human suffering which so much blackens the otherwise amiable and pleasing character of the Japanese people. At last it was finished. As there were but five holes for seven prisoners, two would be obliged to remain in blind agony whilst their companions were being despatched. Five men were accordingly thrust forward with the staves and fists of the police; each man was made to squat on a mound, his clothes—if filthy, tattered rags could be called clothes—stripped from his shoulders; his hands tied behind his back, and his head pushed forward over the holes. Undoubtedly execution by the trenchant Japanese sword is as merciful a death as can be desired; but the Oriental nature, as if to compensate for this erring on the side of mercy, counterbalances it by an undue prolongation of the preparations for death, which is worse than a hundred deaths.

So in this case. As the poor fellows knelt over their holes the executioner slowly and deliberately took off his coat and bared his arms. Then he took from its silk casing the fatal sword, examined it fondly and lingeringly from the *Yasuri me* or filings on the hilt to keep the grash iron from slipping along the *kirimon*, or groove in the blade, to the point, held it over a pail whilst a cooly trickled water down it, and with a great deal of settling of his feet was ready. I was sick and giddy, but I kept my eyes fixed on the scene. At a sign from the official on the camp-stool, the executioner raised his sword slightly, hardly half a dozen inches, and before I could realize it the man's head was hanging over the hole by a single ligament, and the blood was gushing out in torrents.

I then saw why the executioner had so completely severed the head; and the wonderful skill of the Japanese swordmen, using as they do the most perfect weapons in the world, can be imagined in so arranging the force of the blow that absolute decapitation does not take place. He tore the head off, and held it toward the four sides of the square; then he gave it to a cooly, who roughly plastered the severed portion with clay and stuck it on to a kind of elevated shelf. In the meantime two coolies were thumping on the back of the prostrate body to hasten the rush of blood, after which one of the coarse mats was thrown over it and it was laid aside.

I had seen enough, and I turned my head away as the executioner, after wiping his blade with paper, approached the other poor wretch, who was shouting out something at the top of his voice, whether a confession or a denunciation of injustice I was not scholar enough to understand. But although I turned my head away and saw not, I heard every sound, and could follow every act in the ghastly tragedy with exactitude. A movement amongst the crowd in a short time made me look round, and to my amazement within that square space there was not a living human being but the officials and their subordinates.

The execution was over, and when I looked at my watch I found that since the executioner had raised his sword over the first man's neck only twelve minutes had elapsed, but in that brief time seven human beings had been hurried into eternity. Then the crowd dispersed. I watched their faces, but not on the features of one single man, woman or child did I see a sign of the smallest emotion.

Upon this occasion, either because the execution was the last of its kind or because it had been on a bigger scale than usual, the bodies of the victims were carried away by their relatives instead of being thrown into the thicket to be devoured by dogs, and this operation was being carried out when I left.

QUAINT AND CURIOUS PUNISHMENTS.

THE Egyptians prescribed a peculiar punishment for dishonest bakers, and one which certainly had a deterrent effect, namely, baking them in their own ovens. Perhaps this punishment could be resorted to with good effect in these dishonest times, and thereby teach traders to observe more closely the spirit and letters of the Ten Commandments.

In my researches after ancient legal curiosities, I have unearthed the following quaint and curious punishments for the entertainment of the reader. They are as follows:

"MCCCX (1310). The bakers of Dublin were punished after a new way for false weights; for on St. Sampson, the bishops day, they were drawn upon hurdles, at the horse's tails, along the streets of the city." This happened in the year of great scarcity, when a cronage of wheat sold for twenty shillings and upwards.

Then again in Scotland, the home of witchcraft, sorcery, and magic, we find a quaint and curious punishment in the following sentence of a Scotch court at the beginning of the eighteenth century.

It appears from the Records of Justiciary, that a custom at one time prevailed in criminal jurisprudence of commuting sentence of death into gifting away as slaves into perpetual servitude under specified masters. The following extracts will make the mode of gifting understood:

"At Perth, the 5th day of December, 1701. the Commissioners of Justiciary of the South district, for securing the peace in the Highlands, considering that Donald Robertson, Alexander Stewart, John Robertson and Donald McDonald, prisoners within the tollbooth, and indicted and tried at this court, and by virtue of the inquest, returned guilty of death; and the commissioners have changed the punishment of death to perpetual servitude, and that the said prisoners are at the court's disposal; Therefore, the said commissioners have given and gifted, and hereby give and gift the said Donald McDonald, one of the said prisoners, as a perpetual servant to the Right Honorable John Earl of Tullarbardane; recommending to his lordship to provide a collar of brass, iron or copper, which by his sentence or doom, whereby an extract is delivered to the magistrates of the said burgh of Perth, is to be upon his neck, with this description:

"Donald McDonald, found guilty of death for theft, at Perth, December 5th, 1701, and gifted as a perpetual servant to John Earl of Tullarbardane."

The Green Bag.

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

NOTES.

THE GREEN BAG starts the New Year with new plans, new features, and new covers, all of which additions or changes will commend themselves, we trust, to our subscribers. We need not call attention to these new features in detail—the magazine speaks for itself. It may be said, however, that THE GREEN BAG has in hand, or has been promised, articles on a variety of topics, by some of the ablest legal writers, who will present their respective subjects in the same authoritative and interesting way as that in which the Panama question is treated in this number.

AN Irishman was called upon to give evidence in a shooting affray.

"Did you see the shot fired?" asked the magistrate.

"No, sor, but I heard it," replied the witness.

"That is not satisfactory. Step down."

As the Irishman turned to go, he laughed and was rebuked by the magistrate, who told him it was contempt of court.

"Did yez see me laugh?"

"No, but I heard you."

"That is not satisfactory."

And then the Court laughed.

THE GREEN BAG has been asked to define "quorum," and offers the following historical note as a possible answer:

When the honorary members of the First Corps of Cadets, in Boston, were vainly endeavoring to frame a constitution, about the year 1885, Captain (afterward Major) William F. Lawrence, filled with enthusiasm and the annual dinner, on April nineteenth, made the following motion, *viz.:*

"That a majority of those present and voting should constitute a quorum in all matters of business relating to this association."

THE following trustee writ, drawn by a learned justice of the peace in Massachusetts, deserves careful study:

Trustee on William Burrege Wages, Whome works for you.

To Dr. Harrington: Please to stop from your man $4.75, which he owes to Mrs. John Lannon. Cor. of Prince and Pond st. Jamaica Plain he has Promised to Pay it several times but will Not Do it he has be served with a writ from me and Promised to Pay last Monday Night but failed to do so.

So that I had to trustee is Pay.

Yours respectfully,

D J. HEGERTY,

Justice of the Peace, 28 Hall st., Jamaica Plain.

To Dr. Harrington, orchard st.

THIS is the final prayer of the answer to a bill in equity to foreclose a mortgage, recently filed in a New Hampshire court:

"In the name of humanity, in the name of every sainted father and mother, of truth, purity and everything Christlike and holy, in the name of the everlasting love of God. of His Son, our Savior and Redeemer, the defendant implores the protetion of this Court to help her release the mind of her blameless daughter from this wicked hypnotic influence which holds her."

THE late Chief Justice Caleb Baldwin of Iowa weighed 400 pounds and was the largest man who ever held public office in the State. A story is related in regard to the first meeting of the State Agricultural Society, the attendance being small, when the secretary, Dr. J. M. Shaffer asked Judge (then Colonel) Clagget, the first president: "What shall I say, Colonel, about the meeting, through the press?" "Well", said the Colonel in his impulsive manner, "publish to the world at large that a large and respectable meeting was held." "Why," said the doctor, "isn't that stretching it a little?" "Not at all," responded the president, "for Baldwin makes it large and you and I make it respectable." And so the report was worded.

THE annual dinners of the Middlesex (Massachusetts) Bar Association are always productive of interesting legal literature. The menu this year contained the following verses:

Tonight the members of our Bar again in union dine,
Here where bright merriment abounds, o'er brimming cups of wine.
Each year these friendships, waxing strong, around this festive board

Bring *scire facias* whereby the judgment is restored.
And while *coram non judice* you share these lawful joys,
Right merrily you talk and sing, and act again like boys—

Old boys, perhaps, in age and form, but yet without a *mayhem*—
Freed from all wasting cares, with kindred hearts aflame.

Make common cause of Jollity, treat Bacchus as an aide—
I. e., a little something take besides a lemonade.
Dear brethren of the legal faith, who hold the law in fee,
Disdain the thought that to this place, you've come just for a spree.
Look! See how victors from the fray, these Nestors of the Bar—
E. g., our President, Sam H. (he's not the only star)—
Swear in all ways they will themselves in virtue strong intrench,
Eschew all foolish precedents, and ever shun the Bench;
Xactly as a maiden old cries out against the dance,—

"Coarse vanity and idle show": she never had a chance!
Old time lawyers in Middlesex, in effort and in worth
Unfailing, strong, have been replaced by those of later birth.
Not now less than in former days, the leaders of this Bar
Teach, in their practice of the law, what manly virtues are.
Yes, let all to their lead be true, surpass it, if one can,

S(s) trive hard as they, as nobly, too, and ever act the man!

On the meaning of those final ssss
Many persons have bestowed their guesses,
But *Salutamus* say the Muses,
And further lines each one refuses.

CHIEF JUSTICE QUINONES of the Supreme Court of Porto Rico was the leading lawyer practising before the court over which he now presides. He was at the same time very fond of the national sport of cock fighting, and had the best string of cocks in the island. It was customary to designate the cocks by their colors, to wit: *giro*, *canaguey*, and others. The word *giro* also means a bank draft. On one occasion a client at Guayama was a little slow, and the counsellor wrote, demanding his fee, and received a telegram saying that he would send a draft (*giro*) the next day, which was the day of trial. To this the counsellor replied by wire, "*Si no viene el giro no pelea el canaguey.*" Which may be

translated thus: "If the black-crested cock (draft) does not come, the red cock will not fight." The pun is on the word *giro*, which means both a "black-crested cock" and a "bank draft." The "*canaguey*" was a fighter when "sufficiently urged." Among his associates the Chief Justice is familiarly called "*El Canaguey*."

"I ENCLOSE," (writes a Maine correspondent), "a newspaper clipping of a decision just handed down by the Supreme Court of Maine. I think the reference to the mental processes of the dog is worth preserving."

The case is Carroll *v.* James, and deals with liability for damage by a dog, under St. 1895, ch. 115. The rescript by Emery, J., says:—3—The fact that an entry upon the premises of the owner or keeper of a dog was wilful and wanton does not of itself exempt him from the statutory liability for the attack of his dog upon the person so entering. The wilfulness or wantonness of an act is not in the outward visible aspect of the act but only in the mind of the actor; and hence cannot be a provocation to the dog.

THE following is vouched for as an actual occurrence in the Province of Ontario, (says *The Canadian Law Journal*):

The Court called for *ex parte* applications first. A barrister (of Irish extraction) arose and made a motion, to which, when he sat down, another proceeded to show cause. The Court was astonished. "I thought you said it was an *ex parte* application." "Yes, me lard; it is *ex parte* in the sinse that there's no rale answer to it."

A LEARNED friend (says the *American Law Review*) sends us from Honolulu the following questions which were put to a native Hawaiian, about forty-five years of age and a member of the Legislature, on his presenting himself to the court as a candidate for admission to its bar:

Q. What is a trust? Into what classes may be divided? Define each.

A. "A trust is a capital of a combination which may be intrusted in the hands of a third party. There are several classes of trusts. I will name three in particular: (1) Special trusts for purposes which may be defined in their articles of combination; (2) General trusts for the benefit of others; (3) Dry trusts which are only for local benefit."

Q. What is (*a*) connivance, (*b*) condonation, (*c*) recrimination?

A. "Connivance is the effect of conspiracy; condonation is seeing a crime committed and not to intervene or allowing such crime to be committed; recrimination is a counter action, such as a husband suing for divorce and the wife bringing a counteraction."

Q. What is the doctrine of *stare decisis?*

A. "It is a matter which has been already decided and staring in your face; in fact, it is a decision already rendered and not appealed from and the decision standing final. That is *stare decisis*."

Q. What is a direct attack and what collateral attack? What questions may be raised or examined into in one, and what in the other?

A. "A direct attack is personally; for instance, if I strike another that would be a direct attack. Collateral attack is an attack by a third party, and not direct; for example, A and B have a difference. A engages C to assault B. That would be a collateral attack."

Q. Under what circumstances can an agent be held liable personally?

A. "Under no circumstances can the agent be held liable unless he makes a breach of covenant or of a condition in the trust."

Q. What is a contingent remainder?

A. "A contingent remainder is a tenant who has a lease for a certain stated time under certain indenture of lease."

Q. Explain a "deed poll?"

A. "A 'deed poll' is a personal privilege, and may be utilized to purposes suitable to the donator."

Q. What is a natural and what an artificial person?

A. "A natural person is an individual in person; and an artificial person is a body by name only."

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

Sir:—You would do a good service if you would induce some one of your contributors to trace the history of the overthrow of primogeniture in the United States. This subject has received slight attention; although there are few differences between English and American law which have more important bearing upon the state of society than have the differences as to descent.

Yours very truly,

EUGENE WAMBAUGH.

Harvard Law School, Dec. 31, 1903.

To the Editor of THE GREEN BAG:

Sir:—In a week we are promised the report of the Governor's Commission on the Law's Delays. Advance synopses furnished to the Bar indicate a report in favor of four judges and ten trial commissioners. The commissioners are to be in effect masters in chancery and are also to sit as commissioners in condemnation.

Recent experience has shown that very superior men could be induced to sit as referees in bankruptcy and at a compensation much less than that received by our Supreme Court judges. If trial commissioners of like quality can always be procured, then the Governor's Commission will not have to disappoint the large expectations of the Bar. Such another commission for talent and industry has hardly been impanelled in recent years. Mr. Hayes, the counsel for the commission, has the results of vast tabulations, not only of the arrears of our courts but also of the experiences of the English courts. Our judges are appearing in print to claim that the English courts furnish no proper comparisons. We will back our own all we can. If our Tammany clerks are left behind in any argumentative statistics or if Senator Platt's appointees are defective in metaphysical facts, then our pride in them will receive an unexpected shock. Perhaps the benefit, after all, will come from public discussion and private thought; for it will be hard to tabulate the difference between the born judge and the made judge. So far as known, the world has never seen such a serious condition of arrears in the court business, so many thousands of cases going untried for years. Surely we will come soon to a condition that will no longer suffer half-way measures. Two venerable lawyers died this last week, full of years and honors, Messrs. Taft and Coudert. In all their long lives they had never known anything so serious as our present arrearages of justice. Yours truly,

W. G. PECKHAM.

New York, Dec. 23, 1903.

To the Editor of THE GREEN BAG:

Sir:—The arguments upon the appeal in the United States *v.* Northern Securities Company *et al* have been made since I wrote the article upon "Schemes to Control the Market," which is now in your hands. In that article I discuss the decision in the case below of Mr. Justice Thayer with approval. Nothing that has been said by counsel for the defendants before the Supreme Court of the United States has been strong enough to shake my confidence in the opinion on the Circuit Court of Appeals. The greatest stress has been laid by these counsel upon the right of every man to do as he pleases with his own. That one man might have bought what stock he wished in both of the railroads, the Great Northern and the Northern Pacific cannot be denied. It does not follow that a body of men may combine to take control of the two roads. Our law has always made a difference between the freedow allowed to individuals and the policy necessary for combinations. The attorney for the government properly insisted upon this distinction. The issue is thus before the Supreme Court in a square form with everything said that can be said. The time has come for a final adjudication upon full understanding. Within a few months we shall know the extent of our law against combinations in restraint of trade. The device of a holding company can hardly cover this issue. Yours truly,

BRUCE WYMAN.

Harvard Law School,
Cambridge, Mass., Dec. 31, 1903.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

THE MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF IOWA. Compiled and edited by *B. F. Shambaugh*, Professor of Political Science in the University of Iowa. Iowa City; State Historical Society of Iowa. 1903. Vols. I-IV. (pp. xi +487, xiii +524, x+472, ix+382.)

These are the first four of a series of eight volumes. The undertaking is in many respects vast, for it requires the discovery of official documents both in official records and also in newspapers and other places not readily discoverable, and further, it requires the collection of biographical details as to many persons whose prominence has long since disappeared. There are parts of the United States where diaries, voluminous correspondence, autobiographies, and similar manuscript records supply a basis, not free from suspicion, to be sure, for the writer of history; but Iowa has been the home of people who are not given to self-consciousness, and hence the task of the editor in search of biographical matter must have been laborious, and hence too his biographical introductions are of unusual value. For the same reason, the messages and proclamations themselves are peculiarly important pictures of life and of opinion.

To a lawyer, the value of the volumes lies in the indirect evidence of the mode in which the Anglo-American system of law has passed from the older to the newer parts of the United States. As Iowa was part of the great Louisiana purchase from France, before the purchase it was subject to French and Spanish law. Iowa was but sparsely settled in those times, no doubt; but there was at least one Iowa case then tried at St. Louis, and the law used in this case was the Civil Law. How does it happen that the Civil Law is not, as in Louisiana, the basis of the legal system to this day? These volumes do not attempt to answer this question, but they answer it well, nevertheless.

Law is the product of the people, of course; and the sketches of the early governors show where the people came from: Dodge, first governor of the original Territory of Wisconsin of which Iowa formed a part, was from Indiana, Kentucky, Missouri, Illinois, and Michigan; Lucas, the first governor of the Territory of Iowa, was from Virginia and Ohio; Chambers, its next governor, was from New Jersey and Kentucky; Clark, the next, was from Pennsylvania, Missouri, and Wisconsin; Briggs, the first governor of the State of Iowa, was from Vermont and Ohio; and Hempstead, the next, was from Connecticut, Missouri, and Illinois.

It is not necessary to go farther in order to indicate from what environment the early influential inhabitants of Iowa brought their conceptions of law. Yet it is well worth while to stop a moment among the old documents and to notice what were the ideas thus brought at an early day into a State now among the most prominent. It will not be possible or necessary to go beyond a few extracts from the first annual message of Robert Lucas, the first governor of the Territory of Iowa, who in Ohio had been a justice of the peace, a member of each house of the Legislature, and governor. The message is dated November 12, 1838, and among the passages which are striking either because of the date or for some other reason, are these:

"In laying the foundation of a system of jurisprudence in the Territory, would it not be advisable to unite our exertions in simplifying not only our laws, but the rules of practice and proceedings in the various courts of justice within the Territory, and to exclude therefrom, as much as practicable, everything of a fictitious or ambiguous character? In my opinion, the proceedings in our courts of justice should be concise, void of technical fiction, and always directed to

the merits of the cause in controversy. . . . I trust that the odious principle of imprisonment for debt, either on mesne or final process, (except in cases of evident intended fraud), . . . that relic of the barbarous ages that has been permitted to remain as a blot on the laws of some of the States, will never be permitted to soil the pages of the statutes of Iowa. . . . The compilation of a criminal code . . . is a subject of deep interest. . . . It is one which of late has occupied the attention of some of the greatest statesmen and philanthropists . . .; and the general conclusion has been, that sanguinary punishments do not tend to lessen crime, and that the general policy of all criminal laws should be to prevent crimes, rather than to inflict punishment, and that all punishments should be inflicted with a view to reform rather than exterminate the criminal. In these opinions I heartily concur, and would wish to see confinement at hard labor, for life, substituted in all cases, in lieu of capital punishment, when suitable prisons for the purpose can be had. . . . Being sensible of the deleterious effects of public executions, I would recommend . . . providing by law for executing capital punishment (should such punishment be necessary) privately, in the county prison, in the presence of the sheriff, and such other persons as the court passing sentence might direct. . . . I . . . suggest . . . the appointment of a committee . . . to digest and prepare a complete code of laws. . . . By pursuing this method,. . . our system of jurisprudence will be established upon a firm foundation, peculiarly adapted to the situation, interests, habits, and wants of our citizens."

And here, with regret, it is necessary to say farewell to Governor Lucas. There is much other matter of the same sort in these volumes, besides glimpses of Indian fighting, of the early practice of carrying concealed weapons, and of the embarrassments caused by the presence of slavery in the neighboring State of Missouri. These are, in short, volumes of great interest and value; and it only remains to say directly, as has already been said by implication, that the result has been well worth the editor's labor and that the labor has been performed with admirable conscientiousness and skill.

THE LAW RELATING TO TRADE UNIONS. By *D. R. Chalmers-Hunt.* London: Butterworth & Co. 1902. (xxxiii+309 pp.)

The nature and importance of this book may be better gathered from its sub-title: "A concise treatise on the law governing interference with trade, with an appendix of statutes relating to trade unions." There are few topics of more timely interest; and besides being timely this book has the advantage of being done well. Here are discussed elaborately, and with great acuteness and practical wisdom, the Mogul Case, Allen *v.* Flood, Quinn *v.* Leathem, and the whole group of subjects suggested by those famous names. The layman's nine days' wonder, the Taff Vale Railway Case, had not yet reached its last stage when this book went to press; in its earlier stages the case is here treated with the brevity appropriate to its technical unimportance.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by *William Mack* and *Howard P. Nash.* Vol. VIII. New York: The American Law Book Company. 1903. (1145 pp.)

The eighth volume of the *Cyclopedia* covers subjects from "Commercial Paper" to "Contemporaneous," inclusive. The two principal articles are those on "Commercial Paper," by Joseph F. Randolph, author of "A Treatise on the Law of Commercial Paper," and on "Constitutional Law," by George Fox Tucker, formerly Reporter of the Supreme Judicial Court of Massachusetts, and well known as a text-book writer. The other more important subjects treated in this volume are "Common Lands," "Common Law," "Composition With Creditors," "Compromise and Settlement," "Consolidation and Severance of Actions" and "Conspiracy."

CURRENT LEGAL ARTICLES.

VAN VECHTEN VEEDER, whose scholarly writings are familiar to readers of THE GREEN BAG, begins in the December number of the *Columbia Law Review* a series of articles on "The History and Theory of the Law of Defamation," which are sure to attract the favorable attention of lawyers interested in the development of the common law. In an extremely interesting way Mr. Veeder traces the growth of the law of defamation from the early *Leges Barbarorum* down through the seignorial and the ecclesiastical courts, the Star Chamber, and the king's courts of common law.

Early in the Middle Ages (says Mr. Veeder) reputation was amply protected in England by the combined secular and spiritual authorities. In the course of the nationalization of justice by the king's judges the jurisdiction of the seignorial courts fell into decay; and, after a long and bitter struggle, the jurisdiction of the ecclesiastical courts was also absorbed by the royal tribunals. When, however, the king's courts acquired jurisdiction over defamation, during the latter half of the sixteenth century, various social and political conditions combined to contract the actionable right, or remedy. The king's courts granted only a limited remedy, the selection being based partly upon the character of the imputation, partly upon the consequences resulting therefrom; moreover, even this limited remedy was little concerned in theory with the right to reputation as such. By reason of its growth in this way the early common law of defamation consisted merely of a series of exceptions to entire license of speech. When, at length, early in the seventeenth century, the potentialities of the printing press dawned upon the absolute monarchy, the emergency was met not by further additions to the list of actionable imputations, but by a direct importation of the Roman law, without regard to Roman limitations, and with certain additions adapted to the purpose in hand. This special provision for written or printed defamation, first adopted in the criminal law, eventually became also a principle of civil judicature. In this way a new principle of actionable defamation, based upon mere form, was introduced in the law. The original common law doctrine of defamation, based upon the nature of the imputation, became stereotyped as the law of spoken defamation, or slander; the doctrine inherited from Roman law, through the Star Chamber, became the law of written and printed defamation, or libel. The English law of defamation, therefore, was first limited by a process of selection, and then confused by a formal distinction which is not only unknown in other systems of law, but is also wholly accidental in original and irrational in principle.

After stating the distinction between libel slander—"Any written words which injure one's reputation are libellous; but many words which would be actionable if written are not actionable if merely spoken. In the case of slander a plaintiff must satisfy the jury that the words spoken impute the commission of a crime, or the presence of certain contagious disorders, or that they disparage him in the way of his office, profession or trade, in all other cases he must prove special damage, that is, that he has sustained some pecuniary loss as a direct consequence of the utterance of the words complained of."—Mr. Veeder concludes:

It remains only to consider whether there is any rational basis for this distinction as a test of actionable quality. The process of attempting to give a rational or scientific basis to legal rules which have their origin in historical accidents is familiar to students of English law; the law of defamation has been its favorite field. Yet it is easily demonstrable that none of the reasons usually given for the distinction affords any convincing explanation why certain words if written are actionable, while the same words if spoken are not. These reasons apply, in fact, only to the extent of the damage, not to the cause of action. If one's reputation has in fact been injured by the spoken words, he ought to be allowed to recover some damages, although it may be true that, had

the words been written, he would have been entitled to more. There are three elements in defamation: the form of the publication, the character of the matter published, and the motives with which it was published. An actionable test may be rationally based upon the character of the publication, perhaps upon the motive with which it was published, but not upon its form. Yet the English classification makes everything of form and neglects the substance.

The classification upon the basis of form was based upon the inference that written defamation necessarily has a more extensive circulation than spoken scandal. This may or may not be so. A public denunciation by word of mouth surely has a wider circulation than an insinuation in writing in a confidential letter. Even in the instance of widest publicity—publication in a newspaper—the publication can be stopped, an apology can be printed; but slander cannot be thus neutralized. If, indeed, the inference were true it would be no rational test of actionability. The degree of publicity, apart from the nature of the charge, would only affect the extent of the injury. Written defamation, it is true, has a *de facto* permanence; but the causes of a prejudice are forgotten while the prejudice survives, and if a man's reputation has suffered it makes no difference to him whether the attack which injured him is preserved in the back files of a newspaper. Moreover, written defamation operates against reputation largely by becoming in its course spoken slander. Again, if we look at this inference particularly from the point of view of its effect upon reputation, it is equally untrue. It would seem to imply that the injury done to the person defamed is rather in proportion to the extent over which the defamatory matter is spread than to the gravity of the charge istelf. But the greater part of the injury done by defamation is comprised within the narrow circle of one's acquaintances. The defamation of an unknown person may be as void of effect as the defamation of a fictitious person. Within the circle to which defamation extends, and in regard to a private person, that circle is more readily reached by speech than by writing.

One of the reasons commonly given in the books is that written defamation implies a superior degree of malice than that which inspires words spoken, perchance, in the heat of argument. Witness the *reductio ad absurdum* in applying this view to the familiar case of the publication by a newspaper of a speech made at a public meeting. A speaker at a public meeting, speaking, it may be, with deliberate malice and with knowledge that his words are being taken down for publication, makes a false statement concerning an opponent, and yet so frames his words, that, in the absence of special damage, he does not expose himself to an action for slander. The speaker goes unpunished; but the newspaper publishing a report of the meeting, desiring only to pass it on to the public for whom it was intended, so that it may judge between the speaker and his adversary—the newspaper becomes liable for the printed words which were not actionable when spoken.

Then it is said that the tendency to create a breach of the peace is more direct in the case of libel than in the case of slander; hence libel alone is a crime. But if one calls you a liar to your face, are you not more likely to resent it with force than you would be under any other circumstances? And, in the present day at least, defamation published in the tangible form of writing or print is precisely the kind of defamation which is least likely to lead to a breach of the peace. Other and better remedies are open; an attack in a pamphlet or a newspaper may be met through the same medium. It is whispered scandal, which never takes tangible form and cannot therefore be contradicted, that really leads to violence.

The action of the Administration in the quick recognition of the Republic of Panama and in maintaining free transit over the Isthmus, is upheld by Professor Edwin

Maxey in an article on the "Legal Aspects of the Panama Situation" (*Yale Law Journal*, December) in which he says:

The length of time during which the revolution has been going on is manifestly a matter of indifference, so long as the necessary results have been accomplished. And in the present case it would seem that the withdrawal of the government forces from the Isthmus, leaving the revolutionists in complete control, was a virtual recognition of their sovereignty by the Colombian government itself, which, coupled with the fact that there is no apparent likelihood that said decadent government will ever be able to reestablish its sovereignty over its revolted subjects, furnishes ample justification for recognition by the United States of the existence of a *de facto* and also of a *de jure* government.

In addition to the question of our duty as a neutral State there is raised the legal question of our obligations under the Treaty of Dec. 12, 1846, with New Grenada. After providing for "most favored nation" treatment with reference to the commerce of the respective countries, reciprocity with regard to tonnage dues and drawbacks, and freedom of transit across the Isthmus to the commerce and citizens of the United States, there is the following provision: "And in order to secure to themselves the tranquil and constant enjoyment of these advantages and as an especial compensation for the said advantages and for the favors they have acquired by the 4th, 5th ad 6th articles of this treaty. The United States guarantee, positively and efficaciously, to New Granda, by the present stipulation, the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

The fact that New Granada no longer exists does not affect our obligations under the treaty, as it is a well established rule of international law that a change of name by a State does not affect its treaty rights or obligations. This treaty is still in force and we have in accordance with its provisions, sometimes at the request of the Colombian government and sometimes upon our own initiative, used force, to maintain the free transit of the Isthmus. And in so doing we have performed a valuable service to Colombia, to the world and to our own citizens. Until the treaty is abrogated, there is no question as to our legal or moral right to protect and enforce freedom of transit on the Isthmus, whether by rail or any other means of transportation.

But the question has been raised as to our obligation to protect the sovereignty of Colombia against revolution by her own citizens. The terms of the treaty give some color to the view of those who hold that we are under such obligation. The question is one of interpretation. And in interpreting a treaty, as in interpreting a contract between individuals, we must look to the intention of the parties; for a treaty is nothing but a contract to which independent States are parties. In arriving at the intention of the parties, we must take into account the circumstances existing at the time the contract was made and with reference to which both the parties contracted. In the present case there can be no doubt as to the purpose of entering into the treaty. The intention of the parties was clearly not to protect the Colombian sovereignty against the people of the Isthmus, but rather to guarantee it against interference upon the part of European powers from whom there was at that time reason to apprehend danger. The United States has never entered into a treaty for the purpose of compelling a people to submit to a sovereignty which disregarded their welfare, nor is there any evidence that at the time the treaty was entered into the other party to it intended that we should ever be called upon to protect their sovereignty against anything except outside interference. Hence, though

the literal terms of the treaty would give us authority to use force if necessary in order to prevent the people of the Isthmus from establishing their sovereignty over it, such a construction would undoubtedly do violence to the spirit of the treaty. . . .

The recognition of a new State created by revolution against the parent State is always more or less of a delicate nature and very likely to excite opposition unless it follows a formal recognition by said parent State. But the recognition of the New Republic of Panama by the United States has contravened no principle of international law, and the conduct of our government, for which Secretary Hay is largely responsible, has throughout the proceedings been characterized by frankness, tact, and a statesmanlike grasp of the situation.

Professor Henry Loomis Nelson attacks vigorously the course of the Administration in the Panama matter. He says:

The new element which Mr. Roosevelt has introduced is into international conduct rather than in international law. According to the defenders of his policy, the law remains about as it was—that is, that if a nation wishes to do the fair thing by another nation it will give the latter a chance to put down any rebellion against it, but they hold that each nation may violate this law, at the peril of war, if it is for its interest to do so. It has been supposed that international law, unenforceable, of course, is a body of certain moral obligations resting upon nations, to some of which all nations have agreed, some by special treaties. The Roosevelt doctrine, however, giving to the extent that there exist no international moral obligations, upsets this theory. Under the Roosevelt doctrine, international law no longer points out friendly courses to be followed, or unfriendly acts to be avoided, by nations, for the purpose of maintaining peace, or of preventing war; on the contrary, it simply describes conduct, perfectly proper in itself, which may justly be made the cause of war by an offended State.

The upshot of it all in this instance is that, under the old theory of the law and under the precedents, and under the treaty of 1846, Colombia had the right to expect this country to refrain from interference until the Panama rebels had established some form of government and it had had an opportunity to put down the insurrection. Mr. Roosevelt, however, has taken the ground that the interest of this country—he would probably call it the interest of humanity—demands the building of the canal at Panama; that this interest is of greater moment than any obligation which this nation owes, not primarily to Colombia, but to the cause of civilization and to the advancement of peace. It is further contended, therefore, that it is a greater, *i. e.*, a higher, national duty to secure the building of the canal at Panama than to observe those obligations of good neighborhood which have been established among nations for the purpose of mitigating, or eventually extinguishing, the evils of war and of promoting the cause of peace. In a word, the President is upheld for a hostile, war-provoking act against Colombia in order to secure a canal at Panama.

This is the restoration of the pirate code to the conduct of nations. It is not so new as the President's friends suppose; it is, in fact, a reaction to fifteenth and sixteenth century immorality. The restored doctrine is that a nation may do anything it will for the sake of the material advantage of its citizens; it may invite war, and the reprisals of war, for the sake of promoting trade. The tendency of international law, a tendency greatly promoted by this republic, has been in the other direction. The Roosevelt doctrine excuses war if it is invited, or waged, in the interest of trade; the world has supposed that the law was discouraging war in the same interest. The Roosevelt doctrine is based on the theory that a nation owes no moral obligation to its neighbor; the older doctrine, which by degrees led up to The Hague conference, was based on the opposite theory, which is that a nation does owe moral obligations to its neighbors. Indeed, if it

were not for this theory, there could be no international law whatever. . . .

As to the question whether or no Mr. Roosevelt has a right to commit an act which amounts to a declaration of war, without the consent of Congress, there is a general disposition to avoid the subject. Almost every one outside of his partisans believes that he has transgressed against the constitution, although no one who prefers the canal to national morality will be offended by a mere breach of the Constitution.

In the December *Harvard Law Review* Augustine L. Humes discusses "The Power of Congress Over Combinations Affecting Interstate Commerce." After on outline of "the state of the law and the course of the decisions of the courts as they stood before the enactment of statutes by Congress and by the Legislatures of the several States concerning the subject, the existing statutes, particularly the so-called Sherman Anti-Trust Act and its construction by the courts," are discussed; and finally there is pointed out "what may yet be accomplished by Congress in regulating industrial combinations by the exercise of its existing constitutional power."

Although "it has been conclusively determined by the Supreme Court of the United States that the Sherman Anti-Trust Act relates only to those contracts, combinations, and conspiracies whose direct and not whose indirect result is to restrain trade or commerce among the several States," that act does not exhaust "the power of Congress to regulate monopolies and contracts, combinations and conspiracies in restraint of trade. For," says Mr. Humes, "it is believed that Congress has power of regulation over any transaction, cause, or thing whatsoever within the limits of these United States, including the internal commerce of a State which may be reasonably regarded by it as deleterious to interstate commerce. The power is given to regulate. Regulation means government. Government implies action in a manner that controls. To control, one must possess the power to control and the means to enforce that power. The power conferred is governmental. It imports as necessary to its efficacy the right to direct the entire matter to which the power relates. Power to control a given subject includes by necessary implication the right by legislation to promote and restrict it and to destroy or regulate any factors or causes which may disturb or injuriously affect it. The power of Congress under the commerce clause of the Federal Constitution, in dealing with contracts, combinations, and conspiracies in restraint of trade among the States, is not limited to regulations of direct restraints of trade and commerce among the States, but also extends to any indirect restraints, no matter to what extent removed, which might reasonably be considered by Congress to affect that commerce. And the question is not as to the policy of the expedient adopted. The sole question for the court is the dry one: Can this affect commerce among the States? As incident to this power of regulation, it is believed that Congress may call to its aid any means that may enable it to act intelligently with a due regard for the rights of the individual and the public and within its constitutional power. One great aid towards this result will be the requirement of publicity in regard to the dealings of individuals and corporations engaged in the carrying on of transactions which may be reasonably considered to be deleterious to the interests of commerce or which may be reasonably regarded as affecting it."

In the *Yale Law Journal* for December, Hon. Daniel H. Chamberlain, formerly Governor of South Carolina, discusses the Northern Securities Company case, replying to an article on the same subject by Professor C. C. Langdell, in the *Harvard Law Review* for June, 1903. In that article Professor Langdell called in question the decision of the Circuit court, declaring "that a more iniquitous decree was never made may be asserted with confidence," and

"that the decree is a mere act of arbitrary power and utterly without justification or excuse."

Governor Chamberlain, on the other hand, believes:

(1) That the Sherman Anti-Trust Act includes and applies to, and must have been intended to include and apply to, railways and railway companies; (2) That if it does so include and apply, the acts complained of by the United States in the Northern Securities case were forbidden by the Sherman Act, and warranted the bill in equity in that case and the decree of the court thereon; and (3) That at least three decisions of the Supreme Court of the United States absolutely dictated and compelled the decree of the Circuit Court, now under discussion.

In closing, Governor Chamberlain says:

There remains but one word more to be said; a notice of Prof. Langdell's discussion of the special question of the amenability of the Northern Securities Company to the provisions of the Sherman Act. This discussion is found on pages 546-554, and is naturally the backbone of his entire argument.

He begins (p. 546), by saying, "In the Northern Securities case, on the other hand," that is, in contrast to the fact in the three cases just examined, "there is only one person concerned, namely, the Northern Securities Company." Whether this fact, if conceded, would differentiate the latter case from the former cases, in principle or effect, need not be discussed here. But what are the facts in the Northern Securities case? The briefest possible statement of the case must here suffice. Instead of "only one person" being concerned in the Northern Securities case, there were certainly three persons, corporations, who were formal defendants on the record, as well as real defendants in the untechnical sense, namely, the Northern Pacific Railway Company, the Great Northern Railway Company, and the Northern Securities Company. These three defendants were as inextricably linked together as Chang and Eng. In fact, these corporations stood to each other in the precise relations of Milton's "subtle Fiend" to Sin and Death; and between them, in view of their designs, might have passed the words put by the great poet into Satan's mouth:

"I bring ye to the place where thou and Death
Shall dwell at ease, and up and down, unseen,
Wing silently the buxom air, embalmed
With odors. *There ye shall be fed and filled Immeasurably; all things shall be your prey.*"

The first two of these three defendants were, in 1901, owners, respectively, of lines of railway extending from Minnesota to Puget Sound; being actually parallel and competing lines. Early in 1901, they united in purchasing nearly all the stock—98 *per cent.*—of the Chicago, Burlington & Quincy Railway Company, and made themselves joint sureties of the bonds of the last-named company, whereby the purchase was accomplished. Subsequently, in 1901, certain stockholders of the first two companies who practically controlled the two roads, agreed with each other to procure the formation of a New Jersey corporation to buy all, or the greater part, of the stock of the Northern Pacific and Great Northern Companies; the promoters of this agreement agreeing with each other to exchange their respective holdings of stock in the last-named companies for the stock of the New Jersey company, to the end that the New Jersey company might become the owner of the major part of the stock of both companies. Accordingly the Northern Securities Company came into existence as a New Jersey corporation, and almost at once acquired a large majority of the stock of both companies—about 96 *per cent.* of all the stock of the Northern Pacific, and about 76 *per cent.* of the Great Northern.

The scheme thus devised and carried into effect led at least to two inevitable results: First, it placed the control of the two parallel and competing roads in the hands of a single person, to wit, the Northern Securities Company; second, it destroyed all motive for

competition between two parallel and competing roads engaged in interstate trade and commerce.

In the *Columbia Law Review* for December, Professor J. H. Beale, Jr., of the Harvard and Chicago University Law Schools, has an important technical article on "Homicide in Self-Defence." Especially interesting is his statement of the law on "Resistance Without Retreat":

In many jurisdictions it is held that one who, being without fault, is murderously assailed may stand his ground and justifiably kill his assailant, even though he might safely retreat and thus avoid the necessity of killing. In other jurisdictions, on the contrary, it is held that if the necessity of killing may be safely avoided by retreating, the party assailed must retreat, rather than kill.

The arguments in favor of the former opinion are that to require a retreat is to force the assailed to yield a right at the bidding of a wrongdoer; and that it is dishonorable to retreat, and the necessity of such dishonor must not be thrust upon one who is without fault. On the other side it is urged that one may, under certain circumstances, be forced to forego the exercise of a legal right, and that the exercise of a right, when such exercise involves the commission of a public offence can be justified only when it is required by public policy; and that between the killing and the safe retreat of a human being public policy requires the latter.

Even in those jurisdictions which require one assailed to withdraw, if he can, rather than kill, retreat is not required where it clearly would not diminish the danger. For this reason one is not required to retreat from his dwelling-house, or even from his land in the immediate vicinity of his dwelling-house, to which he can retire in case of need; though if he can withdraw from his yard to his house, and thus avoid the necessity for killing, he must do so, and if he has voluntarily left his house he must continue to retreat. One's place of business will be treated like his dwelling-house; he is entitled to remain there in safety.

The doctrine that one need not retreat from his house is based upon the fact that such retreat would leave him exposed to attacks which his house is intended to protect him against. It is not merely an aspect of the doctrine which allows him to defend his dwelling-house from an attack from without. It follows, therefore, that one may stand his ground and repel a murderous assault by one who is already within the house, even one rightfully there.

In a few authorities this rule is carried still further, and it is held that one need not retreat from his own premises, even though not in the vicinity of his house. Most of these cases are from jurisdictions where the duty to retreat is not now enforced in any case of murderous attack; but the Supreme Court of the United States, which does not usually permit one to stand his ground and kill where retreat is open to him, appears not to require a retreat when the assailed is on his own premises, though remote from his house. This distinction appears to be untenable. There can be no question here of depriving the assailed of the protection of a building; if he has a greater right than when off his own premises, it must be a right connected in some way with the defence of land. But there is no right to use fatal force in the defence of one's land.

Where one is threatened with death unless he will give up a chattel he certainly need not retreat, leaving the chattel, rather than kill the assailant; to yield would be to permit the assailant to commit robbery, and one may always kill to prevent the commission of such a felony. It has been attempted to apply this same reasoning to the ordinary case of murderous atack. Foster in a passage often quoted, says "the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either;" and he applies this rule to a case of murderous assault. And it is

quite true that any violence, even killing, which is necessary to prevent the consumation of a violent felony is justifiable; but the killing, to be justified, must be necessary for the purpose. It is necessary in the case supposed to kill to prevent robbery; but, where one murderously assailed can safely escape by retreat, killing is not necessary to prevent murder.

If one not obliged to retreat can escape the necessity of killing by less serious violence as by disarming the assailant or by knocking him down, he must do so. Whether he must first call upon bystanders for help is not certainly determined; but it is probably not necessary as a matter of law.

Sir Frederick Pollock's recent admirable lectures "The Law of Reason" are printed in the December number of the *Michigan Law Review*. The subject is treated under two heads—"The Law of Nature," and "Natural Justice in the Common Law." Speaking of the reasonableness which is "the life of the Common Law," he shows that we owe this ideal to the Greeks, the Law of Nature, as accepted throughout the Middle Ages, being derived directly or indirectly from Greek theories of ethics. He adds:

The Roman conception involved in "*aequum et bonum*" or "*aequitas*," is identical with what we mean by "reasonable," or very nearly so. . . . The Roman lawyers, in search of a rational sanction for the authority of the *jus gentium*, had gone to the Greek philosophy of natural justice; the medieval publicists, twelve centuries later, found in their revived learning this fabric of natural reason claiming respect by the triple authority of Aristotle, Cicero, and the Corpus Juris; this last, be it observed, being no pagan document, but the legislation of the orthodox emperor Justinian. Evidently the Law of Nature must have its place in the Christian system of Church and State, and no mean place. The problem was solved in the Decretum of Gratian by identifying the Law of Nature with the Law of God, as the Roman jurists had identified the *jus gentium* with the Law of Nature. . . . If it be asked why common lawyers did not expressly refer to the Law of Nature, the answer is that at no time after, at latest, the Papal interference in the English politics of the first half of the thirteenth century, was the citation of Roman canonical authority acceptable in our country, save so far as it was necessary for strictly technical purposes. Besides, any such citation might have been construed as a renunciation of independence, or a submission of questions of general policy to the judgment of the Church. These considerations appear sufficient to explain why "it is not used among them that be learned in the laws of England to reason what thing is commanded or prohibited by the Law of Nature."

Of Natural Justice in the Common Law he says:

The real and fruitful conquests of the principle of natural justice or reasonableness in our law belong to its modern growth. Students fresh from striving with the verbal archaism of our law-books must find it hard to realize that the nineteenth century, after the thirteenth, has been the most vital period of the Common Law. The greater part of our actual working jurisprudence was made by men born in the early years of that century, the contemporaries of Darwin and Emerson. A hundred years ago the law of contract was, to say the least, very far from complete, and the law of negligence and all cognate subjects was rudimentary. No such proposition could then have been enunciated as that every lawful man is bound (exceptions expected) to use in all his doings the care and caution, at least, of a man of average prudence to avoid causing harm to his neighbors, and is entitled in turn to presume that they will use reasonable care both for him and for themselves. Now it has become a commonplace, and the wayfarer who reads, as he approaches a railroad crossing, the brief words of warning, "Stop, look, listen," little thinks that they sum up a whole history of keen discussion. The standard of a reasonable man's conduct has been taken by

courts from the verdicts of juries, and consolidated into judicial rules; and we have a body of authority covering all the usual occasions of men's business and traffic, and already tending to be, if anything, too elaborate. All this owes very little indeed to early precedents. The medieval feeling seems to have been rather that, outside a few special and stringent rules, a man should be held liable only for default in what he had positively undertaken; and, in days when mechanical arts were few and simple, and the determination of disputed facts was still a rude and uncertain process, this may have served well enough. But the law was capable of growing to the demands of new times and circumstances; its conclusions in detail were not dogmas, but flexible applications of living and still expanding principles. The knowledge and resources of a reasonable man are far greater in the twentieth than in the sixteenth or the eighteenth century, and accordingly so much the more is required of him.

In the *Columbia Law Review* for December, Sir Frederick Pollock begins a series of scholarly articles on "The Expansion of the Common Law." Concerning judicial interpretation of the law, he says:

A further development, already foreseen in the thirteenth century and settled beyond questioning in the fifteenth, is that which gives our jurisprudence its most peculiar and striking character. Judicial interpretation of the law is the only authentic interpretation. So far as the particular case is concerned this may seem an obvious matter. Positively, the court is there for the purpose of deciding, and has to arrive at a decision. Negatively, no other authority has any right to interfere with a court of justice acting within its competence; this is perhaps not quite so obvious, but may be supposed to be the rule in all or very nearly all civilized jurisdictions. But the Common Law goes much beyond this immediate respect for judicial authority. The judgment looks forward as well as backward. It not only ends the strife of the parties but lays down the law for similar cases in the future. The opinion of a Superior Court embodied in the reasons of its judgment stands, with us, on a wholly different footing from any other form of learned opinion. I am not aware that any historical reason can be given for this other than the early consolidation of royal jurisdiction in England, and the administration of justice by the king's judges on a uniform system throughout the country. Probably we shall never know how much they simplified, or whether their methods were always what we should now call strictly judicial. But we know that in the time of Henry I., it was still possible to talk of distinct bodies of custom as existing in Wessex, in Mercia, and in the Dane law; that in the time of Henry II., there were still undefined verities of usage, which may or may not have been confined to precedence and to the rules of inheritance; and that in the time of Henry III., men spoke only of the laws and customs of England, and whatever did not conform to the Common Law as declared by the king's court had to justify itself as an exception on some special ground. The king's judges, and they alone, had power to lay down what the general custom of England, in other words the Common Law, for the terms are synonymous in our books, must be taken to be. Quite possibly their own views of convenience counted for something in the process of determination; at the same time it is certain that, so far as universal or very general usage really existed, the king's judges, doing the king's business in all parts of the country and comparing their experience at Westminster, were the persons best qualified to know it. The law of the thirteenth century was judge-made law in a fuller and more liberal sense than the law of any succeeding century has been.

The *American Law Review* comments in the following vigorous way on the extension of Federal jurisdiction of State canals by the recent decision—not yet reported—of the United States Supreme Court:

It has been some time since the Supreme

Court of the United States treated the profession and the country with a genuine surprise; and persons who viewed with jealousy and alarm the extension of Federal jurisdiction through amendments to the Federal Constitution, adopted not by the assent of three-fourths of the States, but by the assent of a bare majority of the nine judges of the Supreme Court, had measurably ceased. But they are now awakened to a realization of the fact that the process of "sapping and mining"—we use an expression of Thomas Jefferson—has been resumed. This time it exhibits the alarming feature of holding that the admiralty jurisdiction granted by the States to the United States by the Federal Constitution, extends to canals which are created and maintained by a single State and which lie wholly within the limits of that State,—in the particular case, to a libel for repairs upon a canal boat built to be hauled by horses along the Erie Canal, which is an artificial internal water way of the State of New York. The decision is rendered by a bare majority of the nine judges of the court. The opinion is written by Justice Brown, whose thorough knowledge of the admiralty law will commend it to the respect though perhaps not to the assent of the profession. Concurring with Justice Brown are Justices White, McKenna, Day and Holmes. Dissenting from the opinion of this slender majority are Chief Justice Fuller and Justices Harlan, Brewer and Peckham. Mr. Justice Brewer writes the dissenting opinion. . . .

The premise of this remarkable decision is the following extract from the judiciary clause of the Federal Constitution:

"The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

This no doubt refers to admiralty and maritime jurisdiction as it was understood at the time of the making of the Constitution. The meaning of this undefined and indeterminate clause has been the source of fruitless controversy and of endless casuistry. Many years ago, the different States which were bordered by navigable rivers, or which contained within their territories navigable streams, had what were called "Boat and Vessel Acts," under which liens for supplies furnished to steamboats and for the wages of boat-hands were enforced in the State courts. A decision of the Supreme Court of the United States, extending the jurisdiction of the United States courts of admiralty over inland waters, wiped out this entire State jurisdiction. The Missouri Boat and Vessel Act and similar acts of other States went into decay. Claimants against these small craft were remitted to more expensive proceedings in the District Courts of the United States, and were subject to the unchecked extortion of the officers of these courts.

Now the Supreme Court of the United States has taken a step further, and has applied the admiralty jurisdiction granted to the United States to artificial waters created and maintained by a State, wholly within its own limits.

It took the court some sixty years to find out that the admiralty jurisdiction granted to the Federal judicatories by the Constitution, extended to inland waters. It has taken it about seventy-five years to find out that this jurisdiction extends to State canals; for we have had such canals for about that length of time. Another downward surge has been taken upon the lever of the Federal ratchet. The weight has been lifted to a new point. The tooth has caught in a new notch. The weight will never descend. The contrivance is of such a nature that it works only in one way—moves the weight only in one direction.

This is irretrievably so, unless Congress shall interfere. Congress has plenary power over the subject. The judicial power of the United States "extends to" the subject. But Congress can withhold that or any other subject from the Federal District Courts, and can abolish those courts altogether, if it sees fit to do so. The State of New York ought to demand that jurisdiction over its own internal improvements be restored to its own courts, and Congress ought to, and will if

the demand is made, pass the necessary legislation to undo the mischief which the Supreme Court has done.

In an excellent article in the *Michigan Law Review* for December, Professor John A. Fairlie begins a discussion of "The Administrative Powers of the President," two points of which are of particular interest.

Of "patronage" and its remedy, he says: It must be recognized that the custom of allowing the members of Congress to select local officers gives them a control over the Administration not contemplated by the Constitution, and far from satisfactory in practice; while the President's exclusive power over the formal nominations tends to induce the members of Congress to support legislative measures favored by the administration, in return for patronage favors. There is probably no specific agreement to trade votes for appointments; but the influence of existing customs certainly violates the spirit of the constitutional separation of powers.

To correct this misuse of the Presidential appointing power is not an easy matter, which can be fully accomplished by promulgating a legal rule, either in the form of a statute or of an executive regulation. The positions affected are of a distinctly different character from those in the subordinate classified service now filled by means of competitive written examinations; and call for qualifications of business capacity which cannot be thoroughly tested by that method. A system of higher grade examinations based on a professional university course in law, economics and public administration, such as is followed in Germany, could undoubtedly be devised, and could be so adapted to American educational methods as to avoid any possible danger of the bureaucratic spirit. But even such a system could be perverted to partisan purposes so long as present notions as to the political nature of Presidential appointments prevail. The fundamental change that must be made is the recognition and appreciation, both by the people at large and by the politicians, of the non-political character of the administrative offices.

Two suggestions may be made which, if adopted, would aid in emphasizing this non-political character of such offices and in reducing the scope of political patronage. If the four-year tenure law were replaced by the older system of appointment for indefinite terms, the patronage at the free disposal of any administration would be reduced to a fraction of what it now is. And if the appointment of local officers could be transferred from the President and Senate (both essentially political organs) to the heads of the departments, who are more directly responsible for the efficient conduct of their respective departments, administrative qualifications would receive larger consideration than is now given them. Such a decentralization of the appointing power would not take from the President any control which he personally exercises; but would be simply a recognition that the number of appointments is far larger than the President can select in person, and would transfer the responsible power of appointment to an administrative officer, who would be less dependent on the advice of members of Congress. Not only would this action tend to better the character of the administrative service; but the reduction of Congressional patronage would tend to eliminate a serious corrupting influence from the Congressional elections.

It may be added that still further decentralization in appointments may become advisable in the future as a counterbalance to the growing centralization in legislation and the scope of the Federal administrative service. Certainly if the constitution should be amended to give Congress larger powers, there should at the same time be amendments providing for some decentralization of the Federal administration. This might be accomplished by giving the State Governors the power of appointment to local Federal offices, a method that would secure the advantage of local knowledge and at the same time continue the method of appointments by an executive official. . . .

Two interesting legal questions have arisen concerning executive regulations. First, are they not legislative acts, and there-

fore beyond the competence of the executive, and beyond the power of Congress to delegate? Second, if they are constitutional because not acts of legislation, are they rules of law which will be enforced by the judicial courts, or is their enforcement secured only by administrative processes?

On the first question, Federal judges have held, on the one hand, that Congress may delegate the power to make rules and regulations, and, on the other hand, that this does not constitute a delegation of legislative power. These views would seem to be logically inconsistent with each other; and the inconsistency is not removed by pointing out the difficulty of drawing the line between legislativve action and executive discretion. For Congress possesses only legislative power, and it would seem that any delegation of power by Congress must be a delegation of legislative power. If this view is correct, statutory authorizations of executive regulations are either a grant of legislative power, or they are not grants of power, but merely expressions of opinion by Congress that the details left for executive regulation are not legislative in character.

In some cases Congress has authorized executive regulations which approach very closely the field of legislative action. The most notable instance is in the reciprocity clause of the tariff act of 1890, which authorized the President to suspend other clauses of the act permitting the importation of certain commodities free of duties, with reference to goods imported from countries which imposed duties on American products deemed by the President to be reciprocally unequal and unreasonable. By this provision the imposition of duties was made to depend on the action of the President. The opinion of the Supreme Court as to the constitutionality of this power, in the case of Field *v.* Clark, discusses previous instances of somewhat similar provisions, while the dissenting opinion of two judges serves to emphasize the point at issue.

It was shown that there were numerous instances where Congress had authorized the President to suspend the operation of certain statutes, under given conditions, and some cases where more positive authority had been conferred. The acts which gave the greatest extent of discretionary power to the President were the Embargo Act of 1794, and the Non-Intercourse Act of 1799. The former authorized the President to lay an embargo on shipping "whenever, in his opinion, the public safety shall so require." The latter authorized the President to remit and discontinue the restrictions placed by the act on commercial intercourse "if he shall deem it expedient and consistent with the interest of the United States." These and other acts were cited as showing the Congressional interpretation of the question. But the only act of this kind which had received judicial recognition was the Non-Intercourse Act of 1809, which authorized the resumption of trade when the President by proclamation declared that France or Great Britain had revoked or modified the edicts violating the neutral commerce of the United States. This act was upheld by the Supreme Court on the ground that the act of the President merely announced the condition or fact which the Legislature prescribed as necessary to the resumption of trade.

Following this precedent, the majority of the court held that the clause in the act of 1890 also left to the President simply the determination of a fact or contingency upon which the suspension of free importation was to take effect. . . .

From this opinion Justice Lamar and Chief Justice Fuller dissented. It was urged that the legislative precedents could not bind the judiciary in interpreting the Constitution; and that the provision under consideration differed radically from that in the Non-Intercourse Act of 1809. . . .

It will be noted that the difference of opinion was as to whether the powers conferred were legislative or not; and the view of the majority of the court throws open a wide field for delegated executive regulations. But the entire court accepted the view

that Congress cannot delegate legislative power, apparently the first specific expression by the Supreme Court of a maxim uniformly held by the State courts.

ON the cases on the question of "Pensioning School Teachers" several rules are deducible, says the *Central Law Journal*:

First: Public officers as a class may be pensioned, if the good of the public service demands it. We, however, doubt the correctness of the construction that is put by the Supreme Court of New York on the act of that State, that one member of a certain class can be pensioned while others in the same class or who subsequently come into that class are not entitled to the same privilege. If public moneys are to be used at all for such purposes, they should be expended without favoritism, or the reason that sustains the whole scheme will fail, *i. e.*, that it be for the public good. It certainly would not benefit the school system, for instance, for the teachers to understand that certain ones, at the pleasure of the school board or any other determinate body, would receive a pension on completing a certain term of service, while others who were equally worthy and who had met all the conditions would be denied. Taxation to promote such a scheme would be clearly unconstitutional, as serving no public purpose. Second: The fund out of which such pensions are to be paid must be raised by general and uniform methods of taxation; the State has no right to tax the teachers direct for such a purpose, neither has a board of education or school committee a right to insert in the teacher's contract of employment, an agreement to remit a certain proportion of his salary to create such a fund. The State has no right to compel parties to protect themselves against untoward conditions later in life; if it seems for the good of the public service that certain classes of public servants should be thus protested, it is the duty of the State to supply the means, and, if necessary, to raise the money with which to create a special fund for that purpose, by the ordinary methods of taxation.

THE Editorial Notes of the *American Law Review* are always breezy,—even when dealing with so important a question as the Alaskan Boundary Decision, in the December number.

After quoting the provision of the treaty that:

"Wherever the crest of the mountains which extend in a direction parallel to the coast from the fifty-sixth degree of latitude north to the point of intersection of the one hundred and forty-first degree of west longitude shall prove to be at a distance of more than ten marine leagues from the ocean, the limit between the British possessions and the strip (*lisière*) of coast which is to belong to Russia, as above mentioned, shall be formed by a line parallel to the windings (*sinuosités*) of the coast, which shall never exceed the distance of ten marine leagues therefrom" —the note proceeds as follows:

Unfortunately for this description, the chain of mountains described in the reports of early navigators, which was assumed to exist in this treaty, and which was assumed to exist by early cartographers who had drawn their maps accordingly, does not exist at all except toward the St. Elias Alps, far to the north. This was one of the circumstances which furnished the Canadians with an excuse for their contention and for their extraordinary claim that the word "*côte*" (coast) employed in the treaty meant a line drawn along the western shores of the external fringe of islands which borders the territory in question. The other and efficient cause of this extraordinary contention was the discovery of gold in the Klondike region, making it strongly desirable, from the Canadian point of view, that the Canadians should have access to the sea through what is known as the Lynn Canal. Until the Canadians began to put forward this extraordinary claim, the territory in dispute had been put down as Russian territory, and, subsequently to the Seward Purchase of 1867, as American territory, on all the maps in use in the United States, in England, and in Canada. In fact, those maps showed a greater quantity of American territory than has now been

awarded to the United States; for they showed the American territory as coming down to Portland Channel, according to the very language of the treaty of 1825, which language seems to have been ignored and defied in this decision. . . .

The award is everywhere, except at a single point, which is Mount Fairweather, considerably within the line of American contention. It will also be perceived that the line of the award, after leaving Portland Channel, touches the line of the American contention only at a point near Mount Vancouver in the St. Elias Alps, but that farther to the east it actually crosses the line of the American claim and cuts off a corner of what the American claim conceded to Canada in the vicinity of Mount St. Elias; a few square miles of glacier and cinder. The decision cuts off two islands which constituted the southern end of the so-called Alaskan "panhandle," and which had, prior to the Canadian pretension, being supposed to belong to Russian America, and subsequently to the United States, and which had been so chartered on all the maps, and gives them to Canada; and that instead of making Portland Canal the southern boundary of American territory according to the tenor of the treaty of 1825, it proceeds in the very face of the language of that treaty and traces the boundary through the narrow channel called Pearse Canal, and does not make the Portland Canal the boundary line until the point far to the east of the open sea is reached where Pearse Canal debouches from (or unites with) Portland Canal. On the other hand, it gives to the United States two small islands of unpronounceable names, not shown at all on many of the maps, situated at the mouth of Pearse Canal, indicated by two black blotches on the smaller of the subjoined maps, claimed by the Canadians in their pretension. Having regard to so much of the decision as relates to the southern boundary, it is our deliberate judgment that the decision gives the Canadians this much more than they had a right to claim. This is mathematically true, unless in the year 1825 south meant north, and unless, since that time, the Portland Canal has changed its geographical location by crossing over from the south to the north side of the two islands known as Prince of Wales Island and Pearse Island.

The Anglo-Russian treaty of 1825, quoted above, declares that the line, after leaving the southernmost point of Prince of Wales Island, shall proceed toward the north along the pass called Portland Channel,—the language of the treaty being "*remontera au nord le long de la passe dite Portland Channel.*" A glance at the map will show that the boundary, as made by the commission, does not leave the southernmost point of Prince of Wales Island and proceed toward the north by the Portland Channel, but that if it had done so it would have given Prince of Wales Island and Pearse Island to the United States. Instead of starting at the southernmost point of Prince of Wales Island and proceeding to the north along the pass called Portland Channel, it is made by this decision to start at the northern point of Prince of Wales Island and to proceed toward the north along Pearse Channel. A more obvious mal-interpretation and perversion of the language of a treaty could not be imagined. It thus appears that the Canadian contention relating to the southern part of the boundary was not supported by any ground except "this ground, here in Canada." The Canadians wanted an outlet through Portland Channel in the vicinity of Port Simpson, and the award coolly gives it to them out of American territory, and the American commissioners yield.

A glance at the maps which the *American Law Review* prints with the "Note," from which we have quoted, leads us to wonder whether its editors have not mistaken Wales Island for Prince of Wales Island, the latter confessedly American territory, lying some sixty or seventy miles west of Wales Island. The boundary line starts from the southernmost point of Prince of Wales Island; about this there was no controversy.

THE *Canada Law Journal* for November prints in full the reasons given by Lord Alverstone for his finding in reference to the Portland Channel, which are, in part, as follows:

The answer to this question "What channel is the Portland Channel?" depends upon the simple question, What did the contracting parties mean by the words "the channel called the Portland Channel" in Article III. of the treaty of 1825? This is a pure question of identity. . . .

I will now endeavor to summarize the facts relating to the channel called Portland Channel, which the information afforded by the maps and documents to which I have referred establish. The first and most important is that it was perfectly well known before and at the date of the treaty that there were two channels or inlets, the one called Portland Channel, the other Observatory Inlet, both of them coming out to the Pacific Ocean. That the seaward entrance of Observatory Inlet was between Point Maskeylyne on the south and Point Wales on the north. That one entrance of Portland Channel was between the island now known as Kannagunut and Tongas Island. That the latitude of the mouth or entrance to the channel called Portland Channel, as described in the treaty and understood by the negotiators, was 54 degrees 45 minutes. The narrative of Vancouver refers to the channel between Wales Island and Sitklan Island, known as Tongas Passage, as a passage leading south-southeast toward the ocean—which he passed in hope of finding a more northern and westerly communication to the sea, and describes his subsequently finding the passage between Tongas Island on the north and Sitklan and Kannagunut on the south. The narrative and the maps leave some doubt on the question whether he intended to name Portland Channel to include Tongas Passage as well as the passage between Tongas Island on the north and Sitklan and Kannagunut Island on the south. In view of this doubt, I think, having regard to the language, that Vancouver may have intended to include Tongas Passage in that name, and looking to the relative size of the two passages, I think that the negotiators may well have thought that the Portland Channel, after passing north of Pearse and Wales Island, issued into the sea by the two passages above described. . . .

It is suggested on behalf of the United States that Portland Channel included both the channels—namely, the channel coming out between Point Maskelyne and Point Wales, and that running to the north of Pearse and Wales Islands, and that, upon the doctrine of the thalweg, the larger channel must be taken as the boundary. It is sufficient to say that, in my opinion, there is no foundation for this argument. The lengths and the points of land at their entrances are given in the case of each channel by Vancouver in a way which precludes the suggestion that he intended to include both channels under the one name, and it must be remembered that he was upon a voyage of discovery, and named these channels when he had discovered and explored them.

THE Canadian view of the Alaska Boundary Decision is ably set forth by Thomas Hodgins in *The Canadian Law Times* for December:

Before reviewing the decision of the majority of the Alaska Boundary Tribunal the plain and just-minded people of both nations must admit that both Great Britain and Canada were disastrously handicapped when they submitted the international boundary dispute between Canada and Alaska to a tribunal of six members, one-half of whom, as American politicians, had previously given public expression to a decidedly hostile opinion against the then known British-Canadian claims,— subsequently formulated in the British case,—and had therefore that taint of partiality which, according to the principles of international justice, and the rules of the common law of both nations, absolutely disqualified them from sitting as judges or jurors, and eminently from being ranked as "impartial jurists of repute" which

the two great sovereignties of Great Britain and the United States, as trustees of the national honor, political justice, and good faith of their respective nations, had agreed to appoint to the Tribunal. . . .

With such prejudiced and therefore disqualified colleagues it was judicially, politically, and humanly impossible that impartial justice could be administered, or the recognized doctrines of International Law could be given effect to. And it would have been appropriate that a diplomatic protest should have been made against appointments which dishonored the real impartiality of Tribunals of International Arbitration, and the breach of the Treaty contract to refer the international dispute to "impartial jurists of repute." . . .

Questions five and six formulated the main crux of the dispute; whether the international boundary line crossed the bays and inlets indenting this "coast of the continent."

The fifth question asked: "Was it the intention and meaning of said Convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe, or strip, of coast on the mainland, not exceeding 10 marine leagues in width, separating the British possessions from the bays, ports, inlets, havens, and waters of the Ocean?"

The sixth question was only to become necessary in case the fifth was answered in the negative; and as to the bays and inlets it asked: "Was it the intention and meaning of the said Convention that, where the mainland coast is indented by deep inlets forming part of the territorial waters of Russia, the width of the lisiere was to be measured (*a*) from the line of the general direction of the mainland coast; or (*b*) from the line separating the waters of the Ocean from the territorial waters of Russia; or (*c*) from the heads of the aforesaid inlets?"

In considering these questions, it should be borne in mind—in addition to other points, hereinafter referred to—that a recognized uniform distance of three marine miles from the low-water mark of the tidal sea, determines where the Ocean begins. And as the majority of the Tribunal holds that tidal bays and inlets, being "sinuosities of the coasts," are "ocean" within the Treaty expression "ten marine leagues from the Ocean;" then their low-water mark should also determine where the Tribunal's "ocean" begins.

But the mouths of tidal rivers are also "sinuosities of the coast;" and the influent sea in such tidal rivers has also its low-water mark, which should similarly determine where they become "ocean" according to the above decision. Yet International Law, because the channels of bays, inlets, and rivers are filled to the ocean's tidal level, classes them under the generic term of "arms of the sea," and considers them in regard to sovereignty as if they were land. But the action in the influent sea in perpetually, or occasionally (as in the case of shoals of strands), submerging their lands, precludes them, it is submitted, apart from authority, from being imported into the definition "Ocean;" as that term is understood in International Law.

Then as to the seventh question: "What are the mountains situated parallel to the coast?" The British originally proposed the seaward base of the mountains as the boundary line. Russia objected, because the mountains might slope directly to the ocean, and practically give them no foothold on the coast, and asked that the line should be on the summit of "the mountains bordering on the coast." This was considered in the treaty by the words "the summit of the mountains situated parallel to the coast." But the majority of the tribunal has adopted a line which, at a number of points, rests on mountains lying far inland from the coast, and separated from it by nearer mountains, which come more within the words of the treaty as "situated parallel to the coast," than those selected by the tribunal.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ACCIDENT INSURANCE. (CAUSE OF DEATH, BLOOD POISONING FOLLOWING WOUND.)
IOWA SUPREME COURT.

In Delaney *v.* Modern Accident Club, 97 Northwestern Reporter 91, the court holds that death resulting from blood poisoning following a wound received on a finger, is an accidental death within the terms of an accident insurance certificate. A number of authorities are elaborately reviewed, and the court holds that it is immaterial whether the bacilli causing the disease were introduced into the wound at the time it was inflicted and by the instrument inflicting it, or whether they were introduced afterwards and from other sources. "A disease brought about as the result of a wound, even though not the necessary or probable result, yet if it is the natural result of the wound and not of an independent cause, is properly attributed to the wound, and death resulting from the disease is a death resulting from the wound, even though the wound was not in its nature mortal or even dangerous. Even though the wound results in disease or death through the negligence of the injured person in failing to take ordinary and reasonable precautions to avoid the consequences, the death is the result of the wound."

ALIENS. (CONTRACT LABORERS — MEMBERS OF LEARNED PROFESSION—EXPERT ACCOUNTANTS.)
UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT, NEW YORK.

In re Ellis and *In re* Charalambis, 124 Federal Reporter 637. Two important holdings were made in these cases on the importation of contract labor. The first is, that the omission, in Act of Congress, March 3, 1903, c. 1012, 32 Stat. 1213 (amending and reënacting the previous Immigration Laws and repealing conflicting provisions) of the clause contained in Act of March 3, 1891, c. 551, 26 Stat. 1884, excluding "the class of contract laborers excluded by the Act of Feb. 26, 1885," did not amount to a repeal of that provision in the Acts of 1885 and 1891. This result is reached in view of the recital in the *Congressional Record*, p. 3205, showing that the House concurred in a Senate amendment omitting this clause, "leaving intact the Contract Labor Laws heretofore enacted and now on the statute books." The Act of Feb. 26, 1885, c. 164, 23 Stat. 332, forbade the immigration of any alien under contract made previous to immigration to perform labor or service of any kind in the United States: and under this decision this provision is still operative. The second holding is that an expert accountant is not a person belonging to any recognized learned profession so as to be within the exception contained in Act of March 3, 1903, c. 1012, §2, 32 Stat. 1214. This holding seems to turn on the incorporation of the word "learned" in the act of that year which had been omitted from previous statutes. Just what constitutes a member of a "learned" profession the court does not say.

ARCHITECTS. (PUBLICATION OF PLANS—FILING WITH BUILDING DEPARTMENT—LOSS OF PROPERTY RIGHTS.)
NEW YORK SUPREME COURT.

In Wright *v.* Eisle, 83 New York Supplement 887, the property rights of an architect in plans prepared by him and filed with the building department of the city where the building is to be erected, are considered and held to be thereby lost.

The building department had approved of plaintiff's plans, and in consequence he su-

perintended the construction of the house, receiving compensation therefor. So far the law protected him, but beyond that he had no further rights in his work. The cases of Palmer *v.* DeWitt, 47 N. Y. 532, 7 Am. Rep. 480; Callaghan *v.* Myers, 128 U. S. 617, 657, 9 Sup. Ct. 177, 32 L. Ed. 547; Jewelers' Mer. Agency *v.* Jewelers' Pub. Co., 155 N. Y. 241, 251, 49 New England Reporter 872, 41 L. R. A. 846, 63 Am. St. Rep. 666, are cited in support of this view. The court also holds that where an architect prepares plans for a client for a certain compensation they belong after publication, to the client and not to the architect.

AUTOMOBILES. (CHAFFEUR'S TEMPORARY ABSENCE—DUTY TO FASTEN MACHINE.)
NEW YORK SUPREME COURT.

In Berman *v.* Schultz, 84 New York Supplement 22, the plaintiff sued for injuries to his horse and wagon from a collision with an automobile which was left unattended while the operator went into a building to deliver goods, and which had been started by some small boys playing near by. The court, in reversing a judgment for plaintiff, says that the law did not impose on the defendant the duty to make the starting of the machine impossible; that throwing off the current, putting on the brake, and throwing off the switch, so that the machine could not start of itself, were sufficient precautions, and it was not the operator's duty to chain the machine to a post, or in some way fasten it so that it would be impossible for it to be started by a third person. The act of the small boys was the proximate cause of the trouble.

BLACKLISTING. (LEGALITY—RIGHT OF MASTER TO DISCHARGE SERVANT—CONSPIRACY TO DESTROY LABOR UNION.)
UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

The case of Boyer *v.* The Western Union Telegraph Co., 124 Federal Reporter 246, is a noteworthy addition to the law regulating the relations of capital and labor. The suit was by members of a Telegraphers' Union, to prevent the disruption of that organization by the carrying out of the defendant's purpose to discharge its members from employment. The court holds that in the absence of a contract a master may discharge his servant without notice whenever he pleases, and that in consequence of this right there can be no such thing as an unlawful conspiracy to destroy a labor union by discharging its members or refusing to employ them. The remedy for discharge from employment in violation of a contract is declared to be at law, and not in equity.

And then comes the most important holding in the case; that an employer having discharged employés belonging to a labor union has the right to keep a book containing their names and showing the reason of their discharge, and to invite inspection thereof by other employers, even though the latter therefore refuse to hire the discharged employés. The court says: "Suppose a man should file a bill alleging that he belonged to the Honorable and Ancient Order of Freemasons, or to the Presbyterian Church, or to the Grand Army of the Republic; that his employer had discharged him solely on that account; that he had discharged others of his employés, and intended to discharge all of them, for the same reason; that he kept a book which contained all the names of such discharged persons, and set opposite the name of each discharged person the fact that he had been discharged solely on the ground that he belonged to such organization; and that he had given such information to others, who refused to employ such persons on that account. Is it possible a court of equity could grant relief? If so, pray, on what ground? And yet that is a perfectly parallel case to this as made by the bill."

The court cites in support of this decision: Payne *v.* Western & Atlantic R. C. Co., 49 Am. Rep. 666; Dinah Worthington *et al. v.* James Waring *et al.*, 157 Mass. 421, 32 New England Reporter 744, 20 L. R. A. 342, 34 Am. St. Rep. 294; Hundley *v.* Louisville &

Nashville Railway Co., 48 Southwestern Reporter 429, 88 Am. St. Rep. 298; Raymond *v.* Russell *et al.*, 9 New England Reporter 544, 58 Am. Rep. 137; McDonald *v.* Ill. Central R. R., 187 Ill. 529, 58 New England Reporter 463; Wabash R. R. Co. *v.* Hannahan *et al.* (C. C.) 121 Federal Reporter 563.

BOYCOTT. (ILLEGALITY — RIGHTS OF LABOR UNIONS.)

NEW JERSEY COURT OF CHANCERY.

The case of Martin *v.* McFall, 55 Atlantic Reporter 465, presents a noteworthy contrast to the case of Boyer *v.* Western Union Telegraph Co., 124 Federal Reporter 246, elsewhere reviewed. In the Federal case blacklisting was held legal—in the present case boycotting is held illegal. Since in each instance the essence of the wrong is the interference by one party with the attempt of the other to contract with third persons, it would seem difficult to reconcile the decisions. In the present case the vice-chancellor defines what labor unions may and may not do: Labor unions may lawfully combine and form unions; they may strike; but they may not prevent others from working, or render it either difficult or uncomfortable for them to work; and they may not employ the boycott.

The rather curious remark is added that if the defendants did not intend to do the things forbidden by the restraining order then the order would do them no harm.

CARRIERS. (UNJUST DISCRIMINATION—PASS—INJURY TO PASSENGER—RIGHT OF RECOVERY.)

NORTH CAROLINA SUPREME COURT.

In McNeill *v.* Durham & C. R. Co., 44 Southeastern Reporter 34, the carrying of a newspaper editor on a pass, given in consideration of advertising, is held to amount to unjust discrimination within the inhibition of Laws 1891, p. 277, c. 320, Sections 4 and 25, punishing unjust discrimination in passenger rates by a fine not exceeding $5,000. This is because the value of the advertising is not shown to be exactly equal to the value of the pass, and because it amounted to a sale to the editor of his transportation on credit and not for cash. In discussing the public policy which was voiced in the act, the court refers to the opinion of Mr. Justice Douglas in State *v.* Railway Co., 122 N. C. 1052, 30 Southeastern Reporter 133, 41 L. R. A. 246, in which it was stated that the number of free passes issued in North Carolina in one year was over 100,000 and after deducting those permitted by the statute, over a quarter of a million of transportation was given away annually, mostly to the classes best able to pay, and which was preforce added to the fares of those who paid their way. Having determined that the editor's contract for transportation was illegal, the court then holds that he could not recover for injuries arising from the company's negligence, during his passage. This is on the theory that he and the company are in *pari delicto*. The case is distinguished from those holding ineffectual, stipulations on the backs of free passes, exempting the carrier from liability for injuries sustained by the holder thereof. In those instances the contract for transportation was legal, while in this case it was not so.

CARRIERS. (PASSENGER'S REFUSAL TO PAY EXTRA FARE—FORCIBLE EVICTION—ACTION FOR ASSAULT.)

NEW YORK COURT OF APPEALS.

In Monnier *v.* New York Central & Hudson River R. R. Co., 67 Northeastern Reporter 569, the plaintiff recovered damages for an assault and battery by one of the defendant's conductors when the plaintiff was in one of the defendant's cars as a passenger. Plaintiff had gone to the defendant's station but found the ticket office, which had been open for an hour before the departure of the train, closed for five to ten minutes before the train pulled out and he was compelled to go aboard without a ticket. The price of the ticket plaintiff intended to purchase was fifteen cents but under the rules of the company he could be compelled to pay nineteen cents

on board the train. This he refused to do and was forcibly ejected. The case presented the question whether the plaintiff had any right to resist the conductor when he was ordered to leave the train. It was conceded that the company's rule requiring the extra fare was a valid and reasonable regulation and it is sanctioned by statute. The court was very much divided in its opinion. Three judges held that plaintiff was not justified in resisting the conductor by force but should have peaceably left the car and relied on his legal remedy, especially in view of the small amount involved. Numerous authorities are cited in support of this view. The court says, "He virtually invited all the force necessary to remove him, and since no more was applied than was necessary to effect the object he cannot recover either against the conductor or the defendant in an action for assault and battery." Three dissenting judges held that plaintiff had a right to resist the eviction by force; that no question of good taste was involved; and that the legal rights of the parties, turning on the question of fact as to plaintiff's ability to buy a ticket, had been settled by the verdict of the jury. Judge Cullen who cast the deciding vote takes the middle ground that the plaintiff was justified in forcibly resisting any attempt to remove him in case such an attempt amounted to an invasion of his legal rights; but also takes the view that the conductor was not obliged to rely on the passenger's word, but was justified in enforcing the rule of the company, the extra fare exacted not being beyond the limit fixed by the company's rule.

CARRIERS. (Injury to Express Messenger—Contract Releasing Railroad Company from Liability—Validity.)

Wisconsin Supreme Court.

In Peterson *v.* Chicago & N. W. Ry. Co., 96 Northwestern Reporter 532, the plaintiff, an express messenger, sued for personal injuries received in the course of his employment, by the alleged negligence of the defendant railroad company. The defendant relied on a contract between itself and plaintiff's employer, the American Express Company, whereby the latter covenanted to indemnify defendant from all such liabilities, and on a further contract between plaintiff and his employer whereby he assumed all risks of accident, and agreed in turn to indemnify the American Express Company from any damages it was compelled to pay in consequence of any claim for injuries. The court held that the contracts were not invalid as contravening public policy. The case is said to be a new one in Wisconsin, but the court relied on a decison by the United States Supreme Court, in Baltimore Ry. Co. *v.* Voight, 176 U. S. 498, 20 Supreme Court Reporter 385, 44 L. Ed. 560, in which it was held that an express messenger under similar facts, was not a passenger.

COMPETITION. (Unlawful Character—Inducing Breach of Contract.)

New York Supreme Court.

In the suit of the American Law Book Co. *v.* The Edward Thompson Co., 84 New York Supplement 225, plaintiff sought an injunction to restrain the defendant from agreeing with subscribers to plaintiff's publication, to indemnify them against claims for damages for breaches of their contracts in declining to receive plaintiff's books and purchasing those of defendant. The theory of the defence was that plaintiff had no remedy in equity,—actions at law for breaches of contract, affording adequate relief. It was said in argument that cases where injunction had been granted to prevent solicitation of a breach of contract have involved only contracts for personal services, and that there was no precedent for the injunction sought in the present instance. The court says, however, that if there be no exact precedent to this injunction, none is needed. The defendant is engaged in an attempt to obtain business which the plaintiff has secured, having no regard to fairness of competition but by a resort to trick and device, and that the inadequacy of an action for damages is obvious. The complainant got its injunction.

CONVICTS. (BERTILLON MEASUREMENTS—PHOTOGRAPHS—MANDAMUS TO COMPEL SURRENDER—REVERSAL OF SENTENCE.)

NEW YORK SUPREME COURT.

In re Molineux, 83 New York Supplement 943. As an aftermath of the Molineux case the defendant brought *mandamus* to compel the surrender to him, after his final acquittal, of the photographs and Bertillon measurements which had been made of him while in prison under final sentence after his first trial, and before its reversal by the Court of Appeals. He was denied relief. Laws 1889, c. 382, p. 511, §40, authorized the Superintendent of State prisons to make rules and regulations for a record of photographs and other means of identifying each convict received, and Laws 1896, c. 440, p. 401, §1, requires the superintendent of State prisons to cause prisoners to be subjected to Bertillon measurements. The court says that the relator must have a clear legal right to what he asks for, and it does not appear in this case that he has one. The Superintendent of State prisons is under no obligation to surrender the photographs and measurements, which are no more damaging to the relator than the court records and other traces of his struggle for liberty. The case while peculiar, is not new, the same view having been taken in People *ex rel* Joyce *v.* York, 27 Misc. Rep. 658, 59 N. Y. Supp. 418, and Owen *v.* Partridge, 40 Misc. Rep. 415, 82 N. Y. Supp. 248.

CORPORATIONS. (CHRISTIAN SCIENCE CHURCH—APPLICATION FOR CHARTER.)

PENNSYLVANIA SUPREME COURT.

In re First Church of Christ, Scientist, 55 Atlantic Reporter 536, chronicles the unsuccessful attempt of a Christian Science church to secure a charter of incorporation in Pennsylvania. The court, in affirming the refusal of the charter by the court below, holds that the evidence in the case does not support a finding that the corporation was one for private profit, though individual healers receive compensation, as this seems to be a personal recompense with which the society has nothing to do. But the charter is refused on the ground that the purposes of the proposed corporation include matters injurious to the community. The teaching that disease can be remedied by prayer alone is contrary to the policy of the law, which is to assume control and require the use of the most effective known means to overcome and stamp out those ills which otherwise would become epidemic. In such cases an attempt at treatment by those not possessing the lawful qualifications is violative of public policy. The court says: "Neither the law nor reason has any objection to the offer of prayer for the recovery of the sick." The objection seems to be to relying on it too exclusively.

EVIDENCE. (SEIZURE OF PAPERS—ILLEGALITY—EFFECT ON COMPETENCY.)

NEW YORK COURT OF APPEALS.

In People *v.* Adams, 68 Northeastern Reporter 636, which was a prosecution for running a policy game, Adams being locally known as the "Policy King," private papers of the defendant which had been taken on a search warrant, were offered in evidence. The court in reviewing the admission of these papers in evidence said that no notice need be taken as to how they were obtained, whether lawfully or unlawfully, the evidence being otherwise proper and material. If there was any illegal invasion of the defendant's rights, his remedy was by an independent proceeding. The following authorities are cited: Commonwealth *v.* Tibbetts, 157 Mass. 519, 32 Northeastern Reporter 910; Commonwealth *v.* Dana, 2 Metc. 329, 337; Commonwealth *v.* Lottery Tickets, 5 Cush. 369, 374; Commonwealth *v.* Intoxicating Liquors, 4 Allen, 593, 600; Commonwealth *v.* Welsh, 110 Mass. 359; Commonwealth *v.* Taylor, 132 Mass. 261; Commonwealth *v.* Keenan, 148 Mass. 470, 20 Northeastern Reporter 101; Commonwealth *v.* Ryan, 157 Mass. 403, 32 Northeastern Reporter 349; 1 Greenleaf's Evidence, §254a, §229; 1 Taylor's Evidence, §922; 1 Bishop's Crim. Proc. (3rd Ed.)

§246; Ruloff *v.* People, 45 N. Y. 213; People *v.* Van Wormer, 175 N. Y. 188, 67 Northeastern Reporter 299.

DIVORCE. (SPECIAL LAW—CONSTITUTIONAL INHIBITION—POSTPONING ENTRY OF FINAL JUDGMENT.)

CALIFORNIA SUPREME COURT.

In Deyoe *v.* the Superior Court of Mendocino County, 74 Pacific Reporter 28, Cal. St. 1903, p. 75, c. 67, declaring that a final judgment of divorce shall not be entered until the expiration of one year from the rendition of an interlocutory decree of divorce is held not to violate Constitution, Art. 4, §25, subd. 3, prohibiting special laws regulating the practice in courts of justice. The court reiterates the general principle that constitutional prohibition of class legislation does not forbid such classification as is substantial and germane to the purpose of the law, and then holds that divorce proceedings are so peculiar as to be legitimate subjects for special legislation. As constituting such peculiarity the court instances the theory that the State is a party, and is interested in the maintenance of the marital status. The following authorities are cited: "McBlain *v.* McBlain, 77 Cal. 507, 20 Pacific Reporter 61, Warner *v.* Warner, 100 Cal. 11, 14, 34 Pacific Reporter 523, 524; Hatton *v.* Hatton, 136 Cal. 353, 356, 68 Pacific Reporter 1016; Newman *v.* Freitas, 129 Cal. 283, 289, 61 Pacific Reporter 907, 50 L. R. A. 548. The existence of other Code regulations of divorce proceedings, is also pointed out.

INDECENT PROPOSAL. (SOLICITATION TO SEXUAL INTERCOURSE—CAUSE OF ACTION.)

KENTUCKY COURT OF APPEALS.

In Reed *v.* Maley, 74 Southwestern Reporter 1079, the plaintiff sued to recover damages for a solicitation to sexual intercourse made her by defendant, and the sole question was whether such an indecent proposal, in the absence of trespass or assault, furnished a cause of action. This is answered in the negative. The court says that the fact that no case has been discovered involving this question, conduces strongly to show that the legal profession for centuries has entertained the impression that a civil action will not lie on such a state of facts. Wadsworth *v.* Western Union Telegraph Company, 86 Tenn. 695, 8 Southwestern Reporter 574, 6 Am. St. Rep. 864 is referred to, and the dissenting opinion of Judge Lurton, in which he points out as the reason for refusing an independent action for mental suffering, the remote and metaphysical character of the damages, is quoted with approval. The court says that a solicitation by a criminal to a reputable citizen to join in arson, larceny, or robbery, would furnish no cause of action, notwithstanding the humiliation and indignation which the citizen might feel. A bawd's solicitation of a man to illicit relations with her would give him no cause of action; yet it should do so if a similar proposal would confer a right of recovery on a woman. The cases of Newell *v.* Whitcher, 53 Vt. 589, 38 Am. Rep. 703; Bennett *v.* McIntire (Indiana Supreme Court), 23 Northeastern Reporter 78, 6 L. R. A. 736; City of Henderson *v.* Clayton (Kentucky) 57 Southwestern 1, 53 L. R. A. 145, and Hutchinson *v.* Louisville & Nashville Railway Company (Kentucky), 57 Southwestern 251 are all distinguished from the case at bar.

The argument in support of plaintiff's recovery was that the solicitation to commit adultery constituted a common law offense, and that for a criminal act occasioning injury to a particular individual a cause of action arose. Kentucky Statutes, Section 466, provides that a person injured by the violation of any statute may recover, although a penalty or a forfeiture is also imposed. But the court says that there is no statute denouncing a penalty for a solicitation to commit adultery, and while assuming for the sake of argument that the defendant could have been indicted at common law, it is of the opinion that that fact would not furnish a ground for civil recovery. Judge Hobson dissents.

INFANTS. (MEDICAL ATTENDANCE.—FAILURE TO FURNISH. — MISDEMEANOR. — CONSTITUTIONAL LAW.)

NEW YORK COURT OF APPEALS.

In People *v.* Pearson, 68 Northeastern Reporter 243, an indictment was prosecuted under Penal Code, Section 288, punishing one who fails to furnish medical attendance to a minor, in violation of a duty imposed by law. The question of liability, the court holds, is determined by the fact whether an ordinarily prudent person, solicitous for the welfare of the child would deem it necessary to call in a physician. The phrase "duty imposed by law" has reference to persons designated by the common law as parents, guardians, *etc.* A considerable review of the growth of medical science is presented, and then comes the important holding that by the term "medical attendance," attendance by a regular licensed physician is meant, and attendance by one who, on account of his religious belief, neglects to furnish proper medical care, relying on prayer for divine aid, is not included. The question of the constitutionality of the statute is then considered, as to whether it violates Const. Art. 1, Section 3, guaranteeing religious liberty, and the court says in substance that a person cannot, under the guise of religious belief, commit acts which the Legislature has stigmatized as crimes. The following authorities are cited: Barker *v.* People, 3 Cow. 686-704, 15 Am. Dec. 322; Lawton *v.* Steele, 119 N. Y. 226-236, 23 Northeastern Reporter 878, 7 L. R. A. 134, 16 Am. St. Rep. 813; Thurlow *v.* Massachusetts, 5 How. 504-583, 12 L. Ed. 256.

In a concurring opinion Judge Cullen expresses the opinion that the State cannot dictate the medical treatment which an adult may choose to receive.

INSURANCE. (DEFENSE OF SUICIDE.—STATUTORY PROHIBITION.—AGREEMENT FOR LESSER INDEMNITY.—VALIDITY.)

UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

In Whitfield *v.* Ætna Life Ins. Co., 125 Federal Reporter 269, the effect of Rev. St. of Mo. 1889, Section 7896 (which provides that suicide shall be no defense to a suit on a life insurance policy, unless it be shown that the insured contemplated suicide when he applied for the policy, and that any stipulation in the policy to the contrary shall be void), on a contract providing for a lesser indemnity, in this case $500 instead of $5000, if insured committed suicide, is considered and the provision of the policy is held valid notwithstanding the statute. The opinion turns to a considerable degree on the definition of the term "defense," as used in the statute. The court holds that the Legislature has not undertaken to say that parties making a contract of insurance shall not agree upon the amount of compensation to be paid by the company in the event of death from suicide. Baltimore Ry. Co. *v.* Voight, 176 U. S. 498, 20 Supreme Court Reporter 385, 44 L. Ed. 560; Shaw *v.* Railroad Co., 101 U. S. 565, 25 L. Ed. 892, are cited on the right of private contract, and on the construction of statutes in derogation of the common law; and the court says that the decision of the Missouri Court of Appeals, in Keller *v.* Traveler's Ins. Co., 58 Mo. App. 557 is not binding on it, as the court of appeals is not a court of the highest jurisdiction in Missouri.

INVENTIONS. (AGREEMENT BETWEEN EMPLOYER AND EMPLOYEE.—UNCONSCIONABLE CHARACTER.)

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

In Thibodeau *v.* Hildreth, 134 Federal Reporter 1892, the United States Circuit Court of Appeals held that an agreement by an employé, in consideration of his employment, to give his employer the benefit of all inventions made by him, and to keep the same forever secret if the employer required, was not unconscionable, or against public policy, and such an agreement would not be canceled at the employé's instance. The opinion is very brief and amounts to a little more than a bare assertion of the contract's validity; but it is said that such agreements are not uncommon, and may be necessary for a reasonable protection of the employer's business.

MARRIAGE. (Breach of Promise.—Damages.—Excessive Verdict.)
United States Circuit Court for the District of Oregon.

In McCarty *v.* Heryford, 125 Federal Reporter 46, a verdict of $22,500 for breach of marriage promise, against a man shown to own property worth $70,000, incumbered by a mortgage for $20,000, was held so excessive as to indicate passion or prejudice on the part of the jury, the offer of marriage having been renewed in good faith after the commencement of the action, and the matters of aggravation relied on by the plaintiff not having been sustained by a preponderance of the evidence. The court reviews a number of verdicts in this class of cases and says the verdict in the case at bar is unusual. In Campbell *v.* Arbuckle, 4 New York Supplement 30, a verdict for $45,000 was sustained, but that verdict amounted to only four and one-half *per cent.*, for one year of the defendant's estate. In another case a verdict for $25,000 was allowed to stand, that sum being one-sixth of the defendant's fortune. In other cases verdicts for $16,000 and $12,500, where the defendants were worth $50,000 and $75,000 were approved, the recovery in each instance being increased by matters of aggravation. In the present instance the court says that if the verdict is allowed to stand, in view of the incumbrance already on defendant's property, it will wipe out his entire estate at forced sale; and that if a jury may thus divest a man of his property, its power ought to be exercised with great caution.

MONOPOLIES. (Anti-Trust Law.—Interstate Commerce.)
United States Circuit Court for the District of Oregon.

In Ellis *v.* Inman, Poulsen & Co., 124 Federal Reporter 956, a combination between all local lumber manufacturers in a city to raise and maintain the price to local customers, and to refuse to sell to those who purchased any part of their supply from outside mills, were held not to violate the Sherman anti-trust law, as in restraint of interstate commerce, while the discrimination against local dealers purchasing elsewhere affects interstate commerce only directly and incidentally.

MURDER. (Reversal of Conviction. Plea of Guilty of Manslaughter.—Power to Accept.)
United States Circuit Court for the District of Nebraska.

In United States *v.* Linnier, 125 Federal Reporter 83, an interesting question of practice in homicide cases is presented. The defendant was indicted for murder, was convicted, and then filed a motion for new trial which was sustained. He thereupon offered to file a plea of guilty of manslaughter and allow sentence to be pronounced thereon. The United States attorney objected to the receiving of such a plea, and the question was as to the power of the court in the premises. The evidence had shown the defendant guilty of manslaughter only. A number of cases are cited to show that a reviewing court, on determining that the evidence shows defendant guilty of a lesser crime than that for which he was convicted, may enter judgment for that crime on the verdict already rendered. State *v.* Schele, 52 Iowa 608, 3 Northwestern Reporter 632; State *v.* Keasling, 74 Iowa 528, 38 Northwestern Reporter 397; Commonwealth *v.* Squire, 1 Metc. (Mass.) 258, are cited as instances in which the lower court had pronounced sentence for a lighter offense than that found by the verdict to have been committed. The court then says that it can therefore be said that instead of setting aside the verdict over the objection of either or both of the parties, the court, on the verdict as it stood, because of the state of the evidence, could have pronounced a judgment for manslaughter; and having such power, it is more than certain that the court could and should receive the plea of the lesser offense and pronounce judgment thereon. In concluding, the power of the United States attorney is reviewed, and his objection held not to be insurmountable.

RAILROADS. (CROSSING ACCIDENT.—INJURY RESULTING IN SUICIDE.—COMPANY'S LIABILITY.)
MASSACHUSETTS SUPREME JUDICIAL COURT.

In Daniels *v.* New York, N. H. & H. R. Co., 67 Northeastern Reporter 424, it appeared that plaintiff's testator received a blow on the head in a collision at a railroad crossing. His mind was clear for several weeks, but then he showed symptoms of insomnia and restlessness, had headaches, was melancholy, and at times delirious. An autopsy showed circumscribed meningitis, producing mental aberration. The accident occurred on August 12th, and on the 3d of the next October the testator committed suicide by strangling himself with a napkin. The question was whether his life was lost by the collision, so as to render the railroad company liable. In holding that the death was due to a new and intervening cause, so as to acquit the company from liability, the court cites a number of authorities including Dean *v.* American Ins. Co., 4 Allen 96, and Cooper *v.* Massachusetts Mutual Life Ins. Co., 102 Mass. 227, 3 Am. Rep. 451, to the effect that if death is the result of volition by one who has a conscious purpose to end his life, and has intelligence to adapt means to ends, it is his own act, though he is so far insane as not to be morally responsible for his conduct. This doctrine is contrary to that declared in Breasted *v.* Farmers' Loan & Trust Company, 8 N. Y. 299, 59 Am. Dec. 482; Life Insurance Company *v.* Terry, 15 Wall. 580, 21 L. Ed. 236; Manhattan Life Insurance Company *v.* Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878.

All of these cases were insurance cases. But in Scheffer *v.* Railroad Company, 105 U. S. 249, 26 Law Ed. 1070, the same question was involved as in the present suit, and the Supreme Court of the United States held that the representative of a person who was injured in a railroad accident and took his own life while insane, about eight months afterwards, could not recover against the railroad company. The court says that the subject brings it "near to the vexed theological problem as to free will and pre-destination;" but with commendable caution it declines to "pursue these inquiries too far."

SOLDIERS. (HOMICIDE IN LINE OF DUTY—MARTIAL LAW.—WHAT CONSTITUTES.)
SUPREME COURT OF PENNSYLVANIA.

In Commonwealth *ex rel* Wadsworth *v.* Shortall, 55 Atlantic Reporter 952, the relator petitioned for *habeas corpus* to secure discharge for an arrest for a homicide committed by him during the coal miners' strike of 1902, and while he was on duty as a member of the Pennsylvania militia. He was posted as a sentry in front of a private residence, with orders to halt all persons prowling around or approaching the house, and if the persons failed to respond to his challenge "to shoot, and shoot to kill." The country was much disturbed, and dynamite outrages were threatened. About 11.30 o'clock relator discovered a man approaching the house and called "Halt" several times. His challenge being disregarded, relator, in accordance with his orders, fired and killed the man. The court's first holding is that where the Governor issues a general order calling out the militia to suppress violence and maintain the public peace in a strike district, it is itself a declaration of qualified martial law. The court says it is not unmindful of eminent authorities who declare that martial law cannot exist in England or the United States in time of peace; but relies on the dissenting opinion of Chief Justice Chase in *Ex Parte* Milligan, 71 U. S. 2, 127, 18 Law Ed. 281. The court also remarks that many other authorities hold that martial law exists wherever the military arm of government is called into service. Many authorities, English and American, are then reviewed to show that a soldier is bound to obey the orders of his superior officer where they do not clearly show their own illegality, and that he would be protected in doing so; and that, where a militiaman without malice, under an order of an officer and in performance of his supposed duty, commits a homicide, he is ex-

cusable, unless it was manifestly beyond the scope of his authority. The circumstances of the case are then held to have justified the militiaman's action.

TRADING STAMPS. (CONSTITUTIONAL LIBERTY.—EXERCISE OF POLICE POWER.)

VIRGINIA SUPREME COURT OF APPEAL.

In Young *v.* Commonwealth, 45 Southeastern Reporter 327, the highest tribunal in Virginia considered the constitutionality of Acts General Assembly, 1898-98, p. 442, prohibiting the use of trading stamps. The ground of attack was that the act violated the constitutional guaranties of liberty contained in the Fourteenth Amendment, and in Article 1, Section 1 of the State constitution. The court held the act void. The opinion defines liberty as including the right to follow such pursuits as may be best adapted to the citizen's faculties, and which will afford him the highest enjoyment; to live and work where he will, and earn a livelihood by any lawful calling; and for that purpose to make necessary contracts. (Citing Powell *v.* Penn., 127 U. S. 678, 18 Sup. Ct. 992, 1257, 32 L. Ed. 253; Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; State *v.* Dalton [R. I.] 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818.) The act can only be sustained as an exercise of police power. Then follows an exhaustive discussion of the case of State *v.* Dalton, 46 Atl. 274, 48 L. R. A. 775, 84 Am. St. Rep. 818, in which the supreme court of Rhode Island held a similar act unconstitutional. The absence of any element of chance in the distribution of premiums, is relied on as taking the case outside of the police power.

TRADING STAMPS. (GIFT ENTERPRISE.—CRIMINAL OFFENSE.)

ALABAMA SUPREME COURT.

State *v.* Shugart, 35 Southern Reporter 28, was an appeal from an order discharging on *habeas corpus* a defendant who was in custody on the charge of violating Criminal Code, Section 4808, prohibiting lotteries or other gift enterprises. The court sustained the defendant's release, holding that a trading stamp business which he had been conducting, was not a "gift enterprise." The case turns on the definition of that term which, on a somewhat elaborate review of authorities, the court decides to mean a scheme for the distribution of articles *depending on some element of chance.* The case of Lansburg *v.* District of Columbia, 11 App. D. C., 512 attaching a different meaning to the term, is distinguished in view of the statutory definition there construed, and is tacitly disapproved.

PATRICK HENRY.

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PATRICK HENRY AS A LAWYER.

BY EUGENE L. DIDIER.

TO the study of the law, which is said to require the labor of twenty years, Patrick Henry gave only six weeks, during which time he read Coke upon Littleton, and the laws of Virginia. With so small a preparation, it required an immense genius to win laurels in so arduous a profession. He was twenty-four years old when he secured a license to practise law, of which he was so ignorant that he did not know how to draw a declaration or plea, and incapable, it is said, of the most common business of the profession, even of the mode of entering a suit, giving a notice, or making a motion in court. Thomas Jefferson gave the following account of Patrick Henry's examination and admittance to the bar: "In the spring of 1760 he came to Williamsburg to obtain a license as a lawyer, and he called on me at college. He told me he had been reading law only six weeks. Two of the examiners, however, Peyton and John Randolph, men of great facility of temper, signed his license with as much reluctance as their dispositions would permit them to show. Mr. Wythe absolutely refused. Robert C. Nicholas refused also at first; but, on repeated importunities and promises of future reading, he signed. These facts I had afterward from the gentlemen themselves; the two Randolphs acknowledged that he was very ignorant of the law, but that they perceived him to be a young man of genius, and did not doubt that he would soon qualify himself."

It was a happy thought that turned Patrick Henry to the bar, for it was the only profession which opened to him the pathway to fame, fortune and future distinction. There can be no doubt but that, after securing his license, he qualified himself by sufficient study to attend to the business that came to him during his first years at the bar. A careful examination of the latest records show that, from September, 1760, down to the end of 1763, when he rose to great eminence in the "Parsons' Cause," he entered 1185 cases in his fee-book. After the distinction acquired by that celebrated case, his practice became enormous, and so continued as long as he remained at the bar. Thomas Jefferson had only 504 cases in the same space of time that Patrick Henry had 1118.

When he had been at the bar four years, the famous case of the Clergy *v.* the People of Virginia came up for a final hearing. According to the law of 1748, the clergy had the right to receive their annual stipend either in tobacco at 16s. 8d. per hundred pounds or the amount in money at the market value of tobacco. One season, owing to a short crop, the planters raised the price of tobacco to 50s. per hundred, and the clergy refused to accept their stipend at 16s. 8d., and demanded payment in money at the market value of tobacco. They appealed to the court, and the court decided in favor of the clergy, although the popular feeling was against them. The court was right according to the law. John Lewis, a prominent lawyer, who was counsel for the planters, was so

convinced that the law was against him that he retired from the case. It was at this stage of the case, when the defendants' cause seemed desperate, if not hopeless, that Patrick Henry was asked to plead the people's cause against the clergy. He undertook to argue it before a jury at the next term of the court.

It was a trying scene upon which the young lawyer made his first appearance as a speaker before a court of justice. On one side was arrayed a formidable body of clergy, and some of the most distinguished lawyers in Virginia; but the most trying circumstance of all was the fact that his own father was the presiding magistrate before whom the case was to be heard.

The cause was on a writ of inquiry of damages. Mr. Lyons, of counsel for the clergy, spoke briefly, simply explaining that the law of 1748 was the only one, on the subject, in force; therefore the plaintiffs' case was clear that the said law was the only standard of their damages. When it was Patrick Henry's turn to address the jury, he arose, confused and awkward, and, in a faltering voice, began his argument. The people hung their heads; the clergy exchanged smiles, while the father of the speaker almost sank with confusion from his seat on the bench. But soon, a sudden change came over the young orator, and his latent genius burst forth with overwhelming force. All his awkwardness disappeared; his body became erect; his gestures were graceful, his countenance shone with a new expression—grand and lofty, while his eyes blazed with a light never seen there before. His voice—that magical voice which was to call a nation into existence—carried away judge, jury, people and clergy. The extraordinary scene that day in Hanover Court House was told, retold and told again, until the tradition has come down to our own time. Several of those who were present upon the occasion, who survived until the first decade of the nineteenth century, declared that "he made their blood run cold, and their hair to rise on end." They said that the people, whose countenances had fallen as he arose, had heard but a few sentences before they began to look up; then to look at each other with surprise, as if doubting the evidence of their own senses; then, attracted by some strong gesture, struck by some majestic attitude, fascinated by the spell of his eye, the charm of his emphasis, and the varied and commanding expression of his countenance, they could look away no more. In less than twenty minutes, they might be seen in every part of the house, on every bench, in every window, stooping forward from their stands, in death-like silence; their features fixed in amazement and awe; all their senses listening and riveted upon the speaker, as if to catch the last strain of some heavenly visitant. The mockery of the clergy was soon turned into alarm; their triumph into confusion and despair; and at one burst of his rapid and overwhelming invective, they fled from the bench in precipitation and terror. As for the father, such was his surprise, such his amazement, such his rapture, that, forgetting where he was, and the character he was filling, tears of ecstasy streamed down his cheeks, without the power or inclination to suppress them. The jury, as well as the people, were carried away by the young lawyer's magnificent burst of eloquence, and, disregarding the admitted right of the plaintiff, brought in a nominal verdict of *one penny damages*. The court, carried away by the wonderful spell which the orator threw over all who heard him, overruled a motion for a new trial. When the people saw the great victory their champion had won, they could keep down their enthusiasm no longer, but rushing to the bar of the court, they seized him and bore him aloft on their shoulders through the yard, amid the joyous acclamations of the men, women and children.

In this, his first speech before a jury, Patrick Henry showed that he was a bold, in-

trepid speaker, glowing with a fiery eloquence, and possessed of a mind capable of the highest flights of fancy. Never before in the annals of Virginia, of America, perhaps never in the world, was there so sudden and so brilliant a success. His was an eloquence taught in no school, learned in no college, caught from no master. It was original, spontaneous, natural. It was his own, and he was the people's advocate; through life, he boasted that he "bowed to the majesty of the people."

The great fame which he won in the "Parsons' Case," as it was called, did not send Patrick Henry to his law books, in order to acquire the necessary learning of his profession, in which he was so sadly deficient. He had an unconquerable dislike to the old black letter of the law books, and he never had recourse to them except as a preparation in a particular case. His indolence was too great, too invincible to allow him to submit to a regular course of reading, without which no man can ever become a great lawyer, and a great lawyer Patrick Henry never became; he was a great orator—perhaps the greatest America has produced.

From the obscurity of Hanover County he was called, the next year after his first great triumph at the bar, to plead the case of Nathaniel W. Dandridge, petitioner for a seat in the House of Burgesses which had been given to James Littlepage, the charge being bribery and corruption. He spoke before the committee of privileges and elections on the subject of the right of suffrage in a style of eloquence never before heard in the provincial capital of Virginia. Upon the subject of his eloquence, even in the most trivial matter, one of his contemporaries at the bar, Judge Lyons, said that "he could write a letter, or draw a declaration or plea at the bar, with as much accuracy as he could in his office, under all circumstances, except *when Patrick rose to speak;* but that whenever *he* rose, although it might be on so trifling a subject as a summons and petition for twenty shillings, he was obliged to lay down his pen, and could not write another word, until the speech was finished."

In 1865 Patrick Henry took his seat as a member of the House of Burgesses, a body which numbered such distinguished men as Peyton Randolph, the King's attorney general; Richard Bland, the most accomplished writer in Virginia; Edmund Pendleton, the silver-voiced orator and profound Parliamentary tactician; George Wythe, the accomplished scholar, lawyer and antiquarian; Richard Henry Lee, the polished speaker—these were some of the men among whom the rustic lawyer, Patrick Henry, was now called upon to take part in public life.

In 1769, after serving four years in the House of Burgesses, Patrick Henry came to the bar of the General Court, where he encountered all the legal luminaries of Virginia, gentlemen not only learned in the law, but variously accomplished. In mere questions of the law, he could not cope with those "masters of the learning of their profession." No genius, however brilliant, no eloquence however splendid, can supply the want of legal learning, in which he was woefully deficient. But on questions regarding the laws of nations he was peerless among the lawyers of Virginia. Before a jury none could approach him. His profound knowledge of the human heart and his unerring reading of the human countenance taught him just what language to use to excite their sympathies and sway their minds. Especially was he irresistible in criminal cases. His inductive mind took in and absorbed everything that was presented to it, and enabled him to seize every hint, grasp every situation and employ them with all the vigor of his penetrating intellect, embellished with all the beauty of his brilliant imagination, in language simple, but powerful, and with a voice of marvellous sweetness and astonishing power.

Patrick Henry was called away from his

triumphs at the bar to arouse Virginia and the other colonies to a determined resistance to the encroachments of the British Parliament, which included that most obnoxious act of tyranny upon the rights of a free people, taxation without representation. He was a member of the Virginia Legislature continuously from 1767 until he was elected Governor of Virginia.

On the 12th of June, 1776, Patrick Henry was elected the first State Governor of Virginia, and so acceptable was his administration of the affairs of the Commonwealth during the trying time of the Revolution that he was reëlected twice, and retired only when, under the constitution of the State, he was ineligible for a fourth consecutive term.

In the autumn of 1786 Patrick Henry resumed his professional labors after he had served two more terms as Governor of Virginia. It is painful to have to record that this illustrious statesman, after twelve years of constant, arduous and inestimable public service to his State and country, was obliged to return to the practice of the law on account of being poor and in debt. He was fifty years old, and his health had suffered from his close attention to public duties. He happened to mention to a friend how anxious he was to remove his load of debt, when the latter said: "Go back to the law; your tongue will soon pay your debts. If you will promise to resume practice, I will give you a retaining fee on the spot." Resisting all the attraction that public life offered to him, he carried his genius and eloquence back to the scenes of his early triumphs. The announcement that Patrick Henry was to go back to the bar was received with joy by all persons who had any interest in litigation. His great distinction permitted him to take only such cases as suited his extraordinary genius as an advocate. One of these was the famous British debts case. The origin of this case antedated the American Revolution, and went back to 1772, and was on a bond made in the month of May of that year. By the treaty with Great Britain, in 1783, British subjects could "recover debts previously due to them by our citizens, notwithstanding the payment of the debt into a State treasury had been made during the war, under the authority of the State law of sequestration." Under this provision, a British subject, one Thomas Jones, brought an action of debt in the Federal Court at Richmond against a citizen of Virginia, Thomas Walker, on the bond just mentioned. The real question was "whether the payment of a debt due before the War of the Revolution, from a citizen of Virginia to a British subject, into the Loan Office of Virginia, pursuant to a law of that State, discharged the debtor."

William Wirt declares that "the whole power of the bar of Virginia was embarked" in the case, and that the "learning, argument and eloquence" displayed were such "as to have placed the bar, in the estimation of the Federal judges . . . above all others in the United States." Patrick Henry appeared for the defendant, and associated with him were John Marshall, Alexander Campbell and James Innes. Mr. Henry prepared himself for appearing in this case with unusual care and study. Weeks before the trial was to come off, he retired to his home in the country, and devoted himself to intense study of the case and all the law bearing upon it. He filled a book with notes and heads of arguments, and spent many hours every day reading and meditating. It is related that "he shut himself up in his office for three days, during which he did not see his family; his food was handed by a servant through the office door." The result of this extraordinary preparation was that Patrick Henry "came forth, on this occasion, a perfect master of every principle of law, national and municipal, which touched the subject of investigation in the most distant point." The case was opened on the 14th of November, 1791. When Patrick Henry rose to speak,

the court room was packed to its utmost capacity, and during three days he held the large audience spellbound by his transcendent eloquence. The cause was adjourned over to the next spring term of the court, when the great orator even exceeded his former argument, and won, not only the admiring attention of an audience composed for the most part of lawyers, but also a compliment from the judge who wrote the opinion of the court.

In any cause in which he engaged, whether law or public affairs, he always proved himself a good fighter; his mind and heart worked together in advocating the cause in which he was interested. But, while doing the utmost to win—striking hard blows, right and left, using every weapon of offence and defence—he never bore malice.

As already mentioned, his success in the Parsons' Case gave an immense impetus to his professional business. From that time his fee-books show an enormous increase in the number of his cases. In a day he had risen from obscurity to great distinction, and in a colony remarkable for its great men, he was recognized as the greatest orator and statesman. As he became more and more absorbed in public affairs, his professional business gradually declined. In the year 1765, his cases numbered 547, but declined every year until 1773, when his fee-book shows only seven cases. The next year he gave himself entirely to politics, and thenceforth until after the Revolution, he retired from the practice of the law.

His eminence in the profession enabled him to command the highest fees that had up to that time ever been paid in Virginia. It was as a criminal lawyer that Patrick Henry was most successful. A contemporary describes him as perfect master of the passions of his auditory, whether in the tragic or comic line. The tones of his voice, to say nothing of his manner and gesture, were insinuated into the feelings of his hearers, in a manner that baffles all description. It seemed to operate by mere sympathy, and by his tones he could make you laugh or cry at pleasure. A memorable case was that of John Hook, a wealthy Scotchman, who was suspected of being unfriendly to the American cause during the Revolution. At the time when Virginia was invaded by Cornwallis and Phillips, in 1781, an army commissary named Venable, had seized two steers belonging to Hook, for the use of the half-starved American soldiers. At the close of the war Hook brought an action of trespass against Mr. Venable, and Patrick Henry appeared in his defence. He had complete control over the feelings of the court, jury and spectators, and kept the court room in a roar of laughter at one moment and at another touched their patriotic hearts by describing the distress of the American soldiers suffering from cold and hunger. Then he thundered, "where was the man who had an American heart in his bosom, who would not have thrown open his fields, his barns, his cellars, the doors of his house, the portals of his breast, to have received, with open arms, the meanest soldier of that little band of famished patriots? Where is the man? There he stands—but whether the heart of an American beats in his bosom, you, gentlemen, are to judge." Judge Stuart describes the scene that followed: "He then carried the jury, by the powers of his imagination, to the plains around Yorktown, the surrender of which had followed soon after the act complained of; he depicted the surrender in the most glowing and noble colors of his eloquence—the audience saw before their eyes the humiliation and dejection of the British, as they marched out of their trenches—they saw the triumph that lighted up every patriot face, and heard the shouts of victory, and the cry of Washington and liberty, as it rung and echoed through the American ranks, and was reverberated from the hills and shores of the neighboring river—but hark! what

notes of discord are those which disturb the general joy, and silence the acclamations of victory? They are the notes of *John Hook*, hoarsely bawling through the American camp, *'Beef! beef! beef!'* "

It would be difficult to describe the scene that followed; the decorum of the court was lost in the roar of laughter that convulsed the audience. The clerk of the court, unable to restrain himself, rushed from the room, and, throwing himself on the grass, rolled over and over in a fit of uncontrollable laughter. Here he was soon joined by the plaintiff, Hook, who had left the court room, and sought relief in the yard, but with feelings very different from those that had driven the court clerk to the same place. Hook not only lost his suit, but escaped a coat of tar and feathers only by a precipitate flight from the indignant patriots.

In speaking of Patrick Henry's eloquence, it has been well said that his fancy, although sufficiently rich and abundant, was not so exuberant as to oppress him with its productions. He was never guilty of the fault, of which Corinna accused Pindar, of pouring his vase of flowers all at once upon the ground; on the contrary, their beauty and their excellence were fully observed, from their rarity, and the happiness with which they were distributed through his speeches. His eloquence was described by his contemporaries as a mighty and roaring torrent—a short but bold and most terrible assault—a vehement, impetuous and overwhelming burst—a magnificent meteor, which shot majestically across the heavens, from pole to pole, and straight expired in a glorious blaze. His eloquence was the gift of heaven—"the birthright of genius." John Randolph of Roanoke declared that Patrick Henry was Shakespeare and Garrick combined.

As an evidence of the high opinion of Washington for Patrick Henry, it may be mentioned that, when the office of Secretary of State became vacant he offered the place to his old friend, and urged him to accept it. This being declined, three months afterwards the President asked him to accept the great office of Chief Justice of the United States. This was, also, declined, as well as the appointment of United States Senator, offered him by General Henry Lee, the Governor of Virginia, and the position of minister to France, tendered him by President Adams.

Professional men retired earlier in the eighteenth century than they do in these days of extraordinary mental activity. Patrick Henry, after paying his debts, and securing an ample fortune, retired finally from the bar in 1794, when he was only fifty-eight years old.

EZEKIEL'S ALIBI.

By Albert W. Gaines,

Of the Chattanooga, Tennessee Bar.

"Now, accordin' to dis ditement,
As I heahs it read to me,
I has stole a watah-milyun,
Which dey say am lahceny;
Dat I also tuk a roostah,
(So I understan' it's writ),
Likewise sundry 'n divahs pullets,
On a sartin time, to wit.

"An' yo' honah axes 'Zekiel,
  Des to state, in his own way,
'Bout de chawges brought agin him,
  Eb'rything he hab to say;
So dis niggah, as requested,
  'Fo' de jury an' de jedge,
Say he sartin am not guilty,
  As de ditement dar allege.

"Ef Ole Zeke wah stealin' chickens,
  On a sartin time, to wit,
Den he wah not pullin' milyuns,
  Sho—dis here you mus' admit;
'N' ef he *on dat time, to wit,*
  (To de Cou't I does appeal),
Wah a-takin' watah-milyuns,
  He wah on no chicken steal.

"Foh it is a fac', yo honah,
  Dat de milyun, full ob juice,
Nevah perch hisse'f wid pullets
  'Way up on de chicken-roos';
An' de chicken say it isn't
  Des ezactly in his line
Foh to be diskivered growin'
  On de watah-milyun vine.

"So, it 'pears to me, yo honah,
  When dis ditement chawge so loose,
Dat dis niggah's in de milyun-patch,
  He is at de chicken-roos';
When it say he's stealin' chickens,
  Sho—it's plain dat he's not nigh,
Kaze he's den among de milyun vines—
  So I pleads de alibi."

SCHEMES TO CONTROL THE MARKET.

By Bruce Wyman,
Assistant Professor of Law in Harvard University.

I.

WHENEVER there is an accepted belief among men that a certain line of policy is for their industrial salvation, that belief has already become a principle of the law. In dealing with the eternal problem of competition and combination the judges have the same social imagination as other men. And as the most of men still think that competition in general is a good, the most of courts yet consider combination an evil. Whether or not it is true that a combination in restraint of competition is against the better interests of the community may be judged from the many and various instances of schemes to control the market related in this article.

II.

From the Common Pleas in the year 1415 the following case is reported: "Writ of debt was brought on an obligation of one John Dier, in which the defendant declared upon a certain indenture which he set forth, on condition that if the defendant did not use his art of dier's craft within the town where the plaintiff, *etc.*, for a certain time, to wit, half a year, the obligation should lose all force, *etc.*, and said that he did not use his art of dier's craft in the time limited, which he averred and prayed judgment, *etc.* Hull.—In my opinion you might have demurred upon him, that the obligation is void, for that the obligation is against the common law, and by God, if the plaintiff were here, he should go to prison until he paid a fine to the king. Strange.—We aver that the defendant has used his art for a time, to wit, vii. days, within the time limited by the condition, and the others to the contrary."

From that day to this every contract in total restraint of trade has been held invalid. Our law has never been free from the fear that such agreements might result in serious disturbance of the ordinary processes of competition. This fear was well founded in ancient times, when the market was small, for England had not yet changed from a local economy where each community was sufficient to itself into a national economy which implied interchange of goods between distant communities. Therefore, if one dyer agreed with another not to ply his trade, as likely as not that would leave the other in possession. For that reason the court held the contract against public policy with such righteous indignation.

The same industrial wrong was worked by any scheme to gain control of the market. In early days, in a small town, it was quite possible for one man to buy up all of a commodity coming into the market, which he could then sell again at his own price. Practices such as these were indictable offences in these early times. It was against the public peace that the market should be thus disrupted. There is much ancient law distinguishing forestalling from regrating, and discriminating between enhancing and engrossing. This sort of distinction on distinction is seen in the argument of counsel in King *v.* Maynard (Cro. Car. 231), an information for engrossing one hundred bushels of salt to sell again.

But all of these involved the same misdemeanor, control of the market. This law has all but disappeared as the market has expanded until it has gotten almost beyond the power of any one man to corner it. But this law remains against combinations in restraint of trade, which often are large enough to take possession even of the modern market for a time for their own ends.

The simple case of restraint of trade is as obnoxious to a modern court as ever. Tuscaloosa Ice Company *v.* Williams (127 Ala. 110), the latest uncomplicated case, shows that. The complaint recited that by the terms of an agreement between the plaintiff and defendant, the first party was to pay $875 a year and the second party was to shut down his ice machine for five years. A demurrer to the bill, pointing out that the agreement was in restraint of trade, was sustained.

Mr. Justice McClellan said in part: "This contract is clearly bad. It tends to injure the public by stifling competition and creating a monopoly. Its manifest purpose even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the town of Tuscaloosa and vicinity, and such is its operation and effect. Indeed, on the allegations of the plea it was even worse than this, for one of its results was to reduce the available supply of ice below the needs of the locality affected by it. It thus operated not only to put it in the power of the covenantee to arbitrarily fix prices, but directly and necessarily to create a partial ice famine, upon which the defendant company could batten and fatten at its own sweet will. That a monopoly was created is clear beyond all dispute. That ends the case against the validity of the covenant. Nor is there the least merit in the suggestion that ice could be brought to Tuscaloosa from other places, and hence that the defendant had no monopoly. All of the foregoing propositions sustaining the conclusion that the contract sued on is violative of public policy as stifling competition and promoting monopoly to the manifest injury of the public are fully supported."

In recognition of this law various devices have been tried by astute lawyers to avoid it. A late example of this sort of scheme is the "dead lease" seen in Clark *v.* Needham (125 Mich. 84). The arrangements made by the attorney involved two leases, one from the party who was to sell out one branch of his business, absolute in form at a high rental to be paid by the buyer; the other from the buyer back to the seller at nominal rental, with covenants against engaging in that line of business.

The court was quick to see through this elaborate plan; Mr. Justice Grant said on that point: "These two instruments constitute but one instrument, and must be construed together. Briefly stated, the agreement is this: Plaintiffs, in consideration of $1500, to be paid to them annually, agreed for a period of five years not to manufacture or sell chaplets, except for only one party. Plaintiffs' sales were not limited to the place of manufacture, but extended into other States. The plain object of the agreement was to substantially close this part of plaintiffs' business, and to give defendants a monopoly of it. The parties evidently recognized the invalidity of such a contract, put in plain and unequivocal language, and sought to evade it by these two so-called leases. The arrangement was a bare subterfuge to evade the law. Defendants did not buy out plaintiffs' business, machinery and plant, or lease them for the purpose of continuing their (plaintiffs') business. The result intended and accomplished was to close that part of plaintiffs' business, to throw their employés out of employment, and to deprive the public of any benefit from the continuance of their business. Such contracts tend to destroy competition and create monopolies, and are void."

These, then, are first principles. It is enough if between the two parties to the agreement the restraint is total in any particular. And it does not relieve the situation if the effects of that agreement may be limited to a greater or lesser extent by competition of parties outside of the agreement. The law regards what the effect would be if more and more of such agreements were entered into between competitors in the same

field. The only matter of difficulty is to determine as a matter of fact what schemes will result in control of the market; for some of these are deep laid, as this discussion will disclose. Upon the whole, few rules in our policy are so thoroughgoing as this against restraint of trade.[1]

III.

Upon this vexed question of combination in restraint of trade the leading case in America without much doubt is India Bagging Association *v.* Kock (14 La. Ann. 168); the facts, as they appear from the finding of the court, are as extreme as can be imagined. In 1856, an association was formed of eight firms in New Orleans, holders of large stocks of India bagging. By the agreement the subscribers bound themselves not to sell any bagging whatever for three months, except by vote of the majority. This suit was brought against one of the members by the association for selling seven hundred and forty bales in contravention of these articles, the agreement providing for ten dollars' penalty for each bale so sold.

Mr. Justice Buchanan dismissed this suit in a peremptory manner: "This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice. It is, therefore, adjudged and decreed that the judgment of the District Court be reversed, and that this suit be dismissed, at costs of plaintiff in both courts."

This case, it is plain, represents one extreme—unreasonable suppression of competition; it will, therefore, fix the limits of the discussion to bring forward for examination a case at the other extreme—reasonable regulation of competition. In Stovall *v.* McCutchen (54 S. W. Rep. 969), the facts were these: In 1895, appellant and appellees, all merchants of Russellville, signed an agreement as follows: "We, the undersigned, merchants of Russellville, do hereby agree and obligate ourselves to close our place of business at 6.30 o'clock, beginning May 15th, 1895, and lasting until the first of September." The pleadings and proof all agreed that the intention of this writing was that the stores were to be closed at 6.30 p. m. of each day during the time specified, except on Saturdays. After compliance for a few evenings after the 15th of May, appellant notified appellees that he declined to further comply with the agreement, but would disregard it. This he did. Appellees instituted this action to compel him to specifically perform the agreement.

The opinion of Mr. Justice White was brief, but to the point: "While it is true that contracts in restraint of trade are to be carefully scrutinized, and looked upon with disfavor, all contracts in restraint of trade are not illegal. The restraint here put is but partial,—very inconsiderable. It is but a few hours, at most, each day, and for three and one-half months, during the extremely hot weather. It has come within the observation of the members of this court that during this season (May 15th to September) many merchants close about 6.30 or 7 p. m. This cannot be held to be an illegal restraint of trade."

Of the arrangements between competitors to limit competition some are easy to dispose of under these rules, others are not. Whether or not the scheme results in suppression of substantial competition is the test, a question

[1] The following cases, among others, hold a contract in total restraint of trade unenforceable:

Prugnell *v.* Goff, Allyn, 67; Gunmakers *v.* Fell, Willes, 388; Leighton *v.* Wales, 3 M. & W. 545; Toby *v.* Major, 43 Sol. J. 778; Oliver *v.* Gilmore, 52 Fed. 563; Cravens *v.* Carter Crume Co., 92 Fed. 429; Fowle *v.* Parke, 131 U. S. 88; Lumber Co. *v.* Hayes, 76 Cal. 387; Craft *v* McConoughy, 79 Ill. 346; Harrison *v.* Lockhardt, 25 Ind. 112; Chapin *v.* Brown, 83 Ia. 156; Presbury *v.* Fisher, 18 Mo. 50; Murray *v.* Vanderbilt, 39 Barb. 140; Grasselli *v.* Lowden, 11 Oh. St. 349; George *v.* Coal Co., 83 Tenn. 455; Fairbank *v.* Leary, 40 Wis. 637.

of degree often difficult to fix. Whether independence is reserved in essential things is the question, or whether there has been a surrender of such independence so that there is now no motive for competition is the issue, a question of fact often difficult of interpretation.

Nester *v.* Continental Brewing Company (161 Pa. St. 473) is representative of the class of cases in question. The bill set forth that a Brewers' Association of Philadelphia had been formed under articles of agreement in writing by forty-five brewers of Philadelphia, individuals, firms and corporations. By the principal section of the agreement each member of the association agreed not to sell any beer to any new trade or to any customer of any brewer that belonged to the association. The court below found that the object of this combination was to regulate the price and control the distribution of beer within the city.

A summary from the opinion of Mr. Justice Sterrett follows: "The test question in every case like the present is whether or not a contract in restraint of trade exists which is injurious to the public interests; if injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious. So if the natural tendency of such contracts is to injuriously affect public interests, the form and declared purpose are immaterial. Courts will not lend their aid in illegal transactions no matter how disguised."

Emery *v.* Ohio Candle Company is an interesting arrangement also. An association was proved in that case to include ninety-five *per cent.* of the manufacturers of star candles in the United States. The members of the association surrendered their freedom of action by this provision, that they were required to pay into the treasury two and one-half cents per pound on every pound of candles disposed of on their own account. None of them were bound to operate their factories; whether they did or not they received a share in the profits of the pool. This plan was thus self-acting; it was to the interest of each member to remain idle when the price was low, to operate only if the price were high. It was found as a fact in the case that the expected result followed; the production of candles decreased, the price of candles increased during the whole existence of the association.

The court pronounced the arrangement bad altogether: "We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary to public policy and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement the action is in substance a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. Its suit is to recover its portion of the ill-gotten gains."

The combination in restraint of trade once proved to be such, outlawry is declared.[1] It can bring no suit against those in it, but neither can they sue it; the courts will have nothing to do with association or associates. That is the penalty, that the loss must lie where it falls, a holding which in itself is often one of the strongest of deterrents. Thus any member of the association may withdraw whenever it suits his interest to do so, a result that minimizes the harm that such a combination may effect. For experience shows that the result is that competition still goes on surreptitiously, despite the agree-

[1] The following cases, among others, hold a combination in restraint of trade invalid:
Hilton *v.* Eckersley, 6. E. & B. 47; Cousins *v.* Smith, 13 Ves. 542; U. S. *v.* Jellico Co., 46 Fed. 342; U. S. *v* Nelson, 52 Fed. 646; Mill Co. *v.* Hayes, 76 Cal, 387; Moore *v.* Bennett, 140 Ill. 69; Houston *v.* Kentlinger, 91 Ky. 333; Fabacker *v.* Bryant, 46 La. Ann. 820, Bingham *v.* Brands, 77 N. W. 940; Cohen *v.* Envelope Co., 166 N. Y. 292; Salt Ass'n *v.* Guthrie, 35 Oh. St. 666; Morris Coal Co. *v.* Barclay Co., 68 Pa. St. 173; Mallory *v.* Oil Works, 86 Tenn. 598; Oil Co. *v.* Adone, 83 Tex. 650.

ment, since every active member is strengthening his position in preparation for an ultimate withdrawal at the psychological moment.

IV.

An interesting plot to hold up the market is seen in Pacific Factor Company *v.* Adler (90 Cal. 110). In that case the declaration was that the defendant agreed to deliver to plaintiff company, or their order, whatever number of grain bags up to 187,500 the said company should call on him to deliver until Jan. 1, 1889, on payment to him of seven and one-half cents for each bag; and defendant agreed not to sell to any one other than the plaintiff. The defence was that the plaintiff entered into contracts with other holders of grain bags in all respects similar to the contract made with the defendant to the amount of 30,000,000 bags, with intent to monopolize the market. Motion was made for non-suit upon the following facts: The entire number of bags in the State on the 16th day of May, 1888, and which would arrive prior to January 1, 1889, amounted to 42,000,000; that the annual demand for bags was 32,000,000; and that the plaintiff entered into this "scheme" or "plan" to obtain the control of these 42,000,000 bags, and in pursuance of said plan by contract did actually secure the control of 30,000,000 of these bags from the owners and holders thereof.

Mr. Justice Garoutte affirmed the non-suit. Extracts from his opinion show his argument: "The plaintiff did not purchase the bags; at the same time, by the rigor of its contract, it prevented the owners from selling them. It is clear this 'scheme' or 'plan' was devised, and these contracts entered into, for the purpose of removing all competition, and thereby compelling the farmers to purchase bags from plaintiff, at a price in excess of their real value. Plaintiff controlled three-fourths of all the bags which were in the State, or which would arrive within the ensuing six months. It held the bag market in its hands, for competition was gone, and the price demanded must be paid. These agreements were not entered into for the purpose of aggregating capital, nor for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competitors, but for the purpose of regulating, controlling and withholding the supply of bags, and thereby to take an unjust advantage of the farmers' necessities, by disposing of the fruits of its unlawful labors at an unreasonable advance in price."

Cummings *v.* Union Blue Stone Company (164 N. Y. 401) is higher finance, perhaps, but it is the same thing in last analysis. The evidence was to the effect that in 1887 the plaintiff and fourteen other persons were the producers of nearly the whole product of Hudson River blue stone, and of at least 90 *per centum* of the whole amount of such stone sold in the New York market to customers in various States east of the Mississippi River, and that their yearly sales amounted to upward of $1,500,000. Owing to competition among themselves, their profits had for some time been practically nominal; accordingly, with the intent to increase their profits, and to secure to each of said producers such part of the sales as his usual production bore to the whole production, they entered into the agreement in question, with the defendant, the Union Blue Stone Company. It was thereby agreed that this company should act as their sales agent of all the marketable blue stone, manufactured and unmanufactured which the market would take for the six years from that date at prices to be fixed by the Blue Stone Association should apportion the sales among the producers according to a schedule set forth in the contract, and should sell for no other parties. The producers agreed to sell no stone except through such agent, and, acting as the Blue Stone Association, to fix the prices, and each to furnish, upon the re-

quest of the sales agent, his quota of stone as apportioned. This contract was observed by the parties for about three years.

Accordingly, Mr. Justice Landon held this arrangement bad altogether: "The plaintiff urges that it was a question of fact for the jury, and not of law for the court, whether the contract was simply to secure reasonable prices, or to extort from the public unreasonable prices. It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great. The parties to this contract controlled 90 *per centum* of a total produce of about $2,000,000 in value, marketed in New York city. Other kinds of stone were in competition with it, but it is plain that the customer who preferred this stone would be restricted in his reasonable rights, if constrained by a monopoly to pay an exorbitant price for it or to accept another kind which he did not want. The uncontradicted evidence left it clear that this contract was void for the reasons stated, and the trial court was right in so holding as a matter of law."

A precious scheme is disclosed in Milwaukee Masons and Builders' Association *v.* Niezerowski (95 Wis. 129). This was an action on a note to which the following facts were pleaded as making out a defence upon grounds of public policy. The note was given by the defendant, a builder, to the plaintiff, the association, in pursuance of its requirements that every successful bidder for contracts in Milwaukee should pay over to the association six *per cent.* of the contract price. A prudent bidder would, of course, add the six *per cent.* to his original offer; and as all in the association would do this, the effect would be to force up prices to that extent. It is needless to say that this general plan was kept a secret.

The showing of such a scheme was enough for Mr. Justice Pinney. He said on that point: "The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exist no contract relations. While all reasonable stipulations and means to protect labor or trade are laudable, we must hold that the means here sought to be employed are such as the law will not sanction. We must consider what may be done under such an agreement, and the result which it will necessarily produce. As already pointed out, the operation of this combination, under its private by-laws, is to suppress free and fair competition in bidding for contracts, and by delusive and deceptive means members of the association are enabled to exact from owners a higher price for buildings than they would otherwise have to pay. In the matter of changes or additional work, all competition by other members of the association is prohibited, unless the amount exceeds the original contract price. And as the membership of the association embraces nearly six-sevenths of the mason builders in Milwaukee, the combination not only tends to suppress competition, but operates most unjustly toward builders not members of the association. The restraint thus imposed on the trade is neither fair nor reasonable."

An amazing machination was brought to view in one of the principal proceedings instituted under the Federal Anti-Trust Law, Addystone Pipe Company *v.* United States (175 U. S. 211). This arrangement was entered into by almost all of the manufacturers of iron pipe between the Appalachian Mountains and the Rocky Mountains. By the by-laws, before any sales could be made by any

member of the pool, he must obtain the right from the association. These rights were sold over the table at a secret auction conducted by the central body. Did Atlanta advertise for iron pipe, Atlanta was put up for the highest bidder, who paid the bonus bid into the treasury of the pool. The firm that had thus bought Atlanta had the right to make such a price to her as pleased it. The other members of the combination, on request, were bound to aid by furnishing a fictitious competition by putting in tenders higher yet. So that all that appeared to the eye was that the prices for iron pipe were mounting higher and higher.

In the course of the final decision, Mr. Justice Peckham said: "The combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction resulting high prices would not have obtained. We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity are continually being made. Total restraint of trade in the commodity is not necessary in order to render the combination one in restraint of trade.

All of these cases show that a well-knit organization often has the power to control even the modern market, wide as it is. It is the recognition of this possibility that makes the law against the conspiracy to control the market so thorough-going. For there is no doubt, unfortunately, how any body of business men will act when they get control of the market. It is a practical certainty that if they can get beyond the reach of competition they will raise prices. As it is this competition which in the usual case protects the public by its unvarying action, the policy of the law is to perpetuate it by breaking up all such combinations.[1]

V.

In this last decade the ingenuity of attorneys acting in behalf of clients who wished to bring about a community of interests has led to a change of base at least four times during this brief period. The four plans thus tried with such indifferent success have been: First, the pool—a direct agreement between the corporations concerned for their joint operation to a certain extent; second, the trust—an indirect arrangement between the shareholders to control the action of their corporations; third, the holding corporation—a central company to hold the shares of the constituent companies; and fourth, the single corporation which buys the properties of the combining corporations outright. The modern problem still unsolved is, how may various corporations be concentrated under one control? It will give a better understanding of these—the present condition, if one example is cited of each.

The leading case against the combination of corporations by any partnership is Whittenton Mills *v.* Upton (10 Gray 582). The report of the master disclosed the following facts: The Whittenton Mills were incorporated by Statute 1836, Chapter 19, for the purpose of manufacturing cotton goods. Before 1850, an agreement of copartnership was entered into between the Whittenton Mills and W. Mason. This partnership, under the firm name of William Mason & Company, carried on an extensive business in the manufacturing of machinery for cotton mills;

[1] The following cases, among others, hold a conspiracy to suppress competition illegal:

Anon, 12 Mod. 248; U. S. *v.* Joint Traffic Ass'n, 171 U. S. 605; Lowry *v.* Tile Ass'n, 98 Fed. 897; State *v.* Ins. Co., 66 Ark. 466; State *v.* Phipps, 50 Kans. 609; Woodenware Ass'n *v.* Starkie, 84 Mich. 76; State *v.* Firemans Club, 152 Mo. 44; Lucke *v.* Assembly, 77 Md. 396; Ertz *v.* Exchange, 79 Minn. 140; Stahl *v.* Schlitz Co., 104 Tenn. 715; Richards *v.* Desk Co. 87 Wis. 503.

afterward adding the business of manufacturing locomotive engines. In 1857 the Whittenton Mills, which had continued the business of manufacturing goods, and the said firm of William Mason & Company both became insolvent. Prior to that time the general agent of the Whittenton Mills represented to third persons, with whom the firm of William Mason & Company were dealing, that the corporation was a member of the partnership.

The court—Thomas, J.—held that all this made no difference, since, as a matter of law, a corporation could not be a member of a partnership. The following extract will show the line of reasoning: "The effect of all our statutes, the settled policy of our Legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchise should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy. The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a manufacturing corporation under the legislation of the Commonwealth."

Such was the state of the law when the trust agreement was sprung upon a startled community. The material features of that notorious scheme are well known; the first of the adjudications recited them at length—People *v.* North River Sugar Refining Company (121 N. Y. 582). All the shares of the capital stock of all of the confederating corporations were transferred to a board of trustees. These trustees issued trust certificates in lieu of these shares, thus reserving the voting rights in all of the corporations. As a cover for the scheme all of the several corporations were left in existence, and in form each conducted its own business without any cross agreements between themselves.

In one of the most literary opinions in our books Mr. Justice Finch held the trust agreement invalid. He concluded thus: "And here, I think, we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest. It is not a sufficient answer to say that similar results may be lawfully accomplished by an individual. And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy."

Whether the holding corporation is a way out of this last decision may well be doubted. The situation would seem to be the same in all essentials. The case of United States *v.* Northern Securities Company *et al.* (120 Fed. Rep. 720) is so much in the mind of everyone that it is needless to recite the facts. It is true that there is no direct agreement between the Great Northern Railroad and the Northern Pacific Railroad; it is true that in

form each company is distinct from the other. But it is also true that all competition is at an end between these two systems, because it is also true that these roads are under one control. The situation in holding plan is in all substantial points the same as in the trust scheme.

Therefore the final holding may with some confidence be predicted from the decision in the court below, where Mr. Justice Thayer said in substance: "The scheme which was thus devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between the two roads engaged in interstate traffic which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies. It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce, that is to say, a combination whereby the power has been acquired to suppress competition between two or more competing and parallel lines of railroad engaged in interstate commerce. If it does disclose such a combination, and we have little hesitation in answering this question in the affirmative, then the anti-trust act as it has been heretofore interpreted by the court of last resort has been violated, and the government is entitled to a decree."

It may well be maintained that the present form of organization of the great industrial companies is beyond all the law that has been brought forward, for the single corporation, the present form, is not a combination in the eye of the law. The case upon which the legality of a large proportion of the great corporations depend is Trenton Potteries *v.* Oliphant (58 N. J. Eq. 507). The general process there had been the usual one; a single corporation had been formed which had bought outright the properties of the former companies.

Mr. Chief Justice Magie held everything that was done valid: "Appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The Legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitaton on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the Legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time at least, destroy competition. Contracts for such purchases cannot be refused enforcement." [1]

[1] The following cases, among others, discuss the combination of corporations:

(1) The pool, Hopkins *v.* U. S., 171 U. S. 578; Addystone Pipe Co. *v.* U. S. 175 U. S. 211; Boyd *v.* American Carbon Co. 182 Pa. St. 206; Sabine Tram Co. *v.* Bancroft, 16 Tex. Cev. App. 170; (2) trust, Distilling Co. *v.* People, 156 Ill. 486; Fire Ins. Co. *v.* State, 75 Miss. 24; State *v.* Standard Oil Co., 49 Oh. St. 137; State *v.* Distilling Co., 29 Neb. 700; (3) holding corporation, Pearsall *v.* No. Pacific Co., 161 U. S. 646; Market St. Ry. *v.* Wellman, 109 Cal. 571; People *v.* Chicago Gas Trust, 130 Ill. 268; Grenville Press *v.* Planters Press, 70 Miss. 669; Marble Co. *v.* Harvey, 92 Tenn. 115; (4) new incorporation, U. S. *v.* E. C. Knight, 156 U. S. 1; Harding *v.* Glucose, 182 Ill. 551; Central Shade Co. *v.* Cushman, 143 Mass. 353; Oakdale Mfg. Co. *v.* Garst, 18 R. F. 484.

The state of things at the present writing, then, seems to be this: That the pool, the first of these forms, is certainly bad; that the single corporation, the fourth form, is almost as certainly good; while the trust, the second form, is probably bad, which involves the holding corporation, the third form.

From step to step in this succession there is a movement toward integration. Now that the end of that evolution has been reached in the single corporation, the law against combinations in restraint of trade may at last cease to operate. It has done a good work in forcing those who wish to bring together various corporations into greater enterprises to organize in an open manner under the general corporation laws. Then at last the State may impose such special regulation upon these industrial trusts as the situation requires.

VI.

This industrial reorganization during the last decade may be set down as marking the most important epoch in the economic history of the United States. When the recent movement is so described, it is recognized that it has come about from the combination of various smaller units into larger units. Such consolidation in the face of an adverse policy which made against all restriction of competition has been at times an almost desperate forward movement. That there is so much accomplished fact in consolidation to show despite this law against combination in restraint of trade is proof positive that there have been two opinions upon the social advantage of such concentration all the time, which has been the cause of this weakness. Upon the whole, however, the law against the combination stands unaltered, but it is overreached by the law in favor of the corporation.

EXAMINATIONS FOR THE BAR.[1]

By Honorable Lawrence Maxwell, Jr.,

Of the Cincinnati, Ohio, Bar.

IT is to be regretted that Professor Williston, to whom the committee originally assigned the task of preparing a paper on this important subject, is prevented from keeping his appointment. He would doubtless have laid before you a comprehensive review of the progress of the movement to raise the standard for admission to the bar, and of its present state in various parts of the union, supplemented by reflections and suggestions which would have been of value to those interested in the subject, either as judges, legislators or bar examiners. I have not engaged with the committee to supply the place of such a paper, but only to prevent an absolute gap in the program by presenting briefly some considerations, which may serve to open the discussion. I am obliged to draw upon a rather limited experience gathered through a short service as bar examiner in Ohio, and as a member of a committee of the bar which assisted the Supreme Court of our State to frame the rules and regulations for admission to the bar which were adopted in 1897. I may say that on paper our regulations in Ohio are ideal. Admission to the bar is placed where it should be, in the hands of the Supreme Court, under a statute which provides for an examination, and that the candidate must

[1] An address before the American Bar Association at Hot Springs, Virginia, August 27, 1903.

have sufficient general learning and must have studied law regularly and attentively for three years. The court has established a standing committee to conduct the examinations and has framed rules. We have encountered some difficulties in enforcing the excellent rules adopted by the court. Perhaps our experience may be of value to gentlemen from other States and their experience is likely to be useful to us.

The real purpose of examinations for the bar is to secure proper preparation on the part of those who propose to practise law, and they are useful to the extent that they accomplish that end. They operate by a process of exclusion. It is not necessary to hold examinations for the purpose of admitting members to the bar. They are held for the purpose of excluding applicants, and the question always is, who shall be refused permission to commence the practice of law. I propose to deal with the subject from that point of view and to invite your attention to the classes of persons who in the public interest and for the greatest good of the greatest number, including themselves, ought not to be permitted to hold themselves out to the public as attorneys and counsellors at law.

A general education is the first and most obvious requirement. The law is a science which cannot be studied by those who have not laid the foundation by a course of mental discipline and practice in study, and who have not acquired a certain fund of knowledge of common things. What is known in the United States as a high school course is generally recognized as the least amount of preliminary training and practice in study that will enable a young man to take up successfully a subject so intricate and complicated and calling for such powers of analysis and generalization as the law. This means that the law student shall attend school until he is eighteen or nineteen years of age, studying the English language, its grammar and literature, with exercises in composition, arithmetic, algebra, geometry, geography, the outlines of ancient and modern history, with special reference to English and American history, physics, and a course of two years in a classical or foreign language. These are the minimum requirements for admission to law schools of recognized standing and are the specific requirements for admission to the bar imposed by statute or rule of court in many States, including Ohio, New York, New Hampshire, Colorado, Connecticut, Delaware, Illinois, Iowa, Minnesota, Rhode Island and Vermont. In 1898 Mr. Goodell and Judge Danaher, members of the New York State board of law examiners and Mr. J. S. H. Frink of the New Hampshire board, gave to this association their opinion of the great value of a standard of general education as a condition of commencing the study of the law. Judge Danaher said that according to his observation, the requirements in New York had been productive of wonderful results in elevating the tone and general standard of the profession, and that from his experience he would rather abolish examinations in law than dispense with a high preliminary condition of general education. In New Jersey the value attached to general education is indicated by a provision which requires a candidate for admission to the bar to have studied law four years if he has not been admitted to the degree of bachelor of arts or bachelor of science. Three years' study is required from candidates holding those degrees. In Rhode Island a candidate who has received a classical education is required to study law only two years while other candidates are required to give three years to the study of law. On the continent of Europe the only avenue to the bar is through the universities. In England candidates for admission as attorneys or solicitors, as well as candidates for the bar, who are not university men, must submit to a preliminary examination about

equivalent to that required for graduation from an American high school, before entering upon the study of the law. The requirement is an entirely reasonable one. It means after all only that a young man who proposes to apply himself at the age of 21 or 22 to an intellectual vocation should devote himself up to that time in reasonable and necessary preparation.

The requirement for general education as a condition of successful professional study, was happily stated by Blackstone a century and a half ago.

"If the student in our laws hath formed both his sentiments and style by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this, or any part of it, a student thus qualified may enter upon the study of the law with incredible advantage and reputation."

The resistance to even moderate requirements is illustrated by an act passed by the legislature of Ohio at its session next after the adoption by the Supreme Court of a rule requiring candidates for admission to the bar to produce a certificate of graduation from a high school, or of admission to a college of approved standing, or of an examination upon the subjects required for graduation from a high school. The act provided that no rule of the Supreme Court requiring an applicant for admission to the bar to have received a diploma of graduation or a certificate granted by a board of school examiners, as a condition for admission to the bar, should affect or apply to any person who had studied law during a period of three years prior to the passage of the act. The statute might have been entitled appropriately an act to protect vested interests in illiteracy. The remarkable feature of it was that our law had provided from the earliest times that applicants for admission to the bar should have a general education. The rule of the Supreme Court did not, therefore, impose a new condition. It sought only to enforce an old condition by requiring specific and definite proof of compliance therewith. But anything specific and definite and certain is what those who propose to break into the profession by the back door most abhor. Glittering generalities is their delight. They are ready to produce general certificates, but they resent attempts to compel them to tell when and how and where they acquired their attainments or exactly what they are, or to submit their pretensions to test.

Since the chief purpose of insisting upon preliminary general education is to insure a certain degree of mental maturity and of capacity on the part of the student to take up the study of law, his qualifications in that respect ought to be ascertained and passed upon before he is permitted to register as a student of law. In law schools of recognized standing, it is made a condition of admission. In New York he is given a year after registering as a student of law, to comply with the rule on the subject of general education.

The next most obvious and essential requirement for admission to the bar, is that the student shall study law for a certain period, which ought not to be less than three years. The law cannot be mastered except

by prolonged and attentive study. Nothing can take the place of time, and experience has shown that three years are none too many to enable a person of average capacity to acquire a fair knowledge and understanding of the fundamental principles of the law. This is obvious when we remember that the subjects to be mastered include the law of real and personal property, torts, contracts, partnership, bailments, negotiable instruments, agency, suretyship, domestic relations, wills, corporations, equity, criminal law, constitutional law, pleading and evidence.

A three years' course of study is required in the following States: Delaware, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, New Hampshire, Ohio, Oregon, Rhode Island, Vermont, Wyoming, Colorado and New York, and in Pennsylvania for admission to the bar of the Supreme Court. In New Jersey four years are required of those who have not received the degree of bachelor of arts or bachelor of science. In the following States two years' study of law is required: Louisiana, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, Washington, West Virginia and Wisconsin. Two years was the former requirement in Ohio, which was raised to three years in 1894.

The experience of bar examiners seems to be that the percentage of failures among those who have studied in law schools is about one half as compared with those who have studied without tuition or with the meagre tuition provided by a law office. The immense advantage of study in a law school, with its prescribed courses, regular exercises, periodical examinations, and the competitive association of men in classes, with their moot courts and debating clubs, is obvious. It cannot be denied that the schools furnish opportunities for study and development of which the private student is deprived, and present advantages which in point of time alone are likely to make two years of study at a law school worth three years of private study. I do not find that the regulations for admission to the bar in any State require that any portion of the tuition shall be in a law school, but the time may come when candidates for the bar will be required by rule or statute to avail themselves of the superior opportunities for study provided by the law schools, for a portion at least, of the prescribed period of study.

The familiar scheme which I have thus outlined proposing that the candidate for admission to the bar shall prepare himself by a course of preliminary study, and then shall apply himself for three years to the study of law, is simple enough and entirely reasonable and ought to insure a fair general standard. But to be effective it must be enforced. Rules prescribing standards of preliminary education and definite periods for the study of the law are of no avail unless they are rigidly enforced by insisting upon clear and explicit proof of the facts. Here the bar examiner is confronted with the difficulties presented by false certificates, false sometimes in detail and fact, but more often in general intent.

With respect to certificates of general education, our experience in Ohio has shown that nothing can be depended upon as a substitute for a diploma of graduation except the test of an examination by examiners appointed by the Supreme Court, who act under a sense of direct responsibility to the court. Our rules originally provided for the acceptance of certificates of examination by local examiners, but the court found itself so frequently imposed on by such certificates that it adopted a rule providing for examinations to test the general educational qualifications of the candidate by a committee appointed by the court, where he was not able to produce a certificate of graduation from a high school, or of matriculation in a col-

lege of approved standing. The rules of the State board of law examiners in Illinois provide for special examinations in such cases by the principal of a high school of that State, or the superintendent of a district having a high school under his supervision. The certificate must be sworn to and state the date and place of the examination, the time consumed therein, the extent to which each study covered by the examination was pursued by the applicant, and the true and just grade of proficiency shown by the applicant in each study on a scale of 100.

With respect to certificates of study of law, the attempts to evade the rules are even more flagrant than in the case of certificates of general education, and I am sorry to say are often successful. In Ohio, for instance, our statute provides that no person shall be admitted to the bar examination who has not regularly and attentively studied law during the period of three years previous to his application, either under the tuition of a practising attorney, or in regular attendance at a law school, or for part of the period under the tuition of a practising attorney and for the rest of it at a law school, and the rule of the Supreme Court intended to enforce effectively this provision of the statute provides that the candidate must file with the clerk of the court the certificate of such attorney, or the chief officer of the law school, as the case may be, showing among other things, the date when he commenced the study of law. The rule declares that the three years' study of law required by the statute shall date from the filing of such certificate. The requirement that the candidate shall have regularly and attentively studied law during the period of three years obviously means, and it is quite useless and insignificant unless it does mean, that he shall make the study of law his business for three years, and not that he shall study law off and on during a period of three years devoted to some other vocation. It would clearly not be a compliance with the statute if the candidate's certificate stated specifically that he had studied law every other day or every third day or two hours each day during a period of three years; and yet it is notorious that persons are constantly admitted to the bar examination in Ohio whose study of law is of the latter character. Certificates of study are accepted from law schools in which instruction is given during not more than three or four hours each week, and from practising attorneys who give no instruction whatever to the student and who subject him to no examination. No certificate of study in a law school should be accepted unless the exercises of the class room occupy at least ten or twelve hours a week for eight or nine months in the year. Certificates of study in the office of attorneys should be scrutinized with the greatest care. All certificates, both of general education and of study of the law, should be detailed and specific. Our State bar association has recently suggested to the Supreme Court an amendment of its rules so as to require that the certificate of study of law shall state what subjects were studied, what time in hours the candidate gave to each subject, what text books he used, how many examinations, if any, he was subjected to during the period of study, with the subjects and methods of the examination, what time was given to the instruction of the candidate, and whether, having studied at a law school, he failed to obtain a certificate or diploma from the authorities of the school. The last suggestion was the result of an imposition, which came to the knowledge of the court in the case of a student who had registered under the tuition of a practising attorney, in whose office he studied law for a year, subsequently going for two years to a law school. He failed to pass the law school examination, and was therefore unable to get a certificate from the officers of the school. In that predicament he applied to the attorney with whom

he had originally registered, who certified that he had studied law for three years and recommended his admission to the bar. We must assume in charity that this certificate and recommendation was given without knowledge on the part of the attorney that the candidate had been refused a certificate from the authorities of the law school.

The first and by far the most important duty of the bar examiners is to scrutinize the certificates that are presented to them. If they discharge that duty faithfully, by subjecting them to a rigid test, and if they reject at once all candidates who do not produce reliable evidence of general education and clear proof of having studied law for the requisite period, their work is more than half done, for they will have adopted a reasonably sure precaution against the admission of men who are not prepared. In Ohio the court itself examines the certificates and determines who shall be admitted to the examination. If the examiners could, in addition, assure themselves of the character of the instruction in law, which the candidate has received, the importance of a bar examination would be greatly reduced, if indeed it might not be dispensed with; but since it is impracticable in many cases to assure oneself of the character of the student's instruction by any certificate, the character and method of the bar examination must remain a matter of importance.

Everyone realizes the difficulty of testing the qualifications of a candidate for admission to the bar by means of an examination which in a few hours must cover the entire field of law, but the difficulty can be greatly reduced if the questions are framed so as to circumvent the skill of the crammer and the art of the professional coach.

In 1895 Lord Russell, Lord Chief Justice of England, in an address delivered at the opening of the course of lectures under the Council of Legal Education, gave two instances which he had carefully verified, of candidates who had passed the bar examinations with the sole assistance of a coach, and he came reluctantly to the conclusion that the examinations held by the Council of Legal Education could be satisfactorily passed without any prolonged study and without any real learning, provided the candidate had the guidance for a comparatively short period of a skilled crammer. In both of the cases which he verified, the candidates were Oxford men. One had studied Roman law at the university, but being unable to pass on that subject there, took it up under the auspices of the Inns of Court. He went to a coach in the beginning of November, and after one month's coaching, passed a so-called "satisfactory" examination in all of the subjects of the curriculum including common law, equity and Roman law. The other candidate had not attended any lectures upon law at the university. His first reading for the bar began in October. In December he passed his examination in Roman law. In the following April, he passed his examination in constitutional law and legal history. He then began for the first time to read with a view to the examination in English law and equity, of which he had no previous knowledge. He obtained the services of an intelligent coach and in June, after two months' coaching, passed the examination in English law and equity. The examination covered the elements of real and personal property, conveyancing, including settlements, leases and mortgages, contracts, torts, sale of goods, agency, trusts, principles of equity, administration of assets on death, partnership, criminal law, criminal procedure and civil procedure, and evidence. Upon all of these subjects, the first candidate was able with the assistance of a coach, to pass an examination after one month's preparation, and the other, after two months' study. Of course neither of these candidates had mastered the law; neither had digested or understood the

subjects which he had studied. What they had done was to acquire a slight and superficial knowledge of the subjects and to learn and remember long enough to reproduce them the answers to a large proportion of the questions, which the previous experience of the coach enabled him to say would probably be put in the various papers,—questions, which through a long series of years, bore a strong family resemblance to one another. The feat was one of memory. Lord Russell contented himself with suggesting whether a better or additional guarantee of learning might not be secured by some other method.

The experience of most bar examiners would doubtless enable them to present instances, perhaps none so startling, but, after all, of the same sort, as those verified by Lord Russell. In 1898 Mr. Gregory of Wisconsin gave to the association the case of a young man who was admitted to the bar of that State after having studied law in the university for part of one year. In the same year he was elected a judge. I wonder how, as judge, he would construe the statute of the State requiring a candidate for admission to the bar to have studied law two years. I have known candidates to pass the bar examination in Ohio without any real knowledge of the subjects upon which they were examined. Their chief text book was one of the well known law quizzers, and their chief or sole instruction that of an experienced professional coach who had made a collection of questions put during previous years, those of each year bearing a strong resemblance to the questions of prior years, and who was able in that way to train his candidate to answer a sufficient number of the questions to receive a satisfactory mark. One of these law quizzers is aptly described in the publisher's announcement as "a boon to those about to apply for admission to the bar," with the statement added in large type that "no person studying law can afford to do without it."

I have recently read the examination papers of several States with a view to ascertaining the character of questions put. In some States, as in New York and Michigan, definitions and questions which can be answered categorically seem to be eschewed, and only concrete problems are put, which require the student to state the legal rights of parties upon a given state of facts, with his reason. This is the method pursued in examinations in the best law schools. It can hardly be doubted that it furnishes the most satisfactory test of the student's mastery of the subject. In the examination papers of one State, I find such questions as these: "What is a note, a bill of exchange, a draft, a check, a due bill, a certificate of deposit, a letter of credit? What is a partnership? What is a dormant partner? Define lands, tenements and hereditaments. Define a bilateral contract, a unilateral contract, a divisible contract. What is a surety? Define trust and maxim. Define guardian, master, fellow servant, *respondeat superior*." While no one can safely say that definitions ought not to be called for in any case, such questions as these present no significant test of the student's knowledge of law. In the same set of examination papers, I find questions such as these, which seem to be equally valueless: "Is there a bill of rights in the constitution of the State?" "How many congressional districts are there in the State?" "What apt words should be used in a deed to convey land in fee simple?"

Since bar examiners are required to examine large classes, the examination must necessarily be in writing. Ordinarily no other test is necessary. The paper shows either that the applicant is well prepared, or that he is so deficient as to call for no other test. There are cases, however, where the examiner may have a doubt which an oral examination may dispel. Indeed, some examiners believe and have declared to this as-

sociation that no examination is complete and fair unless an opportunity is given through oral examination to draw inferences from the appearance and manner and discourse of the candidate. An oral cross-examination of the candidate on his certificate of study would be likely to disclose the frauds which often lurk in those certificates.

In order to secure a uniform standard, bar examinations ought to be under the direct supervision of the highest judicial tribunal of the State, and should be conducted by a committee appointed by that court. Such is the plan adopted in those States in which effective steps have been taken to provide adequate standards and methods for admission to the bar. The permanency of the committee should be assured by providing terms of not less than three years, and the members should retire not simultaneously, but in rotation, so that a majority may always be constituted of members of experience. Whether the committee ought to be small, as in New York, where it is composed of three members, or large, as in Ohio, where it consists of ten, or a compromise between these extremes, as in Michigan and Illinois, where the committee consists of five members, is a point upon which my observation or experience does not enable me to express a definite opinion. One would suppose that a small committee would be more likely to be effective than a large committee with its natural tendency to divided responsibility. The compensation to be paid to bar examiners is a matter of practical importance. The efficient discharge of their duties requires much time in the careful scrutiny of certificates, preparation of papers and examination and grading of the answers thereto. There would seem to be no reason why an assessment from candidates for admission to the bar should not be made, sufficient to secure proper compensation to the bar examiners. In New York each examiner receives a salary of $2,500 *per annum*. In Ohio they are limited to their necessary traveling expenses, with $5.00 per day as compensation for each day actually employed in the work of the committee.

The importance of most rigid precautions with respect to the character and scrutiny of certificates of the candidate's moral character needs no enlargement before a body of lawyers who best know the incalculable mischief which an unscrupulous man may do at the bar.

With respect to admission of attorneys from other States it is necessary to take precautions against those who seek to use certificates from other States for the purpose of avoiding an examination in the State in which they intend to practise. In Ohio we provide by statute that a person who has become a resident of the State, and who, having studied law for a period of at least two years and passed a regular examination, has been regularly admitted as an attorney in the highest court of any other State of the United States, and has been in active practice of the law in a State or in the Supreme Court of the United States for a period of not less than five years immediately preceding his removal to the State of Ohio, upon producing satisfactory evidence of such admission, study and practice, and of good moral character, may be admitted to the bar in Ohio without examination.

While I regard the scrutiny of the certificates of general education and of study of law of first importance and the character and method of the bar examination itself as also important, it must be admitted that the supremely important thing is to have a committee of bar examiners imbued with a determination to maintain and enforce a high standard of admission to the bar, for the standard will be whatever the committee makes it. Before a determined committee unworthy candidates shrink and false certificates disappear. In their hands methods and systems and details become compara-

tively unimportant. The standard which they declare and the purpose which they manifest become known and recognized and acquiesced in. It furnishes a mark for the law schools and in numberless other directions exerts a powerful influence for good. No other field of service to which a lawyer can be called affords better opportunity for usefulness. In this important work the courts have the right to command the assistance of men of learning and experience and discretion, whose professional standing is likely to secure the respect and support of the profession, from which will follow general public support. No lawyer should feel at liberty to decline the call of the court to serve as bar examiner.

I have said that the purpose of examinations for the bar is to secure proper preparation on the part of those who propose to practise law. It is one of many means employed to accomplish that end, but it is a necessary means. It is the controlling power which the courts exercise to protect themselves and the State. We cannot rely wholly on law schools or on the motives which stimulate most men to prepare themselves for the highest service at the bar, for there are other men in great numbers who seek to enter the profession with the least possible preparation, and unfortunately so-called law schools are organized in many communities to assist them to do so. These schools are a public evil and ought to be suppressed. The power lies with the courts. All that is necessary in States where standards of general education and definite periods of study are prescribed is to enforce the regulations. That has been found sufficient to put them out of existence in some States, and in other States to prevent them from springing up. Their patrons have no use for them except as means of gaining admission to bar examinations under false pretenses, and if the courts were to reject their certificates they would perish for want of support. I do not mean, of course, to suggest that all schools whose standards are defective ought to be suppressed, for there are many conducted by men with laudable purposes and sincere motives whose standards are capable of improvement and are likely to be improved under proper encouragement and advice and supervision. But there are other schools organized for the express purpose of circumventing the law by issuing false certificates. I have before me the circular of a school which boldly announces that "shorter hours of business make it possible for the young man of today to employ his *leisure moments* in preparation for a life work of his own choice." This is doubtless intended and understood as an announcement that the school will supply its patrons with certificates that they have regularly and attentively studied law during a period of three years, which is the requirement of our statute, well knowing that during the whole of the period they have been engaged in other vocations, and have employed only their "leisure moments" in studying law, and knowing, moreover, that if the facts were stated in the certificate it would be worthless. There is no hope for schools of this sort. Their only influence is to degrade the bar by depressing its standards and lowering its moral tone.

The struggle in which we are engaged is between those who, in the interest of the public, are endeavoring to make the administration of justice more efficient, and those who insist upon projecting their personal and selfish interests across the path of improvement. The outcome of the struggle is not doubtful. It requires only that we shall preach the gospel in season and out of season until the public come to see and know that the movement for a high standard for admission to the bar is not in the interest of any class, but to protect all classes against the cost and delay and suffering and mischief in a thousand forms which an ignorant bench and bar may inflict.

PRESENT STATUS OF THE DREYFUS CASE.

By Richard Walden Hale,

Of the Boston Bar.

IT may interest our readers to have before them a statement of the more recent facts about the Dreyfus case so far as they can be given from the despatches and newspapers which reach this country.

In a general way after the Rennes trial and the pardon of Dreyfus in September, 1899, the Dreyfus party divided into two factions. On the one side were many who felt that they had been fighting for the great principle of justice to the individual, that the particular case had reached a point where it could no longer be used in the vindication of that principle, and that the sooner the heat and troubles caused by the incident should subside the better it would be for France and for all concerned. Others still thought the particular case of much importance and continued to agitate. But they were little listened to, and the Dreyfus case as a great public matter, soon became a thing of the past. The legitimate desire for vindication survived this oblivion, and Dreyfus and his immediate party have continued to seek a revision of the verdict. As I pointed out in the third edition of my little book *The Dreyfus Story*, even after the disgraceful travesty of justice at the Rennes trial "one substantial credit to the French law still remains. If Dreyfus can get a proper 'new fact' the French law, notwithstanding his pardon and his two convictions, still leaves a vindication open to him. Our American Law does not do as well."

The recent movement for revision is well described in the *Indepcndance Belge* of December fourth, 1903, from which I translate and adapt the following statement:

"Immediately after the interpellation of M. James *a propos* of the Syveton election case in the course of which the Socialist leader pointed out that there were irregularities in the Rennes trial, General André devoted himself to a personal investigation which made it clear to him that out of the one hundred and seventy-two documents in the secret *dossier*, there were at least two forgeries. That point once established, the Minister of War turned over the *dossier* of the Dreyfus case to the Chancellor, M. Vallé and the latter immediately passed it on to the president of the Commission in the department of justice which has the duty of pronouncing upon the receivability of demands for revision. Whatever they may say or do, this action means the certain revision of the Dreyfus case, for granting even that the Revision Commission should express the opinion that the demand of M. Alfred Dreyfus for revision is not receivable, (which is impossible, considering that new facts have been brought out) the chancellor will go over their heads, as he has the right to do and get the Court of Cassation to take jurisdiction in the matter.

"This court can send the affair again to another court martial, or it can simply quash the decree of the Rennes court without further proceedings.

"One must, indeed, thank that generous France, where justice does triumph in the end, for the good lesson which she is teaching the world by proclaiming that with the French there is no error which can maintain itself permanently, and that France can only find peace when light has been cast upon the whole *Truth*."

Since the above was written by the Paris correspondent of the *Indepcndance Belge*, the Commission within the Department of Jus-

tice above referred to has rendered a report favorable to revision and the Minister of Justice (or Chancellor) has passed favorably upon it so that revision proceedings in the Court of Cassation are assured. This does not involve any judicial decision whatsoever in favor of Dreyfus. It is merely a decision by the Minister of Justice to file a suit for revision.

As I have pointed out in my little book only one of the four grounds for revision known to the French law can now prove useful to Dreyfus. This is the fourth in number and is expressed in the revision law as—"the existence of the new fact, or new documents, unknown at the time of the first trial, tending to establish the innocence of the condemned person." But this is obviously broad enough to cover almost any claim that better justice is possible in the light of subsequent experience. If it were subject to no restriction almost any case could be retried at any time. Accordingly in this fourth case there is a vital qualification. Only the Minister of Justice can file a suit for revision on this ground. Obviously, then, this result is important and favorable to Dreyfus. But there has as yet been no trial of the real issue. It has only been framed for trial.

As I understand it, the serious new fact is this. Among the documents in the secret *dossier* was a despatch from one *attaché* of a foreign legation or military spy (Schwartzkoppen) to another gentleman in the same business (Pannizardi). In it he said that he expected to have secret information about a certain department at a certain time. Colonel Henry of the secret service office cut off the date and wrote a false one in blue pencil. The false date corresponded with the time when Dreyfus was having a temporary detail to that department to familiarize him with its work. A peculiar French idea of justice allowed the conclusion that this despatch helped to prove that Dreyfus was a traitor. A slightly more enlightened French justice now proposes to give a new trial on the ground that the forgery is a new fact unknown at the time of the first trial.

As I understand the French law a final decree in favor of Dreyfus will not only vindicate him, but will also operate as a matter of law (without giving the Minister of War any discretion) to reinstate him in the army, and give him the rank and pay to which he would have risen if he had remained in the service, together with all back pay and allowances.

The writer in the *Independance Belge*, from whom I quote above, expresses a cynical but justifiable doubt whether a court martial, even at this date could be trusted to do justice. It would be a board of soldiers to whom the prejudice of the earlier agitation and the prospect of having to take one of the Jewish race back into the army after such a career as Dreyfus has had would mean a great deal that would be offensive. And the fact that his pardon frees him from any risk of imprisonment or punishment would allow the court to feel that there was no military necessity for an acquittal.

I have some diffidence in making these statements from the meagre information which has as yet reached this country, but I believe that the main points of the story are correctly given. A certain amount of oblivion has been good for the case. It has changed it from a matter of national concern into a simple question of undoing an injustice. And the French nation can perhaps soon have some just pride in the fitness of its laws upon the subject. They make it easier than our own laws for justice to triumph in spite of every obstacle.

SIR WALTER RALEIGH.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

II.

By Van Vechten Veeder,

Of the New York Bar.

ELIZABETH'S savage prosecution of offenders in any way connected with the Northern Rebellion showed the true Tudor spirit. She instructed Lord Sussex to hang by martial law all those who had no property to escheat; persons of property were to be tried, and if acquitted were to be promptly taken before the Star Chamber. Suffolk hanged over six hundred persons without the formality of a trial, and Sir George Bowes, who assisted in the work, put to death some six hundred more. As the rebellion was over martial law was unjustifiable. The names of most of the prisoners were obtained, by torture, and they were put to death, in open violation of law, on mere suspicion.

The Duke of Norfolk's case (1 St. Tr. 957) is notable in many ways. He was probably guilty of a part if not all of the offenses with which he was charged: but the trial was a farce. He was convicted of a treason resting on presumptions and inferences only. The overt act was his intended marriage with Mary, Queen of Scots, and his correspondence with the Duke of Alva to raise an army to invade the kingdom. It was argued that as Mary had formerly laid claim to the crown, whoever married her would support her title, and consequently endeavor to depose Queen Elizabeth. The letters to Alva had no signatures, and were only proved to be the Duke's by reading the confession of an agent who vouched for their authenticity. He was never really called upon for his defense or allowed to produce his witnesses, but was only allowed to answer at the end of each charge, when he was constantly interrupted and urged to confess by the crown counsel. The evidence was practically all hearsay, and such as it was, had been extorted by fear. The lords of the council even gave in secret certain evidence which it was said that state policy required should not be made public. Norfolk said, on the scaffold, "And, my lords, seeing you have put me out of your company, I trust shortly to be in better company." Considering that the Duke had presided at the judicial murder of his niece, Anne Boleyn, and had testified against his son, Essex, to save his own life, it requires considerable charity to sympathize with him in the hour of his misfortune.

The trial of Campian and other Jesuits before Chief Justice Wray, in 1581 (1 St. Tr. 1049), is characteristic of the reign. At the close of Anderson's opening speech for the crown, Campian, who defended himself and his colleagues with marked ability, pertinently asked the attorney-general whether he came "as an orator to accuse them or as a pleader to give in evidence." There was no evidence against them of treason under the statute of Edward III. If it be said that it was necessary to put them out of the way, they were justified in their assertion that it was for religion, not for treason, that they died. Campian addressed the jury with dignity and power. "What charge this day you sustain," he said, in opening, "and what accompt you are to render at the dreadful day of judgment, whereof I would wish this also were a mirror, I trust there is not one of you but knoweth. I doubt not, but in like manner you forecast how dear the innocent is to God and at what price he holdeth man's blood. Here we are accused and impleaded to the death; here you do receive our lives into your custody; here must be your choice,

either to restore them or condemn them. We have no whither to appeal but to your consciences; we have no friends to make there but your heads and discretions. Take heed, I beseech you, let no colors nor inducements deceive you; let your ground be substantial for your building is weighty."

THOMAS HOWARD, DUKE OF NORFOLK.

When asked to speak at the close, he said: "It was not our death that ever we feared. We knew that we were not lords of our own lives, and therefore for want of answer would not be guilty of our own deaths. The only thing that we have now to say is, that if our religion do make us traitors, we are worthy to be condemned; but otherwise are and have been as true subjects as ever the Queen had any."

From a legal standpoint, nothing can be said in extenuation of the trial of Mary, Queen of Scots (1 St. Tr. 1161). It is almost the only instance in English history of a great state prisoner being condemned by a tribunal before which she neither appeared nor was represented. Mary was tried under a special act by a commission whose jurisdiction she stoutly denied. Even so, the commission had power only to examine as to the alleged conspiracy against Elizabeth's life. But to prejudice Mary's defense a host of statements were made as to her dealings with Spain

which had nothing to do with the question before the court. Copies of letters which it was claimed that she had written were used against her. Not one of the original letters, which were in cipher, was produced; no evidence was produced to show that the copies used were true copies or correctly deciphered, nor was it shown whether Mary had actually sent or received the letters. Selected parts of various confessions were used against her. Upon the evidence produced when Mary was present no case was made against her. She was really condemned on the evidence of two persons, given at an adjourned meeting of the court, behind her back, and before a tribunal composed of her bitterest enemies.

The trial of Essex in 1600 (1 St. Tr. 1333) was one of the fairest under Elizabeth. Yet it was still iniquitous according to any decent standard. The constitution of the court was decidedly unfavorable to Essex. The material evidence was not given *viva voce*, and such witnesses as were examined in open court merely stated that their prior examinations, which had been reduced to writing, were true. Sir Walter Raleigh was the only real witness in the case, and he testified only as to a conversation held with a third person, which was certainly no evidence against the prisoner. Bacon's conduct in voluntarily coming forward to testify against his old friend and benefactor is a repulsive

LORD CHIEF JUSTICE WRAY.

illustration of his servility. From this case rebellion and attempts upon the king's life were held to be synonymous, and it was treason to compel the king by force to change his policy.

The trial of Sir Walter Raleigh (2 St. Tr 1) and his subsequent treatment by James I. exemplifies the worst traditions of Tudor tyranny. Raleigh was accused of having conspired with Lord Cobham to place Arabella Stuart on the throne. Through the influence of his enemy Cecil he was arraigned and convicted on the worthless testimony of a treacherous knave, after a trial which exceeded the usual brutality of the times. There was not a syllable of credible evidence against him. The prosecution relied upon a "confession" or examination of Lord Cobham before the Privy Council and a letter which Cobham afterwards wrote, in both of which Raleigh was sought to be implicated by obscure allusions and implications. Cobham, it must be remembered, was an alleged accomplice, himself facing death; he had retracted his first statement; and what he is alleged to have said at first, even if true, would hardly have supported a charge of treason. Most of the evidence was hearsay of the worst kind.

The conduct of Coke, who prosecuted for the Crown, was infamous. He constantly interrupted Raleigh in order to break the force of the prisoner's argument.

LORD COKE.

Presently even Cecil, who, notwithstanding his open enmity toward Raleigh, was one of the court, interposed. "Be not so impatient, good Mr. Attorney; give him leave to speak." At this Coke flew into a rage, and would speak no more for some time. Soon afterwards, when Coke was speaking,

Raleigh claimed that the facts were being wrongly stated.

Coke: "Thou art the most vile and execrable traitor that ever lived."

Raleigh: "You speak indiscreetly, barbarously and uncivilly."

Coke: "I want words to sufficiently express thy viperous treasons."

uring cast between you and me, Mr. Attorney."

Coke: "Well I will now make it appear that there never lived a viler viper on the face of the earth than thou art."

Coke then produced a letter from his pocket, by which, he said, Cobham withdrew his retraction and confirmed all he had said

MARY, QUEEN OF SCOTS.

Raleigh: "I think you want words, indeed, for you have spoken one thing half a dozen times."

Coke: "Thou art an odious fellow; thy name is hateful to all the realm of England for thy pride."

Raleigh: "It will go near to prove a measbefore against Raleigh. Raleigh thereupon produced a letter that Cobham had written him protesting that he never practised with Spain by Raleigh's procurement.

The conduct of the judges was no less scandalous. Their calm statement to Raleigh that the act of Edward III. had been repealed

when the prisoner was actually being tried under its provisions, is an instance of unblushing effrontery without parallel.

Considering the danger of the Gunpowder Plot (2 St. Tr. 159), neither the arrests nor the executions which followed seem conspicuously excessive. On the whole, the trials of the conspirators were fairer than many of a similar nature under the Tudors, although Garnet was condemned on the statements of persons who had already been executed. Coke, who prosecuted, made an elaborate and highly characteristic speech, concluding with a panegyric on the barbarous punishment for treason. In the case of Sir Everard Digby, he called upon the prisoner "to admire the great moderation and mercy of the King in that for so exorbitant a crime no new torture answerable thereunto was devised to be inflicted upon him."

The proceedings against Darnel and others (3 St. Tr. 1) belong to political rather than to judicial history. The prosecution of Eliot and his fellow-members of Parliament in 1629 for speeches made in Parliament (3 St. Tr. 293) was, of course, an arbitrary exercise of power on the part of the crown. The conviction of the members was reversed in 1668 on a writ of error brought by Hollis. This case is an early authority for the doctrine

THOMAS WENTWORTH, EARL OF STRAFFORD.

resentment which caused the Commons to take his life. The Lords were intimidated and passed the attainder. The king, who had given Strafford a solemn pledge to protect him, now betrayed him. Strafford magnanimously returned the king's promise, but in signing the death warrant of Strafford and Laud, Charles I. signed his own.

The trial of Charles I. (4 St. Tr. 990) was not, of course, conducted according to the

JOHN LILBURNE.

forms of law. The tribunal before which the king was arraigned was established by an ordinance of the Commons alone. The king could not commit treason against himself, and it was only by giving it a retroactive effect that the declaration of the Commons that it was treason for the king to levy war against Parliament could be made to apply to Charles. If he had besought foreign aid in the first civil war, Parliament had, on its side, enlisted a Scotch army. Moreover, that his life of Cromwell, to plead punctilious demurrers to the revolutionary jurisdiction. At the trial many of the orderly forms of procedure were observed. Evidence was heard to prove the facts alleged. His presence at different battles and the fact that people were killed there was proved by the depositions of witnesses who would have been called had he pleaded.

The principal trials during the Commonwealth were those of Lilburne, Andrews and

when under trial of "Freeborn" John Lilburne. Tr. 1270) is one of unusual interest. Besides being one of the few state trials of the time which resulted in an acquittal, it was conducted more in accordance with modern forms than any previous trial. Objections to leading questions and to copies of documents as evidence appear for the first time. The right of the prosecution to reply was also first stated in this case. The treatment of the prisoner does not show much improvement; but Lilburne was a refractory defendant. He at first refused to plead. After much wrangling he plead not guilty, and his defense, stripped of all its quibbles, was that he was a better patriot than his prosecutors. His speech in his own defense is a curious combination of shrewdness and effrontery. "The jury by law," he told the court, "are not only judges of the law but of the fact also; and you that call yourself judges of the law are no more but Norman intruders, and in deed and in truth, if the jury please, are no more but ciphers to pronounce their verdict." Upon his acquittal he was re-imprisoned, and subsequently banished by an act which provided that if he returned he would be guilty of felony. He did return, and upon his second trial was again acquitted (5 St. Tr. 407). In what he termed the "furious hurley burley" of his second trial he achieved the additional triumph of extorting from the court, for the first time, a copy of his indictment. Lilburne's second acquittal incensed Cromwell, and the jury were summoned before the council to answer for their conduct.

Andrew's case recalls the worst days of Tudor tyranny. Andrews, who was a barrister of Gray's Inn and had served in Charles' army, was charged with being implicated in a design to raise a rebellion in the Isle of Ely. Nothing was legally proved against him, and his conviction could only be sustained on the theory that a base intention to levy war is treason. Proof by witnesses, trial by jury, the right of challenge, were all denied him. Attorney General Prideaux openly argued that "as the prisoner had an affection to act, though nothing acted, that was sufficient treason, and for that affection he deserved death."

We have a full and circumstantial report of Love's trial (5 St. Tr. 43). Love was a Presbyterian divine who was charged with being implicated in what is known as the Presbyterian Plot for a Scotch Alliance with Charles. He succeeded in securing a hearing by counsel on matters of law, and Hale appeared for him. He was kindly treated by the court, but the charge against him was not legally proved.

Among other trials during the Commonwealth were the cases of Gerhard, Vowell, and Fox for conspiring to murder the Protector. The guilt of the prisoners was clearly proved, and, apart from the deprivation of trial by jury, the proceedings were unusually fair. In Sidercombe's case it was held that setting fire to the palace at Whitehall was an overt act of treason. In the trial of Hewet, Mordaunt and others on a charge of plotting to restore the Stuarts, Hewet was sentenced upon his refusal to plead. Mordaunt was acquitted by the casting vote of the president of the court. It is said that this was the only instance of an acquittal in the records of the High Court of Justice.

The trial of the Regicides (5 St. Tr. 947), who had been exempted from the general indemnity, followed immediately upon the Restoration. The trials were, on the whole, fairer than might be expected. The prisoners did not dispute the facts; and twenty-nine convictions and thirteen executions may be called mild, according to the practices of those days, for a great rebellion. The disgusting desecration of the graves of the Puritan leaders was a far greater stain upon the Royalists.

Vane's execution was infamous (6 St. Tr.

119). He was no regicide, and the treason alleged against him consisted of acts done in the ordinary routine of government. The old doctrine that compassing the king's death was synonymous with subverting the government was revived to meet this emergency. Vane defended himself with great skill and courage, boldly asserting the sovereign power of Parliament. He was executed in brazen repudiation of the king's promise, and tyranny has never laid his ghost.

Messenger's case (6 St. Tr. 879) shows the progress of the doctrine of constructive treason in levying war against the king. In this case a mob had assembled with the purpose of tearing down bawdy houses. The case is further notable for the fact that it was one of the few cases in which a special verdict was rendered in a trial for treason, and that the defendant was acquitted.

The isolated prosecution of William Penn for tumultuous assembling in 1638 (6 St. Tr. 957) is both instructive and entertaining. Penn had attempted to hold a Quaker meeting in spite of the authorities. From the moment he appeared in court wearing his hat the trial was a pandemonium. Penn asserted his right and duty to meet and preach; but he was told by the recorder that he was not there for worshipping God but for breaking the law. Penn replied that he had broken no law, and demanded to know by what law he was prosecuted. Recorder: "Upon the common law." Penn: "Where is that common

SIR WILLIAM PENN.

law?" Recorder: "You must not think that I am able to run up so many years, and over so many adjudged cases, which we call the common law, to answer your curiosity." Penn: "This answer I am sure is very short of my question, for if it be common it should not be so hard to produce." . . . Recorder: "If I should suffer you to ask questions till tomorrow morning you would never be the wiser." Penn: "That is according as the answers are." Penn was finally haled to the bale-dock—"a stinking hole"—and the recorder charged the jury in his absence. Then began the efforts to force a conviction. "We shall have a verdict by the help of God, or you shall starve for it," the Recorder told the jury. But they finally agreed upon an acquittal, whereupon they were fined and imprisoned. Bushel, one of the jurors, was immediately discharged by the Court of Common Pleas on a writ of *habeas corpus*, and the memorable judgment pronounced on this occasion by Chief Justice Vaughan put an end to the fining of jurors for their verdicts, and vindicated their independence as judges of fact (6 St. Tr. 999).

THE UNPROFITABLE CLIENT.

By J. Edward Rickert.

Of the Philadelphia Bar.

He grasps you by the buttonhole and will not let you go:
"I say, old man, what should one do if the case were thus and so?"

He smiles a bland, untroubled smile—you grin a grin of ice,
The while he picks your pockets of a twenty (in advice).

You dine unwittingly with him; between the soup and roast
He pins you tight to Bills and Notes, this genial private host.

In vain you wriggle and you squirm, to get to golf or horse,
You've simply got to pay your way through every blooming course.

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, THOS. TILESTON BALDWIN, 53 State Street, Boston, Mass.

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

NOTES.

A the trial of a criminal cause a colored used as a witness for the State, and later was used as a witness for the defense, when the following occurred:

"You say your name is James Lanier?"

"Yes, sah."

"You were, I believe, a witness, a short time ago, on behalf of the State?"

"Yes, sah, I was a witness, but I dosen't know whedder I was a witness on *behalf* of de State or de *whole* ob de State."

MRS. B. sued Mr. B. for divorce on the ground of cruel and inhuman treatment such as to endanger life. After stating certain acts of defendant, the pleader continued that said acts "have tended to destroy her health, her happiness and her life, and the same have done so." Defendant demurred on the ground that it was alleged that plaintiff was dead and the action would not lie. The judge declined to sustain the demurrer, but recommended that plaintiff's attorney amend his pleading.

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a western town lived an eccentric doctor. One day he called at the office of an ambitious young attorney, apparently greatly excited, and wished to know the law on a certain point in a trade wherein he had been "fleeced," and for which he wished to institute immediate proceedings. He insisted that the lawyer investigate the law thoroughly.

The lawyer got the digest and looked up citations, and turned to reports and read them one after another. It took possibly two hours. When he had finished the doctor said: "Is that all the law?"

"Yes," replied the attorney.

"Well," said the doctor with a sigh of relief, "if that is the law, I will go out and hire me a lawyer and give him H——." And he walked out.

FOR the following amusing anecdotes we are indebted to a former bar examiner in New York City:

To the question "What is essential to constitute a valid marriage in New York?" one grave candidate replied: "There must be a meeting of the minds; assent and consideration." Another—a more attractive genius—announced to us "that the parties must be of opposite sexes." As this was undeniably true, we passed him at once.

I recall that we asked one rather useless sort of a question, to wit: "What are the limitations of the power of a court of equity to relieve in cases of accident or mistake?" and we were informed that "whenever an injustice is committed by the act of God, equity will not interfere." The late Robert G. Ingersoll told me that the man deserved a medal.

Passing by the gentleman who said that the bailor went on the bond of the bailee, and the other one who in answer to the question "In what office are notices of *lis pendens* filed?" said, "In the room on the left as you go into the Court House on the Broadway side," I come to the Solon who assured me that "Expert testimony is always founded on fictitious facts." A good many of us will believe that he was really wiser than he supposed.

A WITNESS in a Wisconsin court was asked recently: "Well, how about Corry Brothers, as a financial success?"

"As a financial success," replied the witness, "Corry Brothers was a great failure."

IN a jury trial at Los Angeles recently, the attorney for the defendant started in to read to the jury from a certain volume of the Supreme Court Reports. He was interrupted by the Court, who said: "Colonel ———, it is not admissable, 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."

HONORABLE HENRY COLLINGS is one of the common pleas judges of the second subdivision of the Seventh Judicial District of Ohio, and was presiding at a term of that court in Lawrence County. W. D. Cross is a prominent and able young attorney of the bar of that county.

In a cause pending in that court, in which Mr. Cross appeared for the defendant, after his sundry motions and demurrer to the plaintiffs' petition had been overruled, and plaintiffs' demurrer to his answer had been sustained, Mr. Cross said:

"Well, your honor, if plaintiff's pleadings are good against all my attacks by motion and demurrer, and my pleading will not stand his first attack, what am I to do?"

Judge Collings—"Hire a *lawyer*, Mr. Cross."

I WAS called upon some years ago, says a Maine attorney, to defend a man who had been sued in trover for conversion of certain cedar sleepers. The case was to be tried before a trial justice at some distance from the shire town of the county, but I prepared my case as elaborately as possible and thought I had a most convincing defense. I had the evidence and proved that the sleepers were both paid for by the defendant and were delivered at his exclusive landing on the river long before the plaintiff made his alleged purchase. My evidence was not even denied, and I was patting myself on the back, as the clock showed the time to be advancing towards the supper hour, (after a whole day spent in the struggle with many witnesses for the plaintiff and a few for the defendant), and the plaintiff's counsel was finishing up his long-winded harangue. I thought surely the verdict could not be other than for the defendant. My nerves and whole system received a rude shock, however, when I heard the justice drawl out: "Wall, there's a heap of testimony in this case and an all-fired lot of it seems to be contradict'ry, an' I've got a toothache, an' the only safe thing to do, is to give the verdict for the plaintiff and let the defendant appeal!"

A YOUNG attorney had advised his client that he had a good case and had started suit and filed his declaration. The defendant put in a demurrer to the same which was argued before the venerable Judge Gary of Chicago. After hearing the arguments the judge notified the parties that he would sustain the demurrer, whereupon the young attorney for the plaintiff said, "In that case, your Honor, I ask leave to amend."

The judge replied, "It won't do you any good, for upon your own statement of the facts you have no case."

But the attorney insisted, saying, "Your Honor, I must amend, I must amend. What will I tell my client?"

Judge Gary leaned forward in his quiet manner and whispered, "You tell your client that Judge Gary is an old fool."

ON another occasion before the same judge, a young attorney was making some noise in the back part of the court room and was moving around as though in search of something. Judge Gary called him by name and asked what the trouble was, whereupon the young man stated that he had lost his overcoat. The judge replied, "Now see here, some men have lost whole suits in this court and have not made one-half the fuss about it that you have."

TWO MEN were brought before the magistrate in Belfast the other day charged with fighting on the public street. Both pleaded "Not guilty." After hearing the evidence of the constable, the magistrate discharged one, and was about to impose a fine on the other, when his released comrade shouted out, "Yer worship, we worn't fightin' when the polis tuk us; we were trying to separate each other!" Both got off.—*Victoria Cross Magazine.*

GOLF (says *The Law Times*) always seems to have had a traditional connection with the wearers of wig and gown. Literature, in its widest sense, supplies many illustrations that this has been so. Sir Walter Scott paced many a weary step through the echoing hall of Parliament House waiting for more lucrative briefs than Peter Peebles *v.* Plainstanes. There does not seem to be any actual record among the chronicles of his contemporaries that "the Shirra" played the game, but that he was familiar with its jargon of technicalities is seen clearly enough by his autobiographic references in Red Gauntlet. He must have seen the game played over the now discarded Leith Links, once the golfing haunt of Scottish royalty and nobility, and in all probability he tried his hand with the driver and the old feather ball over Bruntsfield Links, near the house of his father. Though Robert Louis Stevenson was entitled to put a brass plate with the word "advocate" on the door of his father's house in Heriot row, he was never known to have handled a golf club, though the majority of his friends were golfers. Yet now and again throughout his books he works in with appropriateness a golfing simile, as, for example, the heading of "A Teed Ball," to one of the chapters of *Catriona.*

IF a prisoner is tired of saying "not guilty, m'lud," he may vary the monotony of that proceeding by pointing to the prosecutor and remarking: "He is a liar."

Five eminent judges, after full consideration of this important question, yesterday reached the conclusion that the two are practically exchangeable terms, or, at all events, that the one phrase is merely a hyperbolical form of the other.

"The statement that the prosecutor was a liar," said Mr. Justice Darling, "appears to me to be merely a repetition of Rouse's plea of not guilty—with emphasis.

"It was only because he was in court," added the judge, solemnly, "that Rouse did not specify the particular kind of liar the prosecutor was.

"He did nothing more than he had a right to. He put his statement in the emphatic way of a man of his class.

"In the heat of cross-examination, he said of one man what the psalmist in his haste said of all men."—*London Express.*

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

SIR:—As the case is at once the foundation and the source of the law in the English speaking world, it is necessarily the basis of instruction whether it be discussed in detail, in class, or whether it be digested by text-writer, or by the lecturer, who in a less formal way digests the case and gives the result to the student. Private study in a law office differs in degree not in kind; for the case whether printed or not, whether in the form of text, or in the brief and abstract form of a digest properly so-called, is still the ultimate source of our knowledge of the law. A busy lawyer cannot well spare the time for discussion or analysis of a case and test by examination the student's grasp of the subject, as was formerly the practice. The student in the office is, therefore, thrown almost wholly on the printed page and himself.

If, then, the case is in itself of the utmost importance, its setting might well be a matter of interest as well as moment. The parties to the action; the lawyers in the case; the judge or judges delivering the judgment of the court—a consideration of these not only lends an interest to the transaction, but very often throws a clear and strong

light on the case itself, and illuminates, at times, other and unsuspected fields of law.

A few examples, taken almost at random, will perhaps, give point to the suggestion. Planché *v.* Colburn, 1831, 8 Bingham 14, decided that an author might waive the contract on the refusal of the defendant to publish his work and sue in a *quantum meruit* for work and labor. The book in question was one upon Costume and Ancient Armor. On turning to Planché in the Dictionary of National Biography, vol. xlv., p. 395, it will be seen that Planché is the author of *The History of British Costumes,* published in 1834, which has been of great service to English historical painters. The short biographical account of Planché contains two items of interest. "In 1823 on the revival of 'King John' at Drury Lane by Charles Kemble, Planché, after making historical researches, designed the dresses and superintended the production of the drama gratuitously. This was the first occasion of an historical drama being brought out with dresses of the period of its action." Then again quoting from the same sketch it appears that "an unauthorized production (of Planché's 'Charles XII.') led to the appointment of a select parliamentary committee on dramatic literature and to the passing on 10 June, 1833, of the act 3, William IV, c. 15, giving protection to dramatic authors."

Take another instance. Wheaton *v.* Peters, 1834, 8 Peters, 591, is a very leading case in the law of copyright, in which the author's rights at common law and under statute are carefully considered. The plaintiff was the illustrious Henry Wheaton, lawyer, diplomatist and leading authority on international law. He was Judge Peter's immediate predecessor as reporter of the United States Supreme Court (Carson's *History of the Supreme Court of the United States,* pp. 620-623) and the dispute arose from Judge Peter's alleged illegal use of matter for which Wheaton thought—erroneously as it turned out—that he had secured the copyright. Wheaton's name suggests that of his commentator, William Beach Lawrence, at one time our *chargé d'affaires* in London, later lieutenant and acting governor of Rhode Island (who figures in two well-known cases: Hall *v.* Lawrence, 1852, 2 R. I. 218, and Lawrence *v.* Dana, 1869. Fed. Cases, vol. 8, 136. . . . Dana was no less a man than the late Richard Henry Dana, Jr., known in literature as the author of *Two Years Before the Mast; To Cuba and Back,* and "the only Massachusetts advocate," Senator Hoar says, "who ever encountered Rufus Choate on equal terms." The judgment in Lawrence *v.* Dana, while it did not enjoin, practically prevented the reissue of Dana's edition of Wheaton—a great loss to students of international law. (Adams' Dana, Vol. II., pp. 282-327; 390-402.) In still another case—Merivale *v.* Carson, 1887, L. R. 20 Q. B. Div. 275, the plaintiff's name suggests a family well known in literary circles. So much for the parties to the action. It is scarcely necessary to state that the date of the action is of great importance for the law of last century, indeed of the past decade, may not be law today. Like every organic growth it obeys the law of social and legal evolution.

The names of the lawyers lend a personal interest to the case—at least to students and practitioners. A case in which Hamilton, Pinkney and Wirt, Jeremiah Mason, Webster and Choate appeared is really interesting from that fact alone; but to the student this fact of itself means that the case was carefully argued and every aid offered the court that the wit and ingenuity of man could advance or devise. In the same way cases in which the names of William M. Evarts and Charles O'Connor—notably Lemmon *v.* The People, 1860, 20 N. Y. 562—and the more recent cases in which Messrs. Olney and John C. Gray, Carter, Choate and Edward M. Shepard figure as the lawyers, mean that no point or authority bearing on the issue was overlooked. In the same way English cases in which Hardwicke (Yorke), Eldon (Scott), Romilly, Westbury (Bethell), and Cairns appear as attorneys of record have a peculiar interest in themselves and offer the guaran-

tee of careful preparation and argument. The names of Erskine, Brougham and Cockburn in like manner suggest eloquence and holy zeal, if not learning in the law.

And finally the very name of the judge means much. Chief Justice Marshall is almost in itself of persuasive weight. Chief Justice Taney is of hardly less authority; while of the justices, Story and Curtis, especially the latter, enjoy great and merited influence. In Massachusetts, Chief Justice Shaw and Justice Wilde; in New York, Chancellor Kent; in Pennsylvania, Chief Justice Gibson; in North Carolina, Chief Justice Ruffin, are, indeed, names to conjure with. The judgment of a less known judge may be no less worthy of respect; but the names of these judges are a guarantee for learning and careful preparation in the formation of the judgment and of accurate expression of the principles of the law in the opinion itself. Even the *dicta* of these judges cannot be overlooked, notably Marshall's numerous *dicta* in Marbury *v.* Madison, 1803, 1 Cranch 137.

In the same way an English case decided by Hardwicke, Eldon, Westbury, Cairns, Hatherly (Wood), Jessel, Mansfield, Parke, Blackburn, Bramwell or Bowen, deserves and will receive careful attention. And this is especially so when the judge has had revious extensive practice at the bar as England. As an example of this take License Cases, 1847, 5 Howard 504, in Taney as Chief Justice rejects his la twenty years before in Brown *v.* On 827, 12 Wheaton 419. Again the m ons of a judge of great experi- that ma ow a more rounded grasp, enced lawy differ from an earlier things that h orris *v.* Clymer, 1845, The expressio Chief Justice Gib- narrative as he r opinion as Justice he looks the exam 1825, 12 S. & R. brightens as he re that opinion for incidents; he uses gen tion, by their in his station of life, ons of the part of the story he is narra of the his tale in his own accusto the If, however, the manner of th

It thus appears that the parties to the action may add an interest to the case and suggest other branches of the law, or fields of activity; that the names of the lawyers in the case are of themselves a guarantee of a careful and elaborate argument of the question or questions at issue; and that the professional careers of judges while at the bar, and their experience on the bench, render their opinions worthy of the greatest weight and consideration.

I would, therefore, venture to suggest in conclusion that students and practitioners cannot well afford to neglect the sketches and biographies—where they exist—of the distinguished lawyers and judges who have honored bench and bar. *The Dictionary of National Biography*, edited by Leslie Stephen and Sydney Lee (67 vols. 1885-1903) gives a sketch of every distinguished lawyer and judge of Great Britain and the Colonies, who has died before January, 1901. The most authoritative works on the judges are Foss' *Lives of the Judges* (9 vols. 1848-1865); Foss' *Biographia Juridica*, an abridgement of the former work, appeared in one volume in 1870. Lord Campbell's *Lives of the Chancellors* and of *The Chief Justices* are too well known to need comment. Racy and interesting, they lack the accuracy of the dictionary and works by Foss.

In America, Carson's *History of the Supreme Court of the United States*, (2 vols. 2nd ed., 1902,) gives an admirable historical and critical survey of the Supreme Courts, and its distinguished chief and associate justices. Appleton's *Cyclopaedia of American Biography*, (6 vols., 1885-1886—1888-1889) to date of publication and the English and American editions of *Who's Who*, put the reader in a position to judge of the educational and legal qualifications of the more distinguished contemporary lawyers of Great Britain and the United States.

I am, very truly yours,

JAMES B. SCOTT.

Columbia University School of Law,
New York, January 9, 1904.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

THE ART OF CROSS-EXAMINATION. By *Francis L. Wellman.* New York: The Macmillan Company. 1903. Cloth, $2.50 (283 pp.).

This book derives its chief value and interest from the fact that the author, as assistant corporation counsel and assistant district attorney of the city of New York, has had great experience with witnesses and with juries. It is encouraging to find him saying: "In the vast majority of trials, the modern juryman, and especially the modern city juryman,—it is in our large cities that the greatest number of litigated cases is tried,—comes as near being the model arbiter of fact as the most optimistic champion of the institution of trial by jury could desire." (p. 14). Such sane words prepare the reader for a sensible presentation of the art of cross-examination. The expectation is well fulfilled. The author's general theory may be gathered from the following quotations:

"No cause reaches the stage of litigation unless there are two sides to it. If the witnesses on one side deny or qualify the statements made by those on the other, which side is telling the truth? Not necessarily which side is offering perjured testimony,—there is far less intentional perjury in the courts than the inexperienced would believe,—but which side is honestly mistaken?—for, on the other hand, evidence itself is far less trustworthy than the public usually realizes. The opinions of which side are warped by prejudice or blinded by ignorance? Which side has had the power or opportunity of correct observation? How shall we tell, how make it apparent to a jury of disinterested men who are to decide between the litigants? Obviously, by the means of cross-examination" (p. 23).

"It is absurd to suppose that any witness who has sworn positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meagre opportunities for observing facts, and rarely suspect the frailty of their own powers of observation. They come to court, when summoned as witnesses, prepared to tell what they think they know; and in the beginning they resent an attack upon their story as they would one upon their integrity. If the cross-examiner allows the witness to see, by his manner toward him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into a discussion of his testimony in a fair-minded spirit, which, if the cross-examiner is clever, will soon disclose the weak points in the testimony" (pp. 27-28).

"It is the love of combat which every man possesses that fastens the attention of the jury upon the progress of the trial. The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent evidence; who seems to know what is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions—he it is who creates the more recent atmosphere in favor of [illegible] Olney and John C. [illegible] presents, a powerful [illegible] and Edward M. Shepard influence with the jurors, mean that no point [illegible] dict. Even if, on the issue was overwhelming, the verdict [illegible] ame way English cases in amount will [illegible] ke (Yorke), Eldon (Scott), schooled [illegible] Westbury (Bethell), and Cairns appear was [illegible] ttorneys of record have a peculiar [illegible] n themselves and offer the guaran-

ness who has testified to no material fact against you. And yet, strange as it may seem, the courts are full of young lawyers—and alas! not only young ones—who seem to feel it their duty to cross-examine every witness who is sworn. They seem afraid that their clients or the jury will suspect them of ignorance or inability to conduct a trial. It not infrequently happens that such unnecessary examinations result in the development of new theories of the case for the other side; and a witness who might have been disposed of as harmless by mere silence, develops into a formidable obstacle in the case" (p. 113).

"Embarrassment is one of the emblems of perjury, but by no means always so. The novelty and difficulty of the situation—being called upon to testify before a room full of people, with lawyers on all sides ready to ridicule or abuse—often occasions embarrassment in witnesses of the highest integrity. Then again some people are constitutionally nervous and could be nothing else when testifying in open court. Let us be sure our witness is not of this type before we subject him to the particular form of torture we have in store for the perjurer. Witnesses of a low grade of intelligence, when they testify falsely, usually display it in various ways: in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness chair, in an apparent effort to recall to mind the exact wording of their story, and especially in the use of language not suited to their station in life. On the other hand, there is something about the manner of an honest but ignorant witness that makes it at once manifest to an experienced lawyer that he is narrating only the things that he has actually seen and heard. The expression of the face changes with the narrative as he recalls the scene to his mind; he looks the examiner full in the face; his eye brightens as he recalls to mind the various incidents; he uses gestures natural to a man in his station of life, and suits them to the part of the story he is narrating, and he tells his tale in his own accustomed language. If, however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is often useful, as your first question, to ask him to repeat his story. Usually he will repeat it in almost identically the same words as before, showing he has learned it by heart. Of course it is possible, though not probable, that he has done this and still is telling the truth. Try him by taking him to the middle of his story, and from there jump him quickly to the beginning and then to the end of it. If he is speaking by rote rather than from recollection, he will be sure to succumb to this method. He has no facts with which to associate the wording of his story; he can only call it to mind as a whole, and not in detachments. Draw his attention to other facts entirely disassociated with the main story as told by himself. He will be entirely unprepared for these new inquiries, and will draw upon his imagination for answers. Distract his thoughts again to some new part of his main story and then suddenly, when his mind is upon another subject, return to those considerations to which you had first called his attention, and ask him the same questions a second time. He will again fall back upon his imagination and very likely will give a different answer from the first—and you have him in the net. He cannot invent answers as fast as you can invent questions, and at the same time remember his previous inventions correctly; he will not keep his answers all consistent with one another. He will soon become confused and, from that time on, will be at your mercy. Let him go as soon as you have made it apparent that he is not mistaken, but lying." (pp. 58-60).

These are fair samples of the author's tone; and they indicate clearly that he can be trusted not to suggest dishonorable or even merely dilatory tactics, and that he does not regard cross-examination as a mode of overthrowing the truth. Indeed, many a reader will pay the author the compliment of saying that the soundness of the author's theory is too obvious. Such a statement has in it one element of truth, namely, that it is less difficult to theorize about cross-examination than to practise it; but the author has

drawn his theory from practice, or at least has found in practice adequate support for his theory; and he has enabled the reader to test and apply his suggestions, as far as a book can do this, by giving extracts from many trials, including a considerable number in which he himself participated. The most extensive extracts are from the Parnell Commission, the Carlyle W. Harris case, the Bellevue Hospital case, the William Palmer case, and Laidlaw *v.* Sage. The extracts, as in other books on cross-examination, are chiefly from criminal and tort cases; and this suggests the question whether in litigation of neither a criminal nor a quasi-criminal nature the character of the issue and of the parties and of the witnesses does not cause cross-examination to be of comparatively slight value. The same forces that have shorn counsel of their oratory—namely, the increased intelligence of jurors and a general tendency toward quiet and accuracy—seem to be doing much toward diminishing the inclination to indulge in cross-examination. Nevertheless, the art will never be unnecessary, and this book can be safely commended as sound, interesting, and useful.

DAMAGES FOR PERSONAL INJURIES. By *Archibald Robinson Watson.* Charlottesville: The Michie Company. 1901. (lxxiii+944 pp.)

This treatise covers part of the law of Torts and part of the law of Damages, for, as the sub-title says, it embraces "a consideration of the principles regulating the primary question of liability, as well as the measure and elements of recovery after liability established." However, almost the whole of the work deals with the measure of recovery. Obviously, the restriction of the view to personal injuries encourages full discussion. The fullness of the treatment of causation is indicated by the fact that one-fourth of the book is devoted to chapters on natural and proximate cause, several proximate causes, losses by persons sustaining contractural relations to individual injured, intervening causes, efforts to avoid threatened injuries, efforts to protect property or to save another's life, intervening acts of children, intervening acts of animals, intervention of natural forces, intervening acts of negligence, anticipation of consequences, proximate cause for the jury, avoidable consequences, injuries to persons diseased, and superinduced disease. The book is meant for practitioners; but it abounds in discussion, and it is clear and readable. Yet while the fullness and the clearness of the text are commendable, it must be said that the narrowing of the discussion to this one subject—personal injuries—leads to some unfortunate results. For example, while the book, following out its restricted plan, necessarily avoids a discussion of damages for breach of contract, how can one feel complete confidence in a discussion of causation which does not even cite the famous contract case of Hadley *v.* Baxendale?

THE RIGHT TO AND THE CAUSE FOR ACTION. By *Hiram L. Sibley.* Cincinnati: W. H. Anderson and Company. 1902. (x+165 pp.)

In 1889 the author, then Judge of the Common Pleas Court of Washington County, Ohio, decided Clark *v.* Eddy, which is reported in 22 Weekly Law Bulletin, 63. His opinion required him to discuss what is the place in which a cause of action arises. His interest was aroused to such an extent that at last this book is the result. The attempt is to define and distinguish the cause for action and the right to action. The book is an interesting contribution to Pleading and Analytical Jurisprudence. It deserves better typography.

NATIONAL LAWYERS' DIARY. Albany, N. Y.: Matthew Bender. Cloth, $1.50.

In addition to the pages for daily memoranda, this handy volume contains many matters of legal interest, including lists of the Federal Judges, Clerks, District Attorneys and Marshalls, Assignments of the Federal Courts, and Rules of the United State Supreme Court.

CURRENT LEGAL ARTICLES.

In the *Harvard Law Review* for January, Professor Bruce Wyman of the Harvard Law School, has an important article—the first of a series—on "The Law of the Public Callings as a Solution of the Trust Problem," in the course of which he says:

The distinction between the private callings—the rule—and the public callings—the exception—is the most consequential division in the law governing our business relations. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten and give any rebates that are advantageous. It is because the trusts are carrying on a predatory competition under the cover of this law that we have the trust problem. All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances, make no discriminations. If this law might be enforced against the trusts, it is believed that a solution of the problem would be found. In this time of peril to our industrial organization faith in our common law may show the way out. It cannot be that this law has guided our destinies from age to age through the countless dangers of society, only to fail us now. . . .

During the nineteenth century the common carrier has become of such consequence in the industrial organization, as the very condition of modern commerce, that the other public callings have been overshadowed and have been at times almost lost to sight; but in the fifteenth century barber and surgeon, smith and tailor, innkeeper and victualler, carrier and ferryman were of more or less equal concern to the law. That these callings were put into a class by themselves, that an unusual law was applied to them, that this was sternly enforced, and that it was elaborately worked out—all these things cannot be without their modern significance. The common law like its English king never dies, it persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The cases just under discussion are illustrations of the course of events. Barber, surgeon, smith, and tailor are no longer in common calling because the situation in the modern market does not call for it; but innkeeper, victualler, carrier, and ferryman are still in that classification, since even in modern trade the conditions require it.

The essential thing in all this is the recognition of the common calling as a thing apart from the private calling, presenting different conditions, involving the necessity therefore of further law than that which suffices to regulate ordinary businesses. In these earliest examples there are certain elements in the situation which are so characteristic that the realization of them should lead to some conception of the nature of the public employment. It would be too much to expect to see the law settled in these times, to find modern aspects of the problem altogether anticipated; but it is not too much to hope to discover some meaning in the group of allied cases, some definition of the first principles involved. Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing; that in the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly. . . .

Experience has shown that the truth of the matter is that the imposition of an occasional monopoly may be advantageous in the ordering of the industrial system. The policy of the grant of an exclusive franchise has appeared in various circumstances. More frequently than formerly this is the method taken by the modern State for dealing with the troublesome problem of the public utilities, for experience has shown that in the nature of the case many of the public works can be conducted with advantage only upon the basis of exclusive franchise. The telephone system is a conspicuous instance; for

a single system of telephones can alone serve to satisfactorily bring together all the telephone users of a community. And in a less obvious case the waste by duplication of plants is so scandalous that the ultimate benefit to the community from giving an exclusive franchise, as to one gas company for example, must be admitted, when the futility of expecting any permanent competition has been so long exposed. Indeed it is now recognized by many advanced thinkers that it is necessary for the perpetuity of competitive conditions in general, that, in the particular instances of monopolistic conditions, the State should proceed to establish a legal monopoly, and then apply to that situation such strict regulation as the exigency demands. . .

Wherever virtual monopoly is found the situation demands this law that all who apply shall be served, with adequate facilities, for reasonable compensation and without discrimination; otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no legal remedies for these industrial wrongs. This is as true where the origin of this condition of monopoly is in natural limitations as where the establishment of it is by fiat of the State. Actual monopoly should be dealt with upon the same basis as legal monopoly; and indeed is so treated by the inclusion of both within the law of public employments.

No one can study the authorities upon this subject without feeling that we are just now entering upon an important development of the common law. It is at the present time difficult to predict what branches of industry will eventually be held of such public consequence as to be included in the category of public callings, because in the last few years the field has extended so widely before our very eyes. However we now have so much material for analogy and comparison that it ought to be possible to advance, in a tentative way at least, a series of tests that may indicate in a general way whether or not a business has attained such control of its market as to become of the class of public employments. . . .

The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our State, that the admission has been made with much hesitation that State control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief. There is now fortunately almost general assent to State control of the public service companies, since it is recognized that special situation requires a special law. That law is based upon the conclusion that it is no inconsistency for the State to leave the generality of business free from restrictions, while controlling with a strict code such lines of industry as are affected with a public interest.

The working out of this detailed law governing public calling is now going on so rapidly that it already is of real value in grappling with actual abuses, such as exclusive demands, inadequate facilities, hidden overcharges, and undue discriminations. At the same time, as will be seen, new businesses are being put into the class of public employments, so that a greater variety of industries is now within the law. It seems only a question of time when the question will be raised for determination whether these great industrial trusts are public service companies. If ever a decision shall put them into that classification, it is submitted that the law of public services will be found to have developed far enough to meet the exigencies raised by the complexity of their operations.

From the editorial columns of *The Albany Law Journal* we take the following appreciative notice of the late Mr. Coudert:

The death of Frederick R. Coudert removes a citizen of the highest character, a man of profound learning and a lawyer who had few peers. It has been well and truly

said of him that "he exemplified in his personality many of the typically strong attributes of the modern French character—a comprehensive sense of diplomatic propriety, logical acuteness, the faculty of systematizing and readily using the results of study and observation, literary finish and personal tact and charm." Although of French extraction, no man was more truly an American in sympathies and sentiments than Frederick R. Coudert. His reputation in the legal profession was by no means confined to city, State or nation. His exceptional talents enabled him to represent this country with signal ability before numerous international tribunals. On a number of important occasions, the last being the Venezuelan arbitration, which closed in 1898, he sustained the interests of this government with distinguished ability and eminent success. He declined a tender of appointment to the bench of the United States Supreme Court, made by President Cleveland, and also refused more than one important foreign diplomatic post, preferring to devote all his time and energies to his private practice

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In *The Juridical Review* for December, Charles Gans, *Docteur en Droit Avocat à la Cour*, Paris, has an instructive article on "The Judicial System of France,"—a system apparently complex but in reality simply "based upon two fundamental principles—the principle of what is termed the double degree of jurisdiction, and the principle of a heirarchy of Courts." As to these principles he says:

Apart from certain exceptions to be detailed later, the theory is that every case which has been submitted to any one tribunal in the first instance may be submitted to a further tribunal of review, which if need be, alters the judgment of the first court. The motive for this is primarily the guarantee of justice afforded to litigants by the existence of a right of appeal to judges who are more remote from them, and who are not subject to local influences, and in the second place the additional guarantee afforded by specially chosen judges who are not only more numerous but also of greater age and experience than the judges of first instance. For this reason no litigant can be deprived of his right of appeal to a higher court, except in certain specially provided cases, as where the matter at issue is of trivial importance. On the other hand certain actions, forming however, only a small class, must be brought directly before the tribunal of the second degree. But these exceptions do not affect the general principle.

On both the Civil and the Criminal side the "judicial heirarchy" is composed of Justice of the Peace Courts, the Courts of First Instance, the Courts of Appeal, and the Court of Cassation. In addition to these there are Commercial Courts, of which M. Gans says:

To pass now from the subject of civil and criminal justice, it remains to consider the Commercial Courts. In commercial matters justice is administered in special commercial tribunals whose organization is very different from that of the Civil Courts. The judges, instead of being appointed by the President of the Republic, are elected by the merchants themselves, who must be citizens of France. No one may be elected except merchants or retired merchants of over thirty years of age, and the President must have served as a judge for two years. There is no representative of the public. The parties may appear in person or by anyone whom they may choose to represent them. The procedure is simpler than in the Civil Courts. In most cases the matter is first brought before an arbiter, whose duty it is to hear the parties' explanations, and to make a report. Thereafter the Court gives its judgment. From the judgments of the Commercial Courts an appeal lies to the same Court of Appeal as that to which judgments of the Civil Courts are taken. . . .

Legal expenses in France are fairly high in all except the Justice of the Peace Courts. But poor persons are not on that account deprived of the means of obtaining justice, thanks to the institution known as *L'Assistance Judiciaire*, the object of which is to en-

able persons who can prove their poverty to bring and defend actions in all the Courts without incurring any expense. The pauper has a right to gratuitous assistance from every branch of the legal profession whose services he may require. He has nothing to pay to the *avoué*, the sheriff's officer, the advocate, the Treasury, or the registration office. With this object a special office has been instituted in connection with each Court, composed of representatives of the Treasury and the administration, and of members nominated from among retired judges, advocates, *avoués* or notaries. Poor persons desirous of bringing or defending an action address a written request to the State procurator accompanied by evidence of their poverty in the shape of certificates granted by their mayor. The procurator transmits the case to the office of *L'Assistance Judiciaire*, which determines whether there is good reason for granting gratuitous assistance. If it refuses to do so, the applicant may apply to the office attached to the Court of Appeal. The application once granted, the Dean of the Faculty of Advocates (*Batonnier de l'Ordre des Avocats*), the President of the Chamber of *Avoués*, and the President of the Sheriff's Officers each nominate a member of their body to assist the pauper. If the latter wins his case, the *avoués* and sheriff's officers are paid, but the advocate, whatever be the result of the case, gives his services absolutely gratuitously. In all criminal cases every accused person is entitled to the assistance of an advocate, and on his requesting such assistance an advocate is assigned to him. . . .

The salaries of the judges, which are paid by the State, are calculated, it must be confessed, upon the most modest scale. A judge starting as judge-substitute receives no remuneration. If he gets promoted he becomes a salaried judge-substitute with 1500 francs a-year, and his remuneration thereafter advances progressively from 3000 francs as a provincial judge to 7000 francs as a councillor of the Court of Appeal, and 10,000 francs as a president of a Court of Appeal. If he goes to Paris his salary is slightly better, with 11,000 francs as a councillor of the Court of Appeal and 13,750 francs as president. The president and the public procurator in the tribunal of the Seine have each 20,000 francs. Finally only two judges in France reach 30,000 francs a year, *viz.*, the first President of the Court of Cassation, and the Procurator-General of that Court. It should be added that few judges follow the regular course of promotion, some spending their whole career in the provinces while others rapidly reach Paris, promotion being determined solely by selection, that is to say, by the choice of the Minister of Justice. Sometimes appointments are made direct to judgeships in Paris; in other cases after a short time spent in the provinces a judge may be made a Councillor of the Court of Appeal at Paris. . . .

The public procurator is an official whose function is to represent the State; in civil cases he sees that the law is applied, while in criminal cases he directs proceedings against offenders. He is represented at each diet by a depute, and in criminal inquiries by the examining magistrates. The examining magistrates are nominated from among the judges of each Court and draw a slightly higher salary than the ordinary judges. They hear the witnesses, adopt such measures as are necessary for reaching the truth, and interrogate the accused. Their powers are very extensive, and were, until a few years ago, even more so. No one was permitted to be present at the examination and the judge acted on his own unfettered discretion. But it came to be considered dangerous and unjust thus to hand over accused persons who, if unresourceful by nature necessarily became more so under the influence of fear, to a judge whose zeal for the discovery of truth might carry him too far. Accordingly, a law was passed in 1898 authorizing advocates to be present at the examination. This is already a great step in advance; perhaps some day we shall have the examination conducted in public.

To the *Michigan Law Review* for January Amasa M. Eaton contributes a valuable article, of some forty pages, on the history and practical operation of the Negotiable Instruments Law, giving an outline of the growth of this act, and examining in considerable detail the objections raised to certain provisions of the law by Professor J. B. Ames. The Negotiable Instruments Law—which, as Mr. Eaton says, "is not the product of hasty immature legislation, but is the slow product of an evolutionary process that has been going on for the last quarter of a century"—has been adopted in twenty-one States, one district, and one territory. "It is remarkable," says Mr. Eaton, "how few cases have arisen under this law in the many States that have adopted it. I have found only forty-two, and of these, sixteen have arisen in New York, the great financial centre of the country." After a summary of these cases he adds: "It will be noticed not only how few cases have arisen under the Negotiable Instruments Law, but also how few of the cases have arisen in consequence of any defect in that law, and that very few cases have been carried to the courts of last resort. Indeed, the wonder is that many of these cases were ever brought, for it is difficult to see how the result could have been otherwise than as was decided. . . . The conclusion we reach, upon a review of these cases, is that the general result is to increase the negotiability of negotiable instruments, and this is certainly in the interest of commerce."

VAN VECHTEN VEEDER contributes to the *Columbia Law Review* the second of his scholarly articles on "The History and Theory of the Law of Defamation." He says:

The law with respect to written defamation has been from the beginning a comprehensive doctrine. In theory its most vulnerable principle is the false basis of criminal libel. The criminal action was from the outset professedly based upon the supposed tendency of the offence to create a breach of the peace. To the application of this principle is directly attributable the more extensive application of the criminal than of the civil action. . . .

Nothing could be more absurd in itself, or more inconsistent with the analogies of the law, than to look beyond the immediate nature of an offence for the grounds of punishment. It is absurd in itself; for why not admit at once that the destruction of a man's reputation is a crime? Why deny to reputation a protection so largely afforded to every other possession? . . .

Surely, then, the sanctity of reputation, not the danger to the peace, forms the real and only rational basis of the criminal action. The other view is a fiction, and is no more the real ground of punishment than many other fictitious principles which have been put forward as the technical ground of judicial proceedings which unquestionably depend upon very different considerations. . . .

The danger to the public peace from certain forms of defamation is still taken into account in the criminal code of some States, and it may be desirable that it should be so. But the real and fundamental basis for the sanctions of the criminal law is the sanctity of individual reputation. To insure its adequate protection the criminal law must be at least coextensive with the civil remedy. The bankrupt libeller must not be suffered to enjoy immunity; nor, on the other hand, should the opulent defamer, whether an individual or a corporation, be allowed to indulge in insolence in proportion to his wealth. . . .

The law with respect to slander leaves much to be desired. It is obvious that the class of slanders which are most dreaded, which inflict the greatest amount of pain, which occur most frequently, and which are most likely to lead to breaches of the peace and other evils abhorred by the law, are not those imputations comprised within the fourfold rule of actionable slander, but imputations of breaches of social code, the code of honor—untruthfulness, cowardice, treachery, and the like. And yet for such slanders the law provides no redress whatever, for they are not within the list of words actionable *per se*, nor are they likely to lead to such consequences as the law contemplates under

the term special damage. It is actionable to say of a man that he is physically diseased; but you may call him a liar with impunity. You may not say of a surgeon that he is a bad operator, or of a lawyer that he is ignorant of the law; but you may tell any stories you please about his private life and to the discredit of his personal character. And, most scandalous of all, in England, until very recently, any one was at liberty to slander a woman by the vilest forms of oral imputations upon her chastity, and the law gave her no redress.

If, now, taking the law of slander as we find it, we examine the basis of the actionable quality of the particular imputations of which it is made up, it will be found to be as irrational and inconsistent as the selection itself. The principle of selection is past finding out. The one thing that is clear is that the right to reputation seems to have been completely lost sight of. . . .

There are three obvious methods of reforming the law of slander. The method commonly adopted among English speaking people is to leave intact the general distinction between libel and slander, and merely remove its worst hardships by extending the list of defamatory imputations which are actionable *per se* when published orally. This course has been adopted in England with respect to imputations upon the chastity of women; but there it has stopped. Such imputations are believed to be universally actionable in this country. In some States further additions have been made by statute to the list of oral imputations which are actionable: adultery or want of chastity in general; impotence; incest and crimes against nature; false swearing; all words, which from their usual construction and common acceptation, are considered as insults, and lead to violence and breaches of the peace.

This patch-work plan is quite in accordance with the spirit of English law reform, but it has little else to commend it. No doubt it is an improvement in the law simply to enact that imputations upon chastity, and some other additions of a like nature, shall be actionable *per se*. But this course does nothing towards removing the theoretical absurdity of the existing law; it would be, morever, at best merely temporary and imperfect. The injury and annoyance inflicted by particular imputations vary in different classes of society, in different places and circumstances, and especially at different periods. No possible foresight in the enumeration of actionable slanders could make the law reasonably just and equal, even for the present generation; and the next generation would have to do the whole work over again to meet altered conditions.

Another method is to substitute for the present distinction, on the ground of mere form, some other classification of a more rational character, applicable to slander and libel alike, founded upon real and substantial distinctions, such as the nature of the imputation, the degree of publicity given to it, or other circumstances surrounding its utterance. In such a method the essential points would be the nature of the imputation and the degree of publicity given to it. This method was adopted in France by the Law of May 17th, 1819. . . .

The third method, which is alike the simplest and the best, is to abolish at once the distinction between libel and slander, and assimilate the law of slander to that of libel. Its advantages are evident. It would put an end at once to the theoretical absurdity of the present law; it would be free from the mischiefs of needless refinement; it would be an efficacious and complete remedy for the mischief to be met; and it would, so far as appears, be a final and lasting settlement of the question. The only plausible objection to it seems to be that it might tend to encourage litigation and lead to oppressive and vexatious actions. These objections apply with quite equal force to the present law of libel. Moreover, in Scotland, where the remedy is alike whether the defamation be oral or written, there has been apparently no serious complaint on this score, and Scotchmen are not less litigious than other people. And such a system has long worked well in

the State of Louisiana. Actions of libel are controlled by the law with respect to privilege and by the law of costs. In the case of writings these have been found sufficient to protect the interests of the public and of individuals, and to prevent frivolous actions, and they would do the same with oral publications.

THE opening article in the *Yale Law Journal* for January is one on "Voting Trusts and Holding Companies," by Edward Avery Harriman. His "fundamental premise is the generally accepted rule that the majority of the stock of the corporation has the right to control its management absolutely, whether that majority of stock be owned by an individual, or by a combination of individuals, incorporated or unincorporated; such right of control being subject only to the limitation that it must not be used for purposes of fraud. This doctrine has been so often affirmed by the courts that it may be regarded as a fundamental principle of corporation law. It is true that traces of a different doctrine are to be found, to wit, the doctrine that the majority stockholder is a trustee and that his dealings with the corporation are to be treated as fiduciary transactions; but this doctrine, however unimpeachable from an ethical standpoint, seems to have been able to triumph finally only in Colorado." After considering some of the objections raised to voting trusts, Mr. Harriman says:

It may be said that almost the entire difficulty with reference to voting combinations springs from a single fact—the refusal to recognize that the voting power of stock is a valuable property right as well as the right to receive dividends. Every business man knows that the right of control has a money value distinct from the right to receive dividends; and recognizing that fact, contracts are daily made with reference to the right of control. To say that that is not to be treated as property, valuable and transferable property, which is so clearly recognized by all financiers as such, is to involve the law in constant confusion, and to impede the legitimate pursuit of happiness by the holders of corporate stock.

The courts have apparently been misled to some extent by a supposed analogy between the duty of a citizen to the State in voting, and the duty of a stockholder to a corporation. There is no satisfactory middle ground between the doctrine that each stockholder is a trustee for the corporation, and the doctrine that the duty of the stockholder is simply a duty not to defraud the corporation by using his power of control to its injury. The former doctrine is generally repudiated on the score of convenience; but the alternative is not always so clearly recognized; and the result is confusion.

PROBABLY the most succinct method (says Chief Justice Clark, of the Supreme Court of North Carolina, in *The American Lawyer*) in which to indicate not only the progress, but the almost complete revolution, which has taken place in the law is to compare the status of the law on a few well known subjects in England today with what it was 100 years ago in that country, for in our 45 States and our Territories we have in the main made similar changes, sometimes anticipating and sometimes following the legal reforms, as made from time to time in the mother country. First as to the criminal law. In the year 1800 there were more than 200 crimes in England which were punishable with death, of which more than two-thirds had been made capital offences during the eighteenth century. Nearly all felonies were capital. As a late English writer says, "If a man falsely pretended to be a Greenwich pensioner he was hanged. If he injured county bridge or cut down a young tree he was hanged. If he forged a bank note he was hanged. If he stole property valued at five shillings—if he stole anything above the value of one shilling from the person; if he stole anything at all, whatever its value, from a bleaching ground, he was hanged. If a convict returned prematurely from transportation; or if a soldier or sailor wandered

about the country begging without a pass, he was hanged. And these barbarous laws were relentlessly carried into execution. A boy only ten yars old was sentenced to death in 1816." It is owing to Sir Samuel Romilly, and later to Sir James Mackintosh, that the death penalty is now imposed in England for only four offences, and very rarely in two of those. Similar, and in some States, even greater changes have been made in this country.

A traitor was drawn on a hurdle to the place of execution, was hung by the neck but cut down alive and his bowels were taken out and burnt before his face, then his head was severed and his body divided into four quarters and placed over the gates of cities to poison the atmosphere. Not until 1870 were these horrid requirements abrogated by statute and they were pronounced, though not carried out, on Frost the Chartist, as late as 1839. You all remember how, on the restoration, the body of the greatest sovereign England has ever had, was dug from his grave and his head was exposed on Temple Bar. These were not the doings of Chinese Boxers, but of enlightened Christian England. Just about the beginning of the nineteenth century the punishment of women for high treason, which till then was by burning, was changed to hanging. In 1811 Lord Eldon was greatly alarmed by "a dangerous bill," as he termed it, which abolished capital punishment for stealing five shillings in a shop and prided himself greatly upon defeating this revolutionary measure in the House of Lords. In 1812 when Bellingham was put on trial for the murder of Spencer Perceval, he was informed that one charged with a capital offense was not allowed to have counsel to speak for him and he had to defend himself. You will remember that the humane law in England not only prohibited argument by counsel to one on trial for his life, but he could neither have process to summon witnesses in his own behalf, nor was he allowed to cross examine the witnesses against him. Bellingham shot Mr. Perceval, the prime minister, late on Monday, May 11; he was put on trial Friday, the 15th, and was hanged the following Monday, the 18th, and his body was ordered to be dissected. When the law in the above particulars was somewhat modified in 1836, twelve out of the fifteen judges protested, and one of them wrote a letter to Sir John Campbell, then attorney general, that if he allowed the bill to pass he would resign. The bill passed, but the learned judge did not resign. Juries were not allowed to separate on trials for felonies or treason, and were locked up "without meat, drink or fire." This produced the poet's taunt "and wretches hang, that jurymen may dine." This law was not changed till 1870.

WHAT the rights are of an employé against employers' blacklists is still an open question in Pennsylvania, says Rupert Sargent Holland, in the December *American Law Register;* and he adds:

The question is therefore still an open one in Pennsylvania. Where no formal blacklist appears and the communication is of a purely personal nature, there being no combination capable of being demonstrated, the employé would seem to have no right of action. Where the blacklist or the equivalent exists, the Pennsylvania courts would probably follow Massachusetts and deny an injunction, though they might very possibly allow an action for damages. This latter view, that the employé deserves such protection, would seem to be slowly gaining ground, as evidenced by the fact that four States have at a comparatively recent date made the formation of blacklisting combinations punishable as misdemeanors.

IN a scholarly article on "Specific Performance for and against Strangers to the Contract," in the *Harvard Law Review* for January, Professor J. B. Ames of the Harvard Law School, states the principles on which "the passing of the benefit and burden of restrictive agreements" rest. He says:

In truth, the passing of the benefit and burden of restrictive agreements is not to

be explained by any single analogy or principle. The imposition of the burden upon others than the promisor and the acquisition of the benefit by others than the promisee are the results of two very different principles.

The burden is imposed upon a subsequent possessor of the *res*, whether real or personal, upon the same principle that the grantee of a guilty trustee, or the grantee of one already under contract to sell the *res* to another, is bound to convey the *res* to the *cestui que trust* or prior buyer. In all three cases there would be the like injustice, if the purchaser with notice, or the volunteer, were allowed to profit at the expense of the *cestui que trust* or promisee by ignoring the trust, the promise to convey, or the restrictive agreement. Equity, therefore, in all three cases imposes upon the grantee a constructive duty co-extensive with the express duty of his grantor.

The right of third persons to the benefit of restrictive agreements is the result of the equally just and equally simple principle, that equity will compel the promisor to perform his agreement according to its tenor. If the restrictive agreement, fairly interpreted, was intended for the sole benefit of the promisee, only he can enforce it. If on the other hand it was intended for the benefit of the occupant or occupants of adjoining lands, then such occupant or occupants may compel its specific performance. It is to be observed that a grantee of the promisee acquires his rights not as assignee of the restrictive contract, but as assignee of the promisee's land. Accordingly the assignee of the land is none the less entitled to the benefit of the agreement, although there was no assignment of the contract, or even although he was ignorant of its existence when he acquired the land. The assignee's situation in this respect is closely analogous to the rights of the buyer of land from one to whom it had been previously sold with warranty. The last buyer enforces the warranty of the first seller not as assignee of the warranty, but as assignee of the land, for that is the meaning of the warrantor's undertaking. The analogy between the restrictive agreement and a warranty holds also in other respects. As the assignee of the land may sue upon the warranty in his own name without joining the warrantee, so the subsequent possessor of the neighboring land may, as sole plaintiff, file his bill for an injunction against the promisor. A warrantee, who has conveyed the land to another, can no longer enforce the warranty; in like manner a promisee who has parted with all of his land in the neighborhood loses the right to enforce the restrictive agreement. A release of the warranty by the warrantee after his conveyance to another is inoperative; a release of the restrictive agreement by the promisee after parting with his land in the neighborhood is likewise of no effect as to the land conveyed by him. A *bona fide* purchaser from the warrantee acquires the warranty free from any equitable defenses good against the warrantee; it is believed that an innocent purchaser from the promisee should be allowed to enforce performance of a restrictive agreement, although the promisors might have defeated a suit by the promisee on the ground of fraud or by reason of some other equitable defense. But no case has been found involving this question.

These qualities, common to the warranty and the restrictive agreement, indicate that they both belong in the same class with bills and notes. For the holder of a bill or note sues in his own name, acquires his right, not as assignee of a *chose in action*, but as the *persona designata* within the tenor of the instrument, and if a *bona fide* purchaser, holds free from equities and equitable defenses. If the right to enforce restrictive agreements were limited to assignees of the land, in privity of estate with the promisees, they, like assignees of a warranty, would be assimiliated to indorsees of a bill or note payable to order. The restrictive agreement, however, is frequently intended to enure to the benefit of any possessor subsequent to the promisee, or even to one who acquired

the promisee's land before the making of the promise. In such cases the true analogue of the restrictive agreement is the note payable to bearer.

THE "Liability of Telegraph Companies" is discussed exhaustively by Morris Wolf in an article of some seventy pages in *The American Law Register* for December. The conclusion which is reached is this: "That the best basis upon which to lay the foundation for a telegraph company's liability consists in the public nature of its employment; and that, so laid, recovery can be had, according to the ordinary measure of damages in delictual actions, in every case in which a message is sent and carelessly handled, whether the message be open or cipher, and whether the natural and not too remote consequences of its non-delivery or of its late or inaccurate delivery be pecuniary or sentimental injury."

TAKING as a text the newspaper protest against the decision of the Supreme Court of Missouri in the Butler bribery case, *The Kansas City Bar Monthly* defends the action of the court, as follows:

The *corpus delicti* of bribery, as declared by the statutes of Missouri, is the exercise or attempted exercise of corrupt means to secure the action of some officer upon any matter "which may be then pending or which may by law be brought before him in his official capacity." The last clause is quoted literally from the statute. The first duty of the court was to determine what elements were essential to come within the terms of the statute and at the outset of his opinion Judge Fox defines these elements as follows: First, there must be a public officer of the city or of the State; secondly, the offer there made must be with intent to influence the vote, opinion, judgment or decision of such public officer; thirdly, the vote, opinion, judgment or decision must be in respect to some question which may by law be brought before a public officer in his official capacity.

The court then proceeds to examine the ordinance of the city of St. Louis under which the contract was awarded to Butler by the Board of Health, and in the light of the city's charter determines the ordinance to have been void as an attempt to invest the Board of Health with powers expressly and exclusively vested by the charter in the Board of Public Improvements. Upon this branch of the case, which, by the way, is one that affects the law of municipal corporations far more vitally than it does the law of crimes, we venture no opinion but assume that the construction of the charter is founded upon reason and precedent. As the ordinance entrusting the power in the public officer attempted to be bribed was void, the matter was not, therefore, one which might by law be brought before him in his official capacity.

When the court found the ordinance void it is difficult to see how the court could have logically found otherwise than it did on the main issue. It is no doubt unfortunate for many reasons that the court should have been compelled in this particular case to hold the attempted exercise of authority of the Board of Health beyond the powers which might be entrusted to them under the charter of the city, but it is neither fair nor sensible to say that the justice and logic of the case demanded that in order to sustain this conviction the charter must be so warped by construction as to place municipal authority in hands other than those to which the people adopting the charter have plainly entrusted them. The division of governmental powers by charters adopted as those of this city and St. Louis are adopted is expressive of the will of the people as to the best method of securing efficient administration. The maintenance of such provisions is far more vital to the protection of public and private welfare, of personal liberty and private property than the conviction of any criminal, however great the enormity of his crime or however much its commission or his escape may shock the public conscience. Whether the question arises in a civil or a criminal action this division must be upheld. Otherwise chaos of municipal activity results.

In the *Michigan Law Review* for January, Professor John A. Fairlie continues his discussion of "The Administrative Powers of President," taking up the special administrative powers conferred on him by the Constitution. Concerning the President's military powers "in maintaining internal order and suppressing resistance to law not amounting to war," the writer says:

For these latter purposes the army is actively employed under two sets of conditions: To protect a State against domestic violence, as guaranteed by the Constitution; and to enforce the laws of the United States and protect the instrumentalities of the Federal government against unlawful interference. . . .

In cases of domestic violence the President was restricted by the condition that he should act on application of the State authorities. But under other circumstances he was authorized to act without any such condition expressed. This larger power of independent action was provided for, on the one hand in cases of invasion or imminent danger of invasion, and on the other hand in cases of opposition to the laws of the United States. The former class of cases deal distinctly with the conduct of war, which has already been considered. In reference to the latter, it is important to notice the statutory provisions and questions that have arisen in the exercise of the authority. The Militia Act of 1795, already mentioned, authorized the President to call out the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act." The Act of 1807 authorized the use of the army and navy under these same circumstances. Under this authority troops were used on various occasions to overcome resistance to the internal revenue laws and for other purposes. And it was under these provisions that President Lincoln issued his first call for militia. By Act of July 29, 1861, the authority of the President was increased; and he was authorized to use the militia or the army and navy "whenever, by reason of unlawful obstructions, or assemblages of persons, or rebellion against the authority of the government of the United States, *it shall become impracticable, in the judgment of the President, to enforce by the ordinary course of judicial proceedings* the laws of the United States within any State or territory."

This provision in the statutes has been continued since the Civil War; and even after the process of reconstructing the southern States was accomplished, Federal troops were stationed in these States and employed especially in enforcing the Federal laws regulating the elections for Presidential electors and members of Congress, commonly known as the Force Bills. But opposition in Congress to this policy prevented the passage of the Army Appropriation bill in 1877 until four months after the expiration of the former appropriation, and led to the adoption next year of a statutory provision to limit the use of troops. The Army Appropriation Act of 1878 provided that "from and after the passage of this act it shall not be lawful to employ any part of the army of the United States as a *posse comitatus,* or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

Among the purposes for which the use of the army and navy is expressly authorized by Acts of Congress are in reference to Indian affairs, the protection of the public lands, the execution of neutrality laws, the protection of merchant marine and the suppression of piracy, the enforcement of judicial proceedings and the suppression of insurrections or unlawful combinations obstructing the laws of the United States.

During the railroad strikes of 1894 Federal troops were employed without request from the State governments to a much larger extent than formerly. The Governor of Illinois protested against action ignoring the State government; but it was shown that the employment of the troops was in accord-

ance with the Constitution and laws of the United States. They were used to enforce the laws of prohibiting the obstruction of the mails and conspiracies against inter-state commerce, and to secure the execution of judicial processes of the Federal courts. The broader scope of Federal action at this time was due in part to a new interpretation as to what constituted an obstruction of the postal service. Formerly where strikers had cut out passenger and baggage cars from a mail train, but did not directly prevent the movement of the postal cars, it had been assumed that they were not obstructing the postal service. But it was now held that interference with any part of a mail train constituted an obstruction to the postal service. Another factor, however, in the extension of the field for the employment of the army was the recent statute prohibiting conspiracies against commerce.

The interpretation of President Cleveland as to the powers and duty of the executive under the circumstances was approved by the Supreme Court and by the Senate and House of Representatives in resolutions adopted by both bodies.

It was to be expected, says *The New Jersey Law Journal* for January, that ultimately Christian Science would get into the courts, and it seems the first decision relating to the subject in New Jersey comes about in an odd way. Kate McCulloch, of Camden, being in feeble health, placed herself under the treatment of George Tompkins as a Christian Science healer, and in the course of the treatment gave him a power of attorney to collect her moneys and invest the same. After a while she became dissatisfied with his management and filed a bill in chancery, demanding an accounting. The defendant, in his plea, set up, *inter alia*, that she had agreed to allow him twenty *per cent.* on his collections. This the complainant denied. In giving his decision in the case Vice Chancellor Gray says: "The defendant claims that he earned commissions by making collections for the complainant by a combination of letter-writing and a making of 'demonstrations.' . . . So far as the defendant's testimony explains what he calls a 'demonstration,' it appears to have consisted of locking himself in a room and devoting himself to the 'thought' of collecting the debts due to the complainant. The defendant testified that the parties who owed the complainant were not in any way connected with the Christian Science Church. The influence which he exerted by 'thought' in collecting the money for the complainant was, therefore, enforced against unbelievers in Christian Science. The moving of the absent unbeliever to pay his debts probably required from the defendant a more intense application of healing power, entitling him, from his point of view, to a higher compensation for his labors." The court allowed him one hundred dollars, "not because the defendant earned or deserved it, but because the complainant consented to give it to him." 62 N. J. Eq. (17 Dick Ch.) 269.

In his President's address (printed in the *Yale Law Journal* for January) before the last meeting of the Pennsylvania Bar Association, C. LaRue Munson discussed the interesting question: "How far shall the justice and rights of the particular cause prevail over a strict application of established rules of law?" In the course of the address he says:

Of the adherence to settled rules of law, it is admitted by all hands that certain legal principles have been established—although not all uniformly in every court of last resort—and to those principles additions are constantly being made, and so far as they may be conscientiously applied, must prevail; but it may well be asked where is the legal principle that can stand the strain of time unless it be bottomed and fastened upon natural justice?—that which we call equity, because in this sense it is indeed "the correction of that wherein the law by reason of its universality is deficient." Rules of law may be firmly declared, and to them we must bend the knee of obedience, but unless they have for their foundation a justice which appeals to man's conscience, they are as unstable as the

shifting sands of the sea. And herein is the very warp and woof of the question at issue.

Aside from various modes of reasoning whereby different interpretations are arrived at even under similar conditions, there has ever been and always must be an evolution in the law, a progress in jurisprudence, as there is in forms of government, human thought, modes of life, manners and customs, and in the arts and sciences through new discoveries and inventions. That which may have been a well settled and accepted principle of law at one stage of human progress would not be tolerated for one moment in these modern days; the earlier legal treatises are full of such principles, they are not merely obsolete, they are positively denied by advanced thought and by the results of experience. The law cannot stand still any more than can mankind cease to progress; as one goes forward so must the other, and as human conditions improve and develop, so, of necessity, must jurisprudence advance. . . .

The foremost and chief principle of all law, and one which cannot be changed, is that justice is to be done, that that which is right and just shall alone be decreed. A law that is not just, or which in its application works an injustice, will not and cannot survive. . . .

If we are to have rules of law hard and fast, and are to bind them so tightly around our judges as to compel them to be followed by the strictest construction, without conscience and without heart, then will our courts become mere machines of learning to force the facts of every cause within those "procrustean" rules, irrespective of the destruction of natural right, and regardless of that justice which will then meaninglessly define their official titles, but which by law and by conscience they have been sworn to uphold; all, forsooth, that we may have the "knowne certaintie of the law," and that the advocates having applied its measuring stick to their clients' causes may be assured that it may likewise be the means of adjudication by the Bench, irrespective of the wrongs done to others. . . .

It has been suggested that if the tendency of the courts to adjudge causes by the particular equities of the case be continued, public distrust may follow, and the electors may refuse to continue for long terms the otherwise faithful judges. Rather let us look at the converse of the proposition and if the public come to believe that the courts are bound by precedent rather than by justice, by rule rather than by what is just and right, that decisions are made which shock the conscience and are contrary to that which men believe to be natural justice, we may see the time when the elective franchise will compel a statute that the jury shall be the judges of the law in all cases, whether civil or criminal, and where then, we may well ask, will there be any certainty either of law or justice?

It is true that there are cases to be found in the reports where the courts of last resort have departed from established precedent in order that justice might be done under the particular circumstances of the case, and I am glad to be of those who maintain that such a course is conducive to the proper administration of jurisprudence.

It seems, says *Law Notes*, that an innocent convict may obtain relief from the courts in one of two ways only, that is, either by a motion for a new trial or by a writ of error *coram vobis*, and that his choice of remedy must be governed by the provisions of local statutes governing these two proceedings in respect to the time within which they may be resorted to. If neither is available because of a time limitation, then relief can be obtained only in the form of executive clemency. An innocent man naturally wants justice and not clemency, and it would be well for legislatures to see to it that no innocent victim of circumstances should ever be subjected to the shocking injustice of being forced to ask to be pardoned for a crime which he did not commit, and to leave standing a judicial record declaring him a felon.

The *Canada Law Journal* concludes an article on "The Alaskan Boundary Award" in these words:

We recognize, of course, that the parties

to the treaty are Great Britain and the United States, although it is Canada that is directly interested in the dispute. We also recognize that the general interests of the Empire, of which we form an integral part, are not to be ignored, either on moral grounds or grounds of expediency. And it may be claimed that for some reason which has not been made public it was necessary to submit to the demand of the United States for territory on the Alaskan border which, we say, belongs to us. But if this was the mind of the British Government, we have three things to say:—(1) Giving in to the demands of the United States, from time to time, and ignoring some very questionable diplomatic proceedings relating thereto, is not the way to secure their respect and co-operation. They have naturally come to the conclusion that a very mild threat is all that is necessary to bring England to their terms; and the feeling among their politicians may be expressed in a remark which has actually been made—"England is playing our game for us with Canada." (2) If it be necessary to secure their good-will, by giving up portions of our territory, it is not consistent with the dignity of British statesmen to be parties in the solemn farce of joining in the formation of a Board of Judges to adjudicate upon one of these territorial claims, under the conditions and circumstances hereinbefore referred to. (3) If so necessary, as aforesaid, Canada can well say that she has the right to be consulted, and to be a party to the deed of gift. Her patriotism and loyalty to the Empire (proved on many occasions and sealed by the blood of her sons) will be equal to the strain.

In conclusion, let it be understood, once and for all, that Canada is an integral part of the British Empire. . . . She is as much a part of the Empire as any portion of the British Isles. The thought of annexation with the United States is dead and buried long ago and beyond possibility of resurrection. . . . There is as we say no shadow of a thought in this Dominion of any dismemberment; but simply that, should the occasion arise, we shall insist upon our rights so far as they are consistent with the welfare of the Empire as a whole.

A NEW scale of allowances to witnesses in criminal cases has been authorized by the Home Secretary. The scale is the outcome of the report of Sir John Dorington's committee on the subject. These are the principal allowances: Per day—Legal and medical witnesses, 1 guinea; ditto (two or more cases), 2 guineas; ditto (over three miles), 2 guineas; solicitor for prosecution, 6s. 8d.; expert witnesses, 1 guinea; expert analyses, medical examinations, plans, *etc.*, extra at discretion of court; interpreters, 1 guinea; ordinary witnesses, maximum, 7s.; ordinary witnesses, if detained all night, 5s. (these allowances are double the old rates, but the maximum is not always to be given); children, servants and unemployed, 1s.; laborers, 3s.; artisans and mechanics, 5s.; others, 3s.; night allowance, 5s. (only half these allowances to be paid if detention is under four hours). First-class fare is not to be allowed "unless there is reasonable ground for supposing that the witness ordinarily travels first class."—*The Law Times.*

THE *Central Law Journal* (January 1) opposes the appointment of trust companies as executors, administrators and guardians. It concedes that "there are many advantageous features connected with a trust company's handling" a trust estate, but says:

These considerations do not apply to the more personal relations of executors, administrators and guardians. While these are also in their nature trust relations, there is also a personal aspect that cannot be avoided. The executor stands in the place of the decedent toward the rest of the family during the interim of administration. During this period the property of the estate and possibly the entire income of a family is tied up in his hands as an officer of the court. If the executor, who thus becomes a member of the family during the period of administration, is a stranger, or worse still, a corporation whose officers must naturally insist on every legal

technicality in the administration of the funds of the estate, the situation of the remaining members of the family dependent upon the stranger or corporation for their very existence often becomes very awkward and embarrassing to say the least. With the widow or some other member of the family acting as executrix or administratrix without bond, these and many other disagreeable and expensive features of the administration of estates by strangers or trust companies are avoided and the family affairs move on after the death of the decedent without interruption or annoyance.

Our conclusion is therefore that the profession should as often as opportunity presents, enlighten the public mind on the disadvantages and embarrassments that arise when trust companies are appointed to act as executors or guardians. Whether it would be wise to seek legislative interference in this regard, as some attorneys have suggested, is to be gravely doubted. The motives of the profession would certainly be misconstrued and misunderstood. But it is certainly advisable, also, in drawing a will for a client, to point out the respective advantages of having a trust company to administer any trust which the testator may create by his will as well as that of having the widow or some other member of the family appointed to carry the estate through the period of administration.

PROFESSOR FRANCIS M. BURDICK, of the Columbia Law School, in a scholarly article entitled "Recission for Breach of Warranty," in the *Columbia Law Review* for January, takes issue with a recent statement by Professor Samuel Williston, of the Harvard Law School, that "though the text writers have not generally recognized the fact, nearly as many courts have followed the Massachusetts rule as have followed the English law;" cases from Alabama, California, Iowa, Louisiana, Kansas, Maine, Missouri, Nebraska, North Dakota, Ohio, and Wisconsin, being cited in support of this assertion.

"The Massachusetts rule," says Professor Burdick, "is stated by Metcalf, J., as follows: 'He to whom property is sold with express warranty, as well as he to whom property is sold with implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it has been paid to him.'" . . . Does a breach of warranty, using the term in the narrow sense of a promise collateral or subsidiary to the main purpose of the sale contract, give to the buyer the right to revest title and possession in the seller without the latter's consent? The Massachusetts rule answers the question in the affirmative. The English law answers it in the negative.

After examining the cases cited as following the Massachusetts rule, Professor Burdick sums up as follows:

The result of this re-examination of the cited cases is this: In but two jurisdictions (Iowa and Maine) have the courts unequivocally adopted the Massachusetts rule. Even if we suppose that the habit of repeating as a dictum the terms of that rule has become so inveterate in Alabama, Missouri and Wisconsin, as to justify the belief that the courts of those States will follow it, when the question is squarely presented, we have but five jurisdictions following the lead of Massachusetts. On the other hand, the learned writer of the article in question enumerates sixteen jurisdictions which have followed the English rule. To these should be added, as we have seen, California and North Dakota, and also Hawaii. When we bear in mind that the doctrine of the United States Supreme Court is controlling in every Federal tribunal of the nation, in the absence of local statutes, the preponderance of American authority against the Massachusetts rule is simply overwhelming.

IN his second article on "The Expansion of the Common Law," (*Columbia Law Review*, January) Sir Frederick Pollock, in his usual scholarly and interesting way, traces

the development of the King's courts, showing how royal justice "became truly national, and preserved the substantial good points of ancient Germanic polity, while it discarded the obsolete forms."

The King's courts, says Sir Frederick, at the outset of their career, came under a rule which we shall find to run through the whole of our legal history, and never to be neglected with impunity. It may be expressed thus: extraordinary jurisdiction succeeds only by becoming ordinary. By this we mean not only that the judgment and remedies which were once matter of grace have to become matter of common right, but that right must be done according to the fundamental ideas of English justice of which we spoke in the first lecture. The Court of Chancery conformed in good time, and prospered; the Court of Star Chamber, warped to political ends, resisted and perished, involving one or two harmless victims in its fall. . . .

For the present purpose we need only to bear in mind the broad fact that in the course of the thirteenth century we find the king's judicial court separated from the king's general council for affairs of State, and further divided into three branches of King's Bench, Common Pleas or Common Bench, and Exchequer. If we are to fix a point where the royal jurisdiction becomes ordinary and of common right, it would seem to be given by the issue of writs in set forms to any one of the king's subjects who will pay the proper fee. The suitor who "purchases" a writ, as the official phrase ran, must of course choose at his peril that writ which will avail him in his particular case. It is no business of the court or its officers to see that he gets the right one. That is part of the fundamental methods of the common law; the party can have the law's help only by helping himself first. On these terms, and not otherwise, it is open to all. But if we must have a date to remember, we still cannot find a better than that of *Magna Charta*, for the text of the charter shows clearly that the king's justice is no longer a matter of favor, and that not even any verbal fiction of its being so will be admitted. . . .

One court might claim, down to modern times, to represent the king's original personal justice more directly than the superior courts of common law and even the Chancellor. This was the Marshalsea, the special court of the king's household weilding archaic and limited jurisdiction over its members; it does not seem to have had anything to do with the King's Council. Its more obvious defects of jurisdiction were supplemented by a new court, entitled "The Court of the Lord the King, at the Palace of the King at Westminster," created by several letters patent of James I., Charles I., and finally Charles II. These courts appear to have almost escaped professional criticism, partly because their jurisdiction was merely local, partly because their powers followed substantially the course of the common law. At any rate the final charter of Charles II. was not disputed; and the Marshalsea, moreover, rested on the firm ground of prescription. We learn, however, from the only writer on the practice of these courts, that the Palace Court had quite superseded it by the beginning of the nineteenth century at latest: the two courts purported to be opened together, but the Marshalsea did no business. He that would know the true causes of the fall of the Palace Court may find them set down as well in a very useful modern book of reference as by a layman whose name was Thackeray in the Ballads of Policeman X, under the heading of "Jacob Homnium's Hoss: a Pallice Court chaunt." Like most petty local courts the Palace Court became a hotbed of abuses and, although error would lie to the King's Bench, the remedy of a new trial was not available to correct a perverse verdict. Such verdicts were not uncommon, for the juries were apparently drawn from the small tradesmen class, and invariably found for a tradesman plaintiff whatever the evidence and the law might be. The court was abolished in 1849, and therewith, it would seem, the last relic of the only royal jurisdiction which had never passed through the hands of the Council.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

PUBLIC POLICY. (ILLEGAL CONTRACT—PARTNERSHIP—CAMPAIGN EXPENSES OF PARTNER.)
MISSOURI SUPREME COURT.

In Ward *v.* Hartley, 77 Southwestern 302, the court had before it the validity of a contract between members of a partnership, that the firm should bear the election expenses of one member, who was a candidate for president of the city council. The partners were engaged in the trade of bricklaying and building, and they undertook large contracts, the largest of which were for public works. They were competitors in the market with other concerns for like work. In holding that the contract was void as contrary to public policy, the court says it may be true that the mere *eclat* which the parties supposed would reflect on the firm by the elevation of one of its members to a high office in the city government is all that was contemplated, and it may be that they estimated that distinction as being worth the money they agreed to pay for it, just as many firms indulge in other forms of advertisement. But beyond that, no consideration is perceived for the agreement. The firm could derive no legal advantage from the fact that one of its members was president of the council, and if he had been elected and had faithfully performed his duty the firm would have derived no *illegal* advantage from his position. Therefore the motive did not sufficiently appear to justify the court in holding that the contract was supported by a legal consideration. The only theory on which direct advantage to the firm could be expected is that the partner, if he had been elected, would have used his official influence to favor his firm over others in like business. This, of course, would be liable to result in detriment to the public service, and would be contrary to public policy.

WITNESS. (CALLING BY COURT—BINDING CHARACTER OF TESTIMONY—VIOLATION OF LOCAL OPTION LAW.)
TEXAS COURT OF CRIMINAL APPEALS.

In Goldwater *v.* State, 77 Southwestern Reporter 221, defendant was prosecuted for violating the local option law. The case was tried by the court without a jury. One witness had given evidence sufficient to sustain a conviction, when the court of its own motion called another witness, who contradicted the first, and whose testimony tended to disprove any violation of law. It was contended that the court, having called this last witness, was bound by his testimony and thereby precluded from convicting. This, it is held on appeal, is not true. His testimony was before the court as that of any other witness, and the court, like a jury, was authorized to believe either witness, and if the testimony of the first was sufficient to sustain a verdict, the conviction must stand.

ACCIDENT INSURANCE. (EXCEPTED CAUSES—THINGS TAKEN INTERNALLY—SPOILED OYSTERS.)
TEXAS SUPREME COURT.

In Maryland Casualty Company *v.* Hudgins, 76 Southwestern Reporter 745, the clause in an accident insurance policy providing that the insurance shall not cover injuries "resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled, but it is understood that this policy covers injury from choking in swallowing," is construed and held to relieve the company from liability for death occasioned by ptomaine poisoning following the eating of some unsound oysters. The court says that the word "take" means to eat as food, for which definition Webster's dictionary is cited, and that this is particularly true in view of the qualifying clause as to

"choking in swallowing." It is true the policy should be construed most favorably to the insured, but the courts cannot undertake to make a new contract. The plain meaning of the language is that the company is not liable for the injuries which may arise from whatever thing of any kind or character, poisonous or not, which the insured might voluntarily and consciously swallow as food or drink. There is no doubt that the oysters were consciously and voluntarily swallowed by the assured. A large number of cases are cited, and Pollock *v.* United States Mutual Accident Association, 102 Pa. 234, 48 American Reporter 204, is quoted from to the effect that where a certificate declares that the benefits thereunder shall not extend to death caused by the taking of poison, it is not necessary that the poison should be taken intentionally, even though when taken innocently it may be said to have been taken accidentally. In conclusion the court says that it is claimed that while the taking of the oysters was not accidental, the eating of spoiled oysters was accidental because unintentional; that the accident consisted in the state of the thing swallowed. Admitting that this shadowy distinction is sound, it does not take the case out of the exception in the policy; for the spoiled oysters were a "thing" which was "taken," and from which the injury resulted, which brings the case within the exception.

ADMIRALTY. (Federal Jurisdiction Over Erie Canal—Canal Boats as Vessels—Repairs in Dry Dock—Unconstitutionality of State Statute Enforcing Lien.)

United States Supreme Court.

In Perry *v.* Haines, 24 Supreme Court Reporter 8, Mr. Justice Brown, speaking for the majority of the United States Supreme Court, holds that the admiralty jurisdiction of the Federal courts extends to the Erie Canal, and is exclusive in character. The case arose under an attempt to take advantage of the remedy provided by New York laws, 1897, c. 418 sections 30, 35, for the enforcement in the State courts by proceedings *in rem* of a lien for repairs made in a dry dock to a canal boat engaged in navigating the Erie Canal and the Hudson River. The court says that a State may provide for liens arising from maritime contracts to furnish a vessel with necessaries, such liens to be enforced by proceedings *in rem* in the United States District Courts. Also for causes of action not cognizable in admiralty, the States may not only grant liens, but may provide remedies for their enforcement. But if the repairs furnished to the canal boat were made under a maritime contract, the denial of exclusive jurisdiction on the part of the admiralty courts to enforce the lien was wrong. This conclusion is reached by first holding that the Erie Canal is a navigable water of the United States. The court says that the old test of tidal effect has long been abandoned. Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they constitute navigable waters of the United States when they form a continuous highway over which interstate or foreign commerce is carried. The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, not always, are wholly within a particular State. This, however, creates no distinction in principle. The Avon, Brown, Adm. 170 Federal Cases, No. 680 is cited as an instance in which admiralty took jurisdiction of a collision occuring on a canal in British territory, and a number of English cases of similar import are referred to. *Ex parte* Boyer, 109 United States 629, 27 L. Ed. 105, 3 Supreme Court Reporter 434, is another instance in which admiralty took jurisdiction of a collision between canal boats occurring in the Illinois and Lake Michigan Canal. In this case it was observed that navigable water used as a highway for commerce between different States was public water of the United States, even though wholly artificial and wholly within the body of the State.

Having secured jurisdiction of the canal, the next question considered by the court is whether canal boats are ships or vessels within the meaning of the admiralty law. It is pointed out that canal boats of from one

hundred and fifty to three hundred tons capacity were used on the canal as late as 1850, and while these boats were vessels of light draught and were drawn by animal power, they were larger than those out of which arose the maritime law of modern Europe, and much larger than those employed by Columbus in his discovery of America. In fact neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed and the business in which it is engaged. As to the argument that boats on the Erie Canal are drawn by horses, that is said to appeal less to the reason than to the imagination. Boats on their arrival in Albany are relieved of their horses and taken by steamer to New York. To hold that such boats are not within the admiralty jurisdiction while going down the Hudson River, would require the overruling of a large number of cases, while it would seem like "sticking in the bark" to hold that a canal boat might recover for a collision while in tow of a tug, but might not recover while in tow of a horse.

In the third place it was argued that as the repairs to the boat in question were made in dry dock they were made upon land. This the court is unwilling to admit. A dock is an artificial basin in connection with a harbor, and a dry dock differs from an ordinary dock only in the fact that it is smaller and is provided with machinery for pumping out water in order that the vessel may be repaired. All injuries below the water line must necessarily be repaired in dry dock, but it has never before been supposed that such repairs were made on land. No authorities were cited on the proposition and the court believes that none exist.

The fact that the boat was employed wholly in commerce within the State of New York was held to make no difference, the ruling case cited being *The Belfast*, 7 Wall. 624, 19 L. Ed. 266. Finally the remedy provided by the New York statute is examined and its character determined to be that of a proceeding *in rem*, and therefore distinctively a remedy of admiralty.

In a lengthy dissenting opinion concurred in by Chief Justice Fuller and Mr. Justice Peckham, Justice Brewer holds that the contract was made on land, for work to be done on land, which was in fact performed on land, and was therefore not a maritime contract; that the proceeding which was instituted was in its essential features an ordinary proceeding according to the course of the common law, which may always be resorted to, even in respect to contracts which are of a strictly maritime nature; and that the grant to the national government over admiralty and maritime matters does not extend to contracts made in respect to vessels which are incapacitated from commerce and are designed and used exclusively for local traffic within a State. Mr. Justice Harlan also dissents.

The case marks a very interesting extension of Federal jurisdiction and recalls the singular prophecy of Horatio Seymour made during his campaign for the presidency in 1868, that those in his audience might yet live to see the day when the Federal judiciary (of whose power he was jealous) would extend its sway over the Erie Canal.

BLOOD HOUNDS. (FOLLOWING TRAIL—EVIDENCE OF CONDUCT IN CRIMINAL PROSECUTION.)
NEBRASKA SUPREME COURT.

George W. Brott was convicted of burglary. The opinion reversing this judgment is found in 97 Northwestern Reporter, page 593. The crucial point in the case was the admissibility of the evidence of the conduct of blood hounds in following the trail of the burglar from the scene of the crime to defendant's residence. The court holds that the evidence was improperly admitted. It says there is a prevalent belief that in the pursuit and discovery of fugitive criminals the blood hound is practically infallible; that it is a commonly accepted notion that he will start from a place where a crime has been committed, follow the track for miles upon which he has been set, find the culprit, con-

front him, and *mirabile dictu*, by accusing bay and mien declare, "Thou art the man." This strange misbelief is with some people apparently incorrigible. It is a delusion which abundant actual experience has failed to dissipate. It lives on from generation to generation. It has still the attractiveness of a fresh creation. "Time writes no wrinkles on its brow." In discussing what is involved in following a trail the court says that the path of every human being through the world at every step from the cradle to the grave is strewn with the putrescent excretions of his body and this waste matter is in process of rapid decomposition. The blood hound which has great ability for differentiating smells, follows the odor thus generated; and for a short time a man may be easily trailed in the woods or open country; but in the city, after a lapse of considerable time, as in this case about twelve hours of sunlight, where the trail is crossed by hundreds of others, the work is obviously more difficult; yet the dog does the best he can. Nice and delicate questions are time and again presented to him for decision and as to the considerations which move his choice of path, he cannot be cross-examined and the jury informed. The result of all this is that the conclusions of the dog are too unreliable to be accepted as evidence.

CONTEMPT. (SECURING INFORMATION AS TO JUROR —INVESTIGATION.)

TEXAS COURT OF CRIMINAL APPEALS.

In *Ex parte* McRae, 77 Southwestern 211, a mere effort to secure the service of a party to find out how a juror stands in reference to a case on trial is held not to authorize a punishment for contempt, where the party employed makes no effort to tamper with the juror, nor holds out any inducement to the jury to decide one way or the other, nor talks with the juror about the case. The court says that the conduct of the relator was reprehensible, but it cannot find any decision of any court of last resort authorizing his punishment for contempt. The trial court is commended for its diligent effort to maintain the purity of the administration of justice, and the court enters its hearty disapprobation of relator's conduct, though because he does not bring himself within any of the known rules authorizing his punishment for contempt, it is compelled to discharge him.

DAMAGES. (GOODS PURCHASED ON INSTALLMENT PLAN—CONVERSION BY THIRD PERSON—MEASURE OF PURCHASER'S RECOVERY.)

WASHINGTON SUPREME COURT.

In Messenger *v.* Murphy, 74 Pacific Reporter 480, it is held that a purchaser of property on the installment plan under a contract providing that the title shall remain in the seller until the purchase price is fully paid, but nevertheless binding the purchaser to pay absolutely, may recover from a third person who converts the property, its full value, though he has paid but a portion of the purchase price. No authorities are cited and not much discussion is devoted to the point.

DAMAGES. (PERSONAL INJURY — EXPECTANCY— AGE OF ANCESTORS.)

MICHIGAN SUPREME COURT.

In Hamilton *v.* Michigan Central Railroad Co., 97 Northwestern Reporter 392, it was held in a personal injury case that the opinions of experts as to plaintiff's expectancy, based in part on mortality tables and in part on the hypothesis that plaintiff resembled his father and grandfather, who lived to advanced ages, were properly excluded. The court says, that without passing on the question of whether the longevity of the father and grandfather was competent evidence, it is agreed that when coupled with a proposal to show by experts the expectancy of life based upon that testimony and upon mortality tables, it was not competent. Judge Grant while dissenting, agrees with this view, and says that in his experience he never knew the question to be raised before, and but one case is cited—that of Chattanooga R. Co. *v.* Clowdis, 90 Ga. 258, 17 Southeastern 888, in which the opinion is too meagre to throw light on the question.

DEATH. (WIDOW'S ACTION FOR DAMAGES—FAILURE OF HUSBAND TO SUPPORT HER—EFFECT.)
TEXAS COURT OF CIVIL APPEALS.

In De Garcia *v.* San Antonia & A. P. Ry. Co., 77 Southwestern 275, it is held that a wife, who has not by her own acts forfeited the right to support by her husband, may recover damages for his death, though he had not for a long time supported her. The court says that so long as she has not acted in a way to forfeit it, the wife is entitled to support at the hands of her husband, and a party wrongfully killing him cannot deprive her of damages by a plea that the husband had not been fulfilling the duties that he owed his wife. Railway *v.* Spicker, 61 Texas 427, 48 Am. Rep. 297, is cited as authority.

EIGHT-HOUR LAW. (STATE CONTRACTS—CONSTITUTIONALITY OF STATE LAW—LIBERTY OF CONTRACT.)
UNITED STATES SUPREME COURT.

In Atkin *v.* State of Kansas, 24 Supreme Court Reporter 124, the provisions of the General Statutes of 1901 of Kansas, Sections 3827, 3828, making it a misdemeanor for any official or any contractor or sub-contractor with, or on account of, the State, a county or city, to require more than eight hours as a day's work from employés, or to pay less than the current rate of wages for such eight-hour day, are passed upon in the light of the guaranty of the 14th amendment to the Federal Constitution, securing liberty of contract. In sustaining the statute, the court says that no question as to the constitutionality of such an act interfering with the contractual relations of private employers and employés is presented. Municipal corporations are mere political subdivisions of the State. The street improvement which defendant contracted to make was one which the State, had it deemed proper, could have taken immediate charge of by its own agents. Instead of undertaking that work directly it invested one of its governmental agencies with power to care for it. Whether done by the State or one of its instrumentalities, the work was of a public and not of a private character. Being of a public character it necessarily follows that the statute does not infringe the personal liberty of any one. It may be that the State in enacting the statute intended to give its sanction to an eight-hour day. The court has no occasion to consider the question of the propriety of such a limitation of working hours, for, whatever may have been the motives in the enactment of the statute, it can imagine no possible ground to dispute the power of the State declaring that no one contracting to work for it or for one of its municipal agencies should permit or require an employé to labor in excess of eight hours each day. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State; nor is any employé entitled, as a part of his liberty, to perform labor for the State. If it be said that a statute like this one is mischievous in its tendencies, the answer is that the responsibility therefor rests upon the Legislature, and not upon the courts. Equally without any foundation is the proposition that the statute denies to the defendant or to his employés the equal protection of the law. It applies alike to all who do work on behalf of the State or of the municipal sub-divisions, and to those employed thereon. The fact that the work performed by defendant's employés was not dangerous and that ten hours labor thereat would not be injurious is held to be immaterial.

INJUNCTION. (COERCIVE REMEDY TO COMPEL PRODUCTION OF WITNESS—PRESIDENT OF FOREIGN CORPORATION.)
UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH DISTRICT.

In Central Grain and Stock Exchange *v.* Board of Trade, 125 Federal Reporter 463, the complainant, an Illinois corporation, sought to enjoin the defendant corporation, located in Delaware, from using certain market quotations. The Delaware corporation questioned the jurisdiction of its person on the ground that it had never transacted business within the State of Illinois. The

matter was referred to a master and the complainant endeavored to subpoena defendant's president. Being unable to do so, the master reported such inability to the court; and apparently entertained the suspicion that defendant's president was evading service. The court ordered the defendant to produce its president, and when it failed to do so, granted a preliminary injunction as prayed for in the complaint.

The Court of Appeals says this order was unwarranted. It knows of no legal duty imposed upon a corporation to produce its officer as a witness when the process of the court cannot reach him. "The duty of an officer of a corporation is prescribed by law, or by the articles of incorporation, or by the by-laws of the corporation. The power of a corporation over its officers has respect only to the duties to the corporation which the law imposes. We know of no legal duty imposed upon an officer of a corporation to appear as a witness against that corporation, except in obedience to the writ of subpœna of a court duly served upon him. We know of no power in the corporation, or any duty devolving upon it, to compel its officer to appear as a witness before a court. We know of no right in a court to compel a corporation to produce its officer as an adverse witness. The law furnishes ample machinery to procure the testimony of any witness, in the service of its writ and by proceedings for contempt for disobedience of the writ, or, if the witness is beyond the jurisdiction of the court, by deposition or upon commission." In addition the action of the lower court is characterized as an attempt to determine the merits of the pending motion for injunction, when neither the record nor the marshal's return disclosed any jurisdiction over defendant's person.

INSURANCE. (COMBINATIONS BETWEEN INSURANCE COMPANIES — CONSTITUTIONALITY OF PROHIBITORY STATUTE—GRANT OF SPECIAL PRIVILEGES —GENERAL AND UNIFORM OPERATION OF LAWS —LIBERTY OF CONTRACT.)

UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

In Greenwich Insurance Company *v.* Carroll, 125 Federal Reporter 121, the constitutionality of Iowa Code, Secs. 1750 and 1755, prohibiting combinations between fire insurance companies in relation to rates, agents' commissions and manner of doing business, is determined, first in view of the provision of the State Constitution against the granting of special privileges and immunities and that requiring all laws when they can be made applicable, to be general and of uniform operation, and second, as to whether the statute violates the liberty of the contract secured by the 14th amendment to the Federal Constitution. The statute is held valid so far as the provisions of the State Constitution are concerned, but is held to violate the 14th amendment. Considering the objections under the State Constitution, the court says that the law has a uniform operation. No one can expect that all laws shall operate upon all people. Classifications can be made providing they are not arbitrarily made. All will agree that there must be rules and regulations applicable to insurance companies not applicable to other corporations. Hundreds of statutes have been enacted in Iowa known by all to be intended to apply to a single city or town or corporation or trade; and so it is as to granting immunities to some which are denied to others. Exempting farmers and merchants, manufacturers, *etc.*, from liability in case an employé is injured by another employé's negligence and holding a railroad liable, illustrates the whole proposition.

After quoting from a number of judges' general statements as to liberty of contract, the court says that the slightest knowledge of insurance will persuade any one that companies must have some arrangements and must make some contracts with other companies. Other classes of both men and associations must do the same and both the laws and constitution permit it, and to single out insurance companies and to say that they shall not, is neither logical nor allowable under the 14th amendment. The following cases are cited as "covering the entire question." People *v.* Orange County Road Const. Co. (N. Y.) 67 N. E. 129; Republic Co. *v.* State (Ind. Sup.) 66 N. E. 1006; State

v. Kreutzberg (Wis.) 90 N. W. 1098. Employers of labor agree what they will pay and laboring men agree for what sum they will work. Buyers and vendors of various commodities make their agreements. Farmers will, and do agree as to the price for which they will sell and what they will pay for labor; but this statute says that insurance companies shall agree as to none of these things. The court disclaims any intention to hold that insurance companies can combine and thereby conspire to accomplish any desired purpose. It only holds that insurane companies may make the usual contracts that all other persons and corporations may make, which this statute seeks to take from them, and which will be taken from them if this statute is upheld.

LIBEL. (PUBLICATION OF PHOTOGRAPH — REPRESENTATION AS TO IDENTITY.)

NEW YORK SUPREME COURT.

De Sando *v.* New York Herald Co., 85 New York Supplement 111, brought up for review the liability incurred by the *New York Herald* in publishing plaintiff's photograph as that of the Italian bandit Musolino in connection with an article describing the various misdemeanors of that interesting individual. Not having his portrait at hand, the *Herald*, as newspapers sometimes do, published one which the public might accept as such. The article was concededly libelous, and the court says it would be a reflection upon the law if it was powerless to afford some remedy for so grievous a wrong. Stripped of extraneous considerations the question is whether the person responsible for the publication of a photograph in connection with a libelous article referring specifically to the picture, can escape liability by placing underneath it the name of a person different from that of the person of whom the picture is a likeness, and stating in the article some facts which, standing alone, would tend to negative the inference that the article was published of and concerning such person. Two cases are cited: the first: Clary-Squire *v.* Press Publishing Co., 58 App. Div. 362, 68 New York Supplement 1028, in which an actress, whose stage name was Mary Louise Clary brought an action of libel based upon the fact that defendant published her picture as that of Louise Cleary in connection with an account of the latter's marriage. The question of identity was left to the jury, which found against the plaintiff. The second case is Morrison *v.* Smith, 83 App. Div. 286, 82 New York Supplement 166, in which the publication of plaintiff's picture in connection with the advertisement of a book said to contain the experience of a giddy typewriter girl was made the basis of an action. The complaint was dismissed on a technicality, but on the question of liability the court said that its inclination would be to hold that the case was for the jury. On the whole the court decides that the *New York Herald* was responsible.

MONOPOLY. (TOBACCO TRUST—EXCLUSIVE HANDLING OF WARES—STIPULATION—REFUSAL TO SELL TO RETAIL DEALER—VIOLATION OF ANTI-TRUST ACT.)

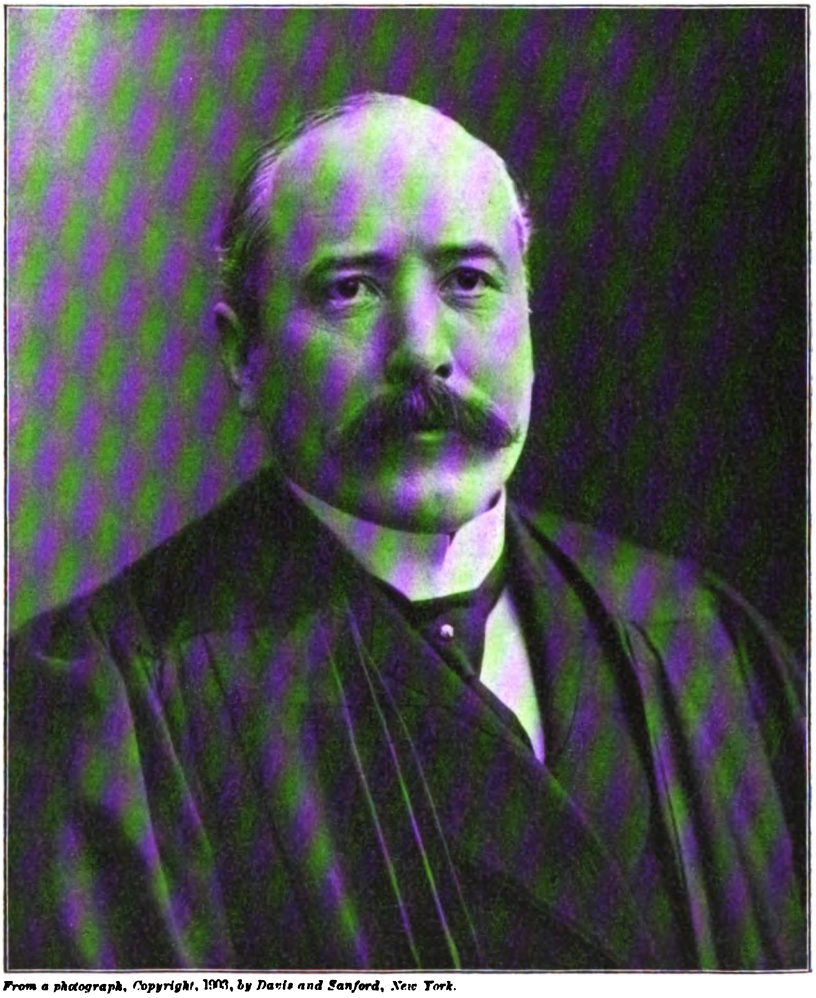
UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

In Whitwell *v.* Continental Tobacco Company, 125 Federal Reporter 454, the court had before it the question whether, in refusing to sell a retailer except under an arrangement advantageous to him only in the event that he would agree to handle none of the product of independent manufacturers, the defendant violated the Act of Congress of July 2, 1900 (United States Compiled Statutes, 1901, page 3200), prohibiting every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce, and also punishing every person who shall monopolize or attempt to monopolize any part of the trade among the several States. This branch of the tobacco trust does business as follows: It allots to an intending purchaser an amount of goods which he is required to buy during each succeeding period of four months, which is much in excess of what he will be able to sell during that time. The price is

fixed so high that, if the purchaser paid it, he could not make any profit from re-sales. If, however, he will agree to refrain from dealing in tobaccos made by independent concerns, his allotment is reduced to the amount he is able to sell, and a rebate made to him on the aggregate price of the goods bought, so that the handling of the trust's goods becomes profitable. Plaintiff having refused to refrain from handling the goods of independent manufacturers, who were competing with the defendant, the latter refused to reduce the allotment which it had made to him or the price thereof, and plaintiff refused to purchase defendant's goods. He was unable to procure them elsewhere, and alleged damages.

The liability of the defendants is first considered under section one of the act, prohibiting combinations or conspiracies in restraint of interstate commerce. The purpose of the statute, the court says, is to prevent the stifling or substantial restriction of competition, and the test of the legality of a combination under the act is its direct and necessary effect upon competition in interstate commerce. If this is to stifle or to substantially restrict free competition, it falls under the ban of the law; citing a large number of authorities, among them the Northern Securities case, 120 Federal Reporter 721, 725. The court declares that the right of each competitor to fix the prices of his commodities and dictate the terms upon which he will sell them is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed. Conceding, for the sake of argument, that the defendant could conspire or combine with its employé, no such combination or conspiracy would be a violation of the law, as the two defendants have never been and never intend to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them can be restrained by their combination to conduct the trade of the defendant company. Then follows this significant utterance: "The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or *quasi* public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale." Citing *In re* Greene (Circuit Court), 52 Federal 104, 115; *In re* Grice (Circuit Court), 79 Federal 627, 644; Walsh *v.* Dwight, 58 New York Supplement 91, 93; Brown *v.* Rounsavell, 78 Illinois 589; Commonwealth *v.* Grinstead (Kentucky), 63 Southwestern 427; Allgeyer *v.* Louisiana, 165 United States 578, 589, 17 Supreme Court 427, 41 Lawyers' Edition 832. There is nothing in the statute depriving any of these competitors of these rights. Had there been, the law itself would have destroyed competition more effectually than any contracts or combinations could possibly have stifled it.

As to the violation of the second section, prohibiting an attempt to monopolize interstate commerce, the court holds that its purpose is practically identical with the first section, and that no attempt to monopolize *a part* of commerce among the States is made illegal unless the necessary effect of that attempt is to directly and substantially restrict interstate commerce. It was not the purpose of the second section to punish the customary and universal attempts of all manufacturers and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind.



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ALTON B. PARKER.

The Green Bag.

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ALTON B. PARKER,

Chief-Judge of the New York Court of Appeals.

By M'CREADY SYKES,
Of the New York Bar.

WHEN in 1897 Alton B. Parker was elected Chief-Judge of the New York Court of Appeals, the court of last resort in that State (the so-called Supreme Court being the court of original and intermediate jurisdiction), he was forty-six years old. He was the youngest man who had ever been called to be the head officer of New York's judicial system. He had already been on the bench for twenty years, and he had sat for several years on a temporary "Second Division" of the same Court of Appeals over which he was now called on to preside. For one so much of whose life had been spent in the comparative isolation of judicial duties he had had a remarkably active career: and he is a man whose temperament would be pretty apt to keep him out of any career that was not active.

Judge Parker was born in Ulster County, New York, in 1851. Before he went to live at Kingston in 1871 he had taught school for a time at Accord. At Kingston he entered the office of Schoonmaker and Hardenburgh. He studied law at the Albany Law School and graduated and was admitted to the bar in 1872. That same year he formed the law firm of Parker and Kenyon.

Everyone knows that outside of a few large cities, lawyers, and above all young lawyers, take to politics as ducks take to water. About the first thing that happened to young Parker was that he was made clerk of the Ulster County Board of Supervisors. Soon after he represented Ulster County in a protracted suit with the city of Kingston, involving the equalization of assessments. This was Parker's first "big case," and so patiently and exhaustively did he master its prosaic details that he was victorious at every point. For his services in this litigation he received a fee of thirty-six hundred dollars, a windfall for a young lawyer in his early twenties.

By 1877, when Parker was twenty-six, he had already made his talents and energy so well known in Ulster County that he was asked to take the Democratic nomination for Surrogate. He was in the minority party, and the Democratic ticket went down in defeat; but so remarkably large was the vote for Parker that on election night the return for Surrogate was still in doubt. When the count was complete it was found that Parker alone had "pulled through." Except in the larger cities, the Surrogate is not debarred from the practice of his profession. In 1883 Parker was reëlected.

A word should be said about Judge Parker's political leadership at this time. Partly from the fairly even balance of political belief, partly on account of New York's commanding influence in national politics, and partly, no doubt, from natural capacity and favorable environment, the country districts of New York have produced with fair regu-

larity a number of men actively engaged in politics, combining personal integrity with a high order of practical capacity for political service. Of these the most striking group historically is the Albany Regency. Parker was in close and intimate relations with the Albany Regency of latter days, and was a warm friend of President Cleveland. Early in 1895, he was summoned by a telegram to Washington, where President Cleveland offered him the post of First Assistant Postmaster-General of the United States. The salary was five thousand dollars. Parker thought the matter over, and although his salary as Surrogate was only three thousand dollars, he promptly declined the place, as he feared that to withdraw from the active life of his own county would mean the loss of his practice, which gave every promise of being established within a very few years.

Somewhat surprised and a little disappointed, Mr. Cleveland sent for Mr. Vilas, the Postmaster-General, saying, "Vilas, Parker says he has a three thousand dollar salary as Surrogate of Ulster County and is building up a law practice, and he can't afford to take a five thousand dollar place."

"That's strange," said Vilas. "Why, I left a twenty-thousand dollar practice to take an eight thousand dollar place in the Cabinet."

"Yes," retorted Parker; "and if I had been making twenty thousand dollars a year for ten years, I should not mind taking a five thousand dollar place in Washington."

Later in the same year, the offer was authoritatively made to Parker of the Democratic nomination for Lieutenant-Governor of New York, but this, too, he declined.

The time was at hand when Parker should definitely retire from politics, although he was not yet half through his thirties. On the urgent solicitation of the Democratic leaders, Parker consented, in the autumn of 1885, to act as chairman of the Democratic Executive Committee in the State campaign. That campaign is still spoken of as one of the most efficient and successful campaigns of the past generation. With practically no campaign funds, Parker fought an uphill fight wherein few hoped for success, and ended the campaign with a decisive victory. Here his political service came to an end, for in December of the same year, 1885, he was appointed to a vacancy on the bench of the Supreme Court. In the following year, he was elected to a full term, the Republicans paying him the compliment of running no candidate. He was only thirty-five years old.

In 1892 Judge Parker was appointed to sit in what was then the General Term of the Supreme Court, a court composed of three or four judges sitting *en banc* to review the judgments of their brethren on the Circuits. Owing to the amount and importance of the business in New York County, additional judges were sent to the General Term there, and Judge Parker has become known to the metropolitan bar chiefly through his service as a member of the General Term from 1892 until the Court's abolition by the new Constitution of 1894. The present Appellate Division of the Supreme Court succeeded to the jurisidiction of the old General Term, and when Judge Barrett was disabled by illness from sitting in the Appellate Division, and a judge had to be sent from up the State to take his place, it was the justices of the Appellate Division themselves at whose request Judge Parker was again assigned to the onerous duties of the First Department. In 1897 he was elected Chief-Judge of the Court of Appeals by a majority of over sixty thousand. The State had given a Republican majority of over two hundred and fifty thousand a year before. I propose to confine myself to Judge Parker's judicial career since assuming his present office.

Every lawyer knows that it is a very difficult thing to discover in the reported opinions of a single judge any fundamental and characteristic qualities running through

them all. Facility in affording this is apt to increase inversely with the competence of the judge. Distinction in style, for example, postulates a large gift of imagination; and the sober traditions of the bench have pretty uniformly and doubtless wisely repressed any imaginative tendency in writing judicial opinions.

Seldom do modern judges reveal a distinctive tendency of thought.[1] But when a man with Judge Parker's marked gift of original and forceful thinking is brought face to face with the novel and pressing problems now coming before our modern courts, and markedly before our Courts of Equity, it is inevitable that his personality should find adequate expression. In insurance cases Judge Parker has shown a decided tendency to enforce the strict letter of the policy, even to a further extent than seems to be required by the drift of the modern decisions. His second opinion, written after he became Chief-Judge, dissented vigorously from the Court's decision that under the standard policy in its then form, cancellation of the policy was not effected merely by notice to that effect from the company, but that the *pro rata* premium must actually be returned.[2] So again Judge Parker wrote an opinion dissenting from the conclusion of the Court that the medical examiner on an application for a life insurance policy does not become the agent of the insured because the policy stipulates that he does. Judge Parker says in the dissenting opinion:

"The decision about to be made is an unusually interesting one because it introduces a new feature into the law of contracts, by which persons of sound and open minds and honest purposes are cut off in one direction from freedom of contract, in that they may not agree that an intermediary shall for all purposes of the contract be deemed the agent of one of the parties if some court be of the opinion that he was the agent of the other."[3]

It is in regard to some of the more recent causes affecting what has come to be known as "labor legislation" and kindred subjects, that interest has lately centered around Judge Parker's opinions. In these cases he has either led the dissent or succeeded in carrying the Court by his own casting vote.

In 1897 the New York Legislature passed what is known as the Prevailing Rate of Wages Law, under which it is provided that workmen and mechanics on all public works should receive not less than the prevailing rate of wages, and that every contract thereafter made for public work should contain a clause binding the contractor to pay the prevailing rate of wages; with very drastic provisions for violation. The City of New York accordingly made a contract containing this clause, and afterwards the question of the constitutionality of the statute was raised in *mandamus* proceedings brought by the contractor for payment by the city for work done, where it was admitted that the prevailing rate of wages had not been paid. When the case reached the Court of Appeals, the Court was so thoroughly convinced of the utter badness and unconstitutionality of the Act, that it promptly awarded the relief sought, in spite of the fact that whether the law were constitutional or not, the contrac-

[1] The case of Chief-Justice Marshall is not really an example of the contrary. Owing to the frequency and importance of its constitutional decisions the United States Supreme Court was for the first half of the last century largely a political rather than a judicial body. Under the Federal Constitution these questions came before a Court; but they were fundamentally the same kind of questions as were coming before the British parliament, although they arose in a very different form. Strongly marked opinions on such questions, governing one's decisions uniformly, are expected in a judge. Lincoln always said that he submitted to the Dred Scott decision as a statement of law, "but not as a rule of political action."

[2] Tisdell *v.* New Hampshire Fire Insurance Company, 155 N. Y. 163.

[3] Sternaman *v.* Metropolitan Life Insurance Company, 170 N. Y. 13, 28. See also Hustace *v.* Phenix Ins. Co., 175 N. Y. 292; Strauss *v.* Union Central Life Ins. Co., 170 N. Y. 349.

tor had made a contract binding himself to pay the prevailing rate of wages. There is considerable common sense in the reply of the Court to this latter objection. If the law is valid, the Court says, it governs the contract and the rights of the parties, whether actually incorporated into the writing or not. If it is not valid, the contractor has not made it so by stipulating in writing to obey it. "It is not in the power of the Legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates."[1] Judge Parker writes a vigorous dissenting opinion, in which he points out among other things, that whether the statute is unconstitutional or not, there is nothing to prevent the contractor from incorporating the phraseology of the statute into the contract. Whatever we may think of the policy of this legislation, we question very much whether the majority of the Court did not step beyond its duties as to the principle of the law and come perilously near to judicial legislation. Judge Parker carried with him only one of the Court. The law was declared unconstitutional by a vote of five to two.

A similar question came before the Court at the same term involving the so-called Dressed Stone Law, a law that required dressed stone for public buildings in New York City to be dressed or carved in the State of New York. In this case Judge Haight, who had joined Judge Parker in the Prevailing Rate of Wages decision, now goes with the majority on the authority of the first case; but the Chief-Judge resolutely reaffirmed his former objections to the law, especially on the ground that the provision was in the contract anyway, whether the law was good or not.[2]

In line with these cases was the decision of the Court of Appeals rendered shortly after, in which the Court declared unconstitutional the law prohibiting any person contracting with the State or with a municipal corporation from requiring more than eight hours' work for a day's labor. The result of the case in the Court of Appeals was to sustain a demurrer to an indictment. Judge Parker concurs in the result on a question of pleading; he writes no opinion, but takes pains to go on the record as dissenting "from even the expression of a doubt as to the power of a State to enforce its constitutional mandate by making the violation thereof a crime, whether such violation arises under contract with the State or otherwise." In this case the Court holds that the law conflicts with the Fourteenth Amendment of the Federal Constitution, because it creates an arbitrary distinction between persons contracting with the State or municipality and other employers of labor, and thus denies to a person within the State's jurisdiction the protection of its laws.[3] It is of interest to note that at the current session of the United States Supreme Court a similar provision of the Kansas Statute has been held not to conflict with the Fourteenth Amendment.[4]

We have already pointed out that Judge Parker's temperament is far indeed removed from lethargic, and it is not surprising to find that dissenting opinions, or opinions making a bare majority, seem to afford the Chief-Judge the most eagerly welcomed carpet for discussion. And the dissenting opinion is apt to stray a long way beyond the argument heard in the court room. When in a recent case the Court held that the use of a street for a street surface railway operated by electricity imposes an added burden upon the property owners of the fee, the Chief-Judge took it upon himself to write a dissenting opinion, carrying with him one of the judges, in which he cites no less than

[1] People *ex. rel.* Rodgers *v.* Coler, 166 N. Y. 1, 9.
[2] People *ex. rel.* Treat *v.* Coler, 166 N. Y. 144.
[3] People *v.* Oregon Road Construction Company, 175 N. Y. 84, 94.
[4] Atkin *v.* Kansas, U. S. Supreme Court Opinions, Advance Sheets, p. 124.

forty-seven cases opposed to the general proposition laid down by the Court, these cases being drawn from all over the United States, and only about half a dozen of them having been suggested to the Court—the rest apparently representing voluntary research.[1]

The New York Court of Appeals has been much criticized of late for two decisions denying equitable relief. The Court bases its refusal in both cases on the fact that it can find no authority for the recognition of the rights said to be threatened nor for the issue of an injunction to restrain the act complained of. In both these cases the opinion was written by the Chief-Judge; in one case, carrying the Court with him by five to two, and in the other by a bare majority. If decisions of this kind are to be particularly associated with the writer of the opinions, we seriously doubt if in the long run these decisions can be accepted by courts of equity as a correct statement of law, or if they are, that they can be regarded as contributions of value to our system of equitable jurisprudence. The first of these cases is Marlin Fire Arms Company *v.* Shields, 171 N. Y. 384. In that case it appears that the proprietor of a magazine largely devoted to sports, published an alleged letter criticizing the Marlin rifle, saying that it had a faulty extractor and rejector; that it was "no good," and using other language which the complaint alleged to be unjust and malicious; the complaint further stated that the alleged letter was not in fact written by a correspondent, but was a sham letter written and published by the defendant to force plaintiff to advertise with him, or failing in that, to gratify his malice. As the case came up on demurrer, all the allegations were, for the purpose of the decision, to be taken as true. The Court holds that unjust and malicious criticism of a manufactured article, for which the manufacturer has no remedy at law because of his inability to prove special damage, are not the subject of judicial cognizance, and that their future publication cannot be restrained by injunction.

The other and more flagrant case is the well-known case of Roberson *v.* Rochester Folding Box Company, 171 N. Y. 538. It was there held that an injunction could not be granted to restrain the unauthorized publication and distribution of lithographic prints of a young woman as part of an advertisement of a legitimate manufactured article, there being no allegation that the picture was libelous, the picture being a good likeness and being used to attract attention to the advertisement, and it appearing that the publication had caused the young woman great mental and physical distress, necessitating the employment and attendance of a physician. In all the lower courts the decision had been in favor of the plaintiff, and the Court of Appeals was closely divided by a vote of four to three. This case has been so widely discussed that it is not worth while to add to the literature on the subject, but it would seem that for a court of equity to declare itself unable to give such relief as was there asked for, because of the difficulty in drawing the line, or because some day it might be asked to enjoin a publication in the newspapers of a public man's portrait, indicated a distinctly reactionary policy. The current development of the law is along the lines of equitable jurisprudence rather than legal. Probably to no common-law judge in the future will be given the opportunity to repeat Lord Mansfield's work of rebuilding the fabric of commercial law. A decision in equity of this sort tending to tighten the bond of precedent is distinctly unfortunate. It may well be that the remedy of injunction should be limited rather than extended, but the Roberson case is not founded on a refusal further to extend the

[1] **Peck** *v.* Schenectady Railway Company, 170 N. Y. 298, 311.

remedy of injunction, but specifically on the denial of the existence of an equitable right.

In a recent case in the New York Court of Appeals, damages were sought by a labor union from the walking delegates of a rival union, who by threats of a strike had caused the discharge of members of the plaintiff's union. The Court denies the right to relief. It puts its decision squarely on the ground that it is lawful for a labor union to refuse to permit its members to work with fellow-servants who are members of a rival organization, to notify the employer to that effect and to notify him that a strike would be ordered unless such servants were discharged; such action being based upon a proper motive, such as to secure the employment of approved workmen only, or an exclusive preference of employment to its own members; and provided that no force was employed and no unlawful act committed. Judge Parker, speaking for the Court, says that a man may work for another or not, just as he pleases; and that if he pleases not to, the lawfulness of his choice is not diminished by the fact that the reason he pleases not to is that his employer retains in his employ some other man to whom he, the workman, objects; and if he chooses not to work, of course he may stop working; and if he may stop working, he may threaten to stop working. "A man may threaten to do that which the law says he may do. . . . A labor organization has precisely the same right as an individual, to threaten to do that which it may lawfully do."[1] With the Chief-Judge vote Judge O'Brien, Judge Haight and Judge Gray: three judges dissent. The Court thus decided the case by a bare majority vote.

The same vote determines the decision of the Court in regard to the Child Labor Law, which prohibits the employment of a child under the age of fourteen in any factory in the State of New York, construing the act as in effect declaring that a child under that age presumably does not possess the requisite judgment to be chargeable with contributory negligence or to have assumed the risks of employment. Here again the vote of the Court is four to three, just carried by the Chief-Judge.

Coming down to the last few weeks, the Court of Appeals has just had occasion to construe an act passed by the New York Legislature in 1897 providing that no employé should be required to work in a bakery or confectionery establishment more than sixty hours in any one week. The Court holds this to be an exercise of the police power, and therefore constitutional. Here again Judge Parker carries the Court with him by a single vote. From writing the dissenting opinion on behalf of himself and a single other judge, Judge Parker has in the somewhat similar Bakeries case come to write the opinion of the Court. The dissenting opinion in the Bakeries case, like the majority opinions in the Prevailing Rate of Wages and Dressed Stone cases, is, it must be confessed, somewhat general in its criticism, and they all furnish an instance of constitutional discussion with almost no reference whatever to any particular section of the Constitution. Perhaps Judge Gray does not go far wrong when he refers to Judge Parker's opinion in the Bakeries case as "carefully expressed and convincing in its reasoning."[2]

Since the above was written, the very latest utterance of the Court of Appeals has been published on the Prevailing Rate of Wages Law;[3] and in view of what I have pointed out as to the vigorous temperament of our Chief-Judge, it is of interest to note that the dissenting opinion in the Rodgers case above referred to has now practically

[1] National Protective Association *v.* Cumming, 170 N. Y. 315, 331.

[2] People *v.* Lochner, 177 N. Y. 145.

[3] Ryan *v.* City of New York, — N. Y. —. (*New York Law Journal*, 11 February, 1904).

become the opinion of the Court. It is true that in the Ryan case just decided, the question involved is the constitutionality of that part of the Act imposing on the *city* the payment of the prevailing rate of wages, while in the Rodgers case the part of the Act involved was that imposing such requirements on municipal *contractors*. In writing the opinion of the Court, Judge Parker *naïvely* says: "As expressed in the Rodgers case," *etc.*, and then proceeds to quote from his own dissenting opinion! And he courteously states that the Ryan case is not controlled by the Rodgers case and distinguishes it, doubtless with a quiet satisfaction not shared by the now dissenting minority. Judge O'Brien, writing the dissenting opinion, holds that the Court has necessarily decided the question in the Rodgers case and that it is no longer open in this court. Judge Parker has now the further support of the United States Supreme Court in Atkin *v.* State of Kansas mentioned above, and his reference to it indicates again, I suspect, independent research on his part of the Court; for it had evidently not been reported when the case was argued.[1]

[1] The fact that the Court of Appeals has apparently swung clearly around on the main question involved illustrates one of the lamentable results flowing from our present system in New York of providing judges for the court of last resort. Recently, under an amendment of the Constitution, certain justices of the Supreme Court were designated to act as Judges of the Court of Appeals, thus making the court temporarily consist of ten judges instead of seven. As only seven judges sit at one time, the *personnel* of the Court is constantly changing back and forth, and what has happened in this case is that the two judges who wrote the dissenting opinion in the Rodgers case, *viz.*, Parker and Haight, have now with them two of the Supreme Court judges (Cullen and Werner), who were also at that time members of the Court, but who did not happen to be sitting, thus making the present majority of four. On the other hand, of the five judges who determined the decision in the Rodgers case, three of them were sitting in the recent Ryan case and again voted against the constitutionality of the law, (Judges O'Brien, Bartlett and Vann), but their two associates (Landon and Martin), who were still members of the Court, did not happen to be sitting in the Ryan case; so the former majority party of five has been turned into a minority vote of three; and this without a change in the opinion or the death or withdrawal from the Court of a single Judge.

This discussion of Judge Parker's recent opinions has been already too far protracted; but I trust that it is evident enough that anyone who cares to follow the workings of a very active and vigorous judicial mind and of a very closely divided Court of last resort, will find of interest the contemporary decisions of the New York Court of Appeals. Judge Parker's tendency, as above noted, is not only to hold private litigants strictly to the letter of their contracts, but is to refrain from relying on general principles of policy to nullify legislative enactments. That this tendency in both cases illustrates the true path of a judge, is, it seems to me, unquestionable. We have seen plenty of vicious legislation, and are apt to see plenty more; but after all, the remedy for this sort of thing is not to be found in the judicial department. The remedy is often as bad as the disease. It can hardly be doubted that even though unintentionally, the United States Supreme Court in the Legal Tender cases was to a certain extent governed by questions of policy, and the resultant legacy of financial heresies sowed a crop of disorder and financial perturbation for more than twenty years thereafter. We complain of populistic legislation; but there are no worse expressions of populism than in some of the sober pronouncements of our courts of last resort. The decisions on combinations tending to monopoly have left the law in a state of combined uncertainty and perverseness. The only safe course for the judges to follow seems to be a rigid adherence to their duties of construction and interpretation, and a resolute refusal to interfere with the proper powers of the legislature. The dangers, passions and prejudices aroused by pending economic and political questions, pass away with the course of years; but the disintegrating influence of courts infected with the virus of judicial legislation lasts for generations. We think Judge Parker's hesitancy in extending recog-

nition of equitable rights, as exemplified in the Marlin and Roberson cases, very unfortunate; but as an expositor of the Constitution and defender of legislative power, he has been a force making for conservatism and the integrity of our institutions.

TO THE GREEN BAG OF BOSTON.

By Lee Wilson Dodd.

[Note.—Secretary Long's green bag is not characteristic of the genial Secretary of the Navy as an individual so much as of the part of the country he comes from. Almost every other Boston man carries one. And there are all shades of green, from the vivid insistent clamorous emerald of a St. Patrick's Day parade to the sober and sombre shade which the dignified Back Bay maidens put on when they want to symbolize in their dress the dawn of spring. The normal, healthy Boston man carries the green bag.—*The Sun*, New York.]

Capacious and convenient,
  Filled with no common fare,
The teeming womb of wisdom,
  Verdant as mermaid's hair.

From out its depths what treasures
  Come hourly to the light—
Browning, and Beans, and Bunyan,
  Stamps and the Stagirite.

Ibsen, and Ink (in bottles),
  Pins, and Pinero, too,
Maeterlinck, Matthew Arnold,
  Görky, and liquid Glue.

Stevenson, Walter Pater,
  Tolstoi, Turguieneff,
D'Annunzio, Dante and Darwin,—
  Macdowell's last thing in "F."

Everything Eddifying—
  From the Elder Edda to one
Writ by the "Mystic Mother,"—
  Scicnce as She is Done!

Oh, the Green Bag of old Boston,
  Built on a novel plan,
True culture's microcosm,
  The critic's caravan!

WHAT THE UNITED STATES HAS DONE FOR INTERNATIONAL ARBITRATION.[1]

By Honorable John W. Foster,
Formerly Secretary of State.

WHEN we come to consider what the United States has done for international arbitration we are carried back to the period in history when the United States entered the family of nations. At that date there was a marked contrast between the state of law which controlled the rights and intercourse of nations and that which enforced the rights and duties of the inhabitants of the respective nations. The civil law, which was in force in most of the countries of Continental Europe and their colonies, was the accepted product of the ripened experience of many centuries of Roman jurisprudence. The common law which prevailed in England and its colonies had been brought into an established system through the careful study and practical application of successive generations of renowned jurists. But the law of nations was then in its infancy. Only one century had passed since Grotius, who has been styled the father of international law, had compiled his treatise on the "Rights of War and Peace;" and Vattel had but recently published his "Law of Nations," and the principles he enumerated were far from being an accepted code.

International law was still in a formative state when our country began its career. It had scarcely entered upon its organized life when the wars consequent upon the French Revolution forced it to consider its rights and duties as a neutral power. It soon learned that there were no established principles which warring nations respected. Its first effort towards the maintenance of international rules of conduct was in President Washington's neutrality proclamation, which within less than a generation brought about a complete change on this important subject. From the beginning it stood as the champion of a freer commerce, of respect for private and neutral property in war, and of the most advanced ideas of national rights and justice.

In the defense of these principles it did not hesitate, even in its youth and feebleness, to challenge the prowess of the Mother Country. After years of remonstrance, it declared war against Great Britain in resistance to the right of search and impressment, of paper blockades, and in support of free ships and free goods. That war did not vindicate these claims, but by persistence in their advocacy this young nation has seen the principles for which it contended finally recognized, not only by England, but by all the nations of the world. After the recognition came, a Secretary of State of the United States, in a letter to the British Minister for Foreign Affairs, referring to that period said: "From the breaking out of the wars of the French Revolution to the year 1812, the United States knew the law of nations only as the victim of its systematic violation by the great maritime powers of Europe."

By its steady championship of a freer commerce and of most elevated principles of conduct in war, the United States has brought about an almost complete change in the practice of nations. There still remains to be incorporated into international law one of the principles announced by the founders of our government, and steadily advocated up to this day—the exemption from seizure of private property on the sea in time of war. President Roosevelt, reiter-

[1] An address delivered at the annual meeting of the New York State Bar Association, held at Albany, January 19, 1904.

ating the words of his illustrious predecessor, in his last annual message, has again urged it upon the nations of the world, and the day is I think not distant when it will be accepted by them.

As our country has from its earliest history led the nations of the earth in creating a more elevated and perfect system of international law, so also it will be seen it has been the most active in adjusting international controversies and preserving peace by means of treaties of arbitration. The first treaty negotiated after the organization of the government under the Constitution—the Jay treaty of 1794 with Great Britain—was an important event in international relations. It marked a distinct advance in the practice of nations and sought to ameliorate the harshness of war and to establish more clearly neutral rights. It contained our first treaty provision for the extradition of criminals. There may be noted in passing the great development within the past hundred years of this feature of comity among nations. The Jay treaty of 1794 provided for extradition in only two classes of crimes; the treaty of 1842 with Great Britain contained seven classes; and that of 1889 enlarged the number to twenty-five.

The Jay treaty was negotiated to avert a war with Great Britain which was imminent. This country was then in a state of intense excitement. John Quincy Adams, writing years after, of the crisis occasioned by the treaty, says it was "the severest trial which . . . the fortunes of our country have ever passed through." No other event in our history "has convulsed to its inmost fibers the political associations of the North American people with such excruciating agonies as the consummation and fulfillment of this great national composition of the conflicting rights, interests, and pretensions of this country and Great Britain."

The convention contained provisions for the adjustment of three of the most irritating of the questions in controversy by a reference to arbitration, to wit, the initial point of the boundary line between the United States and Canada, the indemnification of British loyalist creditors, and the claims of American shippers for violations of neutrality. For these purposes three separate boards of arbitration were created. It was a novel spectacle presented to the nations in the eighteenth century for two peoples, wrought up to the highest pitch of angry controversy, to agree to refer questions which could not be settled by the ordinary methods of diplomacy, to a court of arbitration rather than appeal to the arbitrament of arms.

The year following, 1795, the second treaty negotiated by the new government, that with Spain which sought to adjust very important matters, also contained a provision for a court of arbitration.

We were not so fortunate in our second controversy with Great Britain. The questions at issue were of such grave character that it did not seem possible at that day to settle them by any other method than a resort to war. The right of search of neutral vessels and impressment of their seamen was one in which Great Britain, in her desperate efforts to resist the aggressions of Napoleon, was utterly unwilling to submit to arbitration. The principle that a blockade must be actual and that free ships make free goods was such as time and the advance of nations in liberal commerce must settle, and which no court of arbitration of the period could resolve. Nothing was left for the young nation but to stand by its claims and trust to the future for its vindication. The War of 1812 settled none of the issues of that conflict, but in the course of time all the governments of the globe came to accept the principles for which the United States struggled against the most powerful of the nations.

By the treaty of peace of 1814 with Great

Britain four boards of arbitration were created. These all related to the frontier line with Canada. The boundary question has been from the very beginning of our independence as a nation the source of almost constant discussion, often of angry controversy, and more than once has brought the countries to the brink of war. But in every instance when the usual methods of diplomacy failed arbitration has been restorted to with success.

During the two generations and more which followed the war of 1812 we were able, with one exception, to settle all our controversies with foreign powers by peaceful methods; and that long period contains the record of many courts and commissions of arbitration. The most numerous of them were with the Mother Country, but more than a score of them were with other nations of Europe and America.

The only break in this long chain of peaceful adjustments was the war of 1846-8 with Mexico. That was at an era in our history when the political rule of the slave oligarchy was in the ascendancy, and under its baleful influence what history has recorded as an unjust war was waged against our southern neighbor.

There is, however, a bright spot in this dark record. In the treaty of 1848 which terminated the war with Mexico an article was inserted wherein the United States pledged itself in the future to adjust its disagreements with Mexico by pacific negotiations and by arbitration. And for the past half century and more our relations with our adjoining sister republic have been conducted in the true spirit of the article cited, and when diplomacy has failed we have resorted to arbitration. This provision of the treaty of 1848 being the first of its kind and so notable in its stipulations I quote it in full, as follows:

"ARTICLE XXI. If, unhappily, any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

Our great Civil War, which put to the test all the resources of the country and called for the exercise of the utmost diplomatic skill and forbearance, left us with an irritating controversy with Great Britain over the conduct of the latter in the time of our greatest distress. The feeling in the North was one of intense hostility toward England, because of its hasty recognition of the Confederate Government as a belligerent and for allowing its ports to be made the base of operations for the work of the cruisers which preyed upon and destroyed our commerce and greatly increased the expense and prolonged the war. From time to time our protests against these acts were

presented in vigorous form, and while our minister in London made reclamation for the damages incurred, he proposed to submit all the questions involved to arbitration. At the close of the war when the authority of the Union was fully established throughout the revolted territory, our government renewed its claims of reparation on account of the British disregard of the principles of international law and for the damages inflicted thereby on our citizens.

To these demands the British government replied in a spirit very far from conciliatory. Earl Russell, the Minister for Foreign Affairs, referring to the questions for whose adjustment Mr. Adams had proposed arbitration, said: "It appears to Her Majesty's government that neither of these questions could be put to a foreign government with any regard to the dignity and character of the British crown and the British nation. Her Majesty's government are the sole guardians of their own honor . . . and must therefore decline either to make reparation and compensation . . . or to refer the question to any foreign state." Here was a conspicuous avowal by a proud government in an important controversy of "the national honor," which is so often put forward as a bar or objection to an agreement for arbitration. Yet the sequel proves that when a nation is able to free itself from the heat and rancor of the dispute, "the national honor" is more involved in an equitable and peaceful settlement than in a stubborn adherence to a preconceived opinion to the detriment of the interests of the nation.

Although our people at the close of the war were wrought up by a bitterness of spirit against the British government and felt keenly the wrongs which had been inflicted, they were content to bide their time for a better state of public sentiment in England. Without abating in any degree our claims, but in a spirit of calmness, Secretary Seward informed our Minister in London that he would not again press the proposition for arbitration, but would await the action of the British government. He said, however, that there was not a member of the government, nor, so far as he knew, any citizen of the United States, who expected that the country would in any case waive its demands upon the British government for the redress of wrongs committed in violation of international law.

In the course of a few years a change of ministry occurred in England, and meanwhile the sentiment of its people had been materially modified. They began to feel that the so-called "national honor" ought not to stand in the way of a peaceful settlement of questions about which the American people felt so deeply and which might at any time be fanned into a hostile spirit. With the change of ministry there came an intimation of a willingness to take up the subject anew, and out of this grew the Joint High Commission, the result of whose deliberations was the treaty of Washington in 1871.

This treaty created the Tribunal of Geneva, the most important arbitration in which the United States ever engaged and probably the most august and imposing ever held in the world. It involved questions of supreme importance and pecuniary claims of great magnitude, but its special significance was in the fact of two great nations being able to compose weighty matters, which had awakened the passions of their people to a high state of bitterness, by an appeal to reason and the arbitrament of friendly powers in place of war. Its influence on the world was great and far reaching, and the United States may justly claim the credit for this beneficent event, through its patient but persistent adherence to the peaceful policy of arbitration.

I have recalled these well-known historical facts to accentuate the devotion of our coun-

try to this method of adjusting international differences; but for the lawyer the Geneva Tribunal possesses additional interest, in that it marked an important advance in the law of nations and in the practice of international judicatories. Although Lord Russell had firmly declined to make reparation for the acts of his government, the treaty of 1871 contains an authorization in advance for the British plenipotentiaries "to express, in a friendly spirit, the regret felt by Her Majesty's government for the escape, under whatever circumstances, of the *Alabama* and other vessels from the British ports, and for the depredations committed by those vessels." This declaration, unusual in treaty stipulations, prepared the way for a friendly consideration of the questions submitted to the Tribunal; but it was accompanied by a provision which rendered a decision in favor of the United States almost certain.

This provision was the insertion of three rules in the treaty which was to govern the arbitrators in their decision of the questions submitted to them. These rules embody the principles of neutrality announced by the administration of Washington and which had been early incorporated into the statutes of the United States. They constitute such a distinct triumph on the part of our government in the recognition of principles of international law for which it had so long contended, that I extract them in full from the treaty.

"A neutral government is bound—

"*First*, to use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel whch it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"*Secondly*, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"*Thirdly*, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

The British government asserted that it could not assent to these rules as principles of international law in force during the Civil War, but it agreed that they might be made applicable to the contemplated arbitration. It further agreed to observe these rules in the future relations of the two countries, and the two governments stipulated to bring them to the knowledge of other maritime powers, and to invite them to accede to them.

The last clause of the agreement was not carried out, Great Britain showing a reluctance to a submission of the rules to other powers for accession thereto, influenced in part by disappointment over the award and by the construction put upon some clauses of the rules by the tribunal. The general concurrence of opinion of publicists at the time, with some dissent in England, was that they were a correct statement of international law. At this day they are recognized by all governments, including Great Britain.

The Treaty of Washington of 1871 is of further interest in that it contained the most complete provisions as to the mode of procedure in arbitration which up to that date had been made. It may not be without interest to briefly recapitulate them. The tribunal was composed of one American, one British, and three neutral members; and its decisions were to be made by a majority. Each government was represented by an agent, and such counsel were to be appointed as each government should think proper. The case of each of the two parties, accompanied by the documents and evidence on

which each relied, was to be delivered to the arbitrators and opposing agent within six months after the exchange of ratification of the treaty. Four months after the delivery of the case the counter-case on each side was to be likewise delivered, but the arbitrators were given the power to extend the time for good cause shown. If either party specified any document in its own exclusive possession without annexing a copy, the other party could require a copy to be furnished; and either party had the right to call for the original or certified copies of all papers adduced as evidence.. And, finally, both parties were to deliver, within two months after delivery of the counter case, a written or printed argument; and the arbitrators, if they desired elucidation of any point, could require a printed statement or argument, or oral argument by counsel, to which the other party had the right of a reply. The award of the Tribunal was to be rendered within three months from the close of the argument, if possible.

As is well known, the award of the tribunal was in favor of the United States, but the value of its triumph was not in the money compensation, but in the inestimable benefit conferred not only upon the two nations concerned, but the people of the world, in pointing out a better method of settling international controversies than by war. There was for a time a feeling in England of disappointment and dissatisfaction with the result, but on both sides of the water general relief was experienced that a definite and peaceful settlement had been reached of a matter which had occasioned deep resentment and threatened a long estrangement of the two kindred nations.

Next in importance for the United States to the Geneva arbitration was that relating to the protection of the fur seals in Behring Sea, held in Paris in 1893. The questions then submitted arose out of the effort on the part of the Government of the United States to protect the seals on the high sea, while absent from the islands which they made their home, in quest of food or on their annual migration. The contention of the United States was that the practice of the Canadian vessels in killing the seals in the water on the high sea was necessarily indiscriminate and wasteful, and tended to the extermination of this herd of animals, useful to mankind and a source of profit to the government of the United States.

The latter, in its efforts to protect the seals seized a number of Canadian vessels and confiscated them and their cargoes. Vigorous protests from the British government followed and large claims for damages were presented. After a long diplomatic correspondence, the two governments agreed to submit the questions involved to arbitration.

The treaty provisions for the constitution of the tribunal and its procedure were very similar to those of the Geneva Tribunal. The chief points of variance were as follows: Each of the contracting parties were to be represented by two members of the Court, which with the three neutral arbitrators constituted a court of seven members. The arbitrators were to be "jurists of distinguished reputation in their respective countries; and the selecting powers were requested to choose, if possible, jurists who are acquainted with the English language." In the Geneva arbitration it was provided that the tribunal could call for oral argument if desired by it; but in the fur seal arbitration, in addition to the printed argument, each party had the right to "support the same before the arbitrators by oral argument;" and under this provision the tribunal was in session for three months, mainly engaged in hearing oral arguments.

The decision of the tribunal was against the contention of the United States, and as a result it had to pay about half a million of dollars for damages to the Canadian sealers, and to sustain a heavy loss in its annual

income from the seal islands, because of the diminution of the animals by pelagic sealing. Although the contention of the United States was recognized as a strong one, the arbitrators were influenced in their decision by a desire to preserve what is termed "the freedom of the sea."

The Paris award was so much less satisfactory to the United States than that of Geneva that the first impression created by it was unfavorable to international arbitration, but the more mature and better judgment of the country doubtless is that it was a wiser settlement of the questions at issue than to push them by the continued seizure of British vessels to the extreme of war.

The latter half of the last century was very fruitful in the settlement of questions between the United States and other countries by means of arbitration. It will not be possible for me to enumerate them in detail. It suffices to state in general terms that they cover a great variety of questions, from high principles of international law and important territorial rights to individual pecuniary claims and torts. But there is one feature of these arbitrations which, for the honor of our country, calls for special notice. I refer to the spirit of equity and fair dealing which has marked the conduct of our government in all cases where any suspicion of fraud or exaggerated damages has attached to the arbitral decisions. I cite a few of these by way of illustration.

The only instance in our history where fraud and corruption have been established against an arbitration tribunal was that with Venezuela under the treaty of 1866. Soon after the adjournment of the commission charges of irregularity and fraud on the part of the members were made at Washington by the Venezuelan government, and an investigation established, to the satisfaction of Congress, the fact that a corrupt arrangement had been made between the American commissioner, the umpire (a Venezuelan), the United States minister to Venezuela, and his relative, the leading attorney before the commission, by which a large part of each claim represented by the attorney and allowed by the commission was to be divided between the persons named. Awards upon the claims held by this attorney made up about two-thirds in amount of the total awards, and some meritorious claims not presented by him were rejected. After considerable delay in securing legislation, a new commission was organized which reviewed the work of its predecessor. Of the twenty-four cases allowed by the first commission only nine were passed on favorably, and three old cases rejected were allowed by the new commission, and which represented more than half of the total awards.

Two claims of American citizens against Hayti which were strongly pressed diplomatically by our government, were submitted to arbitration in 1884, and awards for a large amount were rendered. Soon after this action charges of fraud on the part of the claimants were preferred, and Secretary Bayard after investigation held that neither of the cases had any foundation in justice, and that a sovereign state could not in honor press an unconscionable and unjust award. The Haytian government was accordingly released from the payment of these claims.

The Chinese indemnity fraud of 1858 is an instance of the treatment by the United States of exaggerated damages obtained through commissions. A large sum was paid in gross by China upon the alleged claims of American citizens, and their claims were passed upon by a domestic or American commission. After all possible claims had been allowed about half a million dollars or considerably more than half of the sum paid remained in the United States Treasury. After being there for many years, Congress in 1885 directed its return to China. The minister at Washington, in acknowledging its receipt said: "This generous return . . .

cannot fail to elicit feelings of kindness and admiration on the part of the government of China."

A number of other cases of fraudulent award might be cited but the most notable were those which occurred under the claims treaty with Mexico of 1868. Decisions were rendered by the arbitration commission in favor of American citizens in the sum of over $4,000,000. Immediately after the adjournment of the commission newly discovered evidence came into the possession of Mexico which, if not successfully rebutted, would establish the fact that two of the claims to the amount of $1,170,000 were without merit and absolutely fraudulent. This evidence was submitted to the Secretary of the State and by him laid before Congress, with a view to legislation providing for a judicial examination of the charges of fraud.

All efforts to that end were strongly resisted in Congress by the claimants on the following grounds—(1) that the question was *res judicata;* (2) that the parties to the award had acquired vested rights of which they could not be deprived; (3) that the award of an international tribunal could not be reopened; and (4) that Congress was without power to provide for a rehearing of the case.

Under the provisions of the treaty Mexico was paying to the United States the amount due on the awards in instalments. Five of these instalments had been distributed to the claimants, but finally further distribution in the two cases in question was suspended and $750,000 paid in by Mexico was withheld to await action by Congress. Two attempts were made by the claimants to obtain possession of this money by writ of *mandamus* upon the Secretary of State, but in both instances on appeal to the United States Supreme Court the writ was refused. In its decision the Court said: "As between the United States and the claimants, the honesty of the claim is always open to inquiry for the purpose of fair dealing with the government against which, through the United States, a claim has been made."

After fourteen years of delay, occasioned by the obstructive tactics of the claimants, in 1892 Congress passed an act referring the two cases to the Court of Claims for investigation to determine whether the awards had been obtained by fraud and perjury, and if so found the money remaining in the Treasury was to be returned to Mexico. Upon a full hearing this court decided that the two awards had been obtained by fraud and perjury, and upon appeal by the claimants to the Supreme Court the decision was affirmed. Not only was the money in the Treasury returned to Mexico, but Congress made an appropriation for the amount which had been distributed to the dishonest claimants, and that was also repaid to Mexico.

It has thus been determined that international arbitration cannot be used by claimants to perpetrate fraud, and that, in the language of the Supreme Court, "no technical rules of pleading, as applied to municipal courts, ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances."

The foregoing cases show that, though the government of the United States is not infrequently misled by designing claimants or by the unwise action of its diplomatic agents, it has not hesitated when fully possessed of the facts to undo any injuries inflicted upon friendly powers by means of international commissions; and that fraud, once exposed, cannot reap the benefit of its iniquity under the cover of the finality of an award.

A study of the various cases of arbitration in which the United States has been a party will develop a great variety of questions of law and practice, which it will not be possible for me to take up in detail. They relate, in part, to the constitution or personnel of the tribunal, to its procedure, and to the power of the arbitrators to determine their own jurisdiction. In the arbitration of claims

a still broader field of judicial inquiry is opened up, such as the authority and manner of presenting claims, the nationality or citizenship of the claimant, the domicil, the forfeiture of national protection, who are "authorities," what constitutes a denial of justice, what are forced loans, how far cases of voluntary contract are cognizable, responsibility for damages to private property by war, the measure of damages, whether interest should be allowed, and many other questions, some of which are in common with our domestic courts. The various tribunals or commissions have been by no means uniform in the rules laid down on these subjects, and yet, notwithstanding the conflict of decisions, a system of general principles may be evolved which will prove useful in future arbitrations.

The great event of all time in respect to international arbitration was The Hague Peace Conference of 1899. The Convocation of the representatives of all the considerable powers of the earth was mainly for other purposes, but arbitration was the chief practical result of its deliberations. I am supported in the statement by one of the members of that body that when the invitation to the Peace Conference was issued thoughtful observers, at least in this country and in England, recognized at once that the establishment of a permanent court of arbitration was the one important achievement which was within the reach of that historic gathering. The same authority states that the American representatives regarded it as the one end of their endeavors, for which they would have sacrificed almost anything else.

Happily their efforts were successful, and, as a result in large measure of their advocacy of it, the nations there represented united in the organization of The Hague Permanent Court of Arbitration. It is not necessary for me to enter upon the details of the history and functions of this court, as that task has already been ably and lucidly performed by others.

It is especially gratifying to us as Americans to know that our government was the first to show its faith in the efficacy and utility of The Hague Court by resorting to it, with our neighboring republic of Mexico, for the settlement of a question of long-standing diplomatic controversy. The result of that trial has encouraged us to continue to resort to it, and it has had a salutary influence on other of the signatory powers. We were a second time gratified at that action of our government, when President Roosevelt was asked by the three powers—Germany, Great Britain and Italy—to arbitrate their differences with Venezuela. In place of accepting the responsible trust so flattering to his impartiality, he courteously declined and referred them to the Court at The Hague which had by them and us been created for just such cases.

It was a memorable event which testifies to the progress of the world in the appreciation of reason as against force, when those powerful nations stopped their warlike operations against a weak foe, recalled their navies, and agreed to submit their claims to arbitration commissions and to refer to The Hague Tribunal the essential questions involved in the conflict. The peace-loving world will await with the keenest interest the decision of the question to be decided by that Tribunal, to wit, whether nations can by a resort to war secure a preferential treatment in justice and in equity for their claims over nations which pursue a peaceful method of adjustment. Whatever may be the decision, the spectacle of the congregation at one time at The Hague of almost all the leading nations of Europe and several of those of the American hemisphere for the settlement of their differences by argument and reason, will not fail to have a salutary effect. And it is a matter of just pride to us that this result was brought about by the

action of the President of the United States.

My review of the part taken by our country in arbitration will not be complete unless I refer to the most recent adjustment in international controversies—the Alaskan Boundary Tribunal. Its consideration is the more desirable in view of the fact that there exists a strong opposition to making treaties by which the United States would pledge itself to submit all questions of difference with other nations to arbitration. It is contended that there are some subjects which should not be submitted to that method of settlement. If, therefore, some other method of amicable adjustment is found to be practicable for such questions, it will be a great gain for the cause of peace.

When the Alaskan Boundary matter was referred to the Joint High Commission of 1898, the British members proposed to submit it to arbitration upon the same terms as the Anglo-Venezuelan arbitration then in progress. The American members declined this proposal, being satisfied that such action would not command the assent of the Senate of the United States. The ground of opposition was not that a territorial question was not a fit subject of arbitration, for our government had repeatedly agreed to such a reference of controversies respecting the boundary with Canada. The refusal was based upon the fact that Russia and the United States had been in undisputed possession of the territory for many years, and that Great Britain had permitted the United States to exercise sovereignty over it and its citizens to occupy and develop it, without protest or notice of any conflicting claim, until a very brief period before the proposition for arbitration.

In this state of affairs a method of reference was adopted which was indicated in the Olney-Pauncefote unratified Convention of 1897. A tribunal of jurists was created, composed of three members from each nation. The treaty required that these jurists "shall consider judicially the questions submitted to them, each of whom shall first subscribe an oath that he will impartially consider the arguments and evidence presented to the tribunal and will decide thereupon according to his true judgment."

Much doubt was expressed as to any benefit to result from such a reference, and this doubt was possibly as prevalent in the legal profession as in any other class of society. I find in the able report of the committee of the New York State Bar Association of 1896, it is stated that in time of excitement and unfriendly feeling between two countries "it is futile to expect that any beneficial result can be secured from a court evenly balanced between two contending parties." Happily, however, the experiment has proved a success, and by means of such a tribunal we have been enabled to adjust a most perplexing controversy, which threatened to seriously disturb the harmony of our relations with our northern neighbors. It is an occasion of congratulation to the bar that a subject which was not found susceptible of settlement by diplomacy and was regarded as not within the proper limits of arbitration, should be considered judicially by an evenly balanced court and an effective decision reached.

In a very imperfect manner I have completed a review of the most important acts of the United States in respect to the peaceful solution of international controversies. It is a record of which every American may be justly proud. It shows that our country has stood in the forefront of the nations seeking for peace, and that it has been the most influential factor among them in promoting a sentiment in favor of international arbitration. Since our independence was acknowledged four generations ago we have spent only five years in foreign wars—too many for a peace-loving people, but a record which is paralleled by few of the nations of Christ-

endom. The era of warfare has not ceased upon the earth, but if the principles for which our country has contended from its earliest history should universally prevail among men, the future of nations will be quite different from the past.

THE MISHAP OF SQUIRE BERRY TODD.

By John Jordan Douglass,

Of the North Carolina Bar.

SQUIRE BERRY TODD, Magistrate and Notary Public, long, lank and loose-jointed, was apparently a typical American citizen, bearing, as many declared, a close physical resemblance to the pictures of "Uncle Sam." But mentally and morally Squire Berry was an enigma—a *rara avis*. He invariably took the "off" side of every controversy in Pikeville—that is to say, when his official functions decreed not otherwise.

Living alone in his dingy, cob-webbed office, holding daily converse and nightly orgies with the venerable shades of legal lore, the eccentric squire spent his declining—or rather we should say his reclining—years. With his yellow goat-beard and wisp of golden hair, the squire flaunted defiance in the face of the old man of the snows.

The squire's favorite pastime was fishing on the Sabbath, claiming that, according to the most ancient and honorable lexicographers, it was a holiday rather than a holy day, the "y" having been substituted to put a burdensome restriction on youth.

A certain warm, sunshiny day in June, when the members of the Pikeville Bar were industriously and conscientiously singing or snoring off their sins, found the squire seated on his favorite log over "Crocodile Creek." He had landed (or logged) two terrapins and an eel, and lost, by entanglement with a raft of brush, a hefty cat-fish. A swarm of mosquitoes sang about the squire, and it became necessary for him to give them an occasional peremptory flap with his broad-brimmed palmetto hat. He was just in the agony of one of these frantic flourishes when his cork bobbed and sank, as if a five-pounder had seized the hook. The squire instantly made a sudden downward sweep, and, in the distraction of two things being done at almost one and the same time, lost his equilibrium, and went backward into the creek like a monstrous, long-legged bull-frog.

For a moment only a few big bubbles marked the spot where he had made his forcible entry, then the shiny bald spot on his head appeared, closely followed by bony arms and legs, and a furious splatter. Blowing like a porpoise, the squire struck out for the nearest stretch of shore, and had almost gained that coveted *terra firma* when a rusty, evil-eyed alligator suddenly intervened. Though, from the vantage ground of the shore, the log-like creature had seemed perfectly harmless and inoffensive; the squire was not anxious to cultivate his acquaintance in the water; so for once he did just what other men would have done—turned and made for the opposite shore, as if an *instanter capias* had been issued for him.

Imagine, therefore, his surprise and consternation when another, and larger alligator rose directly in his liquid path. "A pretty kettle o' fish!" gasped the squire. "I know now how to appreciate the feelings of a witness when the lawyers get him betwixt the

devil and the deep blue—. Shades of Blackstone!" he cried when he suddenly became entangled in the raft which had previously occasioned the loss of his cat-fish. "Help! help!"

Now it happened that the Reverend Jonas Biddle had candidates to baptize that day, and hearing the squire's cries of distress, he hurried to the rescue.

"The wicked stand in slippery places," observed the parson, carefully perching himself on the log, and opening his bible at the forty-first chapter of Job. "Listen, oh son of Belial, to the patience of Job: 'Canst thou draw out leviathan with a hook? . . . Wilt thou play with him as with a bird? ("No, sah," cried the squire, with an uneasy glance at the alligators) . . . Behold, the hope of him is in vain, shall not one be cast down even at the sight of him? ("Heaven forbid it!" ejaculated the squire) . . . Who can open the doors of his face? His teeth are terrible round about. ("For humanity's sake, stop preaching and get me out of here!" shouted the squire.) . . . He esteemeth iron as straw, and brass as rotten wood . . . He beholdeth all *high* things.'"

The squire crouched lower in the water, which at that point was something over waist-deep. "Rejoice not when thine enemy falleth; let him that standeth take heed lest he fall," he cried desperately. "I never—."

"Do you believe in immersion?" interrupted the preacher.

"It seems so."

"Do you believe in the final preservation of the saints, and the final persecution of the wicked?"

"I believe in the final *persecution* of the saints and the final *perseverance* of the wicked," averred the squire.

"Then work out your own salvation with fear and trembling," said the preacher with a decisive ring in his voice. "My candidates are waiting yonder. I must be going."

"Stay!" cried the squire. "I subscribe to that."

"Do you promise, if admitted to the church, to love the brethren and *sisters?*" continued the preacher.

The squire demurred at this (he had never been an admirer of the sisters), but glancing at the alligators, which seemed to be manœuvering to foreclose their mortgage, he gave vent to a weak affirmative.

"One more brief question," said the preacher, securely tying a rope, which he carried for use in baptismal emergencies, to the log. "Do you, here and now, henceforth and forever renounce, denounce, decry, deny, and despise the world, flesh and the devil—*and fishing on the Sabbath?*"

"I d-d-d-do," shiveringly admitted the squire, with an egg-blue look about his lips.

"Then, brother Berry Todd, I cast you the rope of salvation." The rope fell within easy reach. The squire seized it eagerly, and pulled with such force that the log suddenly went asunder with the Reverend Jonas Biddle on the broken end. But it served to scare off the saurians and to set the squire adrift. A few moments later he and the parson were pulled ashore by the candidates, but the main participants in this serio-comic (or religio-comic) event have never troubled each other about religion since.

AMERICAN LAW SCHOOLS AND THE TEACHING OF LAW.

By George L. Reinhard, L L. D.,

Dean of the Indiana University School of Law.

LAW schools and law school teachers have doubtless something to learn from one another. As remarked by a Harvard law professor,—the knowledge of the science of teaching law is not to be found in any one particular law school. That we have in connection with the American Bar Association a section of legal education and an association of American Law Schools, is sufficient proof that at least we who are members of the same fully recognize the truth of the above proposition. Many of us travel hundreds of miles every year and listen to papers and oral discussions in the meetings of these organizations so that by the exchange of ideas we may become mutually better instructed about the best way to conduct law schools. But while these proceedings are doubtless of great value to those who witness them, they do not, after all, offer opportunities for observing and studying the methods applied in the different schools and their effect upon the students or the character of the students themselves with regard to previous preparation and other qualifications. There are many things said and done in other schools in which law is taught which we do not hear and see in our own. Some of these may and some may not commend themselves to our judgment; nor is it necessary that everything we meet with in prominent schools should receive our unqualified approval or be adopted in our own work. One may pick out that which impresses him favorably, and carry it away with him, if he chooses to do so. But even if he should conclude, after investigation, that he has not been introduced to much which is new to him or better than that of which he is already in possession, it will be a source of some satisfaction, at least, to realize that his own school and his own methods are not very far behind those of others which are counted among the best in the land.

It was with some such feelings as these that I determined last year to visit some of the principal law schools of the country, provided I could obtain their permission to do so. It gives me great pleasure to be able to state, not only that I received favorable replies from the head of every law school to which I had directed a letter on the subject, but that those I actually visited extended to me every opportunity and facility for such observation and inspection as I felt inclined to make; and that my stay at each of these institutions was made pleasant and agreeable by the extention of the most generous hospitalities. My chief regret is that my duties at home did not permit me to include in my itinerary all of the schools I had intended to visit. As it was, I could only remain away a sufficient time to see something of Harvard, Boston University, Yale, Columbia and Pennsylvania.

One of the principal subjects in which I have been interested for some years, and which I may say engaged my special attention at these schools, is the practical working of the so-called case system in the teaching of law in law schools.

At Harvard and Columbia, the case method is employed almost exclusively. Indeed, as is well known to the profession, the case system originated in the Harvard Law School, it being first introduced there by Professor Langdell about a third of a century ago. In the Boston University, Yale and Pennsylvania law schools, it is employed only in connection with other methods, although some of the individual professors in

these schools teach law by cases entirely.

The purpose of the case system is to give instruction in law by means of judicial decisions as the basis of class room work. What are believed to be the most important cases upon a given subject, say contracts, insurance, constitutional law, or whatever it may be, are collected and published in the form of a case book, which is given to the student for study and preparation, so that he may be able to report upon and discuss in the class room the cases previously assigned to him for study. No syllabi or head notes are used or permitted in connection with the cases contained in the case book, and there is nothing to indicate the points of the decision, unless it be the title given to the subject under which the case is grouped. Copious notes are often added, however, referring to other decisions in which the same or kindred questions are determined, either in accord with or contrary to the adjudication of the principal case or cases furnishing the topic for discussion.

No one who has given this system of teaching law serious study can escape the conviction that it has become a potent factor in the world of legal education, and that it has greatly revolutionized the entire work of the law teacher. Formerly, written lectures and recitations from treatises on given subjects constituted the principal means by which a knowledge of law was imparted to law school students. Where the text-book only was employed great emphasis was placed upon the necessity of following the ideas and conclusions of the author; and the contents of the texts were usually recited by rote. The lecture system, as then practised, gave the student but little to do beyond storing up the utterances of the professor for use on examination day. It is true that the lectures contained many and frequent citations of authorities, but these were rarely ever reported on or even carefully examined by the student, and never discussed at length in the class room. All this has now changed. The oral discussion in class has displaced the *verbatim* "recitation" and the written lecture. Neither the dogmatic statement of the text nor that of the instructor is any longer blindly followed, and the spirit of freedom of discussion and independence of thought prevades every well-conducted class in the law school. And this is true whether the teaching is purely by cases or not.

That these reforms in the teaching of law are wholly the result of the case system, is, perhaps, too much to say for it; but that they are so in large part must, I think, be admitted by everyone at all familiar with the subject. Every case that comes before the class, if carefully studied by the student beforehand, will, from the nature of its *ratio decidendi,* call forth either the approval or disapproval of the student of law, if he is sufficiently advanced to entertain a rational opinion on the question decided, or will, at least, raise a question of doubt in his mind, if his views as to the underlying principles of the case are not already firmly fixed. This will supply the motive for an investigation beyond the immediate scope of the decision itself. It tends to arouse the spirit of controversy which is so useful to the student, not only in the class room and in his intercourse with the teacher, but also in the actual practice of his profession afterward.

If, then, the case system has done nothing more for the cause of legal education, its right to a permanent position in law school work seems to be firmly established. But its merit is not to be confined to the beneficial influence it has exerted over the methods of teaching in a general way. Its greater utility lies in its own intrinsic fitness to accomplish the most satisfactory results in the teaching of law as a science, under proper conditions. This is not to say that it can be employed successfully with all classes of students and in all circumstances. If the stu-

dent's mind is sufficiently matured and his previous preparation adequate, I believe it to be the concensus of the best opinion that he can be most successfully taught by means of cases. The great majority of law students, however, especially those just beginning the work in the law school, have not received the benefits of that preliminary mental discipline which is essential to an understanding of the involved language and legal terminology contained in the average judicial opinion, and instruction to these students must be given in a way which they may be able to comprehend more readily. Hence, it may be doubtful whether during the early portion of the course in those law schools which are not entirely or even chiefly made up of students who have received a college education, the exclusive use of cases as a means of teaching law is altogether practicable. Perhaps it may be true that even among advanced students all subjects in the curriculum can not be as successfully imparted by the use of the pure case method as it might be otherwise.

I believe, however, that much of the objection to the case system, as a whole, is largely due to an imperfect understanding of what is really meant by the term. Some people seem to entertain the notion that the use of the case system implies the exclusion of every other avenue of investigation and every other means of demonstration than that of discovering and discussing the points involved in the decisions contained in the case book. They insist that the student of pure case law is too often required to cudgel his brain by wading through a mass of incomprehensible stuff found in some old English case, perhaps, the sole object of which is that he may be able to reproduce the substance of it in the class, where he will receive more or less assistance from his instructor to enable him to fathom its contents. Of course, if this is what is meant by the case method of instruction, its opponents are clearly justified in their objections to it. The study of judicial opinions without other aid, such as lectures, collateral reading of text-books and of other decisions of the courts, would be fully as unsatisfactory as was the old method of teaching law exclusively by the sole means of recitations or lectures read from manuscript. To take up a case in class and simply find in it the point or points which it decides, accomplishes only a minimum part of the benefits which the friends of the system claim for it. The truth is, there are as many different case methods as there are instructors who teach by means of cases. This fact was firmly impressed upon me while attending the different classes in Harvard and the other law schools I visited. One professor who has a strong predilection for extemporaneous exposition uses the system largely as a means of illustrating the points in his lectures. He does not confine himself to the cases assigned for study, but makes frequent reference to other decisions and text-books which either support or oppose the ruling of the case or the point in dispute, or treat of it in any manner. This instructor does not insist so strongly upon a minute recital of the facts of the case reported on by the student as others do, and while inviting discussion on the part of the students, seems inclined to do more lecturing, which, however, is always interesting and instructive. Another teacher does the greater portion of his work in the class room by asking questions and seems to succeed in obtaining a large variety of answers, which generally lead to satisfactory conclusions. Often the same student is called upon to report as many as two or more cases of the number assigned to the class, and is required to state his impressions as to the agreement or conflict between them, whether the one may be dis-

tinguished from the other in principle, and whether in the one or in the other or in all there is room for adverse criticism as to the correctness of the conclusion reached and the soundness of reasoning upon which it is based. Still another, while asking questions sufficient to direct and keep the trend of discussion in the proper channel, encourages a yet wider scope of discussions, thereby evoking the free expression of a great variety of views, some of which, it is not too much to say, even border on grotesqueness and absurdity.

All these methods have the advantage of keeping alive the interest of the students in the work and of encouraging independence of thought and free criticism. If the views uttered happen to come in conflict with those of the court whose judgment is undergoing review, such views are not, on that account, either frowned upon or treated with levity, but are freely encouraged; for in all law schools it is understood to be the prerogative of both teacher and student to criticise the courts and excoriate their decisions whenever it is deemed necessary. One benefit accruing to the student from this, is to learn the importance and desirability of consistency in judicial decisions, and of the establishment of fixed rules and adherence to them rather than to avoid temporary hardships and inconveniences in individual cases.

But while it is true, as has been stated, that each teacher has his own peculiar way of applying the case system, there is one object which all instructors have in common, and that is the use of cases as the basis of instruction. Collateral reading is enjoined and lecturing and oral exposition by the instructor are by no means avoided, but all the investigation that has been made, and all the discussions indulged in hinge upon the question or questions decided in the case under review before the class. To illustrate: Suppose the course is one in damages. The particular doctrine considered by the class we shall say, is that of Proximate Cause. The teacher has stated the doctrine in a general way and perhaps some cases upon it had been previously taken up and discussed. In the case now called for the student makes a brief report as to the facts and the legal conclusion at which the court has arrived. Let us say the case is that of Doe *v.* Roe. Roe is a farmer, who, while gathering rubbish on his land, negligently set fire to the combustible material and permitted the fire to spread, as a result of which the house of a third person, say Jones, was burned. From the house of Jones the wind blew sparks of fire to the barn of Doe, the plaintiff in the case, causing a conflagration which destroyed or injured the barn, to the plaintiff's damage. The court holds that the defendant's negligent act of setting fire to the combustible material was not the proximate cause of Doe's injury, each conflagration being treated as a new and independent cause. The instructor then calls for another case upon the same subject from the same or a different student. In this case it is held that the fire which consumed the last building was the result of a continuous uninterrupted succession of events due to the negligence of Roe in setting the fire and permitting it to spread; that, therefore, such negligence must be regarded as the proximate cause of the plaintiff's injury, and that the defendant is liable. It may be that the point in the last case arose on demurrer to the declaration or plea, while in the former it was raised by a demurrer to the evidence. It is sufficient to know that the question of substantive law decided is the same in each case, and that in principle the decisions are squarely in conflict. It now becomes the function of the teacher, not so much to decide for the class which of these two cases states correctly the principle of law involved as it is to direct the discussion in such a

way as to bring each student to determine for himself which is the better decided case. In order to do this intelligently, he must, of course, have the subject well in hand, be informed as to the weight of authority, and what are the views of some of the better text writers. The student having expressed an opinion on the subject will be required to support it by such authority as he may be able to give. If he is not able to cite other cases or texts, some other student may be ready to do so, or the teacher may direct the members of the class or a portion of them, to make additional investigation and report at the next lecture.

Should the rule established by the case be peculiar to one particular jurisdiction, or only a few jurisdictions, as for example, the doctrine of mental anguish in damage suits, the class will learn that what may be regarded as good law in one jurisdiction may not be considered as such in another, upon the same subject. These are, of course, but a few isolated and, I fear, very imperfect illustrations of the working of the case system; but enough has been shown, I trust, to demonstrate its great advantage over the antiquated methods of the past, in which the student's own activity played but a very unimportant part.

Whether it will ever be adopted as a uniform means of teaching law, however, may well be doubted. In teaching procedure its exclusive use has many drawbacks, although it is employed even for this purpose by such eminent educators as Dean Ames and others of high rank—a fact which I must admit renders the expression of any doubt as to its absolute utility somewhat hazardous. One of the manifest disadvantages in the teaching of pleading and practice entirely by cases, is the length of time required to accomplish any preceptible results. An entire case covering a large number of pages may contain but a single point on the proposition under investigation, which might have been comprehensively stated in a single sentence or at most, in a few short sentences in a textbook. It is quite true that if the cases are well edited much of the objectionable or superfluous matter will have been eliminated; but after all, there must, in many cases, remain a large quantity of such matter which is only remotely connected with the specific principle to be taught, and much time will necessarily be wasted in its consideration.

Another subject of growing interest and importance to law schools and those engaged in the teaching of law in this country, is that of the law school student's preliminary education. The Association of American Law Schools, which is the creature and mouthpiece of the American Bar Association, has placed the requirement at graduation from a high school having a four years' course, or the equivalent of such a course. Harvard and Columbia demand of practically all their law students a collegiate course in some recognized institution. In the law schools of Yale and Pennsylvania, a considerable proportion of law students in attendance are not graduates of colleges or universities, although all are required to have the prescribed high school course, and quite a number have received more or less academic training. A somewhat careful observance of the evident efficiency and ability of the law students in the eastern law schools leads me to believe that the young man with a good high school education and two years more of college training is about as well prepared to enter upon the study of law in the law school as the one who has spent four years in college, and has received an academic degree. Of course, it may be conceded that the additional two years devoted to the study of the arts and sciences are not without their special benefit at a later period in life, as in fact, all education must be, to the lawyer. But while every lawyer's general educa-

tion should be broad and liberal, it is neither just nor practicable to extend the requirement beyond the practical necessities. Richly endowed institutions can afford to set up their own standards and live up to them, but they are not necessarily the criterion for others not so favored, or who are required to rely upon public approval of the standard established by them. It is not, and perhaps never will be, the policy of the average American law school to close its doors to those who have not received a college education covering a period of four years. Public educators, it is true, should be the leaders of public opinion in matters pertaining to public education, but they must not be too far in advance of the main column if they hope to render practical service to their day and generation. What the average law school aims to accomplish is to make good practising lawyers and not jurists. Of course, it is proper enough to provide schools for the training of jurists, and the same is true as to schools for the training of statesmen and diplomats, but these are not essential for the education of men for the practical business of the lawyer. Such schools as Columbia and Harvard and others with equally high class requirements for entrance will continue to be models for the teaching of law to the great majority of the other law schools of the country; but in respect of their entrance requirements few other schools can ever hope to follow their lead. Indeed, it is by no means the unanimous verdict of the best educators of the country, that a four years' college course will prepare the student materially better for his work in the professional school than a course of say, two years, in the study of the arts and sciences judiciously arranged for him. When such men as President Hadley seriously advocate the reduction of the college course for professional men to two or three years, the suggestions cannot be brushed aside with indifference. Judge Simeon E. Baldwin, for many years an eminent instructor in law in Yale University, and himself a university trained man and a ripe scholar, in a paper read before the American Law School Association at its meeting in August last, among other very excellent things had this to say: "The time has come when we must confess that our American university system has attempted the impossible. It has aimed at adding to the education furnished at the English university the education furnished at the German university, and at requiring both from all. The American people have been strangely patient under the strain. They are patient no longer. They are glad that those whose life is to be that of the scholar, should have these ample opportunities for culture. They are determined that those of their sons who are to live less among books and boys than among men, should begin their life-work in time to reap some of its rewards before the flush and joy of youth are past."

It is a hopeful sign for the future of our profession that the American Bar Association is exerting its great influence in behalf of more stringent requirements for admission to the practice. The wonderful progress made in this direction during the last ten or twelve years is due almost wholly to the organized effort of the American Bar. Much of needful work still remains to be done. In many States the unsatisfactory patronage of the better class of law schools is due to the indifferent requirements for admission to the bar.

That every additional year in the life of the Republic will bring new and gratifying reforms can not be doubted, in view of what has already been accomplished; but they can come only through the untiring efforts of the American lawyer who has at heart the good of his profession.

A POLICE COURT OF NEW ERIN.

By Joseph M. Sullivan,

Of the Boston Bar.

THE Police Court has always had a peculiar fascination for loafers. At nine o'clock in the morning you can see the corridor shark, the police court attorney, and the unfortunate client, all engaged in earnest conversation. The Police Court shyster is invariably a shabby genteel individual who knows everything but law, but he is possessed of a very loud voice, which by the illiterate and ill-informed is always considered the standard of a first-class lawyer.

The judge has ascended the bench, and the hearing of applications for warrants is in progress. His honor, with a good-natured Hibernian accent, remarks, "What is the throuble today, Officer McGrath?" "Your honor, I've arrested a man for having four wives." "Ah, let me see what we shall charge him with," remarks his honor.

"Hould, I have it. The first marriage is called in the law 'matrimony,' the second 'bigamy,' the third 'polygamy,' and the fourth 'ignominy.' We shall complain of him for ignominy. Poor fellow, I may sind to the Grand Jury a recommendation for mercy. It wasn't his fault that there were any old maids in the country."

"Officer Duffy, what can the court do for you this mornin'?" "Your honor, some boys set off fire-crackers which were tied to the tail of Paddy O'Rourke's coat." "Let me see. This question is a perplexing one. Ah, I have it! Let me look into a book which I am told contains the law on all subjects. It is called 'Every man his own lawyer, or the practice of law made aisy.' It contains 200,000 statements of the law, and 430,000 offences against the law and their remedies. Let me look under Tinaments and Hereditaments. These boys must be complained of for malicious injury to Paddy O'Rourke's tinaments. A tinament is something that adjoins, and as his coat was adjoining his person, it is clearly a tinament according to my judgment."

"Officer Gillespie, what can the court do for you this mornin'?" "This woman, your honor, wants her husband arrested for non-support." "Well, madam, what did your husband do?" "He forgot to give me his pay envelope Saturday night." "But this is only Monday," remarked his honor. "It's the beginning of a bad habit," replied the woman. "Well," replied his honor in a sympathetic tone. "perhaps your husband had a bad memory; it may be pure forgetfulness on his part." "Bad luck to him, your honor, he remembers the day he first met me, the day he proposed, the day of our wedding, my birthday, and the age of the baby when he cut his first tooth. Do you call that a bad mimory?" His honor acknowledged defeat and granted the warrant.

AN INTERESTING CRIMINAL CASE.

By Bernard C. Steiner,

Dean of the Baltimore Law School.

THE papers of Colonel Timothy Pickering, Secretary of State and United States Senator from Massachusetts, are preserved in the Massachusetts Historical Society, and contain a very interesting letter written, in answer to a request from him, by Dr. James McHenry of Baltimore on December 3, 1807.

Pickering had requested information about an alleged case of piracy on the Chesapeake Bay,[1] and McHenry tells him that at daylight on the 24th of August, the unarmed ship *Othello*, Glover master, bound from Liverpool to Baltimore with a cargo of dry goods, was attacked by a small schooner off Sharp's Island. A few musket balls were first fired at the *Othello* and, when she was within pistol shot, all the men in the schooner fired two rounds of muskets into the ship. A ball passed through the mate's hat and many lodged near the captain, when in the act of hailing the schooner. Some one on the schooner cried "Haste, haste, or I will fire again!" Glover went alongside of the schooner and asked if she were a pirate. The person appearing to command replied, "I am no pirate but a privateer from Guadaloupe," and demanded the ship's papers. Soon afterwards he declared the *Othello* a good prize, as having British manufactured goods on board. Men from the schooner with guns, pistols, knives, swords, *etc.*, filled Glover's boat, demanded his keys and proceeded to the ship, leaving him on the schooner. We now quote Dr. McHenry's exact words.

"The crew were ordered below and two sentinels placed over them, the pilot was told to take the ship to sea, for which service $400 was promised, and the pilot objecting, he was ordered to do it at his peril. Then an examination of trunks, *etc.*, in the cabin took place and provisions, porter, *etc.*, were in great excess consumed. Captain Glover, being permitted to return to the ship about 11 o'clock in the forenoon, was soon ordered back to the schooner, the person appearing to have command declaring again the ship to be a good prize and should be taken to Guadaloupe. On G's requesting to remain on board his ship, the apparent commander replied he should not; but that all the hands, excepting himself, should, and that he would take care to protect his prize. Captain Glover returned on board the schooner, where he was detained until 8 o'clock next morning. At this time, Captain Glover probably went again to his ship, which, being at anchor all night off the Potomac, wind ahead and no prospect of getting her out befor her seizure must be known and her departure prevented, the apparent commander said he was sorry to have detained Captain Glover so long, but, being positively informed on board the French ship *Patriot* that English property was on board the *Othello*, he wished to discover it; apologized for firing into the ship, saying he could not prevent his men lest they might use violence

[1] Just now, it occurred to me to enquire what had become of the French pirates who seized & were carrying off a merchant ship, in the waters of the Chesapeak, & who were committed to prison in Baltimore. Having heard nothing of them, the first thought which occurred was, that, by some means or other, they had been discharged. And I am now informed, that the District Judge, or the Circuit Court of the U. States, in Maryland, said, the laws of the U. States gave the court no cognizance of the crime; and turned the culprits over to the State Court: and that the State Court said *they* had no jurisdiction: and that in consequence, these atrocious villians had been set at liberty. Pray have the goodness to give me a correct state of the facts. It is a *disgrace* to the Country to have no law (incredible as that may seem) by which such offenders may be brought to justice.

to himself and other officers; proposed to liberate the ship, on condition that Captain Glover would certify that he was not plundered or treated improperly, which was at first refused, but afterwards, for obvious reasons, complied with and, for the same reasons, a Mr. Hardens, a passenger on board, being compelled, added his certificate of the truth of the fact. After this his papers were returned to Captain Glover. He was permitted to proceed to Baltimore having been detained 28 hours and the ship carried from Sharp's Island to Point Lookout. So daring a transaction as the pirated seizure of the *Othello* almost within the port of Baltimore, excited considerable alarm among the merchants, who had property afloat and expected to arrive or which they were about despatching to sea, and high indignation among the citizens here in general. Thus excited, it was resolved to arrest the further depredations of the pirate, two or three vessels were accordingly provided for the purpose, manned by our volunteer companies and proceeded down the bay in succession. The vessel which succeeded in capturing the piratical schooner was called the *Volunteer*, having on board a detachment of two companies of the Independent and Baltimore United Volunteers, the companies commanded by the brothers Samuel and Joseph Sterrett, but the schooner *Volunteer* under the direction of Captain Porter of the navy. On approaching near to the pirate, a boat was seen to leave her with four men, and make for the shore; the boat was fired on but affected a landing. At this time, the piratical vessel hoisted French colors, which she soon lowered and when taken possession of had but three men on board, the others who escaped in the boat were afterwards found on board the French ship *Patriot* and politely delivered up, five others were afterwards arrested near Annapolis and the whole, in number 12, were imprisoned in this city. The 1st of September, the pirates were brought before Judge Houston, district judge of the United States, who took the deposition of Mr. Harden, a passenger on board the *Othello*, and decided the crime for which the prisoners were in custody was committed *within the jurisdiction* of the State and, consequently, the courts of the United States had no *cognizance* of it, grounding his decision, it is presumed, on the 8th section of "An Act for the punishment of certain crimes against the United States" in the wording, *viz.*: "If any person or persons shall commit, upon the high seas or in any river, haven, bay, or basin, out of the *jurisdiction* of any *particular State*, murder, or robbery, or any other offence, which, if committed within the body of a country, would by the laws of the United States be punished with death," *etc.* The prisoners were turned over to the custody of the sheriff of Baltimore County by a City Magistrate and Calvert County being nearest to the place where the crime was committed, it was expected the court of that county could alone try the prisoners. The attorney general of the State is said to have since reported that the judges of the court of Calvert, hearing the case of the prisoners, gave a decided opinion, that the crime being committed on the Chesapeake Bay, the court of Calvert county could not take cognizance of it and the Criminal court of this city, who could not touch the offence, proceeded on this report, to liberate the prisoners.

"There would seem to have existed considerable difficulty in this case. Samuel Chase, the associate justice of the Supreme Court, U. S., is understood to have coincided in opinion with Justice Houston. J. T. Chase is the Chief of Calvert County, respectable as a man and eminent as a lawyer. The counties of this State are all bounded by and do not run into the bay. What must have been the case if our late general courts, one for either shore, still existed, I cannot venture to say; but, lately, the general courts

were put down and all original common law and criminal jurisdiction vested in county courts, and, if the counties themselves do not run into the bay, how can the courts of any county hold pleas of a crime committed thereon? An old counsellor at law has mentioned to me that a case occurred of a robbery and murder committed by persons named Robins and Davenport on a John DeCoursi, in the year 1788 in the bay of Chesapeake, that the perpetrators being apprehended in Queen Anne's, they were there held to answer to two distinct indictments; one for murder, which, on account of doubts then existing as to jurisdiction, was never tried; the other for robbery, on this last, with no little hesitation, they were tried, convicted, hung. The trial in this case for the robbery may have preceded and been maintained on the ground of the stolen property being found on the prisoners, which in cases of larceny, the *asportation* of property, is held to be a continuance and repetition of the offence. The last is supposition only, and perhaps it was not a correct principle in the particular case. My informant added that the case mentioned gave rise to a law of Md. of Nov. session 1789, chapter 22 providing for cases of murder when the stroke was given on the bay and the death happened on the shore and the reverse. This last is said to have been considered in the reasoning of the judges on the case in question to apply on the principle of *expressio unius exclusio alterius*, but I don't know this and cannot discover where the report mentioned of our attorney general can be had."

A PAIR OF EARS.

From the French of Philibert Audebrand by Mary J. Safford.

M. ALFRED NAQUET might have added this document to his file of papers advocating divorce.

The incident occurred in the clerk's office of the *Palais de Justice*, where all sorts of things are deposited, stolen articles, *corpus delicti*, and objects tending to prove criminality. Last April, a young lawyer, with lorgnon raised to his eyes, was amusing himself by examining this judicial bric-a-brac. He went from brass watches to revolvers, silver snuff-boxes to burglars' tools, plunging like the youth in the old tale, into a gulf of philosophical reflections.

Suddenly he noticed in a sort of velvet case, two singular objects, round, flat, very peculiar in form, and brown in color. They looked like India-rubber or parchment.

"What are those?" he asked, turning to a young clerk who was acting as guide.

"Why! Don't you see that they are ears?"

"Ears of what?"

"Ears of a man."

"Cut off?"

"Certainly, cut off."

"With what? A sabre? A knife? A razor?"

"A Catalonian poniard."

Then, drawing a steel blade from a leather sheath, he added:

"Here is the instrument by which the aforesaid ears were amputated."

The words evidently referred to some drama. Curious, like all men of his age, the young lawyer stopped and questioned his guide:

"A tragical adventure! Oh, my dear sir, pray tell me about it!"

"Very well! It isn't a long story."

"So much the worse!"

"Don't interrupt me. About three months ago, just at the close of winter, a strange affair occurred in an elegant villa near

Sceaux, occupied by Comte de S. with his young wife, an extremely pretty woman, with whom he was desperately in love. You have divined that he was an Othello under the mask of a man of fashion?"

"No, I knew nothing about him."

"A Bengal tiger could be no worse. One evening, late in January, he returned from Paris by the railway, his feet half benumbed by the cold, and his eyes smarting from the glare of the snow, and dashed into the villa without ringing or knocking, like a hurricane, going straight to his wife's room. Do you know what he saw there?"

"Aha! Here's the key of the drama. What did he see?"

"A very good looking young man who seemed to be pressing the countess's hand."

"The deuce!"

"Not doubting that it was some admirer, he rushed to the weapons decorating the wall, snatched this dagger and, in less time than it requires to tell it, cut off the stranger's ears."

"Ye gods of heaven and earth! Both of them!"

"Those are the articles you see so carefully preserved in that case. Justice keeps them as evidence of criminality."

"But the young wife?"

"Wait! The fair countess exclaimed, 'My dear, you are mistaken! My dear, monsieur is a stranger! My dear, you have cut off one ear; spare the other, I beseech you!' But you know tigers are always still more infuriated by the sight of blood. Besides, the more his young wife tried to soothe him, the more he imagined that she was in league with the visitor. He did not stop till both ears were hacked off."

"Well, what was the fellow doing there?"

"I'll tell you. Did you ever read a story by Balzac, called *Message?* A young man is accused by a friend of carrying a letter to a young married woman. Except for the existence of a secret love, the situation was identical. The stranger who called at the villa near Sceaux, was bringing a message, a letter from a boarding-school friend, which by chance he handed to her just at the moment Othello appeared on the scene. You know the rest."

"A mistake!"

"Yes, but the young man, as you may suppose, will not let matters rest there. As Comte de S. cannot give back his ears, he intends to make him pay damages. Complaint has been brought, with a demand for valuation to serve as a basis for estimating the damages, which will not be less than two hundred thousand francs."

"What are you saying? A hundred thousand francs apiece. Come, that's pretty dear!"

"Would you give yours for that sum?"

"No, of course not; but that isn't the question. We are wandering from the drama. Permit me to return to it. What was the message sent by one boarding-school friend to the other? It must be known. The examination would not fail to reveal it."

"The examination did reveal it, since the message was opened and read. The young beauty in Paris wrote to her schoolmate in Sceaux: 'I have just consulted Dr. Z. whom all the young women in Paris are questioning about their complexions. I generously send you his prescription: *If you want to have a fresh complexion throughout the year, bathe your face daily, during the month of May, every morning, with dandelion juice.* Alice Z.'"

"What! Has dandelion juice been the cause of a jealous husband's cutting off an innocent man's ears and making the *Palais de Justice* echo with the absurd lawsuit?"

"As you see, monsieur."

The young lawyer, smiling, left the room repeating the two philosophical lines by Voltaire:

Oh, Jupiter, it was a bitter jest
When thou dids't create mortals.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

III.

By Van Vechten Veeder,
Of the New York Bar.

WE now come to the greatest stain upon the judicial annals of England—the trials connected with the Popish Plot of 1678 and its counterblast, the Rye House Plot, five years later. It can hardly be said that no plot existed in 1678. The Jesuits were undoubtedly striving to restore Catholicism, and were probably not particular as to the means by which that result should be accomplished. But it is now certain that no such plot as Titus Oakes proclaimed ever existed. Of Oates, the chief promoter of the prosecutions which ensued, Scroggs for once told no more than the base truth when he called him "the blackest and most perjured villain that ever appeared on the face of the earth." But Lord Shaftesbury and the Whigs must bear a large measure of blame for their political activity in magnifying the plot. The plot would probably have died a natural death but for the discovery of Coleman's letters and the murder of the magistrate Godfrey, which gave some color to Oates' story. As it was, Oates, Bedloe and their villainous associates, with the aid of an equally infamous bench, sacrificed the lives of fourteen Catholics, beginning with Coleman and ending with Lord Stafford. Their trials are reported in the sixth and seventh volumes of the State Trials. Space will not permit of more than a hasty examination. Only Wakeman and Stafford defended themselves with any degree of force; Langhorn, the barrister, lost his head completely. Coleman's conviction was a foregone conclusion; Scroggs directed the jury that the prisoner's letters were sufficient evidence of treason. Ireland, Pickering and Grove were convicted upon the testimony of Oates and Bedloe. Even Scroggs was forced to admit that the evidence against Whitebread was insufficient, and the acquittal of Wakeman, Gascoigne and Castlemaine demolished the plot.

Lord Stafford was the last victim. Lord Nottingham presided at his impeachment. Maynard, Winnington and Treby appeared for the prosecution. Wallop and Saunders acted as counsel for the prisoner on questions of law, but their craven conduct led Nottingham to command them to speak up. "You have the protection of the court," he told them, "for the counsel you give in matter of law, and whatever advice you give you should maintain by the law." Objection was made to having the prisoner's counsel stand even within prompting distance of him, and Stafford defended himself as best he could. "My lords," was his pathetic plea, "these things being such great afflictions to me, and some other accidents which I shall not trouble your lordships with teiling you of, have so much disordered my sense and reason (which before was little) that I scarce know how to clear myself to your lordships as I ought to do, or which way to go about the doing of it; therefore, I do with all humility beg your lordships' pardon if I say anything that may give an offense, or urge that which may not be to the purpose. All which I desire that you would be pleased to attribute to the true cause, my want of understanding, not of innocency or a desire to make it appear." The three chief witnesses against Stafford were Oates, Dugdale and Turberville. The first swore that Stafford had brought him a commission, signed by the pope, as paymaster of the army to be raised against the king; the second, that Stafford had offered him £500 to kill the king; the third, that Stafford had promised to reward

him for the same deed, but at a different time. Their testimony was incoherent and contradictory, and Oates pieced out his venom by testifying orally to the contents of letters written by Stafford which he claimed to have seen. Stafford raised the point that one witness to prove an overt act at one time and another witness to prove an overt act at another time, was not a compliance with the statutory requirement of two witnesses in cases of treason. This objection was overruled by the judges. Atkyns said in the course of his opinion: "In the case of Sir Henry Vane and others this very question was started, but was not thought worthy of debate. If it should be otherwise it would touch the judgments which have been given upon this kind of proof; and what would the consequence of that be but that those persons who were executed upon those judgments have suffered illegally." The prisoner might well term this "a strange position." Lord Stafford was convicted by a vote of fifty-five to thirty-one. Lord Nottingham's otherwise admirable and humane speech in delivering sentence was marred by a reference to the alleged burning of London by papists, concerning which there had not been the remotest reference during the trial.

Two cases having more or less connection with the plot deserve notice. Fitzharris' case (8 St. Tr. 243) was a struggle between the commons and the courts for jurisdiction. The real object of the Parliamentary proceedings was to elicit information bearing upon the plot. The king sought to forestall the commons by instituting an action in the regular courts for treasonable libel. Very full reports have been preserved of the elaborate arguments on the question of jurisdiction by Sawyer, Jeffreys, Williams, Winnington and Pollexfen. Pressed by both king and Commons Fitzharris was, of course, convicted and executed.

The trial of Colledge before North (8 St. Tr. 549) was scandulous. On the way to his trial the prisoner was deprived of all the papers provided for his defense, and with the information thus gained the crown counsel astutely refrained from calling witnesses whom the prisoner could have impeached. Nevertheless Colledge defended himself admirably, though unsuccessfully.

Within less than five years after the sanguinary denouement of the Popish Plot a revulsion took place, and the Rye House Plot absorbed the attention of the courts. Scroggs, Jeffreys and North then sacrificed Whigs as they had previously sacrificed Catholics. As in the former plot, some desperate men had undoubtedly organized a plot against the king. But there was no evidence that Russell, Sidney, Essex and other Whig leaders had been parties to it. These men feared for the cause of liberty, and they undoubtedly consulted with a view to revolutionary action in case of need; but they committed no overt act of treason. Yet while history has condemned their taking off, it must be remembered that they had helped to raise the Popish Plot, and Russell had voted for Stafford's death. Essex committed suicide in the Tower, and interest in the carnival of judicial murder which ensued centers around the trials of Lord Russell (9 St. Tr. 577) and Algeron Sidney (9 St. Tr. 818). At the trial of Russell, Chief Justice Pemberton presided over the bench of nine judges. Sawyer, Finch, Jeffreys and North prosecuted for the crown. Pollexfen, Holt and Wood were assigned to advise the prisoners. Russell was accused of having conspired to raise an insurrection against the king, and with having concurred, to that end, in a scheme to seize the royal guards. The witnesses against him were his alleged accomplices, Howard and Ramsey, both of whom were discredited by their character, complicity and contradictory statements. Aided by his wife, who acted as his amanuensis, Russell made a weak and hesitating defense. He

argued that to imagine the levying of war upon the king was not equivalent, as claimed, to a design to kill him. But his main reliance was that no two witnesses had sworn to the same overt act. Chief Justice Pemberton's conduct of the trial was temperate and humane, although he ignored the prisoner's defense with respect to the required number of witnesses.

the king, seeking coöperation from Scotland, and writing a treasonable libel affirming the subjection of the king to Parliament and the lawfulness of deposing kings. The only legal evidence on the first charge was the testimony of Lord Howard, which was completely discredited. The second charge was not proved. With respect to the third charge the authorship of the objection-

By me John Oahs

Sidney's trial before Chief Justice Jeffreys possesses many more elements of interest than Russell's case. Jeffreys disgraced himself by his brutality, but Sidney defended himself with great ability and vigor. The prisoner was charged with three overt acts of treason: holding consultations which amounted to a conspiracy to levy war against

able manuscript was proved, but there was nothing to show that it was intended to be published. Among the many points which Sidney argued with much acuteness he laid most stress, as Russell had done, upon the lack of the required number of witnesses to the same overt act. Jeffreys told the jury that there was scarce a line in Sidney's

treatise but was the rankest treason; that it was to be regarded as a sort of manifesto intended to justify the proposed rebellion, and, therefore, was evidence of the conspiracy. He held, moreover, that if there was one witness to prove a direct treason, and another to a circumstance that contributed to that treason, that was a compliance with the statutory requirement of two witnesses. Sidney, like Russell, was convicted and beheaded. One instance of Jeffreys' brutality will suffice. Upon being sentenced to death, Sidney passionately besought God not to impute the shedding of his blood to the country, but to visit the guilt upon his malicious prosecutors. To which Jeffreys replied, "I pray God work in you a temper fit to go into the other world, for I see you are not fit for this."

The reign of James the Second was an unmitigated tyranny. Guided by the infamous Jeffreys the judges slavishly degraded themselves in carrying out the king's despotic designs. It is needless to dwell upon the infamies of the "bloody assize" which followed Monmouth's Rebellion—the beheading of Alice Lisle (11 St. Tr. 298), the burning alive of Elizabeth Gaunt (11 St. Tr. 382), the judicial murder of Cornish (11 St. Tr. 000) and many other out-

LORD STAFFORD.

rages upon humanity. Justice and law and decency had nothing to do with these proceedings. The impeachment of the Earl of Danby in 1679 (11 St. Tr. 599), and the trial of Delamere in 1686 (11 St. Tr. 510), of which very complete reports have been preserved, contain, however, some interesting discussions of the law of treason.

LORD RUSSELL.

Turning now to the trials for libel during this period, the state of the law may be briefly sketched. Upon the invention of printing the press was subjected throughout Europe to a rigorous censorship on the part of the church. In England this censorship passed at the Reformation to the crown; and printing was still further restricted by grants of patents and monopolies. Under Elizabeth ous penalties, and all printing was confined the censorship was enforced by more rigorto London, Oxford and Cambridge. With the advent of the Stuarts political and religious discussion was suppressed by the Star Chamber with even greater severity. By an ordinance of this court in 1637 the number of master printers was limited to twenty, who were required to give sureties for their good behavior, and the number of letter founders was limited to four. The art of printing was proscribed to all others on pain of pillory dungeon, mutilation and death. Even books

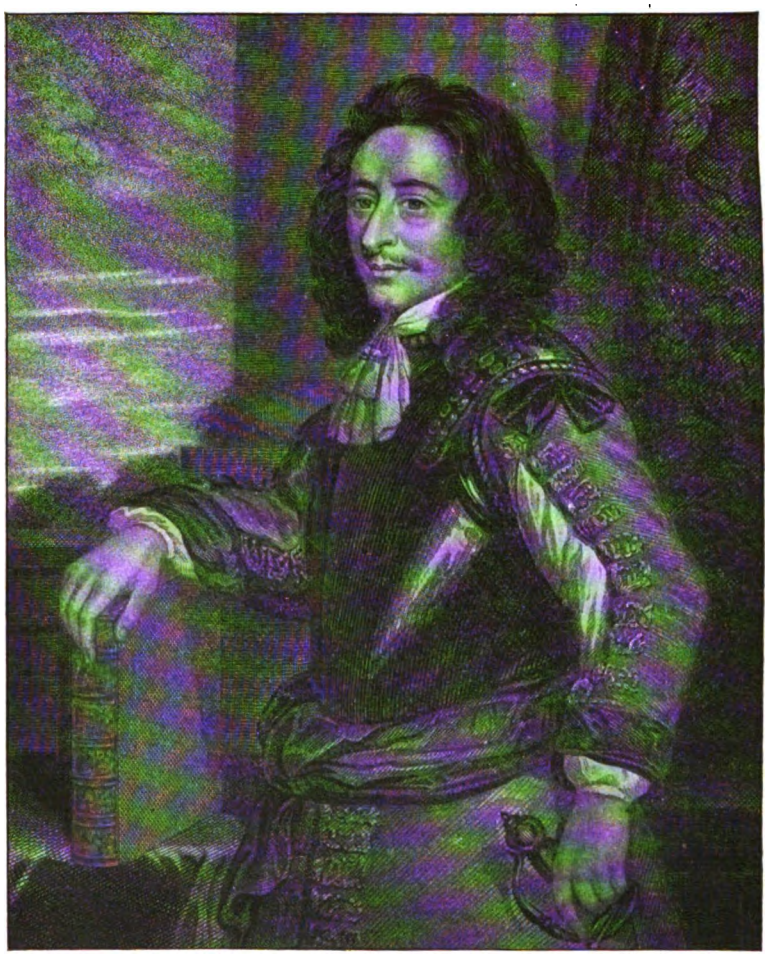
which had been once examined could not be reprinted without fresh license, and books brought from abroad were to be landed only in London, where they were carefully examined by licensers who were empowered to seize and destroy all such as were in their opinion seditious, schismatical or offensive. Periodical searches of book sellers' shops and private houses were also authorized and enjoined. The Long Parliament abolished the Star Chamber but continued the censorship; and the Commonwealth in its turn endeavored "to repress disorders in printing." by the most oppressive ordinances, empowering messengers to break open doors and locks, by day or by night, in order to discover their authors, printers and publishers. Upon the Restoration, the Licensing act of 1662 again placed the entire control of printing in the hands of the government, which was clothed with all the arbitrary powers theretofore exercised by the Star Chamber. These powers were applied with savage vindictiveness; authors, printers and publishers of obnoxious works were hung, mutilated, flogged, imprisoned or fined, according to the temper of the judges. When, in 1679, the Licensing act was suffered temporarily to expire, freedom of discussion was promptly suppressed by the declaration of the judges that it was a crime at common law to publish anything whatever concerning the government without the royal license. At the accession of James II., in 1685, the Licensing act was revived for seven years, and was thus in force at the Revolution.

Under the Tudors and the Stuarts objectionable speaking and writing was generally punished under special acts as treason. This class of offenses was the special province of the Star Chamber, and in this province this court attained its utmost infamy. But Parliament and the regular courts were equally prompt in suppressing discussion. There could, of course, be no rational discussion or development of freedom of speech while a censorship existed, and it will suffice to refer simply to the prominent public prosecutions prior to the Restoration: Udall (1 St. Tr. 1271), 1590; Peacham (2 *ib.* 870), 1615; Floyd (4 *ib.* 1154); Hollis (2 *ib.* 1022), 1615, for traducing public justice; Wraynham (*ib.* 1059), 1618, for slandering Lord Bacon; Floyd (*ib.* 1154; Hollis (2 *ib.* 1022), by the Commons; Mainwaring (3 *ib.* 335), 1621, for advocating forced loans; Pine (*ib.* 359), 1628, for speaking contemptuously of the king; (Chambers (*ib.* 374), 1629, speaking seditious words before the Privy Council; Elliot and others (*ib.* 294) 1629, seditious speeches in Parliament; Prynne (*ib.* 562), 1633, for publishing the Hiltrio-Mastix; Fowles and others (*ib.* 586), 1633, traducing officers of State; Bastwick and others (*ib.* 711), 1637, for publishing seditious and schismatical books; Lilburne (*ib.* 1315), 1637, for seditious publications; Harrison (*ib.* 1370), 1638, for speaking ill of a judge.

From the Restoration to the Revolution the leading cases are Twyn, Brewster and others (6 St. Tr. 514), 1663; Keach (*ib.* 702), 1665; Jenkes (*ib.* 1190), 1676; Harris (7 St. Tr. 926), 1680; Smith (*ib.* 931), 1680; Carr (*ib.* 1111), 1680; Cellier (*ib.* 1183), 1680; Thompson (8 *ib.* 1); Barnardiston (9 *ib.* 1334), 1684; Baxter (11 *ib.* 493), 1685; Johnson (*ib.* 1339), 1686, and the case of the Seven Bishops (12 *ib.* 183). With the exception of the last named, these cases show no improvement over the methods of the Star Chamber. Barnardiston, for instance, was fined £10,000 for writing to a friend some private letters giving some account of the rumors of the day. Barnardiston expressed opinions favorable to Russell and Sidney, and asserted, among other things, that "the Papists and high Tories are quite down in the mouth," and that "Sir George [Jeffreys] is grown very humble." Jeffreys himself tried the case, and instructed the jury that it was unnecessary to show

any seditious intent; the act itself was sufficient.

When, in 1680, the Licensing act had been suffered temporarily to expire, an obsequious bench hastened to formulate the doctrine that it was criminal, independently of statute,



ALGERNON SIDNEY.

to publish any public news, whether true or false, without the king's license. Carr's case, 7 St. Tr. 1114; Harris' case, (*ib.* 927). Carr was prosecuted for the publication of a paper called the *Weekly Packet of Advice from Rome*, in the course of which the writer unmistakably imputed corruption to Chief Justice Scroggs. "There is lately found out by an experienced physician," it read, "an incomparable medicine" [gold]. "It will make justice deaf as well as blind," and it "stifles a plot as certainly as the itch is destroyed by butter and brimstone." Scroggs himself presided at the trial. Carr was defended by Sir Francis Winnington, who admitted that he was "upon a tender point," but suggested that an indiscreet act is not necessarily malicious; that is, Carr was only repeating the prevailing rumors of Scrogg's corruption. In his charge to the jury Scroggs as-

serted that it had been decided by all the judges that the printing or publication of any newspapers or pamphlets whatsoever was illegal; the act was a manifest intent to break the peace, and it was therefore immaterial whether it was malicious or not. Scroggs made the same statement in Harris' case (7 St. Tr. 97).

The case of the Seven Bishops (12 St. Tr. 183) is hardly a precedent for any legal proposition. Yet it is safe to say that no action ever tried in an English court more profoundly stirred the nation. Moreover the dramatic features of this great political contest through legal forms are interesting in themselves. The seven bishops were prosecuted for their protest against an order of the council requiring James II.'s illegal and obnoxious Declaration of Indulgence to be read for two successive Sundays in all the churches and chapels of the Kingdom. Nothing the king could have done was more obnoxious to the prelates; nothing more certain to hasten to a crisis the ill feeling of the people could have been devised. After much deliberation as to the course they should pursue, the bishops drew up a petition to the king. In it they disclaimed all disloyalty and intolerance. But Parliament had lately declared that the sovereign could not constitutionally dispense with statutes in ecclesiastical matters. Since the Declaration of Indulgence was therefore illegal they could not in conscience be parties to its solemn publication in the manner directed. When the bishops presented their petition the king reproached them with treason, and vowed that the declaration should be published as directed. But the people were thoroughly in accord with the bishops, and on the appointed Sundays the Declaration was read in only four churches in London. The king could not recede without humiliation, and at the suggestion of Jeffreys a criminal information for seditious libel was filed against the seven bishops who had signed the petition. By way of preparation for their conviction the bishops were summoned before the council and solicited by Jeffreys to admit their signatures. They refused to incriminate themselves unless the king should positively command them, in which event, they said, they would comply in the confidence that a just prince would not suffer what they said in obedience to his orders to be brought in evidence against them. The king at first refused to command them. "If you choose to deny your own hands I have nothing more to say to you." Later on, however, he commanded them to answer. He did not expressly engage that their confession should not be used against them, but they naturally supposed, after what had passed, that such an engagement was implied, and they thereupon acknowledged their signatures. Jeffreys then told them that a criminal information would be filed against them, and demanded that they enter into recognizances. As peers of Parliament they refused, and all were accordingly imprisoned in the Tower. When, at length, on June 29, 1688, their trial began in Westminister Hall, public feeling was aroused to the highest pitch. The four judges of the King's Bench were Wright, Allybone, Halloway and Powell. Seventy-five years later Lord Camden, in describing "the miserable state of justice in these days," said of them: "Allybone was a rigid and professed Papist; Wright and Halloway, I am much afraid, were placed there for doing jobs; Powell was the only honest man upon the bench."

Sir Thomas Powis, the attorney general, Sir William Williams, the solicitor general, Sergeant Trinder, Sir Bartholomew Shower and others appeared for the prosecution. The defendants commanded the best legal talent of the period. Pemberton, Sawyer, Finch, Levinz, Treby and Somers. The bishops were charged with having written or published a seditious libel in the county of

Middlesex. The prosecution therefore began with proof of the writing. Witnesses were called to prove the signatures of the bishops, but these witnesses were so unwilling that when all had been examined there was no evidence to go to the jury. Thereupon the crown counsel were forced to put the clerk of the Privy Council on the stand and prove by him that the bishops had admitted their signatures. This brought out the proceedings which had taken place at the interview with the king, showing a plain breach of faith on the part of the king. Having proved the handwriting, however, it next became necessary to prove that the bishops had written the alleged libel, and that it had been written, as laid, in the county of Middlesex. This they could not do, for it happened that at least one of the bishops had remained at Lambeth palace throughout the controversy. To avoid the collapse of their case the prosecution thereupon changed their ground and sought to prove that the bishops had published the libel in Middlesex. The delivery of the petition to the king was undoubtedly a technical publication, but as there were no witnesses to the royal audience, reliance was had again to the admission of the defendants. The clerk of the Privy Council was recalled, but he could not remember that the bishops had even been asked whether the paper which lay on the

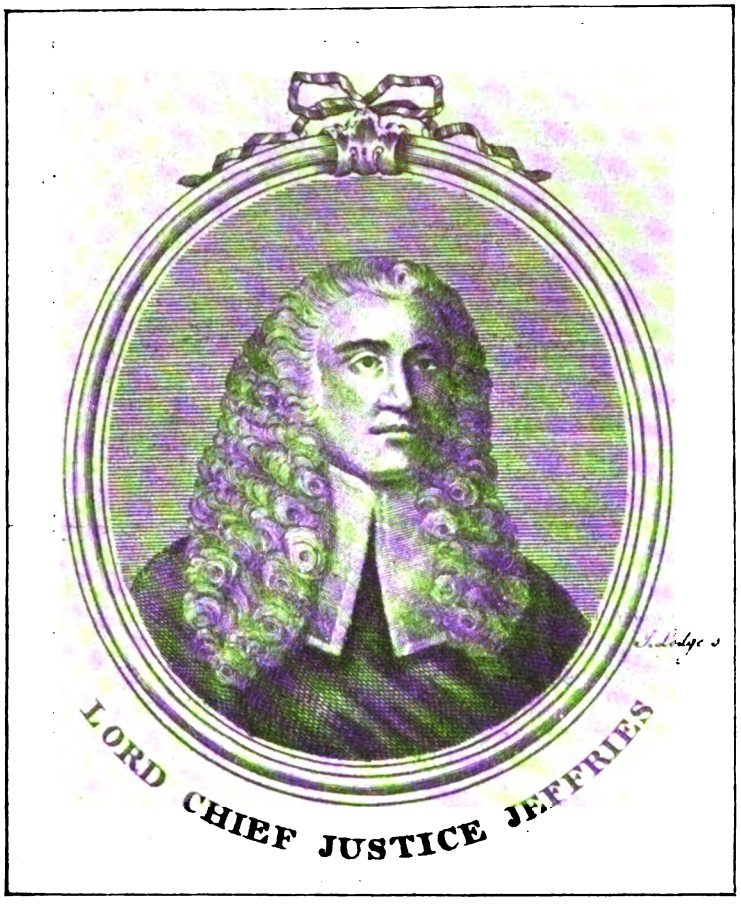


table was the paper which they had delivered to the king. The case for the crown had therefore broken down, and an acquittal was inevitable. Chief Justice Wright was about to address the jury when Finch, of counsel for the defense, indiscreetly interrupted with a request to be heard. "If you will be heard you shall be heard," said Wright, "but you do not understand your own interests." Finch's colleagues at length persuaded him to desist, and the chief justice was again about to proceed with his direction to the jury when a messenger appeared with the information that Lord Sunderland could prove the publication and was hastening to court for that purpose. Lord Sunderland testified that the bishops had informed him of their intention to present a petition to the king, and that they had been admitted to an audience for that purpose. This circumstance, coupled with the fact that after the audience the king held in his hand a petition signed by them, was held sufficient evidence of publication to take the case to the jury. After all these vicissitudes in technical proof, it still remained to convince the jury that the petition was a seditious libel. The alleged libel consisted in the suggestion made by the bishops that the king's declaration was illegal because it was founded upon a dispensing power which did not exist. The defense really was that the dispensing power did not exist and many records were put in evidence to show that such a power had been

JUSTICE POWELL.

repeatedly declared illegal by Parliament. The arguments therefore took a wide range. John Somers, who closed for the defense in a speech occupying less than five minutes in delivery, completely covered the case when he said:

"My lord, by the law of all civilized nations, if the prince does require something to be done which the person who is to do it takes it to be unlawful, it is not only lawful, but his duty, *rescribere principi*. This is all that is done here, and that in the most humble manner that could be thought of. . . . My lord, as to matters of fact alleged in the said petition, that they are perfectly true we have shown by the journals of both houses. In every one of those years which are mentioned in the petition this power of dispensation was considered in Parliament, and, upon debate, declared to be contrary to law; there could be no design to diminish the prerogative because the king hath no such prerogative. Seditious, my lord, it could not be, nor could possibly stir up sedition in the minds of the people, because it was presented to the king in private and alone; false it could not be, because the matter of it is true; there could be nothing of malice, for the occasion was not sought—the thing was pressed upon them; and a libel it could not be, because the intent was innocent, and they kept within the bounds set by the act of Parliament that gives the subject leave to apply to his prince by petition, when he is aggrieved."

Williams closed for the crown in an acrimonious but consistent argument in which he went so far as to deny the right of petition. But the court and jury stood in greater awe of the seething public sentiment. In summing up the evidence, Wright, Allybone and Halloway evaded any expression of opinion upon the legality of the dispensing power. Wright and Allybone considered the petition a libel; Halloway thought otherwise. Powell boldly declared that the dispensing power was inconsistent with law, and the Declaration of Indulgence a nullity; otherwise, he said, the whole legislative authority would be in the king. The jury remained out all night. The next morning they came into court with a verdict of acquittal. It is difficult to specify the legal effect of this trial. The judges were not in agreement as to the law, and the whole proceedings were colored by public excitement. But it is to be observed that not only the criminality of the publication but also the legality of the dispensing power were submitted to the jury as questions of fact. The political effect of the verdict was, however, immense and far reaching. When the troops on Hounslow Heath heard the news they broke into enthusiastic cheering. On the same day an invitation was despatched to the Prince of Orange to assume the British Crown. The tyranny of the Stuarts had come to an end.

WASHINGTON LETTER.

FEBRUARY, 1904.

AS the hands of the clock point to twelve the crier of the Supreme Court of the United States raps with his gavel, the murmur of conversation ceases, and attorneys, court officials, and visitors rise while the crier slowly announces "The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States." The visitors, packed in the space between the wall and the rail which separates them from the members of the Bar, crane their necks and bend their bodies in the effort to see the members of the Court as they file from the anteroom. Robed in black silk gowns, they walk with slow and dignified steps toward the bench. Justice Brown and Justices Peckham and Holmes pause at the steps to the right of the bench; Justices White, McKenna and Day pass behind the bench to the steps at the left, and as the Chief Justice appears at the entrance at the rear they slowly proceed to their seats. As they do the crier cries, "Oyez, oyes, oyez, all persons having business before the Honorable the Chief Justices and the Associate Justices of the Supreme Court of the United States are admonished to draw near and give their attention, for the Court is now sitting. God save the Government of the United States and this Honorable Court."

It is an imposing and inspiring spectacle, the mere witnessing of which increases the red corpuscles of one's patriotism. No man entering that dome-like court room may wear his overcoat. No member of its bar may appear before it in a coat of any color other than black. Such is the dignity and impressiveness of that tribunal that men to whom embarrassment has long been a stranger, evidence the renewal of their acquaintance with it by a stammering speech, a quickened breath, a nervous manner, when addressing the Court.

The senior Associate-Justice occupies the seat upon the immediate right of the Chief-Justice, the next in seniority that upon his immediate left, and so on alternately through the entire Court. Upon the right of the Chief Justice sit Justices Harlan, Brown, Peckham and Holmes—upon his left Justices Brewer, White, McKenna, and Day, in the order named.

Diminutive pages with cherub-like faces stand behind the chairs of the Justices, or scurry back and forth upon errands. When these pages outgrow the knickerbocker stage of their existence, other cherub-faced knickerbockered youngsters are substituted for them.

A case which has attracted national attention, and was recently argued before the Supreme Court, is that of the Northern Securities Company, *et al.*, *v.* the United States. The questions involved in that case are too well known to require mention here, but the marked physical contrast between Mr. John G. Johnson, of counsel for the appellants, and the Attorney-General, is worthy of notice. The latter is much below the average height, clean shaven, faultlessly attired. In the presentation of the Government's case he rarely departed from the text of his argument, which occupied ninety-four pages of print. Mr. Johnson is more than six feet in height, big voiced, big boned, broad shouldered, his forcible mouth and chin partially hidden by an aggressive mustache. I first saw him when he appeared here several years ago before the Supreme Court of the District of Columbia in the "Sugar Trust Cases." Standing in his favorite attitude, with one foot upon the seat of his chair, he

would rest one arm on his upraised knee, and, taking the Court into his confidence, proceed to demolish the argument of his adversary.

Mr. Justice Brown, who was forced to abandon his duties for many weeks because of trouble with his eyes, was present at the short session which the Court held on the first day of February.

On that day Mr. Justice Brewer delivered the opinion of the Court in the case of the State of South Dakota *v.* the State of North Carolina, *et al.*, the decree being in favor of the complainant. A dissenting opinion prepared by Mr. Justice White was read in his absence by the Chief-Justice, who, with Justices McKenna and Day, joined in this opinion.

The facts as stated in the opinion are briefly as follows: In 1849 the State of North Carolina passed an act whereby the North Carolina Railroad Company was chartered with a capital of $3,000,000, divided into 30,000 shares of $100 each. The State subscribed for 20,000 shares, and issued its bonds for a sufficient amount to pay for the subscription, pledging as collateral security therefor its stock in the railroad company. Similar subscriptions for additional shares of the stock of this company and of the Western North Carolina Railroad Company were authorized and effected by a similar method.

In 1879 the State of North Carolina appointed commissioners to compromise the State debt. In 1897 those bonds which had not been compromised matured, were not redeemed, and the holders thereof were unable either to induce or compel the State of North Carolina to redeem them at anything like their face value. One of the holders of a large number of these bonds had a friend who resided in the State of South Dakota, and was more or less prominent in the politics of that State. This bond-holder and his friend from South Dakota held a conference. Thereafter the State of South Dakota was also a holder of certain of the bonds of the State of North Carolina. The following letter addressed to another citizen of South Dakota explains itself:

"Office of Schafer Brothers, No. 35 Wall Street.

New York, Sept. 10, 1901.

Hon. Charles H. Burke,

Dear Sir:—The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

The bonds are all now about due, beside, of course, the coupons, which amount to some one hundred and seventy *per cent.* of the face of the bond.

The holders of these bonds have been advised that they cannot maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.

These bonds can be used to great advantage by States or foreign governments, and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

If your State should succeed in collecting these bonds it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating State, rather

than accept the small pittance offered in settlement.

The donors of these ten bonds would be pleased if the Legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.

Very respectfully,

SIMON SCHAFER."

On the 18th day of November, 1901, the State of North Carolina found itself involved in the litigation which terminated on the 1st day of February, 1904, in the following order:

"A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400), (no interest being recoverable, United States v. North Carolina, 136 U. S. 211), and that the same are secured by one hundred shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the first Monday of January, 1905, and that in default of such payment an order of sale be issued to the marshal of this court, directing him to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington."

Were it not for the fact that the State of South Dakota holds this stock, it would doubtless be impossible to enforce the decree. If the exigencies of the case necessitate the enforcement of all of the provisions of this decree, a novel drama will be enacted upon the steps of the Capitol. Auction sales upon the steps of court-houses are of daily occurrence, but the scene is usually rustic, the actors, dust or mud-covered farmers with more holes than dollars in their pockets, the auctioneer, the sheriff, the building at his back, a one-story court-house. An auction sale of the property of one State at the suit of another, conducted upon the steps of the National Capitol by the marshal of the Supreme Court of the United States, would be an historic event.

This case was stubbornly contested and ably presented by the most eminent lawyers of the State of North Carolina, and was argued three times. The result, however, cannot but recommend itself to fair-minded men. A sovereign State, which, being justly indebted to an individual, not only repudiates its debt and screens itself behind its sovereign prerogative of exemption from suit, but also diverts to its treasury, funds which equitably should flow into the pockets of its debtors, deserves slight consideration at the hands of a Court of Equity, when dragged to the bar of that court by another State.

It is an historic room in which the so-called "Post-office Cases" are, at the present writing, being conducted.

In this room the famous Star Route Cases were first tried. Here also Giteau was tried, convicted, and sentenced. Here Madeleine Pollard prosecuted and won her celebrated suit against William C. P. Breckenridge.

The case against Machen (whose name is pronounced as though it were spelled Mashen), the Lorenzes, and the Groff brothers, has not been devoid of dramatic and humorous incidents, although the testimony introduced by the Government was, to a great extent, dry and uninteresting. It was dramatic when Mr. Conrad, in reply to an ob-

jection, pointed his finger at Mr. Machen, and referring in scathing terms to the relation which that defendant's salary bore to his bank account. It was dramatic when Mr. Conrad, in open court, apologized to Mr. Machen. It was extremely amusing when one of the attorneys for the defense (in whose mental pronunciation of the term "cross-examination" undue emphasis is laid upon the word "cross") said to one of the Post-office inspectors: "Why didn't you come to see me instead of going to my clients?" And the witness replied: "Well, Mr. ———, I had not the honor of your acquaintance at that time, and, in fact, was not aware of your existence."

It was amusing when this same attorney, in cross-examining another inspector said:

"Mr. ———, how is it that your memory is not so clear as to unimportant matters, and so defective as to others?"

"Well, sir," replied the witness, "the only way I can account for it is that I can't remember things that never happened."

The greatest latitude has been allowed the defendants. The opening statements of two of the attorneys for the defense bore striking resemblances to closing arguments. The questions put to the defendants and their witnesses on direct examination have been frequently palpably leading, the testimony frequently pure and unadulterated hearsay, and yet the government has usually remained silent.

No acquaintance or correspondence with Machen and complete ignorance of the plans and methods of Lorenze, *vir*, is the defense of the Groffs; similar ignorance, coupled with a total absence of feminine curiosity as to her husband's affairs, is the defence of Mrs. Lorenze; a preëxisting indebtedness on the part of Lorenze to Machen, and the absence of any agreement or understanding between them in regard to the Groff patent, is their defence.

Before this article goes to print the verdict of the jury will have been recorded.

ANDREW Y. BRADLEY.

LONDON LEGAL LETTER.

FEBRUARY, 1904.

THE tragic and pathetic end of Whitaker Wright's cases illustrate the inexorable way in which the law is administered in England. Probably in no other country, certainly not in the United States, would it have been possible for a trial to have been conducted with so great despatch and with so little regard to the pressure of influence and monied associations. The fact that Whitaker Wright was arrested in New York and detained for some months there, during which time an application for his release on bail was heard in the Supreme Court of the United States, gives to his case an international interest and points the moral of the story of contrast in criminal procedure in the two countries. Mr. Wright had been a successful financier in America, and was a conspicuous and influential dealer in financial corporations in this country. He organized in London permanent and subsidiary companies with a total capitalization of over fifty millions of dollars. Some of these companies paid back to their shareholders five times the invested capital, and nearly all of them were so successful that their shares were for a long period quoted above par. Owing to transactions upon the stock exchange, he incurred the enmity of a bear group of dealers, who undoubtedly determined to punish him individually and to wreck his companies. In the end they succeeded, helped by a declining market and the result of the war in South Africa and the

fall in all securities, government as well as private.

In order to make a favorable showing in certain annual reports, securities were transferred from one company to another and shares were undoubtedly overvalued. This occurred in the annual reports to shareholders in 1899 and 1900. In order to avert the crash Mr. Wright used his own private means for the benefit of the companies to the extent, it is alleged, of several millions of dollars. It was, however, an unavailing offer and liquidation in the bankruptcy courts, so far as the companies were concerned, resulted. Bad blood, however, had been engendered, and an effort was made to induce the government to institute a prosecution against Whitaker Wright for the statutory offence of making a false and fraudulent balance sheet with intent to deceive. After consideration by the law officers of the crown the Attorney General announced in Parliament that he did not see his way clear to undertake a prosecution. The matter rested here until nearly a year later, when an application was made to the Chancery Court for leave for the liquidator of one of the companies to use its funds for the expenses of the prosecution. This application was acceded to, and the funds in the hands of the liquidator were supplemented by private subscription. The day this order was made Whitaker Wright departed from England, and shortly afterwards left France, under an assumed name, for New York where he was arrested upon arrival. His American counsel finding it impossible to obtain an order admitting him to bail, waived further proceedings and in custody of the officers who had been sent over to bring him back, he voluntarily returned to England. Here he was admitted to bail, and at once began preparation for his trial. The preliminary examination before the magistrate occupied some weeks, and in all five months elapsed between his arrival in this country and his trial.

Naturally every attempt was made to secure delay and to obtain the acquittal of the prisoner. He had means for his defence, and employed the best available counsel. It is no reflection upon procedure in America to say that under similar circumstances it is extremely likely that the trial itself, involving, as it did, hundreds of volumes of accounts, so heavy in avoirdupois that they had to be brought into court on wheels, and so intricate in the nature of the transactions they contained, that they required the services of many accountants for weeks to make them comprehensible, would have required months for its preparation and conduct and that upon the excuse a protracted delay in bringing it on would have occurred. Then, too, the influences surrounding a successful financier, upon the boards of whose companies were directors eminent in statesmanship and society and city life, would have counted for something in any other country in the world. Here the trial had no variation from the ordinary course of procedure, except that it was transferred from the Old Bailey to the High Court. There were no applications for adjournment, no challenges to the jurors and no exceptions to the evidence or the rulings of the judge. The jury was asked the general question if any of the members were connected with the companies managed by the accused, and this being answered in the negative the trial proceeded. Altogether it occupied two weeks and two days, one day being devoted to the address by the counsel for the prosecution, and one day to the address by prisoner's counsel and one day to the summing up by the judge. The jury found a verdict of guilty and the judge imposed the maximum penalty—seven years hard labor. Within less than an hour of the sentence the prison-

er lay dead in a room in the court, from an apoplectic attack, it is surmised. Had he lived he would have had to undergo his sentence forthwith, as there is here no appeal in criminal cases, and thus there is avoided the years of delay which might have been secured elsewhere by successive appeals and revisals and demands for new trial.

The pathos of the tragedy is further illustrated by the circumstance that the attorney general who had refused to prosecute Whitaker Wright justified his position before Parliament a few days after the trial had been concluded. He contended that according to the provisions of the statute upon which the prisoner was indicted there must not only have been misrepresentation in a balance sheet or other document issued by the officials of a company, but that the misrepresentation must have been with the intent to deceive or defraud shareholders or creditors or to induce persons to entrust or advance property to the company, and that as in this case the false balance sheet was issued solely with intent to better the company and its shareholders, the offence was not one within the meaning of the act. He quoted an authority which, strange to say, was not brought to the attention of the learned judge who tried Whitaker Wright. It was that of Lord Chief Justice Cockburn, who in a similar case directed a jury that they could not convict unless they were satisfied that the acts charged were done with the fraudulent purpose of defrauding the shareholders and the creditors of the company. Had the *dicta* been quoted at the recent trial it is not improbable that it would have had a very different result.

Comparisons are often made between the fees of counsel in England and America, and with unsatisfactory results as it is difficult to find any relative standard by which to measure upon the result. In this country a firm lawyers would take entire charge of such a case as Whitaker Wright's and have the sole conduct of it from start to finish, and would probably charge a fee to cover the entire work performed based in some measure upon the result. In this country a firm of solicitors is employed to prepare the case for trial, but upon each hearing before the magistrate and at the trial counsel are retained, the solicitors usually briefing the ablest and most skilful their clients means will afford. In the Whitaker Wright trial thousands of pounds were doubtless spent by both sides in getting the case ready. Part of this money was "out of pockets" for the services of accountants and scriveners, but profit costs of the solicitors must have been very large. It is commonly reported that Mr. Rufus Isaacs, K. C., who with Mr. Avery, K. C., and Mr. Emery Stephenson conducted the prosecution, had 500 guineas, say $2,500 marked upon his brief, with a daily refresher of 100 guineas, which would make his compensation for the actual court work $8,500. In the usual course Mr. Avery would receive a fee of two-thirds the amount of Mr. Rufus Isaac's fee, and Mr. Stephenson's fee would amount to two-thirds of Mr. Avery's fee. If this system was followed, and there is no reason to believe it was not, Mr. Avery received $5,600 and Mr. Stephenson $3,600, or a total of approximately $18,000 for the three counsels. Mr. Ranson Walker is said to have had no less than 3000 guineas marked on his brief for the defence, but this was, to at least 2000 guineas, a "special" fee and his associates would not, therefore, receive the same proportional amounts. However, it is not improbable that the defendants counsels were paid something more, and probably considerably more, than $25,000 for their services. These figures are given simply for comparative purposes.

STUFF GOWN.

CURIOUS LAWS OF PURITAN BOSTON.

THE early laws of Puritan Massachusetts possessed an almost Draconian severity. In some cases there was a fixed and definite penalty, but in most instances the question of sentence was left to the discretion of a hard and relentless judiciary. The laws relating to idlers, thieves, agnostics, and drunkards are given in detail here, and the reader will see that justice was seldom, if ever, tempered with mercy.

The law as to idle and disorderly persons was as follows: "Idlers. It is ordered that no person, householder or others, shall spend his time unprofitably, under pain of such punishment as the county court shall think meet to inflict. And the constables of every town are required to use special care to take notice of offenders of this kind, especially common coasters, tobacco takers, and unprofitable fowlers, and present the same to the next magistrate."

The law as to heretics and agnostics was especially severe: "Any one denying the Scriptures to be the word of God, should pay not exceeding £50, to be severely whipped, not exceeding forty strokes, unless he publicly recant, in which case he shall not pay above £10, or be whipped in case he pay not the fine. And if the said offender after his recantation, sentence or execution, shall the second time publish and obstinately and pertinaciously maintain the same wicked opinion, he shall be banished or put to death, as the court shall judge."

The court sentences of thieves and drunkards, which are given below, are extremely interesting.

"Sergeant Perkins is ordered to carry forty turfs to the fort for being drunk."

"Josiah Plaistow, for stealing four baskets of corn from the Indians, is ordered to return them eight baskets, and to be fined £5, and hereafter to be called Josias, and not Mr. Josiah Plaistow, as he formerly used to be."

"John Wedgewood, for being in the company of drunkards, to be set in the stocks."

"April, 1632, Robert Coles is fined £10, and enjoined to stand with a white sheet of paper on his back, wherein a drunkard shall be written in great letters, so long as the court shall think best, for abusing himself shamefully with drink."

Such were some of the laws of our Puritan ancestors.

The Green Bag.

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

NOTES.

THE prisoner at the bar, a small negro boy fourteen years of age, was charged with murder, it being alleged that by the administration of poison he had caused the death of his mother and father. He entered a plea of "not guilty," but the State made out its case beyond any shadow of a doubt and the accused was convicted of murder. On account of his tender years, the jury saw fit to recommend him to the mercy of the court. When presented for sentence, being asked by the presiding judge, if he had anything to say why the sentence of the court should not be passed upon him, the boy with a broad grin and a twinkle in his eyes, unhesitatingly responded:

"Jedge, all I got to say is, have mussy on me caise I's a orphan."

The poor orphan was sentenced to the State prison for the term of his natural life time.

HONORABLE HENRY A. CHILDS is known throughout New York State as one of the most dignified and learned judges on the bench. At a recent term of court he was very much annoyed because the officer who was stationed just inside the court room door found the enjoyment of a short nap, now and then, much more to his liking than listening to the arguments of the lawyers and the rulings of the Court.

One day a well known attorney was about to leave the court room. Court was in session, and the officer was stealing a nap as usual, but awoke just in time to hear the judge say in most strenuous tones, "Mr. M——, if you are going from this court room you will please do so *very* quietly so as not to disturb the officer at the door."

DURING the progress of the Goddard murder case, in Kansas City, Missouri, some years ago, a colored witness for defendant was on the stand, who testified that he was in the chicken business, and had been in a certain vicinity on the night in question. Defendant's attorney asked this witness what he was doing there.

Here the prosecuting attorney interrupted very gently, saying, "I wouldn't ask him that, he said he was in the chicken business."

A FOREIGN born citizen of one of the middle Western States, Pakowski by name, was on trial charged with killing fish by the use of dynamite. He had been seen with the fish in his possession, but insisted that they had been killed by some one else, and that he had found them dead upon the water. As proof of his entire innocence of taking the lives of these fish he explained that they had been dead so long that some of them had an unsavory odor.

In response to a question upon cross-examination, he stated that he was taking them home to feed his family. The prosecuting officer thought he saw an opportunity to make a telling point with the jury.

"Do you mean to tell this jury?" he asked, "that you were taking home these dead fish that you have told us about to be eaten by yourself and your family?"

"Vell," slowly came the answer, "I never yet eat fish vhat vas not dead."

THE following is a literal transcript of the second clause of a will filed and probated in L. county, Wisconsin, a few years since:

"I hereby commit the guardianship of all my children until they shall respectively attain the age of twenty-one years, unto my said wife, during her life; and from and after her decease unto my much and esteemed friend ———, his executors and assigns."

A RATHER pat saying is applied to a certain lawyer, who, when elevated to the bench, failed to satisfy the expectations of members of the bar, and one of them remarked of him "that he went upon the bench with little opposition from the bar and left it with none."

V. SUED S. & F. for raising the waters of O., a meandered lake, so that it overflowed and washed away his land and otherwise invaded his raparian rights. R., attorney for defendants was, because of limited education, rather uncertain in his use of words, while false teeth, which did not fit, rendered his pronunciation indistinct. He was very indignant over what he called the "frivyla" character of the suit.

While the case was on trial an attorney from a neighboring town asked R. what the suit was about. He answered: "It involve' the location of the miranda' line' on O. Lake and right' of the riprarin' ownas. I weesh we c'd dreen the lake as dry as the Dese't of Ohary."

AN able, but impractical, lawyer at the Kansas City bar retired from political office not long ago, taking with him the confirmed habit of poker playing in lieu of the excellent law practice lost to him while holding political office. His sense of humor, however, was in no wise dulled thereby.

Dropping in, one day, to visit a fellow lawyer with little less leisure than himself, he greeted him with the usual question about business affairs. "Poor with me, very poor," was the reply; "and every cent, in fact, that I do make in the practice of law, I lose playing poker, it seems."

"Well, same condition here, old fellow," was the response; "only,—every cent I make playing poker, I lose practising law."

WILLIAM H. PARSONS, the lawyer (says the New York *Times*), tells this story at the expense of members of his own profession.

A burglar returned empty handed to his pal, who had been watching on the outside for him while he entered a likely looking house.

"What did you get, Bill?" the pal asked.

"Nothing. It was a lawyer's house," was the reply.

"Did you lose anything?"

"No. I didn't stay long enough."

I ONCE heard a Lord Chancellor tactfully relieve the situation, when a learned counsel had remained standing silent at the Bar for perhaps ten minutes, while judicial scintillations issued continually from the various members of the House, by saying, in the blandest manner, "My Lords, perhaps it would now be well to allow Mr. A. to proceed with *his* argument before *us*, instead of pursuing *our* arguments before *him!*"

An absolutely justifiable reply by a Scots counsel was once made in the House of Lords in the days before that House as an appellate tribunal was limited to "high judicial" persons. The case related to rights in water. The Scots counsel alluded again and again, in his strong vernacular, to what he called "watter." An English peer interposed thus: "Tell me, Mr. C., do you in Scotland spell 'water' with two t's?" The admirable answer came back like a flash: "No, my lord. In Scotland we spell 'watter' wi' ae t, but we spell 'mainers' wi' twa n's." Under cover of conveying information as to the supposed peculiarities of Scots spelling, Mr. C. delivered a well merited rebuke as to the "mainers" displayed by the English interrogator.—The Solicitor-General for Scotland in *The Juridical Review.*

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

CASES ON CRIMINAL LAW. By *William E. Mikell*, Assistant Professor of Law in the University of Pennsylvania. Philadelphia: International Printing Company. 1902, 1903. Two parts. Cloth. (983 pp.)

Occasional passages from old authorities, such as Bracton, Britton, the Year Books, and Coke, give this collection a proper connection with the past; but the collection is well fitted for class-room use as a practical introduction to current Criminal Law. As in all case books prepared for the use of students, head notes are omitted. Yet through the table of contents, the table of cases reprinted, and the index, the book is as well adapted to the use of the practitioner as circumstances permit. The arrangement begins with general considerations, namely: sources of the Criminal Law, the elements of crime, the criminal intent, negligence as supplying intent, intent as affected by conditions (including ignorance or mistake of law and of fact, infancy, insanity, intoxication, and incorporation), the criminal act, combinations of persons in crime, assault, battery and mayhem; and then the plan proceeds to the development of the peculiarities of specific crimes. The list of topics, it will be noticed, while omitting pleading and procedure, covers practically the whole of the substantive law. As there are other important collections of cases on Criminal Law, it is interesting to notice that this is an independent collection and distinctly an honest piece of work.

FIRE INSURANCE. By *George A. Clement*. New York: Baker, Voorhis, and Company. 1903. (pp. xcviii+637.)

The scope of this book is well indicated by its full title: "Fire Insurance as a valid contract in event of fire and as affected by construction and waiver, estoppel and adjustment of claims thereunder." In other words, the book omits insurable interest, non-disclosure, misrepresentation, warranty, and express conditions as to validity, all of which topics have been treated often and adequately, and devotes itself to the other and equally important half of the subject, loss or damage, statement of proof of loss and other requirements or conditions precedent to loss becoming due and payable, the options of the insurance company, apportionment of the loss, payment of the loss, subrogation, limitation as to suit or action on policy, waiver and estoppel, and construction and interpretation of the fire insurance contract. There are also forms and statutory provisions. The book is apparently intended for the use of insurance men, and especially for adjusters, quite as much as for lawyers. Its rules are often taken from the standard policies, and these can hardly be called propositions of law. To the lawyer an especially interesting feature of the book is the practical discussion of the mode of computing and apportioning a loss.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by *William Mack* and *Howard P. Nash*. Vols. IX. New York: The American Law Book Company. 1903. (998 pp.)

ANNUAL ANNOTATIONS. (1 to 9 Cyc.) 1903.

The most important articles in Volume IX. are those on Contracts by Professor John Davison Lawson, Dean of the Law Department of the University of Missouri, and on Copyright, edited by Edmund Wetmore, formerly President of the American Bar Association. This volume also covers the subjects Contempt, Continuances in Civil Cases, Contribution, Conversion, Convicts and Coroners.

With this volume also comes *Annual Annotations, 1903*, a a book of nearly five hundred pages which, as the editors say in the preface, brings the first nine volumes of the *Cyclopedia* down to the present date.

CURRENT LEGAL ARTICLES.

In an exhaustive article in the *Michigan Law Review* for February, Professor Horace L. Wilgus sets forth "The Need of a National Incorporation Law." After tracing the growth of corporations and the attempts which have been made at regulating them, he says:

The thing to be regulated is the big thing, the big, *menacing* corporation; its national commerce is to be regulated; its holding of stock in other companies is to be regulated; its power to consolidate is to be regulated; its issue of shares is to be regulated; its promotion and organization are to be regulated; its competition with others throughout the country is to be regulated.

Professor Wilgus believes that "No power or authority to do these in the proper and uniform way resides anywhere except in the National Government," and that it would be wise "to enact a national corporation law, in such a manner as to give the National Government unequivocally the ordinary powers of complete control that any State has over its own corporations." To the "imaginary danger" which some persons see in such an act, he replies:

To these something in the way of answer may be suggested. (1) There is no concentration of power,—all that is to be exercised now exists in the National Government; there is therefore no shifting of the balance of powers. (2) It has become apparent that the State governments are unequal to the task,—because they have not, and never since the Constitution have had, the power. Because they can not exercise the power, shall the National Government refuse to exercise it when the occasion demands, and when it was conferred upon *that* government to be exercised "in order to promote the general welfare" as much as any other power? (3) But all the civil rights that are to be so seriously affected, we now hold and always have held, under the same possibility of being limited, expanded, and controlled for the benefit of all, when occasion demanded. (4) But also, it is "we the people" that control in the Federal Union as well as in the States. The National Government was created to do for the benefit of all, what the States could not do, within the terms of the Constitution. (5) The burdening of the courts might occur temporarily, but not likely to any great extent. Complexity, diversity, conflict, uncertainty, beget litigation. Simplicity, uniformity and certainty have the reverse effect. But even if otherwise the creation of the necessary courts is not often made a plea for refusing to relieve a threatening condition of national extent and operation. (6) Such, or similar, dire results were predicted from the establishments of National banks, but they proved to be *imaginary* and not *real*.

There seems to be but one supreme legal test involved in this method,—and that is could the National Government, if it found it necessary, or desirable, classify corporations according to their size and extent of operation, and require, if found necessary, all above a certain size to forego the privilege of engaging in interstate commerce, or tax them so it would be unprofitable, unless they organize under a national act? We believe this question will be answered in the affirmative. The rest would depend on the wisdom of Congress.

Such a national incorporation act should be liberal enough to encourage honorable industrial enterprises; strict enough to prevent fraud and oppression; should protect from unjust State exactions, but require complete compliance with all the laws; should permit large profits commensurate with great risks undertaken, and require the risks and liabilities to be assumed and discharged by those undertaking them; should allow extensive operations and the power and capital necessary to carry them on, but prevent their use as a club to obstruct or detroy others as legal as they; and in general allow great things to be done or undertaken, in subservience to, but not in defiance of, the general warfare; be great to strengthen the hands and add energy to the capital of the honorable and dutiful, and be administered by a power strong and quick to smite the dishonorable and disobedient.

IN *The Law Magazine and Review* for February, Charles L. Nordon has a timely article on "Blockade and Contraband: Law and Practices of Nations in Modern Times." Concerning blockades Mr. Nordon says:

The conditions necessary to the due institution and maintenance of a blockade, and to insure the liability of any neutral for a breach, are as follows:—

(1) The belligerent must intend to institute it as a distinct and substantive measure of war, and his intention must have been brought to the knowledge of the neutrals it affected:

(2) It must have been instituted under sufficient authority:

(3) It must be maintained by a sufficient and properly disposed force.

Although it may be stated of these rules that in theory they are universal in their acceptation by those concerned in war, yet they vary greatly in the method of their application.

The first point whereon any appreciable difference of opinion and practice has existed in recent times is upon the question of the knowledge of the neutral of the existence of the state of blockade. And hereon considerable difference has been adopted between two great schools of thought—that of England and America on the one hand, and that of France, Italy, Spain and Sweden on the other. According to the English and American theory, blockades are for this purpose divided into two classes, *viz.*: blockades *de facto*, without proclamation, and notified blockades. In the former case no vessel incurs liability until she commits a breach conscious of the existence of the blockade, that is to say, the *onus* will be on the belligerent to prove the knowledge of the neutral, save in the case where such *de facto* blockade has existed for some considerable time, when a presumption of knowledge may be drawn from its notoriety. . . . In the case of notified blockades, notification of the impending blockade being given to neutrals by general proclamation, and a reasonable time being allowed for such notification to take effect, all neutral vessels are deemed to be affected with notice, and the mere sailing with an intent to break the blockade will be sufficient to warrant condemnation, for a neutral is bound to shape his conduct upon a presumption that a place subject to a blockade at the commencement of a proposed voyage thereto will continue to be so subject up to its termination, and thus be and remain a prohibited destination for the neutral.

But according to the French and Continental theory, all distinction between blockades *de facto* and those with proclamations on this point being disregarded, the neutral is not bound by any such presumption of continuance; on the contrary, he is permitted to ignore any knowledge acquired by him at any time before he can experimentally test the existence of the blockade on the place subjected to it.

The next point of difference lies in the contrary opinions held as to the continuance and maintenance of the blockade. According to the English and American practice, the blockade is not raised by a mere temporary cessation of operations, provided such cessation be merely the result of unfavorable weather—*secus*, if by reason of the ships engaged being told off for employment. . . . The Declaration of Paris (in harmony with the English doctrine) provides that "Blockades in order to be binding must be effective." . . .

The remaining incident of blockade of any great importance wherein differences obtain both in theory and in practice is its breach. . . . Summing up the French practice hereon, it may be laid down as a general rule that, as the presumption of continuance of every blockade is not admitted, the only act which will occasion forfeiture is an actual attempt on the part of the neutral to effect a breach either by force or fraud. . . . But the English and American Courts, admitting as they do the presumption of continuance, it follows as a natural and logical consequence that they hold subject to confiscation the property of a trader seized at any time during the course of a voyage having clearly for its intended termination the blockaded port. . . .

Certain differences of opinion exist as to the effect of contraband on the vessel carrying it. The penalty attaching to the goods is not in general extended to the ship, and some writers even consider that the neutral vessel has a right to continue on her voyage on her abandoning the contraband she is carrying to the belligerent, unless their quantity is so great that the captor cannot receive them. And this practice was followed by the Confederate States during the American Civil War, though in the opinion of Wheaton it could only be applied to cases in which there is a capacity in the neutral vessel to insure the captor against a claim to the goods. But, under the more common practice, the vessel with its contraband cargo is taken into a port of the captor, where the contraband articles are dealt with either by confiscation or preëmption, the vessel itself in ordinary cases being subjected to no further penalty than loss of time, freight and expenses. If, however, the owner of the ship is a party or privy to the carriage of the contraband goods, the ship itself is dealt with in a similar manner to the cargo.

The Canada Law Journal for February advocates the "Territorial Expansion of Canada"—particularly "the acquisition of the two islands of St. Pierre and Miquelon"—and adds:

There is this further argument in favor of the acquisition of these several portions of contiguous territory by Canada, namely, that by no reasonable extension of the Monroe doctrine can the Government of the United States object to any part of the proceeding. It is true that President Polk's gloss upon the now famous doctrine enunciated by his predecessor Monroe, at the suggestion of the English statesman Canning, has been interpreted to mean that any European power would have to obtain the consent of the United States to any acquisition of dominion in the Americas whether by voluntary cession, or transfer, or by conquest (see Dana's notes to *Wheaton's Elements*, p. 102; Taylor's *International Law*, p. 146.) But Canada does not come within the letter or spirit of this inhibition, and the burden that might rest upon Great Britain, were she purchasing *sua causa*, of establishing that this inhibition is no part of the code of international law, or that Great Britain is herself an American power and so not within the inhibition even if it were valid, would not be raised in the matter of territorial expansion here advocated.

The Harvard Law Review for February contains the second of Professor Bruce Wyman's important papers on "The Law of Public Callings as a Solution of the Trust Problem."

What is contended (says Professor Wyman) is that this distinction between the pulic calling and the private calling is the key to the situation. . . .

All of these cases now under discussion are alike in this, that in all of them the conditions surrounding the industry, and these alone, are held enough to put the business within the law of public calling. That position of affairs may be summed up in a single phrase—virtual monopoly. A review of the instances which have been cited in the course of this discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes made between the undertaking of a public service and the furnishing of a public supply. Now, it is true that most of the cases are cases of service—the railway and the warehouse, for example; but others of the cases are of supply, —the waterworks and gas works, for instance. Indeed, there is nothing in this distinction, either in economics or in law. Virtual monopoly is therefore the exact description of the situation. It is submitted that any business is made out to be a public calling in which there is, from the nature of things, an inherent virtual monopoly.

Virtual monopoly must now be differentiated from virtual competition. It is submitted that upon this difference our constitutional law turns. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it

seems, will consider that calling public in its nature; on the other hand, if virtual competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character. In the public calling, regulation of service, facilities, prices, and discriminations is possible to any extent. Such monopolistic conditions demand such police; in no period has this been more apparent than now. In the private callings, however, no such legislation should be permitted; in no epoch has it been more necessary to insist upon this. Competitive conditions should be left without such restrictions. . . .

So far as one can see, virtual competition is at an end in many of the great industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners; they are affected at the present time with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore the corporations conducting these businesses, having devoted their property to a use in which the public has an interest, have in effect granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. . . .

A company that is engaged in a public business is . . . entitled to a fair return upon its investment. . . .

Plainly there is no safe basis for the determination of the rate except the actual investment. It may be urged that the result of this rule will be to give to the public the advantage of operation under monopolistic conditions, in particular the elimination of the wastes of competition. The reply is that this is precisely the method that should be pursued in dealing with the trust problem. If the State permits monopoly is may demand in return that the monopolist serve at a reasonable price. This has always been the law of public callings when the statement of it is made with discrimination. No rate per ton, no price per cubic foot is reasonable in itself; it depends for its propriety upon whether by such charges the railroad company or the gas company in question will earn too much. In the same way the contention of the promoters of the trusts should be met by our law. It is not an answer for the Standard Oil Company to point to the fact that upon the whole it has not advanced the price of kerosene above the price at which it would have been fixed from time to time had competitive conditions prevailed during the whole period. It is still open to the general public to point to the forty-eight *per cent.* dividends in the last years, to say that these are the proofs of the contention that, notwithstanding, the price of kerosene has been too high during the whole period.

It is not pretended that what has been suggested in this article should be taken as established. It is put forth merely as a working hypothesis that a solution of the trust problem may be found in the law governing the public callings. . . . If this law of public employment could be enforced against the industrial trusts, it may be hoped, a solution would be found for the trust problem.

In *The Commonwealth Law Review* (Australia) for December, Wolfe Fink, in an article entitled "The Trend of Litigation and Costs," pleads for simplicity in procedure. On this point he says:

A case should be founded (he says) on a statement of claim, a defence, and a series of all those admissions of fact which are now only wrung out of each side mutually by the operation of legal machinery.

It is significant that a man can be tried on the most important issue in the world—his life—without any pleadings, and without any interlocutory proceedings, and even an appeal from the verdict, when it lies, is provided for by the simplest, most expeditious and economical of processes; so it is hard to argue that quarrels about property and civil rights demand the expensive decorations that are now in the vogue.

I am arguing for simplicity in litigation because I hold that it means increase of litigation. It is a statistical fact that the greater the prosperity of a country the greater the

litigation; it is a vulgar error to consider such an evil. The adjustment of disputes is a part of the business of the world, and the more simply and expeditiously they can be adjusted the better for the individual and for the Commonwealth.

CHARLES THORNTON DAVIS associate justice of the court, contributes to the *Yale Law Journal* for February a valuable article on the "Massachusetts Court of Land Registration," in the course of which he says:

All of its provisions are carried out under the immediate order of a special court created for the purpose. The use of the act is purely voluntary, but land once registered remains so. The procedure is purely *in rem*, and consists in the judicial investigation and determination, upon petition of any person or persons claiming the ownership or power of disposal in fee simple, of the status of the title, and the boundaries upon the ground, of any given parcel of land; of the issuance of a decree and certificate of title in accordance therewith; and thereafter of the immediate judicial construction and determination of all instruments and proceedings affecting the land, and the maintenance of an official and conclusive muniment of the current title thereto.

Upon the receipt of an application for the registration of a parcel of land the title is referred to one of the official examiners, who returns, as his report in the case, a complete abstract of the record title, together with such facts outside the record as he may be able to definitely state, any recommendations he may deem it advisable to make as to requiring the investigation or proof of further facts by the petitioner, a statement of parties other than those named in the petition upon whom notice of the proceedings should be served, and finally, his opinion upon the title. Notice of the proceedings is then issued by the court to every person who appears from any source to have any right or color of claim in the property. The entire abstract is carefully read by the judge before whom the matter comes, this having been found essential to the issuance of proper notice, to an intelligent trial of the case, and to the ordering of a proper decree which definitely and permanently determines the title.

Any person deprived by land registration of any right or estate without fault on his part is entitled to indemnity from the State treasury, and the responsibility of safeguarding the interests of the Commonwealth, as well as those of all persons having possible claim in or to the land, is thrown directly upon the judges, the whole matter being thus made one, not of clerical routine, but of the administration of justice. . . .

After final decree, future dealings with the land are effectuated by the endorsement or certificate of the recording officer, much as in the case of transfer of certificates of stock, except that the authority for the acts of the assistant recorder is evidenced by deeds and other instruments in their present ordinary form. Registered land is dealt with precisely as is unregistered land, except as to the method and evidence of transfer and the compulsory use of definite boundaries, but the land is no longer subject to the acquirement of any right or interest by adverse possession or prescription. Voluntary transactions are accompanied by a surrender of the duplicate certificate for the proper endorsement, in case of the creation or transfer of a right less than a fee, or the cancellation of the old and issuance of a new certificate where the title passes. In involuntary transactions process issues to the owner to surrender his certificate for proper action thereon.

Judge Davis says, in closing:

There seems to be a present need and a probable future for some such court as a modern though legitimate part of the regular judicial system. The present Attorney-General of Massachusetts has renewed the recommendations of his predecessor that to the new court be given general jurisdiction in all real actions; and such, if it be properly and conservatively administered, would seem to be its probable and natural development.

A VALUABLE study of "Constitutional Provisions Guaranteeing Freedom of the Press in Pennsylvania" is contributed by Thomas Raeburn White to the January number of the *American Law Register*.

There is (he says) some difference of opinion as to how far liability for spoken or written words can be altered by the Legislature. On the one hand, it may be said that freedom to publish being guaranteed, the Constitution does not extend its protection further, and everyone runs the risk of being held responsible for his words, whether that responsibilty is imposed by the common law or by legislative action; that the Constitution does not concern itself with what happens after the matter has been given to the public. In other words, the publisher has full liberty to publish what he pleases, but let him see to it that he does not transgress the law, written or unwritten.

Another view of this matter is possible, and has obtained some recognition, *viz.*, that the Constitution not only gives permission to publish, but guarantees immunity from liability for such words as at common law were non-libelous. It is said that "freedom of the press" would mean nothing if the Legislature, while not able to restrain the printing, could pass laws which would inflict severe penalties for the publication of words which, judged by the standard of the common law, were innocent. The difference between the two views is that under the former the Legislature can create new civil or criminal liability for spoken or written words, whereas, under the latter, its hands are tied; it cannot increase the common law responsibility. This conception of the meaning of the freedom of the press was advanced by Cooley, *Constitutional Limitations*, ch. 12. It has never been the basis of a judicial decision, as no law raising the point has had its validity questioned on that ground.

And in a note is added this interesting comment on the recent Pennsylvania "gag-law":

The Pennsylvania libel act of May 12, 1903, P. L., 349, may be attacked upon this ground, and if so there may be a judicial determination of this important question. By the terms of that act civil liability is created in a class of cases in which at common law there was no liability. It is provided that the publishers of newspapers shall be civilly responsible in damages for all publications made without a careful investigation into facts. In other words, the test of liability in all cases is negligence. This means that where the words have been spoken upon a privileged occasion, the plaintiff to succeed need not (as he must at common law) prove actual malice on the part of the defendant, but that it is sufficient if he prove negligence only. It is true that recklessness in publishing may be evidence of malice, but it is not malice (in Briggs *v.* Garrett, 111 Pa. 404, mere failure to investigate was held no evidence of malice); hence the new act creates liability in a class of cases in which, at common law, there was no liability. If Cooley's view should be adopted, the act may be declared void, as being contrary to the constitational provisions under discussion.

IN the *Michigan Law Review* for February is printed a paper given by Dean Gregory of the College of Law of the State University of Iowa, before the International Law Association at Antwerp last September, on "Jurisdiction Over Foreign Ships in Territorial Waters." The question is considered, first, as to government ships, and then in relation to private ships. The result of the authorities is summed up as follows:

1. That a foreign government ship in territorial waters is not exactly "extraterritorial," but simply "inviolable" by local authority, that the extraterritoriality applies only to her foreign crew and equipments, and this only by general comity.

2. That, her inviolability continues only while she is "demeaning herself in a friendly manner."

3. That, as to vessels belonging to private owners in foreign territorial waters, jurisdiction attaches whether those waters are enclosed or littoral, very much at the discretion of the local State, but with a constant practice in local authorities to refuse juris-

diction if the ship and its company are alone affected.

4. That, as to whether they are alone affected in cases of crimes seems even where there is no direct injury to any other, a question dependent upon the gravity of the crime, and one upon which the cases are not agreed.

5. That, as to whether, in matters of private right, the courts of the locality are compellable to enforce local law against a foreign ship, and those upon it, in local waters, depends upon extremely diverse interpretations of local law, as intended, or not intended, to so apply.

6. That local law enacted by any State may, by its terms, be made applicable to such foreign vessels and their crews coming within the territory, and will then be enforced against them by the local courts.

7. That it can not be said that any established principle of international law preserves any measure of absolute independence to private vessels in territorial waters, although it comes near to preserving, and perhaps does preserve, such independence for government vessels.

PROFESSOR JOSEPH H. BEALE, JR., discusses in the *Harvard Law Review* for February, various problems of "Taxation of Foreign Corporations." On one interesting question which has arisen he says:

How far a tax upon the receipts of a corporation from interstate business may be taxed has not been altogether clear on the authorities. In 1873 the Supreme Court in the case of the State Tax on Railway Gross Receipts (15 Wall. 284) held that such a tax was valid. But in a later case (Fargo *v.* Michigan, 121 U. S. 230) the authority of this case was shaken. The case was distinguished from the State Tax on Railway Gross Receipts on two grounds: first, that in the earlier case the corporation taxed was a domestic corporation, but in the case at bar a foreign corporation; second, that in the case at bar the receipts taxed had never come into Michigan and there been mingled with the other property of the company. The tax was held invalid. . . .

But in Maine *v.* Grand Trunk Ry. (142 U. S. 217), the majority of the court reached a conclusion which seems to be opposed to the earlier cases. A statute of Maine required that every corporation, person, or association operating a railroad in the State should pay an annual excise tax for the privilege of exercising its franchise in the State. The amount of the tax was to be ascertained as follows: the gross receipts were to be divided by the number of miles of road operated, and the resulting average, multiplied by the number of miles operated within the State, was to be the basis of taxation. This statute was held not to be opposed to the Constitution of the United States. . . .

This case also has been many times cited with approval. Some of the points apparently decided in it, however, can hardly be supported. The ground seemingly taken by the majority, that the tax might be supported as an excise tax for the privilege of coming into the State, is certainly unsound; for later as well as earlier cases agree that a State cannot exclude from its territory a corporation or an individual engaged in interstate commerce or in the service of the national government. But the authority of the case being recognized, some more tenable ground must be found on which to place the decision. It will probably be found in the later case of Postal Telegraph Cable Co. *v.* Adams (155 U. S. 688). A statute of Mississippi laid upon all telegraph companies, domestic as well as foreign, a tax for the privilege of carrying on their business, graduated in each case upon the amount of property in miles and its value; and exempted them from all other taxation. It was found in the case that the burden of this tax was less than the ordinary tax on the same amount of property. The court said that although a franchise tax upon a corporation engaged in interstate commerce is invalid, and although this purported to be a franchise tax, yet the substance rather than the shadow was to be looked at. This tax was in lieu of another tax on property, and did in fact stand for a tax on the intangible property within the State, and it was therefore valid.

IN *The Law Magazine and Review* for February Gustav Shirrmeister, Doctor of Roman and Canon Law (Berlin and Leipzig) has an interesting article on "Legal Education in Germany." He says:

The necessary qualifications for a call to the Bar is attained in Germany by passing two legal examinations. The first one must be preceded by at least a three years' course in law at a University. Between the first and the second examination there must be a period of four years, which is to be spent in practical service, partly at the different Courts of Justice, partly in the chambers of practising advocates ("*Rechtsanwaelte*"), and partly in the chambers of a public prosecutor ("*Staatsanwalt*").

After giving the list of lectures on both law and political science which must be attended by a German law student, and the programs prescribed by the Universities of Göttingen and Münster, the article continues:

As it is very difficult for the average student to finish the required course of study in the short space of three years, the authorities of all German Universities recommend that the law student devote four years to the study of law before he tries to pass the first legal examination. Indeed, the law student will usually find it necessary to spend four years at the University in order to finish the prescribed course. The result is that the required academic study in law extends practically over four years in Germany.

THERE is much interesting matter in Sir Frederick Pollock's third article on the "Expansion of the Common Law"—"The Sword of Justice"—in the February number of the *Columbia Law Review*.

Of the jury Sir Frederick says:

On the whole the jury triumphed in criminal, as well as in civil justice. But until the sixteenth century the process was gradual and inconspicuous, and some of the most important matters were settled, as it were, by accident. We can now see that if the verdict of a majority had been accepted, the resistance of juries to the Crown in later times would have been, perhaps, impossible, certainly much less effective. The rule was not fixed before the fourteenth century, and I do not think it was ever laid down in terms that juries must be unanimous. It is true that the dooms of the ancient popular courts had in some countries, if not in England, to be unanimous; but the jury has nothing to do with the ancient folk-law. What was actually decided was that the verdict of fewer than twelve men would not do, and this appears to rest on a quite different, but not less archaic principle, the inherent sanctity of the number twelve. Then, as not less than twelve men would suffice, so it became the fixed custom not to have more on a petit jury; why I know not, unless that it obviously saved trouble to take the least number that sufficed. To this day the grand jury need not be unanimous, though every presentment must be made by at least twelve men. Accordingly, the total number is twenty-three, making twelve a majority.

IN the *American Law Review* for January-February, Blackburn Esterline, after reviewing the cases in which an Act of Congress has been declared unconstitutional by the Supreme Court of the United States, says:

Thus, it will be seen, that of nineteen cases, two of which carried two acts of Congress, the judgment of only six received the concurrence of all the judges, and in two cases Congress "inadvertently" passed its limits. Furthermore, with few exceptions, all these cases were decided and the judgments passed into the archives of the country and into the jurisprudence of the world, without arousing serious public interest or comment. The decisions in Marbury *v.* Madison, the "Dred Scott Case," and the "Legal Tender Cases," the "Civil Rights Cases," and the "Income Tax Cases," are far the most important and practically the only ones that stirred public opinion or prolonged public discussion. In only one of these [Marbury *v.* Madison] did all the judges concur, and in the "Income Tax Cases," when one of the greatest ques-

tions ever submitted to a human tribunal stood for judgment, the Court swayed and groaned and, unfortunately, was seriously divided against itself. Happily, no serious consequences followed; if any confidence was lost it was soon regained, the waves rolled away and all prejudices have evaporated.

THE *Canadian Law Review* for January gives "Some Reminiscences of Criminal Law" by George S. Holmested, K. C., among them this tale:

In the year 1629 one Isobel Young was accused in Scotland of witchcraft, and it was alleged that she had stopped George Sandie's mill 29 years before; that she had prevented his boats from catching fish, while all the other herring boats were successful, and that she was the cause of his failing in his circumstances and of nothing prospering with him in the world. That she threatened mischief against one Kerse, who thereupon lost the power of his leg and arm. That she entertained several witches in her house, one of whom went on the roof in the likeness of a cat, and then resumed her own shape. That she took a disease off her husband, laid it under the barn floor and transferred it to his nephew, who, when he came into the barn, saw the pirlot (*i.e.*, the corn measure) hopping up and down the floor; that she buried a white ox and a cat alive, throwing in a quantity of salt along with them, as a charm to preserve herself and her cattle from infectious distemper; that she had the devil's mark, *etc.* The poor creature's counsel pleaded that the mill might have stopped, the boat caught no fish, and the man might not have prospered from natural causes; that as to the man who had lost the use of his leg and arm, the prisoner had never the least acquaintance with him; and that he was lame before the threatening expression she was said to have used; that the charge of laying a disease under the barn floor was a ridiculous fable, and that two years had elapsed between her husband's illness and his nephew's; and that the mark called the devil's mark was merely the scar of an old ulcer; and that the charge of burying the ox and cat was false.

The celebrated Sir Thomas Hope, who was counsel for the prosecution, insisted that these defences must be repelled, because contrary to the libel! In other words, the defences urged by the accused's counsel contradicted what was charged by the prosecutor; and the defences were therefore overruled by the court, and the poor wretch was convicted and ordered to be strangled and burned!

IN *The Law Quarterly Review* for January W. R. Bisschop points out some of the characteristics of the "Roman-Dutch Law in South Africa." For example:

It is possible to attach the person as well as the goods of the debtor, either (1) to secure the payment of the debt by preventing the person from secretly leaving the country (*suspectus de fuga*), and by compelling him first to give security; or (2) to found jurisdiction (*jurisdictionis fundandae causa*), thus enabling the plaintiff to litigate at his own residence and there recover his debt from the foreigner.

The arrest is apart from the principal cause, and must be followed by a summons submitting the dispute as to the debt for the judge's decision. Thus a safeguard is created to prevent the arrest from becoming a means of extortion and vexation. The debtor can even forestall the plaintiff by applying to the Court by a request *antidotaal*, which compels the creditor who may have the intention of using the said measures to show his cards. The Court is thereby asked to decide in advance that there exist no grounds for an arrest in so far as regards the plaintiff. . . .

Another provisional remedy is the "provisional sentence," whereby payment is ordered of what is claimed, notwithstanding that the principal case is still pending. It was introduced, as Kersteman states in his Law Dictionary, "to check cunning, fraudulent, and unwilling debtors who seek to deprive their creditors by continuous delay and sinister proceedings in the payment of their

lawful claims." By these means the plaintiff can, on the production of sufficient evidence, obtain a provisional sentence condemning the defendant to pay the money over to him or into Court before going any further into the case. If the defendant pay to the plaintiff, the latter may be ordered to give security for repayment of the money. . . .

A third provisional remedy, resembling the above-mentioned request *antidotaal*, is that of perpetual silence. If a plaintiff brings an action, but does not continue it, the defendand can ask for an "absolution from the instance," whereby the proceedings are quashed and the plaintiff has to issue a fresh summons if he intends to persist in suing the defendant. If, however, a person avers that he can bring an action against another person, but does not bring it, and the other person is afraid that if the action were brought at a later time he would be deprived of his witnesses or otherwise of his means to refute the allegations of the plaintiff, he can petition the Court to compel the would-be plaintiff to commence his action at once, or else to be sentenced to perpetual silence. In Roman-Dutch Law it was a means for founding jurisdiction, and was known under the name of *lex diffamari* and *preventie in cas van Purge* (Merula, IV. 2, 22). . . .

A debtor is liable in his goods for the payment of his debts, and—in the absence of any possessions—he is liable in his person. This maxim has been handed down from ancient times, and it was left to the nineteenth century to make an appreciable alteration in a survival from early civilization. The "civil imprisonment" of Roman-Dutch Law, either for debt, or *ad factum praestandum* (which—if valued in money—became also an imprisonment for debt), is still one of the remedies which a creditor can have in Holland and in Cape Colony for obtaining payment from his debtor after all other means have failed. The person concerned is put in prison, where he is kept at his creditor's expense. In Roman Law the imprisonment was for an unlimited time, or until the debt was paid off; and this is still the case in Cape Colony, except in the case of debts of small amount, when a limit of three or six months is imposed. At the present time in Holland the limit is five years, or until the debtor reaches the age of seventy years.

AN interesting account of the courts in North Carolina down to the Revolution is given by R. W. Herring in February number of the *North Carolina Journal of Law*. Of the General Court he says:

Until the arrival of the Constitutions in 1670 the only tribunal in the colony, so far as we know, was held by the Governor and Council, and we know of this only through a law signed by the Lords Proprietors. In the sparsely settled territory of the infant colony one court seems to have been thought sufficient for all causes. It seems to have combined in itself the jurisdiction in law and in chancery as well as in criminal cases. But soon the growth of the colony necessitated the erection of Precincts, or districts of representation in the Assembly, and these Precincts became the territorial basis of the local courts. The Governor and Council held this General Court as late as 1695, and it is only in 1702 that we know that the new system was in use. Then the Governor and the Council became the Appellate Court of the colony. The General Court consisted of a Chief Justice, with assistants, varying in number at different times; the Chief Justice, who was the presiding officer of the Court, being appointed by the Proprietors, themselves, and his assistants by the Governor and Council. Just what powers these associates had, is uncertain. But it seems clear that they need not be "learned in the law" before 1724. In early days they were not, except in rare cases; lawyers.

THE subject of the initiative and referendum (says *The New Jersey Law Journal* for February) which has been adopted in the State of Oregon and has been discussed in many of the States of the union, is a most interesting one, and not the least so in that aspect of its being in conflict with the constitution of the United States, guaranteeing to every State a Republican form of govern-

ment. Some strong articles have appeared in the law periodicals, written by distinguished lawyers, holding that the initiative was certainly contrary to the United States Constitution, the argument being chiefly based upon the idea that the term "Republican form of government" meant that particular form of government existing in the various States at the time the constitution went into effect. It has been said that the idea of a representative form of government was distinct from that of a pure democracy in that, whereas the representatives of the people made and administered the law in the former case, in the latter case it was done by the people direct, and that our forefathers had this distinction expressly in mind. The question has just been decided by the Supreme Court of Oregon, in Kadderly *v.* City of Portland, 74 Pacific Rep. 710, in which the court upholds in every particular the amendment to the State constitution, adopting the initiative and referendum for the State of Oregon.

In an article entitled "The Government's Liability for the Use of Patented Inventions" in the *American Law Register* for January, Charles C. Binney points out the hard lot, under certain circumstances, of the patentee whose invention has been used by the government. Although "the abstract right of the holder of letters patent from the United States, whether as original inventor or as assignee, to receive compensation for the use of the patented invention by the government itself, is thoroughly established," yet the law is far from satisfactory in regard to practical enforcement of that right. The right of suit is clear when an express or implied contract by the government can be shown; such contract can be enforced in the Court of Claims. But "no contract can be implied from the mere use of a patented device by government officers through ignorance, carlessness, or mistake, or without proper authority. So, too, where the government uses a mechanical device of any kind as the invention of a certain person, and under a contract with him, no contract can be implied with a third party who asserts that the device used is really covered by his patent. Such a claim, if valid at all, is for an infringement and is not within the jurisdiction of the Court of Claims." "Infringement is a tort, and the United States, it is held, cannot be guilty of a tort, and hence cannot be liable on any such ground."

After reviewing the more important cases in which the government's liability has been passed on by the courts, Mr. Binney sums up his subject in the following words:

It is perfectly evident that neither the statutes which govern the Court of Claims, nor the rules as to appeals from that court, have been drawn with any reference to the peculiar nature of suits on patents. As the issues in regard to the scope and validity of the patent are precisely the same where the government is charged with having used a patented device under an implied contract, as in an ordinary infringement suit, there is no reason whatever for excluding any evidence from the consideration of the Appellate Court in the former class of cases, which would not be excluded in the latter class. There can hardly be a doubt that the exclusion of all expert testimony was due to a mere accident, the fact that when the rules were drawn the jurisdiction of the Court of Claims in patent cases was not taken into account. It is to be hoped that the rule will some day be amended, especially in view of the evident tendency to construe the scope of that jurisdiction rather broadly, and of the probable increase in the number of such patent suits. Certainly the parties to a suit in the Court of Claims are entitled to as full a consideration of every feature of their case in the Appellate Court as are the parties to any other judicial proceeding.

As to the statutes regulating the jurisdiction of the Court of Claims, if they cannot be legitimately construed so as to give a patentee the same rights in the case of an infringement by the government that he would have as against a private infringer, then the spectacle is presented of a constitutional right, the existence of which the Supreme Court has repeatedly recognized, but which

cannot be asserted in any court, unless Congress can be persuaded to grant jurisdiction in any particular case. Such a state of affairs does not seem in accord with modern views as to the rights of the citizen.

To the *Columbia Law Review* for February Thaddeus D. Kenneson contributes some pertinent observations on "The New York Anti-Trust Act" (Chapter 690 of the Laws of 1899).

The conclusions which Mr. Kenneson reaches are these:

(1) The purpose of the statute in question is simply to make illegal and criminal such contracts, agreements, arrangements, or combinations as had, previous to the statute, been dealt with by the common law, and treated by it as against public policy, and, therefore, non-enforcible by the courts.

(2) The contracts, agreements, arrangements or combinations declared by Section 1 of the statute to be against public policy, illegal and void, are all resolvable into contracts, agreements, arrangements or combinations in restraint of trade or commerce.

(3) The contract, agreement, arrangement or combination aimed at by Section 1 of this statute is a contract, agreement, arrangement or combination whereby the parties thereto by means of the contract, agreement, arrangement or combination voluntarily impose upon themselves a restraint which disables them from competing in some trade or industry with other parties to the same contract agreement, arrangements or combination.

The restraint in all the contracts, agreements, arrangements or combinations aimed at by this statute is a voluntary restraint. It is imposed by the contract, agreement, arrangement or combination itself. It is imposed upon parties to the contract, agreement, arrangement or combination and not upon persons not parties thereto, and it is self-imposed upon such parties by their entering into the contract, agreement, arrangement or combination.

AMBROSE TIGHE, discussing "The Theory and the Law of Waterworks Securities," in the *Yale Law Review* for February, says of the most recent cases dealing with "exclusive" franchise and municipal contract:

Together they settle the law for the present in this fashion: If a city undertakes, by ordinance or resolution, to repudiate a contract with a private water company, the ordinance or resolution is a legislative act, and, if alleged to impair the obligations of the contract, the controversy is one for the Federal courts, and in the Federal courts the exclusive features of a franchise do not make it void, and an agreement to take water for a term of years is not necessarily beyond the city's powers, because in its making the city exercises its business and not its governmental functions.

WILLIAM MARTIN contributes to *The Law Quarterly Review* for January an interesting discussion of the subject of "Treasure Trove," in the course of which he says:

In June, 1903, Mr. Justice Farwell gave judgment in the case of the Attorney-General *v.* The Trustees of the British Museum (1903) 2 Ch. 598. He decided that certain gold ornaments, and other objects, which, turned up by the plough in Ireland, had reached the British Museum, were treasure trove. . . .

In the British Museum case, Mr. Justice Farwell chose for his definition of treasure trove that given in Chitty on The Prerogatives of the Crown, *viz.*

"Treasure trove, is where any gold or silver in coin, plate, or bullion, is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown" (p. 152).

This is substantially Coke's definition, which runs:

"Treasure trove is when any gold or silver, in coin, plate or bullion hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property" (3 Inst. 132). . . .

A scrutiny of the authorities makes it also clear that, for treasure trove to obtain, there

must have been neither an abandonment by the true owner, nor an accidental loss, conditions ordinarily expressed by the statement that the treasure must have been "hidden." . . .

From the present-day point of view, and dealing with the matter from the aspect of the Crown, we may say that if the discovered treasure has not been hidden—whatever that may mean—it is not specifically treasure trove.

In *The Law Students' Helper* for February Lindsey Russell, writing of "Solicitors or the Lower Branch of the Legal Profession in Great Britain," says:

In London in the profession next to the words "fee" we hear the word "brief" more frequently than any other. The solicitor briefs the barrister with the amount of the retainer and refresher marked on the back. Before determining the amount he is willing to allow he sometimes consults with the opposing solicitors. The barrister's clerk, who does the "huggling" accepts or regrets, it being *infra dig.* for the barrister to even discuss fees, and for his services in this respect and in looking up law, the clerk receives 12 *per cent.* or thereabouts of the fee. The barrister does not know the client and looks to the solicitor for payment of his fee though he is without remedy for its enforcement. Sometimes he consults with his client as to the junior and leader to employ, but usually a firm has one or two junior counsels to whom its business regularly goes and between whom there is an understanding, a species of contract not recognized legally or professionally, but when the question arises of employing leading counsel, and one is obtained in every case, the peculiar fitness of the barrister to that particular case is carefully considered. . . .

If a solicitor himself takes trouble to attend an appointment before a judge in chambers, he receives perhaps after waiting some time, a fee of 6s. 8d. If he instructs counsel to attend and is represented by a junior clerk, his fee is the same, and he receives several further fees for copies of documents and attendances on counsel. The usual items in a bill are 3s. 6d., 6s. 8d., 13s. 4d., 1 guinea.

The price to be paid for services is fixed by law, every action subject to judicial appraisal, and the solicitor must deliver to client an itemized statement of what he has done and wait a month before he can compel payment.

Notwithstanding all of these restrictions and red tape, solicitors and their clerks are adepts in the art of running up bills. They charge for each telephone message, for every letter written and at the completion of any work will manage to turn out an aggregate charge that would do credit or discredit to a New York lawyer, according to the client's point of view.

In concluding an article, in *The Law Magazine and Review* for February, entitled "Roman Law in English Decisions," which is "a short historical account of the citation of Roman law texts in arguments and decisions on points of English law," James Williams says:

In the United States, perhaps the most notable case was the great Rhode Island constitutional decision, Trevett *v.* Weeden (1786), the earliest in which a State law was held unconstitutional. There the Roman principles of *mandatum* were applied to the powers of a State Legislature. In general, except perhaps in the Louisiana Courts before the recent constitutional amendments in that State, the American judges seem less inclined than their English colleagues to cite Roman law authorities, though both Story and Kent, to mention no other names, were learned in the Roman system.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ANARCHISTS. (EXCLUSION OF ALIEN—CONSTITUTIONALITY OF STATUTE—GUARANTY OF RELIGIOUS FREEDOM AND FREEDOM OF SPEECH.)
UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

In United States *ex rel.* Turner *v.* Williams, 126 Federal Reporter 253, the exclusion of the English anarchist Turner from the United States under the Immigration Act of March 3, 1903 (32 Stat. 1214, U. S. Comp. St. Supp. 1903, p. 172), is reviewed. The court first holds that the determination of the board of special inquiry that Turner was an anarchist cannot be reviewed. The contention was that the exclusion act was unconstitutional because it infringed Article 1 of the constitutional amendments providing that Congress shall make no law prohibiting the free exercise of religion, or abridging the freedom of speech. The court says that it is difficult to understand on what theory the exclusion of an alien anarchist is a prohibition of the free exercise of religion, and as to abridging speech, that applies only to the speech of persons in the United States, and has no bearing on the admission of aliens. Ekiu's Case, 142 U. S. 657, 12 Supreme Court Reporter 336, 35 L. Ed. 1146, is relied on as authority.

AUTOMOBILES. (USE OF HIGHWAYS—EXCESSIVE SPEED—NEGLIGENCE.)
KENTUCKY COURT OF APPEALS.

In Shinkle *v.* McCullogh, 77 Southwestern Reporter 196, the right of automobiles on public highways is discussed. The case was a damage suit arising from the frightening of plaintiff's horse by an automobile driven at high speed and emitting loud noises. The court says: "While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management, and consideration for the rights of others which is consistent with their safety. If, as the jury found by the verdict, appellant knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile and taken such other steps for appellee's safety as ordinary prudence might suggest."

BAGGAGE. (LOSS—NEGLIGENCE.)
NEW YORK SUPREME COURT.

Tewes sued the North German Lloyd Steamship Company for the loss of his baggage. The case is reported in 85 New York Supplement, page 994. A trunk was delivered to the company to be carried to Europe on a steamer on which plaintiff had engaged passage, but it was allowed to remain on the dock, and two days after the steamer sailed, was burned. Plaintiff's ticket contained a provision limiting the liability for loss of baggage to fifty dollars, unless the value in excess should be declared and freight paid thereon. This is held binding on the plaintiff, citing: Steers *v.* Liverpool, N. Y. & P. S Co., 57 N. Y. 1, 15 Am. Rep. 453; Zimmer *v.* N. Y. C. & H. R. R. Co., 137 N. Y. 460, 33 Northeastern 642. But the court says that by the defendant's neglect it lost the benefit of this provision and made itself subject to the full liability of a common carrier. The loss is traced back from the immediate cause to the first cause, to wit: The negligence or breach of contract in leaving the

trunk on the dock, instead of loading it on the steamer, and there was no clause in the contract making the limited liability cover the case of negligence. The court cites: Michaels *v.* N. Y. C. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Maghee *v.* Camden & A. R. Co., 45 N. Y. 514, 6 Am. Rep. 124; Condict *v.* Grand Trunk R. Co., 54 N. Y. 500; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; London & L. F. Ins. Co. *v.* Rome, W. & O. R. Co., 144 N. Y. 200, 39 Northeastern 79, 43 Am. St. Rep. 752.

BRIBERY. (City Officer—Scope of Authority —Validity of Ordinance.)

Missouri Supreme Court.

State *v.* Butler, 77 Southwestern Reporter 560, chronicles the successful appeal of the notorious Edward Butler from a conviction of an attempt to bribe a member of the Board of Health of St. Louis. The charter of St. Louis required all contracts to be let by the board of public improvements, and on this account an ordinance placing power in the Board of Health to contract for the removal of garbage, is held a nullity, and is also held not to affect the case because not signed by the mayor when Butler's attempt to bribe was made. It follows from this that the Board of Health had no power to let a contract for the removal of garbage, and Butler, in endeavoring to secure such a contract by the offer of a bribe, is in the position of one attempting to bribe an officer to do something which he has no power to do. This, the Supreme Court declares, is not a violation of Rev. St. 1899, Sections 2084, 2089, providing in substance, that every person who shall offer to give any money to any public officer of a city to influence his vote, *etc.*, on any question "which may by law be brought before him in his official capacity," shall be guilty of an attempt to bribe. "How," says the court, "can an officer be influenced to act when there is no law requiring him to do so and no power under the law authorizing him to act? It may be said that it was thought the power existed and there should be a conviction of bribery or attempted bribery. So it may be said that a witness who swears falsely as to an immaterial matter . . . ought to be convicted of perjury because he thought it was material, but what court would for a moment hold that a defendant could be convicted for swearing falsely as to matters immaterial to the legitimate subject of inquiry?" *In re* Yee Gee, 85 Federal Reporter 145; State *v.* Howard, 137 Mo. 288, 38 Southwestern Reporter 908; Collins *v.* State, 25 Tex. Supp. 204; Gunning *v.* People, 59 Northeastern Reporter 494, 82 Am. St. Rep. 433; United States *v.* Boyer, 85 Federal Reporter 426; United States *v.* Gibson, 47 Federal Reporter 833; Commonwealth *v.* Reese, 29 Southwestern Reporter 352; Kitby *v.* State, 31 Atlantic Reporter 213; People *v.* Purley, 2 Cal. 564; Newman *v.* State, 23 Southeastern Reporter 831; Ruffin *v.* State, 38 Southwestern Reporter 169, are all cited in support of this doctrine, while a number of cases are distinguished or held inapplicable. Several minor decisions as to the construction of statutes and ordinances are made, among them that criminal statutes must be strictly construed, and that if there is a fair doubt concerning the existence of a charter power, it will be resolved against the city.

This case has been productive of wide criticism of the court, in part based on the view that the Board of Health would necessarily have to determine its power under the ordinance, and, therefore, pass on the question of its validity, so that the matter was one which would come before the members in their official capacity. This is the holding in State *v.* Ellis, 33 N. J. Law 103, discussed in the opinion. Another and more emphatic criticism is directed toward the holding that the fact that the ordinance had not been signed by the mayor when Butler's attempt to bribe was made, deprived the Board of Health at that time of any official cognizance of the awarding of the garbage contract. Under this rule all that would be necessary to avoid criminal liability for brib-

ery would be to accomplish the undue influencing of the official before the law under which he was to act had taken effect. Thus, if a corporation desired to influence the action of Secretary Cortelyou in his new position as secretary of commerce, all that would have been necessary to make such proceeding lawful would be to have approached him before the President signed the act creating the department of commerce. The obvious absurdity of such a result is one of the great weaknesses of the court's opinion.

CARRIERS. (CARRIERS—FREE TRANSPORTATION—BREACH OF CONTRACT—WIFE'S PASSAGE MONEY—RECOVERY BY HUSBAND—INCONVENIENCE—DAMAGES.)

NEW YORK SUPREME COURT.

In Miller *v.* Baltimore & Ohio Railroad Co., 85 New York Supplement 883, it appeared that plaintiff had made a special contract with the company to transport him and his wife in a certain express train to the city of New York from Cumberland, Maryland. On reaching Philadelphia the company refused to continue the trip and told plaintiff he would have to wait over three or four hours for another distinct train. Instead, he took passage over another railroad and sued for a breach of the contract of carriage and for damages for inconvenience, annoyance and delay. The court first holds that plaintiff could recover money paid for his wife's fare from Philadelphia onward, though she was not a party to the action, and her claim was not assigned to him. This is on account of his obligation to support his wife and pay her expenses, including traveling expenses, especially when she is with him. As to the right to recover for mere inconvenience and annoyance, the court holds that it does not exist in the absence of proof of actual physical or mental injury. Miller *v.* King, 21 App. Div. 192, 47 New York Supplement 534, and Hamilton *v.* Third Avenue Railroad Co., 53 N. Y. 25, are distinguished.

CASH REGISTER. (MEMORANDA AS INDEPENDENT EVIDENCE.)

NEW YORK SUPREME COURT.

In Cullinan *v.* Moncrief, 85 New York Supplement 745, the State excise commissioner sought to recover the penalty of a bond given by defendants, who were druggists, to obtain a certificate to traffic in liquors. The evidence was that a special agent of the excise department had purchased from one of the defendants a half-pint of brandy without a physician's prescription, and paid him 75 cents therefor, which, with the price of another article purchased at the same time, amounted to 96 cents. To rebut this evidence defendants offered a slip from their cash register showing that on that date no sale for 96 cents had been made. The defendant from whom the brandy was said to have been purchased, testified that he had a cash system by which he could tell whether he was in the store or not. His partner explained the working of the cash register. The court holds that the slip was inadmissible, there being a total failure of the evidence to establish the correctness of the items thereon, and says it is also of the opinion that the slip should not have been received in evidence in any event, as it was not an account book, but a memorandum made by the party in his own interest, which was not offered in aid of the witness' recollection.

CONTEMPT. (WHAT CONSTITUTES—DENUNCIATION OF COURT—TERMINATION OF CAUSE—LEGISLATIVE LIMITATION OF AUTHORITY—FREEDOM OF SPEECH.)

MISSOURI SUPREME COURT.

In State *v.* Shepherd, 76 Southwestern 79, the defendant was informed against for contempt of the Supreme Court itself in printing an article commenting on the termination of a personal injury case begun against the Missouri Pacific Railroad and brought by appeal before that court. After referring to the charges of bribery in the Legislature and reflecting on the good faith of the governor and attorney-general, the article proceeded: "And now, as the capsheaf of all

this corruption in high places, the Supreme Court has at the whipcrack of the Missouri Pacific Railroad sold its soul to the corporations, and allowed Rube Oglesby to drag his wrecked frame through this life without even the pitiful remuneration of a few paltry dollars. . . . This very tribunal, after reading the evidence and hearing the arguments of the attorneys, rendered a decision sustaining the judgment of the lower court, which decision was concurred in by six of the seven members of the court. This is usually the end of such cases. . . . But not so in the Oglesby case. Three times was this case at the request of the railway attorneys opened for rehearing, and three times was the judgment of the lower court sustained. But during this time, which extended over a period of several years, the legal department of this great corporation was not the only department which was busy in circumventing the defeat of the Oglesby case. The political department was very, very busy. Each election has seen the hoisting of a railway attorney to the supreme bench, and when that body was to the satisfaction of the Missouri Pacific, the onslaught to kill the Oglesby case began. A motion for a rehearing was granted, and at the hearing of the case it was reversed . . . and was sent back for retrial. . . . Again the jury rendered judgment in favor of Oglesby . . . and again the case was appealed to the Supreme Court. An election was coming on and the railroad needed yet another man to beat the Oglesby case. The Democratic nominating convention was kind and furnished him in the person of Fox. . . . The railroad allowed the case to come up for final hearing, and Monday the decision was handed down, reversed and not remanded for retrial. The victory of the railroad has been complete, and the corruption of the Supreme Court has been thorough." The defendant was fined $500, which was promptly furnished by his fellow citizens. The court filed a lengthy opinion in which the whole law of contempts is elaborately discussed. Among other important holdings is that where a contempt consists of scandalizing the court itself, it need not relate to a pending suit; also that the attempt of the Legislature to define what contempts the court should punish, and limiting its powers thereto was unconstitutional as an interference with the judicial department of the government; and that the constitutional guaranty of freedom of speech was no protection to the defendant. The latter point is discussed at great length. Commenting on the article itself the court says: "In short the article attacks the honesty, integrity, and purity of every branch of the State Government, and of the several officers, and then attacks the Democratic nominating convention of 1902." It would seem from this that defendant was guilty not only of contempt, but of a sort of sacrilege. The court refers to the rule of the civil law embodied in the advice of Maecenas to the Emperor Augustus, when the latter desired to punish a historian who had passed some stinging jests on him, that the best policy was to let such things pass and be forgotten. Cæsar also said that to retaliate was only to contend with impudence and put oneself on the same level, and the Theodosian Code also declared that slanderers of majesty should be unpunished, for, if this proceeded from levity, it was to be despised; if from madness, it was to be pitied; and if from malice, it was to be forgiven.

CONTRACTS. (NEGOTIATION BY TELEPHONE—LEX LOCI.)

CALIFORNIA SUPREME COURT.

In Bank of Yolo *v.* Sperry Flour Co., 74 Pacific Reporter 855, the Supreme Court of California holds that a contract made by telephone between parties in different counties is to be regarded as made in that county in which the proposition of the one is accepted by the other. It says: "A contract is supposed to be made at some place, and the place where it becomes complete is the place where it is made. If a contract is made by exchange of letters or telegrams, it is held to have been made at the place

where the letter is mailed or telegram filed containing an unconditional acceptance by one party of the offer of the other. If the communications are oral, either with or without the telephone, between parties on opposite sides of a county line, the same principle would seem to require that the contract should be deemed to have been made in the county where the offer of one is accepted by the other."

FERRIES. (INTERSTATE CHARACTER—AMOUNT OF TOLL—LOCAL REGULATION.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

In State *v.* Faudre, 46 Southeastern Reporter 269, defendant was indicted for charging ten cents for ferriage from the Ohio side of the Ohio river to the West Virginia side, contrary to the order of a West Viginia county court, fixing five cents as the charge. The defendant's ferry was operated under a franchise conferred by the Virginia Legislature in 1796 and reënacted in 1819. A city ordinance in force on the Ohio side authorized the charge made. In holding that no offense had been committed against the State of West Virginia, the court holds that the point of departure is the home of a ferry, citing Sistersville Ferry Company *v.* Russell, 52 W. Va. 356, 43 Southeastern Reporter 107, and as the ferry had a foothold on the Ohio side, it was a lawful ferry. It was engaged in interstate commerce, and its landing could not be prohibited by West Virginia. These principles are held to apply, though the jurisdiction of West Virginia extends to the low-water mark on the Ohio side. A large number of authorities are cited and discussed as to the extent of this jurisdiction. The opinion, however, relies on the ordinance of Congress for the Government of the Northwest Territory, declaring the Ohio river a common highway, which shall be forever free, *etc.*, and the Virginia Act of Dec. 30, 1788 (12 Hen. St. 780), ratifying the same; and also the Virginia Act providing for the formation of Kentucky, in which it is declared that the jurisdiction of Virginia and of Kentucky shall be concurrent on the river, with the States on the opposite shores. In the concluding portion of the opinion, the case is said to be settled by Conway *v.* Taylor, 1 Black 603, U. S. 17 L. Ed. 191, in which the right of Ohio to establish a ferry to the Kentucky shore was upheld, but the court believes that Ohio could grant a ferry right valid for carriage in both directions. From this extension of the doctrine of Conway *v.* Taylor, Justice Poffenbarger dissents, though concurring in the conclusion reached, while Justice Dent believes that the case turns on the fact that Ohio has jurisdiction above the low-water mark.

HYPNOTISM. (SEDUCTION—SUFFICIENCY OF EVIDENCE—CREDIBILITY OF STORY.)

NEW YORK SUPREME COURT.

In Austin *v.* Barker, 85 New York Supplement 465, the defendant appealed from a judgment rendered against him for the seduction of the plaintiff's daughter, who had given birth to a child in August, 1901. She testified that upon various dates between October 30, 1900, and Jan. 1, 1901, the defendant had had improper relations with her, on the first occasion, forcibly placing her upon a couch and accomplishing his purpose. The defendant denied his guilt, and so far, the court says, the evidence might have sustained the verdict; but after the daughter had been extensively examined on both sides, and had left the stand, she was recalled on the urgent request of defendant's counsel, predicated on new information, and then testified that she was entirely unconscious of defendant's various acts of improper relation with her, and did not know that they had occurred at all until several weeks after the birth of her child; that on the first occasion she understood what was taking place only up to the time she was placed on the couch; that in October, 1901, plaintiff's attorney visited her, and being then placed in a hypnotic stage she recalled the acts of intercourse, the recollection of which she had since retained. She testified, and plaintiff's theory was, that defendant had hypno-

tized her. No expert evidence as to the possibilities or effects of hypnotism was offered, and in view of this the court holds the evidence insufficient to sustain the recovery.

INSURANCE. (CANCELLATION OF POLICY—FRAUD —FEDERAL EQUITY JURISDICTION—REMOVAL OF CAUSES—PENALTY OF EXCLUSION FROM STATE.)
UNITED STATES SUPREME COURT.

Cable *v.* United States Life Insurance Company, 24 Supreme Court Reporter 74, was a suit by the insurance company to cancel a policy on the ground of fraud of the agents of the insured, begun in the United States Circuit Court. The question on the *certiorari* to the Supreme Court was as to the equity jurisdiction of the court below. In the most interesting portion of the opinion the court says: "We start with the proposition that, to any action brought upon the policy in a Federal court, the company would have a complete and adequate defense by proving the fraud as alleged in the bill herein. That shows a defense in the same jurisdiction resorted to by the complainant herein. It is answered, however, that the action [on the policy] has not been commenced in the Federal court, but, on the contrary, the administratrix has commenced her action in the State court, and hence the defense, if made in the State court, is not in the same jurisdiction as that in which the bill in this case was filed. But the company may bring its defense within the same jurisdiction by removing the case from the State to the Federal court, which it has the right to do on account of the diversity of citizenship of the parties thereto."

Doyle *v.* Continental Insurance Company, 94 Northeastern 525, 24 L. ed. 148 is then referred to, in which it was held that a State might revoke the license of a foreign insurance company as a penalty for removing a case to the Federal courts. Whether this case has been shaken by the subsequent cases of Barron *v.* Burnside, 121 U. S. 186, 199, 30 L. ed. 915, 919, 1 Inters. Com. Rep. 295, 7 Supreme Court Reporter 931; Blake *v.* McClung, 172 U. S. 239, 254, 43 L. ed. 432, 437, 19 Supreme Court Reporter 165, and Dayton Coal & I. Co. *v.* Barton, 183 U. S. 23, 25, 46 L. ed. 61, 64, 22 Supreme Court Reporter 5,—the court says is not material. One thing is clear; the company could have removed the administratrix' case from the State to the Federal court, notwithstanding the State statute requiring its exclusion from the State in case it did so, and whether as a result of such removal the State would have the right, by reason of the statute, to revoke the company's license, is not a question which it is necessary to determine. The embarrassment attaching to the company on account of the removal is one of its own creation. As a condition upon which it was admitted to do business in the State it voluntarily signed an application in which it promised to accept a license according to the State law and agreed that the license should terminate in case it removed an action to the Federal court. If the condition be illegal, and no ground for revocation of the license, any subsequent litigation which the company may have with the State officials is still a matter caused by its own action, and does not, in the court's judgment, furnish any ground for Federal jurisdiction.

JUDGMENTS. (ADJUDICATION OF SISTER STATE—FULL FAITH AND CREDIT—DENIAL OF RIGHT OF ACTION.)
UNITED STATES SUPREME COURT.

In Anglo-American Provision Co. *v.* Davis Provision Co., 24 Supreme Court Reporter 92, the provision of the New York Code of Civil Procedure, Sec. 1780, providing that a foreign corporation may sue another foreign corporation only in certain cases, among which is the one where the cause of action arose within the State, though construed by the New York courts as precluding an action on the judgment of a sister State by one foreign corporation against another, is held not to violate Constitution, Art. 4, Sec. 1, guaranteeing full faith and credit to such judgments. The court says the precise point has not been decided by it, but that it has been laid down in cases that raise greater difficulties, that this provision of the Constitution establishes a rule of evidence rather

than of jurisdiction. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 291, 32 L. ed. 239, 243, 8 Supreme Court Reporter 1370; Andrews *v.* Andrews, 188 U. S. 14, 36, 47 L. ed. 366, 371, 23 Supreme Court Reporter 237. The Constitution does not require the State of New York to give jurisdiction to its courts against its will. If the plaintiff can find a court into which it has a right to come, then the effect of its judgment is fixed by the Constitution. But the Constitution does not require the State to provide such a court. The case of Christmas *v.* Russell, 5 Wall. 290, 18 L. ed. 245, is distinguished.

LIMITATION OF LIABILITY. (CARRIERS—NEGLIGENCE—PLACE OF CONTRACT—FEDERAL QUESTION—INTERSTATE COMMERCE ACT.)

UNITED STATES SUPREME COURT.

In Pennsylvania Railroad Co. *v.* Hughes, 24 Supreme Court Reporter 132, it is held that the action of the State court in applying the *lex loci contractus* to a controversy as to the right of a common carrier to limit its liability for negligence to an agreed valuation, does not present a Federal question which will sustain the jurisdiction of the United States Supreme Court, the rule announced in Hart *v.* Pennsylvania Railroad Co., 112 United States 331, 28 L. ed. 771, 5 Supreme Court Reporter 151, in which such a contract was upheld, not being one of Federal law wherein the decision of the highest Federal tribunal is of conclusive authority. The refusal of a State court to uphold such a contract is also held not to contravene any of the provisions of the Interstate Commerce Act of Feb. 4, 1887 (24 Stat. 379, c. 104, U. S. Comp. Stat. 1901, p. 3154), Missouri, K. & T. R. Co. *v.* Haber, 169 United States 614, 42 L. ed. 878, 18 Supreme Court Reporter 488; Smith *v.* Alabama, 124 United States 465, 31 L. ed. 508, 1 Interstate Commerce Reports 804, 8 Supreme Court Reporter 564; Cleveland, C. C. & St. Louis R. Co. *v.* Illinois, 177 United States 514, 44 L. ed. 868, 20 Supreme Court Reporter 722, are cited on this branch of the case, and Chicago, M. & St. R. Co. *v.* Solan, 169 United States 133, 42 L. ed. 688, 18 Supreme Court Reporter 289, is said to be virtually decisive of it.

MINOR CHILD. (PERSONAL INJURIES BY PARENT—RIGHT TO DAMAGES.)

TENNESSEE SUPREME COURT.

McKelvey *v.* McKelvey, 77 Southwestern Reporter 664, was an action by a minor child against her father and step-mother to recover damages for cruel and inhuman treatment, alleged to have been inflicted by the latter. The case was dismissed on demurrer, and in sustaining this ruling the court declares that the common law right of control vested in a parent over his minor child, involving the subordinate right of chastisement, results in giving the child no civil remedy against the father for personal injuries inflicted. This conclusion is reached in opposition to the statement of Judge Cooley in his work on torts (page 171) that in principle there seems to be no reason why such a right of action should not be sustained. Howlett *v.* George, Ex'r, 68 Miss. 703; 9 Southern Reporter 885; 13 L. R. A. 682, is said to be the only case in which the particular question has been discussed, the ruling being hostile to the maintenance of the action. The fact that the cruel treatment was inflicted by the step-mother is immaterial in view of the joint liability of the husband for the wife's tort. Abbott *v.* Abbott, 67 Maine 304, 24 Am. Rep. 27, and Phillips *v.* Barnett, First Q. B. D. 436, relative to the right of a wife to recover for personal injuries inflicted by the husband, are cited as furnishing some analogy to the ruling made.

ORDINANCE. (POLICE REGULATION—CIRCULATION OF DODGERS—VALIDITY.

NEBRASKA SUPREME COURT.

In Anderson *v.* State, 96 Northwestern Reporter 149, the validity of the city ordinance making it unlawful to circulate or distribute dodgers, handbills, *etc.*, on the public streets, was challenged, the contention being that it violated Constitution Article 1,

Section 5, providing that every person may freely speak, write or publish on all subjects, being responsible for the abuse of that liberty. In sustaining the ordinance the court says that it is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition. A police regulation is not invalid simply because it may incidentally affect the exercise of some constitutional right. The test is whether the regulation is a *bona fide* exercise of police power, or an arbitrary and unreasonable interference with the rights of individuals under the guise of a police regulation. Citing Wenham *v.* State, 91 Northwestern Reporter 421, 58 Lawyers' Reports Annotated 825. The ordinance in question is clearly valid. It has no reference to or connection with freedom of speech or of the press, and its plain purpose is, not to interfere with the publication of sentiments and opinions of individuals, but to promote the cleanliness and safety of the municipality. State *v.* Bair, 92 Iowa 28, 60 Northwestern Reporter 486; United States *v.* Newton, 20 District Columbia 226; Beck *v.* Railway Teamsters' Protective Union, 118 Michigan 497, 77 Northwestern Reporter 13, 42 Lawyers' Reports Annotated 407, 74 American State Reporter 421; Commonwealth *v.* Davis, 162 Massachusetts 510, 39 Northeastern 113, 26 Lawyers' Reports Annotated 712, 44 American State Reporter 389, are all cited as containing adjudications analogous to the one here made.

POLICE POWER. (LICENSE ORDINANCE—REASONABLENESS—VERDICT FOR LESS THAN TAX IMPOSED EFFECT.)

UNITED STATES SUPREME COURT.

In Postal Telegraph Telegraph-Cable Co. *v.* Borough of New Hope, 24 Supreme Court Reporter 204, the Borough sued the Telegraph Company, which was doing an interstate business, to recover license fees on poles and wires. The court submitted to the jury the question of the reasonableness of the ordinance imposing the license tax, stating that its verdict would be advisory merely, and instructing it to find for the plaintiff in the full amount if the ordinance was thought reasonable, otherwise to find for defendant. The jury found for the plaintiff in a less sum than that contemplated by the ordinance, and the court directed the entering of judgment thereon. In reviewing this judgment the United States Supreme Court says that it amounts to a determination of the unreasonableness and consequent invalidity of the ordinance, and the act of the jury in finding a lesser sum for plaintiff was an attempt by that body to itself exercise the taxing power. When the verdict was rendered and the court directed judgment to be entered thereon it must have thereby concurred with the jury and held the ordinance unreasonable and therefore void, for, if the ordinance was valid, the court would have directed judgment for the full sum without reference to the verdict. Neither court nor jury had any power whatever to give judgment for what either might regard as a reasonable sum, if that were less than the amount provided for in the ordinance. The source of jurisdiction to give any verdict or judgment for the plaintiff was the ordinance. If the amount of the license fee provided for therein was unreasonable, the ordinance was void, and neither court nor jury could substitute its own judgment as to what was reasonable, and give a verdict or direct a judgment for that sum. Western Union Tel Co. *v.* New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Supreme Court 204, is distinguished from the case at bar, and Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 1660, 47 L. ed. 995, 23 Supreme Court 817, is cited as to the propriety of leaving the reasonableness of the ordinance to the jury.

SALES. (BREACH OF WARRANTY OF ANIMAL'S SOUNDNESS — EXISTENCE OF TUBERCULOSIS — VENDOR'S IGNORANCE.)

DELAWARE SUPERIOR COURT.

In Cummins *v.* Ennis, 56 Atl. Rep. 377, plaintiff sued for the alleged breach of a

warranty of the soundness of a cow in that she was affected with tuberculosis. In charging the jury the court said that if the cow was warranted to be sound, and at the time of the exchange was unsound, the defendant would be bound by the warranty whether he knew of the cow's condition or not.

STREETS. (USE BY SALVAGE CORPS—INJURY TO POLICEMAN—PERFORMANCE OF OFFICIAL DUTY.)
NEW YORK SUPREME COURT.

In Muhs *v.* Fire Insurance Salvage Corps, 85 New York Supplement 911, plaintiff, a police officer, sued for personal injuries from being run over by defendant's fire patrol wagon, while he was endeavoring to prevent a similar accident to a woman and child. The court first holds that the defendant is not absolved from liability for negligence merely because by the terms of the act incorporating it it was given "the right of way in the streets of Brooklyn." Such right, the court says, is necessarily subject to the preservation of the safety of those who may be lawfully on the streets, and, while the defendant is justified in having its wagons driven with speed at the time of a fire, such speed must be exerted with reasonable care and due regard for the safety of those who may be met. It was also held that it was plaintiff's duty to endeavor to save the woman and child, and the consequent exposure of himself to danger was not contributory negligence as a matter of law. The following authorities are cited: Eckert *v.* The Long Island Railroad Co., 43 N. Y. 502, 3 Am. Rep. 721; Spooner *v.* D. L. & W. R. R. Co., 115 N. Y. 22, 21 N. E. 696; Williams *v.* U. S. Mut. Accident Assn., 82 Hun. 268, 31 New York Supplement 343; Hirschman *v.* Dry Dock, East Broadway & Battery Railroad Co., 46 App. Div. 621, 61 New York Supplement 304; Manthey *v.* Rauenbuchler, 71 App. Div. 173, 75 New York Supplement 714.

SUBTERRANEAN WATERS. (RIGHT OF LAND-OWNERS—ADOPTION OF COMMON LAW RULE.)
CALIFORNIA SUPREME COURT.

In Katz *v.* Walkinshaw, 74 Pacific Reporter 766, the common law rule that each land-owner owns absolutely the percolating waters in his land and has the right to extract, sell and dispose of them as he chooses regardless of the results to his neighbor, is held not to apply to the State of California on account of the peculiar physical conditions there obtaining, notwithstanding the California statutes adopt the common law. A large number of authorities are cited on the holding that the common law is adopted only in so far as it is adapted to the needs of the local situation in America. This is said to be a principle of the common law itself, which adapts itself to varying conditions and modifies its own rules so as to serve the ends of justice under different circumstances. The court quotes from Starr *v.* Child, 20 Wend. 159, in support of the rule, and cites among other cases Collins *v.* Chartiers V. G. Co., 18 Atlantic Reporter 1012, 6 L. R. A. 280. 17 Am. St. Rep. 791, in which the same doctrine as to the absolute ownership in percolating waters was modified. Then follows a long discussion of the physical conditions in California, as to scarcity of water, its use for irrigating purposes, and a suggestion that the appropriation of subterranean waters may result in an exhaustion of the underground sources from which surface streams are fed. A number of California cases are distinguished.

SUNDAY CONTRACT. (AUTHORITY OF AGENT—RIGHT OF PRINCIPAL TO AVOID.)
MARYLAND COURT OF APPEALS.

In Rickards *v.* Rickards, 56 Atlantic Reporter 397, the court says that the controlling question passed on below and brought up by the appeal is whether the barter or trade of a horse as made by an agent, confessedly consummated and fully executed on Sunday, does not bind the principal because made on that day. The point is, that as the agent's act was illegal, the principal could not be bound by it. Collins *v.* Blantern, 2 Wilson 341 is quoted from at length on the point that an executed contract cannot be avoided merely because made on Sunday. The court then says: "It is obvious then that the executed contract . . . is binding

. . . even though it was consummated on Sunday, unless the fact that it was made on Sunday, and consequently was unlawful of itself, took it out of the scope of the agent's authority to make it. And here lies the stress of the case." The agent's authority was general and unrestricted, and the court says that the mere fact that an agent in the course of exercising a delegated authority himself violates a prohibitive statute, does not liberate or discharge the principal from the obligation of the contract, if it be one within the scope of the agent's authority. Hamlyn *v.* Houston & Co., L. R. (1903) 1 K. B. 81, is quoted at length on this point, and the court also relies on Evans *v.* Davidson, 53 Md. 249, 36 Am. Rep. 400.

TENANT. (QUIET ENJOYMENT—DESTRUCTION OF BUILDING—INJUNCTION—MODIFICATION.)
NEW YORK SUPREME COURT.

In Benedict *v.* International Banking Corporation, 85 New York Supplement 188, the appeal was from an order modifying an injunction so as to permit the purchaser of a building to tear down that portion of it above the room of which plaintiff was a tenant in such a way as not to interfere unreasonably with plaintiff's quiet enjoyment, and so that plaintiff's roof would not be removed until another was placed over him. The injunction had previously been modified so as to permit defendant to tear down the rear of the building after securing plaintiff with the facilities which might be thus interfered with. The present order marked a subsequent modification. The court held that the first order had gone far enough, and that it was improper to permit defendant to proceed to any extent that it might think would be proper and would not unreasonably interfere with the plaintiff.

X-RAY. (NEGLIGENT USE BY PHYSICIAN—NON-THERAPEUTIC EMPLOYMENT — ELECTRICIAN AS EXPERT WITNESS.)
MINNESOTA SUPREME COURT.

In Henslin *v.* Wheaton, 97 Northwestern Reporter 882, occurs one of the earliest cases determining the liability of a physician in the use of the X-ray. Plaintiff, in the belief that a gold crown from his tooth had lodged in his lungs, went to defendant, a firm of physicians, to have the foreign body located. The X-ray was employed for the purpose, and plaintiff claimed to have sustained an "X-ray burn," resulting from its negligent application. The court says this is the first case of its kind to come before it, and no rule of care in such cases has been laid down; but there can be no doubt that the degree of care and skill required of physicians toward their patients in other cases applies, which is merely the exercise of such reasonable care and skill as is usually given by practitioners in good standing. The court then holds that as the X-ray was employed merely mechanically to disclose the presence of a foreign substance in the body, and not as a therapeutic agent, the defendants were not entitled to have testimony bearing on their use of it proceed only from physicians, but that the testimony of an expert in electrical matters was competent, though he was not a doctor. The case is thus taken out of the rule announced in Martin *v.* Courtney, 75 Minn. 255, 77 Northwestern 813, in which a physician sued for malpractice was held entitled to have the propriety of his treatment tested by physicians of his own school of practice.

The Green Bag.

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ROBERT COOPER GRIER.

BY FRANCIS R. JONES,

Of the Boston Bar.

THE material for an exposition of the life of Mr. Justice Grier is even more meagre than is customary in the case of great judges. Two wholly inadequate notices appeared during his lifetime. One was in *Biographical Sketches of Eminent American Lawyers*, edited by John Livingston of the New York Bar and printed in 1852. The other was in *The Forum*, by David Paul Brown of the Philadelphia Bar, printed in 1856. And there have been divers brief, even attenuated allusions to his life and work in various magazines. These are practically all that there are, except his published opinions, out of which to construct a biography. The proceedings of the Bar of the Supreme Court of the United States upon his retirement furnish no further data. If there were other proceedings after his death nine months later, Mr. Wallace did not print them in the reports. The present writer, therefore, is assured of the necessarily inadequate character of this sketch, especially as from the nature of the biographical articles in this magazine, he is debarred from going into a discussion of the cases which are at once Mr. Justice Grier's monument and his life.

As has been noted before in this series of papers, the seclusion of the scholar and of the judge presents no aspect of dramatic interest. It is a life of daily and uneventful toil, consecrated to a great public duty and to one of the greatest of the sciences. But unlike natural science, jurisprudence holds within its domain no possibility for any great or startling discovery, that awakens and astonishes the imagination and admiration of men. No doubt its steady pursuit conduces to the public weal no less benignly. But that pursuit is not amenable to popular notoriety. Its achievements are those of the closet, where the ancient lamp of learning burns steadily. Its paths are through forest glades, along blazed trails. Only once or so, in a century, has it been given to some master mind to strike out a new path,—to be a pioneer. And that opportunity is to be compelled by no one. It comes unsought and unheralded, almost uncontrolled. Yet it is one of the glories of the judicial history of our race that whenever it has come, there has been a man capable of meeting it; of taking it up and making it at first peculiarly his own and then of handing his achievement down to coming generations as a great and priceless legacy. Of such as these the names of Sir Edward Coke, Lord Holt, Lord Hardwicke, Lord Mansfield, Lord Stowell, and our own great Marshall leap to the front. And after them throng an innumerable list of great jurists, who lacked only the opportunity to win a place beside those still greater ones. If Mr. Justice Grier was not one of those who could have grasped such an opportunity and risen to such heights, he was at the very least a very sound lawyer and a very great judge, who for nearly a quarter of

a century administered his high office with distinction.

Robert Cooper Grier was born on March 5, 1794, in Cumberland county, Pennsylvania. He was the eldest of eleven children. His father, the Rev. Isaac Grier, a Presbyterian clergyman, eked out an existence by preaching to three congregations, running a farm and keeping a grammar school. He was a good Greek and Latin scholar, and grounded his oldest son so thoroughly in the classics, that to the end of his life the learned justice read his testament in the Greek. It is easy to picture the son's boyhood of hard work and hard study, in a sparsely settled rural district, until 1811, when he entered the junior class of Dickinson College. There, sixteen years before, his distinguished Chief upon the Supreme Court of the United States had graduated.

For the next thirty-three years we have very few facts and dates. They are uninteresting and will be set down as succinctly as possible.

Upon the completion of his course in 1812, the future justice remained at the college for a year as an instructor. He then returned to his home in order to help his father conduct the institution, which under his presidency, had grown from an academy to a college. This was in Northumberland County, whither the Griers had moved in 1806. The father died in 1815, and Robert Grier succeeded to the presidency of the college. There he taught chemistry, astronomy, mathematics, Greek, Latin, and went fishing. In addition he studied law. In 1817 he was admitted to the bar and began practice in Bloomsburg, Columbia County. One of two facts is sufficiently patent. Either Robert Grier was a genius, or a very slight smattering of law passed muster. In 1818 he moved to Danville, in the same county, where he resided until, on May 4, 1838, he was appointed, by Governor Wolf, President Judge of the District Court of Alleghany County. He then removed to Alleghany City, which place he kept as a domicile until 1848, when he took up his residence in Philadelphia.

This appointment seems to have been unsolicited. It was made because of his professional eminence. His practice had been lucrative and extensive from the beginning His ability and great fidelity to his clients were immediately recognized and appreciated by the community. It is said, too, that despite his pressing need for money, his benevolence was such, that he took and carried on many cases for indigent clients without remuneration. During these years he also supported his mother, and brothers and sisters, and gave the latter a liberal education. Consider for a moment the courage and large heartedness of a man who could assume such a burden. This noble act compels admiration and disposes one's favorable judgment. It was not, therefore, until 1829 that he found himself at liberty to marry. His wife was Miss Isabella Rose, whose father owned an extensive estate on the banks of Lycoming Creek, which later came into the possession of Mr. Justice Grier. There he yearly took his recreation with his trout rod, accompanied by intimate friends.

Mr. Justice Grier's eminent fitness for the place on the Supreme Court of the United States, made vacant by the death of Mr. Justice Baldwin in 1844, was conspicuous. For twenty years he had been prominent at the bar. For six years he had made an enviable record as a judge. He had the entire confidence of the bar of his court, and its affection to a distinguished degree. His influence with and reputation in the community, were such that his charges to juries disposed of the cases upon questions of fact. His name was sent to the Senate on August 4, 1846, by President Polk, and the following day his nomination was confirmed. He sat upon the Supreme Court of the United States for over twenty-three years,

adorning it with his learning, an able and a great judge. The record of his high judicial service is contained in the thirty volumes of reports from 5 Howard to 8 Wallace. It bears abundant testimony to his diligence, research, sound judgment and great firmness. But Mr. Van Vechten Veeder in this magazine has so recently and so adequately praised Mr. Justice Grier's judicial English, setting forth an example of it, together with a most satisfactory list of his more important opinions, that I shall not attempt iteration of them here. He never based an argument upon a mere technicality, but sought out some broad principle upon which to place the decision of a case. His aspect and bearing upon the bench were dignified and inspiring. He was a large man of vigorous muscle, with a kindly and scholarly face. His courteous manner won him the affection of the bar, as his learning and ability won its respect and admiration. Until stricken with paralysis in 1867, he was never absent from a sitting of the Court, and when on December 14, 1869, he was constrained to send his resignation to President Grant, to take effect on February 1, 1870, it was accepted in a note of cordial praise and affection by the executive. This resignation called forth from his associates upon the Bench and from the Bar expressions of sorrow at his loss so marked and cordial as to show that they were by no means perfunctory. He lived long enough to attend the funeral of his successor, ex-Secretary Stanton, and died on September 25, 1870.

I have within so short a time called attention in these pages to the conditions and circumstances under which the work of the Supreme Court of the United States was done during the years of Mr. Justice Grier's service upon that Bench, and to the historical events during the years of his boyhood and early manhood, which might have had an influence in moulding his character and forming his ideas, that it seems worse than unnecessary to more than refer briefly to some of them here. Suffice it to say that his first years upon the Supreme Court were troubled by the ever-increasing anti-slavery agitation, the questions arising out of the Mexican War, and those brought to the front by the natural growth of the country in population and commerce; the last years by the vexatious questions of Reconstruction; and the intermediate period by those of the Civil War. Under the leadership of Taney, the power of the States to make internal improvements was established. Under the leadership of Chase, the power of the national government to wage war and procure the sinews therefor, was triumphantly asserted. Mr. Justice Grier ably performed his full share of all this work. But I venture to think that his talents and learning were better adapted to the solution of problems of private law. He was especially learned in the law of real property, trusts and probate. But his admirable contributions to the science of jurisprudence in nearly all its branches are not so well known among the lawyers of today as their merits deserve. The terseness and clearness of his style, his strong grasp of the principles of the case before him, make all his judicial opinions interesting reading. They are learned, but not overburdened with learning. They are the products of a strong mind that thought clearly and logically, and he was able to express his judgments in a language that was peculiarly adapted to convey his meaning to the minds of others. He was a life-long Democrat and a strong supporter of the Federal Government. His high conception of the judicial duty and function is everywhere apparent. He sought to administer the law. No man has ever sat upon the Supreme Court of the United States with fewer idiosyncrasies and preconceived conceptions of what the law ought to be. His sole purpose was to ascertain what the law was and then to administer it. He worked

out and applied the principles of jurisprudence which best conserve justice. He had no belief in the shifty expositions of individual and ephemeral conceptions thereof, which are so rampant in these latter days, to the disorder and the blinding of that very justice, which they protest so loudly that they serve. His whole life was devoted to his profession and he was never led from its diligent and quiet pursuit by outside interests. As nearly every eminent judge has been, so he too was a student and widely read. It is unfortunate that so little concerning him has survived the years, but this is too often the fate of a great judge. His name becomes, in time, only an authority, a synonym, an abstraction. His life work is represented by a citation. But the citations of Mr. Justice Grier's judgments will always carry weight with students of jurisprudence. And this is the laurel crown for which every real judge hopes. He is not solicitous for his own fame, but eager only to further the fair name of that great science whose high priest and oracle he is, and so best subserve his fellowmen to the end of time.

Such a man and such a judge was Mr. Justice Grier.

THE "REFORM" JUDGE.

By H. Gerald Chapin,

Editor of *The American Lawyer.*

Mr. Justice Bailem of our Court Supreme,
Rose unto his present height almost like a dream,
Borne upon the topmost wave of a great "reform,"
Left upon a Judge's seat stranded by the storm.

Nowadays a double path leads to honors high,
"Reform" or "strictly party" are the roads you travel by.
Each has its advantages, reformers' nominees
Though paying no "assessments" most always get the "freeze."

Again when one's elected on the strictly party plan,
There's but a single card to play, *viz*: placate the "old man."
But the young "reform" official, as doubtless you will note,
Must always pose to galleries to catch the "peepul's" vote.

Mr. Justice Bailem argued, "Surely I,
Having unto this attained, yet may mount more high,
Appelate Division, State Court of Appeals,
My platform's stenuosity for the people's weal."

Mr. Justice Bailem thinks it rather fun
(Seeing that his term has yet several years to run)
To jibe and jeer at counsel, at plaintiffs and defendants,
Yap and snarl, this he calls, "judicial independence."

Ever and anon he feels deep and pure elation,
When appears before him a defendant corporation,
While labor union cases raise a strong unholy stench,
Conducive to "dismissals" and to tirades from the bench.

Also does his Honor delight to take in hand
And cross-examine witnesses placed upon his stand;
Clips off counsel's argument, cuts objections short,
Thus as Justice Bailem says, "saving time of court."

"Not a mere case lawyer," as he often states,
In rendering decisions, he differentiates,
Whittles all the law down fine, not to hold or bind,
Evidencing, as he thinks, "fine judicial mind."

Mr. Justice Bailem cannot understand,
Why they "pass" the cases when he is on hand,
Why the counsel present 'journ upon consent,
Hints of dark conspiracy, wonders what is meant.

Mr. Justice Bailem waxes passing hot,
Babbles of "ingratitude," promotion cometh not;
Still holds *nisi prius*, like a bear within its lair,
And it's just a ten to one that he'll stay right there.

THE LAWYER: A PEST OR A PANACEA?[1]

By Francis M. Burdick,

Professor in the School of Law, Columbia University.

IT is not inappropriate, I trust, upon an occasion of this kind, to discover, if we can, the opinion which the world entertains of the legal profession, and to consider its accuracy. That this opinion has often taken an uncomplimentary form must be admitted.

One of the earliest expressions of this character, which has fallen under my notice, is that of Richard De Bury, Bishop of Durham, and Lord Chancellor of England, under Edward III. His views, set forth in the rather crabbed Latin of the fourteenth century has been rendered into English as follows: "Lawyers indulge more in protracting litigation than in peace, and quote the law, not according to the intention of the legislator, but violently twist his words to the purpose of their own machinations." Such criticism from a Lord Chancellor would seem, at first glance, to be entitled to serious consideration. It is to be remembered, however, that the English chancellor of that far away time was not a lawyer, but an ecclesiastic; and Bishop De Bury's translator notes that the church and the bar were not on good terms in those days. This was due to the fact, he tells us, that lawyers were often obliged to defend themselves and others against the rapacity of ecclesiastics.

A more violent antipathy to our profession is attributed by Shakespeare to Dick the Butcher, in Henry VI., where he proposes to Jack Cade that the first thing they shall do, upon Cade's becoming king, is to kill all the lawyers. To which Cade responds, "Nay, and that I mean to do." But these two worthies are represented by the great dramatist as arrant anarchists. All the realm was to be in common, declared Jack Cade, and to drink small beer, after he became king, was to be made a felony. Naturally statesmen of such a stripe would hate lawyers.

Similar hostility has been evinced by great despots. The anecdote is told of Peter the Great, that on a visit to Westminster Hall, he was astonished by the imposing array of barristers and attorneys; and declared that he had had but two lawyers in all his realm, and one of them he had put to death. Napoleon, at St. Helena, characterized law suits as an absolute leprosy, a social cancer; and stigmatized lawyers as a class living upon the quarrels of others, and even stirring up disputes to promote their own interests. He virtually admitted, however, that he had not the courage of his convictions, while emperor, or he had not reached the point where he thought it wise to put into operation his plan for starving lawyers, by legislating that they should never receive fees, except when they gained causes.

But, perhaps, the most picturesque indictment of our profession is that found in Macaulay's radical war song of 1820:

"Down with your Baileys and your Bests,
Your Giffords and your Gurneys:
We'll clear the island of the pests,
Which mortals name attorneys."

That these English radicals were not the sanest of thinkers, however, is apparent from the next stanza of the song, which runs as follows:

"Down with your Sheriffs and your Mayors,
Your Registrars and Proctors.
We'll live without the lawyer's cares
And die without the Doctor's."

[1] An address at the annual meeting of the New Hampshire Bar Association, held at Concord, February 29, '04.

If these were the only criticisms upon the profession, we might dismiss them with the homely proverb,

"No man e'er felt the halter draw
With good opinion of the law;"

or, we might add, of lawyers. But we are forced to admit that our profession rests under other and more serious reproaches. Sir Thomas More gave voice to one of the most severe as well as one of the most specious of this sort, in his account of the imaginary institutions of Utopia. Lawyers were excluded from that fabled commonwealth, he assures us, because they were looked upon, as a class, whose profession it is to disguise matters as well as to arrest laws. Therefore, the dwellers in that isle of fancy thought it much better that every man should plead his own cause and trust it to the judge, than to employ professional counsel, as the client does in other lands. By this means, we are told, "they both cut off many delays and find out the truth more certainly."

This phantasy of every man his own lawyer; of a judiciary so honest, so astute to detect the truth, so capable of discovering the real principle involved in every litigation, that the public and rival presentation of the opposite sides by skilled lawyers, is not only unnecessary, but positively baneful, has enjoyed a great but undeserved popularity. Several of our colonies were captivated by it, and their early legislation has the true Utopian ring. Virginia, in 1645, undertook to discourage lawyers by forbidding them to take fees. Massachusetts showed her distrust of the profession, in 1663, by excluding lawyers from membership in the "Great and General Court" of the province. The fundamental constitution of the Carolinas declared it a base and vile thing to plead for money or reward. It prohibited anyone but a near kinsman to plead another's cause, until he had taken an oath in open court, that he had not directly or indirectly bargained for money or other reward, with the party for whose cause he was to plead.

The result of this colonial legislation was quite different from that anticipated by its Utopian sponsors. It is admirably caricatured by Irving in Knickerbocker's New York. The redoubtable governor, Wouter Van Twiller, is the central figure of the picture,—the judge before whom each party pleads his own case and to whose enlightened sense of justice the decision is committed. An important burgher of primitive New Amsterdam explains to the Governor that a fellow-burgher though largely indebted, refuses to come to a settlement. The Governor and Magistrate (for the judiciary had not yet been separated from the executive) "called unto him his constable, and pulling out of his breeches pocket a huge jack-knife, dispatched it after the defendant as a summons, accompanied by his tobacco-box as a warrant." Brought into court by this summary, if primitive process, each party produced his books of account, plead his own cause, and, as we have said, trusted to the judge in true Utopian fashion. The sage Van Twiller "took the books, one after the other, and having poised them in his hands, and attentively counted over the leaves, fell straightway into a very great doubt, and smoked for half an hour, without saying a word. At length, laying his finger beside his nose and shutting his eyes for a moment, with the air of a man who has just caught a subtle idea by the tail, he slowly took his pipe from his mouth, puffed forth a column of tobacco smoke, and, with marvelous gravity and solemnity, pronounced his judgment. Having carefully counted over the leaves and weighed the books, it was found that one was just as thick and heavy as the other. Therefore, it was the final opinion of the court that the accounts were equally balanced; that the parties

should exchange receipts and the constable should pay the costs."

Although the veracious historian assures us that the decision diffused general joy throughout New Amsterdam, and that not another law suit took place during the whole of Governor Van Twiller's administration, while the office of constable fell into such decay that there was not one of those losel scouts known in the province for many years, this Utopian state of things was not permanent, either in New Amsterdam, or in the other provinces.

We have seen that the fundamental constitution of the Carolinas sought to prevent the growth of the legal profession, by prohibiting its members from rendering services for money or other reward. The charter was abundantly successful in this direction. Scarcely a lawyer of reputation made his appearance in these provinces while it was in force. But in every other respect it was an abject failure. Although the joint product of the Earl of Shaftesbury and John Locke, one "the first practical politician" and the other "the first philosopher of England," at that time, it has been characterized by all historians as a simple absurdity. The political system which it set up was clumsy, complicated and fantastic. It imposed upon a primitive community a body of laws devised by a practical politician and a philosophical thinker. So nearly perfect did their authors deem them, that all comments upon, or expositions of them were forbidden. The evolution of a legal system through private law suits was made impossible. It professed to be framed for eternal duration; and it collapsed within a quarter of a century. While it endured, its fruits were turbulence, faction and failure. Scarcely had it been launched, before a leading colonist besought the proprietaries to send over "an able counsellor to end controversies and to put the settlers in the right way of managing the colony." Upon its overthrow, lawyers began to multiply in the Carolinas. A simple and rude, but effective government grew up, and a legal system was developed, under which criminals were brought to punishment, life and property were reasonably secure and productive industry flourished. A more instructive object lesson in the evolution of law has never been afforded, than by this experiment of Locke and Shaftesbury. A body of legal rules, in order to be really serviceable to a community, must be of home growth. No statesman has ever been practical enough, no philosopher wise enough, to evolve from his inner consciousness a successful code. The English common law is far from perfect, either in the mother country or in this progressive republic; but it is alive with the spirit of justice; it quickly responds to the best moral sense of the people and its general tendency has ever been toward the truth. This is due very largely to the active and influential part taken by the bar of England and of America in the development of our legal system.

During the latter part of the seventeenth and the early part of the eighteenth century a change in the popular estimate of lawyers had taken place, not only in the Carolinas, but also in Virginia, in New York and throughout New England. Massachusetts no longer excluded them from membership in her Great and General Court. The Governor of New York could no longer dispose of law suits in the Van Twiller style. When Governor Cosby, in 1732, secured the indictment of Peter Zenger, the publisher of the *New York Weekly*, for crimnal libel, the accused did not try the Utopian experiment of pleading his own case, and trusting it to the judge. On the other hand, he secured the services of the foremost lawyer of the colonies to combat the view then generally entertained by the judiciary, that the only function of the jury, in a trial for criminal libel, was to say whether the libel had been published or not. In Zenger's behalf, An-

drew Hamilton, the leader of the Pennsylvania bar, eloquently contended that truth was a justification if the words of the libel were not scandalous or seditious. He won his case. Zenger was acquitted. Hamilton, we are told, was presented with the freedom of New York City and departed for his Philadelphia home, amid the firing of salutes in his honor. It was an honor well deserved, for he had won the first fight for the freedom of the press in America, thus anticipating by nearly half a century, the great victory of Erskine and Fox for the freedom of the press in England.

So radical was the change in public sentiment towards law and lawyers, that Burke, in his great speech on Conciliation, named as one of the six capital sources of the fierce spirit of liberty among the colonists, the widespread taste for legal education.

"In no country in the world," said he, "is the law so general a study. The profession itself is numerous and powerful, and in most provinces it takes the lead. The greater number of the deputies sent to Congress were lawyers." General Gage had reported he observed that all the people in his government were lawyers or smatterers in law, and that in Boston they had been enabled by successful chicane wholly to evade many parts of the most important penal laws of Parliament. This study of the law, added the philosophic statesman, "renders men acute, inquisitive, dextrous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance and snuff the approach of tyrrany in every tainted breeze."

It was not strange that the American colonists had ceased to look upon lawyers with suspicion, and had come to follow them as leaders. The questions of vital importance now were legal questions. Were the colonists taxable by a government in which they had no representation? Were their persons and property seizable under general warrants? Could the legality of an arrest be inquired into under the writ of *habeas corpus*? These questions involved a knowledge not only of the constitutional history of the mother country, but of judicial precedents and of legal principles. *Magna Charta*, indeed, provided in express terms that no freeman should be taken or imprisoned, unless by the lawful judgment of his peers, or by the law of the land; but it was the writ of *habeas corpus*, framed by the liberty-loving lawyers, and "rendered more actively remedial by the statute of Charles II.," that gave life and vigor to that famous clause of the Great Charter. In Old England, it was John Hampden, the lawyer, who refused to pay the twenty shillings of ship money, because it was a tax imposed without consent of Parliament. True, the decision of the Royal judges was against him, but his sturdy defence of the legal rights of every subject made him the most popular man in England and cost King Charles his head. In New England, a century later, it was James Otis, the lawyer, who attacked the writs of assistance with such a wealth of legal learning, and such fiery eloquence, that the scene in which he figured in the old town house in Boston has been entitled the opening scene of the American Revolution. Such an impression did it make on John Adams, that he declared American independence was then and there born. According to this authority, our great republic had its genesis not at Concord nor Bunker Hill, nor yet in Independence Hall at Philadelphia; but in a lawyer's speech in a lawsuit.

Although the noble part played by lawyers in the great crises of constitutional history, among English-speaking peoples, is generally acknowledged, the popular view of our

profession, in matters of private law, is, I fear, still that of Richard De Bury and of Napoleon. We are charged with a disposition to protract litigation and to twist "the meaning of statutes to the purpose of our own machinations:" with living upon the quarrels of others and even stirring up disputes to promote our own interests. In short, we are deemed the parasites of society, living upon values but creating none. Is this a correct view? If it were, we ought to find those nations the happiest, the most peaceful and orderly, the richest and the most progressive, in which the legal parasites are the fewest. But the actual state of things is just the opposite of this. China has no lawyers. In Russia the proportion of lawyers to population is one to thirty-one thousand. In Germany, one to eighty-seven hundred; in France, one to forty-one hundred; in England, one to eleven hundred; in the United States, one to seven hundred. These statistics would tend to show that the legal profession is a blessing rather than an evil; that its members are not parasites of society, but, on the other hand, if not direct creators of values, that they are the protectors of those engaged in production.

Let us examine the function of the lawyer with a view of discovering whether this interpretation of the statistics is correct. In 1670, William Penn and his companion, Mead, were tried at the Old Bailey, London, for an unlawful assembly. The officers of the crown used every possible effort to secure a conviction, and the judge openly threatened the jurors with punishment, if they dared to bring in a verdict of acquittal. Notwithstanding all this pressure, Penn and Mead were acquitted. Thereupon, the jury were fined by the judge for bringing in a verdict which he declared was against the evidence. One of the jurors, named Bushel, refused to pay the fine, was committed to prison, and sued out a writ of *habeas corpus*. Upon the return of this writ, a question of the highest importance was presented by the counsel for Bushel. For more than four centuries, *Magna Charta* had affirmed that no freeman should be taken or imprisoned, or disseized, or outlawed or banished, unless by the lawful judgment of his peers. But, if the judge could fine the jury for bringing in a verdict, which was contrary to his notion of the evidence, trial by jury was a mere mockery. Not by his peers, not by an impartial jury of the vicinage, but by a judge appointed by the crown and removable at pleasure, was the guilt or innocence of a person to be decided. A matter of vital importance to the liberty of the citizen, it will be seen, was involved in this law suit of Bushel. Keenly was it appreciated and nobly was it argued by his counsel. The fine and the imprisonment were declared illegal, and "from that time forth the invaluable doctrine, that a jury in the discharge of their duty are responsible only to God and their consciences, has never been shaken or impeached." Not for Bushel only was the victory won by his lawyers, but for every juryman, and for every person accused of crime, wherever English common law obtains.

So Hampden's refusal to pay the twenty shillings of ship money and his defence of the suit brought for its collection, were not prompted solely by selfish considerations. He and his counsel were contending for a great principle. If the King had lawful authority to levy a tax of twenty shillings on John Hampden, then all private property in England was held subject to the monarch's will. Not whether the individual Hampden should pay a petty tax, but whether any property holder in the realm could deem his ownership secure, was the issue. Royal judges obeyed their master's commands and condemned Hampden to pay. Appeal was taken to the nation. Monarch and servile judges were overthrown. The rule of law contended for by Hampden was reëstablished, and has ever since remained a car-

dinal principle of English jurisprudence on both sides of the Atlantic.

The breadth and sweep of a great legal principle are admirably illustrated by the Dartmouth College case. By the Federal Constitution the States are forbidden to pass any law impairing the obligation of contracts. Did the charter of Dartmouth College contain a contract between the State and the College corporation, was the important question in the case. Dartmouth College was the only corporation which was a party to the action; but by the decision of that one law suit, the rights of every private corporation were to be affected. Indeed, Sir Henry Maine pointed out, some years ago, that the decision was important to all English investors in American corporate securities, and "that the construction of the constitutional provision by the famous case had secured full play to the economic forces by which the achievement of cultivating the soil of the American continent has been performed; that it is the bulwark of American individualism against socialistic fantasy; that until it is got rid of, communistic schemes have as much prospect of obtaining practical realization in the United States as the vision of a cloud-cuckoo-borough to be built by the birds, between earth and sky." The far-reaching nature of the issue then before the court, was clearly discerned by Mr. Webster, leading counsel for the college. At the close of an argument, perhaps one of the most brilliant and powerful ever addressed to the Supreme Court, the great advocate declared, with quivering lips and choked voice: "This, sir, is my case. It is the case, not merely of that humble institution, it is the case of every college in our land. Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work! You must extinguish, one after another, all those greater lights of science, which for more than a century have thrown their radiance over our land. It is, sir, as I have said, a small college. And yet there are those who love it." Not often does a law suit possess the sweep and breadth and far-reaching influence of the Dartmouth College case. But the vast majority of law suits contribute something towards the establishment or expansion or correction of an important legal rule. It is not given to many lawyers to act the dramatic and memorable part of Webster in that famous scene, when the wrapt attention and tearful eyes of Chief Justice Marshall and his colleagues testified that the advocate had captured the court. But it is given to every lawyer of ability and character to leave his mark on the jurisprudence of his country. The great body of our law has been built up little by little from the accretions of the countless litigations, conducted by ordinary lawyers. It is to the efforts of this profession, composed chiefly of men unknown to fame, that the liberty of the citizen, the freedom of speech and of the press, the security of private property in English speaking lands are due.

If any of my hearers, notwithstanding the evidence thus far adduced, are still disposed to hold with Napoleon, that law suits are a cancerous evil, and that the State should strive to starve lawyers rather than to encourage them, I would commend to them the careful study of a famous little book,—Ihering's *Struggle for Law*. I do not know of a more original or instructive bit of writing in the whole range of legal literature. The central doctrine of this learned jurist's thesis is, that the end of law is peace; but that this end is attained in a community in exact proportion as the legal sense of the citizen is keen, alert and fearless. The author's most striking illustration is one which we should hardly expect a German jurist to employ—the British traveler. Now we know that the Briton is not a popular personage on the

continent of Europe, especially in his capacity of tourist; for leading English statesmen have repeatedly confessed to this, during the last three years. One of the reasons for his unpopularity, strangely enough, is declared by Ihering to be worthy of unqualified praise. He contrasts the Briton with his German countrymen in Austria. "The latter, when duped by inn-keepers, hackmen and the like," he says, "shun the disagreeableness of a public controversy and pay; while the Englishman resists all such unfair exactions," with a manfulness which would make one think he was defending the laws of Old England. In case of need, he even postpones his departure, remains days in the place, and spends ten times the amount he refuses to pay. Austrians laugh at him, and cannot understand him. "It would be better," asserts the learned jurist, "if they did understand him. . . . In the few pieces of silver which the Englishman refuses and which the Austrian pays, there lies concealed more than one would think, of England and Austria; there lie concealed centuries of their political development and of their social life." If we may accept the views of this brilliant jurist, the pet saying of the Scotchman that he will have peace if he has to fight for it, is not so ludicrous as it seems. Nay, it is a fit motto for the best citizenship. When the English tourist wins his law suit against an overreaching or dishonest innkeeper or hackman, he not only vindicates his legal right, not only teaches this particular wrongdoer a wholesome lesson, but he wins exemption for himself and for his countrymen from similar improper exactions in the future. Indeed, it may be safely laid down as a general rule, that not only political liberty but every private legal right is most fully recognized and observed, in a community where it is well known that its invasion will call down upon the wrongdoer's head the heavy weight of a law suit. Let it be understood that the moment a legal right is violated, the victim will not only crave the law, but will find it easy to engage the services of a well-trained and able lawyer to enforce his petition, and the evil-minded man will think twice before deciding to violate the right. It is but natural, therefore, that in this republic, where the legal profession is, as it was in Burke's day, more numerous and influential than in any other land, we have the most orderly, peaceful and thriving population of the world.

Not long ago, I listened to an interesting address before the Society of Medical Jurisprudence, by Dr. Woodbury, Street Cleaning Commissioner of New York City, on the sanitary condition of the metropolis. He displayed numerous pictures showing the bacteria infesting the atmosphere in various parts of the town. I was selfish enough to observe with pleasure, that the air surrounding Columbia University, on Morningside Heights, was comparatively free from these pests. On the east side, however, where we have the most densely populated square mile of territory, I believe, to be found anywhere on the earth's surface, the air was laden with bacteria, the density of microbes rivalling the density of mankind. I was astounded and alarmed. My fancy pictured all kinds of diseases generating in the infested district and spreading havoc through the length and breadth of Manhattan Island.

At the close of the address, the theme was thrown open for discussion. One of the first to speak was a lawyer, who declared that as he listened to Dr. Woodbury and looked at the pictures, he wondered how human life could survive on that East Side. He was born in that region, he assured us, and had seemed to flourish in that atmosphere. As I looked at his genial, smiling face, and at his robust and well-padded physique, I began to thank God and take courage. Following him came a learned doctor, who assured us that all bacteria were not disease-breeders; that many forms were wholly beneficial. Instead

of generating pestilence, they prevent it. Their function is to change decaying substances into new and useful forms, to transmute by their subtle alchemy poisons into cordials, the refuse of slums into food-producing forces. And now my fears were quite allayed.

If the lawyer is a pest, he is of the kind on which East Side humanity flourishes. He is of the beneficial, not of the destructive sort. Recall the statistics of lawyers in the leading nations. China has none. Russia has a lawyer for every thirty-one thousand inhabitants; Germany, one to eighty-seven hundred; France, one to forty-one hundred; England, one to eleven hundred; the United States, one to seven hundred. Bear in mind the history of the legal profession and its function in developing legal rules, and I am sure that you will agree with me that if the lawyer is a pest, he is a liberty-loving, freedom-promoting, property-guarding pest.

At present, there are many signs that popular opinion of the legal profession is veering to quite the opposite direction from that which it formerly held, and that the lawyer is hereafter to be deemed not so much a pest as a panacea.

The submission of the momentous coal-strike controversy to the judgement of a commission has given a mighty impetus to the policy of arbitration for all great disputes between labor and capital. Do not understand me to prophesy that a labor millenium has been ushered in. But I am quite willing to venture the assertion that more and more, as the years pass, will arbitration supplant violence as a means of composing differences between employers and employed. Strikes and picketing on the one side as well as lockouts and military repression on the other, are to give way either to voluntary or compulsory arbitration, which is but another mode of expression for the friendly or the forced law suit. In every such proceeding, the prominent figure, the leading spirit, the dominant influence must be that of the lawyer.

Another indication of the growing influence of the legal profession is found in the numerous world-propositions now before the public. Not only have we international copyright, an international postal union, and countless international conferences, but we have an international banking corporation chartered by Connecticut to do business anywhere in the world. Not to be outdone by her smaller neighbor, Massachusetts has entertained a proposition for a world legislature. I do not understand that the General Court of that State deemed itself competent to set up a legislature for the world; but it did receive a petition for the establishment of a parliament of nations, declared it meritorious, and commended it to favorable action by our Federal Congress. Moreover, this proposition has received the support of the American Peace Society as well as of a multitude of individual petitioners.

If such a legislature is launched, can anyone doubt that it will be manned chiefly by lawyers? Our national experience furnishes a fair indication of what may be expected in this regard. One-half of our representatives in Congress, two-thirds of our senators and three-fourths of our Presidents have been members of the legal profession.

Moreover, a world-legislature would necessitate a world judiciary and a retinue of lawyers specially trained in this new jurisprudence. With the opening of such outlets for legal talents and acquirements, our law schools will multiply and enlarge more rapidly even than during the past decade.

It may be that such a scheme is but a figment of the imagination; or, at least, that it is not to be realized in our age; that if "a parliament of man, a federation of the world" is to be achieved, "And the kindly earth to slumber, lapt in universal law," such achievement is yet afar off. But the mere fact that

the scheme has been formulated; has been presented to and commended by one of the most practical legislatures of our land, shows at least the trend of modern thought and aspiration.

More significant than any of the indications yet referred to, is the changed attitude of the Russian Czar towards lawyers, with its vast train of consequences. Peter the Great, with the true instinct of a despot, distrusted lawyers and gloried in having put to death one of the two who had dared to invade his realm. Nicholas II., child of a later and freer age, an arbitrary monarch, indeed, but one of a generous, humane and lofty nature, turns to the legal profession and to international courts as the only hope of the modern army-and-navy-burdened world. He invites the leading nations to a conference, with a view of devising a scheme for the settlement of international disputes, not by the arbitrament of arms, but by the peaceful processes of the law. The tribunal of The Hague is the result. True it is, that the outcome as yet, has fallen far below the Czar's ideal; that almost straightway two of the most progressive participants in this conference flouted the tribunal and resorted to "the good old rule . . . the simple plan, That they should take who have the power, And they should keep who can."

But last year chronicled a striking victory for international arbitration. Had The Hague conference never been held, do you think Venezuela could have been saved from European conquest, except by the armed intervention of the United States? Germany, Britain and Italy had "entered into a league to make war and seize the assets of Venezuela" as security for their claims against her. "It was the so-called international conscience that caused the failure of this coercive scheme and brought about a peaceable and orderly form of settlement." But what was the fulcrum upon which international conscience fixed its lever for lifting this controversy out of the word-old grooves of war? Was it not the fact that provision had been made by The Hague Conference for a tribunal, before which such controversies could be brought; where both sides could be heard and where a judicial decision could be secured? Never before has the force of international public opinion been so patent or so potent. The new German navy was spoiling for a fight; it was made well nigh frantic by its first taste of blood, but it was compelled to stay its rage and withdraw into non-combatant waters. A triple alliance, before which the petty South American republic was helpless, bowed to the demands of aroused Christendom, and consented to refer the validity of claims as well as the order of their payment to arbitration. It is true that the questions in dispute between Venezuela and her sister nations do not affect the political existence or the territorial integrity of either. They are not of vital importance. They are questions eminently fit to be determined by disinterested umpires. No one, I suppose, imagines that the triple allies, or any of the powers which have been active in securing a peaceful outcome of the Venezuelan imbroglio, are about to beat their iron-clads into plough-shares, or their Gatlings into pruning-hooks, or that the era has dawned when "nation shall not lift up sword against nation, neither shall they learn war any more." But do we not all feel that the dawning of that era is brought nearer by every event of this kind?

This victory for arbitration gave Mr. Carnegie a splendid opportunity to unburden himself of more of his superfluous wealth. Straightway he offered a million and a half dollars to the government of Holland for the erection of a suitable building for the Tribunal of The Hague, and added two hundred thousand for the equipment of a law library. Of course, the gift was accepted, and the handsome Dutch city is to be still further beautified by a "Temple of Peace." No

more important gift than this has ever been made by the great capitalist, who has been fittingly styled the "Star-Spangled Scotchman." He is as ardent a believer in international arbitration as is Nicholas II.; and far more free to act in accordance with that belief. This harmony of thought and purpose between the greatest captain of armies and the greatest captain of industry is a happy harbinger for the world at large; and especially for the legal profession. This Temple of Peace is to be the permanent abiding place of International Justice. To places on its judgment seat will be summoned from time to time great jurists, whose duty it will be not simply to apply existing rules of law, but to evolve new ones. They will find themselves often in the situation of Lord Mansfield, when engaged in laying the foundations of the modern commercial law of England. We are told that when a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it. It was this habit which called forth the oft-quoted eulogium of his disciple and colleague, Mr. Justice Buller: "The great study has been," said he, "to find some certain general principle not only to rule the particular case under consideration, but to serve as a guide to the future. Most of us have heard these principles stated and reasoned upon, enlarged and explained, till we have been lost in admiration of the strength and stretch of the human understanding." Let us hope that we may have many Mansfields on the judgment-seat at The Hague.

The bar of this international court will necessarily include the flower of the legal profession. Its members will not be called upon to expend their energies upon points of procedure, nor will their success depend upon their memory of the narrow and technical rules of their national legal systems. They will be picked men, those who have won distinction in their respective States, for their ability to discover the true principle underlying a great controversy, and their capacity to elucidate and apply it. Their anxiety to win a particular case will be tempered, as in every private law suit it should be tempered, by a prevision of the ultimate results of victory. They will appreciate, as the ordinary lawyer often fails to appreciate, that present success is dearly bought, if it is gained by winning the court to the adoption of an unsound doctrine. Such a doctrine will surely return to plague the inventor. The bar of this court will illustrate very clearly the part played by the legal profession everywhere, in the development of law. As new cases arise, new rules must be formulated for their decision. The true greatness of a lawyer will be seen to consist in the accuracy with which he apprehends, and the lucidity and persuasiveness with which he expounds the principles of justice and the considerations of public policy, which must form the basis of every enduring rule of law.

Undoubtedly, it will take more than a generation; it may require more than a century to realize the ideal of the Czar and the iron master millionaire. But the mere existence of this Temple of Peace will exercise a potent influence. The fact that its portals are to be always open for contending nations; that their strifes may here be settled in the calm and peaceful atmosphere of a judicial tribunal; that the victories to be won shall be those of the intellect and the moral sense, all this will tend to strengthen the demand for international arbitration. More and more the law suit shall supersede the battle as a means of settling controversies between States, as it has almost wholly supplanted it in the adjustment of disputes between individuals. The lawyer shall take the place of the warrior as the champion of contending nations. The jurist, rather than the monarch shall speak the final word in international disputes.

JUSTIFIABLE LARCENY.

By Joseph M. Sullivan,
Of the Boston Bar.

PRAYERS were over at the old meeting house at Swanee, and Brudder Rastus, in behalf of "De respectable colored people," in a dignified tone requested the congregation to tarry awhile, for business of the utmost importance was to be transacted. One of their members had fallen from grace, and it was no case of justifiable larceny, either.

"Deahly belubbed bredren," began Brudder Rastus, "gib me your attenshun and I will read you de charge of un-Christian conduct preferred against Joe Hamilton by de Deacon Ebenezer Johnson. Ebenezer Johnson says that 'Joe Hamilton, widout any provocashun assaulted him seriously an' stole two bushels of potatoes from his, Deacon Johnson's potato patch.' To dis charge Brudder Joe Hamilton says he am not guilty, and for trial puts himself upon de assembly, of which assembly you are. If he am guilty, you will say so; if he am not guilty, you will say so, an' no more.

"Gentlemen and ladies of dis here congregation, hearken to de evidence."

" 'Brudder Johnson, sworn, deposed as follows: One dark night last month I had occashun to visit my potato garden and I saw Brudder Joe Hamilton digging my potatoes, and, widout any leave on my part, proceeded to help himself. I remonstrated wid him, an' tol' him that stealing taters was as mean as stealing sheep. Widout any furder ceremony he proceeded to knock me down an' grievously assault me.

" 'Joe Hamilton, being called, deposed: Bredren of the congregation, de flour was getting low an' my meal bag almost empty, an' I didn't know what to do. Deahly belubbed bredren, we read in the Holy Scriptures that de ravens fed ole 'Lizeh, I think, yes, Elizah, the prophet in de desert, but de critters won't feed me. I sat on de fence an' waited for de pesky birds to come along, and, really, bredren, dem birds hab got above dat business. They came an' paid no attenshun to me at all. Now, I knowed the way to Brudder Johnson's tater patch, an' although the night was dark 'twas easy nuff to find. I had just finished, an' filled my basket when up I looked and saw Brudder Johnson's ole hoss pistol apointing straight at me. Self-preservation being de first law ob nature, I had to knock him down, an' I think you'll agree wid me that dis case am a very trifling one, and ought not to be brought before the church.' "

Brudder Rastus: "Ladies and gemmen and all contrite and repentant sinners, are you ready for de question? Is de delinquent Brudder Hamilton guilty or not guilty?"

Congregation: "Guilty of justifiable larceny."

Brudder Rastus: "Brudder Hamilton, listen to de sentence of de church as de deacons hab awarded it. De deacons sentence you to be suspended from church membership for de term of three months, to fast from eating chicken an' watermelon as a penance for the further term of six months, and you stand so suspended until you perform de above sentence and penance."

"De chair awaits a motion."

Motion to adjourn made by Brudder Johnson.

Carried.

PROBLEMS OF SURVIVORSHIP.

By Clarke Butler Whittier,

Professor in the Law School of the University of Chicago.

As a result of the Iroquois Theatre disaster in Chicago the courts will likely be called upon to decide some or all of the interesting legal problems that arise when property or other rights depend on the order in which two or more persons died, there being no evidence sufficient to establish it. Did A survive B so that a devise from B to A took effect with the result that A's heirs and not B's are entitled to the property? Did the first beneficiary of a policy of insurance survive the insured so as to become entitled to the amount due on the policy, which would then pass to his next of kin; or did he pre-decease the insured, in which event the second beneficiary would have the greater right? These are examples of the questions that arise. How does our law deal with them? Some things are settled, but much is yet in considerable doubt.

Despite occasional statements to the contrary,[1] it is established that there is no presumption that any particular person or persons survived the others.[2] It is equally clear that if there is sufficient evidence to establish the actual order of survivorship as a fact, its use is legitimate and desirable.[3] In such a case the difficulties are avoided. It may also be considered certain today that there is no presumption that all died at once.[4] Nor is there any presumption even that there was *a* survivor.[5] There is thus no presumption of any kind, and in the absence of sufficient evidence, the common law regards the order of death or survivorship as unascertainable.

What then is to be done? Two statements are common in the books. The first is that "survivorship in such a case must be proved by the party asserting it."[6] The other is that "property rights are disposed of as if death occurred at the same time."[7] This

[1] Colvin *v.* Procurator-General, 1 Hagg. Ec. 92 (1827); Moehring *v.* Mitchell, 1 Barb. Ch. 264 (1846).

[2] Most of the cases are collected in a note in 51 Lawyers' Reports Annotated, 863. The following may be added: Robinson *v.* Gallier, Fed. Cas. 11,951 (Cir. Ct. for La. 1875); Faul *v.* Hulick, 18 D. C. App. 9 (1901) overruled by the next case; Y. W. C. Home *v.* French, 187 U. S. 401, 23 Sup. Ct. 184 (1903); Middeke *v.* Balder, 198 Ill. 590, 594, 64 N. E. 1002 (1902); U. S. C. Co. *v.* Kacer, 169 Mo. 301, 310, 69 S. W. 370 (1902); Supreme Council *v.* Kacer, 96 Mo. Ap. 93, 69 S. W. 671 (1902); Southwell *v.* Gray, 72 N. Y. Supp. 342 (1901); Hildebrandt *v.* Ames, 27 Tex. Civ. Ap. 377, 380, 66 S. W. 131 (1901); Screwmen's Ass'n. *v.* Whitridge, 95 Tex. 539, 68 S. W. 501 (1902); Males *v.* Woodmen, 70 S. W. 108 (Tex. Civ. Ap. 1902). In California and Louisiana, however, presumptions similar to those of the civil law exist. Hollister *v.* Cordero, 76 Calif. 649, 18 Pac. 855 (1888); Succession of Laugles, 105 La. An. 39, 29 So. 739 (1901). In both States the presumptions apply only in the absence of evidence sufficient to solve the question.

[3] Broughton *v.* Randall, Cro. Eliz. 502 (1596); Sillick *v.* Booth, 1 Y. & C. (Ch.) 117, 124, 126 (1842); Underwood *v.* Wing, 19 Beav. 459 (1854) affirmed 4 De. G. M. & G. 633 (1855); Robinson *v.* Gallier, Fed. Cas. 11,951 (Cir. Ct. for La. 1875); Smith *v.* Croom, 7, Fla. 81,144 ff. (1857); Coye *v.* Leach, 8 Met. 371, 374 (Mass. 1844); Broome *v.* Duncan, 29 So. 394 (Miss. 1901); Pell *v.* Ball, Chev. Eq. 99 (S. C. 1840); Ehle's Will, 73 Wis. 445, 41 N. W. 627 (1889).

[4] Underwood *v.* Wing, 4 De. G. M. & G. 633, 660 (1855); Wing *v.* Augrave, 8 H. L. Cas. 183, 199 (1860); Middeke *v.* Balder, 198 Ill. 590, 594, 64 N. E. 1002 (1902); Russell *v.* Hallet, 23 Kan. 276, 278 (1880); Johnson *v.* Merithew, 80 Me. 111, 116, 13 At. 132 (1888); Cowman *v.* Rogers, 73 Md. 403, 21 At. 64 (1891); Newell *v.* Nichols, 75 N. Y. 78 (1878). The early English cases *contra* are overruled by Wing *v.* Augrave *supra*. They are the following: Wright *v.* Netherwood, 2 Salk. 593, n. (a), 2 Phillim 266, n. (c) (1793); Taylor *v.* Diplock, 2 Phillim. 261, 280 (1815); Goods of Selwyn, 3 Hagg. Ec. 748 (1831); Satterthwaite *v.* Powell, 1 Curt. Ec. 705 (1838). Perhaps all these cases could have been, and at least two of them were, put also on other grounds. The *dictum* in Kansas Co. *v.* Miller, 2 Col. (Ter.) 442, 464 (1874) *contra* is clearly erroneous.

[5] Newell *v.* Nichols, 75 N. Y. 78, 88 (1878).

[6] Cowman *v.* Rogers, 73 Md. 403, 406, 21 At. 64 (1891).

[7] Newell *v.* Nichols, 75 N. Y. 78, 89 (1878).

second suggestion, though exceedingly common, the writer believes untenable. It is merely a rule of thumb, which, while accomplishing the result the courts desire in the majority of instances, fails completely in certain cases. In Hartshorne *v.* Wilkins[1] the testator gave certain property to trustees on trust to dispose of the income in certain ways during the life of his daughter Louisa, and after her decease to transfer the fund to such of her children "as should then be living," and "*should his said daughter Louisa die without leaving any lawful issue,*" then to transfer the fund to certain nieces. The daughter Louisa and all her children perished in the same disaster and there was no evidence sufficient to establish survivorship. It was held *inter alia* that the nieces could not take "because their title depended on the daughter dying without leaving any lawful issue, and there is no proof whether she did or did not so die, that is, whether her children did or did not survive her.[2] Now if the property should have been disposed of as if all died at once, the decision was erroneous. In that event the daughter would have died "without leaving any lawful issue," and the condition on which, according to the court, the title of the nieces depended would have been performed. In United States Casualty Company *v.* Kacer[3] the policy was payable to "Miss Florence Yocum, daughter, if surviving, if not, to the legal representatives of the insured."[4] Miss Yocum and her father, the insured, were lost in the same catastrophe. The court held that *her* representatives were entitled to the proceeds of the policy. The argument of the court was that "a policy payable to a named beneficiary, but with such words of divestiture, creates a vested interest in the policy, and the money to arise out of it, in the primary beneficiary, coupled with a condition subsequent, that the vested interest shall be divested out of the primary beneficiary and his representatives and vested in the alternative beneficiary upon the happening of the subsequent contingency of the primary beneficiary dying before the assured."[5] The last clause stating the contingency was evidently a slip. The contingency provided for in the policy is not pre-decease but non-survival.[6] The representatives of the insured then had to show non-survival of the first beneficiary.[7] But if it is to be taken that the insured and the beneficiary died at the same moment, non-survival is the basis on which the case should have been decided. The result would be that the interest of the first beneficiary terminated and the representatives of the insured were entitled as the alternative beneficiary.[8] Not only are these cases inconsistent with the supposition of synchronous death, but all the cases in which that notion was applied are equally explicable on other grounds which harmonize all the authorities. Again, as is occasionally noticed by courts adopting this suggestion of simultaneous death, to hold that property is disposed of as if all died at once is in substance to adopt a presumption to that effect.[9] Is it not absurd to say that there is no such presumption and yet to settle all questions

[1] 2 Old. 276 (Nova Scotia, 1866).

[2] *Ib.* 288.

[3] 169 Mo. 301, 69 S. W. 370 (1902).

[4] *Ib.* 307.

[5] *Ib.* 316-17.

[6] See the words of the policy quoted above.

[7] The burden of proof was cast on the alternative beneficiary (p. 317) in accordance with the general rule that the happening of a condition subsequent must be proved by the one who asserts that the vested interest has terminated. For a more complete explanation of this see *infra* p. 22.

[8] One may possibly dissent from one or both of these cases on the ground that the court laid too much emphasis on technicalities in construing the will in the one case and the contract in the other, and overlooked the real intention of the parties. See *infra* pp. 13, 22. But that does not weaken their authority on the point now under consideration. Suppose the conditions which the courts found had been so expressed that no possible construction could avoid recognizing them, were the decisions wrong because the court did not take it that death was simultaneous in such cases?

[9] Newell *v.* Nichols, 75 N. Y. 78, 90; Russell *v.* Hallett, 23 Kan. 276, 278.

that arise as if there were? On the whole, it seems that a supposition of death at the same time is not the true solution.

We are thrown back then upon the statement that survivorship must be proved by the party asserting it. This means, of course, that he who has the burden of proof of survivorship must, in the absence of sufficient evidence, fail. This seems unobjectionable, but the difficulty is to apply it. Who has the burden of proof? The problems that are created by the inability to fix the order of death are so various that it would not have been surprising had it proved impossible to find any one principle that would cover all the cases. But keeping in mind that the exact legal effect of the facts to which it is to be applied must be understood, and that it is subject to possible modification by other established rules concerning the burden of proof, there is a single principle which explains at least all the cases which have thus far arisen. In the largest class of cases the parties are claiming title to property, the ownership of which depends upon who, of those who perished, survived the longest. These constitute about three-fourths of all. Another class of cases consists of contests over the proceeds of insurance policies, the insured and the beneficiaries, or some of them, having succumbed in the same calamity. The other instances are scattering. The general principle can best be stated in connection with the first class of cases mentioned above. Its application to the others will be apparent.

Beginning then with what we may call the descent cases, our largest class, what is the rule for determining the burden of proof which governs them? Here each party wishes to make it appear that the person from whom he would have derived title survived. The solution that the authorities indicate may be stated thus: *Any claimant has the burden of establishing survivorship so far as it is essential to his own chain of title, but he need not establish it for the purpose of disproving his opponent's chain of title, even though the latter, if established, would be superior to his own.* An examination of some of the cases will make the meaning and application of this statement clear.

There are a number of cases of intestacy where the intestate and his nearest of kin perished together, and the contest is between the representatives of these nearest of kin and more remote kindred who are entitled to the property if the nearest of kin did not succeed to it. *In re* Green's Settlement[1] is a simple case of this kind. The property in question was included in a marriage settlement, the trusts of which were exhausted. The wife was settlor of this property, and so there was a resulting trust for her estate. She, with her husband and only child, were killed in the Indian mutiny. The husband died first. Survivorship as between mother and child was undetermined. If the mother survived, her next of kin were entitled, and they were the petitioners; if the child survived, its next of kin were entitled, and one of the respondents was its administrator. The next of kin of the mother succeeded. The decision accords fully with our rule. The next of kin of the mother take directly from her. Their chain of title is complete in showing her death and their own survivorship. They need not disprove the survivorship of the child in order to overthrow their opponent's chain of title. The representatives of the child, on the other hand, do not make out their chain of title without proving its survivorship. Upon them then rests the burden of proof of that fact. As the court said, " . . . a person claiming under such a title must go further and must shew not only that the person through whom he claims would have been entitled if he survived, but that he actually was entitled, or, in

[1] L. R. 1 Eq. 288 (1865).

other words, that he did survive." All the authorities accord with this conclusion.[1]

The next group of cases is composed of contests between parties representing devisees or legatees under a will on the one side and heirs or next of kin on the other. The testator and a devisee having died in the same disaster, the question whether the heirs of the testator or those of the devisee now have title plainly turns on which of the decedents survived. The burden of proof is determined by exactly the same principle as that governing the last case. The heirs of the testator take their title directly from him. He is the person who had title at the time of the disaster. Their chain of title, therefore, is made out by showing his death and their own survivorship. The heirs of the devisee, however, to make out their chain of title, require the survivorship of the devisee. On them, therefore, rests the burden of proof.[2]

But a more complex problem was presented in Wing *v.* Augrave.[3] It is the leading case in another group which may now be considered. A wife, under a power given her by her father's will, appointed the property to her husband, "and in case my said husband shall die in my lifetime" to William Wing. Husband and wife died in the same shipwreck. In default of appointment, the father's will gave the property to certain persons represented by Augrave. It was held that these persons were entitled to the property as against Wing, because he could not show performance of the condition on which his title depended, namely, the death of the husband in the wife's lifetime.[4] Disregarding the condition for a moment, how would the case be decided? Wing was an appointee under the power, and the prior appointments had failed. The other party was entitled in default of appointment. The position is the same as if Wing were the last substituted devisee under a will and his opponents the heirs of the testator. As between such parties, the devisee would of course succeed. Both take directly from the testator. Neither has to prove survivorship of anyone except himself. Neither need show non-survival of prior devisees as that is no part of either's chain of title. Each makes out his own title; but a devisee under a valid devise of course has precedence over the heirs at law. So in the absence of the express condition Wing would have had the better case. Subsequent devisees, all

[1] Satterthwaite *v.* Powell, 1 Curt. Ec. 705 (1838): Goods of Wheeler, 31 L. J. (P. M. & A.) 40 (1861): Smith *v.* Croom, 7 Fla. 81, 141 (1857) *semble; In re* Hall, 9 Cent. Law. Jour. 381 (Ill. Prob. 1879); Russell *v.* Hallett, 23 Kan. 276 (1880); Johnson *v.* Merithew, 80 Me. 111, 116, 13 At. 132 (1888); Coye *v.* Leach, 8 Met. 371, 375 (Mass. 1844); Stinde *v.* Goodrich, 3 Red. Sur. 87, 89 (N. Y. 1877); Ehle's Will, 73 Wis. 445, 41 N. W. 627 (1889). So far as Colvin *v.* Procurator-General, 1 Hagg. Ec. 92 (1827) is authority for anything it is also in accord.

[2] Taylor *v.* Diplock, 2 Phillim. 261, 280 (1815): Goods of Murray, 1 Curt. Ec. 596 (1837); Goods of Carmichael, 32 L. J. (P. M. & A.) 70 (1863); *In re* Lewes' Trusts, L. R. 6 Ch. 356 (1871); Goods of Alston, [1892] P. 142; Robinson *v.* Gallier, Fed. Cas. 11,951 (Cir. Ct. for La. 1875); Matter of Ridgeway, 4 Red. Sur. 226 (N. Y. 1880); *In re* Willbor, 20 R. I. 126, 37 At. 634 (1897); Pell *v.* Ball, Chev. Eq. 99, 108 (S. C. 1840) *semble*. Faul *v.* Hulick, 18 D. C. App. 9, 28 (1901) is *contra* but was reversed on appeal, Y. W. C. Home *v.* French, 187 U. S. 401, 23 Sup. Ct. 184 (1902).

[3] 8 H. L. Cas. 183 (1860).

[4] An interesting feature of this case was that by the *husband's* will Wing was given the husband's estate if the wife died first. So whether husband or wife survived, Wing was entitled to all the property of both, subject, in case the husband survived, to the payment of his debts. The court thought that Wing could not join these alternate claims. A criticism of this position is found in 12 *Harvard Law Review* 45. One readily agrees with the learned writer's view that several persons who among them have title under all possible contingencies, though no one can prove that the contingency on which he would have title occurred, should be permitted to pool their interests and so recover. *In re* Rhodes, L. R. 36 Ch. Div. 586 (1887) seems to countenance such a proceeding. Newell *v.* Nicholls, 75 N. Y. 78, *semble contra*, simply follows Wing *v.* Augrave. But the writer of the article fails to notice that in Wing *v.* Augrave there were three possible states of fact: survivorship of the wife, survivorship of the husband, simultaneous death. In the last event Wing would have no rights at all. Neither the condition in the wife's will nor that in the husband's would be performed. The joining of his two claims would not therefore, have helped Wing. The same consideration made joinder useless in Newell *v.* Nicholls, *supra*.

prior devises having failed, have title as against the heirs at law.

We may turn now to a consideration of the condition. The House of Lords, Lord Chancellor Campbell dissenting, interpreted it literally. They thought that while one might reasonably conclude that the testatrix wished Wing to have the property in case her husband did not live to need it, yet the prior death of the husband was the only circumstance she had in mind by which the husband would cease to need it; that for this circumstance and it alone she provided; that she did not provide for the contingencies of simultaneous death or inability to determine which died first; and that therefore, one of those possibilities having happened, there was an intestacy. Exactly contrary to this conclusion of the highest court in England is that of the highest tribunal in America. In Young Women's Christian Home *v.* French[1] it appeared that the testatrix disposed of her property first for the benefit of her husband and son, adding, "In the event of my becoming the survivor of both my husband . . . and of my son . . . I then give . . . all my property . . . to the Young Women's Christian Home. . . . " The husband died first. The testatrix and her son were lost together in a steamer collision. The representatives of the mother, the representatives of the son, and the Home claimed the property. The court held that the Home had the title. The representatives of the son rightly failed, since they claimed through the son, and so had the burden of establishing his survivorship, which they could not sustain. The great question was, could the Home make out its title as against the representatives of the mother (the testatrix), who would clearly be entitled if all the gifts failed. It could no more prove the performance of the condition, literally interpreted, than could Wing in Wing *v.* Augrave. The Supreme Court,[2] however, thought that the condition should not be taken literally; that from the whole will it appeared that the testatrix intended to dispose of all her property; that her intention, "failing husband and son, was that the Home should take;" and that a literal interpretation would defeat this intention. They held that whether "my becoming the survivor" or "neither surviving me" was used to express the condition was immaterial; that since property is disposed of as if "each survived as to his own property"[3] in this case it must go as if the testatrix survived, namely, to the Home. One agreeing with this result might wish to express the reasons somewhat differently. Possibly the condition could be construed to mean "in case the gifts to my husband and son fail." The Home could prove the happening of that event. Language may be given the meaning it had to the testatrix. But granting the position of the House of Lords[4] that these words provided only for the contingency of prior death, it may yet be thought that the intention to dispose of all her property, and to the Home if neither husband nor son could take, adequately provides for the contingencies of simultaneous death or inability to determine the order of death. According to this intention, which is expressed by the will as a whole, the Home clearly was entitled. As the Supreme Court said: "This is not a case of supplying something omitted by oversight, but of intention sufficiently expressed to be carried out on the actual state of facts."[5] The argument of Lord Chancellor Campbell, dissenting, in Wing *v.* Augrave and of Chief Justice Fuller in Young Women's Christian Home *v.* French seem to the writer unanswerable. The English courts have, of course, followed Wing *v.* Augrave.[6] In the United States the

[1] 187 U. S. 401, 23 Sup. Ct. 184 (1902).

[2] Unanimously. Chief Justice Fuller rendered the opinion.

[3] This is only a way of saying that property is disposed of as if all died at once. This sort of statement has been dealt with, *supra*, pp. 237-238.

[4] In Wing *v.* Augrave, *supra*.

[5] 187 U. S. 401, 418.

[6] The first English case looked in the direction of a

authorities support Y. W. C. Home *v.* French.[1]

But it is to be noticed that this conflict of authority concerns merely the true construction to be given documents like those in question. The divergence of opinion is as to how far an intention gathered from the whole document may modify or supplement a particular phrase. Granting the English construction, the rule for determining the burden of proof remains the same. Performance of the condition is one of the links in the devisee's chain of title. Though all prior devises fail, he is not entitled unless the condition was performed. He must, therefore, show survivorship of the testatrix to make out his own case.

A number of cases involve the application of the same rule as between substituted devisees or legatees under a will and the representatives of those for whom they are substituted, the latter having deceased in the same catastrophe as the testator. The representatives of the prior beneficiaries fail because they cannot sustain the burden cast upon them of showing that the party through whom they make title survived.[2] There is no difference whether one party to the contest is the heirs or next of kin, claiming that all gifts have failed, or merely a later devisee or legatee, claiming that all gifts prior to his have failed. The same principle governs.

There are a few other cases, the facts of which differ from those in any of the groups already discussed, but which involve the same principle. Two joint-tenants die together. The representatives of each fail to prove survivorship. It seems that the *jus accrescendi* fails for lack of this proof and the heirs or next of kin of each succeeds to his interest.[3] Husband and wife perish in the same disaster, the wife owning choses-in-action which the husband had not reduced to possession. His representatives must prove his survival to make out their claim of title and therefore, on failure to do so, the representatives of the wife are entitled.[4] In Wollaston *v.* Berkeley[5] the final *cestui* of a trust was the survivor of A and B. Survivorship could not be proven. A resulting trust for the settler was declared.[6] An intention to dispose of the property fully could be gathered here just as in Y. W. C. Home *v.* French, but this fails of effect because the person who was to have the property if other dispositions failed cannot be determined. Durrant *v.* Friend[7] is an interesting

liberal construction, Goods of Selwyn, 3 Hagg. Ec. 748 (1832). But in Underwood *v.* Wing, 4 De G. M. & G. 633 (1855) the strict view was taken. This was adopted in Wing *v.* Augrave and has since prevailed. Elliott *v.* Smith, 22 Ch. Div. 236 (1882); Goods of Alston, [1892] P. 142; Hartshorne *v.* Wilkins, 2 Old. 276 (Nova Scotia, 1866). It is perhaps worth remarking on account of the very common opinion to the contrary, that Underwood *v.* Wing and Wing *v.* Augrave are entirely distinct cases, though arising out of the same facts. Mrs. Underwood represented the next of kin of a surviving daughter of the deceased husband and wife and was claiming all the property except that over which the wife had merely a power of appointment. This latter property was claimed by Mr. Augrave representing the devisees, in default of appointment by the wife, nominated by her father's will.

[1] Middeke *v.* Balder, 198 Ill. 590, 601, 64 N. E. 1002 (1902); Fuller *v.* Linzee, 135 Mass. 468 (1883); Supreme Council *v.* Kacer, 96 Mo. Ap. 63, 69 S. W. 671, 675 (1902) *semble*; Newell *v.* Nichols, 75 N. Y. 78 (1878); Southwell *v.* Gray, 72 N. Y. Supp. 342, 346 (1901); Paden *v.* Briscoe, 81 Tex. 536, 569, 17 S. W. 42 (1891); Hildebrandt *v.* Ames, 27 Tex. Civ. Ap. 377, 66 S. W. 131 (1901); Males *v.* Woodmen, 70 S. W. 108 (Tex. Civ. Ap. 1902). The majority of these cases involved the construction of insurance contracts, not wills. But it is more difficult to give a liberal construction to a contract than to a will since two parties join in making it and it must appear that both used the words in the non-literal sense. These insurance contract cases will be considered as a class later. They are cited here merely on the question of construction.

[2] Mason *v.* Mason, 1 Meriv. 308 (1816); Goods of Selwyn, 3 Hagg. Ec. 748 (1832); Barnett *v.* Tugwell, 31 Beav. 232, 240 (1862); Y. W. C. Home *v.* French, 187 U. S. 401, 23 Sup. Ct. 184 (1902) reversing Faul *v.* Hulick, 18 D. C. App. 9 (1901); Newell *v.* Nichols, 75 N. Y. 78 (1878). In Elliott *v.* Smith, 22 Ch. Div. 236 (1882) the substituted devisees failed because of the strict construction of a condition in the devise to them.

[3] Bradshaw *v.* Toulmin, 2 Dick. 633 (1784). Lord Thurlow said the heirs of each one would take as joint-tenants with the heirs of the other. Possibly they should be considered tenants-in-common. 2 Blackstone, Com. 180.

[4] Scrutton *v.* Patillo, L. R. 19 Eq. 369 (1875). Moehring *v.* Mitchell, 1 Barb. Ch. 264 (N. Y. 1846) is *contra*.

[5] L. R. 2 Ch. Div. 213 (1876).

[6] Could the representatives of A and B have joined their interests and excluded the resulting trust? See p. 12 n. 1.

[7] 5 De G. & S. 343 (1851).

case. A testator insured certain personal property which he had bequeathed to A. The testator and *the property* were lost together. There was no evidence as to which survived. It was held that the proceeds of the insurance belonged to the estate and not to A. A's title to the property and so to the insurance money depended on its surviving the testator. This cast the burden of proof upon him and caused his failure. There are a few cases where the oath required of one applying for administration was changed to meet the difficulty of inability to establish the order of death.[1] In a couple of cases the same principle was applied, although the failure to establish the order of death arose from the absence of one of the parties at the time of his death and the lack of information as to just when it occurred.[2]

One state of facts raises a problem which it seems neither the rule herein suggested nor any other known to the law will adequately solve. *In re* Rhodes[3] presented this difficulty. An owner of property left home and was unheard of for seven years. Administration to his estate was granted, the presumption of death having arisen. The question was, who were his next of kin. At the beginning of the seven years a mother and two brothers were his nearest kindred. Their representatives claimed the property. At the end of the seven years the six children of one of the brothers were the next of kin, the mother and both brothers having died. The children also claimed the property. There was no evidence concerning the time during the seven years that the absentee died. The learned justice followed the more common rule that there is no presumption on that point. He admitted his inability to decide between the claimants and suggested a compromise. The representatives of the mother and brothers could not prove that these persons survived the absent owner. They therefore failed. But why did not the children succeed? They would take directly from the deceased and could prove their survivorship. The answer depends on when they were born, which did not appear. If they were born after the deceased was last heard of it seems that they would properly fail. They could not prove that they were in existence when he died. Surely this must be essential.[4] But even if the children were born before the deceased left home, it is not certain that they would be held entitled. There was a period at the beginning of the seven years extending until the mother and brothers were all dead, during which the children were not next of kin. If the deceased died in that period they would have no rights. Possibly this would exclude them.[5] At all events under the first supposi-

[1] Goods of Wainwright, 1 Sw. & Tr. 257 (1858); Goods of Ewart, 1 Sw. & Tr. 258 (1859); Goods of Grinstead, 21 L. T. n. s. 731 (1870); Goods of Johnson, 78 L. T. n. s. 85 (1897).

[2] *In re* Phene's Trusts, L. R. 5 Ch. 139 (1809); Schaub *v.* Griffin, 36 At. 443 (Md. 1897).

In Wright *v.* Netherwood, 2 Salk. 593 n. (a), 2 Phillim. 266 n. (c) (1793) the question involved was the application of the rule that the burden of proof of revocation of a will is on the contestant. Williams, Executors, 7th Am. Ed. I, 210, 214; Page, Wills, s.448. This rule supplanted the ordinary principle which we have seen applies generally. Kansas Co. *v.* Miller, 2 Colo. 442, 464 (Ter. 1874) was an action for wrongful death. The wife, who would be the one primarily entitled to sue, died in the same railway accident with her husband. The result of the case is perfectly consistent with the principle governing the burden of proof which the other cases establish. It seems unnecessary to work this out in detail here.

[3] L. R. 36 Ch. Div. 586 (1887).

[4] Even proof that the claimant was in existence during the entire seven years and so must have been alive at the time of the death of the absentee owner, coupled with the fact that he survived, would not, necessarily entitle him to recover. Under the supposition just discussed in the text, neither the mother and brothers nor the children could make out their title. Could a cousin who lived during the entire period of absence have a better claim? At no time during the seven years would he be next of kin.

[5] When property is given to next of kin surviving a disaster as against nearer kindred who perished in it, the question is not the same. There, though it is highly probable that the kindred who died did not succumb at the first moment of the period of danger, yet it is possible that they did. It is therefore at least possible that the surviving kindred were the next of kin throughout the entire period during which the deceased may have passed away.

tion, that they were born after the deceased was last heard of, we have a case where neither party can show title to the property under the law as it now stands. Some provision should be made to enable a court to decide such a case. A presumption that death occurred at the end of the first year of the seven, to be applicable only when without it the rights of the parties could not be determined, would perhaps be as reasonable as any and afford a solution. It would not be open to the objection urged in Nepean *v.* Knight[1] against a presumption of death at the end of the seven years: namely, that "if you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day" and thus the reason for the presumption of death would cease. Moreover, it would not be so obviously contrary to the fact as a presumption of death on the first day of the seven years.

We have left for consideration the insurance contract cases. We may dispose first of those in which it appeared that the insured had reserved the right to change the beneficiary. In such a contract the beneficiary gets no interest until the death of the insured.[2] This makes them perfectly analogous to cases arising concerning wills. Each claimant must prove his own chain of title but no more. The representatives of any beneficiary that perished in the same disaster with the insured will fail. They will be unable to prove the survival of the person through whom they claim. The first party who can establish his own chain of title succeeds.[3]

But where no right to change the beneficiary is reserved the problem is complicated by the fact that either by statute or judicial decision it is almost universal law that the beneficiary gets a vested interest in the contract the moment it is made.[4] This materially alters the situation. Suppose now that the insured and beneficiary have perished together. The beneficiary and not the insured was the owner. Those claiming under the beneficiary[5] made out their chain of title by showing the death of the beneficiary and their own survivorship. The title need not be traced from the insured because it was not in the insured. Assuming this vested interest doctrine and the absence of any condition in the policy for divesting this interest, the representatives of the beneficiary are clearly entitled to the proceeds of the policy. Nor will the presence of a condition divesting the interest of the beneficiary if he pre-deceases the insured alter the result. The representatives need not establish the non-performance of this condition. On the contrary, any beneficiary substituted in the event of this divestiture, or if none such, then the representatives of the insured, must prove the performance of the condition. It is essential to their chain of title to show that ownership has passed from the primary beneficiary to them. The representatives of the first beneficiary therefore succeed.[6] But, it may be asked, why not construe this condition liberally, as in the will cases, so as to accomplish the general intention of the insured apparent from the whole policy? This, it is believed, is impossible. First, granting that there is

[1] 2 M. & W. 894 (1837).

[2] 3 Amer. & Eng. Ency. Law, 2nd. Ed. 990 ff.

[3] Middeke *v.* Balder, 198 Ill. 590, 601. 64 N. E. 1002 (1902); Supreme Council *v.* Kacer, 96 Mo. Ap. 93, 69 S. W. 671 (1902) *semble;* Southwell *v.* Gray, 72 N. Y. Supp. 342 (1901); Screwmen's Association *v.* Whitridge. 95 Tex. 539, 68 S. W. 501 (1902); Males *v.* Woodmen. 70 S. W. 108 (Tex. Civ. Ap. 1902). In all but one of these a liberal construction was given to express conditions in accordance with the principle of Y. W. C. Home *v.* French, *supra*, though without much consideration of the difficult question of construction involved. See p. 242 n. 1 *supra*.

[4] Amer. & Eng. Ency. Law, 2nd. Ed. 980 ff.

[5] Whether by assignment, will, or descent.

[6] Cowman *v.* Rogers, 73 Md. 403, 21 At. 64 (1891); U. S. C. Co. *v.* Kacer, 169 Mo. 301, 12, 69 S. W. 370 (1902).

an intention apparent to dispose of the policy fully and not to have it revert to his estate, analogous to the intention against intestacy in the will cases, it is carried out. The proceeds do not go to the estate of the insured, but to the representatives of the first beneficiary. If under the law the representatives of the husband in Wing *v.* Angrave[1] *could* have gotten the property, Wing's claim would have been greatly weakened. Intestacy would have been avoided without deciding for him. Secondly, how could the condition be construed so as to make it possible for a second beneficiary[2] to prove its performance? "Non-survival" of the first beneficiary is no easier to establish than his or her "pre-decease." "Failure of the gift to the first beneficiary" cannot be shown. This discloses the difference between this sort of case and the will cases. There failure of the gift can be shown. It can be proven that the facts are such that the representatives of the first devisee cannot get the property because of inability to sustain the burden of proof resting on them. But no such burden of proof rests on the representatives of the primary beneficiary of an insurance policy.[3] The representatives of the beneficiary can take. There is no failure of the gift. Suppose the condition be construed "on failure of the first beneficiary to take *personally* the right to the proceeds shall pass to the second." This seems to go the full length of stating the insured's intention. Yet the second beneficiary cannot show that the first did not survive long enough to take personally.

However, in Fuller *v.* Linzee[4] a subsequent claimant, the estate of the insured, succeeded. But this was because the court held that, although no right to change the beneficiary was reserved, yet the first beneficiary got no vested interest. This of course is contrary to the general doctrine already stated. It, however, excites one's sympathies and seems to accomplish the aim of a husband in taking out a policy, payable to his wife and in case she died before him to his children, better than the other doctrine. If the policy creates no vested interest, the case is exactly the same as the will case, both as to burden of proof and the propriety and possibility of construing the condition liberally.[5]

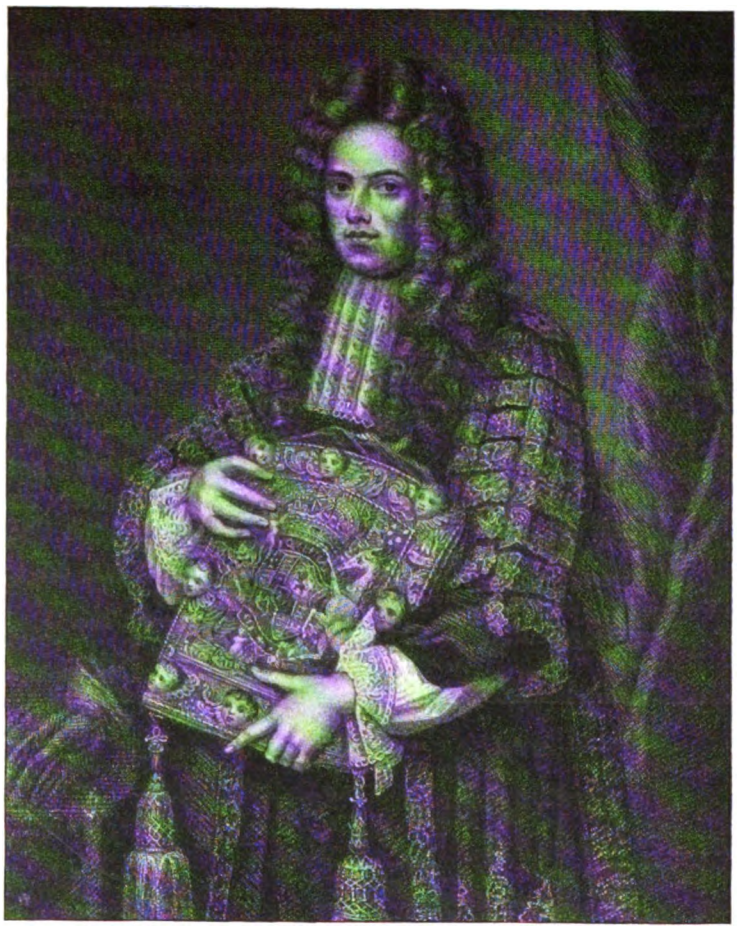
[1] 8 H. L. Cas. 183.

[2] Any claimant other than the first beneficiary, has of course the same burden as to this condition as the second beneficiary.

[3] As explained *supra* p. 244.

[4] 135 Mass. 468 (1883).

[5] Hildebrandt *v.* Ames, 27 Tex. Civ. Ap. 377, 66 S.W. 311 (1901) is in accord with Fuller *v.* Linzee, *supra*.



JOHN, FIRST LORD SOMERS.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

IV.

By Van Vechten Veeder,

Of the New York Bar.

TO the frightful excesses of the Stuart reign the Revolution put an end. James' chancellor was safely lodged in the Tower and his chief justice in Newgate. With Lord Chief Justice Holt at the head of the criminal bench, and a body of associates selected for their eminent qualifications alone, the administration of justice was to receive a new significance in the minds of the people. Parliament soon removed the anomalous and disgraceful conditions under which judicial murder had been accomplished with expedition and without resistance. It was enacted that every person indicted for treason should have the assistance of counsel; that he should be furnished with a copy of the indictment and a list of the freeholders from among whom the jury was to be taken; that witnesses for the defendant should be sworn, and their attendance enforced, if necessary, by process.

Even before the concession of these decent privileges, we have an admirable illustration of what was possible without them under a humane administration.

The spirit of the new time is shown by the trial of Lord Preston and his fellow Jacobite conspirators for treason in 1691 (12 St. Tr. 646). John Somers, the solicitor general, prosecuted with marked moderation. "I never did think," he said, "that it was the part of any who were of counsel for the king to aggrave the crime of the prisoners, or to put false colors on the evidence." Chief Justice Holt's conduct was faultless. Lord Preston constantly interrupted the charge to the jury. "Interrupt me as much as you please," said Lord Holt to the prisoner, "if I do not observe right. I will assure you I will do you no wrong willingly." At the conclusion of the summing up Lord Preston sought to address the jury again. The chief justice explained to him that he should have completed his remarks before the charge, and the proceedings closed with the following dialogue:

"Lord Preston: My Lord, I beg your lordship's pardon if I give any offense."

L. C. J. Holt: "No, my lord, you give me no offense at all; but your lordship is not right in the course of proceedings. I acquaint you with it, not by way of reproof, but by way of information."

"Lord Preston: Then I hope the gentlemen of the jury will consider that all that is alleged against me is but presumption. My life and fortune, my posterity and reputation, are all at stake. I leave all to the jury's consideration; and the God of Heaven direct them!"

"L. C. J. Holt: If you go on thus to reflect upon the court, you will make the court to reflect upon you. The jury hear how the evidence has been stated; I think it has been done very impartially, and without any severity to you. Why should you think we would press the evidence further than it ought to go against you? You are a stranger to most of us, and I am sure we do not desire your life; but still we must take care that justice be done to the government and the kingdom, as well as to any particular person, and evidence that is given must have its due weight and consideration."

The prisoners themselves were impressed by the fairness of the prosecution. "I would not mislead the jury, I'll assure you," said Lord Holt to Preston. "No, my lord," re-

plied Preston. "I see it well enough that your lordship would not." "Whatever my fate may be," said Ashton, "I cannot but own that I have had a fair trial for my life." The evidence was clear, however, and the prisoners were convicted.

the government was informed before the plot was ripe, and all the leading conspirators were apprehended. One by one they were brought to trial before Chief Justice Holt, convicted and executed. (12 St. Tr. 1378; 13 *ib.* 1, 406.) The treasonable and murderous

SIR BARTHOLOMEW SHOWER.

Soon after the death of the queen the Assassination Plot was planned by Robert Charnock and his associates. This conspiracy involved not only the assassination of the king, but an open insurrection to be supported by a foreign army. Fortunately

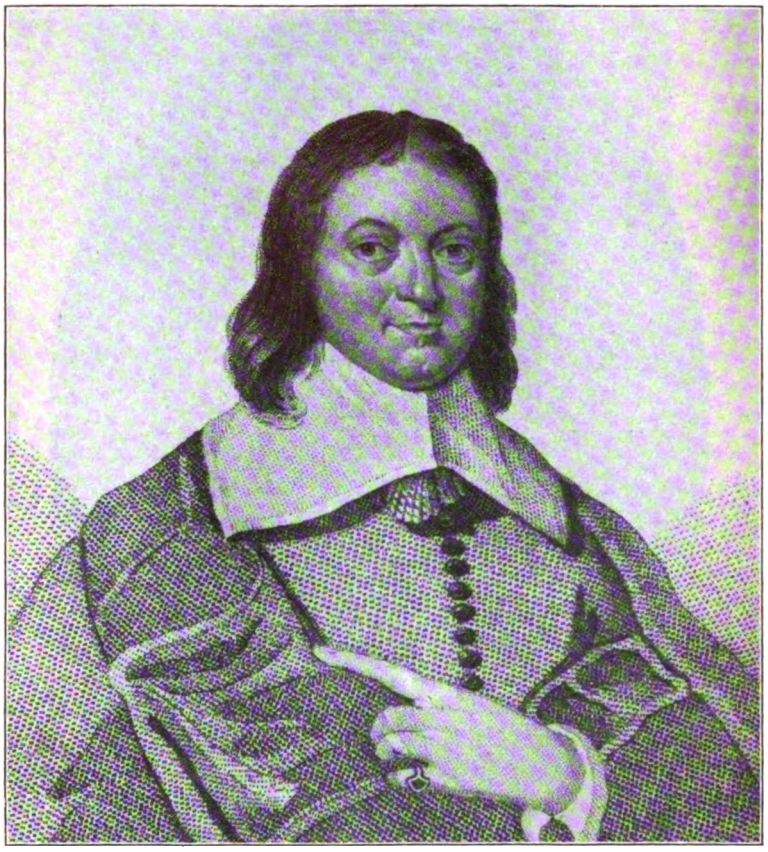
conspiracy was fully proved, and the justice of their condemnation cannot be gainsaid. One feature of these trials is, however, worthy of mention. Charnock, the foremost conspirator, together with King and Keys, were put on trial March 11, 1706, and Freind

and Parkyns followed shortly afterwards. The new act regulating the procedure of treason trials was not effective until March 25th. All the prisoners arraigned before the latter date asked for counsel or requested a continuance of their trial until they should be able to avail themselves of the new act. But the judges could not relax the law, and it. Charnock, indeed, showed presence of mind and good judgment, and made as good a defense as counsel could have made for him; but the trial of Freind was a strong illustration of the injustice of forcing an ignorant and helpless prisoner to defend his life against experienced lawyers. He was so ignorant of history as to believe that the

LORD CHIEF JUSTICE HOLT.

the attorney general would not postpone the trials. The real fault would seem to have been with the government in pressing the cases for trial. The prisoners would have gained nothing by delay, and if, as the act had virtually conceded, the old procedure gave an unfair advantage to the crown, it was unseemly in the government, under such circumstances, to avail themselves of statute of treasons, passed in the reign of Edward III., provided that no papist should be a witness, and insisted on having the whole act read from beginning to end. Parkyns, the last prisoner tried under the old procedure, would have escaped in consequence of an error by the solicitor general, if it had not been for the acumen of his junior, William Cowper. Rockwood was the first

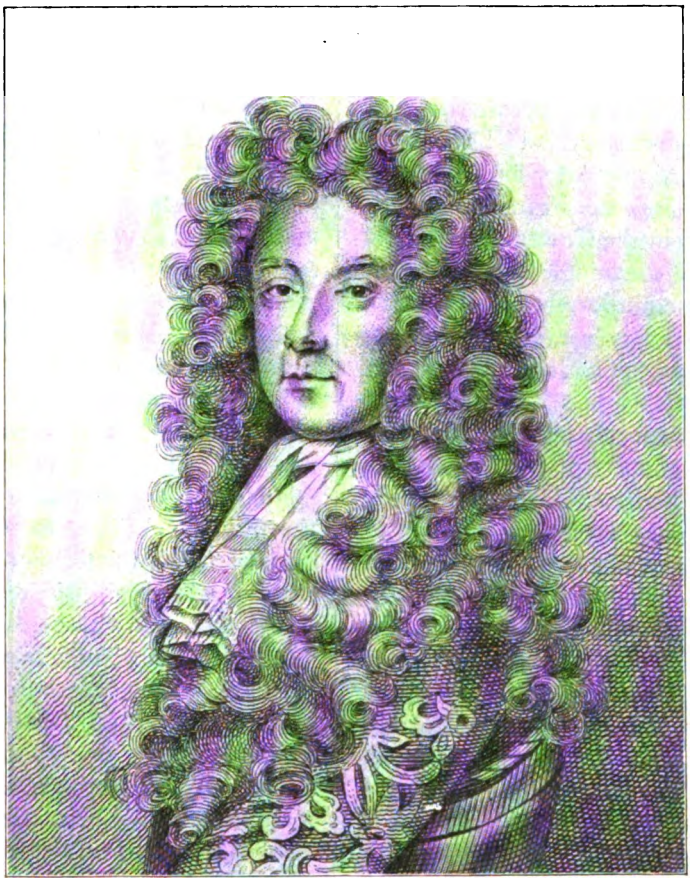
prisoner tried in accordance with the provisions of the new act. He was defended by Sir Bartholomew Shower. Shower's servility in the prior reign had given him the significant nickname of "manhunter," and he set about his task with disgusting obsequiousness. "If your lordship pleases," he said in opening, "we have a doubt or two to propose to your lordship in respect of the trial this day; but before I offer it, we beg your favor for a word in behalf of ourselves. My lord, we are assigned of counsel in pursuance of an act of Parliament, and we hope that nothing which we shall say in defense of our clients shall be imputed to ourselves. I thought it would have been a reflection upon the government and your lordships' justice if, being assigned, we should have refused to appear; it would have been a publication to the world that we distrusted your candor towards us in our future practice upon other occasions. But, my lord, there can be no reason for such a fear; I am sure I have none; for we must acknowledge, we who have been practisers at this bar especially, that there was never a reign or government within the memory of man, wherein such indulgence, such easiness of temper, hath been shown from the court to counsel, as there always hath been in this." It is a relief to find Lord Holt interrupting this fulsome introduction with, "Look ye, Sir Bartholomew Shower, go on with your objections; let us hear what you have to say."



RICHARD GRAHAM, VISCOUNT PRESTON.

As a matter of fact there was little to say, and the remaining prisoners were speedily convicted.

Under the rigid censorship of the press which was still in force a class of half-starved and fanatical Jacobin libelers pursued their vocation with the secrecy and cunning of counterfeiters. Their scurrilous publications were disseminated by trusted agents in a hundred surreptitious ways. Some were sent out by the post; thousands were often scattered broadcast at night on Fleet street; others were thrust under doorsteps or dropped on the tables at coffee houses. To this nefarious class belonged William Anderton. His place was located by a messenger of the press, and a search disclosed some of the most frantic of Jacobin libels. The government determined to make an example of Anderton, and he was brought to trial on a charge of treason (12 St. Tr. 1240). From the very brief report of the case it does not appear that any issue was made upon the scope of the charge. But there is grave doubt of the legality of his hasty and severe condemnation.



SIR JOHN FENWICK.

Sir John Fenwick was the last person to suffer death in England by act of attainder (13 St. Tr. 538). His connection with the Assassination Plot had long been known,

but he had managed to evade arrest, and in concealment his fertile brain conceived a plan to escape the fate of his friends. Two witnessess were necessary to convict him. It had already appeared at the trial of his accomplices that there were in fact only two persons, Porter and Goodman, who could prove his guilt. Fenwick was safe, therefore, if he could put either of these men out of the way. He first attempted to persuade Porter to abscond, but was unsuccessful. Porter and Goodman appeared against him before the grand jury, and he was indicted for high treason. After an unsuccessful attempt to escape to France, Fenwick was safely lodged in the Tower. Cunningly inducing delay by meaningless confessions, he managed to communicate with his friends, who now exerted every nerve to get Goodman out of the way. The latter was finally cornered by Fenwick's desperate emissaries, and offered the choice between absconding and receiving an annuity of £500, or having his throat cut on the spot. He was not long in deciding, and was promptly escorted to France. When, therefore, the government was ready to proceed with Fenwick's trial, they discovered to their consternation that it was too late. But the government was determined that Fenwick should not escape the consequences of his great crime merely because he had added to it the offense of bribing witnesses to suppress the evidence of his guilt. It was decided to proceed against him by an act of attainder. On the hearing on this bill, which lasted three days, Fenwick was represented by counsel. Porter testified to the treasonable conspiracy. By testimony which would have been inadmissible in a court of law, the plan and purpose of Goodman's disappearance were made plain. Goodman's sworn confession was put in evidence. Some of the grand jurymen who had found the indictment against Fenwick testified to Goodman's statement before them, and their testimony was supported by the evidence of jurymen who had convicted another conspirator. This was the case before the House. The long debate that followed was one of the ablest discussions to be found in Parliamentary records. Every man of note took part, but the brunt of the argument was sustained by Cowper and Montague for the Whigs, and by Harcourt and Seymour among the Tories. The two-witness rule in treason cases was elaborately discussed. The Tory orators claimed for it an eternal obligation; it was part of the law of nature and of God. "Caiaphas and his Sanhedrim were ready enough to set up the plea of expediency for a violation of justice; they said—and we have heard such things said—'We must slay this man, or the Romans will come and take away our place and nation.' Yet even Caiaphas and his Sanhedrim, in that foulest act of judicial murder, did not venture to set aside the sacred law which required two witnesses." "An eternal law!" replied Montague. "Where was this eternal law before the reign of Edward the Sixth? Where is it now, except in statutes which relate only to one very small class of offenses? If these texts from the Pentateuch and these precedents from the practice of the Sanhedrim prove anything, they prove the whole criminal jurisprudence of the realm to be a mass of injustice and impiety. One witness is sufficient to convict a murderer, a burglar, a highwayman, an incendiary, a ravisher. Nay, there are cases of high treason in which only one witness is required. One witness can send to Tyburn a gang of clippers and coiners. Are you, then, prepared to say that the whole law of evidence, according to which men have during ages been tried in this country for offences against life and property, is vicious and ought to be remodelled? If you shrink from saying this, you must admit that we are now proposing to dispense, not with a divine ordinance of universal and perpetual obligation, but simply with an English rule of

procedure, which applies to not more than two or three crimes, which has not been in force a hundred and fifty years, which derives all its authority from an act of Parliament, and which may therefore be by another act abrogated or suspended without offense to God or men." In the end, the bill passed both Houses by narrow margins, and on January 28, 1697, Fenwick was beheaded.

THE TRIAL OF MAXIMILIAN.

The State's Charges and His Defence.

By Rupert Sargent Holland,

Of the Philadelphia Bar.

STUDENTS of constitutional law must seek far to find a case involving so many and such curious points of law as those discussed, but unfortunately never decided, in the trial of the Emperor Maximilian of Mexico, in the year of grace 1867. That the difficulties of the situation were tremendous cannot for a moment be denied; how far real or seemingly real obstacles should interfere with the administration of constitutional justice is a question as old as constitutions themselves, and likely to prove as lasting. Senor Romero, representing the Mexican government at Washington, set forth the more pertinent of these difficulties in a letter to the Honorable Hiram Barney, of New York, under date of May 31, 1867, in which he says:

"I have perused with interest your remarks about the way in which we ought to treat the enemies of Mexico. I do not know what disposition President Juarez will make of Maximilian, but I am afraid that if he is allowed to go back to Europe with impunity, he will be a constant menace to the peace of Mexico. He will keep on styling himself to our shame—Emperor of Mexico; all dissatisfied Mexicans will keep up an active correspondence with him about his supposed popularity there, and even may induce him to return at some future time, as they did with Iturbide; such of them as can afford it will go over to Austria and form a Mexican court for Maximilian at Miramar, and he will have enough of them to organize a legitimate Mexican government there, as the ex-king of the Two Sicilies did at Rome, after he was expelled from Naples; some European powers will keep recognizing him as the Emperor of Mexico, as Spain did with the ex-king of the Two Sicilies; whenever we may be likely to have complications with any European nation, the first step taken by the interested party will be to intrigue with Maximilian, and to threaten us with giving aid to our lawful sovereign to recover his authority from the hands of the usurpers, if we decline to accept their terms.

"Besides, if Maximilian is pardoned and allowed to go home, nobody in Europe, I am sure, will give us credit for magnanimity, as weak nations are not supposed to be magnanimous; but, on the contrary, it will be said that we did so through fear of public opinion in Europe, and because we would not dare to treat harshly our sovereign.

"I do not mean by this to say that Maximilian must necessarily be shot; what I mean is that his power to do any further mischief in Mexico must be utterly destroyed before he is allowed to depart."

That President Juarez and his cabinet fully recognized the fearful responsibility of the

course they were to pursue cannot be doubted. They had seen the clemency accorded Jefferson Davis by the United States only a year or two before, and the respect with which the victorious French republic had treated Charles X. in 1830. The gravity of the situation, as outlined in the letter of Senor Romero, required a grave consideration. That the Mexican government having decided what it was in their opinion imperative they should do, should seek to put their purpose into execution through the medium of a trial by court of law, and the invocation of established precedents of constitutional and international law is one of those curious instances in which men try to hide a painful necessity under the cloak of imperative justice.

Maximilian was officially charged by the government and brought to trial for having, as was set forth in the original document, "offered himself as the principal instrument of the French government to carry out certain plans of intervention, which were to disturb the peace of Mexico, by means of a war, unjust in its origin, illegal in its form, disloyal and barbarous in its execution; and of arousing in Mexico the political faction that has sacrificed the national rights and interests in order to satisfy their particular interest; and which faction was already reduced and unable to offer further resistance without the assistance of foreign arms; in order to destroy the constitutional government of the nation established by the people, who were in the exercise of all its powers, and recognized by foreign nations, and even by the very powers which brought on the intervention; in order to transform the Republic into a monarchy, which would favor the policy of Napoleon III., in opposing American democracy, and favor the base interests of the French government" and its agents who had no other object in view than that "of obtaining so base and iniquitous advantages from a war which had been called a War of Intervention."

Secondly, that Maximilian had assumed to himself the supreme power without any other title than that which the armed force of the French government gave him, and a few votes which he pretended to call the national will, "notwithstanding that such pretended expression of the national will is false in form and substance, since the Mexican Republic being established as it is on the fundamental charter of 1857, the only legitimate expression of the will of the people is that which is defined in the charter and regulated by the electoral law as laid down in the same."

Thirdly, that the Archduke Maximilian had accepted voluntarily the responsibilities of an usurper of the sovereignty of a people constituted as a nation free and independent; and, fourthly, with having, with an armed force, disposed of the lives, rights and interests of the Mexican people.

Fifthly, with having made war in many cases under the direction of the commander-in-chief of the French army in Mexico, and of having consented to innumerable atrocities. Of having, in his own name engaged in a filibustering war, inviting and enlisting foreigners of all nations to join him. Of having published and carried into effect barbarous decrees authorizing the execution of all prisoners of war upon the spot; of having assumed that the person at the head of the Constitutional Republican Government had abandoned the Mexican Territory; of having attempted to sustain his false title of Emperor of Mexico after the French army had withdrawn from Mexico.

Tenthly, with having abdicated the false title of Emperor, so that it should not take effect until he was conquered; of pretending to be entitled to the consideration due to a sovereign conquered in war, when for the Mexican nation he had not been such. And, finally, with having failed to recognize the competency of the national Council of War,

but of having protested against the same.

Each accusation to which the defendant returned no answer was taken as having been proven against him. Moreover the limits of his answers were closely circumscribed by the court, and the objections of his counsel invariably overruled.

The Emperor, seeing himself already sentenced under the guise of law, was yet anxious that his true legal position should be made known to educated men in the rest of the world. For this purpose he requested Mr. Frederic Hall, an American numbered among his legal advisers, to draw up a rough brief of his defence. This was done hurriedly, and sent to many prominent Americans. It makes exceedingly interesting reading at this day, because of the very curious circumstances of its occasion, and the attempt to answer fairly, and with reference to principles of established law, charges which had so palpably been prejudged.

The defence reads:

"Whereas, Maximilian is now a prisoner in the city of Queretaro, Mexico, by virtue of his surrender to the Mexican forces, heretofore, to wit, on the 15th of May, A. D., 1867; and whereas certain criminal proceedings have been ordered on certain charges and accusations against him by the Mexican authorities; and whereas the said Maximilian has, heretofore, made his solemn protest, denying the jurisdiction of the court established for the purpose of trying him on said accusations and charges: Therefore, be it known, that the said Maximilian hereby further protests against the jurisdiction of said military court or tribunal, and against the right of any military tribunal to try him; that he is only a prisoner of war, and was so considered and declared so to be by the commander-in-chief of the Mexican Liberal Army, to whom he surrendered himself, as aforesaid.

"1st. He contends that he is only a *prisoner of war*, and that according to the generally recognized usages and rules of war, that if he is to be tried by any court, or by any law, the trial should be before a competent court, and in accordance with International Law, as understood among civilized nations; which consists of those rules of conduct which reason deducts as *consonant* to justice from the nature of the society existing among independent nations, with such definitions and modifications as has been established by general consent.

"2nd. That, according to the generally recognized usages and rules of International Law, no use of force is lawful *except* so far as it is necessary. A belligerent has therefore no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but those who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. The killing of prisoners can only be justified in those extreme cases where resistance on their part, or on the part of others who came to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing that nothing but the strongest necessity will justify such an act. (See Wheaton on the Law of Nations, Part 4th, Chapter 2d, Section 2d.)

"3rd. That, if it be lawful to try him by a court-martial, the officers who compose the court established by the order of the Mexican authorities of the Liberal Party are of too low a rank, according to the usage and rules of civilized nations.

"4th. That the *internal sovereignty* of a State does not, in any degree, depend upon the recognition by other States. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a State because it exists. Upon this principle, the Supreme Court of the United States held, in 1808, that the *internal sover-*

eignty of the United States was complete from the time they declared themselves "free, sovereign, and independent States," on the 4th of July, 1776. The same principle was recognized in the treaty with Great Britain and the United States, in 1872. (See Wheaton, Part 1st, Chapter 2nd, Section 6th.)

"5th. That he, Maximilian, was Emperor and Sovereign head of Mexico for a long time, and as such Sovereign head exercised jurisdiction and control over the greater part of the territory of Mexico.

"6th. That he, Maximilian, being the Sovereign head of Mexico, and so recognized by nearly all the nations of the world, was not and is not subject to any laws or decrees made by the President of the Liberal or any other party, although said President was recognized by the United States as President of Mexico, because said Liberal party was not the government *de facto* of Mexico, and therefore he ought not to be adjudged by any such laws or decrees.

"7th. That, according to the rules and principles of International Law, the sovereign head of a government *de facto* cannot be tried or punished for making or issuing any decree or law; and while within his own government, is not amenable to tne municipal laws of any other government or party. Therefore, Maximilian, upon legal principles, cannot be tried or condemned for issuing the decree known as the "Decree of October 3d," whatever may be the character of said decree. Every State has certain *absolute* sovereign rights; one of the most important is the right of self-preservation. This right necessarily involves all the incidental rights which are essential as means to give effect to the principal end. (See Wheaton, Part 2d, Chapter 1st, Sections 1, 2, 3.)

"8th. The law of President Juarez of 1862, January 25th, is unconstitutional. 1st. Because it was made by the President alone, who has no authority to legislate. See Mexican Constitution, Title 3d, Art. 50, under the "Division of Powers," which says that the supreme power of the federation is divided into legislative, executive, and judicial powers; that no two of said powers can ever be united in one person; and that *legislative* power shall *never* be deposited in *one individual*. Therefore *any law* not made by the *legislative* power is unconstitutional. 2d. Said law is unconstitutional, because it punishes a man with death for *political* crimes, contrary to Art. 23d, Title 1st, Section 1st.

"9th. The powers given to the President in Art. 29, Title 1st, Section 1st, Mexican Constitution, to *suspend* certain *guarantees* mentioned in said Constitution, do not extend to those guarantees that *secure* the *life* of man.

"10th. That word '*guarantees*' in the Constitution means *individual* guarantees or rights, and the power to suspend them does not give the power to the President *to make laws*. If the President can make laws, he can destroy the form of the government, and it would become monarchical rather than constitutional. If the President can exercise legislative power, he can likewise exercise judicial power, and he would then be an autocrat.

"11th. That the Congress of Mexico have no power to declare that the President can make laws. Congress cannot delegate its power to any one. If it can delegate its powers to the President, then it can do so to any other individual. Neither Congress nor the President can destroy the *form* of government by giving each other a part of their respective constitutional powers. All the powers of Congress are mentioned in Title 3d, Section 1st, Paragraph 3d, Art. 117; and there is no authority given to *delegate* the powers of Congress to the President. According to Title 6th, Art. 117, the powers which are not expressly conceded in the Constitution to the federal functionaries are understood to be reserved to the States. Art 126th, Title 6th, says that 'This Consti-

tution, the laws of the Congress of the Union which emanate from it, and all treaties made, or which may be made by the President of the Republic with the approbation of Congress, shall be the supreme law of the Union.' And, further, under the head 'Of the Inviolability of the Constitution,' Title 8th. Art. 128th, it says, 'This Constitution shall not lose its force and vigor even in time of rebellion.'

"12th. That the late or present war being a civil war, the punishment of death cannot be awarded for political crimes, according to the said Art. 23d.

"13th. That there is a distinction between an executive regulation and a law. The executive can only provide for the execution of the law; consequently a regulation or decree of the President conflicting with any existing law, or the Constitution, is void. Lares, in his Derecho Administrativo, page 19, says:—'Neither the judicial nor administrative tribunals are under any obligation to obey illegal reglamentos' (regulations). Such is the opinion of the writers on the Civil law which is in force in Mexico.

"14th. That if the said war is a foreign one, then Maximilian is not guilty of treason, as he is an Austrian.

"15th. That whilst a civil war, involving the contest for the government, continues, other States may remain indifferent spectators of the controversy, or may espouse the cause of either. The positive law of nations makes no distinction between a just and an unjust war in this respect; and the intervening State becomes entitled to all the rights of war against the opposite party. And the fact that foreign States in Europe furnished him, Maximilian, troops and munitions of war, or whether such troops rendered him aid voluntarily, does not, according to the law of nations, change his rights as a contestant in the struggle for the supremacy of government.

"16th. That the general usage of nations regards a civil war as entitling both the contending parties to all the rights of war against each other, and even as respects neutral nations. And therefore, if the decree of Juarez, of January 25th, 1862 was legally made, which punished with death prisoners of war, then Maximilian was justified in issuing the decree of October 3d, 1865, in retaliation, it being only equal in severity.

"17th. That, as a fact, the French forces under Marshal Bazaine were not subject to the control of Maximilian in regard to their military regulations, orders, and movements, as will appear by the treaty of Miramar; but only so in regard to their political government while in the Empire of Mexico.

"18th. That the said decree of October 3d, 1865, was drawn by instructions, and according to the direction of Marshal Bazaine; and that he, Maximilian, was informed that the said Marshal Bazaine enforced a part of said decree before it was signed by said Maximilian.

"19th. That at the time said Maximilian signed said decree Marshal Bazaine stated to him, Maximilian, that ex-President Juarez had positively left the territorial jurisdiction of Mexico, and that he was then in the State of Texas, in the United States of North America.

"20th. That the said Maximilian, after he left the city of Mexico for Orizaba, at the Hacienda Zoquiapam, on the 21st of October, 1866, annulled said decree; but that said annulment thereof was secreted by the said Marshal Bazaine for three weeks before the same was published, although he, the said Maximilian, sent three despatches to the city of Mexico, ordering the annulment to be published forthwith. Therefore, upon principles of natural justice and the usage of nations, the said decree of January 25th, 1862, if ever legal, should not have been enforced after the annulment of the said decree of Maximilian of October 3, 1865.

"21st. And the said Maximilian hereby declares, as a fact, that in no single instance did he ever issue an order to take the life of any particular prisoner or prisoners; but that, on the contrary, whenever he was informed that prisoners of war were in the possession of his forces, he immediately issued orders not to take the life of any of them.

"22d. And further, as one of the charges preferred against him, Maximilian, is, that of contumacy in objecting to the jurisdiction of the court ordered to try him, he avers that that is a question of law; and that in every court in civilized nations it is the legal right of a defendant to make such objections as he may be by counsel advised.

"FREDERIC HALL, of Counsel."

This curious document is, perhaps, the only known instance in which the head of a State charged with treason, and on trial for his life, has through counsel filed pleas to the jurisdiction of the trial court, and submitted a brief of his case. Maximilian undoubtedly realized the uselessness in all human probability of submitting such a form of argument to his judges, but he strongly desired that the legal strength of his position should be made known to the outside world, and left orders that the above brief should be sent to certain eminent men. This was done, and to that end the paper served its purpose; the trial of the ex-Emperor, however, proceeded undisturbed, and, as was foreseen from the beginning, Maximilian was found guilty and sentenced to be shot.

So far as I have been able to learn, Mr. Hall's brief has never been considered from the point of view of International or Civil law, nor have writers upon those subjects seen fit to deal largely with Maximilian's case. Yet it is only too evident that such cases must from time to time arise, and unless it be admitted that at all such times might alone makes right, we have no form of precedent to study. That in all such cases the party in power at the crucial moment should act as suits it best, whether it be by uncontrovertible experience, but to the student of jurisprudence such an answer must form of law or at its own sweet will, may be and without needful authorities as he was, always be of little satisfaction. Mr. Hall, drawing a form of defence, pressed for time yet contributed much to our knowledge of his peculiar case, and the vagaries of the law in Mexico. The case deserves greater attention from the student of history, the efforts of Maximilian's counsel, both Mexican and American, deserve to be resurrected from oblivion, and the charges brought and answers given to be read and re-read as a unique instance in the law of Nations.

THE ACTUAL DECISION IN THE MERGER CASE.

By BRUCE WYMAN,

Of the faculty of Law in Harvard University.

IT seldom happens that an entire change in the law is worked by force of a single decision. At least this is true, that the consequences of a great case are never to be known at the outset. And certainly this is true of the United States *v.* The Northern Securities Company *et. al.*, that no one can predict with any certainty its final scope. For the present the most that can be attempted is an inquiry into the actual decision as it stands.

The original bill was filed by the United States to restrain the violation of the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies"—the Sherman

Anti-Trust Act, so-called; the defendants were: The Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont,—all of whom were charged with entering into a combination against the provisions of the anti-trust act.

The testimony taken upon the hearing was voluminous, but perhaps the following summary will suffice. Two of the defendants, the Northern Pacific Railway and the Great Northern Railway, own lines running from the Great Lakes to the Pacific Ocean. A glance at a railroad map of the United States will show to how considerable an extent these systems are competitive from the necessity of their situation. And until 1900 there had generally been competition between them, although there had been temporary cessation at various times. In 1901, it was disclosed by various movements that a few large stockholders had virtual control of both railroads and were directing them according to concerted plans. The joint purchase of the Chicago, Burlington and Quincy Railroad, was an avowed first step toward ultimate community of interest. There followed upon this deal one of the fiercest assaults to capture a railroad from its holders in the history of the stock market; Northern Pacific sold on one day for $1000 a share. It was a drawn battle; the treaty of peace that followed after negotiation was the formation of the Northern Securities Company.

In accordance with this plan it was arranged between the individual defendants and various others not defendants to form a holding corporation to take over the most of the stock of both the Great Northern and the Northern Pacific—and to issue in exchange stock of the new company. The individuals who conceived this plan, it was proved, came to a preliminary agreement as to this general scheme. The Northern Securities Company was thereupon organized under the laws of New Jersey with a capacity to issue $400,000,000 of stock in exchange for stocks of other companies which its charter empowered it to hold. Soon after its organization this securities company acquired 96 *per cent.* of the capital stock of the Northern Pacific Company, at the rate of $115 per share, paying for this in its own capital stock at par; and 76 *per cent.* of the stock of the Great Northern Company was bought at $180 per share, payment as before being made in stock of the holding company. So much was this flotation to the mind of the market that Northern Securities was sold on the curb as high as 115.

But throughout the Northwest the merger was viewed with alarm as certain to lead to increase of rates in the end and consequently to repression of its trade. It was doubtless this widespread indignation on the part of the people most involved that led to the early beginning of the litigation and the active prosecution of the suit. The government, to be sure, was aided in advancing the suit by the act of February 11, 1903, which required the expediting of such cases upon a certificate that they are of general public importance. The Circuit Court judges decided unanimously for the government on April 10, 1903, after elaborate proceedings, Mr. Justice Thayer writing an able and comprehensive opinion.

The decision was an unpleasant surprise to many, but it was acclaimed by others. During the year that followed although contraversalists in the public prints discussed the problem with much heat as an open question, the generality of observers came to the conclusion that the Supreme Court would affirm the decree. On March 14, 1904, only the expected happened when the Supreme Court decided for the govern-

ment; even the stock market had discounted the decision with such certainty that Northern Securities stock rose from 85 to 87 during the day.

The decree as rendered is in substance as follows: Adjudging that the stock of the Northern Pacific and Great Northern companies, now held by the Securities Company, was acquired in virtue of a combination among the defendants, in restraint of trade and commerce among the several States, such as the anti-trust act denounces as illegal; enjoining the Securities Company from acquiring or attempting to acquire further stock of either of said companies, also enjoining it from voting such stock at any meeting of the stockholders of either of said railroad companies, or exercising or attempting to exercise any control, direction or supervision of influence over the acts of said companies, or either of them, by virtue of its holding such stock, enjoining the Northern Pacific and Great Northern companies, respectively, their officers, directors and agents from permitting such stock to be voted by the Northern Securities Company or any of its agents or attorneys on its behalf at any corporate election for directors, or of the case of either of said companies, and likewise enjoining them from paying any dividends to the Securities Company on account of said stock, or permitting or suffering the Securities Company to exercise any control whatsoever over the corporate acts of said companies or to direct the policy of either; and, finally, permitting the Securities Company to return and transfer to the stockholders of the Northern Pacific and Great Northern companies any and all shares of stock of those companies which it may have received from such stockholders in exchange for its own stock, or to make such transfer and assignment to such person or persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies.

This the Supreme Court now confirms with liberty to the Circuit Court to proceed to the execution of its decree as the circumstances may require. At the present moment, however, it seems improbable that any further judicial action will be required. Within a week after the decision the directorate of the Northern Securities Company have announced their intention to conform to the decree immediately. It is now proposed to return to the stockholders *pro rata* all of the holdings of the Northern Securities Company in the Northern Pacific Company and in the Great Northern Company. The capital stock of the Northern Securities Company will be thus reduced by 99 *per cent.;* and the episode will then be closed.

Thus the actual decision in the case of the United States *v.* Northern Securities Company *et. al.*, is that this particular form of consolidation of interests,—a holding corporation uniting rival corporations in such a way as to suppress possible competition between them,—is in violation of the Federal anti-trust act in that it is a combination in the form of a trust or otherwise in restraint of interstate or foreign commerce. A lawyer may not permit himself to discuss a decision of such moment until the full opinions are at hand; unless, indeed, this general comment may be made, that no radical change in the fundamental principles of the law governing the industrial organization as a whole, can follow from an opinion like this upon a special issue decided by a court evenly divided by a radical opposition of tendencies where the balance of power is held by a judge of such conservatism.

WASHINGTON LETTER.

APRIL, 1904.

SEATED in the centre of the Bench of the Supreme Court of the United States, the mere fact of position would make conspicuous the man who is at the head of the judicial branch of our government. Above his head is poised with outstretched wings an eagle—in front of him is the desk at which counsel stand—to him primarily are addressed their arguments. But were it not for these circumstances the personality of Mr. Chief Justice Fuller would attract the attention of an observer, however casual. The luxuriance of his hair is accentuated by the absolute baldness of his immediate associates; its whiteness is intensified by the sombre robe upon which it falls.

Born in Maine, his collegiate education was had at Bowdoin College. Born into a family of lawyers, the current of his inclinations flowed naturally into legal channels. He studied his profession at Harvard and practised it for a time in his native State, with both paternal and maternal uncles. Leaving in 1856, after three years of practice, he went to Chicago, where he remained, until appointed by Mr. Cleveland in 1889 as the successor of Mr. Chief Justice Waite, who had died in March of that year. He has evidenced the possession of those traits of mind and character which are essential to the successful and acceptable administration of his judicial duties. His courtesy and consideration have frequently been as oil upon the troubled waters of an attorney's embarrassment, and the attention which he devotes to the arguments of counsel tends, in a large measure, to offset the apparent indifference of other members of the Court.

The case of The Mutual Life Insurance Company of New York *v.* Eliza Maud Hill and others, defendants in error, has recently been argued and submitted to the Supreme Court of the United States for the second time. This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 19th day of October, 1895, to recover the sum of $20,000, with interest, from January 3d, 1891, claimed to be due on a policy of life insurance issued in 1896 by the plaintiff in error to one George D. Hill, the father of the defendants in error. Hill paid the first premium, but failed to pay the second or any other subsequently accruing, and ultimately surrendered his policy to the agent of the company. The company failed to comply with the provisions of the laws of the State of New York requiring the mailing of a notice to the insured of the intention of the insurer to cancel the policy, and it is mainly, if not solely, upon this ground that the defendants base their right to a recovery. The case was submitted to a jury, and a verdict was accordingly rendered against the company.

The equities of the case outweight the verdict of that body of men for whom individual litigants clamor, and against whom corporations so justly inveigh.

Enter Joseph F. Smith, "President" of the Church of Jesus Christ and The Latter Day "Saints;" President also of apparently every other association and corporation doing business in the State of Utah; President, also, of five of the weaker sex, whose aggregate contribution to the already innumerable family of Smith has been, up to the present writing, forty-five.

This patriarch was induced to forego the performance of his priestly, presidential and parental duties in order that his voice might be diverted temporarily from the exposition of the words and will of Joseph Smith, Jr., —and God, and devoted to the telling of "the truth, the whole truth, and nothing but the truth," for the enlightenment of the Sen-

ate Committee on Privileges and Elections.

Liberty of conscience is, and will ever be, one of our most sacred liberties, but when the doctrines inculcated by a religion tend to induce the adherents of that religion to violate, not only the dictates of decency, but the law of the land, those doctrines are the proper subjects of investigation by judicial and semi-judicial tribunals. It is upon this theory that the Senate Committee on privileges and elections forced unwilling answers from the lips of Joseph F. Smith.

Claiming to possess powers unusual in the complement of attributes of ordinary mortals, this high priest of Mormonism displayed an inability to give categorical answers to the questions propounded to him, which would have been inexplicable in an ordinary witness, and would have been the cause of his being subjected to a rigid and disastrous cross-examination had be been a hostile, instead of a friendly witness to the other side.

Questioned in regard to historical facts concerning his church (facts with which there can be no doubt, he was, and is as familiar as a fox with his den), he would almost invariably qualify his answers by some such phrase as "I suppose," "I believe," "I think."

Claiming that the teaching of his church, in regard to the taking of "plural" wives was a Divine command, received by inspiration by his illustrious predecessor and relative, and that the recent manifesto prohibiting the further practice of that doctrine was received from the same source, he was unable, or unwilling to explain why he relied upon the former and disregarded the latter.

Less scepticism will doubtless be expressed by the average citizen concerning the "inspiration" of the latter than of the former "revelation" concerning "plural" marriages. Senator Bailey voiced a popular sentiment when he remarked during one of the sessions:

"For my part I don't have much faith in a doctrine that doesn't get a revelation commanding a change of conduct until there is a statute compelling it."

It is a singular and significant circumstance that, although the doctrine of plural marriages is not compulsory, no monogamist has ever occupied the office of "President" of the Mormon Church.

Seated beside his fellow "apostles" is the cause of this investigation. Tall, raw-boned, broad-shouldered, Reed Smoot has the appearance of a master mechanic in Sunday clothes. Contrasted with such men as Senators Burrows, Hoar, Foraker, Depew and Dubois, he gives one the impression of being out of his class. Up to the present writing he has taken little, if any, part in the proceedings. He sits quietly behind his counsel, following closely such citations as are taken from those standard works of Mormonism, which have been introduced in evidence.

What effect this investigation will have upon the status of Reed Smoot as a member of the Senate of the United States cannot be predicted, but whatever the result in this respect the legislative eyes of the body politic have been directed to a sore upon its person which requires prompt and heroic treatment. It is an occasion for the application of that injunction "physician heal thyself."

The jury in the case of the United States *v.* August W. Machen, *et al.* did not share the doubt expressed by Mr. Conrad as to the guilt of Samuel Groff, and brought in a verdict of guilty against all of the defendants. The opinion of the Court evidently coincided with that of the jury, for the motions for a new trial were overruled and the extreme penalty of the law imposed upon each defendant. The appeal, which had been noted to the Court of Appeals may be heard before the summer recess, but this does not seem probable.

ANDREW Y. BRADLEY.

The Green Bag.

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

NOTES.

IN justice to THE GREEN BAG'S accurate and able London correspondent it should be said that the statement in the "London Legal Letter" of last month that Whitaker Wright died from an appoplectic attack was in accord with the prevalent belief at the date of the "Letter." As soon as it became known, however, that Wright had died from poison, our correspondent wrote to call attention to this fact, but through oversight the correction was not made.

IRISH Magistrate (to prisoner at the bar): "Are ye guilty or not guilty?"

Prisoner: "Not guilty, sor."

Magistrate: "Thin git out of the coort. Phawt in the divil are ye doin' heere if ye're not guilty?"

IN Nevada County, California, a humdrum, shiftless fellow was found guilty by a jury of attempted burglary. Counsel had been appointed to defend him. Before pronouncing sentence, the Court put the usual question:

"Prisoner, have you anything to say why the sentence of the Court should not be imposed on you?"

"No-o, your honor, except this: I want to thank your honor for your fairness and impartiality and your square treatment. I want to thank the jury, and every member of it, for the verdict; it was according to the evidence and the law. The District Attorney did his duty all right, all right, and I want to thank him also. But, your honor, I'd like to kick the fool of a judge who admitted my lawyer to practise."

IN the Circuit Court at Lima, Ohio, the other day, Judson Harmon of Cincinnati, who was the Attorney General of the United States under President Cleveland, was trying a case with Judge John A. Doyle, of Toledo, who was formerly of the Supreme Court of Ohio.

In commenting, in his argument, on a brief which had been filed by the other side, Judge Doyle spoke of the "poetry" of it. When asked what he meant, he replied, that the Supreme Court of Ohio, when he was on that bench, used to call the lists of citations, one on each line, "the poetry." Whereupon Judge Harmon remarked that he hoped the Court always "scanned" it!

THE witness was a hard-fisted, resolute yeoman, with a bristling chin beard. "Mr. Gigson," said the attorney for the defense, "are you acquainted with the reputation of this man for truth and veracity, in the neighborhood in which he lives?"

"I reckon I am," replied the witness.

"I will ask you to state what it is."

"Well, sur, his rep'tation for truth ain't no good. His rep'tation for vrassity—well—that's diffrunt. Some says he does and some says he don't."

"Witness," interrupted the judge, "do you know the meaning of 'veracity'?"

"I reckon I do."

"What do you understand by the word?"

The witness twirled his hat in his fingers for a few moments, without replying. Then he looked up defiantly.

"I refuse to answer that question, judge," he said, "on the ground that it might discriminate me."

SINCE the death of Frederic R. Coudert any number of anecdotes showing his wit and brilliancy in repartee have come to light. Here is a pair of the best:

On one occasion, a decade ago, he was trying an admiralty case before a judge whose attainment he did not hold in the highest esteem. At a critical stage of the proceedings his opponent sought to sustain his own contention by citing the *dictum* of a British judge, Lord Chancellor Fitzgibbon.

"I am astonished," retorted Mr. Coudert, "that my friend should seek to influence your Honor's mind by quoting the views of Lord Chancellor Fitzgibbon. He ought to know, and I don't doubt he does know, that Fitzgibbon was a man of no erudition. The decisions of Fitzgibbon have never had any status to speak of with the British judiciary for a century. He was a political appointee, a mere accident. He knew very little law."

"Excuse me, Mr. Coudert," interrupted the trial judge, deferentially, "but are you not in error as to Lord Chancellor Fitzgibbon? I have read his opinions and have often wished I knew as much law as he did."

Coudert arose to his full height and looked the judge square in the eyes:

"I wish to God you did," he said.

The other story is told by a Columbia confrère, who went skating with Coudert when they were university students together.

"I noticed," said the raconteur, "that Coudert's skates were new, but I thought nothing of that. I was under the impression that he could skate admirably. This impression, however, was soon corrected. Coudert no sooner got his skates on than he sat down on the ice hard. I hurried to help him to his feet, but he would not get up. He sat where he had fallen, taking his skates off.

" 'Is this your first experience at skating?' I asked, as I assisted him.

" 'No,' he said, 'no, it's my last.' "

PROSECUTING ATTORNEY: "Was the prisoner in the habit of singing when he was alone?"

Witness: "Sure, and Oi can't say. Oi was nivir wid him whin he wor alone."

A SCOTCHMAN went to a solicitor, laid before him a case in dispute, and then asked him if he would undertake to win the suit. "Certainly," replied the solicitor, "I will readily undertake the case. We are sure to win." "Ay. Sae ye really think it's a guid case?" "Undoubtedly, my dear sir. I am prepared to guarantee you will secure a verdict in your favor." "Aweel, I'm much obleeged to ye, but I dinna think I'll gae tae law this time, for, ye ken, the case I've laid afore ye is ma opponents."—*Victoria Cross.*

IN a native irregular force raised by an Afghan chieftain the following amusing incident took place. A man was brought before the chief for stealing a shirt, and this is how the case proceeded:

Chief (to prisoner)—You are charged with stealing a shirt.

First Witness—Your honor, it was my shirt.

Second Witness—I saw him steal the shirt, your honor.

Result—Prisoner ten days for stealing the shirt; first witness ten days for not looking after the shirt better; and second witness ten days for not minding his own business.—*The Regiment.*

Apropos of examination to the credit of witnesses, a story is told of Mr. Justice Darling. A King's Counsel, cross-examining a witness, says, "You compel me to test your credibility. This is not the first time we have met." The witness did not seem to remember. "Surely it must have occurred to you during this trial that we are not unknown to one another," continued the cross-examiner. Then the judge, in his artless manner, takes up the running thus, "Do you want the jury to believe, Mr. ——, that the witness is discredited because he knows you?" One could forgive many things to Mr. Justice Darling for such a perfect bit of judicial joking.—*The Scottish Law Review.*

"YES, my work is rather confining."

"What is its nature, may I ask?"

"O, I'm a jail warden."

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

SIR:—Although the recent action of the United States Senate has made the "Panama Question" one of purely historical or academic interest, you will perhaps permit me to offer a few comments upon the tenor of the arguments of those who opposed the conduct of the administration in this matter, more particularly upon the extremely able and suggestive article by Prof. Woolsey, published in THE GREEN BAG for January.

These arguments have, generally speaking, been based upon the assumption that international questions of this character—questions affecting the interests of many nations and of future generations—must, in all cases and under all circumstances, be settled, if settled at all, by a strict adherence to certain forms and precedents which are supposed to have been fully established by international practice.

It is far from my purpose to throw any discredit upon the propriety or validity of these forms or precedents; for they are the result of a long and gradual process of development, in the absence of which we would be like a ship at sea without chart or compass. Nor is it primarily my purpose to defend the conduct of the administration in this particular instance, although I believe it to have been fully justified under the circumstances. I merely wish to call the attention of your readers to a few *genera* of facts that are generally ignored or overlooked by that class of writers and critics of which Prof. Woolsey seems to be a type.

In the first place, I would observe that international law, which is supposed to be based upon international practice or custom, is in a state of constant growth and that the critics in question do not perhaps sufficiently realize that a slavish adherence to its forms and precedents, at all times and under all circumstances, would be fatal to this development.

In the next place, a slight examination of historical precedents would suffice to show that international practice has varied a great deal in such matters as the recognition of the independence of insurgent communities. Lack of space will not permit me to enter upon such an inquiry; but it will, I think, be sufficient for my purpose simply to point to this variation in international practice in the cases of the recognition of the United States by France; of the South American Republics by England and the United States; and of Texas and Cuba by the United States.

There can, however, be no doubt as to the rule which should be followed in ordinary cases and under normal conditions. According to this rule, which was followed in the cases of the South American Republics and Texas, an insurgent community should not be recognized until "independence is established as a matter of fact." The propriety and validity of this rule in ordinary cases is admitted by President Roosevelt (See his special message to Congress on Jan. 4, 1904).

So far there is no dispute. "But," President Roosevelt continues, "like the principle from which it is derived (the principle of non-intervention) the rule is subject to exceptions, and there are clear and imperative reasons why a departure from it was justified and even required in the present instance. These reasons embrace, first, our treaty rights; second, our national interests and safety; and third, the interests of collective civilization."

The real questions at issue may thus be reduced to two. (1) Are there any such exceptions? (2) Did the Panama case constitute such an exception?

(1) That there are exceptions where, as Hall (3d edition, p. 90) says, "reasons of policy interfere to prevent strict attention to law," or which, as Lawrence (3d edition, p. 120) observes, "cannot be brought within the ordinary rules of international law," is admitted by leading authorities on international law as well as demonstrated by historical examples. (2) Did the Panama case constitute such an exception? Many of the arguments which have been advanced in defence of the conduct of the administration are clearly absurd or fallacious. It is absurd to put forth the claim that Panama had actually achieved its independence prior to recognition by the

United States, and the arguments which are based upon our treaty rights are clearly fallacious. In so far I entirely agree with the views and arguments of Prof. Woolsey and the critics. But was there no other ground upon which the conduct of the administration in this affair can be defended? I think there is.

The recognition of the independence of Panama must be justified, if at all justifiable under the circumstances, as an act of *political* intervention. It was an interference in the internal affairs of Columbia which, although not an act of war in itself, would have justified a declaration of war by Columbia against the United States.

I believe the correct, normal, everyday rule of international law to be that of non-intervention. Although history teems with instances of intervention on various grounds and under divers pretexts, the principle of non-intervention is a necessary corollary of the Grotian doctrine of the independence and equality of sovereign States. Intervention should be regarded as an altogether abnormal and exceptional procedure which can only be justified on high political or moral grounds, and which should never be resorted to except in those rare and exceptional cases where, *e. g.*, great crimes against humanity are being perpetrated (as in the case of Cuba), or where essential and permanent national or international interests of far-reaching importance are at stake (as in the case of Panama).

While the habit of obedience to law and custom is the essential condition of all true liberty, every nation as well as every individual certainly admits in practice, if not in theory, that there are occasions or circumstances which may furnish a justification for acting independently, if not in direct violation, of established law and custom. Just as there are essential and permanent interests of organized society before which the technical and vested rights of individuals and corporations must give way in particular and exceptional instances, so there are vested rights of "sovereignty," exercised by unscrupulous or incompetent "sovereigns," which must give way before the essential and permanent "interests of collective civilization."

It seems to me that critics of the type of Prof. Woolsey do not take sufficient cognizance of the fact that *beyond*, and in some respects *above*, the well-cultivated field of international law there lie vast and partially unexplored regions of national and international policy and morality where motives of interest, policy, morality, and humanity prevail. These may be in harmony with established laws and customs; but they are just as likely to be independent of, and may be directly antagonistic to, recognized rules and principles. Practical statesmen and men of the world are perhaps more apt to realize this than mere students who derive most of their knowledge from books and documents.

Might it not be pertinent for some of us to ask ourselves such questions as these? Have the statesmen who contributed most toward the building of such modern empires as those of Russia, France, Germany and Great Britain always been governed by a scrupulous regard for established forms and precedents? Does the United States thoroughly respect the sovereignty of the unstable and revolutionary governments of Spanish America? Was not—to cite but one instance—Japan recently compelled by the force of circumstances to violate the sacred neutrality of the sovereign State of Korea? To ask such questions is to answer them.

It is but too true that the doctrine of interest, necessity, or expediency has always been the plea of the tyrant and the conqueror; but the misuse or misapplication of a doctrine does not invalidate its general truth or impair its validity for those who possess the political wisdom and sense of discrimination necessary to its proper use and application. We must learn to discriminate between essential and permanent interests and temporary or selfish expediency, to distinguish between reality and pretext; to know our friends from our enemies.

Amos S. Hershey.

Indiana University,
Bloomington, Indiana, March 7, 1904.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

THE JUDICIAL DICTIONARY OF WORDS AND PHRASES JUDICIALLY INTERPRETED, to which has been added statutory Definitions. By *F. Stroud*, of Lincoln's Inn, Barrister-At-Law, Recorder of Tewkesbury. 3 Vols. Second Edition. Boston: Boston Book Company. 1903. (pp. ccxxvii+2302.)

It would perhaps be exaggeration or inaccurate—and the reviewer of a Dictionary should not use his words amiss—to term Stroud's *Judicial Dictionary* indispensable to judge, practitioner or student of the law. Generation after generation has got on indifferently well without such a work; the Bench and the Bar have kept commonplace-books in which judicial interpretations of words and phrases have been noted or jotted down for immediate use or future reference; but no systematic survey of the field of judicial interpretation was ever made with an attempt to arrange and to bring under the eye scattered and obscure meaning of words contained in the common law, statute and judgments of the courts.

Mr. Stroud undertook this collossal task and has accomplished it in a way to lay the profession under a deep and lasting obligation. In the first edition of 1890, he opens his preface with the statement that "This work in no sense competes with, nor does it cover the same ground as [the various law dictionaries]. As its name imports, it is a Dictionary of the English language (in its phrases as well as single words), so far as that language has received interpretation by the judges."

In the second paragraph Mr. Stroud expresses the sources and authorities upon which he has relied, and it cannot be better presented than in his own words. "The decisions of the English judges," he says, "are, and will remain, the central source whence this authoritative exposition must come, though Irish, Scotch, and Colonial decisions should harmonize and amplify. To formulate the English judicial interpretations from the earliest times down to the end of the nineteenth century and therewith to blend the statutory definitions of the High Court of Parliament has been the endeavor of this edition; incorporating a not inconsiderable treatment of Irish decisions, and some from Scotland and the United States."

The last clause expresses the limitations of the work—necessary limitations from an English standpoint. In this one regard the American lawyer may complain, but the criticism reaches the scope, not the workmanship.

A Dictionary is a fascinating work. A study of the definitions of words cultivates, if it does not form, the habit of exactness, and the quotations by which the meanings are illustrated often throw strange lights on the growth of usage and the change of language. If it be true, as Professor Lounsbury points out in his charming little work—*The Standard of Pronunciation in English*,—that no one standard is possible in matters of pronunciation, the fact remains that written language is capable of exact discrimination and definition. The Dictionary registers what intelligent scholarship considers correct usage. "Nor is a Dictionary a bad book to read," says Emerson, as quoted by Mr. Stroud. "There is no cant in it, no excess of explanation, and it is full of suggestion."

The study of dictionaries has always been considered an admirable if not an indispensable preparation for the orator by profession, or indeed for the man who occasionally addresses the public. The oratorical supremacy of Chatham will not be disputed. In addition to translating the classics into English, he studied the masters of English. "As a means of acquiring copiousness of diction and an exact choice of words," says Dr. Goodrich in his excellent collection of select British eloquence, "Mr. Pitt also read and

re-read the sermons of Dr. Barrow, till he knew many of them by heart. With the same view, he performed a task to which, perhaps, no other student in oratory has ever submitted. He went *twice* through the folio Dictionary of Bailey (the best before that of Johnson), examining each word attentively, dwelling on its peculiar import and modes of construction, and thus endeavoring to bring the whole range of our language completely under his control."

We may safely assume therefore that the study of an English dictionary is not only interesting, but that it has peculiar advantages and compensations to the layman. The professional man must needs know the meanings of, as well as the words for, things. "Is not the judge," says the learned Baron Martin, "bound to know the meaning of all words in the English language?" If this be so and if the judge does not derive the knowledge from descent he must by purchase, and this work is simply indispensable to him; for herein he finds not merely the word but the word as interpreted by his elders, if not betters, in solemn judgments of courts of last resort. The professional meaning he must have, and if counsel do not suggest it, he must fumble through many a volume in what often proves a painful if not wholly illusive search. The word in its technical sense is wanted; philological nicety is not required, but a knowledge of its derivation is far from useless. Sir Richard Kindersley, indeed, maintains the contrary, as quoted by Mr. Stroud, for the learned vice chancellor says: "It is not necessary to go into the derivation of words for that sort of reasoning would not assist in the administration of justice." True as a general rule, it may not be so in a particular instance. If we open Stroud (Vol. II., p. 942) at "inappreciable," we find Baron Parke taking issue with Kindersley's general statement, and the learned and fussy baron is, as always, right. "An 'inappreciable' abstraction of water from a stream, has been suggested to mean, so 'inconsiderable an amount as to be incapable of value or price' (per Talfourd, J., Embrey *v.* Owen, 20 L. J. Ex. 212; 6 Ex. 353); on which Parke, B., in delivering the judgment of the Court of Exchequer, said, 'We are not prepared to say that the learned judge was correct in the interpretation of 'inappreciable' when connected with 'quantity'; nor are we sure that he was not. The word 'unappreciable,' or 'inappreciable,' is one of a new coinage, not to be found in Johnson's Dictionary, Richardson's, or Webster's. The word 'appreciate' first appears in the edition of Johnson by Todd, in 1827, with the explantion, 'To estimate and vale.'" (Vth., per Bowen, L. J., Brunsden *v.* Humphrey, 14 A. B. D. 150.)

But conceding that Mr. Stroud's work is eminently useful, indeed indispensable, is it sufficiently full and accurate for professional purposes? It is impossible to answer this question without doing Mr. Stroud's work over again, but a careful examination of numerous passages would lead the reviewer to reply in the affirmative.

Some time ago the writer had occasion to read the case of Birmingham *v.* Allen (L. R. 6 Ch. Div. 284) in which Sir George Jessel considered *inter alia* "the right of the adjoining owner." Stroud, Vol. I., p. 34, article "adjacent," noted the reference to Birmingham *v.* Allen and other references were given under the appropriate articles: adjoin, adjoining, adjoining owner, and neighboring. This is only one of many instances that might be given. A single quotation will indicate Mr. Stroud's method and its thoroughness—the first paragraph of the heading "Keep" (Vol. II., p. 1038). "'To keep in Good Repair' pre-supposes the putting into it, and means that during the whole term the premises shall be in good repair (per Rolfe, B., Payne *v.* Haine, 16 M. & W. 546; 16 L. J. Ex. 130; Luxmore *v.* Robson, 1 B. & Ald. 584; Proudfoot *v.* Hart, 59 L. J. A. B. 389; 25 A. B. D. 42); the meaning is the same if the phrase is 'keep in repair' (cf, Crowe *v.* Crisford, 17 Bea. 507; Cooke *v.* Cholmondeley, 4 Drew. 328; Woodf. 628; Fawcett, 314): and this ruling seems applicable not only to Buildings but also to a

Road (R. *v.* Kerry Jus., Ir. Rep. 9 C. L. 471)."

A word might be said in conclusion as to the book's relation to Law Dictionaries properly so called. For example, Rawle's Bouvier is really an encyclopedia in which the various topics of the law are discussed, defined, and cases cited. It is at once a dictionary, a series of short treatises and a digest. Stroud on the contrary does not supply short treatises on substantive law, but rather aims to collate and enumerate the judicial interpretation of the various words and phrases to be found in the judgments of law courts.

In short, the Stroud is a separate and distinct work as appears from the title-page, and it neither takes nor attempts to take the place of the Law Dictionary properly so called, such as Rawle's Bouvier. It does not supplant: it supplements.

The two works are valuable, but the Stroud, in its own field, is not only unrivalled and alone, but well-nigh indispensable to members of the profession.

THE MIRROUR OF JUSTICES. By *Andrew Horne*. With an introduction by *William C. Robinson*. Washington: John Byrne and Company. 1903. (xix+337 pp.)

It is one of the problems of legal history to determine to what extent the *Mirror* is a fable. The book purports to give a picture of English law at ancient dates—indeed, as early as the reign of King Arthur. It summarizes statutes elsewhere unknown. It tells tales so strange as to be certainly mythical. It states as law that which never was deemed law by any other writer. Towards the end it gives a list of abuses of the law, that is to say, of departures, chiefly judicial, from what the author has been pleased to call law.

He will be a skilful person who will straighten out this puzzle. There is one key that goes a little way. It is found in the author's declared intention to correct abuses. It is no uncommon thing today to hear a lawyer, even a learned lawyer, say that some rule is "not law," when clearly enough what he means is that it ought not to be. Still more common is it to hear a lawyer say that some established doctrine is "not equity," when it is not at all clear what he does mean. In either case, if his words were written down they would perplex such future ages as might take his statements seriously.

Yet the *Mirror* is not cleared up, nor its author vindicated, by pointing out that to some extent the book may partake of the innocently fictitious character of Plato's *Republic* and of More's *Utopia*. The mere device of pretending that its contents, written apparently about 1289, came largely from very ancient times, is so common a mode of gaining a respectful hearing that it is comparatively innocent; but the fables carefully elaborated with fictitious and impossible names (pp. 245-251) are often of no conceivable utility, and try the patience of even the most lenient critic; and the deliberate misstatements of law are irritating beyond forgiveness.

It is true, however, that the book contains some matter which, if carefully sifted and sparingly used, may be of value. Even if the author were a romancer with not the slightest intent to tell either past or contemporary law, he was confined within the limit of all romancers—namely, the necessity of reproducing to some extent his own environment. It happens that the date of this strange book is so early as to make it worth while to take the pains necessary for extracting here and there a grain of truth. For example, what is said of the wrongs—grotesquely called perjuries—committed by escheators (pp. 36-37), may well be used as some indication of the powers contemporaneously exercised by those not very well understood officials. Such dealing with this queer book must, however, be surrounded with precautions and suspicions. Here is no tool for the 'prentice hand.

The *Mirror* has had a strange history. Lying in manuscript for at least three hundred and fifty years, with slight attention from the profession, it chanced to reach the hands of the most stupendous figure in the law, Sir Edward Coke; and he accepted it as true,

spoke respectfully of it in the prefaces to the ninth and tenth parts of the Reports, and sometimes cited it in the Institutes. It is not strange that shortly afterwards, in 1642, the Law French text was printed. In 1646 came the translation by William Hughes. Yet publicity was fatal. In 1784, Reeves, the first systematic historian of the English law, cast suspicion upon the *Mirror*. In 1832, Sir Francis Palgrave spoke more plainly. In 1895, Pollock and Maitland's History pointedly refused to rely upon it as to any matter whatsoever; and almost simultaneously, in a delicious introduction to Mr. Whittaker's revised Law French text and new translation, published by the Selden Society, Professor Maitland demolished the *Mirror* to the gratification and amusement of all readers, and left open for future investigators—though with valuable hints—the interesting but comparatively unimportant question whether Andrew Horn, the reputed author, a fishmonger otherwise of creditable record, can prove an alibi. Now, however, the *Mirror* reappears, in the familiar translation by William Hughes, and in a new place, the Legal Classic Series, beside Glanville, Britton, and Littleton; and thus the queer old book—whether romance, blunder, falsehood, or jest—now stands in a worshipful company; but not even the present editor's good-natured introduction indicates that any one has ever considered it a classic, and in truth it is simply a dangerous curiosity.

A Manual of the Business Corporation Law of Massachusetts By *Charles N. Harris* and *Grosvenor Calkins*. Boston: Little, Brown, and Company. 1903. (xl +253 pp.)

This volume deserves, and doubtless will occupy, a place on the shelves of Massachusetts lawyers beside Smith's *Probate Law* and Crocker's *Common Forms*; and like these last named volumes it will be a useful book of reference.

The *Manual* contains, in full, the text of the recently enacted Business Corporation Law (St. 1903, chap. 437), which modified in important particulars the statutes of the Commonwealth relating to business corporations. As a help to the construction and interpretation of this Act of 1903, the various sections are followed by notes referring to decisions bearing on former corresponding statutes, some of these notes being quite full, as, for example, that which treats of the liability of stockholders (Section 33). Certain sections of the new act will require judicial interpretation; for instance, just what are the rights of, and the limitations upon, securities-holding corporations under Clause (F) of Section 4, which section defines corporate powers? In a note to this clause the editors express the opinion that in other sections of the Act "there are implications that a corporation may hold securities," "although there is no explicit authority to that effect."

The last half of the volume is devoted to miscellaneous statutes affecting business corporations, to forms and precedents and to an excellent index.

Cyclopedia of Law and Procedure. Edited by *William Mack* and *Howard P. Nash*. Vol. X. New York: The American Law Book Company. 1904. (1370 pp.)

Volume X. is a noteworthy publication, being, in fact, a full and valuable treatise on the law of Private Corporations (except Foreign Corporations), by Judge Seymour D. Thompson. Judge Thompson's previous work—large in amount, and varied and strong in character—has placed him in the foremost rank of American law writers; and here he is dealing with a subject which is peculiarly his own,—as witness his exhaustive *Commentaries on the Law of Corporation*, now out of print.

The Decision in the "Merger Case." By *J. L. Thorndike*. Boston: Little, Brown, and Company. 1903. Paper. (36 pp.)

This is a review of the decision of the Circuit Court at St. Paul in the case of United States *v.* Northern Securities Company, 120 Fed. R. 721. The recent decision by the Supreme Court adds, rather than detracts, from the value of this strong adverse criticism.

CURRENT LEGAL ARTICLES.

In an article on "The Limitation of the Right of Appeal in Criminal Cases," in the *Harvard Law Review* for March, Nathan A. Smyth gives certain statistics relating to appeals in criminal cases in New York county during the five years, 1898-1902, and then suggest how the right of appeal should be limited. He says:

The review of the reversals, however, suggests a way by which the right of appeal may be greatly limited without going so far as to run the risk of committing substantial injustice. The fundamental theory upon which the suggestion about to be made is based, is that juries can be trusted. Our whole system is based on that theory, yet we have been far from consistent in following it. There are certain errors which may be committed in the conduct of a trial which, if juries are trustworthy, we can trust the jury to correct. There are other errors which the jury cannot be supposed to correct. The present suggestion, in a word, is to limit the right of appeal to cases where error of the second sort is committed.

No risk would be run in making it impossible to appeal on the ground that the verdict was against the weight of evidence because the jury is a more reliable tribunal than a higher court, so far as the facts are concerned. As for errors in judges' charges it is doubtful if, in cases where the testimony is *prima facie* sufficient to prove the crime, a verdict is ever unjustly influenced by such error. Juries do not convict unless they are convinced of moral guilt, and if the facts testified to make out a *prima facie* case of legal guilt, no wrong has been done by the verdict. So, too, any misconduct of the prosecuting attorney is more quickly detected and resented by the jury than by any higher court.

In two instances, however, error does substantial injustice which cannot be corrected by the jury. These are, first, where the uncontradicted evidence for the People does not prove a crime under the law. The conviction in such a case indicates the jury's belief that the acts charged as a crime were done by the defendant—the jury is bound by the court's ruling that those acts constitute a crime against the law. The second case is where a defendant is wrongfully prevented from introducing evidence in his own behalf. He has not been given a fair chance to present his side of the case, and the jury are bound to consider only what he has introduced, and so cannot correct the error.

Thus we come to the suggestion that appeals from convictions be limited to cases—

1. Where it is claimed that the evidence submitted by the prosecution does not establish the crime *prima facie*.

2. Where it is claimed that material evidence offered by the defendant has been improperly excluded.

3. Where the trial judge reserves some question of law which he considers doubtful and of importance.

By so limiting the appeal most of the technical loopholes for escape would be closed and the number of appeals would be reduced. At the same time opportunity would be left to remedy any substantial injustice that is at all likely to occur. If some provision could be devised whereby in the third class mentioned the State could be made to bear the whole cost of appeal in the case of poor defendants, the greatest injustice of the present system would almost entirely disappear.

"State Police Powers and Federal Property Guarantees" are the subject of an interesting paper by Charles C. Marshall in the *Columbia Law Review* for March. After pointing out the significance of the License Cases, Slavery Cases, Slaughter House Cases, and the Grain Elevator Case, as regards State Police Powers—powers which the Supreme Court "for a hundred years has exalted above the constitution itself"—Mr. Marshall finds it "difficult to discover any basis for that rigid conception of property which prevails in American life, for that widespread notion of Federal property guarantees ready to be invoked by the citizens of the States, for that conviction so deeply imbedded even in intelligent minds

that the legal conception of property is definite and permanent, that "property" existed prior to the Constitution and is superior to it, and that the principal object of that instrument is to preserve it forever in its original lines regardless of economic, social and moral changes, the exigencies of society and the very life of the State itself."

Especially timely is the writer's comment on the Northern Securities Case: Underneath the question whether the Northern Securities Merger is a violation of the Federal Anti-Trust Law, which is the question presented in the case of the United States against that company, is the more fundamental and perhaps the controlling question [assuming the absence of purely technical questions] presented in the case of the State of Minnesota against that company, whether the Northern Securities Company, under the sovereignty of New Jersey which created it, can assert rights in property localized in Minnesota, contrary to the statutes of that State enacted in the exercise of its Police Power. It is the same question which inhered in the License Cases and in the Slavery Cases—the paramount right of a State in the exercise of its Police Power to determine the status of property localized or situated within its territorial limits as against the legislation of another State, touching such property. The fugitive Slave Clause alone prevented the assertion of this right in regard to the escaped slave. The Commerce Clause alone prevented its assertion in regard to the barrel of gin, and then only as to the first sale in the original package. What shall prevent its assertion by the State of Minnesota in respect to the railways of that State? By what Federal Power or Guarantee, by what inherent Sovereign Power of her own, can New Jersey assume to determine the status of the ownership of the railways of Minnesota, and by the alchemy of modern corporation law convert real estate in Minnesota into personalty through the medium of stock certificates, and consolidate in the ownership of a New Jersey corporation the railways of Minnesota, whose consolidation the fundamental law and express policy of that State forbid?

The plea may be made, as it has been made by the Northern Securities Company in the Minnesota case, that freedom of commerce forbids that the State of Minnesota should have the power to prevent the consolidation of her State railways, in that such consolidation, necessarily affecting interstate commerce, would be interference therewith, and therefore illegal. The object of this plea is obviously to secure the consummation of the purposes of the Northern Securities Company through the nullification of the Railway Law of Minnesota. But the plea contains within itself its own refutation, for surely if the law of the State of Minnesota consolidating her railways is void because inimical to the Commerce Clause of the Federal Constitution, the Law of the State of New Jersey creating a corporation which by original purpose or subsequent accident consolidated those railways in a single ownership would be equally inimical to the Commerce Clause. . . . But argument in respect to the validity of the plea is superfluous for the Supreme Court has already spoken (in Louisville & Nashville Railway *v.* Kentucky, 161 U. S. 677).

THE interesting question "Is the British Empire Constitutionally a Nation?" is discussed by Stephen B. Stanton in the March number of the *Michigan Law Review*. After noting that the power of declaring war and of making peace, and the management of foreign relations and of the army and navy, reside wholly with England, and that imperial expenses must be met with English taxes alone, he says:

The British Empire is federal in spirit but imperial in form. England is trying to run it on federal principles without the facilities of a federal system or the strength of a federal constitution. She thinks and plans for the colonies; endeavors extra-constitutionally to learn their needs and wishes; and she spends and fights for them. But she has not, to meet this expenditure, the disposal of an imperial revenue; nor in the discharge of

this care and protection has she at her command the strength of a full imperial armament. Thus she conducts her imperial rule with the minimum of benefit and the maximum of burden to herself. For her, "union is *not* strength," but exhaustion.

Now it is plain that this great potential nation forgoes its full strength for lack of a suitable constitutional structure of government. There is no joint body to attend to joint interests. The Empire, highly developed in local government, is insufficiently organized for collective purposes. It has no imperial revenue because it has no representative branch of government to administer such revenue. It cannot call forth its entire military and naval power so long as the disposal thereof is left in the hands of England alone and so long as she alone conducts the Empire's dealings with foreign countries leading up to war and decides as to its declaration. . . . The entire Empire suffers from this defect of central power, but England most, the colonies least. . . .

Central power incommensurate with centre responsibility; that is what we find to be the Empire's constitutional weakness. In the long run, duties and rights must always be lodged in the same hands. England cannot perform imperial duties if she gives away imperial powers. They must again be joined. Whether joined in the colonies,—which already have all the rights,—and so colonial separation be the outcome; or in England where now all the duties are concentrated (or in a Federal government),—and so a strong, united Empire be the outcome,—that is for the future to answer. . . .

Without imperial unity of action and imperial strength, there cannot, of course, be national action at all; and to the extent to which these fail the empire constitutionally is not a nation. Greater centralization alone can make it one; and in an empire this is to be gained in but two ways, by Despotism and by Federalism. To an empire which treads the constitutional path, the latter alternative alone remains.

Some of the "Interesting Aspects of the Russo-Japanese War" are discussed by F. Baty, in *The Law Times*. Among other matters commented upon are these:

It may not be out of place to indicate briefly the lines on which discussion of the international questions already raised by the Far Eastern conflict must proceed. It is common ground that no formal declaration of war need precede actual hostilities; and, indeed, most modern wars have commenced without one. Whether this would apply to a case of absolute surprise, like the sudden invasion of the Palatinate by Louis XIV., may be doubtful. But no such point arises in the present circumstances, where the diplomatic tension was such as to dispense with the necessity of any declaration. The enemy, in such a state of things, is not taken unawares, is (or should be) perfectly on guard, and is free to take measures which may cause extreme future embarrassment and are only to be stopped by force. A formal warning of the intention to attack is therefore unnecessary, and perhaps its disappearance is not to be regretted.

Whichever side fired the first shot, it is quite clear that the operations against the Russian fleet in Port Arthur were legitimate acts of war. However complete the actual surprise, it could only have been one which should have been foreseen; and it now appears that the Russians were, in point of fact, draw up in line of battle to meet the opposing forces. Under these circumstances, to talk of treachery in connection with the Japanese strategy is absurd, and can only console a St. Petersburg audience.

From the accounts which appear of the seizure of six Norwegian ships laden with Russian coal, one infers that Japan includes coal in the class of contraband articles, or at least in that species of merchandise which may become contraband if destined for the naval or military use of the enemy. It will be remembered that the position of coal (which is analogous to the naval stores, timber, tar, hemp, *etc.*, of Napoleonic times) was the subject of much discussion in 1870.

Curiously, it does not seem to have attracted much attention in the American Civil War.

The Chemulpo conflict also gives rise to one or two points of interest.

The reception on board the *Talbot*, *Elba*, and *Pascal* of the survivors of the very valuable cruiser *Varyag*, and their refusal by the United States vessel in company, furnishes an example of the so-called right of asylum. It is a little difficult to understand the United States' position in complying with the Japanese demand that the fugitives should not be received on board. Possible it was dictated by remembrances of the *Kearsage-Alabama* affair, when the British yacht *Deerhound* (whose owner certainly had no Southern sympathies) picked up the survivors of the latter. Clearly, there is no fixed principle that on the high seas, or in neutral waters, a neutral may not receive and shelter fugitive belligerents. What has been open to discussion is the question whether the neutral may do so in the protesting belligerent's waters. Thus, it was a common occurrence in American *émeutes*, dignified with the term "revolutions," for refugees to seek shelter on foreign warships. Their reception was complained of as a breach of the condition on which the foreigners were admitted to the hospitality of the port. Yet the party struggles of the young republics were so frequent and were accompanied by such vindictive proscriptions that the custom of giving shelter was never abandoned. A parellel case was the reception of fugitive slaves. The contest in Parliament and elsewhere is not yet forgotten, which turned on the propriety of affording shelter to escaped slaves in defiance of the local law. The prevalent opinion is that these historic instances of asylum were exceptions to the general rule caused by the stress of circumstances. In the present case there is the curious complication introduced by the anomalous position of Corea. It might be urged that the port of Chemulpo was not really a neutral one at all, but virtually Japanese. This, however, opens up the wide question of the neutrality —and, indeed the existence—of Corea as a Government. There seems no reason for considering Corea other than neutral, and the forcible acts which the Japanese authorities appear to be doing in that country may technically be acts of war. If Corea adopts and approves these acts, no war can arise, and she preserves her neutrality, subject to Russian complaint. But she does not necessarily and at once become the ally of Japan; and it therefore seems that the British, Italian and French ships were justified in receiving and retaining on board Russian sailors rescued in a neutral Corean port.

THE interesting question of Canada's "Rights in Hudson's Bay," is discussed by W. E. O'Brien, in the *Canada Law Journal*. He says:

Hudson's Bay, which ranks in point of extent with the Black Sea and Baltic, differs from those great inland seas so materially that no common rule of international law is applicable to all. No precedents for our guidance can be found in the solution of the many questions which have arisen with regard to them, nor is there, in any part of the world, a case precisely similar to ours. Our inland sea is peculiar in this—that while the shores that surround it are all in the possession of a single power, which is not the case with either the Black Sea or the Baltic, yet the channel by which it is approached, varying in width from one hundred to sixty miles, differs entirely from the narrow passages to those other seas which can be controlled by the Powers occupying them.

By their original charter the Hudson's Bay Company were granted the sole right to trade and commerce in all the waters lying within Hudson's Straits, including of course what is known as Hudson's Bay, and that sole right, whatever the validity of the grant may be, undoubtedly passed to Canada by the purchase of the Hudson's Bay territories and all pertaining thereto in the year 1869.

By the treaty of 1818 between Great Britain and the United States, which defined the rights of the Americans to fish off the coasts of Labrador and Newfoundland, reference was made to the exclusive right of

the Hudson's Bay Company. The waters inside of Hudson's Straits are not mentioned in the treaty. The natural inference from this would be that the Americans recognized the existence of those exclusive rights and are debarred from now calling them in question.

The several questions then which must be faced in dealing with this matter are, first: Had the British Government the right to treat the waters of Hudson's Bay as *mare clausum*, and therefore to confer upon the Hudson's Bay Company the sole trade and traffic of Hudson's Bay? If that can be established no further argument is necessary. Again by the treaty of 1818 did not the Americans recognize that right? If so, are they not precluded from now calling in question the sovereignty of Canada in these waters?

Taking the first point into consideration, the nearest approach that we can find to a parallel case is that of Conception Bay in Newfoundland—a sheet of water forty or fifty miles long, and over twenty miles wide at its mouth. In Direct United States Cable *v.* Anglo-American Telegraph Company, 2 App. Cas. 394 (1877) it was held, on appeal to the Privy Council, that this bay was a British Bay, and a part of the territorial waters of Newfoundland, in opposition to the contention that the bay was part of the open sea, and not *mare clausum*. . . .

Evidently, there must be some other and wider principle upon which the claim to jurisdiction over land-locked waters by the Power owning the coast surrounding them must be founded than the precise width of the entering channel.

In the Conception Bay case this was found in the undisputed sovereignty exercised for many years by the British Government. In a case arising from the seizure of a ship in Delaware Bay the entrance to which is more than six miles in width, the United States Courts held the seizure to be illegal as the waters of the bay were neutral, the shores on both sides being part of the territory of the United States. Great as is the extent of Hudson's Bay, it is as completely a "British Sea" as was the Black Sea a Turkish sea before the Russians obtained a share in its coasts; and wide as is the channel leading into it, it is in no sense a highway of nations, or a road for commerce, as are the Dardanelles, the Straits of Gibraltar, or the Sound leading to the Baltic. It is not so now, and nature forbids it ever becoming so. Closing the Hudson's Straits would be no hindrance to commerce, or inconvenience to travel. It would be a matter of as purely domestic concern as would be the closing of the channels leading from Lake Huron to the Georgian Bay. The width of the straits, therefore, no more affects British rights in Hudson's Bay than does the width of the mouth of Chesapeake or Delaware Bays effect the rights which the Government of the United States claims in those by no means land-locked waters.

The American Lawyer for February prints in full Professor William C. Morey's address, delivered before the Rochester Bar Association, on "International Right of Way," in which the recent action of the Administration in the Panama matter is upheld.

The conclusions which Professor Morey draws from his discussion of the moral and legal relation of sovereign States are these:

1. That the jurisdiction of a nation is morally, but not therefore legally, qualified by the commercial rights and interests of other nations.

2. That the international right of way over the natural lines of commerce situated within the territory of sovereign States—although based upon principles of natural justice—has become legalized only so far as it has been sanctioned by treaty stipulations.

3. That there is legally recognized at present no international right of eminent domain, whereby the territorial rights of a State may be forcibly appropriated without its own consent.

4. That the policy of a nation to use its influence through diplomatic and other legal measures to open necessary lines of commerce through the territory of other States

is morally justifiable; and that the nation which adopts such a policy is entitled to the moral support of the world, and the nation which obstructs such a policy merits the condemnation of mankind.

5. That the exercise of force by the United States within the Isthmus of Panama is legally justifiable to the extent that such force is necessary to protect rights and fulfill duties created by treaty stipulations.

6. That the legal right conferred upon the United States by the treaty of 1846 to a free and unobstructed transit across the isthmus of Panama justifies the use of force sufficient to preserve the said line of transit free from all obstruction.

7. That the legal duty imposed upon the United States by the same treaty, to maintain the sovereignty of the territory, justifies and requires the exercise of force sufficient to prevent the encroachment of any foreign power upon this territory.

8. That the right of way conditioned by the correlative duty of protection constitutes an easement attached to the territory and unaffected by changes of proprietorship.

9. That by the transference of the sovereignty of this territory to the new republic of Panama, the legal right of defending the transit across the isthmus is still held by the United States as against Panama; and the legal duty of maintaining the sovereignty of the territory against foreign encroachments is still imposed upon the United States in favor of Panama.

10. That by the recognition of the independence of the new republic, Columbia has acquired the status of a country foreign to Panama; and the United States is hence under the legal obligation to protect by all necessary force the territorial sovereignty of Panama against any encroachments on the part of Columbia.

The Legal Adviser gives the following summary of the "Venezuela Case:"

The Hague Tribunal has decided in favor of Germany, Great Britain and Italy, the blockading powers in the Venezuela case. The Tribunal decided that the blockading powers are entitled to a preference of 30 *per cent.* of the custom duties at La Guayra and Puerto Cabello, the litigants to pay the cost of the Tribunal.

The Tribunal states that it has been guided by international law, the equity of the case, the protocols signed at Washington since Feb. 13, 1903, and the protocol of May 7. The court further says that it is not competent to question the character of the warlike operations of the blockading powers, nor to decide whether they had exhausted all pacific means to prevent the necessity for employing force.

The decision also states that the blockading powers could not have intended to renounce the acquired rights, that Venezuela throughout the diplomatic negotiations constantly distinguished between the allied powers and the neutrals, and that the latter did not protest against the claims for preference by the blockading powers, either at the time the war stopped or immediately after the signature in the protocol of Feb. 13.

To the United States is assigned the duty of carrying out the decision of the Tribunal so far as it relates to the payment of costs.

Having submitted the case to The Hague Tribunal, its decision has become international law so far as the signatory powers are concerned and will, no doubt, be recognized as law by all the powers. The decision must be disappointing to all the advocates of arbitration in settling international disputes. It offers a premium to the creditor nation which makes a show of force by giving it a preference to the nation which seeks the milder method of diplomacy or arbitration.

H. CLEVELAND COXE, attaché of the Consul General of the United States at Paris, writing in the March number of the *Yale Law Journal*, expresses the belief that the thing which "strikes most forcibly the legal minded American who comes to France to study her institutions . . . is the condition of personal liberty. . . . Strange as it may seem, it is, nevertheless, perfectly true, that the personal liberty of the French citizen today is little better protected, in some respects,

than it was 100 years ago." He says:

Presumption of innocence in France is admitted in theory in the "*Déclaration des Droits de l'Homme*," and is inferred, at the present day, in the *Code d'Instruction Criminelle*, but strange to say, in practice innocence is not presumed until the contrary has been clearly proved. In other words, the law on this point is not carried out. . . .

The Code of Criminal Instruction (Procedure), Article 91, authorizes an examining magistrate (Juge d'Instruction) to issue an order for a suspected person to appear before him. In practice the suspected person is generally arrested at once and then examined by the magistrate. Now the Code does not intend that anyone should be arrested in this way unless it appears that there is danger of the suspected person evading justice and making good his escape before sufficient evidence has been collected to proceed to an immediate examination of the suspected person. Now, on account of there being nothing equivalent to a *Habeas Corpus* Act, a man once arrested in this way cannot regain his liberty until the examining magistrate pleases. His reputation may be absolutely ruined and his business utterly destroyed by this detention, but he has no redress. Not only are the Juges d'Instruction very powerful in the matter of arrest, but the Prefects of Departments (and, at Paris, the Prefect of Police) are clothed with magisterial powers by Art. 10 of the Code of Criminal Instruction—thus placing the power of arbitrary arrest in the hands of three classes of public authority—Juges d'Instruction, Prefects of Departments and Prefect of Police.

Under the law of 1897, although at the first preliminary investigation of the charge against a suspected person the examining magistrate is not empowered by law to do anything more than establish identity, state the charge and hear what the accused has to say, something very much more than this happens in practice. The magistrate questions the accused, confronts him with witnesses and examines the witnesses. It is not until after all this unlawful proceeding that the lawful (law of 1897) examination begins (assuming that the magistrate decides that a *prima facie* case is made out). Then for the first time is the accused allowed to have counsel present, but the latter is not allowed to speak "until after having been authorized to do so." There is no cross examination of witnesses allowed at this or any future stage of the prosecution, and to put the accused at a further disadvantage, he is often interrupted at the examination referred to by, "You did not say that at your preliminary examination." So that the magistrate has a case made out against the accused and the latter is, to a certain extent, already judged, before he comes to trial.

Our Federal immigration officials have never been charged with overscrupulousness in administering the immigration laws in the case of certain classes of immigrants—particularly the Chinese; but it is doubtful if they have ever shown greater ingenuity than that displayed by the Australian customs officials in the following case under a law which proscribes the immigration of "Any person who, when asked by an officer, fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer," to which case attention is called by the Australian correspondent of *The Law Times*.

An example of the extreme care with which the educational standard of voluntary or involuntary immigrants into Australia is watched was shown recently in the case of Hans Max Stelling in Newcastle, New South Wales. Hans was the second mate of a German barque, and he had been convicted in Newcastle, during the month of June last, and sentenced to six months' imprisonment for stealing some cigars and paint, the property of the captain of his ship. In due course the term of his imprisonment expired, and Hans was discharged from durance vile. But, ere he had gone many yards from the gaol gates, he was again arrested and haled forthwith before a customs officer, in order that he might be tested in modern European

languages. The officer dictated to Hans a passage in modern Greek, but, as this language was unknown to the examiné, he was condemned to the pains and penalties enforceable against a prohibited immigrant. Hans claimed to be a German subject, and he offered to submit himself to any test in the German, French, or English languages. Notwithstanding his offer, the magistrate, being unable to order a second test, was compelled to administer the law as written, and committed him to prison. This seems a rather severe punishment for not knowing modern Greek! However, the severity of the application of the above statutory provision roused public opinion against it, and, after the public press and German Consul, not to mention the inevitable solicitor for the person punished, had joined in protest, the Federal Government ordered the release of Hans in view of having him deported from Australia under Sects. 7 and 8 of the above-mentioned act. Meanwhile, an application for a rule *nisi* for a writ of *habeas corpus* had been granted, but, when the motion to make it absolute came for hearing, the application was dismissed, as Hans was at liberty. Now that he is at liberty legally, within the bounds of the Commonwealth, it appears that he cannot be dealt with as a prohibited immigrant. He refuses to leave Australia, and so he places the onus of the next move on the Federal Government. Owing to the manner in which public opinion has been expressed, the Federal Attorney-General has explained that the reason Greek had been used as an educational test was to keep Hans Max out of our white Australia, as he was the son of a German father and an Egyptian mother, and so a colored person, and likely to cause a permanent blot on the whiteness of Australia. Why were not our politicians honest in the beginning and in a straightforward manner place the ban on color, not spelling? The form of the legislation under which Hans Max has been persecuted is only a subterfuge, easily understood by the manner of its enforcement, and now put beyond doubt by the positive statement of the Attorney-General.

In an interesting address on "Suicide and the Law," delivered recently by Wilbur Larremore before the New York Bar Association, printed in the March number of the *Harvard Law Review*, the author says:

Cato the Younger, who is probably the most illustrious of suicides, upon the eve of his act, discoursed with much vehemence in justification of the right "to set himself at liberty." Cato's view has been assumed as self-evidently true by all nations and tribes that have not received a strong influence from Christianity.... Undoubtedly the logic of the situation is with Cato and the pagans to whom suicide itself never suggested any idea of turpitude, it being held immoral only if, and in so far as, some collateral feature, such as cowardice, characterized it. The sentiment against suicide which generally prevails among Christians and Mohammedans constitutes one of the most signal moral accomplishments of Christianity, or rather of the Christian church. It is nowhere condemned in the Bible, though it is expressly inhibited in the Koran, Mohammedanism having "on this as on many other points borrowed its teaching from the Christian church, and even intensified it." . . . The anti-suicide sentiment generated by the Christian church very naturally was embodied in the English common law. . . .

In the present state of intelligence, however, no good can result from adherence to the dogma of the absolute sinfulness of suicide. . . . There is just one condition which safely may be tolerated by public opinion as a justification of suicide. That condition is the most simple and primitive one—the one that has been recognized by all systems save the Christian church. If a person be facing certain death, which must be preceded by excruciating physical pain, his suicide may be viewed without reproach. . . . But the line must be drawn with the avoiding of physical torture which is a prelude to certain death from causes outside the victim's will. If exceptions were allowed in favor of some

forms of acute mental suffering, private judgment would speedily come to be asserted as against the general dissuadent sentiment and the paganistic attitude would be revived. . . .

The contention of Cato and Mr. Lecky is certainly valid to the extent that one who attempts suicide should not be treated as a criminal. . . . He should be classed not as a criminal, but as an unfortunate person amenable to temporary deprivation of liberty. He should be made subject to restraint in the discretion of a magistrate not exceeding a brief, definite period.

The Law Register has this to say of "The Reed Smoot Case":

Smoot's case seems to be different from Roberts', in that the Utah Senator is said not to be a polygamist. But it is claimed, and not denied, that he associates with open and avowed polygamists, and is an apostle of a church which does not condemn polygamy, and whose decrees are held paramount in authority to the laws of the State or nation. When Smoot's credentials were first presented, they were referred with many protests against the admission of the man, to the Senate Committee on Privileges and Elections. This committee has been taking testimony in the course of its investigation, and before it has appeared the president of the Mormons, evidently a fellow of excellent pith, "Fate tried to conceal him by naming him Smith." But his barn-yard rooster pride, and, it must be admitted, a downright tendency to truth telling are destined to make him historical.

The Senate Committee is said to be "shocked" by his self-revelations. Such unreserved and unnecessary truth-telling must certainly affect peculiarly a body of public men to whom as a class truth is so precious as not to be used on all occasions and with everybody.

But this man Smith has owned up to cohabiting, since 1890, when Utah became a State, with five polygamous wives and during that time to have become the father of eleven children. What these things have to do with Smoot has not been made to appear as yet, except that Smoot is Smith's friend and colleague in the Mormon Church. This fact alone is deemed by some as sufficient to disqualify Smoot from holding the office of Senator. It may be, but to condemn a Senator for the company he keeps or for the religious or irreligious or immoral views he entertains would open a Pandora's box of evils. The word "qualifications" is capable of an almost infinite variety of constructions, under pressure of political, religious and social considerations. Arbitrary action lies that way. A colored man might be found disqualified *per se*.

The case is not the same as if a man had been proved guilty of a crime known to the law. Then evidently the Senate or House could expel. Yet the Senate allowed an embezzler to sit in it for six years. Smoot has not yet been proved guilty of anything more than keeping bad company. But may not other Senators be guilty of the same offense, and "shall the pot call the kettle black?" That public opinion would uphold the Senate in unseating Smoot is undoubted, but public opinion is not the law and unless the Utah Senator is expelled legally the precedent will come back to plague us.

Law Notes for March quotes the following tale, rightly adding that, if true, it "furnishes food for thought."

The Louisville *Courier-Journal* prints a piece of news which is an interesting supplement to the trial of Lieutenant-Governor Tillman for the murder of Editor Gonzales in South Carolina. It is likewise an instructive commentary upon our jury system and the practice of criminal law. A Southern traveling man for a Cincinnati house is reported to have given the following account of the rather unique method adopted to secure a jury that would be sure to acquit: "As soon as it was known in what county of South Carolina the case would be tried, men representing themselves as agents for a picture enlarging establishment made their appearance in that county. There were a dozen of them, and each man carried with him

as a sample of the work done by his house an enlarged chromo of Tillman, which was so natural that no one could fail to recognize it as Lieutenant-Governor Tillman, who was as well known by his pictures as is Governor Beckham in this State. The agent carrying his picture of Tillman would go to a house, ask for the head always, and with the man would begin to talk about securing a contract to enlarge a picture of any member of the family. After a few minutes' conversation he would display his sample, the picture of the slayer of Gonzales. This would invariably bring the talk around to the Tillman case, and the pretended agent would draw out of the man an expression of opinion on the case. He would obtain the name of the man, and after leaving the house—always without accepting any money, but with a promise to call later for the order—would put down in a book the name of the man, and whether he was for or against Tillman. This was done in every house of the county. Not one was missed, and at the end of the time, when the trial was to begin, the attorneys of Tillman were furnished with an alphabetical list of the entire male population of the county eligible for jury service, and opposite the name of each man was a memorandum showing how he stood on the case. When a man was called who was on the list as being opposed to Tillman and in favor of convicting him, this man would be forced to state that he had expressed an opinion in the case, and was therefore ineligible for service on the jury. This was the way Tillman's attorneys secured a jury which was composed of men who had all expressed themselves beforehand as favoring an acquittal."

In the *American Lawyer* for February, R. Cleveland Coxe thus comments on divorce in France:

In regard to divorce, there is much to be learned from France. In the first place, the causes for divorce are very liberally accorded by the Code. One does not have to commit adultery to obtain divorce. Very slight causes which show an apparent unsuitability of the spouses for life in common practically open the door to divorce.

Even persistent application on the part of both parties for divorce, on the ground that life as man and wife is not possible, was sufficient to dissolve the union. An effort is now being made to grant divorce on the application of only one of the parties for this cause mentioned. While this step is not to be recommended, on the ground that history, in connection with Rome, shows that a limit must be placed somewhere in order that marriage may be respected, still, where a judge in divorce may use a proper discretion, it is very doubtful whether the power would be abused in America. But where both husband and wife wish to be divorced, and persist in this step for a considerable time, it would be moral to facilitate the gratification of this mutual desire. . . .

French procedure in divorce is admirable. According to the Code the petitioner presents personally his *requête*, whereupon the judge, if he deems a *prima facie* case has been made out, issues an order for the two parties to appear before him privately. The parties are heard on the points set out in the *requête* and the judge attempts a conciliation. If this conciliation is not possible, permission is given to the petitioner to get out a summons. This permission or order is subject to appeal. As in all civil matters, the case is tried by a judge without a jury. There are other delays. The procedure, however, except as to the jury, is not unlike ours after the point referred to above. . . .

The feature of privacy cannot be too much enlarged upon in divorce proceedings. Not only does article 239 of the Civil Code provide that evidence can be heard with closed doors, but press reports are forbidden under a fine as high as 2000 francs as a maximum. . . . The French system of concilation joined with privacy in divorce evidence is putting the legal horse before the legal cart. Not so a decree *nisi*. . . .

It may be asked—does this admirable French system as to divorce mark a diminu-

tion in the number of applications for divorce? I answer quite frankly, "No." It is a fact that divorce has lately slightly increased in France, but I call attention to the fact that divorce is as easy in France, under certain conditions, as in the most liberal State in the United States, even for foreigners, provided the parties accept the jurisdiction of the French courts.

In an article (*Michigan Law Review* for March) on "Some Legal Aspects of Special Assessments," Professor Frank L. Sage, of the University of Michigan, says of Norwood *v.* Baker, 172 U. S. 269:

However we may now be tormented with doubt concerning the general principle established by Norwood *v.* Baker it is made clear by . . . later cases that the validity of the front foot rule is not subverted by the 14th Amendment and that all or any part of the cost of a local improvement may be assessed under general laws without an opportunity to the taxpayers to show that the tax was in excess of the benefits. If this method is to be discarded it must be done by the legislatures or tribunals of the various States.

Yet it does seem that we may still believe that there is enough left of Norwood *v.* Baker, as well as from intimations in these subsequent cases, and also in King *v.* Portland (184 U. S. 61), that while these methods, that might be called arbitrary, are not only *prima facie* valid, but are generally conclusive, still, if the application of the rule would result in total confiscation of the property, the 14th Amendment might afford relief. Whether any thing less than entire confiscation would be relieved must, we believe, remain for future determination.

Nevertheless the case had a good effect as it has resulted in a re-examination of the fundamental principles of special assessment and some courts, which followed it while it was still in its primal vigor, appear to be well satisfied and disinclined to revert to or adopt the old doctrine that the determination of the legislature is conclusive.

The third chapter of the interesting controversy between Professor Samuel Williston, of the Harvard Law School, and Professor Francis M. Burdick, of the Columbia Law School, over the question of "Recission for Breach of Warranty," is found in the *Columbia Law Review* for March. Professor Williston here answers Professor Burdick's criticism (*Columbia Law Review*, January) of the former's original article (*Harvard Law Review*, May, 1903). Professor Williston bases his discussion on the proposition "that the Massachusetts law allows recission of an executed sale for breach of warranty whether the warranty be express or implied, collateral or a so-called condition, and that the English law denies recission of an executed sale for breach of any warranty or promissory condition whatever its nature, though it allows, as does the law of every jurisdiction, the buyer to take the goods temporarily into his possession to inspect them."

In conclusion he says: When I first wrote I was prepared to admit that the weight of actual authority was in favor of the English view. I am still ready to admit this. I thought and still think, however, that the balance of judicial authority in favor of the English view is much less than is ordinarily supposed. Until a few years ago the only text book on sales in much use was the the English treatise of Benjamin, and this doubtless tended to impress upon student and teacher, practitioner and judge the English doctrine. The amount of support that the contrary doctrine has found has not unnaturally been imperfectly noted. The question, however, in which I am primarily concerned, and I cannot help thinking it is the really vital question, is not whether the courts of ten or twelve or fourteen jurisdictions or more or less support the Massachusetts rule but what is the intrinsic merit of the rule itself. Nearly half of the United States have as yet neither decision nor *dictum* in regard to the matter. When the States I cannot believe that the proper way to decide it is by a popular vote of jurisdic- question is presented to the courts of these

tions which have previously decided it. The Massachusetts rule has certainly sufficient judicial authority behind it to entitle it to consideration on its merits in a jurisdiction unfettered by authority. It is still more clear that a Legislature called upon to deal with the question should adopt the rule which is intrinsically superior.

Dean Ernest W. Huffcut, of the Cornell University College of Law, discusses, in the *Yale Law Journal* for March, the question of "Percolating Waters: The Rule of Reasonable User."

To put (he says) the concrete case, may one landowner intentionally (that is, with foreknowledge of results,) cut off a neighboring landowner's water supply by thus intercepting, collecting or monopolizing the percolating waters that feed the neighbor's well or spring?

The answer given to this question in the leading American case is that he may do so if he collects the water for his own use, but not if he collects it for the sole purpose of injuring the neighbor. If he collects it for his own use it is immaterial that he also entertains hostility toward the neighbor. The right should not, however, be exercised from mere malice. Later American cases transfer the emphasis from the showing of "malice" to a showing of "unreasonable user" which may or may not be accompanied by malice.

The answer given to this question in the leading English case is that he may do so absolutely, since he owns the soil absolutely, and all that lies therein, whether solid rock, or porous ground, or venous earth, or part soil, part water, and may dig therein and apply all that is there found to his own purposes. . . .

The English law is therefore clear. The landowner who by operations on his own land cuts off the percolating waters that would otherwise feed his neighbor's well or spring need make no defence, need show no justifiable purpose or occasion. His sufficient answer is that he has an absolute right to all the percolating waters brought or held within his own lands, and can not be called upon to explain to any one why he has chosen to collect them, or after collecting them to waste them. Some American cases are to the same effect.

It is believed, however, that the prevailing American view is that, in order to justify the cutting off of another's water supply derived from percolating waters, it is necessary that this should be the result of a reasonable user of defendant's rights in his own lands. To cut off a water supply from mere malice is to cut it off without reasonable excuse or justification.

Another contribution to the already voluminous discussion of "The Negotiable Instruments Law" is found in the current number of *The Brief*, in which John Lawrence Farrell returns to the defense of the new code and to a consideration of Professor Ames' objections thereto. In closing Mr. Farrell says:

While I desire not to be understood as considering the code by any means sacred and not to be defiled by the ruthless hand of criticism, I think that it may be seriously questioned whether this continually recurring to alleged objectionable features thereof, which appear to have no basis except *obiter dicta* or are predicated upon hypothetical cases or conditions created by the negligent acts of individuals who may be parties to the instruments, is fair to the code itself or to those jurisdictions where it is already a part of the written law. It tends to create a feeling of uncertainty and of apprehension that the courts may so construe some of the sections that injustice will result and that eventually amendments may be made. And in those States whose legislatures have not yet adopted the law it produces hostility and distrust in the minds of lawyers and bankers, and this does not augur well for the passage of the law. Professor Ames apparently appreciates this, for he says that it would no doubt have been on the statute books of a greater number of States had he not vigorously urged his objections.

In the *Michigan Law Review* for March, Dwight B. Cheever sums up as follows the law bearing on "The Rights of Joint Owners of a Patent":

As side lights upon the main proposition it may be stated that—

(A) A joint owner cannot grant a license which will destroy rights which have already accrued to the joint owners, and, by implication, a license by one owner can only take effect from the date of its issue.

(B) The proportion of interest which the licensing joint owner has is immaterial as affecting his right of licensing.

(C) While there is no title or right to account in the absence of contract, the matter may be regulated by contract, but such a contract makes the parties joint tenants in common and not partners.

(D) A contract of assignment to two or more parties as individuals does not make them partners.

(E) Where the title to a patent is conveyed to a partnership the members of the partnership acquire no individual title and the foregoing propositions do not apply to them; if attempted licenses are made by one of the partners, he is liable to account to his co-partners.

(F) A case wholly irreconcilable with the foregoing authorities is Herring *v.* Gas Consumers' Association (9 Fed. 556), which holds that while a coöwner cannot be held to account for his use of the specific device of the patent, he can be held for using an infringing device. As a device to infringe must be the device of the patent or there is no infringement, the decision is clearly wrong. The case, decided by a Missouri District Court, appears to have been never affirmed or followed by another court. . . .

An attorney asked to draw a contract providing for joint ownership of a patent should always advise against it for the reasons stated and make the conveyance, preferably, to a corporation in which the owners are stockholders; if this is impossible, then to a trustee under a full and detailed trust agreement and as a last alternative to a technical partnership of which the proposed owners are members. If all of these plans are rejected by the client, insist that a full and specific written contract defining the rights of the respective coöwners be entered into, at the time they take title; and, if possible, record the contract with the assignment in Washington.

Of a test for identifying the nature of blood stains *Law Notes* for March has this interesting description and comment:

The recent Bechtel trial at Allentown, Pa., has brought into prominence in this country the biological test for identifying the nature of blood stains. Although employed in the United States once or twice before, the test is not so well known here as in Germany, the land of its origin. It marks a distinct and important step, however, in the history of evidence, because while very simple, so far as it goes, it introduces certain knowledge where all before was ignorance and confusion. From the description which we have seen the method is somewhat as follows: The matter containing the stains supposed to be blood is placed for a time in a solution of salt and water; this is afterwards filtered and set aside. Suppose that the State claims that the stain was made by human blood, and the accused claims that it was made, say, by hog's blood. The chemist would, as the next step, inject into a rabbit on several consecutive days, gradually increasing doses of human blood serum, and into another rabbit similar doses of hog's blood serum. After a time the blood of the rabbits thus treated becomes chemically like that of a human being and of a hog respectively. Drawing then from each rabbit a portion of its blood, the operator is ready for the final step in the test. If into a tube containing a portion of the salt solution in which is dissolved the suspected stain is placed a portion of the blood from the rabbit treated with human blood, there will immediately be formed a precipitate, provided the blood stain was that of a human being, but not if it was that of another animal or of a fowl. If no precipitate be formed, it is absolutely certain, say the

chemists, that the stain was not caused by human blood. The State's contention is disproved and the "damned spot" becomes as harmless as a splash of red paint. If it be desired to go further and corroborate the accused, blood from the rabbit treated with hog's blood is placed in a second tube containing a portion of the salt solution. If precipitation occurs, the witness is corroborated, and his general veracity strengthened. If not, he was lying, but the lie can have little effect upon the immediate question, since the other test eliminated the stain altogether as evidence.

SPEAKING of legislative measures with respect to gambling in "option" and "future" contracts in foods stuffs and agriculture produce, *The Law Times* says:

It appears that, with the exception of Austria, Germany, and Norway, in no country does any special legislation exist which deals with the matter. But in those three countries statutes expressly prohibiting such gambling have been passed; while in the Argentine Republic, Greece, the Netherlands, and Spain there seems to be sufficient power, without further direct enactment, to frustrate transactions which constitute a gamble or depend on illegal speculative engagements. A Bill relating to the offence has been before the Belgian Senate, and also before the Legislature of France; but, so far, nothing has been done in the matter. And in the United States of America, although various Bills have been introduced, none apparently has as yet passed into law. Manifestly, however, it is only a question of time for all Governments to act in checking the evil, and that of the United Kingdom will not wisely be behind the others. There will be no novelty in the proceeding. Engrossing of the market was in this country an offence by the common law; and "forestallers" and "regrators" met with scant consideration in the Middle Ages. Any attempt to buy up and "corner" the necessaries of life, for the purpose of selling them again at a dearer price, was repressed with a high hand in those days; and, in the interests of the public generally, none the less should it be so now.

THE recent Iroquois theatre fire in Chicago has given rise to a number of legal questions, which are discussed in several law journals.

On the "Liability of Municipality for Failure of Its Officers to Enforce Ordinances," the *Central Law Journal* (February 26) says:

Coming now to the exact question before us, *i. e*,. the liability of municipal corporations for negligence in the enforcement of municipal ordinances, we find the law to be settled, though not without some dissent, against the imposition of such liability. The reason of the rule that a municipal corporation cannot be held liable for the non-action of its officers in this regard is stated to rest on the principle of *ultra vires*—the city not being held liable where the non-action of its officers is contrary to the will of the corporation, as expressed in its ordinances.

Case and Comment for February says:

The law seems to be well settled, in most jurisdictions, at least, that the failure of a city to enforce ordinances enacted in the exercise of the police power will not render it liable for damages caused by their non-enforcement.

The *Albany Law Journal* for March takes the same view.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ASSUMPTION OF RISK. (DISTINGUISHED FROM CONTRIBUTORY NEGLIGENCE — IMMINENT DANGER.)

UNITED STATES CIRCUIT COURT OF APPEALS.

In St Louis Cordage Company *v.* Miller, 126 Federal Reporter 495, the doctrine of assumption of risk is re-asserted in all its juistine harshness and fatuous disregard of the facts of everyday life. The action was by a young woman twenty years of age, for an injury to her hand from gearing which her employer had left uncovered in violation of the requirement of 2 Rev. St. Missouri, 1899, Sec. 6433. The court below instructed that if the jury found that the risk from exposed geering "was so grave and imminent that persons of ordinary prudence under similar circumstances would have declined to go on with the work," then plaintiff assumed the risk, but otherwise she did not. The court speaking by Judge Sanborn says that the instruction was undoubtedly inspired by Southern Pacific Company *v.* Yeargin, 109 Federal Reporter 436, 442, 48 C. C. A. 497, 503, and which the court now regards as mistaken. The effect of the instruction is to make the defense of the assumption of risk and that of contributory negligence identical, and the majority opinion is largely taken up in drawing a sharp distinction between them. Assumption of risk is said to rest on two grounds, the first, the maxim, *Volenti non fit injuria*, and the second, contract. The venerable fiction which disregards the necessitous condition of the laboring class,—that a servant is not compelled to begin or continue to work for his master and is at liberty to retire from his employment at any time, is re-asserted, and the court says that assumption of risk is not conditioned or limited by the probability or improbability, imminence or remoteness, of the danger from the risk assumed.

The doctrine of assumption of risk is held to apply equally to dangers arising after the employment is entered upon, and the suggestion that there is no consideration because the wages are not increased with the hazard, is said not to be persuasive, because the doctrine rests on the maxim, *volenti non fit injuria* as well as upon contract, and because ordinarily contracts for times certain do not exist, and there is in fact a constantly recurring daily offer and daily acceptance of the risk, and of the wages tendered to induce an assumption thereof.

But the method of escape from the doctrine is clearly indicated. The Missouri Factory Act does not abolish the defense of assumption of the risk, differing in this respect from the Act of Congress, relative to automatic couplers on cars engaged in interstate commerce. Congress in that act expressly provided that employés should not be deemed to have assumed the risk arising from non-compliance with the act, and the Missouri Legislature had power to apply a similar provision to cases in which employers failed to keep their machinery guarded. The trouble is that the Legislature did not do so.

In a notable dissenting opinion, Judge Thayer proclaims a newer and juster view. He points out that the views expressed by the majority may lead employers to be less careful in discharging their duties towards employés and less vigilant to prevent accidents.

The case of Glenmont Lumber Company *v.* Roy, 126 Federal Reporter 524, is a parallel case to the one just reviewed, and should be read in connection with it.

BRIBERY. (MEMBER OF CONGRESS — LIMITATIONS.)
UNITED STATES CIRCUIT COURT, EASTERN DIVISION OF NEW YORK.

In United States *v.* Driggs, 125 Federal Reporter 520, an indictment against a member of Congress for receiving a bribe in violation of Rev. St. Secs. 1781 and 1782, is considered. These sections make it a criminal offense for a congressman to receive any money, property, or other valuable consideration for aiding in the procuring of any contract from the government.

In this case the defendant was given a non-negotiable note by a government contractor, promising to pay certain sums as the proceeds of the contract to be secured were realized. The note was delivered more than three years prior to the finding of the indictment and the defendant argued that the crime, if any, was committed at that time and was barred by limitations. On this point the court says: "The instrument was tainted and made worthless by the statute itself. Could the same statute stamp as something valuable, as property, a writing whose existence it had inhibited? The statute declares that a member of Congress shall not agree 'to receive any money, or property, or other valuable consideration whatever, from any person, for procuring . . . any contract . . . from the government.' If a member of Congress and such person enter into an agreement to do this very thing, how can the agreement be regarded as property or a valuable consideration? Does the statute refuse the agreement life by prohibiting it, and at the same time, upon its interdicted birth, breathe life into it, and give it the characteristics, the protection, and the quality of property? According to such argument, the statute kills and quickens the same agreement at the same instant. It stifles while it animates. It precludes its existence, and, being defied, attaches worth to its reality. Leavened and vitiated by guilt, and imbued and vivified by virtue, by the same statute! One seeks in vain for fit expression of the contrariety. . . . The very statement of the defendants' proposition should demonstrate its invalidity. It is so abhorrent to moral and legal conceptions, so inimical to plain reason, that some technical rules, elsewhere wholesome and properly applied, but now skillfully invoked by defendants' counsel, must be broken through and discarded, and ultimate vital judgments allowed to prevail. If any one shall decide, or has decided, that a statute may be interpreted to denounce an agreement as impossible of worthy existence, and after it has come forbidden into the light, declare that it has such worthiness that it may be regarded as 'property' or 'other valuable consideration,' for the purposes of the same statute, the responsibility of such decision shall not rest upon this court." The court holds that being rendered illegal by the statute itself, the note did not constitute a valuable consideration, and therefore that the offense was not committed until payments under the note were made, which was within the period of limitations.

BRIBERY. (MEMBER OF CONGRESS—MEMBER ELECT —CONSTRUCTION OF STATUTE.)
UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEBRASKA.

In United States *v.* Dietrich, 126 Federal Reporter, page 676, the first of a series of indictments against Senator Dietrich of Nebraska is considered, and the jury were directed to return a verdict of not guilty. The statement of the attorney for the prosecution showed that the acts charged as a violation of Rev. St. Sec. 1781, occurred after the defendant's election, but before the convening of Congress, when he presented his credentials and took the oath of office as a Senator. The statute makes it a punishable offense for any "member of Congress or any officer or agent of the government," to take or receive, or agree to receive, a bribe for procuring or aiding to procure any contract, office or place for another person from the United States, and also makes it a punishable offense for any "member of Congress" to take, receive or agree to receive a bribe "after his election as such member," for his attention to, service, vote, *etc.*, on any question then pending or which may be brought

before him in his official capacity. In holding that Dietrich was not a member of Congress within the first clause, the court relies on the practical distinction intended by Congress between a "member of Congress" and a "member of Congress . . . after his election as such member." A number of statutes which distinguish between a member of Congress and a member elect, are referred to. Acceptance is declared to be essential to the induction into public office and acceptance could not occur until the Senate had convened. The defendant was governor of the State for some time after his election, and it is said that the State Legislature did not and could not remove him from that office by merely electing him as a United States Senator. Opinions of the Attorney General are also cited, and the case of Cordiell *v.* Frizell, 1 Nev. 130, 132 is said to be much in point. The case against the Congressman Driggs, (just reviewed,) is distinguished, because in that case the prosecution was under section 1782 and not section 1781. The fact that Dietrich received his salary from the time of his election, is said to be of no moment, in view of the statutes which expressly provide for the payment of salaries to representatives and delegates elect. In conclusion, the court says: "A completed act which is not an offense at the time of its commission, cannot become such by any subsequent act of the party charged, or of another, with which it has no connection, and this is true whether the first act was done for a good or bad purpose."

CONSPIRACY. (BRIBERY OF MEMBER OF CONGRESS —AGREEMENT TO GIVE AND RECEIVE BRIBE.)
UNITED STATES CIRCUIT COURT OF THE DISTRICT OF NEBRASKA.

On page 664 of the Federal Reporter, Vol. 126, another indictment against Senator Dietrich is considered. The indictment was brought under Rev. St. Sec. 5440 (U. S. Comp. St. 1901, p. 3676) providing that if two or more persons conspire to commit an offense against the United States, *etc.*, and any one do an act to affect the object of the conspiracy, all the parties shall be liable for a penalty, *etc.*

The indictment charged that Dietrich and one Fisher, the former being a member of the United States Senate, conspired to commit an offense against the United States and to violate a law of the United States, to wit: section 1781 of Revised Statute, by Dietrich agreeing to take a bribe for procuring the office of postmaster for Fisher, and Fisher agreeing to give the bribe. This is followed by the specification of an overt act done by Fisher pursuant to the conspiracy.

Section 1781 makes it a criminal offense for a member of Congress to agree to receive any money, property, *etc.*, for aiding to procure any office from the government, and a like offense in the person offering the bribe. After an elaborate discussion in which the cases of Shannon *v.* Commonwealth, 14 Pa. 226; Miles *v.* State, 58 Ala. 390; State *v.* Butler, 8 Wash. 194, 35 Pac. 1093, 25 L. R. A. 434, 40 Am. St. Rep. 900, are cited, the court holds that section 1781 creates a substantive offense, to the idea of which plurality of agents is logically necessary, and therefore one which is not punishable as a conspiracy, the gist of which is the acquisition of a second agent to the offense as an added element to its conception.

A very interesting discussion follows as to whether several defendants may be charged in the same indictment with different offenses of the same kind, the word "severally" being employed and the indictment regarded as a series of separate indictments. As Dietrich and Fisher are charged in one count, the court's intimation that such a practice would be proper does not save the indictment in this case.

CONSTITUTIONALITY OF STATUTE. (RIGHT TO RAISE ISSUE—PROSECUTION FOR ASSAULT ON OFFICER.)
COLORADO SUPREME COURT.

In Keady *v.* People, 74 Pacific Reporter 893, defendant was prosecuted for assault with intent to murder, made on an officer who attempted to search him for concealed weapons.

This duty was imposed on the officer by 3 Mill's Ann. St. Sec. 1364, and the court holds that the defendant cannot question in this prosecution the constitutionality of that statute. It was the duty of the officer to regard the statute as valid and in attempting to perform his duty under it he should be protected. An officer armed with a warrant valid on its face, has authority to arrest, and a person resisting arrest does so at his peril. So also, the court thinks that a statute which clothes an officer with authority to act cannot be attacked by a defendant on a trial for assaulting the officer while acting under it.

No authorities are cited.

CONTRACTS. (UNITED STATES — MEMBER OF CONGRESS — EFFECT OF ELECTION.)

UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF NEBRASKA.

In 126 Federal Reporter 671, another indictment against United States Senator Dietrich came up for consideration, the charge being violation of Rev. St. Sec. 3739, providing that no member or delegate to Congress shall undertake, execute, hold or enjoy any contract made or entered into in behalf of the United States, and that all contracts made in violation of the section shall be void. The contract in the case at bar involved a lease by the defendant of a building to the United States, for use as a postoffice, and for the purpose of the demurrer on which the hearing was had it is assumed that the contract was entered into prior to the defendant's becoming a Senator. Then in answer to the contention that, being valid in its inception, the defendant's subsequent election would not affect its validity and binding force, the court holds that the statute terminates the contract so far as it remains executory, the statutory provisions being read into the contract itself. Where performance of a contract legal in its inception, becomes unlawful by reason of any subsequent event, the contract is thereby dissolved or terminated so far as it remains executory and both parties are excused from its further performance. Melville *v.* De Wolf, 4 El. & Bl. 844, 850; Reid *v.* Hoskins, Id. 979, 984; Newby *v.* Sharpe, 8th Ch. Div. 39; Anglesea *v.* Rugeley, 6 Q. B. 107, 114; Bailey *v.* De Crespigny, Law Rep. 4 Q. B. 180; Brick Presbyterian Church *v.* New York, 5 Cow. 538; Mississippi, *etc.* Co. *v.* Green, 9 Heisk. 588, 592; Knoxville *v.* Bird, 12 Lea 121, 49 Am. Rep. 326; Cordes *v.* Miller, 39 Mich. 581, 33 Am. Rep. 430; Brown *v.* Dillahunty, 4 Smedes & M. 713, 723, 43 Am. Dec. 499; Bradford *v.* Jenkins, 41 Miss. 328, 335; Irion *v.* Hume, 50 Miss. 419, 427; Macon, *etc.* Co. *v* .Gibson, 85 Ga. 1, 17, 11 Southeastern 442, 21 Am. St. Rep. 135; Odlin *v.* Ins. Co. 18 Federal Cases, p. 583 (No. 10,433); Tait *v.* Ins. Co., 23 Federal Cases 620 (No. 13,726); Hangner *v.* Abbott, 6 Wall. 532, 535, 18 L. Ed. 939; New York Life Ins. Co., *v.* Statham, 93 U. S. 24, 23 L. Ed. 789; Ins. Co. *v.* Davis, 95 U. S. 425, 24 L. Ed. 453; Jones *v.* Judd, 4 N. Y. 411; Heine *v.* Meyer, 61 N. Y. 171, 176; Bennett *v.* Woolfolk, 15 Ga. 213.

The demurrer was overruled.

CRIMINAL CONVICTION. (BAR TO ACTIONS FOR PENALTY.)

NEW YORK SUPREME COURT.

In People *v.* Snyder, 86 New York Supplement 415, an acquittal in a criminal prosecution is held not to bar an action by the people for the penalty prescribed for the same offense. The statute violated was Law 1900, p. 66, c. 20, Sec. 229, which prohibits the burning of fallows during certain periods of the year, and prescribes that any person violating the section "is guilty of a misdemeanor and in addition thereto is liable for a penalty."

The court says that the contention that conviction is a bar is founded largely on the fact that two remedies are prosecuted in the name of the people and that the suit for penalty is *quasi* criminal in character. They are, however, entirely independent, and one is a criminal and the other a civil action. The rule governing the trials of the two cases are dissimilar. In the criminal action the evidence must satisfy the jury of the defendant's guilt beyond a reasonable doubt.

The taking of evidence by commission is not permissible, and the manner of eliciting proof is more restricted. The jury, without any departure from the strict letter of the law or any misapprehension of the evidence, might acquit in a criminal action, and upon the same proof and with equal propriety, render a verdict for the amount of the penalty. People *v.* Rohrs, 49 Hun, 150, 1 N. Y. Supp. 672, People *v.* Stevens 13 Wend. 341, People *v.* Meakin, 133 N. Y. 214, 30 N. E. Rep. 828, Blatchley *v.* Moser, 13 Wend. 215, Rollins *v.* Breed, 54 Hun, 485, 8 N. Y. Supp. 848, and Behan *v.* People, 17 N. Y. 516, are cited.

It is said that a contrary principle has been maintained in Coffee *v.* United States, 16 U. S. 436, 6 Sup. Ct. Rep. 437, 29 L. Ed. 684, but that decision is said to have been limited in Stone *v.* United States, 167 U. S. 178, 17 Sup. Ct. Rep. 778, 42 L. Ed. 127.

Justices Williams and Stover, dissent.

The majority opinion also holds that where a statute punishes an act as a misdemeanor and also imposes a penalty, it is not necessary to obtain a conviction before suing for the penalty.

CRIMINAL PROCEDURE. (REMITTING INDICTMENT FROM DISTRICT TO CIRCUIT COURT — CONSTRUCTION OF STATUTE.)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

In 126 Federal Reporter 659, another indictment against United States Senator Dietrich, came up on a question of jurisdiction raised by the court itself; the precise question being the meaning of the words "next session" in Revised Statues, Sec. 1038 providing that any district court may, by order, remit any of the indictments to the "next session" of the Circuit Court of the same district, when, in the opinion of the District Court, difficult and important questions are involved; and "thereupon" the proceedings shall be the same in the Circuit Court as if the indictment had been originally presented therein. The indictment had been returned to the November, 1903, term of the District Court. The November term of the Circuit Court was adjourned from December 24, to December 28, and then by successive adjournments to January 4, 1904. On December 26, 1903, the District Court made an order remitting the indictment to the next session of the Circuit court. If the words "next session" were taken as referring to the next term the indictment would not be triable until the May term of the Circuit Court. If, on the other hand, they meant the next resumption of business, after an adjournment during the term, it would be triable at the current term.

After reviewing a large number of definitions, the court decides that "next session" means the next resumption of business at the present term. McMullan *v.* United States, 146 U. S. 360, 13 Sup. Ct. Rep. 127, 36 L. Ed. 1007; United States *v.* McKee, 4 Dill. 1, 26 Fed. Cas. 712, (No. 15,687), Jones *v.* United States, 137 U. S. 202, 11 Sup. Ct. Rep. 80, 34 L. Ed. 691; Smith *v.* United States 137 U. S. 224, 11 Sup. Ct. Rep. 88, 34 L. Ed. 700, are cited.

LIBEL. (ARTICLES LIBELOUS *Per Se*—RIDICULE OF OPINIONS.)

NEW YORK SUPREME COURT.

In Triggs *v.* Sun Printing & Publishing Company, 86 New York Supplement 486, the noted professor of English Literature in the Chicago University, was refused relief against the New York *Sun* for articles deemed by him to have been libelous *per se*. The majority of the court, Justice Laughlin dissenting, say that the spirit of exaggeration and fun pervading these articles was not intended seriously. The plaintiff has regarded the publication too gravely and has considered what was intended to amuse the readers of the paper, as a serious criticism upon his work, a view which a study of the articles does not warrant. As far as the court knows, an article which makes an opinion propounded by a teacher ridiculous has never been held libelous. Quotations from the articles in question follow:

"And now the god has spoken. At the Cook County League of Women's Clubs, Saturday, Prof. Triggs looked into the seeds of time and had a vision of the 'new man.' Hear and tremble, miserable homunculus of today:

"'The businesss man of the futute would not be recognized by the business man of today. The present

order of man will pass away. Tnere shall come a new humanity. Notice the passing of patriotism, which is merely an expanded egotism. Notice the new state of diplomacy. All this points to the new era when the social spirit will prevail; when the selfish, the egotistic motive will be gone. The business man will wish to share his successes with the rest of society.'

'We hate to differ with Prof. Triggs, but his remarks about patriotism are reported incorrectly, or there is some kink in his definition. If patriotism is expanded egotism, what is Triggs? If Triggs and patriotism are one, how can patriotism 'pass?' We are ready to believe in the 'new humanity' and to welcome it; but what is new humanity without the same old and ever young Triggs? Insisting that Triggs must and ever shall be preserved, let us cast an admiring glance at the business man of the future. He will share his successes with the rest of society? It would be Philistine to call for a bill of particulars. The new man will divide his profits among his customers or among the whole community. The individual dividends may not be large, but they will show a kindly spirit in the divider. Presumably, the customers or the community will consent to be assessed in case the business loses money. Let altruism have its perfect work. It may be hard for a thoroughly new business man to resist the temptation to give his goods away.

"As for Triggs and all other altruistic professors of the Chicago University, they will pay Dr. Harper for the privilege of working for him. Already some of them delight to prepare for the new order by giving themselves away."

The foregoing appeared in the New York *Sun* of March 2, 1903. On April 6, another article was published commenting in a humorous and satirical fashion on an offer made Prof. Triggs to act as an advance agent for a theatrical representation of Romeo and Juliet. On April 10, the following appeared:

"To men of good liver, life is full of happiness. To us it is, and long has been one of the greatest of these felicities to guide amateurs to Prof. Oscar Lovell Triggs, a true museum piece, and the choicest treasure in Dr. Harper's collection. We cannot boast of having discovered Triggs, for he was born great, discovered himself early, and has a just appreciation of the value of this discovery. But in our humble way we have helped communicate him to the world, assisted in his effusion and diffusion, and beckoned reverent millions to his shrine. We have joyed to see him perform three heroic labors, viz.:

1. 'Knock out' old Whittier and Longfellow.
2. 'Do up' the hymn writers.
3. Name his baby at the end of a year of solemn consultation.

"But these achievements are only the bright beginning of a long course of halcyon and vociferous proceedings. As yet, Prof. Triggs is but in the bud. He came near blossoming the other day, and the English drama would have blossomed with him. A firm which is to produce 'Romeo and Juliet' offered him $700 a week to be the 'advance agent' of the show and to 'work up enthusiasm by lecturing.' Prof. Triggs was compelled to decline the offer, but the terms of his refusal show that it is not absolute, and that 'some day,' as the melodramas cry, he will illuminate Shakespeare, dramatic literature and the public mind: . . . . If these plays are to be put upon the stage, they must be rewritten: and Prof. Triggs is the destined rewriter, amender and reviser. The sapless, old-fashioned rhetoric must be cut down. The fresh and natural contemporary tongue, pure Triggsian, must be substituted. For example, who can read with patience these tinsel lines?

"'Madam, an hour before the worshipped sun
'Peered forth the golden window of the east,
'A troubled mind drove me to walk abroad.'

"This must be translated into Triggsian, somewhat like this:

"'Say, lady, an hour before sunup I was feeling wormy, and took a walk around the block.'

"Here is more Shakesperian rubbish:

"'O, she doth teach the torches to burn bright.'
'Her beauty hangs upon the cheek of night,
'As a rich jewel in an Ethiop's ear.'

"How much more forcible in clear, concise Triggsian:

"'Say, she's a peach! a bird!'"

"Hear 'Pop' Capulet drivel:

"'Go to, go to,
'You are a saucy boy.'

"In the Oscar dialect this is this:

"'Come off, kid! You're too fresh.'

"Compare the dropsical hifalutin:

"'Night's candles are burnt out, and jocund day,
'Stands tiptoe on the misty mountain's tops.'

—with the time-saving Triggsian version:

"'I hear the milkman.'

"The downfall of Shakespeare is only a question of time and Triggs. Carnegie ought to endow Triggs. Oscar Hammerstein ought to dramatize Triggs. Triggs is the hope, and soon will be the pride of the stage. He ought to have not less than $7,000 a week for fifty-three weeks a year."

And the New York Supreme Court held that these were not libelous! Poor Triggs!

LOTTERY. (TRANSPORTATION OF TICKETS—CRIMINAL OFFENSE — CONSTRUCTION OF STATUTE.)
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

In United States *v.* Whelpley, 135 Federal Reporter 616, defendant was charged with violating Act March 2, 1895, c. 191. 28 Stat. 963, (U. S. Comp. St. 1901, 3178), providing that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or carrying "from one State to another" in the United States, any ticket of a lottery, shall be punished, *etc.* The defendant was charged with having shipped from Dayton, Virginia, to the District of Columbia, certain lottery tickets, for the purpose of disposing thereof, and the question was whether the District of Columbia was a "State" within the statute.

After remarking that the statute is highly penal and should be strictly construed, the court points out that the power given Congress is to regulate commerce with foreign nations and among "the several States" and with the Indian tribes, and says that it is at least possible that because of some doubt as to its power to so legislate, Congress intentionally omitted to include shipment of lottery tickets from States to a territory or to the District of Columbia. It is true that in the Interstate Commerce Act, Congress has undertaken to regulate commerce between any State or territory and the District of Columbia. But that act was passed by the forty-ninth Congress, while the fifty-third Congress, which was responsible for the statute in question was composed, to a considerable extent, of different individuals.

Moreover, the court says that while it may be within the power of Congress to forbid interstate shipments of lottery tickets through any State, even when their ultimate destination is a Territory or the District of Columbia, it cannot think that it was the intention of this statute. If a shipment were made from New Jersey through New York to Canada, it seems clear that the statute in question would not support an indictment therefor. In conclusion the court says, that if it gives Congress, which always numbers many able men of the legal profession among its members credit for knowing that the word "State" has often been held not to include a territory or the District of Columbia, it cannot say with certainty that it intends the word "State" to mean Territory or the District of Columbia.

MASTER AND SERVANT. (INTERFERENCE WITH RELATION — THREATS OF THIRD PERSON INDUCING DISCHARGE — LIABILITY.)

ILLINOIS SUPREME COURT.

London Guarantee and Accident Company *v.* Horn, 69 Northeastern Reporter 526, presents a somewhat novel and extremely interesting question as to liability for securing the discharge of a person from his employment. The facts, which were somewhat complicated, are thus summarized in the syllabus: The plaintiff while employed for an indefinite time by the A. S. Company was injured while at work and brought suit against his employer therefor. The employer was insured against loss for injuries to its employés by a policy issued by defendant which entitled the latter to cancel the policy on five days' notice and to defend actions for injuries brought against the employer, but which gave the defendant no right to demand the discharge of an injured servant. Defendant at various times sought to settle plaintiff's claim and in order to induce a settlement threatened to have him discharged. A representative of defendant went to the A. S. Company's factory and after an unsuccessful attempt to settle the claim stated to the company that if it did not discharge plaintiff the policy would be canceled. The company would have employed plaintiff steadily had it not been for this threatened cancellation of the policy. It did discharge him, however, and plaintiff sued the insurance company for its part in the matter. In defending the suit the insurance company relied largely on the case of Allen *v.* Flood, 67 L. J. Q. B. 119, decided in the House of Lords in 1897. In that case certain shipwrights secured the discharge of certain boiler makers and a recovery was denied the latter principally on the ground that every workman has a right to exercise his own option with regard to the persons in whose society he will work, and that when the employer is confronted with the possibility of the loss of services of one set or the other, he has a right to elect which he will lose. That and other cases of a like kind are distinguished from the present case by the court on the ground that they presented instances of lawful competition, the view being taken that it is a violation of legal right to interfere with the contractual relations of others if there is no sufficient justification therefor, but that competition in trade, employment, *etc.*, is such a justification. It is then held that the insurance company and plaintiff were not in competition, despite the fact that the company wanted to settle the claim for the least possible amount, while the plaintiff wanted to secure the largest possible amount. The word "competition" is held to

mean trade competition. The dissenting opinion of Mr. Justice Holmes in Vegelahn *v.* Guntner, 167 Mass. 92, 44 Northeastern Reporter 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, giving a larger meaning to the term is not approved. From the holding that plaintiff has a cause of action Justices Wilkin and Cartwright dissent, principally on the ground that the company had a right to cancel the policy for any reason it pleased and that the threat to do a lawful act cannot be unlawful.

POLICE POWER. (BAKERS—EMPLOYES—REGULATION OF HOURS OF WORK—CONSTITUTIONALITY OF STATUTE—LIBERTY OF CONTRACT.)

NEW YORK COURT OF APPEALS

In People *v.* Lochner, 69 Northeastern Reporter 373, the New York Court of Appeals had before it the question of the constitutionality of laws 1897, c. 415, art. 8, sec. 110, p. 485, providing that no employé shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than 60 hours in any one week, or more than 10 hours in any one day, unless for the purpose of making a shorter work day on the last day of the week, nor more hours in any one week than will make an average of 10 hours per day for the number of days during such week in which such employé shall work. The section is followed by a number of provisions relative to the cleanliness and general sanitary condition of bakeries. Chief Justice Parker delivered the main opinion. The statute was defended as a health regulation, and therefore a valid exercise of the police power. After citing many cases as to the extent of the police power, notably that of Holden *v.* Hardy, 169 U. S. 366, 18 Supreme Court Reporter, 383, 42 L. Ed. 780, in which a Utah statute providing an eight hour day for miners was upheld, and People *v.* Havnor, 149 N. Y. 195, 43 Northeastern Reporter, 541, 31 L. R. A. 689, 52 Am. St. Rep. 707, in which a statute forbidding barbers to work on Sundays was also sustained, the chief justice declares that the statute in question was enacted with the intention to promote the public health.

"It is but reasonable to assume from this statute as a whole that the Legislature had in mind that the health and cleanliness of the workers, as well as the cleanliness of the workrooms, was of the utmost importance, and that a man is more likely to be careful and cleanly when well and not overworked, than when exhausted by fatigue, which makes for careless and slovenly habits, and tends to dirt and disease. If there is opportunity—and who can doubt it?—for this view, then the Legislature had the power to enact as it did, and the courts are bound to sustain its action as justified by the police power."

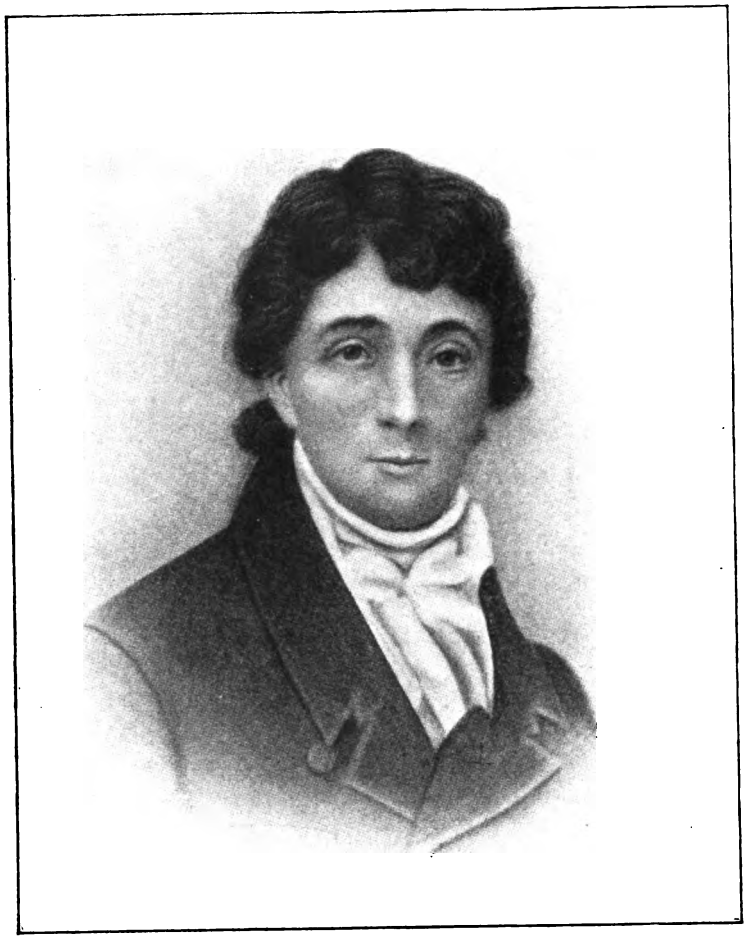
Justice Gray, in a concurring opinion, says that it is true that a tendency has been growing in the direction of excess of paternalism in government, and the courts have rather hastened to uphold legislative interference with the pursuits of citizens upon any plausible pretext. But the Legislature has, and should have, the broadest authority to exercise a police power of internal regulation in the direction of protecting the peace, the safety and the health of the community, and in this law he thinks may fairly be perceived a statutory regulation reasonably promotive of the public health.

Justice Vann, concurring at considerable length, cites various medical authorities which declare that the occupation of a baker is peculiarly conducive to pulmonary diseases.

Justice O'Brien in dissenting, indulges in a somewhat desultory criticism of the statute, saying that it is class legislation, that it is impossible to perceive what connection the number of hours that the workmen are employed can have with the healthful quality of the bread they make, and that while the Legislature may no doubt define what shall constitute a day's work, it cannot prohibit parties from making agreements on the subject for themselves.

Justice Bartlett also dissents.

The fact that the statute is found codified under the title "Labor Law," is productive of some difficulty in regarding it as a health regulation, but one which the majority does not find insurmountable.



FRANCIS SCOTT KEY.

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FRANCIS SCOTT KEY AS A LAWYER.

By EUGENE L. DIDIER.

FRANCIS SCOTT KEY possessed in a singular and unusual degree the delicate fancy of the poet, and the strong reasoning faculty of the lawyer. His fame as the author of the first of our national songs, "The Star-Spangled Banner," has dimmed his earlier reputation as a lawyer. He was thirty-five years old when he wrote his immortal song, but he had already acquired a prominent place among those who flourished in what has been most appropriately called "the golden days of the Maryland bar," when such men as William Pinkney, Luther Martin, William Wirt, Robert Goodloe Harper, Reverdy Johnson and John Nelson formed an unrivalled galaxy of legal giants.

Key was born in the midst of the American Revolution, on August 1, 1779, and his father, Colonel John Ross Key, served with distinction in the Continental Army and contributed liberally in money to the support of the glorious cause of American independence. After graduating at St. John's College, Annapolis, Maryland, high in the class known as the "Tenth Legion," on account of the remarkable brilliancy of its members, young Key studied law in the office of his uncle, Philip Barton Key. He was admitted to the bar in 1801, and began to practise in Frederick, Maryland, in the county of which he was a native. Seeking a wider field for professional honors, he removed to Georgetown, D. C., and entered upon a successful career in Washington, Baltimore, Annapolis and other cities.

He frequently appeared before the bar of the Supreme Court of the United States where he distinguished himself by his chaste, elegant and finished eloquence. One of his ablest arguments before this high tribunal was made in March, 1825, upon a question involving the seisure, by a revenue cutter, and the confiscation of a vessel engaged in the African slave trade. Not only was there a large amount of money involved in the suit, but certain moral considerations of great delicacy. Mr. Key opened the case for the United States, having been engaged to assist the Attorney General, the celebrated William Wirt. On the other side were Charles J. Ingersoll, of Philadelphia, and John M. Berrien, of Georgia. The case attracted great attention, and the Supreme Court was crowded by lawyers, politicians, members of Congress, fashionable women and idle men. Mr. Key, who was deeply interested in the case from a moral as well as a professional point of view, made his opening argument with a force, an energy, a beauty of language, a power of logic, and a richness of fancy which astonished even his most admiring friends. He closed his speech with a picture of the horrors of the "middle passage," (after describing the unhappy lot of the poor wretches, who were seized and carried off from their homes, their families and friends) in a style of burning eloquence that might have done honor to a Pitt or a Wilberforce.

Mr. Key was an enthusiastic promoter of the African Colonization Society whose ob-

ject was to settle emancipated slaves in Liberia. Henry Clay, John Randolph and other broad-minded Southerners, were deeply interested in this object, believing that it offered the best and most practical solution of the Slavery question. Mr. Key's interest in the matter was no doubt the reason why he was retained to represent the United States in the case just cited, as it was the inspiration of his eloquence on the occasion. He was most exact in all his professional engagements; in fact, he was a model Christian gentleman and lawyer. Few persons are now living who ever heard him speak, but tradition has brought down to our time something interesting about his personal qualities: his voice possessed a touching pathos, a sympathetic tone, and a persuasive tenderness that won the ears and the hearts of all who heard him; his words flowed with the ease, sweetness, and clearness of a mountain stream; his language was choice and classical, and appealed with irresistible force to the cultivated, the educated, the refined. He had the enthusiasm of the poet with the power of logical reasoning. His brilliant fancy threw a charm over the driest legal questions; indeed, it may be said of him as Dr. Johnson said of Goldsmith, "he touched nothing which he did not ornament."

No one who saw Key only in the retirement of domestic life, participating in the sports of his children, his dreamy eyes melting with tenderness, his sensitive mouth wreathed in smiles, could believe that this same gentle, courteous gentleman was capable of becoming the fiery Rupert of the forum, the Richard Coeur de Lion of the arena, the Bayard of debate. Fervid, impassioned, enthusiastic, he possessed a splendid reserve force which concealed the pure gold imprisoned in his warm heart.

For many years Mr. Key's winter home was in Georgetown, which was a city before Washington was a town, and, in the first quarter of the nineteenth century, was the favorite residence of distinguished statesmen, lawyers, and government officials. One of Mr. Key's most intimate friends was the cynical, erratic and brilliant John Randolph. They carried on a very confidential correspondence for many years; Key's religious nature impressed itself so strongly upon the Virginia statesman that his faith in Christianity, which had been weakened in his youth by reading the works of Voltaire and other French infidels, was revived, and, during the balance of his life, he was a believer in the faith of his ancestors. Randolph had so high an opinion of Key's ability that he once wrote to him: "Were I Premier (of Great Britain) I should certainly translate you to the See of Canterbury."

Mr. Key was the leading counsel in the celebrated Gaines case, in the early period of the proceedings before the Supreme Court of the United States. This case came up from the United States court of Louisiana, and was before the Supreme Court, off and on, for thirty years and more. Mr. Key devoted much time and study to the case, and was convinced that Mrs. Gaines had been cruelly wronged, and unjustly deprived of the great fortune left by her father, Daniel Clarke of New Orleans. The lady had studied the case *ab initio*, and could give the lawyers points in the matter.

When the opposing counsel in the Gaines case claimed for his clients all those valuable lands in New Orleans, of which Daniel Clarke died possessed, upon the ground that they were evidently Clarke's children because they bore so great a likeness to him, physically—Mr. Key, in his reply, said he was not impressed with that argument; but, on the other hand that Myra Clarke Gaines showed that she was his daughter because she had all the strong and sturdy qualities which her father possessed.

Mr. Key died before the cause was finally settled; so did other lawyers, who were engaged on either side, as well as judges in the

lower courts and the Supreme Court. It was not until 1869 that the case was finally settled, but Mrs. Gaines recovered only a small portion of her father's immense fortune, the lawyers' fees and the costs having swept away the bulk of the property in litigation.

Mr. Key was the intimate personal and confidential friend of President Jackson, as well as his trusted legal adviser. During the Nullification troubles in South Carolina, the President sent him on a confidential mission to Charleston, and it is said that his great tact, forbearance and diplomacy did much to avert an outbreak against the Government.

In recognition of his legal ability and high standing at the bar, President Jackson, on June 29, 1833, appointed him United States Attorney for the District of Columbia; and was so well pleased with the manner in which he discharged his duties that, on June 6, 1837, he reappointed him to the same office; and, at the expiration of his second term, President Van Buren renewed the appointment.

It should be remembered that, during the thirty-three years Mr. Key practised before the Supreme Court, his contemporaries were Daniel Webster, Thomas Addis Emmet, Walter Jones, Rufus Choate, besides his illustrious Maryland contemporaries, already mentioned in the first paragraph of this article. It required a lawyer to be possessed of commanding talents and profound legal learning to cope with such antagonists. On the bench of our great tribunal of justice in those days sat Chief Justice Marshall, Associate Justice Story, Chief Justice Taney, and other learned jurists. The legal battles fought in that great arena were battles of the giants. They were fought by men who were the Alexanders, the Cæsars, the Napoleons of the American bar. Francis Scott Key occupied a high, but not the highest place among his contemporaries: he was not the peer, as a lawyer, of Webster, Pinkney, Wirt, Taney and Harper; but, as a man, he was not surpassed by any, and equalled by few men of his generation.

Key enjoyed the advantage of attending the Court of Appeals of Maryland, while studying law at Annapolis. All the leading lawyers of the State practised in that court. In this way he gained much legal knowledge not found in the books—practical knowledge, which was of great use to him when he came to the bar. One of the judges of the Court of Appeals when he was admitted to practice was Judge Nicholson, his brother-in-law, who afterwards had the "Star Spangled Banner" printed.

Key was the master of many inherited slaves, and he was their true and generous friend, always keenly alive to their best interests, and doing everything to promote their happiness and comfort. He was the unpaid counsel of the colored people on all occasions. He knew their true interests better than they did themselves, and when one Dr. Trandall was indicted and tried for exciting the negroes to insurrection in the District of Columbia, Mr. Key wrote a pamphlet denouncing the wickedness of such incendiary conduct.

A man named Lawrence attempted to shoot President Jackson at the Capitol. Fortunately, his pistol missed fire, and the brave old General advanced upon his would-be assassin, with cane uplifted, ready to strike him down, but the man was hurried away before the General could reach him. Mr. Key, as United States Attorney for the District of Columbia, had to investigate the matter. He was placed in a very delicate position, for some of the more excitable Democrats saw in the attempt upon the life of their idol a conspiracy of his political enemies to get him out of the way. But, after a thorough examination, the assassin was found to be insane, and was locked up. Key was a Democrat, and, as already men-

tioned, a devoted personal and political friend of General Jackson, but, in the conscientious discharge of his duty, as United States District Attorney, he saw that the would-be assassin, Lawrence, had the protection of the law which he had violated.

In a recent conversation with General James Howard, grandson of Francis Scott Key, and of Colonel John Eager Howard, (an illustrious ancestry), he said he remembered his grandfather Key very well, and in the most interesting manner recalled his youthful recollections of Mr. Key's last visit and death. He had not long before returned from a professional visit to Fond du Lac, and he spoke of the case which took him there, and of the fee which consisted of several lots in that town. General Howard inherited the original portrait on wood which is reproduced in this article. Major McHenry Howard, another grandson, who has successfully practised the profession which his grandfather adorned, has been most kind and obliging in furnishing material for this article, and has taken pains to verify dates by referring to family papers.

Mr. Edwin Higgins, of the Baltimore bar, who has been engaged for several years in collecting the facts for an elaborate life of Francis Scott Key, has naturally been deeply interested in an article on Key as a lawyer, and he has permitted the use of a succinct, striking, and remarkable grouping of incidents, each of which has some bearing upon the author of the "Star-Spangled Banner." This interesting paragraph will be a fitting conclusion to this article. As it is one of those rare pieces of writing that cannot be abridged without being spoiled, and cannot be changed without being deformed, it is given in Mr. Higgins' own language:

"I stood at the close of the day upon the portico of the Peabody Institute, in Baltimore. The deepening shadows were gathering about the Mount Vernon Place Methodist Episcopal Church, and it appears to me an exquisite monument to the memory of Francis Scott Key, for it was upon its site he fell asleep January 11, 1843. In the square to the left stands the effigy in bronze of Roger Brooke Taney, Chief Justice of the Supreme Court. He married Mr. Key's sister. To the east, George Peabody, the benefactor of two worlds, adorns the square. He was a member of the same rifle corps with Mr. Key in the War of 1212. The Institute stands upon the site of the old residence of John P. Kennedy, author and statesman. He gave the first place to the 'Star-Spangled Banner' in his *Autograph Leaves of American Writers.* I looked upon the monument to Washington, the first erected to his memory, and I recalled the fact that General John Ross Key, the father of Francis Scott Key, was a friend of Washington; that he marched to Boston and participated in the organization of the Revolutionary Army; that Washington, when President, visited General Key's home and doubtless placed his hand in blessing upon the head of the boy whose song has thrilled the hearts of millions and inspired them with love of country. The site of the monument was a gift from John Eager Howard, hero and benefactor, and one of his sons married the daughter of Francis Scott Key."

Baltimore has recently erected an equestrian statue of John Eager Howard in one of the squares which he gave the city. This tardy honor to the most gallant soldier that Maryland gave to the Continental Army shows that this one of the original Thirteen States does not altogether forget her worthy sons. Let her remember Francis Scott Key, another of her sons deserving of monumental honor. There is a vacant place in Washington Square between the sitting figure of Taney and the equestrian figure of Howard. Let it be filled by the standing figure of the author of the "Star-Spangled Banner."

RESPECT THE ASS.

Davies *v.* Mann, 10 M. & W. 546.

By J. B. Mackenzie.

Per Curiam.

In evil hour, the toil-spent ass
Upon a highway Davies turned,
Along whose marge was humid grass,
Repast from which was ten times earned.

With forefeet bound, while thus it cropped
The esculent, with hurried gait,
Mann's equipage (had this but stopped
Regret on us would hang no weight)

Approaching by a stiff decline,
Passed o'er the hapless quadruped;
When—crushed its all too brittle spine—
The vital spark instanter fled.

Hardship unequalled has been wrought
By that rare animal's demise;
With issue big the plaint is fraught:
Let Judges to th'occasion rise.

For such a wrong 'tis clear to all
Money's requital will be dross;
Yet on some one the load must fall
Ensuing from the tragic loss.

Mann's pocket should, we reason, bear
The cost; for had his Jehu shown
A reasonable amount of care,
His friend would Davies not bemoan.

The Court, besides, *nem. con.*, agree
That, e'en if plaintiff were to blame,
The roadsters would—with rein less free—
Have left unbruised that donkey's frame.

THE CONFLICTING OPINIONS IN THE MERGER CASE.

By Bruce Wyman,
Of the Faculty of Law in Harvard University.

NOW that the opinions in the great case of the Northern Securities Company, *et al.* *v.* the United States, are published, it would seem that it ought to be possible at last to come to some definite conclusions as to the power of the Federal Government to deal with the combination in restraint of trade. But the truth of that most important matter seems to elude us still; we understand more about it, to be sure, but we do not know many things that we would wish. Of these uncertainties that thus remain, many complain; yet, upon the whole it seems well that the development of these extensive functions should be slow. So fundamental a problem to society as that of the trusts should not be dealt with except upon the cautious basis of experimentation.

Nor is the division in the Court to be deplored; it is as necessary for the proper solution of these basal questions that there should be an effective minority as that there should be an efficient majority. As in all of the great issues of life, there is some truth upon each side; a settlement, therefore, cannot come about except by some compromise in the end, when each understands the other. Therefore, due weight must be given in any discussion, not only to the majority opinions of Mr. Justice Harlan and Mr. Justice Brewer, but also to the minority opinions of Mr. Justice White and Mr. Justice Holmes. For what is of permanent interest in these opinions is not so much the dispute over the particular facts as the argument upon the general principles. It is to that end that the extracts which follow have been made.

The argument of Mr. Justice Harlan is thoroughgoing, as may be seen from this quotation: "The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this Court the Anti-Trust Act has been construed as forbidding any combination, which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this Court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce in an economic question which this Court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment

of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a Government of laws, and not of men. Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences."

Undoubtedly, the most important feature of the Merger Case is the opinion of Mr. Justice Brewer, for in this, although concurring, pains are taken to limit the operation of the act to unreasonable restraint of competition, as this excerpt will show: "I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views. First, let me say that while I was with the majority of the Court in the decision in United States *v.* Freight Association, (166 U. S. 266,) followed by the cases of United States *v.* Joint Traffic Association, (171 U. S.. 505,) Addystone Pipe & Steel Company *v.* United States, (175 U. S. 211,) and Montague & Company *v.* Lowry, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only '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 purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended. . . . I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with State law and within the letter and spirit of the statute and the power of Congress. Therefore, I concur in the judgment of affirmance. I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the Court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation."

Mr. Justice White, as might have been predicted, based his dissent upon the rights of the States: "Under this conception of the power of the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of State laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. . . . If the question be looked at with reference to the powers of the Federal and State governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives to Con-

gress the right to regulate the ownership of stock in railroads chartered by State authority is absolutely destructive of the Tenth Amendment to the Constitution, which provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.' This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such State charters tended to restrain commerce between the States or to create a monopoly concerning the same. Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of State railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations. It would likewise overthrow every State law forbidding such consolidations, for if the ownership of stock in State corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit. Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong."

Mr. Justice Holmes in his unexpected concurrence in the dissent furnishes the most interesting opinion. He proposes to base his opinion upon simple interpretation, but he cannot at times avoid the revealing of his social conscience any more than he can fail to exercise his literary art: "Great cases, like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. . . . The provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction. That provision taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It does simply require that a party's freedom in trade between the States shall not be cut down by contract with a stranger. . . . To suppress competition in that way is one thing; to suppress it by fusion is another The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. . . . For again, I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of trade, every such combination caused by their entering into partnership is a restraint of trade, every such combination, as well the small as the great, is within the act. In view of my interpreta-

tion of the statute, I do not go further into the question of the power of Congress. That has been dealt with by my brother, White, and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law, which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretence. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried."

The four opinions that have been given upon this merger case to a certain extent must all be taken into the account in any estimate of the decision. These conflicting opinions leave us much in doubt, but they also give us much information. Certain things should be held to be settled by the majority, notwithstanding the dissent of the minority. But it must be recognized also that many things remain unsettled by reason of the division of the Court. Upon the whole, therefore, we may say nothing of this whole adjudication without qualification. No doctrine can be deduced from any one opinion with safety unless the limitation put upon it by some other opinion is made in the same statement. Now that the gist of the opinion of each of the justices has been given separately, the more difficult task will be undertaken of discovering how they stand with relation to one another upon the principal points in issue.

Perhaps the two most general questions as to the Federal trust legislation are first, as to its validity, and, second, as to its extention. Whether the present anti-trust law is constitutional, and by anticipation what anti-trust laws would be permissible is the first problem. The second question is, to what restraint of trade the present act applies, and against what forms of consolidation it may be enforced. And yet in a way, these problems cannot be separated, since the constitutionality of a statute depends upon the extention that it may have, while conversely limitation of its scope may save its constitutionality. Upon the whole it is as a complex question like this, rather than as a series of questions, that the judges have treated the case.

That anti-trust legislation may be constitutional in general must be regarded as settled beyond dispute. Mr. Justice Harlan is quite justified in claiming that it does not go beyond due process of law to forbid by legislation combination on restraint of trade. "All rights which men have in a civilized society are held subject to the established police power of the State"; and the suppression of conspiracy when injurious to the public has been within that power from time immemorial. It should be noted, however, what Mr. Justice Brewer points out, that "the scope of the act should be held to be limited by the power which each individual has to manage his own property and determine the place and manner of its investment; as freedom of action in those respects is among the inalienable rights of every citizen." This distinction makes unnecessary the warning of Mr. Justice White that "the enforcement of the act means a subjection to absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property." It avoids also the absurdity to which Mr. Justice Holmes would reduce the matter, that "if the act is construed to affect the purchaser of shares in two railroad companies because of the effect it will have upon the competition of these roads, the mere existence of that man may become a crime." Federal legislation, of course, can only affect interstate commerce;

it cannot touch trade wholly within a State. This was one of the most difficult points about the railroad merger, the Northern Securities Company, it was claimed, was a New Jersey corporation doing no business outside that State. Mr. Justice Harlan says bluntly that this is not the truth of this matter taken as a whole, "this combination is within the meaning of the act a combination in restraint of interstate and international commerce." And Mr. Justice Brewer states simply that, "the holding corporation was a mere instrumentality by which the separate railroad properties were combined under one control, that combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates." On the other hand Mr. Justice White puts it this way: "Can it on reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?" And Mr. Justice Holmes adds, "the fact that trade or commerce may be indirectly affected is not enough, interstate commerce depends upon population, but Congress could not upon that ground undertake to regulate marriage and divorce, there would then be no part of the conduct of life with which on similar principles Congress could not interfere."

The real inquiry, therefore, becomes whether this creation of the securities company involved a combination in restraint of interstate commerce. Here again the opinions conflict. Mr. Justice Harlan as before holds that it did, "necessarily by the combination or arrangement, the holding company in the fullest sense dominates the situation in the interest of those who were shareholders in the constituent companies." Mr. Justice Brewer reinforces this by the reminder that, "there was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation, the purpose to combine and by combination destroy competition that existed before the organization of the corporation of the Securities Company." Mr. Justice White continues his argument that this is a simple corporation "investing in the stock of other corporations," while Mr. Justice Holmes insists that "a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent would not be obnoxious to the law."

This discloses the principal issue raised by the minority, that all that has been done by all of these defendants is not contrary to the form of the statute. Surely the act is comprehensive enough; it provides as follows: "Sec. 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. 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. Sec. 2. 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, 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." Yet square issue is taken. Mr. Justice Harlan on one side declares that, "No scheme or device could more effectively or certainly come within the act or could more

effectively suppress free competition between the constituent companies." While Mr. Justice Holmes, on the other side, bases his opinion upon the belief that all that was done in the Merger affair was "neither in restraint of trade nor monopolization."

Such is the Northern Securities Company *v.* the United States, taken by itself, and it is indeed difficult for one to assure himself of the legal situation left by these conflicting opinions. But the case does not stand alone, for it is from the point of view of the lawyer simply the last of a series of cases in the Supreme Court upon the anti-trust statute. These cases to this date are as follows: United States *v.* E. C. Knight, 156 U. S. 1; United States *v.* Transmission Freight Association, 166 U. S, 290; United States *v.* Fruit Traffic Association, 171 U. S. 585; Hopkins *v.* United States, 171 U. S. 578; Anderson *v.* United States, 171 U. S. 604; Addystone Pipe and Steel Company *v.* United States, 175 U. S. 211; Montague *v.* Lowry, and Northern Securities Company *v.* United States, both in the current volume.

The holdings in these various cases may be recalled by a brief summary. In United States *v.* E. C. Knight Company it was held that the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in United States *v.* Trans-Missouri Freight Association, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in United States *v.* Joint Tariff Association, that an arrangement between certain railroad companies in reference to passenger rates among the States, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in Hopkins *v.* United States and Anderson *v.* United States, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted, but no more; in Addystone Pipe and Steel Co. *v.* United States, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided by the operation of a secret pool, was covered by the Anti-Trust Act; and in Montague *v.* Lowry, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress.

It may now be possible to speculate as to the final course of events to be anticipated upon each of the four points that have been raised: upon the constitutional question and upon the interstate commerce question, upon the interpretation of the statute and upon the application of it. What, in fine, has the Federal Government done, and what may it do do with the combination in restraint of trade that so threatens our industrial peace?

First of all, anti-trust legislation is constitutional; it does not deprive any persons of life, liberty and property to prohibit them

from entering into combinations in restraint of trade. The function of the State to interfere to maintain the ordinary processes of competition from such attack cannot be denied. It is, however, at present, not constitutional to prohibit an individual from acquiring such property as he will for any purpose that he pleases. The difference between these two things arises from the greater potentiality of the combination for the disruption of the industrial order. This is the result of United States *v.* Trans-Missouri Freight Association, United States *v.* Fruit Traffic Association, Addystone Pipe Company *v.* United States and Northern Securities Company *v.* United States.

In the second place, Federal legislation may interfere in all business operations that affect interstate commerce in any direct way, and confederacy to raise prices or to divide markets is within this. On the other hand, the Federal Government may not interfere to regulate the conduct of business operations that have no direct effect upon interstate commerce, as the manufacture of commodities or the wages of laborers. Upon that point United States *v.* E. C. Knight and Hopkins *v.* United States are to be compared with Addystone Pipe and Steel Company *v.* United States, and Northern Securities Company *v.* United States.

Third, all combinations of every sort are within the prohibition, whether in the form of pools, or trusts, or holding corporations, or other device. If the fact of existing conspiracy be established, it is enough. The great question still remains unsettled whether the single corporation which buys outright the properties of former companies with intent to monopolize, is subject to dissolution. The case of the Northern Securities Company *v.* United States is more nearly that than is the case of Montague *v.* Lowry; and obviously the law has gone far beyond United States *v.* Trans-Missouri Freight Association and Addystone Pipe and Steel Company *v.* United States in that respect. There is still the conspicuous distinction that in the case of the holding corporation, a combination of existent corporations remains in existence defying the law; while in the case of the single corporation it is difficult to find a continuing combination against the law after the transaction is complete.

As a last point, it is to be remarked again, that by the opinion of five justices at least, the prohibition may extend only against unreasonable restraint of trade. To sum the matter up, the present anti-trust law is now held remedial, not substantial in its provisions. What is a combination in restraint of trade, or to monopolize it, remains a common law question; the statute simply provides effective Federal procedure—the injunction and the indictment. Without doubt this is the most important result of the conflict of the opinions in the Merger Case. By this alone a great advance is to be marked from United States *v.* Trans-Missouri Freight Association to Northern Securities Company *v.* United States.

The portentous thing in all of these decisions is the force of the Federal Government. Upon the whole, one feels the conviction that there is power enough in the Federal Government to deal with the trust problem. It will be well if that proves to be the outcome. What the situation requires is uniform regulation. This it can have alone from the general government. It means perpetual anarchy for the industrial situation unless the artificial lines of the States be ignored and the commercial interests of the country be treated as a whole. The fate of the nation must be entrusted to the national government. Concessions may be made by the majority judges to the minority judges in all but this.

THE NEGRO LAWYER.

By William Tyree.

THE acuteness of the negro lawyer in the New South—for he is distinctly a product of the New South—and his keen insight into human nature, especially that of the white man, is well illustrated by the following incident:

In one of our Southern cities a warrant had been sworn out against a negro girl who had served in her young mistress' family as her maid, for stealing a very handsome evening dress which had only been worn a very few times and which the girl greatly admired. The girl was indicted, and in due course of time the case came to the City Court for trial.

There happened to be in the city a negro attorney who was recognized by both white and colored citizens as an exceptionally bright negro, and him the girl retained as counsel.

As the day of the trial approached he was asked by many of his white friends if he would not prefer a jury composed of both white and colored men to sit upon the case, and to them all he gave the same answer, that he wanted a jury made up of white men entirely, influential citizens, and, if possible, former slave owners.

When the evidence had gone to the jury, and a verdict of guilty seemed inevitable, the attorney for the accused arose, 'mid perfect silence, and addressed the Court as follows:

"May it please your Honor and gent'men of de jury," and he leaned slightly over the desk in front of him toward the twelve men who sat opposite. "I propose to show you dat dis gal had no intention whatever of stealin' dis dress. While we admit dat she was found wid dis dress in her possession, she did not intend to steal dis dress. Gent'men, de circumstances are dese. Dis gal was invited to a party, and she had no party dress to wear; she knew dat her young mistiss had a wardrobe full of dresses, and she thought it would be no harm fur her to go to dat wardrobe and teck down one of them dresses and wear it to de party, intending to bring dat dress back in de mornin,' after de party; bresh it nicely and hang it back in de wardrobe whar it belonged, jest as if it had never been tecken out of thar; and her young mistiss would know nothin' 'bout it. But unfortunately, gent'men, dis culled gal was belated in gettin' home from de party, and when she walked in in de mornin', her young mistiss was up and caught her wid de dress on.

"Now, gent'men, if dis gal had not been belated, as I have stated, de dress would have been back in its place and nobody would have been hurt. Now I ask you gent'men of de jury, as I know each and ev'y one of you has owned niggers, ef you haven't had, at some time durin' your life, your body-servant teck out of you' wardrobe or trunk, some of you' clothes and wear dem clothes off and return dem clothes to their place. Gent'men, you all never considered dat stealin', and I am satisfied, gent'men of de jury, you don't believe dat dis heah gal," and he turned around to his client, "intended to steal dat dress.

"In view of the facts, gent'men, as I have stated dem I leave dis case in your hands, and believe dat your verdict will be one of acquittal for de accused."

The negro sat down amid much laughter. In a few minutes the jury filed into the court-room, the foreman pronouncing the verdict: "After considering all the evidence in the case, we find the accused not guilty."

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

I.

Failure to Declare War and Alleged Violation of Korean Neutrality.

By Amos S. Hershey,
Associate Professor of European History and Politics, Indiana University.

THE present Russo-Japanese War promises to present an exceptionally interesting and important field for the application of certain principles of International Law, more especially for some of those modern rules governing the rights and duties of neutral States and individuals[1] which are of comparatively recent origin and to the growth of which the United States has so largely contributed. Certain of these rules or customs may be said to be still in process of formation, or have not as yet been fully established by the general practice of nations; others are perhaps no longer observed, and are therefore of doubtful or decaying validity. International Law is in a state of constant growth as well as of decay; for its rules are the result of international practice which, although based upon fundamental principles, varies in different times and under different circumstances. The present war may serve either to strengthen such customs as are in a stage of formation or of imperfect development on the one hand, or to weaken such as are in a state of decay on the other. These introductory remarks may perhaps serve as a sufficient apology for a series of articles which aim to deal with certain questions suggested by the present struggle in the Far East, from the standpoint of International Law.

War is an abnormal relation between individuals as well as between States, and its outbreak brings into existence an entirely new set of rules which regulate the rights and duties of neutral States and individuals in respect to belligerent States and individuals, as well as the relations of the belligerents with one another, and which largely supplement or supplant those rights and obligations already in existence. In view of this fact, it becomes extremely important to fix upon a definite date for the beginning of these new and abnormal relations between neutrals and belligerents on the one hand and the two or more belligerents on the other.

A majority of the more recent authorities[2] on International Law hold that between belligerents a formal notice of intention or a declaration of war is no longer necessary prior or preliminary to the outbreak of hostilities. "An act of hostility, unless it be done in the urgency of self-preservation or by way of reprisal, is in itself a full declaration of intention; any sort of previous declaration therefore is an empty formality unless an enemy must be given time and opportunity

[1] A number of nice and delicate questions relating to the laws and principles of neutrality have, in fact, already arisen at the present writing. Some at least of these will be discussed in later articles.

[2] A majority of the older authorities insisted upon the necessity of a declaration in some form. They were doubtless influenced by traditional views or customs which had their origin in the fetial law of the Romans or in the chivalry and ceremonies of the Middle Ages. The Romans, *e. g.*, were very strict in their observance of certain formalities connected with the declaration of war, and they largely measured the justice or the injustice of a war by the strictness with which these formalities had been observed.

For a very extensive citation of the older authorities and historical examples, see Hall, Treatise on International Law (3d ed.) pp. 376-79 and notes. Especially interesting is the citation from Burlamqui (note on p. 379), who naively says that "an enemy ought not to be attacked immediately after declaration of war, 'otherwise the declaration would only be a vain ceremony.'" This is a *reductio ad absurdum* of the view that a declaration of war is necessary.

to put himself in a state of defence, and it is needless to say that no one asserts such quixotism to be obligatory."[1] The date of the first actual or pronounced hostilities is, in fact, a better criterion of the commencement of a war than the date of formal declaration; for the declaration may have been preceded by acts of hostility, and in such cases difficult questions are bound to arise which may lead to great uncertainty and much long and useless controversy.[2]

Although the modern authorities[3] are still somewhat divided on this question, the general practice of nations, at least since the sixteenth century, shows conclusively that declarations of war prior to the outbreak of histilities have been comparatively rare and altogether exceptional.[4] So far as the writer is aware, the opinion of judges of prize courts (at least in the United States and England), who have been called upon to pass upon the validity of captures made prior to the declaration of war, is unanimous that war may exist without a declaration.[5]

[1] Hall, *op. cit.* p. 374.

[2] "In the eighteenth century declarations were frequently published several months after letters of marque had been granted, after general reprisals had been ordered, and even after battles had been fought; and disputes in consequence took place as to whether war had begun independently of the declaration, or from the date of the declaration, or in consequence of the declaration, but so as to date, when once declared, retrospectively to the time of the first hostilities. As the legitimacy of the appropriation of private property depends upon the existence of a state of war, it is evident that conflicts of this nature were extremely embarrassing and, where different theories were in play, were altogether insoluble. To take the state of war on the other hand as dating from the first act of hostility, only leads to the inconvenience that in certain cases, as for example of intervention, a state of war may be legally set up through the commission of acts of hostility, which it may afterwards appear that the nation affected does not intend to resent by war; and, as in such cases the nation doing hostile acts can always refrain from the capture of private property until the question of peace or war is decided, the practical inconvenience is small." Hall, *op. cit.* p. 375.

[3] For more or less extensive citations of the modern authorities, see Hall *op. cit.* pp. 379-81 and note on p. 380; Calvo, IV, § 1906; Pradier-Fodere, VI, § 2673. The great French publicist, Pradier-Fodere (VI, § 2677) is of the opinion that "if declaration is not an essential condition of a regular war, it is, at least, a useful formality which States ought not to omit." The great Russian publicist, De Martens (III, 205), thinks that "neither proclamation nor diplomatic notice are obligatory, provided that the state of relations is such that hostilities will not be a surprise. Hostilities which constitute a surprise, he characterizes as brigandage and piracy." The German Holzendorff (Handbuch, IV, §§ 82-84) holds neither declaration nor manifesto to be necessary, although he thinks that "a belligerent ought to give notice of some sort if he can do so consistently with his political interest and his military aims." The last two citations are given by Hall, note on p. 380.

[4] "Most of the wars of the seventeenth century began without declaration, though in some cases declarations were issued during their continuance." Hall, note on p. 377. "The nearer we approach to modern times the rarer do formal declarations become. There have been only eleven of them between civilized States since 1700, whereas the present century has seen over sixty wars or acts of reprisal begun without formal notice to the power attacked." Lawrence, p. 300. In a compilation of cases of hostilities extending from 1700 to the present time, Colonel Maurice of the British army, found but 11 out of 118 instances in which a declaration of war preceded hostilities. Snow *Manual*, p. 78. In most cases declarations have, however, followed the outbreak of hostilities.

For extensive citations of historical examples, see Hall, cited above; Phillimore, Commentaries, III, Pt. IX, c. 5; Calvo, IV, § 1908; Rivier, II, pp. 223-28. For an abstract of cases in which hostilities have occurred between civilized powers prior to declaration from 1700 to 1870, see Maurice, Hostilities without Declaration of War (1882), and a review of this work by Prof. Holland in the *Revue de Droit International*, 1885, No. 6, pp. 63-65. See also *Des Hostilities sans Declaration de Guerre*, by M. Feraud-Giraud in the same review for 1885. No. 1, pp. 19ff. See also Owen, Declaration of War, 1899.

It should perhaps be noted that recent wars seem to have witnessed a return to the older practice, *e. g.*, those of 1870 and 1877. The practical futility of the declaration of 1877 is, however, shown by the fact that Turkish territory was invaded by Russia on the day of her declaration of war on April 24, 1877. In the China-Japanese war of 1894-5, hostilities were begun before the declaration, and in our own recent war with Spain war was formally declared by Congress on April 25, 1898, after the capture of several Spanish vessels and the blockade of the Cuban ports on the 22nd of April. The existence of hostilities was dated back to the 21st of April by the Declaration itself.

[5] See, *e. g.*, the opinion of Lord Stowell in 1 Dodson 247; of Sir W. Scott in the case of the Eliza Ann, 1 Dodson 244: The U. S. Supreme Court in Bas *v.* Tingy, 4 Dallas 37, and in The Prize Cases, 2 Black, 635: Lord Chief Justice Mellish in the Teutonia, 4 Privy Council Reports 171; and J. Locke in the Buena Ventura and Panama, 87 Fed. Rep. 927.

The utmost that nations in a state of peace have a right to demand is that they shall not be suddenly surprised or treacherously attacked without any intimation or warning whatsoever. But "the use of a declaration does not exclude surprise"; it only "provides that notice shall be served an infinitesimal space of time before a blow is struck. . . . The truth is that no forms give security against disloyal conduct, and that when no disloyalty occurs States always sufficiently well know when they stand on the brink of war."[1] War is usually preceded by a long period of negotiation which generally, although not necessarily, terminates in an ultimatum. Moreover, with modern facilities for telegraphic communication, a complete surprise would be well-nigh impossible.

The mere recall and dismissal of ambassadors or ministers or, in other words, the breaking off of diplomatic relations, is not and ought not in itself to be regarded as equivalent to a declaration of a state of war;[2] but such acts indicate that the relations between the States in question are very much strained or altered, and they often form a sort of transition from a state of peace to that of war. They are generally preceded by an ultimatum or final note which usually prescribes a definite time within which a favorable answer must be returned in order to prevent a resort to force. In such cases the ultimatum amounts to a conditional declaration of war, *i. e.*, conditional upon the rejection of the terms proposed or failure to accept them within the time specified.

For the convenience of neutrals, as also to warn citizens or subjects of the belligerent State, it is however customary, in lieu of or in addition to a declaration, to issue a proclamation or manifesto which usually sets forth the causes or motives of the war, but even these are sometimes omitted.

The foregoing rules or customs are so well known to students of International Law and their practice is so generally observed by modern States that it might perhaps be deemed unnecessary to restate them here were it not for the charges of "treachery," "piracy," "bad faith," and "breach of International Law" which have been made in certain quarters—high as well as low—against Japan in consequence of the Japanese attack upon the Russian fleets at Chemulpo and Port Arthur on February 8th prior to the formal declaration of war by Japan against Russia on February 10th. Not only have these charges been noised abroad by the apparently unanimous voice of the French as well as the Russian press, but the same opinion is said to be held by leading authorities on International Law in Paris and St. Petersburg. Most serious of all, the Czar himself is said to have made himself the mouthpiece of these charges in public as well as private utterances, and they have been presented to the whole world through the medium of the Czar's formal Manifesto of February 10th and Count Lamsdoff's Circular Note to the Powers of February 22d.[3]

A brief review of the facts ought to convince the most prejudiced or the most skeptical that the conduct of Japan in this matter was entirely correct. It is not our intention to enter upon a discussion of the causes of this war with reference to their justice or injustice; for International Law as such is indifferent to causes—it does not consider the justice or injustice of a war. As far as International Law is concerned, all wars are equally just or unjust; or, more properly speaking, they are neither. International Law merely takes cognizance of the

[1] Hall, p. 381. See also Lawrence, pp. 301-02; Woolsey (6th ed.) pp. 189-90; Walker, *The Science of International Law*, p. 242; Pradier-Fodere, VI. § 2676; Rivier, II. p. 222; Funck-Bretano et Sorel, *Precis*, p. 245; De Martens, *Traite*, III, 205.

[2] Pradier-Fodere, VI. § 2678; Rivier, 711, p. 220; Funck-Bretano et Sorel, p. 243.

[3] For these documents, see London *Times* (weekly ed.) for February 12th and February 26, 1904.

existence of war as a fact and prescribes certain rules and regulations which affect the rights and duties of neutrals and belligerents during its continuance. The justice of war in general or of a certain war in particular are questions of the gravest importance and the most vital interest, but they belong to the domain of international ethics or morality rather than to that of International Law.[1]

In order to justify the propriety of the Japanese attack upon the Russian fleets from the standpoint of International Law, it is enough for us to show that all peaceful or diplomatic relations between Japan and Russia had been severed a sufficient time before the attack, and under such circumstances as to guard against all reasonable danger of a surprise. It must have been reasonably clear to all concerned for months prior to the outbreak of hostilities that war was inevitable unless important concessions should be effected or a compromise agreed upon which neither State seemed willing to make. This fact must have been realized at St. Petersburg as well as at Tokio, and the long Russian delays[2] in answering the Japanese notes during the period of negotiations which preceded the outbreak of hostilities can hardly be explained on any other theory than that Russia desired time for the completion of her military preparations and the concentration of her land and naval forces.[3] The Russian reply to the last Japanese note of Jan. 13, 1904, had not been received by February 6th in spite of a request on the part of the Japanese Government for a prompt response on account of the gravity of the situation, and in spite of the repeated requests for an answer on the part of the M. Kurino, the Japanese minister at St. Petersburg.[4]

Under these circumstances the only matter for surprise is that the Japanese Government should have delayed so long (unless it, too, required more time for military preparations), and it is therefore no cause for adverse criticism that diplomatic relations with Russia were abruptly severed on Feb. 6th. The Russian Government was informed that "the imperial Government (of Japan) have no other alternative than to terminate the present futile negotiations. In adopting this course the Imperial Government *reserve to themselves the right to take such independent action as they may deem best* to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests."[5] This was undoubtedly a sufficient declaration of intention on the part of the Japanese Government, and if the Russian fleet or the Rusian Government allowed themselves to be surprised after such a plain, albeit diplomatic, intimation of hostile inten-

[1] Bluntschli (*Droit International Codifié*) 5th ed., § 515, p. 293) expresses a different view. He says, "War is just when International Law authorizes recourse to arms; unjust when it is contrary to the principles of law." He adds in a note, "this principle is not only a rule of morality, it is a true principle of law." He admits, however, that it has no great practical value, inasmuch as each of the belligerents is sure to affirm the justice of its cause, and because there is no judge to pronounce upon the value of these assertions.

But, as Funck-Bretano et Sorel (*Précis*, p. 232, 2nd ed.) says, "it is only an abuse of words, in relying upon the law of nations, to qualify wars as just or unjust. The law of nations only considers States in their relations with each other. . . . It is with wars between States as with combats between men; they only commence when all notion of reciprocal right and justice ceases. . . . War is a political act. . . . "

[2] The Japanese proposal of August 12, 1903, was not answered by a counter-proposal until October 3d. The answer to the Japanese proposal of October 30th was delayed until December 11, 1903. For a history of the negotiations, see London *Times* (weekly ed.) for February 12, 1904.

[3] For evidence on this head, see the Japanese reply to the Russian charges in London *Times* (weekly ed.) for March 4, 1904.

[4] See the Japanese statement of the case in the London *Times* (weekly ed.) for Feb. 12, 1904. So far as we are aware, the Russian Government has not denied these facts. The burden of the Russian complaint is that Japan did not await the receipt of the last Russian note which, it is alleged, was on the way to Tokio at the moment of the rupture of diplomatic negotiations; but it is not alleged that this note conceded any appreciable portion of the Japanese demands.

[5] See N. Y. *Times* for Feb. 13, 1904.

tion, the fault, if any, can certainly not be laid at the door of Japan. Russia can hardly be accused of such ignorance or inexperience of the methods of modern diplomacy as is implied in her complaint that Japan began the attack on Port Arthur without "previously notifying (us) that the rupture implied the beginning of warlike action."[1]

The Japanese attack on the Russian fleets at Chemulpo and Port Arthur occurred on February 8th,[2] *i. e.*, over two days after M. Kurino, the Japanese minister at St. Petersburg, had informed the Russian Government that Japan had decided to sever diplomatic intercourse with Russia, and that she reserved to herself the right to "take such independent action" as was deemed proper for the protection of her rights and interests. Surely there is here less cause for the charges of "surprise," "bad faith" and "treachery" than if Japan had patiently awaited the Russian note, carefully preserved the appearance of diplomatic relations, then suddenly declared war, and immediately followed this declaration by an attack on the Russian fleet.

Russia also complains of another serious infraction of International Law on the part of Japan—*viz.*, of the violation of the neutrality of Korea. In a circular note to the Powers, sent on Feb. 22d, Count Lamsdorff, the Russian Minister of Foreign Affairs, charges Japan with "an open violation of all customary laws governing the mutual relations between civilized nations." "Without specifying each particular violation of these laws on the part of Japan," he calls the most serious attention of the Powers to the acts committed by the Japanese Government with respect to Korea," the "independence and integrity" of which "was recognized by all the Powers." In thus violating the neutrality of Korea, Japan is accused, not only of a violation of treaties, but of a "flagrant breach of International Law," as well.[3]

There can be no doubt but that, according to the strict letter of the law, Japan has been guilty of a violation of one of the most fundamental rules of International Law,—*viz.*, the right of a sovereign State to remain neutral during a war between other members of the family of nations,[4] and to have its neutrality and territorial sovereignty respected by the belligerent States. On the other hand, as the Japanese Government is careful to point out in its official reply to the Russian note, "the maintenance of the independence and territorial integrity of Korea is one of the objects of the war, and, therefore, the dispatch of troops to the menaced territory was a matter of right and necessity, which had the distinct consent of the Korean Government."[5]

This seems to be one of those not altogether rare, although exceptional, cases where reasons of policy or motives of national interest, if not the necessity of self-preservation, intervene to prevent a strict observance or necessitate a positive violation of law. The "Monroe Doctrine" of Japan has long since included Korea as within her political "sphere of influence" or protection, and Korea is one of the main objects of the present war. It was, therefore, just as impossible for Japan to respect the neutrality of Korea after the opening, or in contemplation of hostilities, as it would be impossible for the United States to respect the neutrality of a Spanish-American State under similar

[1] See the Czar's Manifesto in London *Times* (weekly ed.) for February 12, 1904.

[2] It is claimed by the Japanese that the first shot of the war was fired by a Russian vessel at Chemulpo; but this point is entirely immaterial, inasmuch as it was Japan that made the first aggressive movement.

[3] It is now claimed that it was Russia who first violated the neutrality of Korea by sending troops across the Yalu on February 2d. See London *Times* (weekly ed.) for April 1, 1904.

[4] This right was scarcely recognized in practice before the modern period and it has often been violated even in modern times; but it may now be regarded as one of the best-established and most fundamental rules of international law.

[5] See the London *Times* (weekly ed.) for March 11, 1904.

circumstances, *e. g.*, if threatened by a European Power. The complaints of Russia on this score, although theoretically sound, are practically absurd.

Russia's real motive in entering this protest is probably to be found in the conclusion of Count Lamsdorff's note. "At the same time, the Imperial Government (of Russia) considers it necessary to issue a timely warning that, owing to Japan's illegal assumption of power in Korea, the Government declares all orders and declarations which may be issued on the part of the Korean Government to be invalid." In order to raise her position in Korea above that of a mere military occupant or a vulgar conqueror, Japan has negotiated a treaty with the Korean Government in which she "guarantees the independence and integrity of the Korean Empire," (Art. III.) and agrees to protect Korea against the "aggressions of a third Power or internal disturbances."[1]

The Russian Government claims that this treaty is invalid because made under duress.[2] This raises a very interesting question. Is the duress here alleged of such sort as to render the treaty and all acts performed under its sanction invalid? The rule which applies in such cases is perfectly clear, although we are not fully informed as to the facts in this particular case. One of the antecedent conditions upon which the validity of a treaty depends is "freedom of consent." But "the freedom of consent, which in principle is held as necessary to the validity of contracts between States as it is to those between individuals, is understood to exist as between the former under conditions which would not be thought compatible with it where individuals are concerned. In International Law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for. Consent, therefore, is conceived to be freely given in international contracts, notwithstanding that it may have been obtained by force, so long as nothing more is exacted than it may be supposed that a State would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts. And as International Law cannot measure what is due in a given case, or what is necessary for the protection of a State which declares itself to be in danger, it regards all contracts as valid, notwithstanding the use of force and intimidation, which do not destroy the independence of the State which has been obliged to enter into them. When this point, however, is passed, constraint vitiates the agreement, because it cannot be supposed that a State would voluntarily commit suicide by way of reparation or as a measure of protection to another. The doctrine is of course one which gives a legal sanction to an infinite number of agreements, one of the parties to each of which has no real freedom of will; but it is obvious that unless a considerable degree of intimidation is allowed to be consistent with the validity of contracts, few treaties made at the end of a war or to avert one would be binding, and the conflicts of States would end only with the subjugation of one of the combatants or the utter exhaustion of both."[3]

In the treaty between Japan and Korea, the "independence and territorial integrity" of Korea are carefully and explicitly provided for, so that there can be no objection to the validity of the treaty on this score.

[1] See the London *Times* (weekly ed.) for March 4, 1904, for the text of the treaty between Japan and Korea.

[2] The Russian *Novosti* has published a statement from the Ministry of Foreign Affairs declaring that "Russia does not consider Korea as a belligerent State, but simply as a neutral State acting under violent pressure from Japan and deprived of the power of free action." For this reason, it is said, "Russia cannot regard as valid any treaty concluded by Korea for the benefit of Japan, nor any abrogation of Russian concessions." See London *Times* for March 25, 1904.

[3] Hall, *op. cit.*, 3d ed., pp. 325-26.

"The only kind of duress which justifies a breach of treaty is the coercion of a sovereign or plenipotentiary to such an extent as to induce him to enter into arrangements which he would never have made but for fear on account of his personal safety. Such was the renunciation of the Spanish crown extorted by Napoleon at Bayonne in 1807, from Charles IV. and his son, Ferdinand. The people of Spain broke no faith when they refused to be bound by it and rose in insurrection against Joseph Bonaparte, who had been placed upon the throne."[1] So far as we are aware, it has not been alleged that Japan has used such methods of coercion in the present instance.

[1] Lawrence, pp. 287-88. Cf. Hall, p. 326.

THE PRACTICE OF LAW IN NEW YORK CITY AS IT APPEARED TO A LAW STUDENT.

By S. Murray, LL.B., 1903.

I HAD a letter from one of our giant capitalists whose commercial wars extend even to European soil and under it. But I was obliged, none the less, to win a secretary's *visé* before I could see the busy person to whom my note ran. He appeared at the end of the passage, a stoutish, well-dressed man, with a face, given a normal nose, like Doyle's figure on the cover of *Punch*. Holding a bundle of papers in his hand, he waved me on, and seemed to be pawing the ground with impatience, so that I had difficulty in keeping from running.

Everyone "runs" in New York, even those engaged in a profession notorious, since Hamlet, for its delays. Law clerks have no union; they work day and night. I noticed in one office a switch girl studying stenography with a receiver fastened to her head; a call boy in another would dart like a fire-horse from the handwriting he was practising in his copy book, when the bell sounded. The whole place is at white heat.

The man who grasped my hand and dragged me into his partner Bramwell's office, makes more money than any other lawyer; accordingly he is often called the leader of the New York bar. Not much over fifty years of age, he has pulled his way up from the bottom by a series of remarkable mental strainings. If the climb is interrupted by break-downs in health, it is resumed with ferocity after six months of rest. His clerks call this strange perversion of the human species "the wild man" and scatter at his approach; call boys and stenographers duck when he appears, and the whole office force trembles with an increased power put on at his advent.

His confidence in himself is as great as his ability. Once he is reported to have said, when the wisdom of his clerks could not burrow the authority he needed, "Gad, I'm not the leader of the bar yet!" But these are better samples of his talk, "Bet you twenty-five, Bramwell, I win Smith *v.* Jones. Are you on, Bramwell?" and, to his assistant managing clerk, a year's graduate of the law school, "When does the case of—come up?"

"I think it's the tenth, sir."

"You think, you!—You have no business to think. I think; it's *your* business to know."

He has no social relations with his people. Even his partners are without glimpses of him for days at a time. Half a year after he

had taken the son of a client into his employ, he saw the boy in the elevator, and pleased at remembering his face, queried pleasantly "if he was still at Williams?"

The corporation shop of which he is the power and superintendent requires two whole floors in a large office building. From the outer waiting room you see boys dashing in all directions, clerks and stenographers laden with papers, issuing here and there from noiseless doors; and all about, piled to the ceiling, great lettered, iron boxes, filled with the papers of fruitful cases.

In these particulars the office is no different from say fifteen other offices in New York, almost as large. Sometimes the whole front room is taken up with counters, cages and bars, which make you think you have wandered by mistake into a bank. In some "shops," too, the elevator disgorges into the outer office, adding its continual bang to the rush and confusion.

The library in these establishments will be complete and sometimes fitted with leather chairs and even with heavy plush curtains. Private offices of the partners are apt to be in good taste. The great man looks out at you over the highly polished plain of two large desks. The wall behind him may be burlapped, and like as not, hung with old engravings, heavily framed in black, of early English justices.

"This is Mr. Murray, Bramwell, who comes highly recommended by Mr. Merger; of course, anything we can do for Mr. Merger and Mr. Murray we shall want to do"—and Bramwell's partner was gone.

"Does your father live in New York?" asked Bramwell. This is always the opening question. Rents are high, and business from any source is acceptable. As a friend who had been indifferently successful and is correspondingly cynical said to me, "Nothing is cheap in New York but brains. If you can bring them business well and good; if not—bah! Goldsmith meant New York when he spoke of the 'place where wealth accumulates and men decay.' "

After some talk I reminded the great attorney that I had known him by correspondence over an intercollegiate debate. Now notice the genius for time saving. Instead of "Ah, indeed, when was that?" he replied, "I remember it well," although as I recalled later it was a lawyer of the same name but with different initials to whom I had written.

Bramwell is a great, shaggy man, whose talk takes the form of very personal questions in such rapid succession as to make satisfactory replies impossible. "He goes into court," said a disgruntled clerk, "and without saying a word there, sends a whacking bill for glaring at the judge and mussing papers." Every few minutes while I was being cross-examined and looked over, the telephone on his table would buzz and allow him to vituperate or cajole the other end of the wire.

Question: "Do you have to live on what you are going to make here?"

Answer (evasively, because imagining a replication of "Impossible" to an affirmative reply): "I should like to."

Q. "But do you have to?"

Ans. "No."

"Well, that's bad! I always had to, and there's nothing 'll drive a man like earning the drachmæ he lives on. Don't come to New York at all," he continued. "It is and has to be a heartless place. No one is important here, and we simply haven't time for the amenities. You boys come down from the schools and we lead you a dog's life; and what seems to distress you most, is that there is no kindergarten to make things pleasant. The humanity in a man is jammed out of him when he comes down in the cars; we contribute our youth and our dreams and turn out—a corporation's brief."

The fact that there are so many very large offices to absorb business, results naturally, in many small ones to subsist on the leavings.

The latter are the more discouraging. In one, I met a fellow who ten years ago had been the most prominent undergraduate at New Haven. He apologized for offering no salary and thought the law "laborer worthy of his hire." The work he could offer was of uncertain character; often there might not be much of anything to do. An hour or two each day must be devoted to keeping the office record; work which, though wearying, might be excellent instruction; then, there were errands to the clerks and courts.

Some one has suggested that it is hard to get up the ladder, because of old fellows near the top who block the way coming down. There are many lawyers in New York who give not more than half the six hours daily which Sir William Jones advises for the law. Pride and the bitterness of leaving so much legal wisdom and cunning, make them lag after their force is spent. One of our great legal writers, at seventy-five and blind, learned, as I know, all the French irregular verbs because he came upon one which confused him. Judge D——, long past the good Book's three score and ten, as much the law on his subject as a text writer can be in a common law country, has an office somewhat removed from the furious rush of the main streets. It is fitted with the dingiest of furnishings—a setting in which one would picture Sergeant Buzfuz. This tenant, however, has better work than the defense of unfortunate Pickwicks; some of the most powerful corporations in the country would refuse an instrument on the strength of his *imprimatur*.

"I can't learn that wretched code," said one of these old gentlemen. "To try, is a prostitution of the human intellect."

His son had taken me into the room where the learned counsel was occupied with the signing of checks his secretary placed before him, and with having his shoes polished at the same moment—the time-saving habit still a part of him, though needless now as a horse's fifth toe.

"Father, this is Mr. Murray and—"

"I don't give a damn if it is," he burst out with the peevishness of an old man. "At least," he went on more mildly, with a charming smile, "until I've finished this business." Then to his secretary, in reference to his writing, "Pretty shaky, today, ain't it?"

I supposed he had forgotten my presence, but in a moment he whirled about and astonished me by telling my home city and the *minutiae* of my college and law school courses. Here was the nearest approach to the kindergarten for law students, the existence of which, in New York, Bramwell had denied. It is his greatest pleasure to have fellows from the Harvard Law School consult him about an office. As a matter of fact, he has placed many of the now prominent attorneys in New York; even Bramwell and his brilliant colleague are "his boys." And the firm which bears and will bear his name is hardly worse than the best in New York. (This custom of keeping an old firm name, by the way, led a student on one occasion to ask to see a partner who had been dead some fifteen years.)

If you chance to look through the Supreme Court reports of the past forty years, and into the reported cases in State courts of highest resort, you will find one name constantly recurring in the list of counsel. Its owner is one of say three men, of whom you could say none is leader of the New York trial bar—because of the others. The great barrister must have won judges and juries entirely by his remarkable intellect; he has used the cross-bow, argument, in the famous comparison of Lord Bacon, and not the long bow of persuasion, which depends on the man; for his manner is cold and austere. A smile that should have been charming is hardened by cynicism, and the great advocate speaks with indifference and sometimes with bitterness.

"What do you want," he said, "fame or money?"

I expressed a desire for a judicious combination of the two; in fact I supposed one a concomitant of the other.

"No, there are lawyers who have made single fees of a million without going into court, and there are attorneys who appear every day in court and in the public prints—but not in the banks.

"Don't go into a large office either. If you come in here you will probably never get to see me about your work and you will certainly not argue any of my cases or even motions. People want me; they don't pay to have someone else. Besides everyone starts in this office as a student and grows to be a clerk." (The difference between these stages of advancement is a salary.)

"What I wish to know is, can a man work his way up into the firm?"

"Well, a man once got to be managing clerk here in three months—and then quit with nervous prostration. But I don't mean to answer your question that way, Alderson," he shouted. "Alderson," he said when his young partner appeared, "this is Mr. Murray, who wishes to run things as soon as possible in our office. I called for you as the best answer to his question whether a man can work into a firm if he deserves to get there."

In looking into so many offices I was following the usual student method of making a choice. In some, division of labor is so planned that you may be given one sort of work and kept at that. A classmate of mine spent his summer vacation with the *Federal Reporters*, abstracting every case in them relating to Admiralty; this, because his employer hoped to find an authority, although none appeared in the indices. Of course, then, there is no fixity of term for office positions. If a man sees himself sinking into a rut, he pulls out.

The annual flood of students has not swept away from some few lawyers their interest and consideration. Three men, all at the top of their profession, I met with no other introduction than my card. Two of them offered me openings, and the third, entirely of his own volition, tried to help me with the men at his club. But altogether it was a disheartening search. There is little professional spirit or pride in New York; the place is too big for that. A student will generally get advice, but no encouragement; and pay, after the plunge, if any at all, such as East side office boys or stenographers would sneer at. In many offices earning with some frequency fees of one hundred thousand dollars, the struggling younger brother will get no pay for half a year, and then from five to ten dollars a week. To put on a brief the name of the man who drew it, is quixotic. In one of the most important cases ever decided in New York, the clerk whose suggestion moved the Appellate Division, received not a tittle of recognition or praise for his brilliant thought.

The whole practice of the law is warped, too, by the brutal mass of business. The successful lawyer detests trial work, partly because affairs of great moment cannot wait two years to get into court, and then be bandied about for possibly ten more; partly also, because there is no telling which way a judge or jury will move. They have certain fixed ideas and habits of thought that one must accept, and which no argument can overcome. Frequently a judge's opinion is written for him by the successful litigant; otherwise, like as not, by the judge's secretary. Juries disagree outrageously where corporations are defendants; clerks of courts and sheriffs often own real estate that three times their salary could not have bought. No one has time or inclination to disbar a "shyster," and the practice of the law, losing the semblance of a profession, is being distorted into the appearance of a very sordid and money-worshipping business.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

V.

By Van Vechten Veeder,
Of the New York Bar.

THE trial and conviction of Daniel Dammaree in 1700 (15 St. Tr. 522) is one of the conspicuous landmarks in the development of the pernicious doctrine of constructive treason. During Sacheverell's trial his motley following had become riotous in his support, and among other acts of violence, a mob had proceeded to pull down meeting houses of the Dissenters, crying, "Down with the Presbyterians." Dammaree, a waterman, had been one of the leaders of this mob, and he was forthwith tried and convicted of high treason in levying war against the queen. Lord Chief Justice Parker's views will appear from the following passage in his summing-up:

"There is a vast difference between a man's going to remove an annoyance to himself, and going to remove a public nuisance, as in the case of the bawdy-houses, and the general intention to pull them down all is treason; for if those that were concerned for them would defend them, and the others would pull them down, there would be a war immediately. . . . A bawdy-house is a nuisance, and may be punished as such; and if it be a particular prejudice to any one, if he himself should go in an unlawful manner to redress that prejudice, it might be only a riot; but if he will set up to pull them all down in general, he has taken the queen's right out of her hand; he has made it a general thing, and when they are once up they may call every man's house a bawdy-house; and this is a general thing; it affects the whole nation." Since, therefore, this mob proceeded with the avowed intention of demolishing all dissenting meeting-houses, as far as they were able, those who participated in its acts were guilty of treason. By such artificial reasoning, ignoring all consideration of treasonable intent, was the life of the subject jeopardized in the first decade of the eighteenth century. This construction remained unquestioned until the trial of Lord Gordon in 1778.

In 1719 Matthews was tried and convicted for treason under the provision of the statute defining the offense of asserting the right of the Pretender (15 St. Tr. 323). Matthews was the printer of such a treasonable libel. It is believed that he was the last person executed for treason of this kind.

The trials of the leaders of the rebellion of 1715 (15 St. Tr.), and of Layer and his fellow Jacobite conspirators in 1722 (16 St. Tr. 94), present no unusual features.

Nor was there anything remarkable, in a legal sense, in the trials of the leaders of the rebellion of 1745 (18 St. Tr. 530). From the noble and courtly Kilmarnock and Balmerino to the infamous Lovat they were undeniably guilty of treason, and, together with seventy-four companions in arms, they paid the penalty of death. The spectacle of the notorious Lord Lovat, after a long life of debauchery and crime, repeating with his dying lips the famous line of Horace, "*Dulce et decorum est pro patria mori*," was in keeping with his truly remarkable career.

During this period the practice of impeachment practically succumbed to its own excesses. It has ever been the weapon of party warfare, and no more disgraceful exhibition of party spirit has ever been given than the attempt by a Tory House of Commons, in 1701, to impeach the Whig peers, Somers, Portland and others, for high treas-

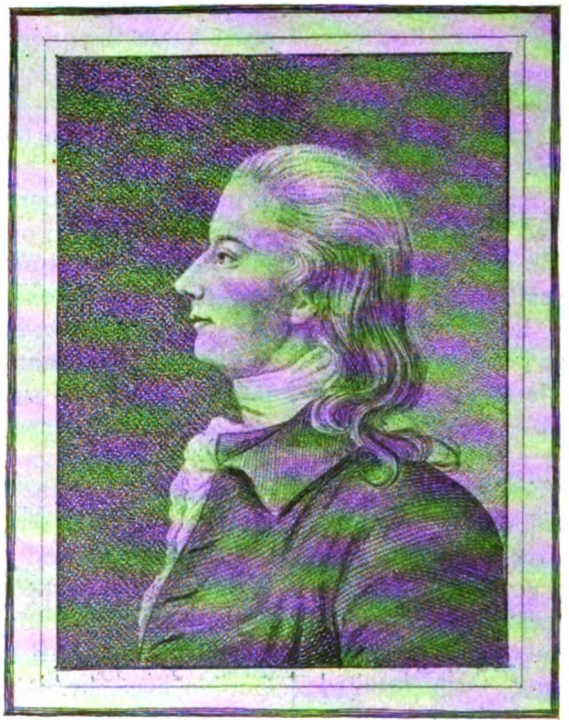
on in promoting the Spanish Partition Treaties (14 St. Tr. 223). The two Houses quarreled over the time and method of impeachment, and as the Commons refused to appear on the day appointed to proceed with the evidence, the ministers were acquitted.

In 1715 the Whigs retaliated by impeaching the Tory ministers who had negotiated the Treaty of Utrecht (15 St. Tr. 993). Bolingbroke and Ormond fled to France. After being imprisoned for two years, Oxford was set free in consequence of the inability of the Commons to agree with the Lords upon the mode of procedure. This was the last attempt at a purely political impeachment.

LORD LOVAT.

Meanwhile, however, in 1710, had occurred one of the most conspicuous illustrations of political imbecility to be found in modern English history. The established Church had, of course, as a body, opposed the Revolution, and it was not slow to observe that succeeding events were tending to impair its power and prestige. The Scotch Union introduced Presbyterianism into Parliament. The act providing for the naturalization of foreign Protestants was certain to swell the ranks of the Non-conformists, and it excited, moreover, a widespread feeling among the mass of the people against foreigners. The ill-advised prosecution of

Sacheverell (15 St. Tr. 1) developed the strength of this adverse feeling and discredited the party which had thus magnified its importance. Henry Sacheverell, rector of St. Saviour's, Southwark, a high church writer of some prominence, but of small ability and even less character, was impeached by Parliament for two sermons in which he had inculcated the doctrine of unlimited passive obedience, inveighed against toleration, and insinuated that the Church was in "peril from false brethren," meaning, of course, ministers of the government. Swift described this trial as "a general muster of both parties." Certainly both parties exerted their utmost powers, and as a debate upon the fundamental conceptions of social government the controversy was conducted with signal ability. The Whigs seem to have had the best of the argument, and the speeches for the prosecution on the trial have always been accepted as an authoritative statement of the principles of the Revolution. Revolution, they maintained, can only be justified where the social compact has been broken, where the sovereign has violated the laws and endeavored to subvert the plan of government established by King, Lords and Commons. But in normal times —unless there be such a distinct violation of the fundamental law—obedience is a sacred duty; the instability of a government exposed in its essential parts to perpetual revision at every fluctuation of public caprice, is wholly foreign to the spirit of the English Constitution. On the other hand Sacheverell prostituted his cause by calling God to witness, in opposition to the plain meaning of his sermon, that he had neither suggested, nor did in his conscience believe that the



LORD GEORGE GORDON.

Church was in the least danger from the administration. Moreover, his counsel evaded rather than met the charges. Upon the right of nations in any case to resist their sovereign the language of the Church had been unequivocal; royalty was so eminently a divine institution, they had claimed, that no tyranny could justify resistance. But Sacheverell's Tory defenders admitted the right of resistance in extreme cases, and one of them even maintained, in direct opposition to Tory theology, the supremacy of Parliament.

In the great case of Lord George Gordon, in 1780 (21 St. Tr. 485), the doctrine of constructive treason received a blow from which it never recovered. Lord Gordon was an enthusiastic and erratic young Scotch nobleman who had been elected president of the Protestant Association, an organization designed to secure the repeal of the lately enacted statutes relieving Roman Catholics from some of the onerous penalties to which they had long been subject. As president of the association Lord Gordon brought about a gathering of some forty thousand adherents in London on June 2, 1780, and led them to the Parliament House to present a petition for the repeal of the obnoxious acts. This great concourse of people blocked all the avenues to Parliament; they were not armed and most of them were orderly, although individuals among them insulted some members of Parliment who were passing into the building, requiring them to put blue cockades on their hats and to cry "no popery." Lord Gordon presented the petition to the House of Commons, but it was promptly rejected by a vote of 192 to 6. When this vote was announced the crowd became disorderly, and the whole affair assumed a serious turn. The proceedings of the next few days have been made familiar by Dickens' *Barnaby Rudge*. The Catholic chapels at the residences of the foreign ministers were demolished; the city prisons were broken open; thirty-six fires were started at various points throughout the city; Lord Mansfield's house and all its priceless contents were destroyed; breweries and distilleries were broken open, and for several days the city was at the mercy of an infuriated mob. When at length order was restored, nearly five hundred persons had been killed or wounded. Lord Gordon was promptly arraigned for high treason. Lord Mansfield presided at the trial; Erskine and Kenyon defended the prisoner. The prosecution contended that the prisoner, in assembling the multitude, if he did so with a view to overawe and intimidate Parliament, was guilty of levying war, within the terms of the statute of treason—a doctrine which was fully confirmed by the court. Moreover, it was contended that the overt acts proved might fairly be construed into such a design; they were, in fact, the only evidence by which a treasonable design could be shown. On behalf of the defendant considerable evidence was introduced to show the prisoner's loyalty and orderly demeanor. It appeared that he had counselled order and had suggested that riotous persons should be delivered to the constable. It was proved that the bulk of the people around Parliament House and in the lobby were idlers, vagabonds and pickpockets who had thrust themselves into the assembly. The Earl of Lonsdale, who took Gordon home in his carriage, testified that Gordon, in reply to inquiries from the great multitude as to the fate of the petition, answered that it was uncertain, and earnestly entreated them to retire to their homes and remain quiet. Long after midnight Erskine made his remarkable maiden speech to a jury in defence of the prisoner. He did not take direct issue with the authorities as to what constituted treason. "If it had been proved," he said, "that the same multitude, under the direction of Lord George Gordon, had afterwards attacked the bank, broken open the prisons and set London in a conflagra-

tion, I should not now be addressing you." In other words, such acts would have been treason by levying war, and actually were so in the case of those who committed them. But the defense was that the prisoner had nothing to do with the riots, which were, as far as he was concerned, the unintended and unexpected consequences of his imprudent conduct in putting himself at the head of a mob for tumultuous petitioning. The jury accepted this view and acquitted the prisoner.

The case of De la Motte, in the following year (21 St. Tr. 687) was one of the few English cases under the clause of the treason statute relating to adherence to the king's enemies. De la Motte was convicted of corresponding with France.

AUNT LUCY'S QUESTION COLUMN.

By Arthur F. Gotthold.

AUNT LUCY will answer questions of little correspondents on topics of legal interest. All letters should be plainly addressed on the inside and marked "For The Green Bag, U. S. A."

417. "Aunt Lucy, Dear Madam:—I discharged my Japanese butler the other day for refusing to serve Russian caviare on a china plate. Have I any redress?

Yours, *etc.*,
A Housewife."

This is such a delicate question of international law that I fear the daily papers alone can answer it. As a preliminary measure, I should urge you to hide behind a door and imitate a charlotte russe. This will probably catch your butler and the matter can then be adjusted out of court.

418. "Darling Aunt Lucy:—I met, oh, such a lovely young gentleman, this summer. He used to call me 'Stubbs,' and promised me some chewing gum. He ain't ever sent the gum. Can't I put him in jail for breach of promise?

Passionately yours,
Myrtle."

This is certainly a case where litigation should be started promptly. But I doubt if criminal proceedings are advisable. I think an action in the nature of a *quo warranto*—that's as close as it ever gets—would bring the scoundrel to terms.

419. "Dear Auntie:—While riding in a street car the other day, a pauper child knocked a penny belonging to me on the muddy floor. While I was on my hands and knees looking for it (to wit, the penny), I was carried seventeen blocks beyond my destination. The conductor refused to give me a transfer. Have I any remedy against the Commissioner of Charities?

Your little nephew,
R-ss-ll S-g-."

Fudge, my child.

420. "Dear Aunt Lucy:—My father was a Turkish odalisque, and my mother a Caucassian beauty. I was born in Portugal during the temporary absence of my parents, and was brought up in a convent. I have married an American girl, who got a divorce from me. In 1887 a burglar, named Smith, robbed my mother-in-law's house, was convicted and imprisoned. I have been asked to sign a petition for his pardon but learn that he is dead. Please, ma'am, what shall I do? Your ob't serv't,
S. Xrsqlvwrstrsk."

Unless the decedent's executors revive the action, I feel certain that you are free from any liability. Besides, the Statutes of Limitations is a bar.

THE FUTURE OF INTERNATIONAL LAW.

By Allen E. Rogers,
Professor of Constitutional Law in the University of Maine School of Law.

As commerce and trade and intercourse, fostered by ever increasing means of transportation and communication, were above everything else the great factors in bringing the semi-independent commonwealths of the "united states" of the Articles of Confederation into the "more perfect Union" of the Constitution, and the still to a great degree isolated and jealous States of the earlier decades of the nineteenth century into the real nation of today, so under the same influences the nations of the world are coming into closer contact with one another, are becoming more and more closely associated, if not as one State, yet as one great organism with a common welfare and common interests.

But the closer and more complex this association becomes, the more frequent are the opportunities for quarrels and conflicts which not only retard its development, but threaten its very existence. The only safeguard against this danger lies in a corresponding development and observance of the customs and rules which regulate the intercourse and dealings of nations with one another, just as the increasing complexities of social and business life demand a corresponding development of municipal law in order that present advantages be maintained and progress made possible.

Indeed, in many respects the character and conditions of International Law today are identical with the character and conditions of Municipal Law in the earlier stages of its existence.

Customs observed for purposes of mutual convenience and good neighborhood and enforced by no sanction other than that of the ability of the individual or of his family to avenge his injuries seem always to have preceded any attempts on the part of the community or State to regulate the relations between its constituent members, and when such attempts were first made in order to prevent the disorganization resulting from quarrels and feuds that tended to become ever fiercer in intensity and more far-reaching, they aimed simply to the setting of a limit to the punishment that the injured person or his kin could inflict; necessarily involved in this, however, was the determining whether the act complained of justified the infliction of any punishment at all. From such conditions was evolved Municipal Law, as "a rule of conduct prescribed by the supreme power of a State."

That International Law will ever acquire the character possessed by Municipal Law today; *i. e.*, that there ever will be a federation of the nations sufficiently complete to compel its constituent members to observe established and recognized principles of justice in their dealings with one another, is scarcely to be hoped, if indeed, it is to be desired; but on the other hand, it may reasonably be expected, and is of the greatest moment to the interests of peace and the progress of civilization the world over, that the rules and principles embodied in International Law should develop in scope and obligatory character as international relations become more extensive and more intimate, and as the observance or non-observance of such rules and principles more vitally affect human welfare and happiness.

Since the day of Grotius, International Law has, in the main, been steadily developing in scope and, in many respects, in definiteness. Publicists, jurists, treaties, and

more recently, international conferences and congresses, the Institute of International Law, arbitral tribunals, prize courts, and courts of law generally, have all tended to keep it in harmony with advancing civilization and to extend its doctrines that they may meet as fully as may be the exigencies which arise from the increasing complexity of international relations.

But, on the other hand, there has been no corresponding development in the obligatory character of International Law as such, or in its administration by those to whom the immediate guidance of the affairs of State is confided; as affecting international relations its rules are still observed from the standpoint of convenience or of present advantage, rather than from that of abstract justice, and as yet have no sanction other than that of the compelling or avenging power of the nation that holds itself injured or threatened with injury by the breach of them.

The doctrines of International Law, the work of jurists and other learned men, are, in the main, in harmony with the twentieth century civilization, but the administration of them in what we might term the political relations between the nations is an anachronism, is of an age of barbarism. In this respect, the situation is much the same as if our present highly developed system of municipal law should be relegated to individuals for its enforcement.

The problem is, then, not so much to develop the scope of International Law, as to make its rules and doctrines a greater force in determining international relations,—to impress upon the minds of intelligent people the world over that these rules and doctrines are based on great principles of right, that unfair dealing, dishonesty, and injustice between nation and nation are no less shameful, no less to be deplored than they would be between man and man.

When Grotius in his epoch-making work, *De Jure Belli ac Pacis*, laid the foundation and built a large part of the present structure of International Law, he made the major premise of his discussion the equality of nations before the law; adopting the Roman doctrine of a *Lex Naturae*, the great Dutchman held that Nature has conferred certain rights and imposed corresponding obligations upon nations no less than upon men.

Whether such rights and obligations are established by Nature, or whether they are to be deduced from the fact of association, or society, they exist; and as a failure to recognize and respect them in a society of individuals would mean degeneration and anarchy, so in the association of nations it would mean confusion and the rule of brute force.

Publicists, text-writers, and jurists have but with few exceptions followed the example of Grotius in insisting upon the legal equality of nations, for on no other basis would it be possible to build up a logical body of doctrines consistent with definite ideas of right and justice. For a like reason, arbitral tribunals have reasoned from the same premise, as have courts of law when questions involving international relations have come before them.

This principle does not involve the idea that no nation shall be restricted in its freedom of action by others, or shall suffer any special disabilities. On the contrary, just as persons may, under wise and just provisions of the municipal law be placed under guardianship for various purposes, so individual States may for the general good be limited in regard to certain powers, or denied the right to exercise them at all, or be obliged to suffer interference in matters generally regarded as purely internal and, hence, not subject to interference from outside.

But aside from these restrictions, which may justly be made by the Powers collectively for the general good, and occasional

interference in the internal affairs of certain nations to prevent the perpetration of crimes or the continuance of conditions that are revolting to humanity, every nation should, subject to the principles and rules applicable to all alike, be regarded and treated as standing on an equality with the others.

This is, of course, an ideal standard, a standard that, perhaps, is unattainable, but just to the extent that it is not realized in the administration of law, municipal or international, just to that extent does law, municipal or international, fail to be an instrument of justice; and if in either case, no attempt is made towards its realization, the law becomes worse than a set of empty forms, for the rule of open and undisguised force is better than the rule of force under the cloak of dishonesty and hypocrisy.

The rulings of courts on points of International Law that come before them and the decrees of prize courts and arbitral tribunals are, as precedents, of great importance and value in its development, for they are the products of reason seeking to ascertain and apply the rules of that justice "whose set and constant purpose is to give to every" nation "its due." But the great mass of the questions of vital importance that arise between nations are settled by diplomacy, pressure, and war, and such settlements are of about as much value as precedents in International Law as the results of the ancient trials by ordeal or by combat would be in Municipal Law. Equality before the law is too often the last thing that enters into the consideration of the representatives of a powerful country when they are dealing with those of a weaker. Statesmen and diplomats seek to achieve victories, not to realize the principles of abstract justice.

Lawrence in his excellent work, *The Principles of International Law*, tells us (p. 20), "Statesmen uphold the cause for which they are contending by reference to acknowledged rules deduced from the general practice of States. . . . Very seldom do we find appeals to natural rights or innate principles of justice and humanity. Sometimes such considerations are used to bolster up a case for which little support can be found in acknowledged principles or accepted rules. Their presence in a State paper is a pretty sure sign that International Law is hopelessly against the contention of its authors!" The practical and logical results of such doctrines are later set forth in the same work, (p. 242) where it is declared,—"But a careful examination of recent international history seems to reveal a series of important facts, which can have no other meaning than that the doctrine of Equality is becoming obsolete and must be superseded by the doctrine that a Primacy with regard to some important matters is vested in the foremost powers of the civilized world. . . . We do not assert that the hegemony of the Great Powers in the Old World and of the United States in the New is an undoubted principle of public law. All we contend for is that events are tending in that direction and, unless this tendency is speedily reversed, the Grotian doctrine of Equality will soon be a thing of the past."

That the tendency suggested by Professor Lawrence exists and that it is the outgrowth of diplomacy, pressure, and war, are obvious, that if it is not checked or counteracted, the Grotian doctrine of Equality will soon be "a thing of the past" is equally obvious; and that if this foundation of International Law is destroyed, International Law itself as a system worthy of any respect or consideration must fall, is self-evident. Grapes cannot be gathered from thorns or figs from thistles in the field of international relations any more than in the field of morals.

The conditions suggested by Professor Lawrence, however, are by no means conclusive as to the future. The concert of the great powers of Europe is undoubtedly a strong factor in the preservation of peace

from the fact that it tends to the substitution of reason for force in the settlement of the differences and controversies that may arise among them. But in this very settlement, precedents are established and rules are laid down which, by enlarging the scope and giving definiteness to the doctrines of International Law, strengthen in many respects the position of the weaker nations and place them more nearly on a plane of equality with their powerful neighbors, for every advance in the development of law and in its orderly administration, even though many of those affected by it have no part or influence in making it, tends to secure in a higher degree the rights of all, and the securing of rights is the promoting of equality.

The Monroe Doctrine, a rigid insistence on which is so necessary to keep the United States free from the entanglements and complications of European politics, is but a matter of policy; it is outside of International Law, not a part of it, and the necessity for its existence will grow less as the administration of the Law of Nations becomes of a more complete and binding character. This is shown in the very origin of the so-called doctrine and in every case where there has been actual call or need for its application.

The establishment of The Hague tribunal was, perhaps, the most promising attempt to substitute reason in the place of force in international relations since the appearance of the *De Jure Belli ac Pacis*. By the joint act of the great nations of the earth a permanent court was established where their disputes might be settled according to the dictates of justice and humanity instead of being submitted to the barbarous arbitrament of war. To quote the words of Secretary Hay in his letter of instructions to the delegates representing the United States: "The duty of sovereign States to promote international justice by all wise and effective means is only secondary to the fundamental necessity of preserving their own existence. Next in importance to their independence is the great fact of their interdependence. Nothing can secure from human government and for the authority of law which it represents so deep a respect and so firm a loyalty as the spectacle of sovereign and independent States, whose duty it is to prescribe rules of justice and impose penalties upon the lawless, bowing with reverence before the august supremacy of those principles of right which give to law its eternal foundation."

Unfortunately, the result of this attempt to promote the reign of peace and justice has been, in the main, a great disappointment. Of the many questions, some of them of vital importance, that have arisen between nations since 1899, but two, and those of lesser moment, have been submitted to this tribunal.

The causes of this neglect are not far to seek Every intelligent person will agree with Secretary Hay in his estimate of the advantages to mankind that might flow from this great international court; but as the present system of administration of our municipal law is the growth of centuries, so there must be many more stages in the evolution of present international conditions and relations before the promises of The Hague Tribunal can be realized.

Despotism is better than anarchy. Law emanating from and imposed by superior physical force is better than no law at all. But there comes a time in the evolution of law when physical force ceases to be constructive, when it must give way to ultimate principles of right and justice if this evolution is to continue. International Law has reached this stage, and the building up of greater and greater armies and navies is as hostile to its further development as the arming of man against man or of family against family would be hostile to the development of our present municipal law.

To the militant nation that is superior in

power to its adversary, the settlement of a matter in controversy on the basis of law; *i. e.*, of equality of rights, would ordinarily be no more acceptable than would have been a similar proposition made to a feudal baron.

The proposal of Russia to the other nations assembled at The Hague, looking to the non-augmentation of military forces and expenditures was in complete harmony with that of the establishment of a tribunal to which international differences and controversies might be referred; in fact one was but the complement of the other.

This proposal was believed by the Conference to be impractical, and the reasons for this belief are, in their last analysis, the same as those which have led to the neglect of the Tribunal itself.

The enormous and increasing military burdens imposed, even in time of peace, upon the subjects of the Great Powers of Continental Europe, are destroying their very ability to bear them. The present condition cannot be maintained indefinitely, and we may confidently hope that in the not distant future as this pressure becomes more and more unbearable, nations will seek relief by turning more and more away from war and all the evils that it entails, and seek to establish their rights through the arbitrament of reason.

This tendency once established will be a constantly increasing force. Every decision made or reason given therefor in an international court of arbitration will be a precedent and a new force in the establishment of justice between nations, and with the doctrines of International Law firmly based on the principle of Equality as laid down by the great founder of the system, it may be that war itself will be "a thing of the past."

HAIR.

By R. Vashon Rogers, K. C.,
Of the Kingston, Ontario, Bar.

"BUT you will say that hair is but an excrementitious thing." So said Thomas Howell in his *Familiar Letters*.

Among the ancient Jews he who put his hand on his own beard and swore by it bound himself by the most solemn of oaths, to violate which would render him infamous among his fellow men. The favorite oath of the Mahommedan was by the "Beard of the Prophet."

Three hairs from a French king's beard, under the waxen seal stamped on the royal letter or charter, were supposed to add greater security for the fulfilment of all promises made in the document itself.

The Lacedemonians compelled their magistrates, yclept the *Ephori*, to undergo what seemed the ridiculous ceremony of being shaved merely to show the readiness with which they would obey the law in all things. (Perhaps appointment to office was sufficient compensation for the loss of these hirsute appendages.)

When Henry VIII. was king the custom of wearing beards—which, for a time had gone out of fashion with the growth of civilization—had so revived among the legal fraternity that the authorities of Lincoln's Inn prohibited wearers of beards from sitting at dinner at the great tables, unless they paid double commons. This was doubtless before that very arbitrary monarch ordered (1585) his courtiers "to poll their hair," and he himself grew that beard which is so fa-

miliar to all from engravings. After this a tax was placed upon beards, graduated according to the owner's position.

In the days of the beardless Edward VI. we read that "the Sheriff of Canterbury and another paid their dues for wearing beards, 3s. and 4d. and 1s. and 8d." In Mary's reign lawyers seem to have been very particular about their personal appearance; to check waste of time over their long beards an order was issued by the Inner Temple "that no fellow of that house would wear his beard above three weeks' growth, on pain of forfeiting twenty shillings."

The last Tudor tried to extend this scheme of raising money out of hair, and so we read that in the first year of Elizabeth every beard above a fortnight's growth was taxed at three shillings and six pence. This seems unreasonable when her majesty herself was so fond of the unnatural that at one time she had no less than eighty attires of false hair. The law, however, was too absurd to be enforced.

Peter the Great of Russia aiso thought that taxing beards would be a good way of increasing the revenue. The duty he imposed was a rouble for a nobleman; a commoner had to pay a copec for the inestimable privilege of keeping his chin covered by nature. The imposition of this tax is thus described by Dean Stanley in his *History of the Greek Church:* "Most serious of all Peter's changes was his endeavor to assimilate his countrymen to the West by forbidding the use of the beard. The beard was one of the fundamental characteristics of the ancient Eastern faith. Michael Cerularius had laid it down in the eleventh century as one of the primary differences between the Greek and the Latin Church. To shave the beard was pronounced by the Council of Moscow in the seventeenth century 'a sin which even the blood of the martyrs could not expiate.' It was defended it still is defended, by texts of scripture, by grave precedents, by ecclesiastical history. Even Peter, with all his energy, quailed before the determined opposition. The nobles and gentry, after a vain struggle, gave way and were shaved. But the clergy and the peasantry were too strong for him. Flowing locks and magnificent beards are still even in the established church, the distinguished glory of the clerical order. To the peasant, a compromise was permitted. Many when compelled to be shaved yet kept their beards to be buried with them, fearing lest, without them, they should not be recognized at the gate of Heaven; and finally a tax was substituted, of which the token of receipt was a coin stamped with a nose, mouth and moustache, and a bushy beard; and now throughout the ranks of conformity the shaven beard is nowhere to be seen."

According to Bingham the fourth Council of Carthage enacted that a clergyman shall neither indulge in long hair, nor shave his beard, but Bellarmine and others contend that the word for "shave" should be omitted from this canon, and they thus bring it into harmony with the practice of the Roman Church.

In Ireland, by the Brehon law, a heavy fine had to be paid by any one who maliciously shaved the false locks of a poet, or of a scholar, or of a show girl, or who cut off the eye lashes, or the hair of the brow, or the beard or whiskers of a man.

Robbing a man of his beard, among the Saxons, according to Alfred's laws, was punishable by a fine of twenty shillings; he who shaved a priest against his will was mulcted in thirty shillings; while binding the ecclesiastic, as well as shaving him, raised the penalty to two pounds.

It has been held in one of the lower courts that the captain and crew of a vessel on the high seas have no right to permit or excite old Neptune to shave a passenger, or immerse him in a tub of water, contrary to his will. (9. THE GREEN BAG, 447.)

Ho Ah Kow brought the subject of his being violently deprived of his queue before the courts, alleging that the loss of that tail-like appendage was a mark of disgrace and ostracised him from associating with his fellow Celestials here below, and what was worse—that after death it would bring unmerited misfortune and punishment upon him in the world to come. Ho had been sent to jail in San Francisco for keeping a boarding-house not of the regulation size; while in confinement his hair had been cut or clipt to the uniform length of one inch from the scalp. Although this hair-dressing had been done in pursuance of an ordinance of the city, the Court held the act illegal, the law unconstitutional and gave a judgment in favor of the tailless Chinaman. (20 *Albany Law Journal*, 250.)

In the old days, when every particular injury to the human form divine had to be paid for by a compensation settled by statute, hair was not forgotten in the list of prices. In the realm covered by the laws of Howel, the Good, we find, in the Venedotian Code, that the worth of hair plucked from the roots was "a penny for every finger used in plucking it out and two pence for the thumb." The Dimetian Code, however, went higher; "a legal penny for every hair pulled by the root from the head and twenty-four pence for the front hair." The Gwentian Code valued a person's eyelid at a penny for every hair upon it.

Even a horse's hair was not deemed too insignificant a thing to be dealt with by the old Welsh law makers (*De minimis non curat lex*, appears not to have been among their legal maxims); they enacted that whosoever should borrow a horse and chafe its back so as to cause an ugly loss of its hair should pay four legal pennies to its owner. The mane of a horse was worth as much as its bridle, that is, four pence. Whosoever cut off the tail of a horse had to put the injured animal in a place where it could not be seen, and keep it there until the caudal appendage had grown as before, supplying the owner with another nag meanwhile. These old worthies seem to have been as considerate of the horse's sensitiveness over the loss of its hirsute adornment as was David over that of his messengers to Hanun the Ammonite.

One cannot speak of horse hair without thinking of the wigs of English barristers; these coverings were introduced into England from France after the Restoration; they came in very gradually, the judges thinking them, at first, so very coxcombical that they would not suffer their wearers to plead before them. *Tempora mutantur*—now this grotesque ornament, fit only for an African chief, is considered almost indispensably necessary to the proper administration of justice in England in this Twentieth Century of Grace.

We are told that tigers' whiskers, chopped fine and mixed with ordinary food, was, at one time, a recognized and most dreadful instrument for the punishment of criminals in Burmah.

A decade or two ago there was some extensive and expensive litigation over who should have the custody of a certain holy relic, called "Assura Shereef," which was a small case containing a hair from the beard of Prophet Mahomet. The case was heard before the High Court of Madras, and was keenly contested; perchance the fact that the rightful guardian of the sacred heirloom was entitled to a government pension of Rs 100 added zest to the contest. Some six claimants, some men, others women, were represented by gentlemen of the long robe. As some of the counsel were Mr. Biligiri Izengar, Mr. Sabramaniein Sastri and Mr. Nullathamby Moodelliar, all who know anything about that learned and accomplished bar can imagine how astute must have been the arguments, how eloquent the appeals, how keen the discussions.

The combing of a superfluity of hair should not be done in public, when it will annoy others. The "Seven Sutherland Sisters" were in the habit of combing and dressing their hair in a shop window; the crowds of astonished gazers who congregated in front of the exposed toilet to admire the wondrous tresses of the ladies, obstructed the entrance to the store next door. The Court was appealed to and put a stop to the exhibition. (Elias *v.* Sutherland, 18 Abb. (N. Y.) C. Cas. 126.)

Chemists should be careful as to the kind of hair dye or wash they sell, husbands should be chary about buying such stuff for their wives, and women should trust to nature alone. In 1869 Joseph George went into the shop of Skivington, the chemist, who professed to sell a chemical compound made of ingredients known only to him, and which he represented to be fit and proper to be used for washing the hair, which could and might be used without personal injury to the person so using, and to have been carefully and skillfully and properly compounded by him, the said Skivington, the chemist; and Joseph George bought of Skivington, and Skivington sold to George at a certain price a bottle of the said compound to be used by George's wife Emma for washing her hair, as the chemist then knew, and on the terms that the same was fit and proper to be used, and could be safely used by her for the purpose aforesaid, without personal injury to her, and had been skilfully, carefully and properly compounded by the said chemist; yet the chemist had so unskilfully, negligently and improperly conducted himself in and about making and selling the said compound that by the mere unskilfulness, negligence and improper conduct of the chemist the said compound was not fit or proper to be used for washing the hair, nor could it be so used without personal injury to the person using the same; and by reason of all this Emma, who used the said compound for washing her hair pursuant to the terms upon which the same was sold by the chemist, was by using the same injured in health, *etc.* Thus, Mr. and Mrs. George told their story when they sued the chemist, Skivington. Skivington said, in effect, "What if I did?" But Chief Baron Kelly and three other Barons, considered that there was a duty on the vendor Skivington to use ordinary care in compounding this wash for the hair and gave judgment for the Georges, holding that their declaration contained a good cause of action. (L. R. 5 Exch. 1.)

What the compound was we are not told, what it did we know not. But all legal students know what the effect of the Cyanochaitanthropopoion and the Tetaragmenon Abracadabra of the fashionable perfumer and perruquier of Bond street in turning the red hair of Mr. Tittlebat Titmouse, by way of green and purple, into black; those who don't know will find the whole story in the report of the case by Sir Samuel Warren.

That great lawgiver of the far East, Manu, in his directions as to the choice of a wife, lays it down that a Hindoo of the upper classes must not marry a woman that has thick hair on her body, or one who has reddish hair, or one whose head has less or more than the usual quantity of locks. Another, Pundit, Vyasa, says that a man must not marry a girl who shows signs of an incipient beard, or whose eyebrows hang low, or who has too much hair.

Short hair has often been regarded as a symbol of chastity. Every Buddhist novice has to cut off his locks to prove that he is willing to give up the most beautiful and highly prized of his ornaments for the sake of a religious life; and in ancient Mexico both men and women who adopted such a life had their hair cut. In Sparta and Athens, as well as among the Anglo-Saxons, the newly married wife had her locks shorn. On the other hand one of the charges

against poor Joan of Arc was her cutting and wearing her hair short. The Apostle, her adversaries contended, had forbidden such a thing. She pleaded that she acted thus by the command of God; but the Canonists of the University of Paris decided that in wearing men's clothes and short hair, taking the sacrament while in them and asserting that God so commanded, she was blaspheming God, despising his sacraments, transgressing the Divine law, holy writ and canonical ordinances; that she, accordingly, savored ill in the faith, boasted vainly and was suspect of idolatry, and condemned herself in not being willing to wear her sex's garments and in following the customs of the heathen and the Saracen.

Some such an idea of the wickedness of long locks must have influenced the Roundheads and their fellow Puritans.

The Council of Agde ordered the priests to refuse absolution to any penitent who would not cut off his hair. The Council of Toledo decreed that "anyone desiring penance was first to be polled, then made to change his habit to sackcloth and ashes, and so admitted to penance."

Saint Ambrose, writing to a virgin who had committed fornication bid her cut off her hair, which, through vain glory, had given her occasion to sin.

One of the primitive Christian customs on the occasion of a first marriage was the loosening or untying of the bride's hair.

In 1634 the General Court of Massachusetts enacted, *inter alia*, that if any man should judge the wearing of long hair to be uncomely or prejudicial to the common good and the party offending reformed not on notice given, then that the next assistant, being informed thereof, should have power to bind the party so offending to answer at the next Court, if the case so require. In 1649 Governor Endicott and the magistrates issued a declaration against men wearing long hair, prefaced by these words: "Forasmuch as the wearing of long hair, after the manner of the ruffians and barbarous Indians, has begun to invade New England," and declaring "their dislike and detestation against wearing of such long hair as a thing uncivil and unmanly, whereby men do deform themselves and offend sober and modest men, and do corrupt good manners."

The records of the Bay Colony show that in 1676 thirty young men were presented—"some for wearing silk, some for long hair and other extravagances."

Hair must not be used as an alarm clock. A divorce has been granted to a man because his wife pulled him out of bed by his whiskers; and in another case a poor husband was granted similar relief because his wife heaved a teapot at him and jerked out quite a quantity of his hair. (This latter was duly produced in court, filed and marked exhibit A.)

May the color of a woman's hair be legal ground for a divorce? And what is an improper red for a woman's head? These were the important questions that came up in a New York court not long ago.

Beards suggests barbers; originally these men were the assistants and dressers to the ecclesiastics when those godly men practised surgery; when, in 1163 the Council of Tours forbade any cleryman or monk to undertake any bloody operation, the art of surgery fell into the hands of the barbers and smiths—the latter were soon ousted by the former, and the barbers became so important that in 1461 the freemen of "The Mystery of Barbers, using the mystery or faculty of Surgery," obtained a charter from Edward IV., and were incorporated under the name of "The Company of Barbers in London," and none were allowed to practise the art except those admitted by the company. Although this charter was several times amended by subsequent kings, yet side by side with the regular barber-surgeons there grew up a body of men who practised pure surgery, and

who actually formed a company called "The Surgeons of London." In 1540 by an act passed under his most gracious majesty, King Henry VIII., these rival companies were united and named "The Masters, or Governors, of the Mystery and Commonalty of the Barbers and Surgeons of London." The third section of this act provided that "no manner of person within the city of London, suburbs of the same and one mile compass of said city of London, after the Feast of the Nativity of Our Lord God then next coming, using barbery or shaving within the said city, *etc.*, he nor they, nor none of them, to his, her, or their use, shall occupy any surgery, letting of blood or any other thing belonging to surgery, drawing of teeth only excepted; and furthermore, in like manner, whosoever that useth the mystery or craft of surgery, shall in no wise occupy nor exercise the feat or craft of barbery or shaving, neither by himself, nor by any other for him, to his or their use." In 1745 this union was dissolved.

In Scotland at an early day the barbers and the chirurgeons were united and enjoyed many rights and privileges; in 1505 the crafts of "Surregeury and Barbouris" were formed into a college or corporation by the town council of Edinburg and became one of the fourteen incorporated trades of the city. In Ireland the "Fraternity of Barbers and Chirurgeons of the Guild of S. Mary Magdalene" was incorporated by Henry II.

The style of the barber's pole was fixed by statute in the olden time and still recalls the days when barbers lawfully drew blood; the spiral ribbons representing the two bandages used, the one twisted round the arm before bleeding, the other for binding afterwards. Lord Thurlow, speaking in the House of Lords in 1797, said that by a statute then in force barbers and surgeons were each to use a pole as a sign. The barbers were to have theirs blue and white, striped, with no other appendage; but the surgeons, which was the same in other respects, was likewise to have a galley-pot and a red rag, to note the peculiar nature of their avocation.

In Rastell's Entries there is an interesting precedent of a declaration in an action on the case against a barber for having shaved a beard "inartificially": "*R. S. nuper de N. attach fuit in respondendum H. B. de placito, quod cum idem R. ad barbam ipsius H. bene et artificialiter cum novacula munda et salubri radere apud N. assumpsisset, predictus R. barbam ipsius H. cum quadam novacula immundi et insalubri tam negligenter et inartificialiter hasit, quod facies ipsius H. morbosa et scabiosa devenit ad damnum ipsius H. 40s ut dicitur.*"

When the Portugese admiral, Juan de Castro borrowed a thousand pistoles from the city of Goa, he left in pledge one of his whiskers, saying, "All the gold in the world cannot equal this natural ornament of my valor." We are not told whether the worthy captain ever returned to redeem his precious pledge, or how the city was satisfied with the security.

The ministers of the Church of Scotland in the seventeenth century used to enforce discipline on the unruly sons of the church by cutting the half of their hair or shaving their beards.

Lord Mansfield tried a man for assault, he was convicted; the Court thought imprisonment an unsuitable punishment under the circumstances; an affidavit was produced in which the offender stated he was wholly unable to pay a pecuniary fine. While this was being read the man stood proudly erect, his face adorned with enormous whiskers and mustaches, the pride of his heart, his boast in his cups. Mr. Dunning, for the prosecution, suggested to the judge that "as the prisoner had very *fine* moustachios and whiskers, perhaps his lordship would take the punishment out of these, and order him at once to be shaved."

WANDERED FROM THE RECORD.

AT a recent bar dinner, in responding to the toast, "Stories of By-gone Days," Judge Edward Higbee of Schuyler County, Missouri, tendered this evidence:

This occurred in the days of the late Judge John W. Henry, then a jurist well advanced in years and fame. The yarn I will relate is a matter of record, but so as not to disturb the sleep of the dead, or occasion heart pangs to the living, some of the names used will be fictitious.

Way back in the seventies, Colonel John S. Wilson and Honorable Arthur Dabney were well-known lawyers of the then 27th judicial circuit. Wilson and Dabney possessed all the fire and enthusiasm that characterized the old-time barristers, and were generally on opposite sides of every important case. The colonel was tall, dignified and severe. Dabney was smaller and more active, but far less prepossessing. Outside the courtroom they were very good friends, but when in action the average spectator would be in momentary dread of bloodshed. On one occasion, however, there was a rupture between the two lawyers that extended outside, and for nearly a year they were not on speaking terms. Dabney was representing a man Comstock, who had something of a reputation as a Shylock, in a suit for rent against a delinquent tenant. When the time came for arguments, Colonel Wilson felt justified in relating a little of Comstock's history from his personal knowledge.

He told of how the plaintiff had foreclosed a mortgage on a preacher and turned him out of house and home, with a sick wife and a half dozen or so small children. Nothing of the sort had been introduced in evidence, and everybody was astonished at Dabney for letting his opponent thus wander from the record.

The colonel, with eloquent verbal paint brush, sketched a terrible picture of the sufferings of the preacher and his homeless flock, and the jury began to look vindictively at Comstock, who shifted in his seat and did his best to look unconcerned. The money-lender was beat when the colonel sat down, but Dabney had the close. He began by referring to the colonel's flagrant disregard of the record, but said his man had never committed an act in his life of which he was ashamed, and that he had nothing to conceal. Therefore, he had not objected to the opposing advocate's conduct except in one respect.

"My learned friend, Colonel Wilson, told you the truth, gentlemen—a part of the truth," said Dabney, with unusual impressiveness. "But he didn't go back far enough. Why didn't he tell you the reason Mr. Comstock foreclosed his mortgage on Parson Smith's home? Ah, gentlemen, he who hides a part of the truth is worse than he who misrepresents it all. It now becomes my painful duty to tell why Mr. Comstock exercised his legal rights in foreclosing that mortgage.

"You all know who occupies the place now (the jurymen tried to look as if they did, but not a one of them knew). The widow Dennis—that noble, white-haired old mother of Israel, who was so foully dispossessed of it ten years ago by this same bogus preacher, Smith, in a swindling scheme by which he traded her some worthless Nebraska land that was fit only to raise rocks and blizzards on! That's what he did. For ten long years the widow Dennis and her little fatherless children toiled and suffered. And what did Comstock do? Why, he waited and waited and waited. At last the land swindler, the whited sepulchre of a preacher, the robber of the widow and orphans, needed money; he goes to Comstock—the despised money-

shark, if you please. With his heart bleeding for the homeless widow, Comstock lets the reverend hypocrite have the money. The months roll by. The time for payment arrives.

"Comstock don't need the money, but the widow Dennis needs the home of which she has been so cruelly—so villainously deprived, if you please. Comstock tells Mr. Preacher man that he must put up or vacate. He pleads for a renewal—this 'robber of the widow and the orphans.' Comstock is relentless. It is a poor, friendless woman against a great strong man, and Comstock—'the money-lender,' 'the note-shaver,' 'the userer,' as my friend Colonel Wilson would have it, takes the part of the woman in distress. The sanctimonious hypocrite is forced to leave, and the widow and her tattered children are restored to their own by this 'scheming trickster,' Comstock!

"Find against him if you will, gentlemen; but I want you to remember this when you go to your jury room to make up your verdict."

It is stated the jury was back inside of five minutes with a verdict for Comstock. They had accepted Wilson's story as true, and felt bound to accord the same respect to Dabney's sequel. As Dabney was leaving the courtroom, Judge Henry pulled him to one side and said:

"See here, both of you fellows ought to have been ashamed of yourselves for running off to the brush that way, but now that it's all over, I want you to tell me honestly, was that wind-up story of yours facts or pure imagination?"

The little lawyer's gray eyes twinkled, as they sought the ceiling, and the owner of them replied musingly:

"Your Honor, I've gone through the books pretty thoroughly, and I failed to find any rule directing a man to meet an argument outside of the record with facts."

WASHINGTON LETTER.

WASHINGTON, D. C., APRIL, 1904.

THE name of a great man usually hangs like an ill-fitting garment upon a namesake. The personality of the original possessor has been so impressed upon it that he to whom it is subsequently given must be possessed of a robust individuality to escape the acting of a life-long masquerade.

Mr. Justice John Marshall Harlan began life with such a name. The fact that undue emphasis is not laid upon his first two names is attributable to a mentality the virility of which is undiminished after more than a quarter of a century of service upon that Bench with which all of his names are now inseparably connected.

Justice Harlan was born in Boyle County, Kentucky, on the first day of June, 1833. His profession was an inheritance, the enjoyment of which was interrupted by the Civil War, in which he served his country, and by subsequent political aspirations which were never fully gratified. He was at one time Attorney General for his State, and, after being defeated in gubernatorial contests, he again took up his profession. Thereafter he followed, as a wise man, that legal star whose name he bears, and was led to that Court which sits at the feet of the Goddess of Liberty and watches over the law which is there given birth. On the tenth day of December, 1877, he took the oath of office which he now holds, and the reports of the

Supreme Court evidence the unremitting zeal and vigor with which he has performed that portion of his oath by which he bound himself to "defend the Constitution of the United States."

The State of Kentucky is doubtless more celebrated for certain of its products which are essential to the happiness of man and the continuance of the race, and to a certain other which conduces to his exhiliration, than it is by virtue of its being the birthplace of Justice Harlan. No son of that State, however, has ever reflected more glory upon it than has he. Few, if any, of the names which are inscribed upon the roll of the Supreme Court stand sponsors more frequently for its decisions than does he.

Justice Harlan delivered his first opinion, in the case of National Bank *v.* Insurance Co., 95 U. S. 673; his first dissenting opinion in United States *v.* Clark, 96 U. S. 37; and his first opinion in a case involving a Constitutional question in Ford *v.* Surget, 97 U. S. 594. Everyone is cognizant of the conspicuous part which he took in the decision of the so-called "Merger Case." Justice Harlan possesses the faculty of infusing his writings with the very tones of his voice so that one who is familiar with the latter must invariably hear it in the former.

My first recollection of Justice Harlan is of a mammoth man shaking the church as he slowly walked up the aisle to his pew on Sunday mornings. The immense bulk of the man effectively killed any germs of incipient scepticism which may have been lurking in my young mind in regard to the absence of youth on the part of Adam, for no one possessed of a normal imagination can so adjust his mental lenses as to reduce John Marshall Harlan to infantile proportions. His laugh and his voice are in proportion to his body, which is a fitting tabernacle for his heart and his mind. No man is so small as to be beneath his notice—none so great as to be above it. For years he has been a regular attendant upon the annual Shad-Bakes of the Bar Association of the District of Columbia, and on these festive occasions he spends a great portion of his time in the shooting gallery, where he defends against all comers the reputation of his State.

Several decisions of general interest were handed down by the Supreme Court on the fourth day of last month, and another is in process of argument at the present writing. One of the former is that involving the right of the Interstate Commerce Commission to compel certain railroad companies to produce certain of their contracts before that Commission, the decision being against the companies. Another is that in which the Court upholds the Constitutionality of the "Election Law" of 1902 of the State of Maryland, in regard to its requirements relative to the "declaration of intention" on the part of prospective voters.

Numerous Southern States, in recent years, have amended their constitutions for the ostensible purpose of eliminating the illiterate vote, the real purpose and the actual effect of such amendments being to eliminate the negro vote. Virginia recently followed the example of her sister States in this respect. Two cases involving the Constitutionality of that clause of its new constitution which, in this respect, is obnoxious to the negro, were argued before the Supreme Court during the month of April. The pendency of these cases was heralded by the shepherds of the various colored flocks of this city, and the members of their folds were exhorted to attend Court on the following day. The consequence was that of the many who were called, few were chosen, so far as admission to the court-room was concerned, but, like that historic little follower of Mary "whose fleece was"—of another color, those who were cast into the outer darkness of the corridor "lingered near and waited patiently about" until the hour of adjournment.

ANDREW Y. BRADLEY

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

NOTES.

A LAWYER of inquiring turn of mind, who recently argued a case before the Supreme Court at Washington, propounds the following questions of Supreme interest:

Does it necessarily follow that Harlan is yellow merely because he is between White and Brown?

Would one be justified in inferring that McKenna stands by night merely because he sits by Day?

Would you conclude that Peckham lives on Capitol Hill merely because he has Holmes so near?

Is it because the Chief Justice sits next to a Brewer that he is Fuller?

A COLORED man at Marshalltown, Iowa, was brought into the Justice Court. Despite the efforts of his attorney the offender was bound over to await the action of the Grand Jury. When court convened the negro's counsel was not present. The case was called and the judge asked the defendant if he had an attorney.

"Well, suh, I had one," he said, looking "but I ain't seen him since I was done up before the Justice, an' I guess he's done absconded, suh."

"Well, do you wish to employ another attorney?" asked the Court.

"No, suh," was the answer. "I ain't got no money. I'se willin' to let God Almighty look after my case."

"The Court will appoint a lawyer to assist your counsel," was the reply from the bench.

IN one of the counties bordering on the Bay of San Francisco, is a judge whose brusqueness has not endeared him to the members of the profession.

On one occasion, a young attorney was addressing the court when his Honor interrupted him in the midst of a sentence:

"Young man," said the Court, "I wish to ask you a question."

"Certainly, sir," replied the young attorney, all attention.

"Have you been admitted to practice before the Supreme Court?"

"Yes, sir," was the prompt reply.

"Well," said the judge slowly, "the Supreme Court does some very funny things."

AN old-time lawyer in a town not far from Lowell, Massachusetts, known to everybody as Uncle Ben, was a lover of Old New England rum, and enjoyed an afternoon off occasionally, in the company of congenial spirits. At one of these gatherings Uncle Ben, turning to one of the good fellows present, said:

"Teddy, if you hear your old Uncle Ben has departed from this life, and gone to the better world, go over to B.'s and buy a quart of good Old New England rum, put a feather in your pocket, and proceed to my house. You will probably find mother in tears. After expressing your regrets at the loss to the community and to the profession, ask to see old Uncle Ben. Mother will show you into the darkened front room; when you are alone, and in the presence of death, take out your rum, dip your feather in and rub it across my lips once or twice; and if I don't stick my tongue out, go to mother and my friends and tell them to let the funeral go on,—Uncle Ben is dead."

An Iowa lawyer tells the following story of his first months of practice. He went to a small country town and secured an office room in front of which was placed the usual sign. Then he sat down and waited for his clients to appear, all the while feeling very much the dignity of his position. The day passed and no one called, and another, and another, until the weeks went by and still there had been no client.

One morning, however, he was at the depot to attend upon the arrival of the daily accommodation train, quite an important function of the town, when a handsome, well-dressed young lady approached and inquired, "Is this Mr. Smith?" At once the feeling of importance returned, and in his blandest tone, he replied: "It is, madam. What can I do for you?"

"Can you tell me how much it will cost to send a sow and pigs down to the next station?"

Judge James Sevier, of the Kingston, Tennessee, bar, a great-grandson of the famed John Sevier, hero of King's Mountain, and first governor of the State, tells the following story of a busy, money-making old fellow who lived in the country, and seldom went to town, except on business:

One day, while in on an important errand, he was summoned to attend court as a juryman. He tried to persuade the officer to let him off, but the fellow was incorrigible, and then the man who was "cotch" concluded to try his powers of persuasion with the judge. The latter dignitary declined to excuse him until a certain murder case should have been disposed of, in which case he had found it difficult to secure a jury of competent men.

The cause was at last called, and our friend, the countryman, took his seat in the box.

He answered the usual questions, leaning as strongly as possible towards the side of his own disqualification, but without avail. He was accepted, and yielded to fate, as gracefully as possible.

The judge had positively promised to excuse him when that case was disposed of, and his heart jumped when the question was propounded to the prisoner, "Are you guilty, or not guilty?" and he responded, "Not guilty."

Thereupon the unwilling juryman snatched up his hat and started to leave the court-room.

"Where are you going, sir?" demanded the judge.

"Why, I'm going home," said the juryman.

"But you cannot go, until this case is disposed of. I thought you understood that."

"W'y, jedge, I thought hit was done disposed of. Didn't ye hear 'im say he ain't guilty?"

The matter was explained to him, and he finally understood that the prisoner's statement was not quite conclusive of the question at issue.

The trial proceeded, and when, after two or three days of torture to the hero of the story, the judge delivered his charge and gave the case to the jury, our friend was called upon to tell what he thought about the defendant's guilt or innocence.

"When he said he wasn't guilty, I believed him, and supposed that settled it," he explained. "But the judge said it didn't, and *that* of course settled it.

"When I heard what the witnesses for the State said, I was ready to quit, and help hang him. But when I heard what the other witnesses had to say, I wanted to turn him loose, without any more foolishness. Then the attorney general made a speech, and I come to the conclusion again that the feller was guilty, and thought he ought to be hung. But his lawyer made a speech after that, an' I made up my mind that he ought to be turned loose, as I had thought twict before.

"Then Judge Blank, the old fleebitten numbskull, he made a speech, and now I don't know what in the devil we ought to do. I'm willing ter jest leave the whole thing to the balance of ye, an' I hope ye'll settle it, purty mighty quick. I want to go home, and git to work."

DOWN in Virginia one planter sued another to recover damages for a dog that had been killed. The lawyer for the complainant confused many of the defendant's witnesses by a severe cross-examination. At last Uncle Charlie, a coachman, took the stand.

"Now, uncle," said the nagging lawyer, "did you know this dog that was killed?"

"Yes, sah," said Charlie, "I was personally acquainted with him."

"Then tell the jury exactly what sort of a dog it was."

"He was a big, yaller dawg."

"We know that already, Charlie. Tell the jury what the dog was good for."

"Well, sah, he wan't no good. He wouldn't hunt; he wouldn't gyard de house none; he jes' wouldn't do nothin' but lay around and eat. Dat how come dey give him de name he had."

"And what was his name. Uncle Charlie?"

"Dey call him 'Lawyer,' sah," answered Uncle Charlie gleefully, and even the judge joined in the merriment.—*Philadelphia Ledger.*

THE late Sir Frederick Bramwell was famous both as a wit and an arbitrator in engineering disputes. His brother, the late Lord Justice Bramwell, had had dealings with him in both capacities and was well qualified, according to *St. James' Budget*, to appreciate him.

The Lord Justice was once asked for advice by a young barrister.

"Something comprehensive, sir," said the young man.

"In a general way," began the Lord Justice, "you must be careful of four kinds of witnesses. First, of the liar; second, of the liar who can only be adequately described by the aid of a powerful adjective; third, of the expert witness; and, finally, of my brother Fred."

LAWYER (cross-examining): Where was your maid at the time? Witness: In my boudoir, arranging my hair. Lawyer: And where were you? Witness: Sir!—*Irish Law Times.*

THE fair plaintiff had sued the elderly capitalist for breach of promise and her lawyer was trying to persuade her to compromise.

"He offers," said the lawyer, "to give you one-third of the sum you are trying to recover if you will withdraw the suit."

"I won't do it," she replied. "I want the full amount."

"Failing in that," pursued her attorney, "he offers to marry you."

"What do I want to marry him for?"

The lawyer shrugged his shoulders.

"Well," he said, "think of the possibilities of a divorce suit, with a fat claim for alimony."—*Chicago Tribune.*

SUPREME Court Justice Leonard A. Giegerich always had a kindly feeling for Timothy J. Campbell and enjoys regaling his friends with reminiscences of the eccentric politician. At the Catholic Club on the evening of the funeral he recalled an incident of Campbell's career on the bench that may not have appeared in print before.

"Tim" was presiding at a trial where it soon became apparent that the plaintiff had no just claim to recover. At the proper moment counsel for defendant, as is usual under such conditions, asked the judge to dismiss the complaint.

"Complaint dismissed," jerked out Campbell, not waiting for a word from the lawyer for the plaintiff.

"But, hold on, your Honor," shouted the latter, in a fury. "Surely you won't dismiss my complaint without hearing me against the motion?"

"Go ahead, counselor," replied Campbell, leaning far over his desk, and hissing defiance. "Go ahead with your argument. But I'll bet ye tin dollars I dismiss your complaint."—*New York Mail.*

Two Irishmen were in court, one for stealing a cow, the other a watch. "Hello, Mike! What o'clock is it?" said the cow-stealer to the other.

"And sure, Pat, I have no time-piece handy, but I think it is most milking time."

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

Sir:—The unfortunate war now existing between Russia and Japan, and the lack of a previous and formal declaration has given rise to much discussion in the press as to the necessity and advisability of a declaration previous to hostilities.

As to the advisability of a declaration, there can be no doubt, for the rights and liabilities of belligerents arise upon the existence of war. A formal act of the Governments fixing the date of the outbreak of war, gives and taxes the whole world, belligerent, as well as neutral, with notice. It is of importance to the belligerents, for it makes them alien enemies from the date established, and forbids friendly communication of all kinds. It is of importance to neutrals, for it subjects them to liabilities non-existent in time of peace. A formal declaration is, therefore, in the interests of the belligerents themselves desirable.

But however desirable it may be, it is not necessary. War is not a theory; it is a fact, and its existence is ascertained in the same manner as any other fact. The first act of a hostile nature sufficiently establishes the beginning as well as the existence of war. (Dole *v.* Merchant's Mutual Marine Insurance Co., 51 Me. 465, 470; *The Teutonia*, L. R. 4 P. C. 171; *The Panama*, 87 Fed. R. 927, 933.) A declaration may interfere with important military or naval advantages arising from striking the first blow. This may be bad morals, but it is good law. Indeed, it may be well nigh impossible to issue a formal declaration, as in the cases of a civil war (The Prize Cases, 2 Black 665; Matthews *v.* McStea, 91 U. S. 7.)

In the matter of practice, it may be said that from the middle of the eighteenth century belligerents have consulted their individual interests, at times making a formal declaration; at other times, striking the blow in full peace and declaring the war afterwards by legislative enactment. General Maurice, in his interesting little work on "Hostilities Without Declaration of War," published in 1883, enumerates no less than one hundred and four instances of war without previous declaration, from the years 1700-1870. From which it would seem, admitting that a declaration is advisable, that bad precedent makes binding, if not "good" law. The late W. E. Hall admirably summarizes the doctrine in his masterly "Treatise on International Law." (5th edition, pp. 377-385.)

In regard to the justice of a particular war, we may well rest content with Shakespeare's line: "Thrice is he armed that hath his quarrel just." If we attempt to discriminate we fail utterly. Russia regards the war as just and stigmatizes Japan's conduct as little less than nefarious. Japan considers Russia's conduct no less reprehensible. Each belligerent pins the badge of moral purity to its breast and seeks to have "his quarrel just" as far as the subjects are concerned, and each probably succeeds. Self-preservation is above nice ethical distinctions, and in the ultimate analysis war may be said to involve this doctrine to a greater or less degree. And of self-preservation each nation is naturally the final judge.

In conclusion, war is a fact and is provable as such whether it be officially declared or not; its justice or injustifiableness in a particular instance depends upon the interests of the belligerents, of which they are the proper if not the sole judges. I am,

Very truly yours,

JAMES B SCOTT.

Columbia University School of Law,
New York, April 4, 1904.

To the Editor of THE GREEN BAG:

Sir:—Why should a lawyer be put to the trouble of marking a jury case for trial? In every State in our country with the possible exception of Maine and Massachusetts a case is put on the trial list by the court when issue is joined by the parties and the pleadings are at an end. For a lawyer to be obliged to mark a case for trial after he has entered it in court, seems to me an unnecessary waste of time and labor.

JOSEPH M. SULLIVAN.

Boston, April 10, 1904.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book, whether received for review or not.

LEGAL MASTERPIECES: Specimens of Argumentation and Exposition, by Eminent Lawyers. Edited by *Van Vechten Veeder.* 2 Vols. St. Paul: Keefe-Davidson Company. 1903. (pp. xxiv+618+706.)

Law reports, text books and digests are not considered, even by the profession, as light reading. The profane, indeed, look upon them askance, as technical, dry and wearisome in the extreme. Their frame of mind and probable end are admirably sketched in a masterly way by Macaulay: "Compared with the labor of reading through these volumes [Law Reports, Text-books, Digests] all other labor, the labor of thieves on the treadmill, of children in the factories, of negroes in the sugar plantations, is an agreeable recreation. There was, it is said, a criminal in Italy, who was suffered to make his choice between Guicciardini and the galleys. He chose the history. But the war of Pisa was too much for him. He changed his mind and went to the oar."

Hence it is that the clients leave the law books to the lawyers who are, or ought to be, paid liberal fees for undergoing, as it were, vicarious punishment. But there is a limit even to the lawyer; for the man of the Green Bag when the day is done, leaves his books and papers under lock and key; betakes himself of an evening to the comforts of home, or plunges into pleasing dissipation of literature, the play, the opera, or in rare and not well authenticated instances he gives himself over to dissipation of an ignobler nature.

The novel, it would seem, has fascination for the legal mind, and not a few members of the bench and bar have added to the store of forgotten literature. But they may well be pardoned in any case; for the strenuous and exacting labors of the day require a change of a quieting and restful nature. If the mind will not let up, an avocation is well nigh a necessity, and indeed a well known person in "*Who's Who,*" states under the heading of recreations, change of employment.

Admitting the need, it might be suggested that a lawyer might well find his avocation in legal history and biography, things pleasant, refining and broadening in themselves, and of no little aid in professional life.

Mr. Van Vechten Veeder would seem to have had this end in view when the happy thought occurred to him of preparing his singularly charming and delightful collection of legal masterpieces. At any rate, it serves this purpose, and to the anxious-minded it may well serve as the basis of instruction in the art of argumentation and exposition. That law is a science, we may safely admit; that it is not necessarily divorced from literature many a well prepared argument and opinion show; but the daily experience of the practitioner shows that law and literature do not trip hand in hand through court-room, and the little world in which he "lives, moves and has his being." The verdict is the desideratum, and yet literary style and feeling may lead towards it. Erskine, for example, did not find a fine literary feeling a drawback, and Webster and Choate did not scorn a classical allusion and a well-turned phrase as an unclean thing. At any rate, the absence of literary style has made many a worthy practitioner nothing more than a name, a mere tradition at best. Bad English in a judge is admittedly no good ground for reversing the judgment. Bad opinions, however, do not read well, and if they do not read well and easily, nobody will consent to read them unless driven to it by sheer necessity. Mr. Baron Parke lorded it in Westminster Hall, and his judgments are carefully studied by the profession; but the layman would rather be buried alive in his Parke or go to the oar, than con the cases in Meeson & Welsby.

But to return to Mr. Veeder. His *Legal*

Masterpieces are made up, first, of opinions delivered from the bench by Lords Mansfield (1), Stowell (1), Bowen (4); by Chief Justice Marshall (4), and B. R. Curtis (1); second, of professional opinions as distinguished from judgments or arguments in courts: Lord Mansfield (1), Alexander Hamilton (1), Horace Binney (1), and James C. Carter (1); third, of arguments and briefs, by Erskine (5), Curran (1), Brougham (1), Horace Binney (1), Webster (3), Cockburn (1), B. R. Curtis (4, including one charge to a jury), Wendell Phillips (1), Charles O'Conor (3), R. H. Dana, Jr. (1), J. S. Black (1), D. D. Field (1), Wm. M. Evarts (3), and James C. Carter (1).

That the selection is well made, no one will question, for no undeserving name appears. The judicial and professional opinions, as well as the briefs and arguments included, deserve preservation and publication as models for study and imitation. One name alone will, perhaps, surprise the profession, for Wendell Phillips is known as orator and agitator, not as a lawyer. A careful reading, however, will at once show that the platforms and a great cause deprived the law of a great and leading advocate. Phillips' argument in support of a petition for the removal of Judge Loring (1855)—"an outrageously able speech," as Rufus Choate termed it—does undoubtedly give Wendell Phillips, as Mr. Veeder states, "an honorable place in forensic annals."

But if the selection is not open to objection on the ground of inclusion, it may be subject to criticism on the ground of exclusion. Sir James Mackintosh's superb defense of Jean Peltier on a libel against Napoleon Bonaparte (1803), merited printing in whole or in part, both from the interest of the subject and from the rare ability and eloquence displayed by Mackintosh. Erskine, who was present at its delivery, thus expressed himself in writing: "I cannot shake off from my nerves the effect of your powerful and most wonderful speech, which so completely disqualified you for Trinidad or India. I could not help saying to myself, as you were speaking, '*O terram illam beatam quae hunc virum acciperit, hanc ingratam si ejicerit, miseram si amiserit.*' I perfectly approve the verdict, but the manner in which you opposed it I shall always consider as one of the most splendid monuments of genius, literature and eloquence."

Again, neither Rufus nor Joseph H. Choate figures in the text; but Mr. Veeder has not overlooked, although he has refused them admittance. As regards the elder, the editor certainly does justify himself in the introduction (pp. xxi—xxii), and it must be conceded that, however successful as a lawyer and advocate, Rufus Choate is not to be imitated. As Mr. Veeder says, and truly: "As compositions, his speeches (except the occasional orations revised and published by him) are by no means safe models." The case of Joseph H. Choate is different, but feeling it necessary to choose between Mr. Carter and Mr. Choate, the editor preferred the former. "As a jury advocate he [Mr. Carter] is, perhaps, surpassed by Mr. Joseph H. Choate, and others may equal him in learning or in native ability; but in the combined qualities of sterling character, breadth of mind, and varied culture, he has had few superiors among American lawyers, past or present." (p. 1197). True, but was it necessary to make the choice, or was it necessary to include two specimens from Mr. Carter, instead of dividing the crown?

A few other instances might be mentioned, but this is Mr. Veeder's selection, and it is unfair to criticise him in this minor matter. Mr. Veeder may be right and the reviewer wrong. The editor's answer is easy and conclusive, namely, that he could not well compress hundreds of volumes into two without many a sigh and sincere regret.

Passing from the purpose and the selection itself, the question remains, how has Mr. Veeder performed the editorial part of his work? And to this, there is only one reply, admirably. A short biographical note of Judge and Lawyer represented is given containing the essential facts of their careers, and this is invariably followed by an essay sometimes long and comprehensive, always

admirable and interesting, in which the importance of the lawyer, his influence, characteristics and style are pointed out and appreciated. They are remarkable examples of compression and in not a single instance has Mr. Veeder fallen short. Indeed they show the editor possessed of a rare critical faculty, of broad knowledge and culture, and of a literary style worthy of imitation. If reviewer or reader may not criticize, he may well be permitted envy.

It should be said that each selection is preceded by an adequate, and at times, elaborate statements which makes the text easy of comprehension and appreciation, and the work ends with a very satisfactory index.

Mr. Veeder, it would seem, has fallen asleep over his pen in a few instances. It is true (as stated on page 7), that Lord Mansfield was only twice directly reversed, but Perrin *v.* Blake (1769), 1 W. Bl. 672, dealt with the rule in Shelley's case, not with the "question of literary copyright at common law." Mr. Veeder, confusing the two Shelleys, evidently had in mind Millar *v.* Taylor, (1769) 4 Burr. 2303. It is not without interest to note that the dissenting opinions of Mr. Justice Yates in both these cases were followed on appeal. The imperious Lord Chief Justice had not had a single dissent from his judgments up to that date, and he took it so much to heart that the unfortunate justice deemed it advisable to be transferred to the Common Pleas.

Mr. Veeder ascribes the "Answer to the Prussian Memorial," 1753, to Mansfield, then solicitor general. It is true that Lord Mansfield is generally credited with the authorship of the famous and authoritative document, but it is known that Sir George Lee had a hand in it. Sir Robert Phillimore is inclined to attribute it to Lee, of whom he says: "He was the principal composer of a State paper on a great question of International Law. The Answer to the Memorial of the King of Prussia. . . . To that Memorial indeed another name was affixed, the name of one who was not indeed a member of the College of Advocates, but who was destined to be among the few luminaries of jurisprudence in our island, and able to vie with those which have shown upon the continent. . . . This great man was then Mr. Murray, afterwards Lord Mansfield." (1 Phillimore's Int. Law, xlvi-xlvii.)

In the list of distinguished judges, (p. xxiii.) Mr. Veeder places William K. McAllister as the sole glory of Illinois. Concensus of opinion in Illinois would probably assign precedence to Lawrence, Scholfield, Breese or Walker—perhaps in the order given.

Again the life of B. R. Curtis, mentioned on page 619, was by his son B. R. Curtis, Jr., not by his brother, G. T. Curtis. Slips like these are most trifling blemishes in a work replete with scholarship and a fine literary and discriminating sense.

A Treatise on the Law of Negotiable Instruments. By *John W. Daniel.* 2 Vols. Fifth edition reëdited and enlarged with notes and references to American and English cases by *John W. Daniel* and *Charles A. Douglass.* New York: Baker, Voorhis, and Company. 1903. (clivx+936, 1004 pp.)

It seems to be well settled that when doctors disagree the patient dies; but in the present instance the Honorable John W. Daniel goes his way untroubled, and the fifth edition of his authoritative work in two volumes on Negotiable Instruments will be cited by the Supreme Court in the future as the previous editions have been in times past.

The statement in the above paragraph is made because of the fact that Senator Daniel's work has been reviewed by two competent hands—both teachers of the subject in two leading law schools—in the May and June numbers respectively, of the *Columbia* and *Harvard Law Review* for the year 1903. The review in the *Columbia Law Review* is flattering and pronounces the author and his work in excellent standing and seems to take evident satisfaction in the favorable diagnosis. A few weaknesses are pointed out, such as foisting on the back of the great Lord Mansfield, a decision of Sir James of that name (Fentum *v.* Pocock, Sec. 1333) and the review closes with this bit of general

commendation: "A number of errors in proof reading, also, should be corrected. For example, Edwin *v.* Lancaster in note 40, Sec. 1334, should be Ewin *v.* Lancaster. Barring this and a few other mistakes, which are not serious, the present edition is an admirable piece of work."

Not so the reviewer in the *Harvard Law Review*. The author and his book are flayed alive and the calf is torn from the covers of the book, although it may be said some few patches are left to the hide of the unfortunate victim himself. The reviewer states that he examined the book prejudiced in its favor and "we have been surprised," he says, "to find how greatly we were mistaken." The gist of the onslaught consists of four charges, namely: That Mr. Daniel mistakes the law; that the cases cited often do not bear out the generalization and positive statement in the text; that many opposing authorities are not mentioned at all, although squarely in point, or are quoted for a *dictum* in favor of the author's view; and lastly that the omissions of important cases, whether *accord* or *contra*, seriously impair the completeness of a work on this delicate and vastly important subject. To this general statement might be added another objection of the reviewer, namely, that cases cited in the table of contents are not to be found in their proper places. "Mistakes of this kind," he says, "are so common in this edition that we forbear to give further examples." And another serious drawback arises from the fact that "this edition continues to cite many cases as reported only in law reviews, although they have been for years published in the regular reports."

A final quotation will show the value this work has in the reviewer's eyes. "We have made," he says, "no special effort to find errors in this edition. None is necessary. They *sautent aux yeux*. Those which we have mentioned and others have come to our notice either when we have opened the volumes at random or when we have examined them to find Mr. Daniel's views upon some controverted point."

As this latter is a detailed and extensive review, the prospective owner of this edition may well examine it and test it for himself. The present reviewer has consulted Daniel's frequently and has at times examined pas-pages in which he had a present and often pressing interest. The section on Negotiable Instruments secured by Mortgage (Vol. 1, pp. 842-848), discusses, in the light of the weight of authority, the theory that the mortgage is merged in the note to such an extent, that the rights of an innocent holder in course for value and without notice are those of a holder of a negotiable instrument. This ignores the fact that the transaction is a mortgage transaction and is to be regulated by the law of mortgages. On principle this is clear and unanswerable. Mr. Daniel cites many authorities for the prevailing and irrational view, and he throws in in a haphazard way, authorities *contra*; but in this latter list, the reviewer finds but a single Ohio case, while the leading case of Bailey *v.* Smith, 1863, 14 Oh. St. 396, in which Mr. Justice Ranney riddles the doctrine and refuses to follow it, is omitted from the section altogether. The case, is, however, misspelled and miscited in sects. 758a, 779a.

But it would be unfair to overlook the fact that the courts have quoted this book time and again so that it stands before the public and the practitioners invested, as it were, with a halo of judicial authority. For this reason it has had and does have substantial merits, and in this new form it will continue to decide many a law suit in the future as it has in the past. The present reviewer does not detract in any way from its practical utility; but he suggests a careful perusal of the review in the *Harvard Law Review*, Vol. XVI. (pp. 605-612) by way of caution to those who would or might otherwise rely upon it as a sole and unassailable authority.

THE LAW AND PRACTICE IN ARTICLES FOR TORTS IN THE STATE OF NEW YORK. By *J. Newton Fiero*. Albany: Matthew Bender. 1903. (xviii+893 pp.)

In the modest guise of a local book here is a work of merit, well deserving circulation

outside its professed jurisdiction. The plan includes a treatise, an abstract of New York cases, and forms. The topics covered are the general principles of liability and specific injuries to the person. Injuries to property are not covered, and it is to be hoped that they are reserved for a future volume.

The author has done his work so well that there is doubtless some excellent reason for giving such scanty notice to Wright *v.* Wilcox, 19 Wend. 118 (1838), cited at p. 91 on a point for which it is not very important; but lawyers outside New York would welcome a rather elaborate discussion of the present value of that celebrated case, in its home jurisdiction, as to the point on which it is greatly used—the master's responsibility for a servant's wilful acts. This is, however, a very slight omission, and the only serious shortcoming discovered is the lack of a table of cases. By way of set-off, it may fairly be pointed out that in one respect at least the author has unnecessarily, but very properly, carried his labors beyond the field usually occupied by writers on torts, in that among injuries to the person he has included breach of promise to marry.

A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS. By *Walter Chadwick Noyes*, Judge of the Court of Common Pleas in Connecticut. Boston: Little, Brown, and Company. 1902. (pp. xlxii, 703)

The industrial reorganization now going on may well be set down as marking the most important epoch in the economic history of the United States. From the point of view of the lawyer, this has involved at every stage the complex problems connected with the consolidation of corporations. So much new knowledge and such need for future guidance has properly resulted in a special book dealing with the law of intercorporate relations. In respect to the greater problem of restraint of trade, there are four forms of intercorporate arrangement which have been employed: First, the pool—a direct agreement between the corporations for their joint operation; second, the trust—an indirect arrangement between shareholders for joint management of their holdings; third, the holding corporation—a central corporation to own the shares of the constituent companies; and, fourth, the single corporation which buys the plants of the old owners outright. When this book was written the fate of the first and second had been decided; and the author set forth the whole law which led to their dissolution. But the disposition of the third and fourth was then unknown, and, indeed, is not yet settled, but the author treats the matter in the best way possible. The secret of the continuing value of the work under review is that it is based upon permanent principles, not upon transitory rules. For from beginning to end the theory of the treatise is that the validity of a combination depends upon considerations of public policy.

LITERARY NOTES.

The account of the organism and function of the Virginia County Court given in the *Life and Letters of Robert Lewis Dabney*,[1] is of special interest to lawyers and jurists.

The old county court of Virginia which wielded unrivalled power in the early life of that State was notably the great upholder of justice, but it was also the training school of Virginia's noted orators. There lawyers of State reputation did not hesitate to put forth strenuous efforts even in cases of small importance, and it was in this old court, with his father sitting among the magistrates, that Patrick Henry leaped into fame by his great speech. "These county courts were a sort of resurrection and metamorphosis of similar courts which had obtained anciently in England, and some of which had continued to exercise their powers down to the time of Henry VII. They were established in the Virginia colony in 1623 and were first called monthly courts, but in 1642 the name was changed to county courts and by that name they are familiarly and almost exclusively known. They exercised judicial, leg-

[1] THE LIFE AND LETTERS OF ROBERT LEWIS DABNEY. By *Thomas Cary Johnson*. Richmond, Virginia: The Presbyterian Committee of Publication. 1903. (xvi+585 pp.)

islative and executive functions." The court was composed of all the justices of peace of the county, of whom there was often a large number. All of the magistrates could sit together, but a minority made a quorum. This body, a close corporation where members served during good behavior, on the occasion of a vacancy gave three names to the Governor, from which he was obliged to make a selection. The jurisdiction of the county court was wide and was in part concurrent with that of the circuit court. Besides holding court once a month, the magistrates were the county executors; as a body they levied taxes, supervised the disbursement of public moneys, made contracts, and performed many of those duties which in our more complex society are discharged by different boards. Individually the members of the court were local magistrates, preservers of the peace and general advisers of their respective county sides. "The only compensation which the justices received was the emoluments of the office of high sheriff. The sheriff was appointed by the governor from one of the three justices of peace recommended by the county court. The members aimed to confer this office on themselves in turn, in order of official seniority." Only the high sheriff received any compensation for services, for the theory then prevailed that the State was the expression of the law and general peace, the fountain of honor, the embodiment of all civic virtues, and to whom every man owed free service.

The clerk of the county court was usually a man of education, often a fine office lawyer, and a great county character. He was appointed by the court and his term of office was indefinite. The bench of magistrates represented the intelligence and influence of the county and the monthly court days brought together the freeholders of the county who made a critical audience.

In early Virginia days there was not a great deal of voting; the curse of universal suffrage had not yet come and freeholders were the only voters. Among the freeholders the country gentry were the natural leaders of the yeomen and mechanics and largely directed the ballots. The only votes cast were for presidential electors, congressmen and members of the Legislature, as the governor and the judges of the circuit and appellate courts were chosen by the Legislature. The freeholders gathered for election at the county seat, the one voting place and all the voting was *viva voce*, as "a secret ballot was thought fit for cowards only." Sometimes the candidates were present and sat upon the dais in the court room, while the sheriff held the polls, and a voter as he declared his preference, might receive a bow and formal thanks from Mr. Marshall, Mr. Randolph, or the great Mr. Henry.

Around every court house was a well-turfed green, studded with trees, where the politicians harangued the voters and which swarmed with a multitude on court days. There the bullies and champions had their fierce fisticuffs with the slightest interference from their Honors of the bench who sometimes adjourned to see the fight. An anecdote told by Mr. Robert Lewis Dabney shows that even the aristocratic John Randolph of Roanoke took an interest in these combats. On one occasion while looking on at a fight on the court green of Cumberland county, he was so impressed with the powers of the victorious champion that he engaged him on the spot as overseer for a plantation in Charlotte county, hoping that the athlete might subdue a powerful negro who was the terror of the plantation. The champion accepted and subdued the negro after a Homeric battle in the field, destructive of much growing tobacco.

The court house was the heart of community life and court week took the place of county fairs, social clubs and political conventions. During court week on court house green could be found the aristocratic planter, the yeoman, the merchant, the pedler, with his goods, the office-seekers with pleasant manners and suave speech. Court week was a season of festivity, but the work of the court itself was serious and faithfully performed. It is said to have given Virginia the best government ever enjoyed by the State.

CURRENT LEGAL ARTICLES.

In the *Yale Law Journal* for April the "Doctrine of Continuous Voyages" is the subject of a lengthy article by Charles B. Elliot, Judge of the District Court, Minneapolis.

The doctrine of continuous voyages (says Judge Elliot), was developed by the English courts in the early part of the last century to meet the devices by which it was sought to avoid the rule of the war of 1756, which forbade neutrals in time of war to engage in a commerce from which they were excluded during peace. A neutral vessel might lawfully sail from a neutral port to a non-blockaded port of a belligerent with goods not contraband of war, and the simple device of interposing a neutral port between the forbidden colonial port and the belligerent port of ultimate destination suggested itself to the enterprising carriers. As trade between the colonies in America and between America and Europe was permitted, the Yankee skippers merely sailed from a colonial port to an American port, and from thence to Europe, and claimed exemption during the latter part of the voyage. The British courts met this evasion of the rule by holding that the two voyages were in fact one continuous voyage, unless the goods passed into the common stock of the country to which they were first carried. Naturally this rule did not meet with the approval of the neutrals who were thus deprived of a valuable carrying trade which was open to them. But while Americans were particularly energetic in their manifestation of disapproval, their objections were of no avail, and the rule was thoroughly established that "when the ultimate destination of a ship or cargo is such as to infringe belligerent rights, the offending ship cannot escape by stopping at an intermediate neutral port." . . . During the Civil War the United States invoked the same rule for the purpose of checking violations of the blockade as well as carrying of contraband goods to the Confederates. A blockade runner, by well established British and American rules, was subject to capture as soon as she had left her foreign port with the intention of running the blockade, and English boats loaded with goods destined for the Confederates were thus imperiled during the entire voyage across the Atlantic. But by clearing for the British port of Nassau, and there trans-shipping the goods to more suitable vessels, the danger line was brought to within a few miles of the blockaded coast. A barren rock in the Bahamas thus became a great commercial port. Its harbor swarmed with innocent looking neutral trading vessels, and the United States government was expected to presume that they had no relations with the rakish craft of race-horse build that frequently called at that busy port. The truth known to every one was that the whole trade was a manifest and palpable evasion of a recognized and admitted rule of maritime law. Nassau was a mere output for attack, a resting place while hovering off the coast and awaiting the arrival of a stormy night suitable for a dash to some convenient port.

In a series of prize cases the United States courts held that where interposition of a neutral port was a mere pretence, the voyage was continuous, and that the vessel and cargo, or merely the cargo, depending upon the circumstances of each case, subject to condemnation.

Comment—generally adverse—on these cases by English and Continental jurists, as well as by several American writers, is quoted at some length by Mr. Elliott, who adds, however:

The doctrine of continuous voyages as construed by the United States, especially as applied to carrying contraband goods, has been recognized in subsequent cases and is now an established rule of maritime law.

One phase of the Eastern situation is thus commented on by the *Law Journal* (London):

The decision of the neutral Powers not to protest against the Russian declaration of a state of siege at Newchang is a wise one. There can be no doubt that it is the duty of a belligerent to respect neutral territory—a duty which both Russia and Japan violated

at the outset in sending their armies to Korea. The position, as regards the Manchurian portion of the Chinese Empire occupied by Russia, is altogether anomalous. That occupation, illegal though it may be, was a *fait accompli* before the war. A glance at the map is sufficient to show that it would be pedantic under existing circumstances to expect Russia to refrain from any steps that may be necessary to protect the railway and hold the adjacent territory, even though the trading rights of neutrals at treaty ports be interfered with. On the other hand, as China has been unable to preserve her neutrality, Japan will be within her rights in attacking the enemy on Chinese territory. Nor can she be expected to draw the line strictly at places already occupied by the Russion forces.

In *The Harvard Law Review* for April, Judge Simeon E. Baldwin of the Yale Law School, outlines the "Recent Progress Towards Agreement on Rules to Prevent a Conflict of Laws." After mentioning the two Pan-American Congresses of 1889 and of 1901-2, Judge Baldwin says:

In 1893 the Netherlands issued invitations to such European States as she judged best, to send delegates to a Conference at The Hague to consider the adoption of identical laws or of an international convention on certain subjects relating to personal *status*, private property, and the forms of legal documents. Thirteen nations sent delegates, and similar conferences were held in 1894 and 1900, resulting in conventions for determining what law shall be applicable in case of conflicting claims as to matters of marriage, divorce, and guardianship, and to successions and bankruptcies, and to regulate certain methods of judicial procedure affecting foreigners. The conventions as to the celebration of marriage, adjudication of divorce and guardianship, were, by the summer of 1902, ratified by the executive departments of twelve of the powers. To that concerning successions ten acceded, but as Russia and Hungary refused their assent, the Netherlands has called another Conference to revise that and, as to some points, the others, which will assemble in May, 1904. . . .

If The Hague conventions, as they may be revised and perfected this year, should go into full force in eastern and central Europe, it is probable that on certain points the United States would eventually be glad to express their concurrence in them, by some formal act of adherence, on the part of the treaty making power. There may be constitutional objections to such action in respect to some of the matters involved, owing to the peculiar relations of the States to the United States. But so far as the United States can speak, it would be obviously desirable that they should.

Some interesting points of "Japanese Law and Jurisprudence" are noted in the March-April number of the *American Law Review*, in an article by A. H. Marsh, K. C., of the Toronto Bar, based on two lectures by Dr. R. Masujima, of the Tokyo Bar. Says the article:

The learned lecturer tells us that the adoption by Japan of her present system of codes was hastened by the desire of the Japanese people to rid their country of the ex-territorial jurisdiction exercised in Japan by the courts of foreign nations, and it could not be expected that the foreign nations would concede this point unless Japan first furnished herself with a recognized and uniform system of laws. . . .

It is astounding to learn from these lectures that the judges of Japan are not generally drawn from the bar, but are appointed directly from the graduates of law schools and colleges, and that the appointments are based upon examination; that preëminence at the bar is not a necessary qualification for the bench, and that the bench is not a post of honor and emolument to which men look forward with ambition. . . .

We learn from these lectures that people in Japan very rarely think of the lawyer as a professional guide, but that they generally do their own legal business, and rarely consult a lawyer until after a suit is actually

pending, and that, if they do seek his assistance, it is generally in the last stages of the suit. . . .

One is surprised to learn from these lectures that in the Japanese courts they have no system of pleading by which the issues to be tried between the parties are defined, and that neither party knows with any degree of accuracy what his opponent's case or defense is until trial, when the judge, by oral questions, elicits what are the real points in controversy. There is no such thing as a preliminary examination of the parties for discovery, or a preliminary production of documents in the possession of the parties, and finally the examination of witnesses is conducted by the Judge and not counsel for the parties. . . .

Perhaps the most interesting portion of Japanese law is that part of the civil code which deals with family relations. While the remaining portion of Japanese law has in great part been formulated in accordance with the ideas of modern Europe, this portion of Japanese law has been in great part formulated in accordance with ancient Japanese law. This being the case, it is interesting to note the similarity between the Japanese law of family relations and the Roman law touching the same subject. The learned lecturer tells us that "There is no other department of law which enters so closely into the heart and foundations of society as the law of 'family relations.'" This doubtless accounts for the fact that while Japan was ready to adopt the general body of the law of modern Europe she was not willing to revolutionize the indigenous law which circles around the hearth-stone. Society in Japan has gone through the stages of family groups, village community and feudal system, which latter system lasted until the Revolution of 1868. This is the order of progress which has been recognized elsewhere throughout the world, and, speaking in a general way, Japan has now brought her jurisprudence into line with the latest phase of modern European advancement. In one respect, however, there is still room for growth along the line recognized throughout the world as the line of progress, and that is with respect to the law of family relations. Dr. Masujima tells us that it has been generally stated that in Japan the family is still the unit of society and not the individual, and he proceeds to argue that this is not strictly accurate, because the law of Japan does, to a considerable extent, recognize the position of the individual, but he makes it clear that the saying, which he combats, has in it a considerable deal of truth.

To the April number of *The American Law Register* William W. Smithers contributes the second of a series of articles on "Russian Civil Law," bringing the narrative down to the end of the sixteenth century. Of the important codification of Russian laws about 1050, the following interesting account is given:

The *Russkaia Pravda* of Yaroslav is important as a mirror of ancient legislation and customary law which had become well recognized in principle at the time of its promulgation. It was primarily intended for a body of people known to have come from many countries, although most strongly impressed by Scandinavian and Slavonic ideas and customs. . . .

The importance of the family above the individual is manifested in many provisions for punishing criminals, and the class distinctions of the boyars and thanes, the men of the sword, merchants and free workers, and the slaves is clearly established. The relation of master and hired servant is recognized and the right of the latter to quit the employment at will on repayment of advanced wages is given.

The familiar maxim of the English common law as to right of protection of one's private property is thus recognized: "Each citizen has the right to kill within his own property the robber whom he surprises therein at night."

Damages are allowed for the destruction of cattle, boundary fences, trees, bee swarms, *etc.*

The master is made responsible in damages for the torts of his slaves. A curious

example of the law of negligence appears in the clause providing that if a free servant lose a horse of the master, he must pay the latter its value. If a master fail to pay his free servant the wages agreed upon, he can be fined for the benefit of the *fisc* and also be made to pay the wages due.

The commercial law is accorded very great consideration. Among the provisions under that head may be mentioned:

"Creditors whose debts are denied are obliged to support their claims by witnesses, and in case of recovery are entitled to the amount claimed together with damages in the nature of a penalty."

"In cases of money lending between merchants, the debt being denied, no witnesses are necessary, but the oath of the alleged debor shall suffice to relieve him of liability."

"Where an insolvent debtor's goods are sold for the benefit of his creditors, a foreign merchant who has supplied some of the goods in the induced belief that the debtor was solvent shall be given preference in the distribution."

"If a merchant receive merchandise or money on deposit and the same be lost by *force majeure*, as by flood, fire, or act of the public enemy, he shall not be liable to arrest, but he shall be entitled to a reasonable delay to repay the value of the goods or money lost."

"Every merchant who by reason of prodigality, drunkenness, or negligence permits goods to be injured while they are deposited with him shall be subject to arrest at the instance of his creditors, and if they do not agree to accord him time, he shall be sold as a slave unless he at once satisfy the claims against him."

"If a slave obtain money by representing himself as a freeman, his master shall reimburse the innocent victim of the fraud or renounce his right of ownership in the slave."

"Every master who authorizes his slave to engage in commerce shall be liable for the commercial debts thus contracted by the slave."

"If a person claim to have left objects on deposit with another, the latter's denial under oath that he received the articles is sufficient to discharge him."

Interest for borrowed money at the rate of 40 per cent. is recognized and made payable every four months.

Laws of Succession: "If a man of low estate die without issue, his property escheats to the public treasury. If he leave male issue, they shall take it. If he leave only female issue, they shall inherit, in proportion, with the public treasury, if they be of marriageable age."

"The Prince shall have no rights in the succession of his boyars nor in that of the officers of his military guard. If they die without male issue, their daughters shall inherit." (The Code does not say whether the treasury or the next of kin shall take in case boyars and officers of the guard die without issue.)

Wills are to be faithfully executed, and many provisions cover the respective rights of widows and children where the former remarry. In case of disagreement among children, the affair is to be left to the tribunal of the Prince, whose right is recognized to delegate his powers as the fountain of justice of the empire to his civil or military officers.

The greater part of the Code is devoted to criminal law and criminal procedure, the most important feature of which is the provision that in every trial the prosecutor must confront the accused before twelve citizens from the vicinage, sworn to decide the questions of fact "according to their convictions and the light of their conscience." The officer invested with the power of judge at the trial determines the penalty and orders its infliction. This feature of the sworn jury indicates how much the Scandinavians had impressed their institutions and laws upon the Slavs. Saxo, the Danish historian (1130-1204), says that in the eighth century Ragnar Hodbrok, King of Denmark, was the first to establish a criminal tribunal with twelve sworn jurors. *(Historia Regum Heroumque Danorum.)*

THE recently discovered Code of Hammurabi, is the subject of an interesting art-

icle in the March issue of *The Juridical Review*, is the course of which the writer, D. Oswald Dykes, says:

Hammurabi's Code was certainly the most widely known and most influential legal system of antiquity. Many centuries after its date [220 B. C.], it was used in the law-schools of Babylonia and Assyria. Its influence on the Hebrew law is at the present time a subject of lively controversy among Semitic scholars. . . . The most conspicuous characteristic of the provisions of the Code is their concrete and particular form. As in the Roman XII. Tables and the old Germanic law, no general legal doctrines are here laid down. Each section uses the conditional form, with a hypothesis stating the facts to be considered, and an apodosis giving the "doom" or judgment for that case. This creates a strong probability that this so-called Code was a collection of decisions pronounced by the King or by some other Court, and now classified and promulgated by royal authority to guide the Courts as binding precedents. . . . .

The preliminary stages of an action are not easy to understand from the glimpses given by extant documents. It seems clear that the jurisdiction of the judges was local, and there are examples of actions dismissed, as we should say, on the plea of "no jurisdiction." When a diet had been fixed for hearing the cause, the parties went to the temple in which, or at the gate of which, the Court sat. The property in dispute, the "fund *in medio*" or the title-deeds of the property, was commonly deposited with the deity of the temple. The judgment delivered by the Court was the judgment of the god. The tribunal, however, included besides the judge, a body of assessors who appear to have been head men of the town or village, whose local knowledge makes them somewhat analogous to the earliest forms of jury in England. These assessors had a judicial function, and assented to the decrees of the Court. . . .

Of the pleading before this tribunal we know little. There are some indications that there were written pleadings, which would contain the parties' versions of the facts and the statement of their respective claims. Written contracts played a large part in Babylonian litigation, and an action involving the reduction of such a writing was concluded by the formal breaking of the tablet. Oral evidence was given on oath. The formula is not known, and according to one theory, the recitation was accompanied by the lifting of the hand. There is no indication that torture was ever employed to compel testimony or to test it. Examples occur of persons having an interest, and not original parties to the suit, intervening during its progress. The oral pleadings were apparently conducted by the parties themselves; although the written pleas may have been put in proper technical form by the professional scribes who wrote them.

The decision of the Court was embodied in a document bearing the seals of the judges and the names of witnesses, and it is from such documents, some of them 4000 years old, that we gain most of our knowledge of the early legal procedure. Appeal was allowed to the King's Court, where he seems at times to have heard and decided cases in person. Documents now extant record orders of Hammurabi, directing that parties and witnesses should be sent to his Court at Babylon.

"THE French Jury System"—in criminal cases, for "France has never adopted the principle of jury trials in civil cases"—is described by Judge Simeon E. Baldwin in the April number of the *Michigan Law Review*. After outlining the jury systems from the Revolution to the establishment of the present Republic Judge Baldwin says:

Soon after the present Republic was organized, during the presidency of Thiers, a new system was adopted which is still in force. This was set up by the law of November 1, 1872, and its main provisions are these:

Jurors must be at least thirty years old. They must be in the enjoyment of political and civil rights. Household domestics and servants on wages, convicts, bankrupts, ministers of religion, certain public functionaries,

and those who do not know how to read and write French, are excluded. Men of seventy; those who live by means of daily manual labor; and those who have already served during the same year or the year next preceding, are excused.

A list is annually made up for each canton by a commission consisting of the local justice of the peace (*juge de paix*) and his assistants with the mayors of each commune. They pick out a certain percentage of all its citizens who are not disqualified, selecting whom they please.

These lists are transmitted to the clerk of the trial court of the *arrondissement*. Another commission, consisting of the presiding judge of the court, the justices of the peace, and the members of the legislative council of the department (*conseillers generaux*) then strikes off half the names. It may also add new names, not exceeding in number a quarter of those in the first lists. Before each term of court forty names are then drawn by lot from the final list, as the jurors for the term. . . .

Senator Victor Leydet has proposed to restore in substance the practice of the first two Republics. He has recently brought forward a bill for an Act putting any citizen enjoying civil and political rights and on the electoral list, on the jury list also, provided he is between forty and sixty years old, and can read and write. Excuses will be received on the ground of ill-health, other public duties, or serious injury to the man's family should he leave them to attend court.

The last proviso suggests one of the obvious defects in the present system. No jury fees are paid to jurors residing in the court town. Those living at the distance of two kilometres can demand about sixty cents for each myriametre traveled, towards indemnifying them for their necessary traveling expenses. Nothing is paid by way of remuneration for services.

Senator Leydet's bill proposes a change in this respect, letting the government, from time to time, fix a small compensation for the jurors in each department, according to its particular conditions, of say not over ten francs a day. . . .

In January, 1904, the Minister of Justice, M. Vallé, announced his general adhesion to the views of Senator Leydet. He would, however, adhere to thirty as the *minimum* age. The matter will soon come before Parliament for decision; and it seems probable that some steps in the way of reforming the present system will be adopted.

COMMENTING on the Merger Decision, the *Albany Law Journal* for April says:

It can hardly be disputed, we think, that under the so-called Anti-Trust Law of 1900, rigorously applied and enforced, ancient rights hitherto held to be incontestable, are abridged, industrial tendencies that promote the increase of national wealth are checked, and business thrown into inextricable confusion. But we have the comforting assurance from the administration, through its chief legal officer, the attorney-general, that there is no intention to "run amuck" among the great corporations of the country. In other words, the government having settled the interpretation of the Anti-Trust Act through this great test case, will wink at its continued violation. However inconsistent this attitude may be, it is exceedingly politic as well as fortunate, for it has been estimated by competent authority that eighty-five *per cent.* of the railroad mileage of the country is controlled by railroad systems operating in violation of the law as it has now been declared and sustained by the Supreme Court. The only remedy for this anomalous and disquieting condition of affairs would seem to be an amendment of the Anti-Trust Act, which was passed primarily to meet a partisan emergency in a difficult campaign in which Democrats were making party capital by attacks upon the trusts, so as to make it apply only to unreasonable restraints of trade. But again, "partisan emergencies" may block this obviously wise and reasonable course.

THE Peonage Cases are the subject of an interesting article by Honorable William Wirt Howe, in the *Columbia Law Review* for April. These cases arise under the Thir-

teenth Article of Amendment to the Constitution of the United States and the Act of Congress of 1867 concerning peonage:

During the last year a large number of indictments have been found by United States grand juries in the District Court for the Middle District of Alabama, at Montgomery, for holding persons in a condition of peonage or returning them to such a condition. One of these juries appears to have requested special instructions on the subject and concerning the meaning of the Act of 1867, above quoted; and, in June last, Judge Thomas G. Jones of that District, delivered an elaborate charge which has been reported. After alluding to the origin of peonage in Spain, and its transfer to Mexico, and thence to New Mexico, the Judge stated that peonage is not slavery and that a peon is not a slave, but a laborer bound to his master for an indebtedness founded on advancements made in consideration of service. He then showed how this system had been abused in New Mexico, and why the Act of March 2d, 1867, had been adopted. In construing the Act, he laid down the rule that such a statute, imposing as it does penalties for the invasion of the rights of the citizen in order to protect him in his liberty and happiness, is not the subject of disfavor in the law, and should not be construed with the same strictness, or on the same footing, as laws which regulate or restrain the exercise of a natural right or forbid the doing of things not intrinsically wrong. He declared that under the statute in question, which makes it an offence to hold a person in a condition of peonage, or return a person to such condition, it is immaterial, as regards such offence whether or not the condition of peonage exists by virtue of a local law or custom creating such a condition, or whether it exists in violation or without the sanction of law. The "condition of peonage," the Judge held, is a condition of enforced servitude by which the servitor is restrained of his liberty and compelled to labor in liquidation of some debt or obligation, real or pretended, against his will; and any agreement giving another the right to exact such servitude is invalid in law, is treated as made involuntarily, and affords the creditor or master no protection; and in considering the effect of influence, threats or force in rendering service involuntarily and creating the "condition" in question, we may take into consideration in each case the relative inferiority of the person so contracting to perform the service when compared with the person exercising the force. The Judge further declared, in view of the variety of cases before him, that if a person hires another under, or induces him to sign, a contract, by which the latter agrees during the term to be imprisoned or kept under guard, and, under cover of such agreement, afterwards holds the party to the performance thereof, by threats, punishment or undue influence, subduing his free will when he desires to abandon such service, he is guilty of holding such person in a condition of peonage. He also charged that a person who falsely pretends to another that he is accused of crime and offers to prevent conviction if he will pay a sum of money to satisfy the prosecutor, and thus induces the party to sign a contract to work out the amount, and to submit to restraint and deprivation of liberty while thus working out a debt, is guilty of holding such laborer in a condition of peonage, or causing him to be so held, whenever such laborer desires to leave his employment, but is compelled by threats or punishment to remain and work under such contract. Other charges were also given, of an interesting character, concerning local conditions in Alabama, and as to false accusations of crime made for the purpose of placing laborers in a condition of involuntary servitude; and as to the unconstitutionality of certain laws in that State. As a result a large number of indictments were found, to some of which the defendants have pleaded guilty and have paid large fines. . . .

To sum up briefly, it would seem that in the opinion of the three United States judges who have considered the act of 1867, the statute is constitutional and acts directly on the individual who holds another in a condition of peonage, or returns another to such condition, and that no regular "system" of peon-

age, whether statutory or customary, must be established and exist as a condition precedent to the possibility of such an offence. However, in due time we shall hear from the appellate courts; and it is probable that the Supreme Court of the United States may be asked by certificate of *certiorari* to pass on the interesting questions involved in the various cases.

SINCE Mr. Howe's article, quoted above, was written, the indictment in one of the Georgia Peonage Cases (United States *v.* Crawley, *et al.*) has been upheld by Judge Emory Speer, of the Southern District of Georgia, in an opinion rendered at Savannah on March 15. Judge Speer holds "that the Act of March 2, 1867, denouncing peonage and involuntary servitude in any form, is a valid exercise of a power granted to Congress by the Thirteenth Amendment to the Constitution of the United States," and is of the opinion that "the illegal holding of any person to involuntary servitude to work out a debt or contract claimed to be due by the person so held to the person so holding," is "a condition of peonage comprehended by that Act."

Referring to the contention of the defendant that a "condition of peonage" imports a system of peonage, the Court says:

This, however, does not follow. A general condition of peonage might be synonymous with a general system of peonage, but a citizen held and worked by lawless methods against his will for the purpose of compelling him in this manner to discharge a real or alleged obligation, is in contemplation of law held in a condition of peonage. The words, "a condition of peonage," as used in this sense, should be broadly construed in favor of the liberty of the citizen.

"THE Hawaiian Case" furnishes Judge Emlin McClain of Iowa material for an able article in the *Harvard Law Review* for April. He says:

The Hawaiian Case [Territory of Hawaii *v.* Mankichi, 23 Sup. Ct. Rep. 787, decided in June, 1903] involved, to state it succintly, the question whether the provisions of the Fifth and Sixth Amendments to the Federal Constitution, so far as they guarantee to a person accused of an infamous crime the right to be tried only on an indictment by a grand jury and the verdict of a common-law jury, rendering a unanimous verdict, were applicable to a criminal proceeding under the laws of the Territory of Hawaii as they existed between the time of the annexation of the islands to the United States in 1898, and the time when by act of Congress of April 30, 1900, the Constitution of the United States was formally extended to those islands and provision was made for the indictment and trial of those accused of crime in accordance with the ordinary common-law methods. . . . The decision of the United States District Court, on application for writ of *habeas corpus*, was that defendant was unlawfully held in custody, and this decision was reversed by the Supreme Court of the United States. . . .

After stating the majority and minority views of the court in the Downes, DeLima and Hawaiian Cases, Judge McClain continues:

If it be permitted to suggest a line of decision which would not have involved the complicated distinctions made or attempted in the cases under discussion, and to consider the results which the court following such line of decision would have reached in these cases, it is briefly submitted that without serious difficulty or disastrous consequences it might have been held that all territory over which the sovereignty of the United States is extended becomes incorporated into and a part of the territory of the United States; that the power of Congress to legislate with reference to such territory is given by the constitution and subject to the limitations of the constitution; and that these limitations are divisible into two classes, those of the one class being applicable to legislation relating to territory within State limits, the other to legislation of any character regardless of territorial limits. . . .

It would seem perfectly justifiable to hold that the requirement of uniformity is limited

to such duties, imposts, and excises as Congress may impose for the support of the Federal Government regarded as a government of the States; and that the prohibition of preferences to the ports of one State over those of another should be limited in the same way. . . . It is difficult to conceive any reasonable objection which could be made to the holding that the doctrine of uniformity as to imposts, duties, and excises, like the rule of apportionment of capitation and other direct taxes, should be limited to the power of Congress to raise revenue for general purposes.

The application of the line of decision above suggested to the question in the Hawaiian Case, that is, the effect of the Fifth and Sixth Amendments on proceedings in territorial courts, would perhaps be more difficult, and yet a satisfactory solution might easily be reached. The contention on the one hand would be that as the only judiciary directly contemplated by the Constitution is the Federal judiciary, exercising its power within territory included in State limits, these amendments have no application to territorial courts which are not created or authorized in pursuance of the judiciary article, but are provided for or authorized by Congress under the authority to legislate for the government of the territories. On the other hand, it could be contended that these amendments forming part of the Bill of Rights were incorporated into the Constitution as a result of the fear that too great a measure of power was being given to the Federal Government, and the conviction that Congress should be limited as State legislatures had already been limited in State constitutions for the protection of individual rights, and were intended to apply to the exercise of any power vested in Congress by the Constitution, including the power to make rules and regulations for territory not within State limits. The latter of these views seems to the writer of this paper to be more in consonance with the principles of our constitutional government. If it is admitted that the framers of the Constitution contemplated the exercise by Congress of the power of providing territorial governments, it can hardly be conceived that they intended to give to Congress unlimited power in this respect. It must be borne in mind that the protection of individual rights and property against the undue exercise of governmental power was an ever-present motive in the framing of the State and Federal Constitutions; and that the rights thus protected were not conceived of as the rights of any particular persons, but of all persons. It is hardly imaginable that the framers of the Constitution, having in mind the principles of the Declaration of Independence, would have deliberately contemplated the subjection of any class of people who should come within the jurisdiction of the United States to an arbitrary and unlimited power which they did not tolerate for themselves.

UNDER the title "Is Congress a Conservator of the Public Morals?" William A. Sutherland, in the *American Law Review*, criticises the decision of the Federal Supreme Court in the lottery case of Champion *v.* Ames, 188 U. S. 321, in which the decision was "that lottery tickets are articles of commerce, and that their transportation from State to State by common carrier is interstate commerce, which Congress, under the power to regulate, may prohibit."

Mr. Sutherland puts three questions:

First. In the light of prior decisions of the court can a lottery ticket be said to be an "article of commerce?"

Under this head the argument is, in part, as follows:

In the early case of Paul *v.* Virginia [8 Wall. 182], the Supreme Court established a rule that has ever since been adhered to, *viz.*, that the issuing of a policy of insurance is not a transaction of commerce; that the policy is not an article of commerce; and that it is not an interstate transaction, although the parties reside in different States. The reasoning upon which the conclusion as to the nature of a policy is based is very concisely stated in Hooper *v.* California [155 U. S. 653]. There the court lays down a rule which may be applied in every case in

which this question is raised. It is said: "They are not subjects of trade and barter as something having an existence and value independent of the parties to them." In other words, intrinsic value would seem to be the criterion.

Why is not this language applicable as well to a lottery ticket? Is a lottery ticket subject to trade and barter as something having an existence and value independent of the parties to it? The value of an insurance policy is independent of the paper itself and rests upon the assurance of the company issuing it that it stands ready with its capital to pay to the holder a certain sum of money upon the happening of a certain contingency. In what else does the value of a lottery ticket consist? It contains, as does the insurance policy, a promise to pay upon the happening of a contingency, that contingency being the coincidence of the number of the ticket with a number to be drawn from a wheel at a future day. Value is imparted to the ticket by the capital of the company operating the lottery. The contingency is as likely to happen (at least theoretically) in the one case as in the other, and so long as that possibility continues, so long do the policy and the lottery ticket have the value imparted to them by the parties issuing them. When, by the terms of the contracts, the obligation to pay is terminated, the paper evidences of the contracts are simply paper, of no value whatever. . . .

There seems no escaping the conclusion that the distinction between lottery tickets and insurance policies is one based upon considerations of public policy. In this the Supreme Court has, not avowedly, it is true, but nevertheless as effectually, departed from a rule of construction laid down in the very beginning, and always, until now, followed, *viz.*, that in determining the validity of an attempted exercise of power, the question cannot be affected by considerations of expediency. It is a startling departure from a long-established canon of construction, and one that of itself should excite comment. . . .

Secondly. Can the word "regulate" have been intended by the framers of the Constitution to comprehend absolute prohibition?

In no case decided by the Supreme Court, and in none of the debates of the constitutional convention, do we find a hint of any other object than to facilitate intercourse by securing harmony.

Would the prohibition of intercourse facilitate intercourse? The question is too absurd to be asked seriously. . . .

Thirdly. Does not the act prohibiting the transportation of lottery tickets trench upon the powers reserved to the States?

The Supreme Court has ever recognized the regulation of lotteries as peculiarly within the police power of the States, and however much we would welcome any legislation that would effectually wipe out the "widespread pestilence of lotteries," yet if the power to enact such legislation does not exist under the commerce clause, or some other clause of the Constitution, let us not attempt to stretch the Constitution to give that power to Congress. The commerce clause empowers Congress to regulate commerce, not the public morals.

In an article dealing with "The Physician as an Expert." in the *Michigan Law Review* for April, Professor H. B. Hutchins well describes what should be the attitude of any expert witness. He says:

The functions of the expert are in a sense judicial and should be so regarded by him. He is called into the case, in theory at least, not as a partisan or advocate, but to aid the jury by his opinions in reaching correct results. The fact that the jury are not bound to be governed by what he says, in no way relieves him of responsibility or changes his relation to the controversy. Although a witness whose testimony is to be considered by the jury like that of any other witness, he should always maintain the judicial attitude. The frequent failure of the expert to do this is undoubtedly the cause of much of the unfavorable comment from the bench in regard to this class of testimony, and has served perhaps more than anything else to bring the

expert witness into disrepute. So long as the present method of selecting and paying experts continues, but little change for the better can probably be expected. The change will undoubtedly come when the expert is appointed and paid as an officer of the court and is by law made a part of the judicial machinery of the State.

On the question of "Keeping Photograph and Measurements of Accused after His Acquittal," *Case and Comment* for April says editorially:

The denial by the courts of the application of Molineux for a *mandamus* to compel the removal of his photograph and measurements from the records of the superintendent of State prisons has attracted wide attention and much adverse comment from the press. The decision by the court of appeals of New York to this effect is, however, fully justified by the opinion of Judge Vann. . . .

The injustice of perpetrating the photograph and Bertillon measures of an innocent man after his innocence has been adjudged may be strongly urged, but it is clearly a matter for the Legislature to say whether or not public policy requires such records, once made, to be preserved. The perpetuation of a judicial record of the trial of an innocent man may, as the court well points out, be very unpleasant to him, but such records are always preserved. It is not likely to be argued that such records ought to be expunged. The record itself, though it may be humiliating to the person who has been accused, is, nevertheless, his shield against a repetition of the same accusation after his acquittal. But the retention of his photograph and measurements among those kept for convicts seems to be an unnecessary humiliation, which the public does not require him to endure. It is unquestionably a matter for the Legislature to determine, and no good reason appears why the Legislature should not provide for the removal of the portrait and physical measurements of one who has been adjudged innocent from the portraits and records of convicts.

In the *Columbia Law Review* for April Professor Francis M. Burdick follows up in an article entitled "Codification of the Doctrine of Revision," the discussion which for several months has been raging—in scholarly and friendly fashion—between Professor Williston, of Harvard, and himself over the question of "Revision for Breach of Warranty."

Professor Burdick maintains "that only Iowa and Maine can be counted as unequivocally committed to the Massachusetts rule; and that but three other States show, at the present time, any decided inclination in favor of that rule," and asserts that because "all of the Federal Courts, as well as those of nineteen State and Territorial jurisdictions, have unhesitatingly adopted the English rule, and several others have indicated, in *dicta*, their approval of that rule, a very powerful argument is afforded for incorporating it rather than the Massachusetts rule in an American Code of the Law of Sales."

I submit (he says), that the prevailing rule should be incorporated into the proposed Code of the Law of Sales in this country: First, because it is the prevailing rule, and came to prevail for the reasons and in the way above described; second, because, it is the rule of the English Code, and uniformity on this important topic in commercial law is most desirable; third, because it accords with the general principles of the law of contracts; fourth, it holds parties to contracts which they have honestly and deliberately made; and, fifth, because it treats both parties with perfect fairness and works no injustice to either.

An important contribution on a pressing question of governmental control of corporations is the draft filling some ninety pages of "A Proposed National Incorporation Law," by Professor Horace L. Wilgus, in the *Michigan Law Review* for April. The rational point of view of Professor Wilgus is indicated by the following extracts from his short foreword to the act itself:

It is not the duty of the government to act as a parent of its people; neither is it

the duty of the government to clothe a part of its people with great powers and privileges, peculiarly susceptible of abuse, without providing reasonable protection against, and adequate remedy for, such abuse. The writer believes that the corporation is the most efficient business machine yet invented; and its very efficiency makes it, in the hands of the honorable, most beneficent; but in the hands of those otherwise disposed, most oppressive. The vast majority of business men are honorable, and need but little, if any, restraint beyond their own consciences; there are, however, many others who are bent upon securing and exercising undue advantage over their fellows; the former, not needing restraint, will not, or should not, feel hampered by such restraints as are made necessary by the latter; while the law cannot make men better, it may make it more difficult for them to injure their neighbor,—and this is the standpoint from which many provisions herein should be judged. Many of the provisions are designed to meet the evils that the investigations of the Industrial Commission, the Interstate Commerce Commission and the Commissioner of Labor have found to exist,—over-capitalization, unjust discriminations, predatory competition, oppressive combinations, unjust, unsafe, and unsanitary conditions of labor, and insufficient publicity either for safe investment or proper legislation.

In the April number of the *Harvard Law Review*, J. L. Thorndike of the Boston Bar, discusses at considerable length two recent English cases, cited below, involving the question of indemnity arising through the registration by a corporation of a forged transfer of stock, and maintains that the reversal of Lord Alverstone's opinion, cited below, was wrong.

In two recent cases (says Mr. Thorndike), the question has come before the English courts whether a corporation that has been induced to register a forged transfer of stock, or to allow a transfer of stock on its books under a forged power of attorney, is entitled to indemnity from the person that has induced it to do so, when he has acted in good faith and in the belief that the document was genuine. In one [Starkey *v.* Bank of England (1903) A. C. 114] it was held that the person who induced the corporation to allow him to transfer the stock under the forged power of attorney thereby represented that he had authority to make the transfer, and that this representation imported a contract that the authority under which he acted was valid, and made him answerable for the damages sustained by the corporation. In the other [Sheffield Corporation *v.* Barclay (1903) 2 K. B. 580; reversing the decision of Lord Alverstone, C. J. (1903) 1 K. B. 1] it was held that the person who in similar circumstances induced the corporation to register the forged transfer made no representation or contract that the document was genuine and was not bound to indemnify the corporation. . . .

There is one case in this country [Boston & Albany Railroad Co. *v.* Richardson, 135 Mass. 473] in which the question was decided [affirmatively that] a company could recover damages from a person who had induced it to register a transfer of shares under a forged power of attorney or a forged transfer, where he acted in good faith.

"The Modern Law of Charities as Derived from the Statute of Charitable Uses" is the subject of an excellent article by Rupert Sargent Holland in *The American Law Register* for April.

The Statute 43 Eliz. c. 4, passed in 1601 (says Mr. Holland), was long regarded as limiting the classes of legal charities. It recited that land, money, and other property had been given for various charitable purposes, which it enumerated, and authorized the appointment of commissioners to inquire into such gifts and make orders for their proper application. The list of charitable purposes contained in it has always been treated as an expression by the Legislature that all such purposes are lawful charitable purposes, and a guide to the court in deciding on the legality of other purposes.

The list enumerated in the statute is as follows:

(1) The relief of aged, impotent, and poor people.

(2) The maintenance of sick and maimed soldiers and mariners.

(3) The maintenance of schools of learning, free schools, and scholars in universities.

(4) The repair of bridges, ports, havens, causeways, churches, sea-banks, and highways.

(5) The education and preferment of orphans.

(6) The relief, stock, or maintenance for houses of correction.

(7) Marriages of poor maids.

(8) The supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed.

(9) The relief or redemption of prisoners or captives.

(10) The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes. . . .

[This] statute did not create a new law with respect to charities, but only furnished a new and ancillary remedial jurisdiction for enforcing them.

The statute has been variously regarded in the United States. It has been recognized as part of the common law in Maine, Massachusetts, Illinois, Kentucky, Missouri and North Carolina and has been virtually reenacted in Connecticut and Rhode Island. The statute aside from the effect of its enumeration of charities has been rejected in New York, New Jersey, Delaware, Maryland, the District of Columbia, Indiana, Michigan, South Carolina, Tennessee, Virginia, West Virginia, Mississippi, and California. The question of its status has been raised but left undetermined in Alabama, New Hampshire, and Texas. In Pennsylvania, Ohio, and Georgia the principles developed under the statute by the English courts of equity have been approved and adopted, although those States do not specifically recognize it as part of their common law. In the remaining States the question has not been squarely brought before the courts. . . .

We now come to a consideration of the purpose to which the statute is commonly put today. It is regarded as a universal standard or test in deciding what objects are to be considered charitable, and it is the accepted rule that those objects only are charitable which are named in the act or are considered within its spirit. . . .

Using the enumerated objects of the statute of Elizabeth as a basis, it will now be clear that both the English and American courts allow themselves the utmost freedom within precedents in determining what are and are not charities.

IN the *American Law Review* for March-April is printed a paper on "The Civil Jury," read by A. Caperton Braxton, of Stanton, Virginia, at the recent meeting of the New York State Bar Association. It is a plea for the abolition of the "illogical and oppressive rule requiring unanimity in civil verdicts." Of the origin of this rule Mr. Braxton says:

Since the researches of the German scholar, Dr. Bruner, it has been generally conceded that the English civil jury (which, by the way, is several centuries older than the criminal jury), came, not "from the forests of Germany," as Montesquieu claims, but originated in England as an outgrowth of the "inquisition of witnesses" created by the Carlovingian kings of France to establish the facts in controversies concerning the royal estates. It was not derived from the ancient "folk-courts," but was substantially different from them.

Those early "folk-courts" were not bound by the unanimity rule, nor were any of the older tribunals. The "*Judicium Parium*" of *Magna Charta* was not required to be unanimous. In all tribunals known to man—those of ancient Egypt, the Grecian dicasts, the Roman judices, and the courts of the ancient Germans and Anglo-Saxons, of the Britons and the Normans—in each of them the majority ruled. How, then, did this anomaly of jury unanimity arise? The answer is, that it had its origin when the jury was not a tribunal at all, but merely a body of witnesses—

an "inquisition of witnesses"—summoned, not to decide upon evidence, but to prove facts.

The policy of the law, in requiring more than one witness to establish a fact, is as old as law itself. . . .

The old law, however, required twelve witnesses to agree upon a disputed fact, in order to establish it; and so it was that, when the first twelve witnesses summoned failed to agree, they were "afforced" by summoning additional witnesses, till twelve were found that would agree. This grew to be inconvenient; and some six hundred years ago the rule requiring twelve witnesses to concur was relaxed, and the concurrent evidence of a majority of the twelve witnesses was taken as sufficient.

This was unquestionably a sensible innovation and a decided improvement; but, in the latter part of the fourteenth century, during the reign of Edward III., the English law courts, with their characteristic zeal for upholding the forms of antiquity, even when the substance had been rejected, restored the rule requiring twelve concurrent witnesses to establish a disputed fact. But these old judges were not so impractical a set as their pedantic adherence to ancient forms might indicate; and, being unwilling to resort to the inconvenient and expensive "afforcing" process, to obtain twelve witnesses who would agree, they resorted to the simpler and more direct method of compelling the original twelve to agree, whether they would or not, by holding them "*sine cibo et potu*" until they did agree!

The very reasons upon which this remarkable rule was based showed the courts' recognition of the wisdom and propriety of the majority rule; for it was said that the minority were inexcusable in holding out against the majority; that, as they were all merely witnesses to the same fact, if the majority agreed upon what that fact was, nothing but stupid obstinacy, "impious stubbornness," or corruption, could account for the minority taking a different view about a matter of plain fact and not involving opinion or judgment at all!

Thus was the "unanimity rule" established; and it is to an origin, based upon such essentially different conditions and upon such absurd and illogical reasons. characteristic of an age of intellectual night, that the modern advocates of unanimity of verdicts in civil juries cling with superstitious veneration

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THE progress of the "Proposed Reforms in Marriage and Divorce Laws," from the report of the Committee on Jurisprudence and Law Reforms at the meeting of the American Bar Association in 1882 to the present time, is set forth by Amasa M. Eaton in the April number of the *Columbia Law Review*. Since 1892 reform in marriage and divorce laws has been one of the most important subjects before annual Conferences of the State Commissions on Uniformity of Legislation. Several excellent acts have been drafted by these Conferences, none of which, however, have been adopted by any of the States.

Referring to one of the acts proposed by the Twelfth Conference, 1902, Mr. Eaton says:

Even though no State has yet adopted in its entirety the Divorce Procedure Act recommended by the Conference, some of its features have been adopted, and probably more will be, and more States will follow the examples set, and adopt some of its features that other States have adopted. However, even should no general adoption of our act result, it cannot be said that the work of the Conference is a failure. It will have shown, at least, that such a law is not the one called for. If so, the question then is, what is the legislation that is called for? Why should not the general rule suggested, be adopted, that any competent court, having actual jurisdiction over the parties, shall have jurisdiction over divorce between those parties, irrespective of the vexatious question of domicile? Would not the cause of justice and the peace and quiet of the State, be better subserved by such a rule?

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ANIMAL. (GOOSE—RUNNING OF RAILROAD TRAIN —ALARM WHISTLE—LIABILITY FOR KILLING.)

TENNESSEE SUPREME COURT.

In Nashville & K. R. Co. *v.* Davis, 78 Southwestern Reporter 1050, a goose is held not to be an "animal or obstruction," within Shannon's Code, Sec. 1574, sub-sec. 4, requiring railroad trains to sound the alarm whistle and apply the brakes, and use every possible means to stop the train, when an "animal or obstruction" appears on the track. It is also held that in the absence of recklessness or common-law negligence, a railroad company is not liable for the killing of geese permitted to run at large and which trespass on the right of way. No cases are referred to. The court says: "It is true, a goose has animal life, and, in the broadest sense, is an animal; but we think the statute does not require the stopping of trains to prevent running over birds, such as geese, chickens, ducks, pigeons, canaries, or other birds that may be kept for pleasure or profit. Birds have wings to move them quickly from places of danger, and it is presumed that they will use them (a violent presumption, perhaps, in the case of a goose, an animal which appears to be loath to stoop from its dignity to even escape a passing train). But the line must be drawn somewhere, and we are of the opinion that the goose is a proper bird to draw it at. We do not mean to say that in the case of recklessness and common-law negligence there might not be a recovery for killing geese, chickens, ducks, or other fowls, for that case is not presented. Snakes, frogs, and fishing worms, when upon railroad tracks, are, to some extent, obstructions; but it was not contemplated by the statute that for such obstructions as these trains should be stopped, and passengers delayed."

APPEAL. (APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY—ACTION FOR A DEBT—STATUTORY PROVISION.)

MISSOURI COURT OF APPEALS.

In Marsh *v.* Kansas City Southern Railway Co., 78 Southwestern Reporter, 285, plaintiff sued for the negligent killing of her husband, asking and recovering judgment for $4,500. Rev. St. 1899, Sec. 2864, fixes $5,000 as the liability which a defendant must forfeit in a case of this kind. But the plaintiff sued for $500 less, thus bringing the case within the jurisdiction of the court of appeals for review rather than the supreme court.

The court holds that the statute is not strictly a penal one, so that suit may be for less than $5,000, and having sued for less, the amount sued for is the amount "in dispute" as regards appellate jurisdiction. A number of cases are discussed, none which are directly in point, Proctor *v.* Railway Co., 64 Mo. 112, 122, in which it was declared that the damages recoverable under the statute were $5,000, no more, and no less," is distinguished, as is also Rafferty *v.* Railway Co., 15 Mo. App. 559. Why plaintiff desired to avoid the appellate jurisdiction of the Supreme Court is not indicated, but it is understood that that tribunal is behind with its docket.

ATTORNEY'S FEE. (DIVORCE CASE—PERCENTAGE OF ALIMONY—VOID CONTRACT.)

MICHIGAN SUPREME COURT.

In McCurdy *v.* Dillon, 98 Northwestern Reporter 746, a contract between attorney and client for an attorney's fee, consisting of a percentage of the alimony to be recovered in a divorce case, is held void, as contravening public policy. The case is said to fall directly within Jordan *v.* Westerman,

62 Mich. 181, 28 N. W. 826, 4 Am St. Rep. 836, in which it was said, in substance, that in fixing the amount of alimony, the court is entitled to have all the facts which would influence its decision laid before it, and it cannot be supposed that an allowance would be made of a gross sum for permanent alimony if the court knew that the wife had contracted to pay a portion thereof to her attorney. Such contracts are against public policy for another reason. Public policy is interested in maintaining the family relation, and in promoting reconciliation between the parties. Contracts like this one tend directly to prevent reconciliation, and to bring around an alienation of husband and wife, by offering a strong inducement, amounting to a premium, to attorneys to promote the dissolution of the marriage tie. In the case at bar, the court distinguishes Chadwick *v.* Walsh, 70 Mich. 627, 38 N. W. 602, saying that the validity of the agreement therein was not questioned. It is also held that where the only contract an attorney has for compensation is void, he is entitled to recover what his services were reasonably worth.

BENEFIT INSURANCE. (Exemption of Association from Garnishment—Constitutionality of Statute—Equal Protection of Laws—Special Privileges.)

Texas Court of Civil Appeals.

In Supreme Lodge United Benevolent Association *v.* Johnson, 77 Southwestern Reporter 661, the constitutionality of Act May 11, 1899, Sec. 16, exempting from garnishment, benefits payable by fraternal beneficial associations, is reviewed. The act was attacked as violating the fourteenth amendment, prohibiting the denial by a state of equal protection of the laws, and also as violating Article 1, Sec. 3, of the Texas constitution, prohibiting exclusive privileges; it being first urged that the distinction between fraternal insurance associations and other insurance companies was an invalid discrimination. Williams *v.* Donough, 65 Ohio St. 490, 63 N. E. Rep. 84, 56 L. R. A. 766, relied on by appellee, is distinguished by the court, and in view of the settled distinction in Texas jurisprudence between fraternal associations and other insurance companies, the act is held not open to this objection. In Section 16, however, certain named beneficial associations are exempted from its operation, and this the court holds renders the act a violation of the constitutional provisions mentioned, and inasmuch as the act must be regarded as an entirety this infirmity invalidates it *in toto.*

BUCKET SHOP. (Prohibition—Power of City.)

Arkansas Supreme Court.

In City of Hot Springs *v.* Rector, 76 Southwestern Reporter, 1056, a general power given cities to "license, regulate, tax or suppress brokers" is held to authorize an ordinance prohibiting bucket shops, and requiring of applicants for brokers' licences a sworn statement that they are not doing a bucket shop business.

The court says that the city had a sound discretion in fixing the terms on which it would grant a license, and this discretion would not be interfered with except when it was abused, to the hurt of the citizen complaining. The presumption is that the city council's precautions were wise and proper, and unless some private right is shown to be infringed, the abstract rights of individuals need not be discussed, for the mere claim of private privilege must yield to the police power of the State.

No authorities are cited.

CHURCHES. (Nuisance—Noisy Service—Right of City to Restrain.)

Kentucky Court of Appeals.

In Boyd *v.* Board of Councilmen, 77 Southwestern Reporter, 669, the right of a city to prevent the erection of a church building, on the ground that the services which will be held therein will be of such a noisy character as to constitute a nuisance, is adjudicated and decided adversely to the city.

Ky. St., Sec. 3290, subs. 14-16, empowers third-class cities to prevent the establish-

ment of any business offensive to the public, or dangerous to health, and to make police regulations to secure and protect the health, comfort, convenience, morals, and safety of the public, and also to prevent and remove noisances.

The ordinance in question provided that if any person should proceed to erect any structure without the consent of the common council, which, when used for the purposes intended, would be greatly injurious to adjacent property, and destroy the comfort, convenience, peace, and reasonable enjoyment of adjacent residents, such building should be deemed a nuisance, and the persons who built it fined, *etc.* The court says that if it be possible that the colored people of this church can hold their services in an orderly way, then the building cannot be a nuisance; and that it would be strange indeed to find any legal authority declaring that a beer garden or dancing hall may exist in a city, and yet a fireproof brick church may not be built therein. The fact that the members sang louder in their old and dilapidated building than was agreeable to neighboring residents, the court does not regard as any evidence that such would be their manner of singing in the new one.

No authorities directly in point are cited.

COPYRIGHT. (MUSICAL COMPOSITION—MIMICRY.)
UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF PENNSYLVANIA.

In Bloom & Hamlin *v.* Nixon, 125 Federal Reporter 977, the complainant sued for an alleged infringement of a song which had been composed by Bloom and was performed in a musical extravaganza entitled "The Wizard of Oz" belonging to Hamlin. The stage business accompanying the rendition of the song was prepared by Hamlin's stage director and, as described by the court, required the actress to step to one of the boxes, single out a particular person and sing to him alone, a number of girls being brought upon the stage to sing the chorus, with the usual gestures, postures, and other resources of the actor's and of the manager's art. "The song" says the court, "aided by these accompaniments—especially, as it seems, by the rather striking impertinence of making one of the audience uncomfortable, obtained some popular favor," and the actress who was the most recent singer was regarded as having "made a hit." The defendants were the owners and managers of another theatrical production entitled "The Runaways" and among the company was an actress who possessed unusual powers of mimicry. She imitated the peculiarities and characteristics of certain actresses, among them the one rendering this song. Her performance was preceded by an announcement that it was an imitation. She was alone upon the stage, no chorus being present. The court quotes the first verse and chorus of the song, which it says will exhibit its quality, as follows:

"Did you ever meet the fellow fine and
dandy,
Who can readily dispel your ills and woes?
Did you ever meet the boy who's all the
, candy
Where'er he goes?
That's the very sort of fellow I'm in love
with,
He is all the daffodils of early spring,
And to me the finest bliss is
Just to revel in his kisses
When to him I sing:"
(Chorus.)

"'Sammy, oh, oh, oh, Sammy,
For you I'm pining when we're apart;
Sammy, when you come wooing
There's something doing around my heart.
Sammy, oh, oh, oh, Sammy,
Can't live without you, my dream of joy;
Tell me, oh, oh, oh, tell me,
You're only mine, my Sammy boy.'"

The court says: "As will no doubt be observed, this sounds the note of personal emotion that is characteristic of the lyric." The holding is that as the essential feature of the reproduction is the mimicry of the peculiar actions, gestures and tones of the original production, which were not copyrighted by Bloom and could not be since

they were the subsequent device of other minds, there is no infringement of his copyright. The court says: "No doubt, the good faith of such mimicry is an essential element; and, if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly. But where, as here, it is clearly established that the imitation is in good faith, and that the repetition of the chorus is an incident that is due solely to the fact that the stage business and the characteristics imitated are inseparably connected with the particular words and music, I do not believe that the performance is forbidden."

CRIMINAL SENTENCE. (Modification of Supreme Court—Exercise of Pardonding Power—Constitutionality of Statute.)

Nebraska Supreme Court.

In Palmer *v* State, 97 Northwestern Reporter, 235, the provision of the Nebraska Criminal Code, Sec. 590a, empowering the supreme court to reduce an excessive sentence, and pronounce such sentence as in its opinion is warranted by the evidence, is held not to violate the constitutional provision forbidding the judiciary to exercise any power properly belonging to the executive branch of the government. Palmer was sentenced to seven years' imprisonment for the larceny of a stray steer, worth $20, and the court says the sentence is excessive, and almost Draconian. The validity of the statute was denied in Barney *v.* State, 49 Neb. 525, 68 Northwestern Reporter, 636, and in Fanton *v.* State, 50 Neb. 354, 69 Northwestern Reporter 953, 36 L. R. A. 158, but "after much reflection," the court declares these decisions unsound. The following authorities are relied on as sustaining its position: Fager *v.* State, 22 Neb. 332, 35 Northwestern Reporter, 195; Anderson *v.* State, 26 Neb. 387, 41 Northwestern Reporter, 951; Charles *v.* State, 27 Neb. 881, 44 Northwestern Reporter 39; and Nelson *v.* State, 33 Neb. 528, 50 Northwestern Reporter 679.

DETECTIVES. (Disorderly Conduct—Shadowing—Right of Privacy.)

New York Supreme Court.

In People *v.* St. Clair, 86 New York Supplement, 77 defendant was convicted of disorderly conduct in violating Penal Code, Sec. 675, as amended by Laws 1891, p. 657, ch. 327, providing that any person who, by any offensive or disorderly act, or language, shall annoy or interfere with any person in any place, or with the passengers of any public stage, railroad car, or other public conveyance, shall be guilty of a misdemeanor. Defendant was a private detective, and was properly licensed as such. He was engaged in shadowing the complaining witness, and for several days had followed him closely from place to place along public streets, making inquiries about him, and attracting attention to him. The court first holds that the term "public place" is not limited by the places subsequently mentioned in the act, but covers any public place. The fact that defendant was licensed did not relieve him from the punishment prescribed. The fact that there is no right of privacy at common law does not render the statute void as beyond the power of the Legislature to enact. It is finally declared that defendant's conduct amounted to a violation of the law. Judge McLaughlin dissents. No cases are cited in support of the majority holding, and the case seems to be *res integra.*

DIVORCE. (Abandonment — Insanity of Defendant.)

West Virginia Supreme Court.

In Fisher *v.* Fisher, 46 Southeastern Reporter, 118, a wife is held entitled to divorce for wilful abandonment and desertion continuing for three years during which the husband was sane, though subsequently he became insane and at the time of the commencement of the suit was a lunatic. Rathbun *v.* Rathbun, 40 How. Pr. 328; Douglas *v.* Douglas, 31 Iowa, 421; and Cook *v.* Cook, 53 Barb. 180, are cited as authority for the holding. It is also held that the insanity of defendant does not prevent the prosecution of a suit for divorce.

DOGS. (STATUS AS PROPERTY—NEGLIGENT KILLING —LIABILITY OF RAILROAD COMPANY.)
GEORGIA SUPREME COURT.

In Strong *v.* Georgia Railway & Electric Co., 47 Southeastern Reporter 366, it is held, following Jemison *v.* Southwestern Railroad, 75 Ga. 444, 58 Am. Rep. 476, that a suit cannot be maintained against a railroad company for the negligent killing of a dog. In an opinion in which he concurs under protest, Justice Cobb quotes from an opinion of a lower court, containing a half humorous, half eloquent tribute to the canine creation:

"The dog has figured very extensively in the past and present. In mythology, as Cerberus, he was intrusted with watching the gates of hell, and he seems to have performed his duties so well that there were but few escapes. . . . Few men will forget the song of their childhood, which runs:

"'Old dog Tray's ever faithful;
Grief cannot drive him away;
He is gentle, he is kind;
I'll never, never find
A better friend than old dog Tray.'

"Nor can any of us fail to remember the intelligent animal on whose behalf 'Old Mother Hubbard went to the cupboard.'

"Few men have deserved, and few have won, higher praise in an epitaph than the following which was written by Lord Byron in regard to his dead Newfoundland: 'Near this spot are deposited the remains of one who possessed beauty without vanity, strength without insolence, courage without ferocity, and all the virtues of man without his vices. This praise, which would be unmeaning flattery if inscribed over human ashes, is but a just tribute to the memory of Boatswain, a dog.' The dog has ever invaded the domain of art. All who have seen Sir Edwin Landseer's great picture will know how much human intelligence can be expressed in the face of a dog. His picture entitled 'Laying Down and Law' will not be forgotten in considering the dog as a litigant. Thus the dog has figured in mythology, history, poetry, fiction, and art from the earliest times down to the present, and now in these closing days of the nineteenth century we are called upon to decide whether a dog is a wild animal (*feræ naturæ*) in such sense as not to be leviable property; or, if he is a domestic animal (*domitæ naturæ*), whether he is not subject to levy, on the ancient theory that he had no intrinsic value if he was not good to eat. . . .

"The dog has been very often before the courts of the different States and of different countries, and has been the subject of a good deal of judicial humor and judicial learning, but it bears a tinge of the ridiculous to contend that, however many and however valuable dogs a man may own, he cannot be made to pay his debts if he will only invest his money in dogs—a contention which reminds one of the very solemn discussions in a certain court, at a time not very long past, as to whether the oyster was a wild animal. . . . Let it be remembered that in a trover case the plantiff has the option of taking a verdict for the property or a money verdict. If he should take a money verdict, surely the law did not contemplate that he should sit in court with his judgment and fi. fa. in his pocket, and watch the defendant carry the dog away, because, although he could recover a judgment for its value, he could not realize it by levy."

FIRECRACKERS. (ORDINANCE PROHIBITING EXPLOSION—CONSENT OF MAYOR.)
MISSOURI COURT OF APPEALS.

In City of Centralia *v.* Smith, 77 Southwestern Reporter, 488, the conviction of the defendant for exploding firecrackers within the city limits on the fourth of July, is revived. An ordinance of the city prohibited the explosion of firecrackers without the written consent of the mayor. This is held to be within the police power of the city and not void as delegating legislative power to the mayor. A number of defenses are then discussed, and it is held no defense that previous violators of the ordinance had not been prosecuted; that defendant had participated with most of the citizens in violating the ordinance on previous occasions on which the mayor had charge of the fireworks. It

is no defense that defendant did not know of the ordinance, or did not know that an order of the mayor to the city marshal to arrest persons violating it, was meant to embrace defendant's own back yard. Finally, it is no defense that the fourth of July celebration had been advertised by the citizens and defendant thought that shooting firecrackers was in keeping with the occasion. That such an ordinance would tend to stifle the exuberant patriotism of Young America does not seem, strangely enough, to have been relied on as a ground of attack.

FORGERY. (Of Will During Testator's Lifetime.)

Texas Court of Criminal Appeals.

In Huckaby *v.* State, 78 Southwestern Reporter, 942, it is held that a will is not an instrument subject to forgery during a lifetime of the purported testator. The holding depends on the construction of Penal Code 1895, Arts. 530, 536, 537, which declare guilty of forgery one who forges an instrument which, if genuine, would "have created, increased, diminished, discharged, or defeated, any pecuniary obligation or would have transferred or in any manner have affected any property whatever;" which defined "pecuniary obligation, as every instrument having money for its object and every obligation for the breach of which a civil action for damages may be brought; and which provide that by an instrument which would "have transferred or in any manner have affected" property, is meant every species of conveyance or undertaking in writing which supposes a right in the person purporting to execute it to dispose of or change the character of property of every kind and which could have such effect when genuine. The case is distinguished from the English rule under which an instrument to be the subject of forgery must be such as would have some legal efficacy, if genuine. The court says: "Now, can it be held that the will, if genuine, during the lifetime of the testator would have the effect, *in praesenti*, to create or discharge any pecuniary obligation, or to transfer or affect any property whatever? It is essentially ambulatory during the lifetime of the declarant, subject to his revocation at any time, and cannot possibly take effect until his death. Being such an instrument, we hold that it is not the subject of forgery, where the making of the instrument occurs during the life of the testator."

INTOXICATING LIQUORS. (Sale on Sunday—What Constitutes.)

Texas Court of Criminal Appeals.

In Wallis *v.* State, 78 Southwestern Reporter 231, it is held a violation of the Sunday liquor law for a saloon keeper to sell beer on Saturday under an agreement to keep it on ice for the purchaser until Sunday, and then on Sunday hand it out to him through a broken glass in the door.

The court says that if the saloon keeper could do this in one instance, he could do it in other instances, and if he could make a sufficient number of sales for delivery on the next day, his house might be kept open the entire day to consummate deliveries. An essential part of the business of a saloon keeper is the keeping of his drinks cool, and if he can make sales on Saturday, and keep the goods in his refrigerator for delivery on Sunday, he will be compelled to keep his place open for that purpose, though he can make no sale on Sunday, nor receive any money on that day for goods previously sold.

No cases are referred to.

LIBEL. (Anonymous Article—What Constitutes.)

North Carolina Supreme Court.

In Williams *v.* Smith, 46 Southeastern Reporter 502, the necessity of notice as a preliminary to an action for libel, as required by Pub. Laws, 1901, c. 557, Sec. 1, is discussed in the light of section 3, which provides that section 1 shall not apply to anonymous communications and publications. The newspaper article on which the suit was

founded was signed by "Smith." The defendant's full name was Isaac H. Smith. This, it is held, is not an anonymous publication. The definition given in the Century Dictionary of the term "anonymous" is relied on.

LITIGATION. (FAILURE TO MAKE PARTY—ACTION FOR DAMAGES.)

KENTUCKY COURT OF APPEALS.

In Friend *v.* Means, 78 Southwestern Reporter 164, the plaintiff, who was the holder of an unrecorded deed subject to a remote vendor's lien, was not made a party defendant to proceedings forclosing the lien, and on this account she brought an action for damages against the remote vendor.

The court says that the action is both unique and untenable. Defendant was under no duty to make plaintiff a party, even if he had known she owned an interest in the land. No legal right of hers could be prejudiced in an action to which she was not a party, and that she was not a party was due to her failure to record her deed. Even if she had been a party, she could not have fared better than she did, as, under the agreed facts, she had no defense. Her only remedy for the loss she sustained is upon the warranties she holds from her vendors.

No authorities are cited.

MASTER AND SERVANT. (EMPLOYMENT BY YEAR—DISCHARGE OF SERVANT—ACTION FOR WAGES.)

NEW YORK SUPREME COURT.

In Walsh *v.* New York & Kentucky Co., 85 New York Supplement 83, the court holds that where one is employed as a salesman for a year, his wages to be paid by the month, and he is discharged after a month's wages are due, and after he has performed several days' work on the next month, he can recover the month's wages, subject to any counterclaim of his employer, but for the subsequent days he can recover only if his discharge was wrongful, and then only as damages.

The case of Turner *v.* Kouwenhoven, 100 N. Y. 115, 2 Northeastern Reporter 637, is distinguished, and Tipton *v.* Feitner, 20 N. Y. 429, Bowdish *v.* Briggs, 5 App. Div. 592, 39 New York Supplement 371, and Clark *v.* Fernoline Chemical Co., 5 New York Supplement 190, are cited as supporting the rule that even where a contract is made for a year, but there is provision for periodical payments during the time, and the contract in its nature does not necessarily contemplate entire performance as a condition precedent to compensation, the servant, when discharged for cause, is entitled to recover the amount due for the month, or his monthly wages, as wages earned, subject to recoupment by the master for any damages suffered by him by reason of the neglect, unskillfulness, or nonperformance of the servant. As to the days of the succeeding month, the court says a distinction is to be observed, the servant's action being not a suit to obtain a proportionate amount of the month's salary, but rather an action of *quantum meruit* to recover for breach of contract.

Arnold *v.* Adams, 27 App. Div. 348, 49 New York Supplement 1041, and Elliot *v.* Miller, 17 New York Supplement 526, are cited on this latter point.

MASTER'S PERIL. (RESCUE BY SERVANT—INJURY—MASTER'S LIABILITY.)

IOWA SUPREME COURT.

In Saylor *v.* Parsons, 98 Northwestern Reporter 500, the plaintiff, who was in defendant's employ, sued to recover for injuries sustained in endeavoring to rescue his employer from a position of peril resulting from the latter's attempt to undermine a brick wall. In discussing the plaintiff's right of recovery the court says, that negligence on the part of defendant, either toward the person rescued, or the party making the rescue, is esential. Evansville & Crawford R. Co. *v.* Hiatt, 17 Ind. 102, Donahoe *v.* Railway Co., 83 Mo. 560, 53 Am. Rep. 594, and Gramlich *v.* Wurst, 86 Pa. 74, 27 Am. Rep. 684, are cited as sustaining this view. The court says that it is not pretended that plaintiff was not assigned a safe place to work, nor is it claimed that there was any want of

care with respect to him after he began his efforts to sustain the wall. As to whether there was any negligence of the employer toward himself, the court says: "Undoubtedly Parsons owed the moral duty of protecting his own person from harm. But the love of life is regarded as a sufficient inducement to self-preservation; all that is deemed essential for the government of persons in matters affecting themselves alone. Where no one else is concerned, the individual may incur dangers and risks as he may choose, and in doing so he violates no legal duty. He cannot be guilty legally, though he may be morally, of neglecting himself. . . . It may be said, however, that Parsons ought, in placing himself in peril, to have anticipated that some one would, upon discovering his danger, undertake to shield him from harm. But this was a contingency which, as it seems to us, would not be likely to be contemplated. Men do not expose their lives to danger with the idea that others will protect them from harm by risking their own lives. Though history teems with accounts of heroic conduct and self-sacrifice, deeds of this kind have not become so common that they are to be anticipated as likely to occur whenever opportunity is afforded. The instincts of self-preservation still so dominate human conduct that acts like that under consideration, in which life itself was risked for the protection of another, are of such rare occurrence as always to commend the special attention and admiration of the entire community, and by the common voice of mankind those who do them are singled out as worthy of enrollment on the scroll of heroes. Because of their infrequency, however, it cannot be said that they should enter into the calculations of men as at all likely in the ordinary transactions of life. As they spring from magnanimity, magnanimity must be relied upon in cases like this for reparation."

MUNICIPAL CORPORATION. (Act of Officer—Prosecution Under Void Ordinance—Liability of Municipality.)

Washington Supreme Court.

In Simpson *v.* City of Whatcom, 74 Pacific Reporter 577, the question was whether a city was liable for damages for prosecutions conducted by its officers for the violation of a void ordinance requiring a license fee to be paid into its treasury, for the use of bicycles on its streets. The ordinance was enacted in conformity with Laws 1899, p. 41, authorizing cities to regulate and license the riding of bicycles. The court says that the question has never been presented to it, and an exhaustive examination of the authorities discloses that they are bewildering, both in numbers and lack of harmony. The two cases particularly discussed are McGraw *v.* Marion, 98 Ky. 673, 34 S. W. Rep. 18, 47 L. R. A. 593, and Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. Rep. 948, 57 Am. St. Rep. 361, the doctrine of the latter case—that a municipal corporation is not liable for the acts of its officers in enforcing a penal ordinance or while engaged in duties relating to the public safety and in the maintenance of public order being the one finally followed. As the ordinance in question was enacted under legislative authority, the city is regarded as a governmental agency, notwithstanding the license fee went into its treasury, and its officers acted as agents of the State or general public. Other cases are: Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289, Lawson *v* Seattle, 6 Wash. 184, 33 Pac. 347, Worley *v.* Columbia, 88 Mo. 106, Nisbet *v.* Atlanta, 97 Ga. 650, 25 S. E. 173, Bartlett *v.* Columbus, 101, Ga. 300, 28 S. E. 599, 44 L. R. A. 795, McFadin *v.* San Antonio, 22 Tex. Citv App. 140, 54 S. W. 48, Caldwell *v.* Prunelle, 57 Kan. 511, 46 Pac. 949, Buttrick *v.* Lowell, 1 Allen, 172, 79 Am. Dec. 721, Trescott *v.* Waterloo (C. C.) 26 Fed. 592, and Town of Laurel *v.* Blue (Ind.) 27 N. E. 301.

MUNICIPAL OFFICES. (Incurring Indebtedness—Excess Over Constitutional Limitation—Personal Liability.)

Iowa Supreme Court.

Lough *v.* City of Esterville, 98 Northwestern Reporter 308, was an action brought by taxpayers of the defendant city against it and its officers to enforce against the latter

a personal liability claimed to have arisen because they had incurred for the city a bonded debt in excess of the constitutional limitation, which by reason of the transfer of the bonds to innocent holders the city was precluded from contesting. The proposition is said by the Court to be unique and in discussing it no authorities are cited. In the opinion of the Court the defendants are not liable. The following quotations will illustrate the Court's views: "Counsel for appellant does not cite any case holding that the mayor and the respective members of the council of a city may be held personally liable in damages because that municipal indebtedness in excess of the constitutional limit has been contracted or permitted. We know of no such case, and we cannot say that there is anything in reason or the spirit of our system of government that dictates the promulgation of any such rule at our hands. While a violation of the Constitution in the respect in question is to be condemned, and the courts should interfere to prevent such violation whenever called upon so to do, yet we are not prepared to adopt the suggestion that an action for damages may be resorted to, as affording a proper means of redress, where a violation has been accomplished." . . . "It has always been the law that a public officer who acts either in a judicial or legislative capacity cannot be held to respond in damages on account of any act done by him in his official capacity. His act may be void, as in excess of jurisdiction, or otherwise without authority of law, and he may be subject to impeachment and removal from office for corrupt practices, but he cannot be mulcted in damages."

NURSE. (VALUE OF SERVICES—OPINION EVIDENCE—TESTIMONY OF PHYSICIAN.)

TEXAS COURT OF CIVIL APPEALS.

In Cameron Mill & Elevator Co. *v.* Anderson, 78 Southwestern Reporter, 971, it is held that a physician who is not a nurse, and who has never employed one, and who has no personal knowledge as to the compensation of professional nurses in the city beyond what a few of them told him, is not qualified to testify as to their reasonable and customary compensation. The court says, that while hearsay may form the basis of a receivable opinion as to value, the inquiries or statements relied upon should be of such extent and character as will afford a fair inference that the witness had knowledge of the subject.

PARDON. (VALIDITY—SUFFICIENCY OF FILING—GOVERNOR'S SIGNATURE—PRACTICE.)

MICHIGAN SUPREME COURT.

In Spafford *v.* Benzie Circuit Judge, 98 Northwestern Reporter 741, various questions of practice connected with the pardoning of a convicted person are discussed. It is held that the fact that a pardon is not addressed to the court having custody of the prisoner, and does not state the date of his conviction, and erroneously recites that he has been sentenced, do not affect its validity, and that the fact that a pardon was delivered directly to the prisoner concerned is immaterial. A formal motion to the court to discharge the prisoner because he has been pardoned is said to be the proper method of bringing the pardon to the court's attention. Where the original pardon is delivered to the court having custody of the prisoner several days before the hearing of such a motion, there is a sufficient filing of the pardon, though no copy was filed with the clerk until after the motion was made. People *v.* Marsh, 125 Mich. 410, 84 N. W. 472, 51 L. R. A. 461, 84 Am. Rep. 584, is cited as conclusive of the governor's power to pardon before sentence. Finally, it is held that the fact that only the initials of the governor's Christian names are used in his signature to the pardon, which is duly attested by the Secretary of State and is otherwise regular in form and substance, does not affect the pardon's validity.

PUBLIC BUILDINGS. (UNAUTHORIZED USE—RIGHT TO COMPLAIN.)

KANSAS SUPREME COURT.

In Amusement Syndicate Co. *v.* City of

Topeka, 74 Pacific 606, a private citizen is denied the right to maintain an action enjoining city officers from allowing the use of the city auditorium for entertainments for private profit, even though such use may be wrongful. The court says that it has been repeatedly held that a private party cannot maintain an action against a public officer where the acts complained of affect merely the interests of the public generally. Before he can maintain such an action and challenge the conduct of public business, he must allege an interest personal and peculiar to himself, that is not shared by and does not affect the general public. The fact that the plaintiff in this case was a large taxpayer and was the proprietor of places of amusement which were injured by the competition thus created by the city fathers, is held not to give him such a standing as to sustain the action.

STRIKES. (INTERFERENCE WITH PICKETS—RIGHT TO ENJOIN.)

NEW JERSEY COURT OF CHANCERY.

In Atkins *v.* W. & A. Fletcher Co., 55 Atlantic Reporter 1074, striking machinists sought to enjoin interference by their former employer and an association to which it belonged, with pickets maintained by them in an orderly manner. The interference was alleged to be by intimidation, threats, violence, arrests, *etc.*

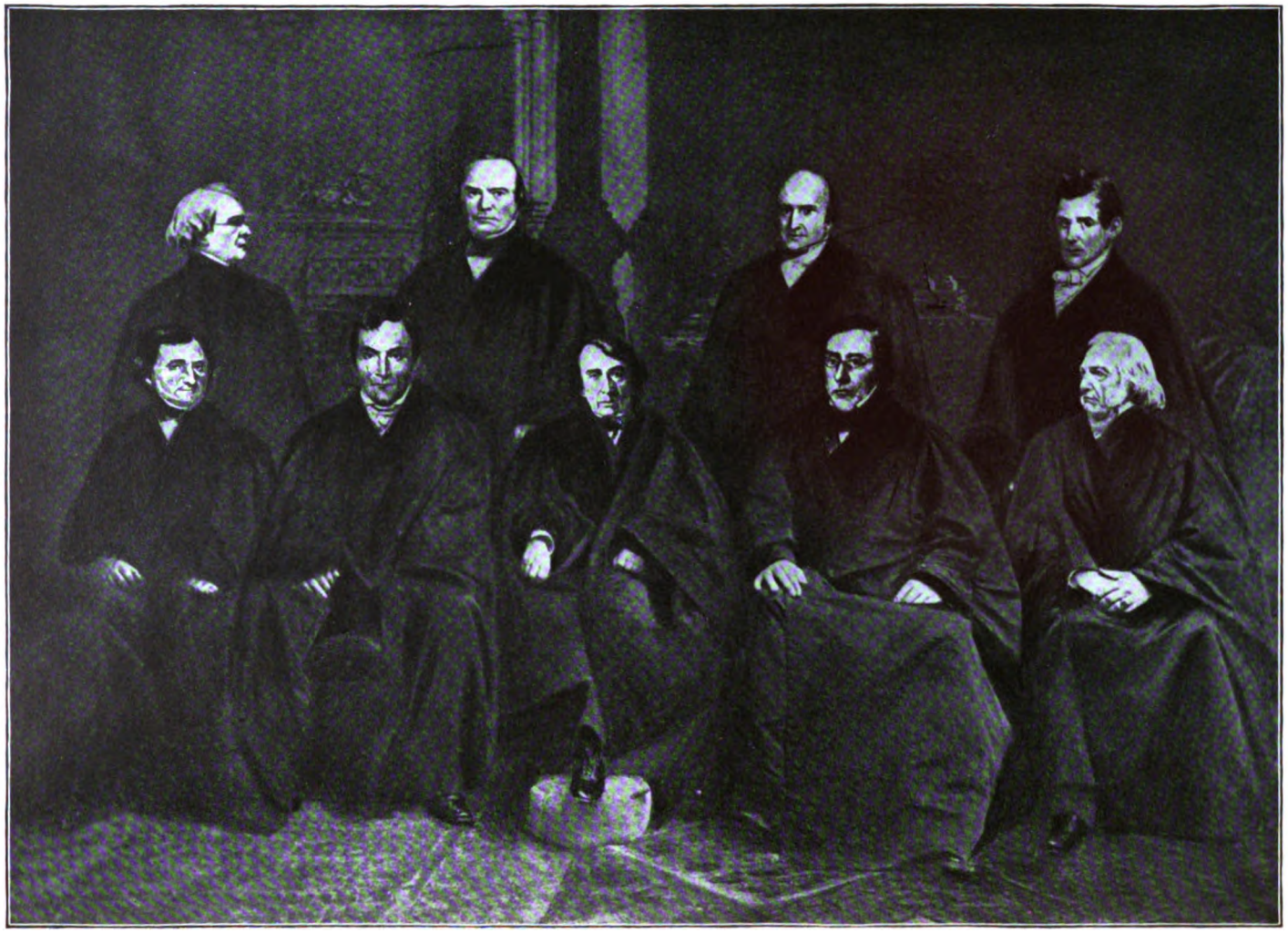
In an oral opinion, the chancellor says that complainants are before the court as employers, and not as employés, the pickets being their servants. That the former employer of the complainants had the right to combine with other employers to refuse employment to any class of workmen, as fully as employés have the right to combine to refuse to be employed. The mere fact that defendants, by intimidation or criminal violence, interfere with the free flow of labor to complainants, does not give them the right to equitable relief, since the complainant employer must show substantial money damages, for which no adequate legal remedy exists. "The injunction, at the instance of an employer, in these strike cases, was forced out of courts of equity because the situation presented was one where, without injunctive relief, ruinous losses to the complainant would be inevitable. Railroads and large plants of machinery were paralyzed, aggregations of capital lay idle, while the persons acting in combination, who by their interference with the free labor market had caused and were continuing this great pecuniary loss, were themselves irresponsible pecuniarily. It is to this class of cases, in my judgment, that the strike injunction should, under present social and business conditions, as far as possible, be confined." In conclusion, the court holds that the right of a voluntary association engaged in supporting a strike to freedom in the labor market, so that it can readily employ pickets and other agents in carrying on its industrial warfare, is not a proper subject of protection by injunction.

But one authority is cited, Jersey Printing Company *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. Rep. 230, and that is on the point that the complainants appear in court as employers whose right to have labor flow freely to them is being interfered with.

TICKET BROKERS. (WORLD'S FAIR TICKETS—INJUNCTION TO PREVENT TRAFFIC.)

MISSOURI SUPREME COURT.

In Schubach *v.* McDonald, 78 Southwestern Reporter, 1020, writs of prohibition were applied for by a number of St. Louis ticket brokers to prevent the St. Louis Circuit Court from further entertaining injunction suits brought by railroad companies to prevent the plaintiffs from trafficing in World's Fair tickets issued by the railroad companies at reduced rates and made non-transferable. While the case turns on the sufficiency of the pleadings below, and the propriety of the injunction is not directly determined, its atmosphere is significant of a possible holding that the traffic in question can be enjoined, the jurisdiction of the lower court being upheld and the writs denied.



THE TANEY BENCH.

Robert C. Grier. Benjamin R. Curtis. Levi Woodbury. John McKinley.
John Ca'ron. Philip P. Barbour. Roger B. Taney. Peter V. Daniel. Samuel Nelson.

The Green Bag.

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THE TANEY BENCH.

By Andrew McKinley,
Of the New York Bar.

THE Supreme Court of the United States may be likened to the balance wheel or governing valve in machinery. Under our Constitution, three great heads form the political economy of the nation—the Legislative, the Executive and the Judicial. They are all closely interwoven and much dependent upon each other, but the Judicial Department controls the other two when the question is put to a final issue. Laws may be enacted by Congress and sanctioned by the President, but the question of their validity is established or denied by the Supreme Court. No body of men are so omnipotent as the Justices of this Court acting in their capacity as members of the bench, their decisions and decrees are truly speaking "law" as far as the government of this nation is concerned, and their mandates must be obeyed irrespective of social or political condition of the citizen, their rulings even go so far as to affect or control in certain instances the laws of the different States and almost every political body is subject to the power of this Court,—indeed, the very existence of the nation itself is dependent upon this tribunal.

Mr. Hampton L. Carson has very happily put it in the following words:

"Amid the din of conflict between personal interest and above the deep mouth thunder of the combat between conflicting sovreignties, the calm tones of our great tribunal have been distinctly heard commanding States as well as citizens to submit without the spilling of blood to a legal settlement of differences. In this respect the court is a conservator of the peace of the nation and her voice is the harmony of the union." It is well, then, that men of learning, integrity, pureness of mind, having only the interests of the people at heart have been and should be elevated to this office of trust. Seldom has faith been lost by the people in the decisions of this court and then only temporarily or until the fuller light has shown the justice of what at the first blush seemed unreasonable or harsh.

The judicial power of the United States is vested by the Constitution in this Court and its judges hold their office during good behavior, making the Court invulnerable and far beyond the reach of political intrigue or private interference. Its jurisdiction affects all cases of admiralty or maritime law, controversies between States and between citizens of different States, all cases affecting ambassadors or public ministers and in many other cases, it is the Court of last resort.

Under Article III. of the Constitution, our present Supreme Court came into being, with John Jay as its Chief Justice and four associate justices as his colleagues. Their duties were not many, nor were the questions of great importance, and not until Marshall's time did the Court really become great and its importance felt throughout the land. This learned Chief Justice not only established the nation upon a firm foundation but so wisely construed all constitutional questions coming up before him affecting the

rights of States as between themselves that he knitted the Union into the insoluble whole, which not even a civil war could disturb.

One of the most important cases decided by the Taney Bench was Briscoe *v.* The Bank of the Commonwealth of Kentucky in which the difference between bank bills and bills of credit was ably discussed by Messrs. White, Hardin, Clay and Southard. The law relating to bills and notes was pretty thoroughly thrashed and the Court by a divided bench had some trouble in making the distinction clear. The Dred Scott case, in which Chief Justice Taney delivered the opinion of the Court, was most radical as we now consider the negro, the Court holding that he was not a citizen within the meaning of the Constitution, but was recognized as a species of property. It is contended by many that this decision caused the Civil War, but this would seem paradoxical, as the Court upheld the very reason that caused secession, while the position of the North was denied.

One of the most important decisions rendered by this bench in its far-reaching effect was Almy *v.* The State of California in which that State attempted to place a tax on goods shipped to any point within or without the State. This was promptly held to be repugnant to the Constitution of the United States, which declares that no State without the consent of Congress can lay any imports or duties, *etc.* On this case is built the foundation of all interstate commerce. These and numerous other decisions of great importance made the Taney Bench the greatest bench, except Marshall's, since the Court came into existence and it helped largely to form the lines upon which our Republic has grown into manhood and strength. A less intelligent and patriotic bench would not have made our progress possible. Thirty-five volumes from 11 Peters to 2 Wallace contained the history of the Taney Bench, every line of which is a line of importance, forming and moulding our Republic and laying its foundation so deep and solid that though shock and strain may come, all storms will be safely weathered so long as the Supreme Court is our compass.

The Supreme Court consisted of five members from 1789 to 1795. A sixth member was added in 1807, two more in 1837 and the ninth in 1863, the year before Roger Brooke Taney of Maryland, who had been its Chief Justice for twenty-eight years died. Before his appointment to the bench, he was the leading lawyer of the Baltimore bar, Attorney General of his State and a member of the United States Senate. He and Chief Justice Marshall presided for sixty-three years, and together they have given us, in the words of Mr. Carlisle, "a body of law, constitutional and other, unsurpassed in the records of courts for the security it gives to political, personal and municipal rights." He also says of the Chief Justice, that his life was honorable and useful and that his general demeanor, studious habits and pure life gave him the good will and confidence of the people.

Philip P. Barbour was a distinguished son of distinguished Scotch ancestors, and like several of his associates on the bench, he began the practice of law in Kentucky. At school, he developed great aptitude for learning, and he began his public career in the Assembly. His next step was Congress where he acted as Chairman of the Judiciary Committee and in 1821 was chosen Speaker of the House of Representatives. He refused many high positions of trust, including the nomination for Governor of his State and for the United States Senate. He was on the bench when Chief Justice Taney was confirmed, and although his term of service was short, no member of this bench displayed greater judicial power or keener insight in the construction of constitutional law.

President Van Buren appointed John

Catron of Tennessee an Associate Justice on the eighth of March, 1837. His early education was most rudimentary and he was twenty-six years of age before he began the study of law, but he soon acquired reputation as a lawyer of ability. "His power of judicial analysis was remarkable and he sought in all cases to weigh and examine every authority cited by counsel and to accept such only as seemed founded upon principle."

John McKinley was also appointed by President Van Buren. He was reckoned the leader of the bar of Alabama and was sent to the United States Senate for two terms, having been selected for the bench during his last term. He served for fifteen years "as a candid, impartial and righteous judge, shrinking from no responsibility; he was fearless in the performance of his duty, seeking only to do right and fearing nothing but to do wrong. For many of the last years of his life, he was enfeebled and afflicted by disease and his active usefulness interrupted and impaired. It may truly be inscribed upon his monument that as a private gentleman and as a public magistrate, he was without fear and without reproach." These words were uttered by Mr. John J. Crittenden, Attorney General in the proceedings in relation to the death of Mr. Justice McKinley.

Mr. Jeremiah S. Black, Attorney General at the opening of the Court on December fourth, 1860, said the seat which had been occupied by Mr. Justice Daniels has been made vacant by his death. He was a man of perfect integrity and the laws of this country were never administered by any judge who had a higher moral tone or who was influenced by purer motives.

At the close of the December term 1872, Mr. Justice Nelson addressed the following letter to his associates: "I part from my brethren with regret and retire from an occupation which has been the height of my ambition for much the largest portion of my life, not from choice but for the reason that age and infirmities have disabled me from the performance of a full share of my duties."

Nearly all the practising members of the bar before the Supreme Court joined in these words to Mr. Justice Nelson on his retirement from the bench: "During many years of practice before you, we have had ample opportunity to appreciate and to admire your learning, impartiality and integrity, your kindly deportment towards the members of the bar, your elevated conception of justice and of right. In a word those preëminent judicial qualities which have distinguished your career, on the bench."

At the December term, 1851, Mr. John J. Crittenden, Attorney General, announced the death of Mr. Justice Levi Woodbury and said, "It has rarely happened that any citizen has enjoyed such a succession of exalted public honors as were shared by Judge Woodbury, Governor, Secretary of the Treasury, Senator and his last and greatest distinction Judge of the Supreme Court of the United States."

Mr. Justice Grier was appointed to the bench in August, 1846, and resigned in January, 1870. General Grant, then President, writes him: "I sincerely regret the increasing physical infirmities which induce you to retire from the bench and with the assurance of my personal sympathy and respect, desire also to express my sense of the ability and uprightness with which your judicial duties have been performed."

"In looking upon your honorable and long career in the public service, it must be especially gratifying to yourself to remember, as it is my agreeable duty and privilege on this occasion thus distinctly to recognize, the great service which you were able to render to your country in the darkest hour of her history by the vigor and patriotic firmness, with which you upheld the just powers of the government and vindicated the right of the nation under the constitution to maintain its own existence."

The appointment of Benjamin R. Curtis, of Massachusetts, as an associate member of the Court was made by President Fillmore at the solicitation of Daniel Webster, then Secretary of State. Mr. Justice Curtis was a member of the distinguished family of his name in Massachusetts, a graduate of Harvard and a scholar of the highest distinction. It was said of him that he was the consummate master of forensic style among American lawyers and that his rhetoric both in form and manner was perfection of its kind, clear, calm, distinct and unimpassionate.

The history of the Taney Bench would not be complete if the other members of the Supreme Court who served so ably with him were not included in its history. The great Story, who many claim was only second to Marshall as an expounder of the Constitution. Mr. Justice Smith Thompson, of whom Mr. Justice Nelson said, "He fulfilled all the obligations of his exalted position." Mr. Justice John McLean, of Ohio, whose mind was firm, frank and vigorous. Mr. Justice Baldwin, of Connecticut, who was appointed by President Jackson, because of his "superior talents, extreme information and learning." Mr. Justice James M. Wayne, of Georgia—he was a graduate of Princeton College and practised law with great ability in his native city, Savannah—"as a judge he was able, learned and conscientious." And last but not least by any means, was Mr. Justice John Archibald Campbell, of Georgia, who on account of his Southern sympathies, resigned in 1861. After the war he resumed practice of the law before this Court and his "arguments became of great renown."

The Associate Justices included in the frontispiece were selected after carefully considering all who served with Taney during his long and useful career as those being most in sympathy with the Chief Justice in his life's work.

The history of this Republic in its giant strides for enlightenment impresses one with the fact that the framers of the Constitution were farsighted beyond the vision of mankind generally in lodging with the Supreme Court a power of control and hedging its members about so that neither hope nor fear would influence their actions. Without this firm hand on the tiller, the ship of State must have ere this gone upon the rocks of discord with fatal results.

BICKEL v. SHEETS.

24 IND. 1.

BY R. D. OGLESBEE,
Of the LaPorte, Indiana, Bar.

When Bickel gave his note to Sheets
He practised one of Cunning's feats,
And shrewdly figured out a way
To hold from Sheets the promised pay;
But in a Hoosier court of law
A righteous judge discerned a flaw
In Bickel's plans, which shows once more
The danger of deficient lore.

The case was this: One Sheets possessed
A billiard table; Bickel guessed
That he might use it in his place,
Where all the thirsty populace
Resorted for refreshment, and
Proposed to give his note of hand
In purchase; Sheets was soon agreed—
For cash he had no present need.

The pay day came; the debtor passed.
A little later Sheets, harassed
By Bickel's show of unconcern,
Resorted to the court of stern
Dogberry in the little town.
Then Bickel giggled like a clown
And said his note was doubtlessly
Subversive of morality.

The justice asked how that could be.
"Why," said the debtor, "don't you see?
The billiard table's a device
For gambling, and, to be concise,
Sheets knew that my intention was
To use it in a wicked cause.
Contracts of sale with such intent
Are void, and I don't owe a cent."

The magistrate said that was fine;
Too fine, in fact, to undermine
His notions of fair play; so he
'Gainst the defendant made decree.

The foxy Bickel still was sure
He had a quirk that would endure,
And thought the judge of common pleas
Would right evade and cold law seize.

So he appealed. But in that court
His satisfaction was cut short,
For judgment went against him there.
He told his lawyer to prepare
An argument to educate
The highest forum in the State.
The solemn supreme judges smiled
When they perused the record filed.

They went clear back to Mansfield's time
For sales that contemplated crime;
They cited Eyre and Ellenborough;
Of ancient books their search was thorough;
They overlooked no modern case
For principles on which to base
A judgment that would bring Sheets cash
And settle Bickel's subtle hash.

In closing, with fine scorn they said
Appellant's shrewd defence was plead
With ill grace, coming from the man
Whose purpose was to break the ban
Laid by the law on gambling games;
Who got the goods, and now proclaims,
On moral grounds, that he is free
To keep the gear and pay no fee.

It may be so; but if it be,
Rewarding his dishonesty
Will not at all tend to help out
The morals he himself doth flout.
Dogberry's wisdom was confirmed,
And Bickel, while he doubtless squirmed,
Learned that he could not by a flaw
Entangle justice in the law.

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

II.

The Hay Note and Chinese Neutrality.

By Amos S. Hershey,
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THE most important questions which have thus far arisen out of the Russo-Japanese War have been connected with the great problem of maintaining the neutrality and the integrity or "administrative entity"[1] of the Chinese Empire. In order to preserve the integrity and neutrality of China proper, as well as to restrict the area of hostilities as much as possible, Secretary Hay, acting, it is said, at the suggestion of Germany, sent the following instructions to our representatives at St. Petersburg, Tokio, and Peking on February tenth:

"You will express to the Minister for Foreign Affairs the earnest desire of the Government of the United States that in the course of the military operations which have arisen between Russia and Japan, the neutrality of China and in all practicable ways her administrative entity shall be respected by both parties, and that the area of hostilities shall be localized and limited as much as possible, so that undue excitement and disturbance of the Chinese people may be prevented, and the least possible loss to the commerce and peaceful intercourse of the world may be occasioned."

At the same time all the Powers interested in the fate of China were informed of this action on the part of our Government and invited to take similar action on their part. The favorable replies which were received from all the Powers would seem to indicate that similar action was taken by them, and the principles embodied in the Hay Note were also accepted by China, Russia and Japan. China at once issued a proclamation of neutrality; but the acceptance of the belligerents, more especially of Russia, was made conditional upon the acceptance of certain provisos which may lead to troublesome complications in the future. In its reply of February nineteenth, the Russian Government signified its willingness to respect the neutrality of China on the following conditions: (1) That China herself "strictly observe all the duties of neutrality"; (2) that the Japanese Government "loyally observe" not only the "engagements entered into with the Powers," but also "the principles generally recognized by the law of nations"; and (3) that "neutralization be in no case extended to Manchuria." Japan on the other hand, in her reply of February thirteenth, merely stipulated that the "region occupied by Russia" be excluded from the neutral area, and that "Russia, making a similar engagement, fulfil in good faith the conditions and terms of such engagement."[2]

It will thus be seen that both Russia and Japan have made their acceptance of the main principle of the Hay Note, *viz.*, the maintenance of the neutrality of China proper, conditional upon its observance by the other belligerent. This is entirely reasonable and proper; but Russia has, in addition, stipulated for a strict observance of the duties of

[1] The phrase "administrative entity" is said by some to be ambiguous. It is not really so, for it must mean the integrity of that portion of the Chinese Empire which is actually administered or governed by Chinese officials. It at least includes China proper, *i. e.*, the 18 provinces south of the Great Wall and east of Thibet, and probably Mongolia. Manchuria and Korea are of course excluded.

[2] For the texts of these replies, see *World's Work* for April, 1904.

neutrality on the part of China and of the law of nations on the part of Japan. Inasmuch as numerous disputes regarding neutral rights and obligations as between neutrals and belligerents, as also charges and countercharges of violations of the law of nations between the belligerents themselves, are bound to arise in every war, and inasmuch as each party is its own judge in these matters, it is not difficult to see that we have before us a task of no small magnitude and one which contains possibilities of endless complication and controversy. Pretexts in infinite number and variety will not be wanting, especially to Russia, if she desires to avoid the natural consequences of her engagement.[1] Not only must the conduct of both belligerents be closely scrutinized, but that of China must also be carefully watched.

The term "neutrality," as applied to China by the Hay Note, appears to have a double meaning. In the first place it means that China is to be "neutralized" during the struggle, *i. e.*, she is not to be permitted to become a party to the war. This might perhaps be called a *temporary*, as opposed to the *permanent* neutralization of Belgium and Switzerland. It is neutralization under a sort of international guarantee of the Powers, although less formal and perhaps less effective than that of Belgium and Switzerland, which was the result of great international treaties. It may, however, prove to be a step in the direction of permanent neutralization. If such guarantees are to prove wholly successful, the guarantors must, of course, be ready and willing to resort to other means than those of "moral suasion" or "pressure of public opinion" in case of necessity. Whether the Powers are prepared to resort to the use of force in case of such necessity in the present instance remains to be seen. The "temporary neutralization" of China might also be compared with other modern tendencies to restrict or "localize" hostilities as much as possible in the interest of the possible or actual belligerents or of neutral commerce, *e. g.*, the practice of pacific blockade and other forms of reprisal, although here the difference is one of kind rather than of degree.

In the second place the maintenance of Chinese neutrality, as implied in the Hay Note, means that hostilities or hostile preparations must not be carried on within the territorial limits of China proper, *i. e.*, in those parts of China administered by Chinese officials. This is, in a sense, merely a guarantee of a right already in existence, *viz.*, of the undoubted right of China to remain neutral, if she so desires, and to have her territorial sovereignty respected during the struggle by both belligerents. The violation of this right by either belligerent would be a gross violation of International Law in itself which it might be the duty of China to resist by force of arms; and, in case China herself were incapable of such an effort, such an attack might be resisted by any State which chose to champion her cause, although such knight-errantry is rare among nations except where their national interests are involved. The right of the Powers to take such measures as may be necessary in order to prevent or to defeat an attack upon the neutrality of China is clear and unquestionable.

It seems to be clearly understood on all sides that Manchuria, or that portion of the Chinese Empire which is administered, in accordance with treaty stipulations, by Russian officials for certain purposes and is actually occupied by Russian troops, shall be exempt from the application of the principles of the Hay Note. This appears to be a case of what has been called "double or ambigu-

[1] The Hay Note is also bound to give rise to important questions of policy and diplomacy: but this is not the place to consider them.

ous sovereignty."[1] In such cases the territories or districts in question owe a nominal allegiance to one sovereign, but are really subject to the commands of another who is in actual possession. It is possible for such a place or region to possess a belligerent and a neutral character at the same time—belligerent in respect to the belligerents and neutrals, and neutral in respect to the nominal sovereign and his relations with other States. "The precise legal position of these territories, is very difficult, and perhaps impossible, to determine."[2] One modern publicist, who has carefully examined the question, has come to the conclusion that "a juristic examination of these relations can only lead to negative results; it is a political provisional arrangement in which law and fact are in contradiction to each other."[3]

The law which should govern in all such anomalous cases is, however, reasonably clear. "The belligerency or neutrality of territory subject to a double sovereignty must be determined for external purposes, upon the analogy of territory under military occupation, by the belligerent or neutral character of the State *de facto* exercising permanent military control within it. . . . When a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil. In like manner, but with stronger reason, where sovereignty is double or ambiguous a belligerent must be permitted to fix his attention upon the crude fact of the exercise of power. He must be allowed to deal his enemy blows wherever he finds him in actual military possession, unless that possession has been given him for a specific purpose, such as that of securing internal tranquility, which does not carry with it a right to use the territory for his military objects. On the other hand, where a scintilla of sovereignty is possessed by a belligerent State over territory where it has no real control, an enemy of the State, still fixing his attention on facts, must respect the neutrality with which the territory is practically invested."[4]

In view of the anomalous position of China in respect to Manchuria, and also because of the vast interests involved and the great danger to the peace of the world which might result from any violation of Chinese neutrality (whether by either or both belligerents or by China herself), it is not surprising that the Press of all countries (and particularly of our own) has shown itself very sensitive to any charges of a violation of the neutrality of China (especially by Russia), and that much has been said by way of criticism and denunciation which is either unjust or impolitic.

Several weeks after the outbreak of the war, Admiral Alexieff issued a somewhat quaint and curious proclamation to the inhabitants of Manchuria, of which there has been much unfair criticism. This manifesto, which contained "six regulations which all must tremblingly obey" (after charging the Japanese with treachery in covertly attacking the Russian fleet while peaceful negotiations were in progress) lays especial stress upon the indissoluble unity of Russian and Chinese interests. He expresses the opinion that "on the principle of mutual connection between the cart-prop and the cart, the duty of China should be to join in attacking and destroying the invader wherever he is encountered;" but, "since China has announced her resolve to remain neutral and to look on with her hands in her sleeves," Admiral Alex-

[1] Other examples of double or ambiguous sovereignty are Bosnia, Herzogovina, Cyprus, and Egypt. These territories or districts are under the nominal sovereignty of the Sultan of Turkey, but are really administered by Austrian and English officials.

[2] Hall, *Treatise*, note on p. 509 of 3d ed.

[3] Holzendorf, *Handbuch*, II., § 51—quoted by Hall in note cited above.

[4] Hall, *op. cit.*, p. 511.

ieff contents himself with ordering "every (Chinese?) official in Manchuria" to render the Russian army every possible assistance in obtaining supplies, and in directing all the inhabitants of Manchuria to treat the Russian troops with confidence. He declares that he will hold "all virtuous citizens residing in the neighborhood of Manchurian railways or telegraph or telephone wires responsible for their protection," and that "the official headmen and village elders must unanimously devise means to prevent damage. . . . Should attempts at destruction be made, not only will the offenders be severely punished, but the officials and people of the vicinity who witnessed such attempts will be held responsible." He also threatens severe punishment against any one privily harboring or concealing the Chunchuses or red-bearded brigands of Manchuria. He finally threatens that "if officials or people treat with enmity the Russian army, the Russian Government will assuredly exterminate these persons, showing no mercy."[1]

While the language of this proclamation is certainly somewhat harsh and the penalties prescribed rather severe, they do not seem to go beyond the rights of an invader or a military occupant, nor do they constitute a violation of Chinese neutrality. As has been noted above, Manchuria is not included within the sphere of Chinese neutrality as far as the belligerents in their relations with each other and with neutrals are concerned.[2] The position of Manchuria is one of double or ambiguous sovereignty which is closely analogous to that of a territory or district under military or belligerent occupation.[3] Under such circumstances pillage or mere plunder is strictly forbidden and private property on land is not subject to capture and confiscation; but the invader or military occupant has an undoubted right to levy and collect fines, requisitions, and contributions for strictly military purposes, and he may, if he chooses, make the war support itself. These should, however, be as orderly and as light as possible, and they should not exceed the needs of the troop or the resources of the district in which they are levied. Above all, it should never be forgotten that the fundamental law of warfare is that of *reasonable military necessity*, and that only so much violence is permitted in war as is necessary for self-protection and the destruction of the enemy's power of resistance. The fact that the Russians expect the Chinese in Manchuria to treat them in a friendly or non-hostile manner, or even that they require them to furnish their army with supplies and carts for purposes of transportation, is no evidence of an intention or a desire to violate Chinese neutrality, as some of our newspapers seem to have regarded it, nor is it a breach of the laws of civilized warfare.

It is said that the Russian minister at Peking has made firm representations to the Chinese Government concerning the activity of the Chinese troops along the Manchurian frontier; that Russia has served notice on China that the latter must not send troops beyond the Great Wall; and that China has been informed that she must use her influence to restrain the Chinese bandits (who are spoken of as partially under the control of Chinese officials) from interfering with the railway and telegraph lines. It is also stated that Russia has notified China that a refusal to heed these warnings will be considered a breach of Chinese neutrality, and that China has received a pointed intimation of the defensive measures which Russia may in that

[1] For the text of this curious and interesting proclamation, see the London *Times* (weekly ed.) for February 26, 1904.

[2] It is neutral in respect to the relations between China and other States.

[3] On the subject of Military or Belligerent Occupation, see especially Hall, Pt. III., c. 4; Lawrence, Pt. III., c. 4; Halleck, II., pp. 444ff; Bluntschli, Arts. 539-41; Calvo, §§ 2166-98.

case be compelled to take for her own protection.[1]

The dispatch of Chinese troops to the Manchuria frontier is not necessarily a menace to Russia, inasmuch as it may have for its object the perfectly legitimate one of protecting the neutral rights of China against possible or probable encroachment. On the other hand the massing of such troops in this quarter in large numbers might, under certain circumstances, be regarded as menacing in its character. In no case could it be regarded as a direct violation of Chinese neutrality. The request that China use her influence to restrain the Chinese bandits in Manchuria as far as possible seems to be a perfectly proper one to make it itself, although, to be sure, it would be absurd for Russia to claim that China can be held responsible for any degree or amount of lawlessness and violence on the part of any portion of the population in Manchuria, or for the attacks of Chinese bandits in that region.

Dispatches from St. Petersburg further declare that Russia has demanded the dismissal of the Japanese military instructors with the Chinese army. Russia's protest on this head would seem to be eminently reasonable and proper and is said to have been tacitly approved by the United States Government.

It is also said that Russia believes or suspects that China has been giving secret aid to the Japanese fleets by allowing them to coal and re-victual in Chinese harbors. So far as our information extends, these charges have been very vague and non-specific in their character and particular instances have not been cited. If China has permitted any of her ports to be used as a constant and regular base of supplies, whether of coal or of provisions, to the Japanese fleet, she would undoubtedly render herself liable in damages for any injury which might result to Russia. The neutrality regulations of most States, particularly of the United States, are very stringent and explicit with regard to coal. Our Proclamation of Neutrality, issued by President Roosevelt on February eleventh, provides that "No ship of war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive, if dependent upon steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the Government to which she belongs." But it should be borne in mind that the peculiar or particular stringency of our own municipal decrees or regulations regarding our neutral obligations are by no means to be taken as a necessary measure or standard of what is permitted or forbidden by International Law.

There have also been complaints on the part of the Japanese of the sinking of a Japanese coasting steamer near Tain Chin Island, presumably in Chinese waters, and there is said to have been considerable irritation in Japan over the inability of the Chinese Government to compel a Russian gunboat

[1] These representations are supposed to have been made in March of this year. In the absence of official documents, we have been forced to rely upon doubtful or possibly exaggerated newspaper reports.

to leave Shanghai, as also of their inability or unwillingness to drive the Russians from the region on the west side of the Liao river.[1] We are not sufficiently informed as to the facts in order to pass judgment upon all of these charges, but the sinking of a vessel in Chinese waters by either belligerent would be a gross violation of Chinese neutrality for which ample apology or reparation should at once have been made. The refusal of a Russian war vessel to leave a Chinese port at the request of the Chinese Government would be wholly unwarranted and would constitute a serious breach of Chinese neutrality. But these are questions which, even assuming the facts to be as reported, might easily be settled without a resort to arms. As to the inability of the Chinese to secure the evacuation by Russia of the region west of the Liao river, or to protect that region from a possible Japanese invasion, these are points which require a closer examination and a fuller discussion.

There has been a considerable newspaper controversy in respect to the neutrality of that portion of Manchuria which lies west of the Liao river, and of the treaty-port of Niu-Chwang, an important strategic point east of the Liao river and one of the *termini* of the Northern China Railway system. It is in this region that China's neutrality has been "subjected to the severest strain and to the closest scrutiny and criticism," as a recent writer in the *Contemporary Review*[2] predicted would be the case. This region, like the rest of Manchuria, was fully occupied by Russia in consequence of the Boxer uprising in 1900.[3] On April 8, 1902, Russia agreed to a gradual evacuation of Manchuria within eighteen months, and of this particular region within six months, although she reserved to herself the right to guard the Russian railways. According to this treaty, Russia agreed to the "reëstablishment of Chinese authority in Manchuria," which was to remain "an integral part of the Chinese Empire," and also consented to "restore to China the right to exercise sovereign and administrative powers."[4] This arrangement, however, never seems to have been fully carried out, owing, as Count Cassini says,[5] to the "failure of China to furnish the required guarantees."[6]

China claims that this region is neutral and has included it in her declaration of neutrality. Russia has, however, declined to respect its neutrality, and has gone so far as to proclaim martial law at Niu-Chwang. She has re-occupied (?)[7] this district and has forbidden China to station troops within its borders. Yet, on the other hand, she has shown a disposition to hold China responsible for the preservation of order in this territory and is said to have intimated that

[1] The Russians on *their* side have suspected China of a willingness to aid the Japanese to land in this region.

[2] See article on "The Neutrality of China" by D. C. Boulger in the *Contemporary Review* for April, 1904.

[3] This region had, however, been practically, though not definitely, under Russian control since 1898, when China leased Port Arthur and the Bay of Ta-lien to Russia, and at the same time granted her a railway concession through Manchuria from Siberia, including the right to garrison and govern the territory along the line. A similar railway concession in Northern Manchuria had been obtained by Russia as early as 1896.

[4] Art. I. of the treaty. See *Current History* (XII., pp. 292ff) for June, 1902.

[5] See article on "Russia in the Far East" by Count Cassini in *North American Review* for May, 1904.

[6] A portion of the Russian army seems, indeed, to have been withdrawn, but the remainder were simply stationed at important places along the Manchurian railways. The Northern Chinese railway to Niu-Chwang was restored to China. In September, 1903, Russia undertook to restore Niu-Chwang and to evacuate Mukden on Oct. 8, 1903, but this never seems to have been done: for, on Dec. 28, 1904, the Russian Minister at Peking informed the Chinese Foreign Office that "no further steps towards evacuation can be undertaken at present." See *Statesman's Year Book* for 1904, p. 516.

[7] The question mark indicates a doubt as to whether it had ever been really and wholly evacuated.

a landing of Japanese troops on its coast would constitute a violation of Chinese neutrality for which China would be held responsible.

A great outcry was raised by the American Press in consequence of the proclamation of martial law at Niu-Chwang on March twenty-seventh. This outcry was probably aggravated by the indiscreet action of the Russian police authorities in ordering some American (and British) flags on certain private buildings at Niu-Chwang to be hauled down. The Russian authorities seem to have been clearly within their rights in this matter, but they wisely apologized for this action and the flags were restored to their former places upon the representations of the American consul.[1] It was also reported that the foreign consuls at Niu-Chwang were notified that they were no longer to exercise consular jurisdiction and consular functions, especially those of extra-territorial jurisdiction, but this report does not seem to have been confirmed. It seems that certain of their functions, especially those comprehended under the term "extra-territoriality" were merely suspended, and that the foreign consuls are still permitted to exercise such of their duties as are compatible with the execution of martial law. We do not recall that it has been customary to deprive consuls of their ordinary duties in time of war, but it could hardly be expected that they should be permitted to perform such service as would be inconsistent with the operation of military law.

In declaring martial law at Niu-Chwang, as also in occupying the region west of the Liao river with troops, Russia was clearly acting within her rights and was guilty of no violation of neutral rights or of the neutrality of China. This region forms a part of Manchuria which was at least impliedly excepted from the application of the Hay Note, and has been practically in the possession or under the control of Russia since 1900. When Russia chose to "re-occupy" this region with troops and to declare martial law in the early part of the present struggle, all doubts as to its neutrality vanished and it became a part of the field of possible military operations for Japan as well as for Russia; for it would be absurd for Russia to make belligerent use of this territory while claiming any part of it as neutral in respect to Japan.[2]

In conclusion, it may said that at the present date of writing,[3] there have been no serious or well-authenticated cases of the violation of Chinese neutrality, whether on the part of either belligerent or of China herself, which would necessitate the intervention of the Powers or would justify either belligerent in attacking China. Even if such violations have occurred or should occur on the part of China, they ought to be treated with great leniency, especially by Russia, on account of the serious difficulties of China's position and because of her military and administrative weakness. For this weakness and these difficulties Russia is in large measure responsible. Any violation of Chinese neutrality on the part of either belligerent, short of actual invasion of Chinese territory, should be settled by diplomacy or arbitration.[4]

[1] There seems to have been no protest at Washington. Of course if the flag had been removed from the official residence of the consul, the case would have been different. A prompt and ample apology would have been necessary.

[2] Russia seems to have made such claims in respect to the sea-coast.

[3] May 4, 1904.

[4] Since the above was written Niu-Chwang appears to have been practically abandoned by the Russians, although it does not, at the present date of writing (May 20, 1904), seem as yet to have been occupied by Japanese troops. It will be interesting to notice the policy which the Japanese shall adopt in respect to the neutrality of Niu-Chwang and the region west of the Liao river.

A curious and interesting story has come *via* London from Peking to the effect that the Russian ministers at Söul and Peking have been trying to induce China to "take over" Niu-Chwang.

The purpose of such a proposal on the part of Russia (and we are inclined to credit the story because such methods are highly characteristic of Russian diplomacy), is, of course, obvious. It is intended to embarrass Japan in her future relations with China and the Powers. But, apart from any question as to the ultimate disposition of this territory, Japan could not thus be deprived of her right to the use of this region for military purposes. See editorial in N. Y. *Times* for May 15th.

There has also been a report, emanating from St. Petersburg, to the effect that the Chinese have tacitly agreed to coöperate with the operations of the Japanese against Russia. The Japanese propose, it is said, to drive General Kuropatkin's forces into Mongolia. This, it is urged, would place the Russians in the position of invaders of Chinese or neutral territory, and would enable General Ma's army to make reprisals, thus cleverly avoiding the infringement of Chinese neutrality by Japan or China. See N. Y. *Times* for May 16th.

If Russian troops should be driven into Chinese territory, a well-known and indisputable rule of International Law requires that they be *interned* and kept there at Russia's expense until the close of the war or until exchanged. China has again recently given repeated assurances of her intention to observe all her neutral obligations toward both belligerents. For the recent attacks of Chinese bandits in Manchuria on Russian outposts and coal mines, China can in no wise be held responsible unless they have been inspired or encouraged by the Chinese government.

WON THE JURY.

By Guy H. Holliday,
Of the Boston Bar.

IT was in the early days of the Southwest where the juries were apt to be more familiar with Spanish than with English. The case against the prisoner was strong. There was upon the evidence, offered by the district attorney, not a shadow of a doubt that the defendant had stolen the horse, and the cross-examination by his counsel had not helped matters in the least. In spite of all this, however, and the fact that horse-stealing in that region was more serious than murder or robbery, the defendant's counsel, who was something of a student of human nature, as well as learned in the law, managed to win his case. As soon as he had learned from his client the weakness of the defense, he had sought out a Spanish speaking friend and had learned from him four words of Spanish,—"Gentlemen of the jury." He had practised on these until his accent was irreproachable. Then, when the time came for the argument, he arose deliberately and turning to the jury spoke those four words; all the Spanish he knew.

In an instant, the district attorney was on his feet, objecting to the use of Spanish in the argument, that English was the official language of this country, that such an innovation was without precedent, and a great deal more to the same effect. But the defendant's counsel waxed indignant also, and in the most urgent manner showed to the court that this case was of vital importance to the prisoner, that an argument to the jury lost half its force when filtered through an interpreter. Again and again, he shouted that it was the right, not only of the accused, but of the jury to have the argument made in a language that they could understand.

Finally, as he had expected, the court decided against him, and the argument was finished in English. As he had also expected, however, the jury, though unable to understand English well, had got the idea into their heads that he had wanted to address them in Spanish and had not been allowed to do so, and also got the notion that they themselves had in this way suffered a slight, and accordingly, with a fine disregard for the evidence, promptly gave their verdict in favor of the prisoner.

AN EXPERIMENT IN EVIDENCE.

By Waddill Catchings.

AN experiment carried through recently by the Kent Law Club of the Harvard Law School, throws a rather startling light upon the accuracy of human testimony. Four members of the club were told to be on the steps of Austin Hall at one-thirty on Tuesday, February ninth, and to watch what happened between two other members of the club, Chalmers and MacGuire. They were told that they were to be witnesses in a jury trial to be held later, and they were put on their mettle to report accurately what occurred. One of the witnesses was supposed to be a friend of Chalmers, another a friend of MacGuire, the other two were to be disinterested onlookers. The events which were to occur were carefully rehearsed by Chalmers and MacGuire.

At a little before two o'clock on February ninth, Chalmers and MacGuire met on the steps. After a few moments of general conversation, they came to a disagreement. MacGuire, who stood directly in front of Chalmers, swore at him under his breath, and at the same time turned away toward the right. Chalmers reached forward, grabbed MacGuire by the left shoulder as he turned away and asked, "What was that you said?" He grabbed him rather severely, and MacGuire, thinking that he had been struck, turned and attempted to strike Chalmers. His arm was caught by a bystander, Poe.

Chalmers did not realize that Poe had caught MacGuire's arm and struck out sharply. In taking hold of MacGuire, Poe had pulled him around to the right again. Consequently Chalmers' blow landed on MacGuire's left arm just below the shoulder. MacGuire was then lead into the Law School building by Poe.

Poe immediately came out again and remonstrated with Chalmers for having hit MacGuire, while he was being held, and in a few moments when MacGuire himself came out, Chalmers started to apologize.

He said, "I am sorry I hit you. I thought that you were going to hit me yourself."

MacGuire replied, "You not only hit me while Poe was holding me, but you hit me in the back. You are a coward."

When Chalmers became angry at this, MacGuire said that, although he had a good case against him for assault and battery, they would settle the matter then and there. Before any blows had been delivered, however, the two were separated.

Chalmers sued MacGuire for slander in the use of the words, "You hit me in the back." MacGuire entered a general denial and also a plea of truth.

The trial was held on February twenty-fifth, a little more than two weeks after the occurrence. On the afternoon of the occurrence all of the witnesses were examined by counsel so that their ideas were crystalized while they were fresh in their minds.

The first witness testified that he had heard the words "You hit me in the back." As to the encounter, he stated that the parties were standing face to face; that MacGuire rushed forward and hit Chalmers—and then sprang back; that Chalmers then stepped forward and delivered a "swinging" blow—hitting MacGuire on the front of the body, a little to the left of the middle of the chest. He saw Chalmers touch MacGuire only this one time. As to the presence and position of Poe, the witness had no distinct recollection. He remembered that Poe took hold of MacGuire and led him off, but he did not know exactly what had occurred between the time when Chalmers hit MacGuire and when Poe started away with MacGuire.

The second witness, who was a friend of

Chalmers, heard MacGuire say not only "You hit me in the back," but also "You are a coward"—and "I could have you arrested for assault and battery." He testified, however, that MacGuire did not hit Chalmers, that he only advanced in a threatening manner. He thought that Chalmers had struck believing that MacGuire was about to strike him. He thought that the two were one to three steps apart and that MacGuire might be said to have sprung forward. When Chalmers hit out he thought that MacGuire's right side was turned somewhat forward and that the latter was hit on the right side of the chest. He had little idea of what happened after this blow—until Poe led MacGuire into the building.

The third witness, MacGuire's friend, gave decidedly the most accurate account. His recollection as to details was very complete. He was not asked by either counsel what was said. As a matter of fact, he had heard the defendant utter the alleged words of slander. In testifying as to the details of the encounter, he was so clear and accurate that curiously enough some of the jurors in view of the rather confused accounts of the other witnesses, were firmly convinced that he must be lying. One part of his testimony was wrong. He stated that Chalmers hit MacGuire on the right shoulder, and that Poe took hold of MacGuire from the left side and turned him to the left. When later the actual facts were again acted out before him, he was amazed, stating that he had been more convinced of the truth of that portion of his testimony than of any other, and he says even now, that he has a clear mental picture of the right shoulder being forward and of the turning to the left.

The fourth witness, curiously enough, did not hear MacGuire say that Chalmers hit him in the back. He was rather confused as to the details of the encounter, but testified that Chalmers hit MacGuire twice on the left arm, and that MacGuire seemed only threatening Chalmers. As to Poe, the witness did not remember much as to what he did. His most positive testimony was as to the hitting on the left shoulder, thereby testifying correctly to the one thing as to which all the other witnesses had been mistaken.

A review of the testimony of the four witnesses reveals several interesting facts. Three out of the four testified correctly to the use of the words "You hit me in the back," and two of these remembered the accompanying "You are a coward," and "I could have you arrested for assault and battery." The words made no impression on one witness. As to the actions, the third witness only saw what led up to the blow. Two —the first and second—were entirely mistaken: one "saw" MacGuire strike Chalmers; the other "saw" the former spring forward threateningly. The fourth had a rather indefinite impression as to what led up to Chalmers' blow. As to the blow itself, one—who in other respects proved the most accurate—thought that the blow was on the right arm, one thought that it was on the right side, the third thought that it was somewhat to the left of the middle of the chest, and the fourth alone perceived that the blow was on the left shoulder. The fact that there were seemingly two blows in rapid succession escaped all but this witness.

It seems from this that as soon as each witness received a definite impression his efforts to impress this on his mind caused him to fail to observe what followed. A good illustration of this interesting fact, was that all four failed to notice what Poe did, and how he came to lead off MacGuire.

It seems also that when the witness received this definite impression, his idea of the accompanying details was what he thought likely to have happened rather than what he actually saw. These imagined details made as vivid a part of his mental picture as did the impression which he received

from the actual occurrences which made the definite impression. In this resulting mental picture he was unable to distinguish in any way between what he imagined he had seen and what he had actually seen. He was as honestly convinced that he had seen the one as the other.

Surprising as the result of this experiment has been, the conditions under which it was conducted were remarkably favorable for accurate testimony. The assault and the attending circumstances were extremely simple, not lasting more than eight or ten minutes. The witnesses were above the average in mental ability; two of them are among the highest rank men in the present second year class. They knew at the time that they would have to testify to the occurrence. Accordingly every faculty was alertly directed toward accurate observation. They were on their mettle both to see exactly and to report exactly. They were honest. The fact that two were friends of the parties did not seem to make any difference; their better acquaintance with details may be attributed to their more trained minds. These facts, together with the immediate examination of the witnesses by the counsel, all made the chances of obtaining an accurate account on the witness stand unusually favorable.

Yet under such conditions it was impossible to convey to the jury what actually occurred. After listening to all of the testimony the jury were in hopeless confusion.

THE CRIME OF "HOGAMY."

By H. C. C.

A CERTAIN "daughter of Erin," of many summers, and twice wedded, —once in Ireland where she left "her ould man to shift fur hisself and become silf-supparting," and once at a certain mining camp in the far West—came into my office recently in a state of considerable excitement, and while extracting a ten dollar bill from a tobacco sack, recited her trouble as follows: "Sure and wud ye belive it, sor, but thim vinimous neighbors o' mine is all puttin' their dirty hids togither and sayin' that Mrs. Pat Mulligan (and that's mesilf) has broke the law and committed 'hogamy' and that they'll soon be about giting the shiriff after me, sure, and Mr. O'Hooligan, the only dacent man in the town, says I must see a lawyer to onct, and git all the advice I kin for ten dollars. He says I must buy a divarce, and thin shake the coort papers in the shiriff's face, if he ivir presoom to put his unsoightly mug inside my door. And that's jist what I'll be after dooin'! How soon kin I buy a divarce from one or the ither of them onery curs that I tied mesilf up to in a moment of silf-forgitfulness?" I told her that there was no such crime known to the law as "hogamy," —was she sure *that* was the name? "Well, sur," she explained, "ye see it's jist this way, thim same dirty neighbors o' mine call it *pigamy*, but I calls it *hogamy*, sure I do, because the fust time I ever heard the beastly name applied to mesilf, it come straight from one o' thim; and till me now what difference can *that* make whin it comes to buying a divarce?" So it gradually dawned on me that her dear neighbors had been whispering around that she had committed the crime of *bigamy*, and had made threats that they would have her "arristed" for it. Then I ascertained that her first husband, so far as she knew to the contrary, was still living at the same place in the "ould countrie"

where she had left him "to shift for hissel! and become silf-supparting"—no letters having ever passed between them. "Supposing," I said, "that a divorce is what you need, and that I can get it for you, which of your two husbands do you prefer to be separated from?" *"I lave that entoirely to you, sor,—entoirely,"* she promptly replied, the only proviso being that she "could git thim papers from the coort to shake in the shiriff's face if he ivir presoomed," *etc.* Then I told her not to worry about it, and to say nothing (a rather useless suggestion doubtless under the circumstances) until I could write a letter to a certain magistrate "in the ould countrie" and find out if her first husband was still in the land of the living,—assuring her, as a matter of course, that she had nothing to fear in the meantime, as I would defend her "in coort" if the "shiriff should arrist her." She gave me the last known address of husband No. 1 and went away well satisfied with my advice.

In due time I received a reply from "the ould countrie" to the effect that "the gentleman enquired about had for over two years past reposed peacefully" in a certain graveyard where "he had been buried at public expense." The magistrate added a note to the effect that he personally knew the man in question, and that as soon as he was thrown upon his own resources by the emigration of his wife, he commenced to waste away, "and being disinclined to work for a living, in due time had laid himself down and died." I then found that his exit from this mundane sphere antedated, by several months, my client's alliance with husband No. 2. I sent for her and told her she needed no "divarce," and had committed no crime. "Ye've done well, sor, but ye must put it *in writing*, and I'll nail it on me front door as a warnin' to thim dirty neighbors and the sheriff, too, that I'm an honest loidy and know how to 'consilt' a lawyer whin my good name is set upon by sich as thim." So it was "put in writing," and for weeks afterwards Mrs. Mulligan's front door was decorated with my "opinion" which had been tacked thereto, after the aforesaid lady had ornamented my letterhead with heiroglyphics of her own, intended to spell the word "WARNING." Some daring miscreant upon a certain night, so I have been told, removed this "opinion" of mine from the door in question (it is the only one of all my "opinions" that has ever been published exactly as written), but Mrs. Mulligan has more than triumphed over her "vinimous" neighbors, and I have heard no more of either her domestic, or foreign, *affaires de cœur*, or of the crime of "hogamy" for which she at one time so feared "arrist."

THE ENFORCEMENT ABROAD OF STOCKHOLDERS' OR DIRECTORS' LIABILITY.

By Joseph Henry Beale, Jr.,
Professor of Law in the Harvard Law School.

INDIVIDUAL members of a corporation may in various ways incur a liability which it is desired to enforce in a foreign State. Before entering upon a discussion of the law upon this subject, it may be convenient to classify the cases of liability, since the power to enforce the obligation in a foreign State depends greatly upon the nature of it.

1. The stockholder is liable at common law for his unpaid subscription for his shares. This is a purely contractual liability, on which the corporation or its representative may sue as upon any claim of the corporation.

2. By statute an additional liability is placed upon individuals. Thus the stockholders are often made responsible for the debts of the corporation up to the par value of their stock; or for the debts until the whole amount of the capital has been paid in. So the directors are often made liable by statute for all debts contracted in excess of the capital stock. This liability, while statutory, is original; the stockholder or director is a party to the debt at the moment of its creation, he is, in fact, a statutory surety for the corporation under the circumstances described. Liability of this sort may either be a direct and absolute liability, or it may be indirect and contingent. If the liability runs directly to the corporation, it is quite analogous to the liability for calls; if it runs directly to the creditor, it may be enforced by him as he might enforce the liability of any other surety. But an indirect or contingent statutory liability must be enforced, if at all, in accordance with some particular provisions of the statute creating it.

3. Another kind of statutory liability, not usually imposed upon stockholders, but often on directors, attaches to the individuals for all debts of the corporation by reason of some wrongdong or omission of duty; as for instance, where the directors who file a false statement of the condition of the corporation are made liable for all its debts, whenever contracted. This is not an original liability, since at the time the debt was contracted the director was not a party to it. The debt to be sure, might happen to be contracted after the filing of the false return; but that would be a mere accidental circumstance. The nature of the liability is the same whether the debt was contracted before or after the director's liability arose; the director is arbitrarily made responsible for it, and his liability was not counted upon by the creditor at the time the debt was contracted. This is the sort of liability which is commonly called penal.

In all these cases the existence of the obligation is to be determined by the law of the State of charter. That law creates the obligation, and that alone can determine what liability it has created. The statutes of that State, as interpreted by its courts, determine the nature and extent of the liability.[1] And accordingly, if by the law of the State of charter the stockholder may set off against his liability a debt due to him from the corporation,

[1] Nashua Savings Bank *v.* Anglo-American L. M. & A. Co., 189 U. S. 221; Morris *v.* Glenn, 87 Ala. 628; Young *v.* Farwell, 139 Ill. 326, 28 N. E. 845; Fowler *v.* Lamson 146 Ill. 472, 34 N. E. 932; Mandel *v.* Swan Land & Cattle Co., 154 Ill. 177, 40 N. E. 462; First Nat. Bank *v.* Gustin, 42 Minn. 327, 44 N. W. 198; Tompkins *v.* Blake, 70 N. H. 584, 49 Atl. 111; Molson's Bank *v.* Boardman, 47 Hun, 135; Aldrich *v.* Anchor Coal Co, 24 Or. 32, 32 Pac. 756; Ball *v.* Anderson, 196 Pa. 86, 46 Atl. 366; Vance *v.* McNabb Coal & Coke Co. (Tenn. Ch. App.) 48 S. W. 235; Farr *v.* Briggs, 72 Vt. 225, 47 Atl. 793; Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184.

being regarded as equitably liable only for the balance, he may do this in any State in which he may be sued.[1] And if any special form of proceeding is required by the law of the State of charter, as for instance, that a judgment should first be obtained against the corporation before the individual can be sued, this procedure must be followed.[2]

I.

A person who has subscribed for stock, and has agreed to pay for it, but has not done so, is evidently liable to the company for the amount he has subscribed, and this liability arises entirely from contract. Primarily a creditor of the corporation has nothing to do with it. The corporation must call for the payment of the subscription, and must then enforce its call by getting in the amount from the stockholders. This liability to respond to calls for unpaid subscription to the capital stock, is like any other debt due to the corporation. Upon this obligation suit may be brought in any State by the corporation,[3] or by its representative, as for instance its receiver[4] or assignee.[5] The amount of the call may be fixed by the directors, or if a receiver has been appointed it may be fixed by the appointing court; and suit for the amount may then be brought in any State.[6] The effect of this order of assessment is to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether any particular stockholder is liable for anything; and one who is sued as stockholder may therefore interpose any personal defence, as for instance, that he is not a stockholder, or that the statute of limitations has run in his favor;[7] or (where such defence is allowed in a similar action in the State of charter) that the call was for an illegal purpose and *ultra vires*.[8]

But while a creditor has no direct right to come upon the stockholder, he may take advantage of any method of reaching him open to him in the State where he sues. If the claim has not been enforced by the corporation it is an asset, and if such remedy is permitted, a creditor may reach it either by garnishment or by a creditors' bill. The subscribing stockholder should be treated in the same way as any other debtor of the company. If the law of the forum permits the garnishment of such a claim, the creditor may reach it in that way.[9] If a creditor can reach the claim only by a creditors' bill, he must thus proceed, making the corporation and all the stockholders parties.[10]

Where the stock was taken without any agreement to pay for it (as for instance, if it were in exchange for property of small value, or were given as a bonus to purchasers of bonds) there is no agreement to be enforced, and in the absence of a statute no creditor could claim a right against the stockholder.

[1] Mechanics' Sav. Bank *v.* Fidelity Ins. Co., 87 Fed. 113; Broadway Nat. Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603; Sargent *v.* Stetson, 181 Mass. 371, 63 N. E. 929; Ball *v.* Anderson, 196 Pa. 86, 46 Atl. 366.

[2] Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747.

[3] Mandel *v.* Swan Land & Cattle Co., 154 Ill. 177, 40 N. E. 462; Sigua Iron Co. *v.* Brown, 171 N. Y. 488, 64 N. E. 194.

[4] Mann *v.* Cooke, 20 Conn. 178; Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711; Dayton *v.* Borst, 31 N. Y. 435. In Vermont the foreign receiver is not allowed to sue in his own name. Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752; Sparks *v.* Estabrooks, 72 Vt. 101, 47 Atl. 394.

[5] Stoddard *v.* Lum, 159 N. Y. 265, 53 N. E. 1108.

[6] Hawkins *v.* Glenn, 131 U. S. 319; Lehman *v.* Glenn, 87 Ala. 618; Glenn *v.* Williams, 60 Md. 93; Mut. Fire Ins. Co. *v.* Phœnix Furniture Co., 108 Mich. 170, 66 N. W. 1095; Commonwealth Mut. Fire Ins. Co. *v.* Hayden, 60 Neb. 636, 83 N. W. 992; Parker *v.* Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751

[7] Glenn *v.* Marbury, 145 U. S. 499, 506; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329.

[8] Bank of China *v.* Morse, 168 N. Y. 458, 61 N. E. 774.

[9] *In re* Queensland Mercantile and Agency Co. [1891] 1 Ch. 536.

[10] Patterson *v.* Lynde, 112 Ill. 196; Tuttle *v.* Bank of Republic, 161 Ill. 497, 44 N. E. 984; Rule *v.* Omega S. & G. Co., 64 Minn. 326, 67 N. W. 60; Aultman's Appeal, 98 Pa. 505.

A creditor could have no right against a subscriber, founded on his agreement, unless the corporation could sue him on the contract.[1] The case would, however, be different if the stock, purporting to be fully paid up, was issued at fifty *per cent.* of the par value; in spite of the statement contained in the share, the original subscriber still owes fifty *per cent.*, and that amount may be collected from him in a proper proceeding.[2]

II.

Where by statute the stock is liable to assessment for the payment of debts, and a call has been made by the corporation or its representative, the amount due may be collected in another State, either by the corporation itself[3] or by its receiver.[4] If by the law of the State of charter the stockholder is liable to the creditor only, a receiver of the corporation cannot sue,[5] and conversely if the receiver is entitled to get in the amount, a creditor cannot sue in a foreign State.[6]

Similarly, when the law of the State of charter creates a direct absolute liability of the stockholder to the creditor, there is an ordinary suretyship obligation, imposed on the stockholder at the time of the original transaction, and capable of being enforced by an ordinary action sounding in contract or debt. If the nature of the liability is such by the law that created it, that any creditor could sue any stockholder and recover from him up to the amount which he is liable to pay leaving for him to recover such contribution as may be due him from other stockholders, this liability may be enforced in any State.[7]

"It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations toward creditors of the corporation which they have assumed by becoming stockholders. . . .

"The legislature of Kansas has chosen to give to the creditors of certain of its corporations the security which the individual liability of each stockholder affords, to the extent prescribed by its statutes, leaving the burden of enforcing contribution from other stockholders on any stockholder who has been compelled to pay anything in discharge of the debts of the corporation.

"Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the State or country under which the corporations are organized, and they cannot complain if this liability is enforced against them."[8]

Judgment in favor of the creditor against the corporation in its own State is ordinarily conclusive in every State against a stock-

[1] New Haven Horse Nail Co. *v.* Linden Spring Co., 142 Mass. 349, 7 N. E. 773; Seymour *v.* Sturgess, 26 N. Y. 134; Christensen *v.* Eno, 106 N. Y. 97.

[2] Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132.

[3] Pfaff *v.* Gruen, 92 Mo. App. 560.

[4] Howarth *v.* Ellwanger, 86 Fed. 54; Kirtley *v.* Holmes, 107 Fed. 1; Howarth *v.* Lombard, 175 Mass. 570; Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489; Cushing *v.* Perot, 175 Pa. 66, 34 Atl. 447 (*semble*).

[5] Hale *v.* Allinson, 188 U. S. 56.

[6] Cushing *v.* Perot, 175 Pa. 66, 34 Atl. 447.

[7] Flash *v.* Conn, 109 U. S. 371 (s. c. 16 Fla. 428); Whitman *v.* Oxford Nat. Bank, 176 U. S. 559; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640 (reversing 20 R. I. 466, 40 Atl. 340); Rhodes *v.* U. S. Nat. Bank, 66 Fed. 512; McVicar *v.* Jones, 70 Fed. 754; Mechanic's Savings Bank *v.* Fidelity Ins. Co., 87 Fed. 113; Dexter *v.* Edmands, 89 Fed. 467; Hale *v.* Hardon, 95 Fed. 747; Ferguson *v.* Sherman, 116 Cal. 169, 47 Pac. 1023; Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346; Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207; Broad way Nat. Bank, *v.* Baker, 176 Mass. 294, 57 N. E. 603; Western Nat. Bank *v.* Lawrence, 117 Mich. 669, 76 N. W. 105; First Nat. Bank *v.* Gustin, 42 Minn. 327, 44 N. W. 198 (*semble*); Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Tompkins *v.* Blakey, 70 N. H. 584, 49 Atl. 111; Perkins *v.* Church, 31 Barb. 84; Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489; Aldrich *v.* Anchor Coal & Development Co., 24 Or. 32, 32 Pac. 756; Cushing *v.* Perot, 175 Pa. 66, 34 Atl. 447; Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. 225.

[8] Field, C. J., in Hancock Nat. Bank *v.* Ellis, 172 Mass. 39.

holder as to the existence of the debt.[1] A stockholder who was not actually before the foreign court may, however, show that the alleged debt was *ultra vires*.[2]

But where the liability created by the statute is neither a direct liability nor an absolute obligation to any individual creditor, but a contingent liability which can be enforced only by some particular form of procedure, the liability cannot be enforced in another State, at least unless the latter State can provide some process suitable for the purpose.[3] For the particular result attained by the method provided in the State of charter must be attained in the foreign State, if the stockholder can be held there at all. No one can or ought to be held on his stockholder's liability in any other way.[4]

It is often provided, for instance, in the State of charter (either by the statute itself or by the common law) that the stockholders shall be reached by a creditors' bill in equity, in which all creditors may join, and to which all the stockholders and the corporation itself must be parties. Where such is the law of the charter State, a stockholder in a foreign jurisdiction may be reached neither by an action at law there[5] nor even ordinarily by a creditors' bill there, since the corporation and the other stockholders cannot be reached.[6]

[1] American Nat. Bank *v.* Supplee, 115 Fed. 657; Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888; Straw &c. Mfg. Co. *v.* Kilbourne, 80 Minn. 125, 83 N. W. 36; Elderkin *v.* Peterson, 8 Wash 674.

[2] Ward *v.* Joslin, 186 U. S. 142.

[3] Russell *v.* Pac. Ry., 113 Cal. 258, 45 Pac. 323; Yonng *v.* Farwell, 139 Ill. 326, 28 N. E. 845; Tuttle *v.* Bank of Republic, 161 Ill. 497, 44 N. E. 984; Lowry *v.* Inman, 46 N. Y. 119; Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419; Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184; Finney *v.* Guy, 111 Wis. 296, 87 N. W. 255; May *v.* Black, 77 Wis. 101, 45 N. W. 949.

[4] Pollard *v.* Balley, 20 Wall. 520, 527; Fowler *v.* Lamson, 146 Ill. 472; Remington *v.* Samana Bay Co., 140 Mass. 494; Rice *v.* Hosiery Co., 56 N. H. 114; Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489; and cases cited in the preceding note.

[5] Erickson *v.* Nesmith, 15 Gray 221.

[6] Erickson *v.* Nesmith, 4 Allen 233.

"We have no jurisdiction that will reach such corporation out of this commonwealth, and having no assets here, and the same is true of the stockholders residing in New Hampshire. A bill in equity in Massachustts is therefor not the remedy intended to be prescribed by the statute of New Hampshire creating and regulating the liability of stockholders in a manufacturing corporation in New Hampshire. It is urged on the part of the plaintiffs that great practical evil may result from thus refusing to charge a party here who is an actual stockholder of a corporation in New Hampshire, but who resides without its limits. To this it may be replied, that it would be a much more serious evil to hold that the whole matter of winding up the concerns of a bankrupt corporation of New Hampshire, ascertaining who are its creditors, who its stockholders, what is the amount of its assets, and how are the same to be distributed, should be transferred to the jurisdiction of Massachusetts by reason of the residence here of a single member of such corporation. There seems to be no practical mode of dealing with such corporation and its members, when seeking to charge the latter upon their statute liability, but to proceed in the manner prescribed by the statute creating such liability, and in the local jurisdiction where the corporation was established and carries on its business, and by whose local statutes alone the liability exists."[7]

In most cases it will be possible to obtain relief by proceeding in the State of charter, since the courts there have jurisdiction over the corporation and for this purpose, at least, over all the stockholders; and a judgment having been obtained in that State proceedings upon the judgment may then be brought in the stockholders' State.[8] This is not al-

[7] Dewey, J. in Erickson *v.* Nesmith, 4 Allen 233.

[8] Broadway Nat. Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603; Tompkins *v.* Blake, 70 N. H. 584, 49 Atl. 111.

ways possible, as for instance, where the corporation has been dissolved.[1] But the impossibility of obtaining relief is no hardship of which the creditor has a right to complain. Since his right is entirely dependent upon the statutes of the State of charter, he is entitled to claim no more than that State grants.

A stockholder's contingent liability can therefore be enforced in another State, if at all, only when the remedy provided by the statute is such that it is capable of use in the other State. But it is doubtful whether such liability can be enforced by original action in a foreign State even if a suitable form of proceeding can there be found.

"This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created."[2] If the enforcement of the liability involves a determination of the internal affairs of the foreign corporation, clearly no action will lie; and it may well be held that an action which requires the parcelling out of corporation debts among the stockholders does involve such determination. It is accordingly held in most jurisdictions that where there is no direct and absolute obligation from the stockholder to the corporation or the creditor no action will be allowed in a foreign State.[3]

It is sometimes asserted that the views of the courts are changing, that the doctrine just stated is yielding to a more liberal view, and that today a creditor may pursue such a remedy in any State which can do justice between the parties.[4] And there is indeed much ground for this opinion. In several jurisdictions successive suits founded upon the same statutory liability have been decided, the first against and the second in favor of the plaintiff.[5] But the later case is in every case consistent with the former; a direct liability of the individual stockholder to each creditor was not alleged in the earlier case, but was alleged and proved in the later case.[6]

If the stockholders' liability is penal, it cannot be enforced in a foreign State; but the stockholder's liability, whether absolute or contingent, is usually an original one, and not penal upon any theory.[7]

III.

The liability of a director is in almost every case direct and absolute. The creditor is entitled to sue the director as a party absolutely liable for the debt, and to recover judgment without joining either the corporation or the other directors. No difficulty of procedure is involved, therefore, and if the liability is to be regarded as a contractual one there is no reason why recovery should

[1] Remington *v.* Samana Bay Co., 140 Mass. 494.

[2] Field, J., in Post *v.* Toledo, C. & S. L. R. R. 144 Mass. 341, 345.

[3] Evans *v.* Nellis, 187 U. S. 271: State Nat. Bank *v.* Sayward, 16 Fed. 45; Elkhart National Bank *v.* Northwestern Loan Co., 87 Fed. 252; New Haven H. N. Co. *v.* Linden Spring Co., 142 Mass. 349, 7 N. E. 773: Bank of North America *v.* Rindge, 154 Mass. 203, 27 N. E. 1015; Coffing *v.* Dodge, 167 Mass. 231, 45 N. E. 928; Crippen *v.* Laighton, 69 N. H. 540, 44 Atl. 538; Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419; Barnes *v.* Wheaton, 80 Hun, 8; Bank of Virginia *v.* Adams, 1 Pars. Eq. 534; Bates *v.* Day, 198 Pa. 513, 48 Atl. 407; May *v.* Black, 77 Wis. 101; McLaughlin *v.* O'Neill, 7 Wyo. 187.

[4] See this view well and vigorously expressed in Pfaff *v.* Gruen, 92 Mo. App. 560.

[5] State Nat. Bank *v.* Sayward, 91 Fed. 443 and Hale *v.* Hardon, 95 Fed. 747; Tuttle *v.* Nat. Bank of Republic, 161 Ill. 497, 44 N. E. 984 and Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346; Coffing *v.* Dodge, 167 Mass. 231, 45 N. E. 928, and Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207; Marshall *v.* Sherman, 148 N. Y. 9, 42 N. E. 419, and Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489.

[6] See, for instance, the language of the Court in Flash *v.* Conn, 109 U. S. 371, 380; Howarth *v.* Angle, 162 N. Y. 179, 189, 191.

[7] Flash *v.* Conn, 109 U. S. 371.

not be had against the director in a foreign State. But if the liability is penal, the obligation is not to be enforced outside the State which created it.

In the State courts the question, what is a penal obligation, appears to be well settled. If the directors' obligation formed part of the original contract, and is given the creditor to prevent his personally suffering a loss of his claim because of some misconduct of the director, it is remedial, and may be enforced in any State. Such a statute as that making the directors liable for debts contracted in excess of the capital stock creates a liability which may be enforced in any State.[1] "Where the purpose of a statute is to furnish a remedy to creditors who have been injured by the directors' violation of the requirements of the statute, the liability of such officers is contractual, and actions upon such statutes are transitory and can be brought in any State in courts of competent jurisdiction."[2]

If on the other hand the liability is imposed upon the director as a punishment for not doing his duty, as for instance, for failure to file a report or for misrepresentation contained in such report, and enures to the benefit of the creditor without regard to the creditor's injury or even to the time of contracting the debt—if in short, the liability is imposed for some act or neglect in no way connected with the contracting of the debt, the obligation is a penal one, and cannot be enforced in a foreign State.[3]

To the same effect are decisions of the courts that liability of the sort just described is penal, and therefore does not survive,[4] and that a judgment obtained against the corporation in an action on the contract is *res inter alios*, and cannot be shown in an action against the director.[5]

The Supreme Court of the United States, however, has taken a different view of this question. It has expressed the opinion that no obligation will be refused enforcement as penal in a foreign State unless it arises out of the commission of a crime.[6] In this opinion Mr. Justice Gray followed the reasoning of the English Privy Council on a Canadian appeal,[7] and held that the statutory liability of a director for filing a false return is not penal, but may be enforced by a creditor by an action brought in a foreign State.

In support of this doctrine no authority quite in point was cited except the decision of the Privy Council; nor is it believed that at that time any such authority existed. The cases in State courts holding such obligations penal were cited without attempting to distinguish them. The court in support of its view referred to several cases (previously cited in this article) where the remedy was clearly remedial; and to a few cases in which it is difficult to discover how the question under consideration was in any way involved. The view expressed in the case cannot be regarded as sound in principle.

This doctrine was not necessary to the decision of the case before the court, either in the Privy Council or in the Supreme Court of the United States. In both cases the question was whether action could be brought in a foreign State upon a judgment obtained against the director in the State of charter.

[1] Field *v.* Haines, 28 Fed. 919; Neal *v.* Moultrie, 12 Ga. 104; *ex parte* Van Riper, 20 Wend. 614; Farr *v.* Briggs, 72 Vt. 225.

[2] Tyler, J., in Farr *v.* Briggs, 72 Vt. 225.

[3] Flash *v.* Conn, 109 U. S. 371 (*semble*); Mitchell *v.* Hotchkiss, 48 Conn. 9; Diversey *v.* Smith, 103 Ill. 378; Halsey *v.* McLean, 12 All. 438; Derrickson *v.* Smith, 3 Dutch. 166; Woods *v.* Wicks, 7 Lea 40; Stephens *v.* Fox, 83 N. Y. 313. On this ground enforcement of the director's liability in a foreign State was refused in First Nat. Bank *v.* Price, 33 Md. 487, though in that case the liability would seem to have been purely remedial.

[4] Fisher *v.* Graves, 80 Fed. 590; Stokes *v.* Stickney, 96 N. Y. 323.

[5] Chase *v.* Curtis, 113 U. S. 452; Miller *v.* White, 50 N. Y. 137; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62.

[6] Huntington *v.* Attrill, 146 U. S. 657.

[7] Huntington *v.* Attrill [1893] A. C. 150, reversing S. C. 17 Ont. 245, 18 Ont. App. 136.

How far the *dictum* in Huntington *v.* Attrill will be followed when the question is actually presented in the Supreme Court of the United States it is difficult to say. It is naturally followed in the inferior Federal courts.[1]

A proceeding against a director in such a case, though an action for a penalty is not a criminal proceeding; and if action is brought against the director and judgment obtained in the State of charter, the judgment will be enforced everywhere. The original claim, which was not enforceable in a foreign State, merged in the judgment; and that being an ordinary judgment *inter partes*, effect is given to it in a foreign State.[2] By this method the director may always be reached, if the incorporating State will have it so; for even if the director is not an inhabitant of that State, a valid judgment may be had against him under a statute providing that any member of the corporation shall be subject to the jurisdiction of the courts of the State. Judgment having been obtained in the State of charter may then be enforced anywhere. No injustice is done, therefore, by the refusal of a foreign State to enforce such provisions.

IV.

When one stockholder or director is obliged to satisfy a claim against the corporation, because of his statutory liability to do so, a claim for contribution from his fellow-stockholders or fellow-directors arises which may be enforced in any jurisdiction.[3]

[1] First Nat. Bank *v.* Weidenbeck, 97 Fed. 896.

[2] Huntington *v.* Attrill, 146 U. S. 657, reversing Attrill *v.* Huntington, 70 Md. 191.

[3] Allen *v.* Fairbanks, 45 Fed. 445; (but see Sayles *v.* Brown, 40 Fed. 8); Nickerson *v.* Wheeler, 118 Mass. 295.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

VI.

By Van Vechten Veeder,
Of the New York Bar.

THIS period (1688-1789) witnessed the rise and development of the press as an organ of public opinion. On May 3, 1695, the Licensing Act expired, and since that day there has been no censorship of the press in England. Within a fortnight the first real newspaper made its appearance, and the history of this great factor in civilization had begun. But no sooner had the press escaped the clutches of the licenser than it compromised its character and imperiled its freedom by becoming the instrument of party rancor. With a construction of the law of libel inherited from the Star Chamber it was an easy matter for the dominant party to suppress criticism and to crush its critics. The former was accomplished by means of stamp taxes, and the latter by prosecutions for criminal libel. The law was rigorously enforced under William III. and Anne, but the long supremacy of Walpole brought a period of general toleration. Walpole was indifferent to public attack and openly avowed his contempt for the public press. Although the mass of political writers might well be described as "a herd of wretches whom neither information can enlighten nor affluence elevate," the press was, nevertheless, slowly gaining in influence. During the period from about 1760 to 1792 it rose above party and justified its claim to represent public opinion. This period, beginning with the activities of John Wilkes and ending with the excesses of the French Revolution, is one of the most important eras in the history of the liberty of the press. It was then that the nation, excluded from representation in a servile and corrupt House of Commons, found utterance in the public press.

The first notable trial for seditious libel after the Revolution was that of Tutchin, in 1704 (14 St. Tr. 1905). Tutchin was a characteristic specimen of the low class party scribbler of the time. He had fallen into Jeffrey's clutches after Monmouth's Rebellion, and had been sentenced to imprisonment for seven years, together with a whipping each year through every market-town in Dorsetshire—which involved a whipping every fortnight during the term of his imprisonment. He managed to escape this punishment, however, by catching smallpox, and upon his recovery he was able to purchase a pardon. Among many subsequent adventures he is said to have called on Jeffreys, when, after the Revolution, the latter was confined in the Tower, and to have impressed upon him some obvious reflections on the irony of fate. He was finally beaten so severely for one of his scurrilous libels that he died of his injuries.

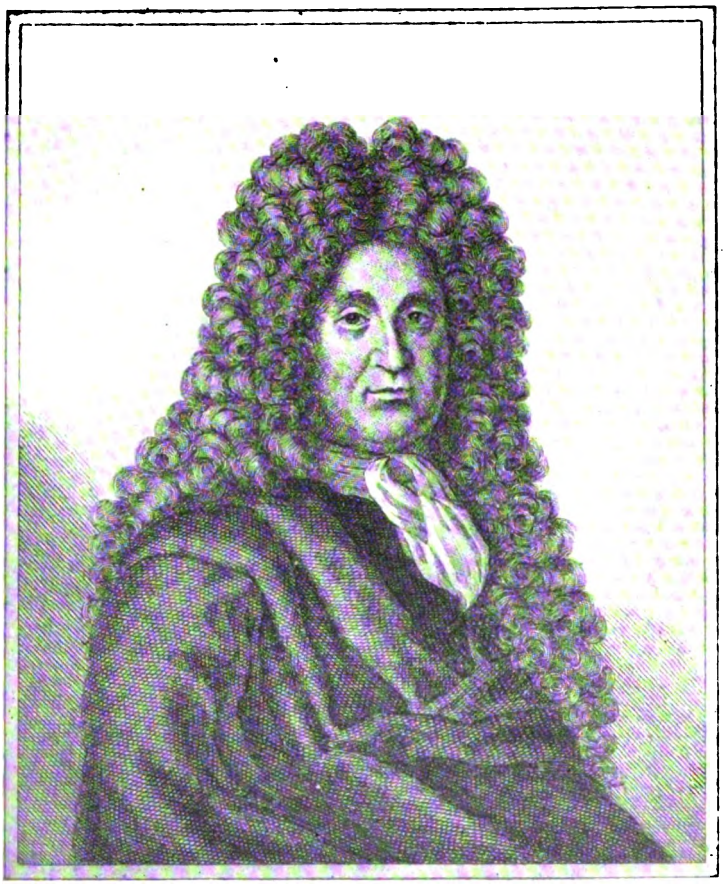
Tutchin was brought to trial before Lord Chief Justice Holt in 1704 for a libel in *The Observator*. He had said, in substance, that the ministry was corrupt and the navy inefficient. For this statement, which would now pass unnoticed, he was tried and found guilty of seditious libel, in order that (to use the language of the prosecuting attorney, Sir Thomas Powis) "men might be warned of the difference between liberty and licentiousness." He was ably defended by Sir James Mountague,[1] who succeeded in arresting

[1] Mountague's opening was very graceful: "I can hardly say I am counsel with Mr. Tutchin, because I have never seen him but upon recording his appearance in open court; and he has not thought fit to send us any instructions till this morning, when we were just going down to Westminster. But I do suppose this remissness in his temper does proceed from the innocency of the accusation against him, and he has a mind to let the world see how easy it is to make his defense, since he has pitched upon me for his advocate, and given me so little time to prepare myself for it."

judgment upon a technical error. Lord Chief Justice Holt did not instruct the jury directly that they must take the law from him, although such was the effect of what he told them. His charge is very interesting for its complete inversion of modern ideas of free discussion of public affairs:

"To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavor to procure animosities as to the management of it; this has been always looked upon as a crime, and no government can be safe without it being punished."

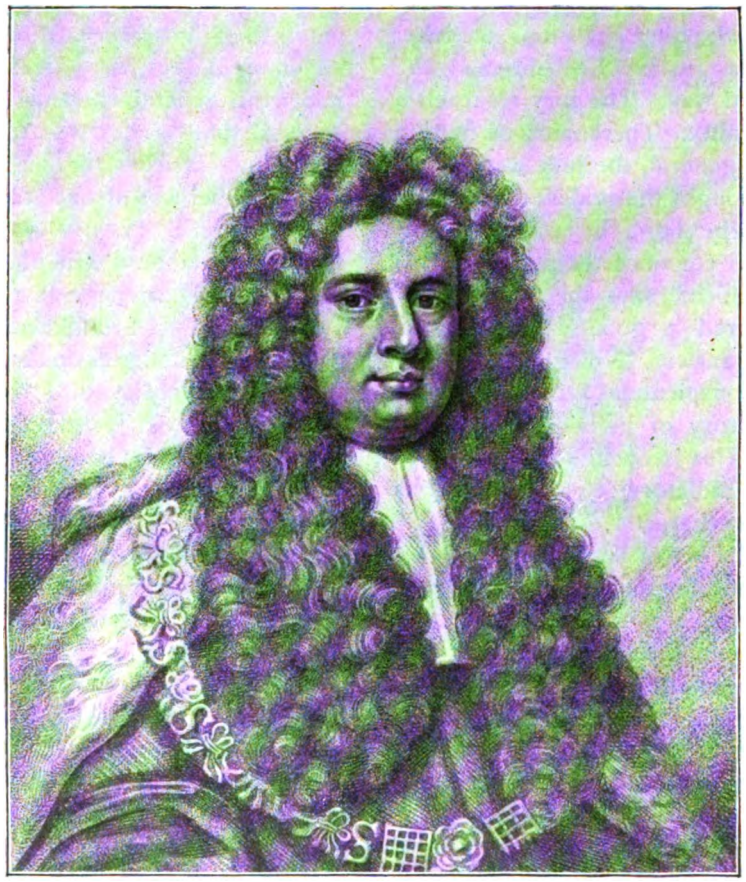
In 1731 Franklin was tried for a similar political libel (17 St. Tr. 626; *22 ib.* 973, n).



JOHN TUTCHIN.

He had published in *The Craftsman* the famous "Letter from The Hague," said to have been written by Lord Bolingbroke. This letter censured the policy of the government with reference to the Spanish treaty of 1729, charging the ministry with incapacity and perfidy. The prosecution was conducted by two future chancellors, Philip

Yorke and Charles Talbot, and it is interesting to observe their conception of the liberty of the press. "The liberty meant," said Yorke, "is to be understood of a legal one: he may lawfully print and publish what belongs to his own trade; but he is not to publish anything reflecting on the character, the reputation and administration of his majesty or his ministers; nor yet to stain the character or reputation of any of his subjects; for, as I said before, that to scandalize and libel people is no part of his trade, so I say that it is only that liberty of the press which he is to use that is regulated by law and subjected to it; and if he breaks that law, or exceeds that liberty of the press, he is to be punished for it as well as for breaking other laws or liberties." The defense was confined mainly to the small question whether the expression "certain ministers" meant the king's ministers, for Lord Chief Justice Raymond ruled in explicit terms that the jury were to judge only of the fact of publication and the application of the language; the question of libel was for the court alone.



LORD CHIEF JUSTICE RAYMOND.

Owen's case (18 St. Tr. 1203), in 1752, is significant as the first case (unless the case of the Seven Bishops be so regarded) in which an English jury exercised their power

of returning a general verdict of not guilty in a case of libel. Owen was charged with a libel on the House of Commons. He had published the statement that the commitment of Alexander Macdonald by the House for his behavior at the Westminster election was unjust and oppressive. His counsel—Camden among them—urged the jury to acquit on the ground that the publication had not been proved either malicious or false; but Lord Chief Justice Lee directed the jury in the usual way. The jury returned a verdict of not guilty. Thereupon, on motion of the attorney general, the jury were asked whether they thought the evidence of Owen's publication of the book by selling it was not sufficient to convince them that he did sell it. "At which," says the report, "the foreman appeared a good deal fluttered, and could only answer, 'Not guilty.'"

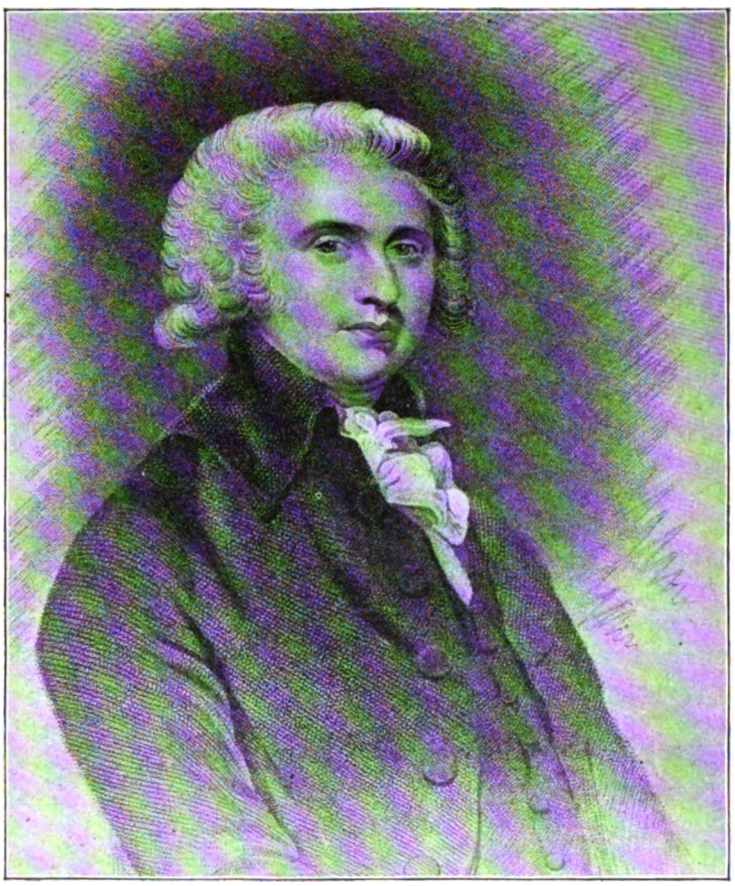
The most conspicuous single figure in the judicial history of individual liberty is John Wilkes. This is not the place to dwell upon the contradictory elements of this great agitator's character. It is creditable to Wilkes that he broke away from the profligacy and beastly humors of his early associates, Sandwich, Dashwood, Potter and their fellow rakes of the Medmenham Abbey, and turned to politics. The government journals, the *Briton* and the *Auditor*, had already raised up a critic in John Entick's *Monitor;* but the establishment of the *North Briton* by Wilkes marks a new era in journalism. Wilkes met the heavy handed violence of the *Briton* with a virulence and ferocity that ultimately overpowered Lord Bute and drove him from office. When it became apparent from the king's speech at the opening of Parliament in 1763 that the new administration proposed to carry out Bute's obnoxious policy, Wilkes published the famous Number forty-five of the *North Briton*, in which he stigmatized the king's address as "the most abandoned instance of ministerial effrontery ever attempted to be imposed upon mankind." The article was not conspicuously intemperate, and it was certainly not unjust, but it goaded the king and his ministers to frenzy. The law officers of the crown pronounced the article to be a seditious libel, and by a strained exercise of prerogative a general warrant was promptly issued for the arrest of the authors, printers and publishers of the *North Briton.* Forty-nine persons, including Wilkes, were arrested on suspicion under this general warrant. It was soon discovered that Wilkes was the author of the obnoxious article, and an information for criminal libel was at once filed in the King's Bench (19 St. Tr. 982 *et seq.*). Released from prison upon a writ of *habeas corpus,* on the ground of privilege as a member of Parliament, Wilkes brought an action against Wood, the under-Secretary of State and obtained a verdict of £1000 damages (19 St. Tr. 1154). A few days later Leach, one of the printers who had been arrested on suspicion recovered a verdict of £400 for false imprisonment (19 St. Tr. 1002). The case went off without a judicial determination of the chief points raised. The attorney general avoided a decision on the legality of general warrants by conceding that the warrant had not been pursued. But enough was said by the court to make it plain that the judges would in a proper case hold that general warrants to seize the person were illegal. Next, John Entick, the suspected author of the *Monitor*, brought an action against the messengers who had seized all his books and papers under a general search warrant (19 St. Tr. 1030). Lord Camden held, in an able and vigorous opinion, that such warrants, which had originated in the practice of the Star Chamber, and had been unjustifiably continued since the expiration of the Licensing Act of Charles II., were absolutely illegal.

Meanwhile the government pursued Wilkes through his private papers. Among

the papers found in Wilkes' possession was an *Essay on Woman*, an obscene parody of Pope's *Essay on Man*. Wilkes had amused himself in his earlier day with a printing press, and this was one of his productions. The piece bore no name, and it seems certain that Wilkes' share in this affair was limited to printing it. At all events, only a few copies had been printed for private circulation among the friends with whom Wilkes then associated. No offense had been committed or had been intended against public morality; yet the House of Commons, at the instigation of the notorious rake, Lord Sandwich, voted the poem an obscene libel and a breach of privilege, and the Lords called for Wilkes' prosecution. Expelled from the House of Commons, and suffering from wounds received in a duel, Wilkes joined his daughter in Paris. His enemies made the most of his absence. He was found guilty by the court of King's Bench of having reprinted number forty-five of the *North Briton* and of having written the *Essay on Woman*. As he did not appear for sentence he was outlawed for contumacy. Thus the ministry thought they had got rid of Wilkes; but they mistook their man and the strength of the public feeling which had been aroused. Wilkes wearied at length of continental life, and in February, 1768, he audaciously appeared in London and announced himself as a candidate for Parliament for London. Although he had entered the contest too late to secure his election, his boldness aroused the greatest enthusiasm. He immediately came forward again as a candidate for the County of Middlesex, and was triumphantly elected. The news of this victory excited the greatest enthusiasm among the London populace. For two days the city was practically at the mercy of the mob. On April twentieth, Wilkes, pursuant to his promise, surrendered himself

JOHN WILKES.

to the Court of King's Bench. His prison at once became a storm centre. On May tenth the government, under pretence of fearing a riot, rashly sent a regiment of soldiers to guard the King's Bench prison, together with a letter from the Secretary of State, Lord Weymouth, to the local magistrate, urging him to make use of the soldiers in case of disturbance. In the inevitable conflict which ensued several persons were killed or wounded. Wilkes succeeded in securing a copy of Lord Weymouth's letter, and had it printed in the *St. James Chronicle*, together with some comments of his own in which he accused the ministry of having planned a massacre. The House of Commons immediately voted this publication a libel, and for this as well as his former offenses, Wilkes was again expelled from the House. The same ceremony of reëlection and expulsion was gone through with again, with the addition of the fatal mistake on the part of the House of declaring Wilkes disqualified from membership. In April, 1770, Wilkes' term of imprisonment came to an end. He had already been elected alderman, and as such had been instrumental in forcing Parliament to remove the embargo upon the publication of its debates. He was now elected sheriff of London, and in 1774 lord



THOMAS, LORD ERSKINE.

mayor. In the same year he was elected for the fifth time member of Parliament, and, after ten years' varied experience, in which he had made some lasting contributions to individual liberty, he took his seat.

In the midst of the excitement caused by the prosecution of Wilkes, Junius' letters appeared. His famous Letter to the King appeared in the *Morning Advertiser* of December 19, 1769. Informations were immediately filed against the printers and publishers of the letter. Almon, the bookseller, was first tried for selling the *London Museum*, in which the libel had been printed (20 St. Tr. 803). The paper was proved to have been sold by his servant in his shop, but it did not appear that Almon knew of or authorized the sale. Lord Mansfield held that a publisher was criminally liable for the acts of his servants, unless proved to be neither privy nor assenting to the publication. This doctrine, taken in connection with the action of subsequent judges in excluding exculpatory evidence, rendered publication of a libel by a publisher's servant proof of criminality. Lord Mansfield also repeated in this case the doctrine which he had laid down in the case of the printers of the *North Briton*, that it was the province of the court alone to judge of the criminality of a libel.

LORD CAMDEN.

In the case of Miller, the publisher of the *Evening Post* (20 St. Tr. 870) there was no question as to publication, but Thurlow and Glynn, the opposing counsel, respectively attacked and defended Junius' letter itself. Lord Mansfield directed the jury in his usual way. He admitted that they had the legal power to give a general verdict of not guilty, but denied their moral right to do so unless they doubted the fact of publication or the truth of the innuendoes. The jury boldly took the matter into their own hands, and returned a verdict of not guilty.

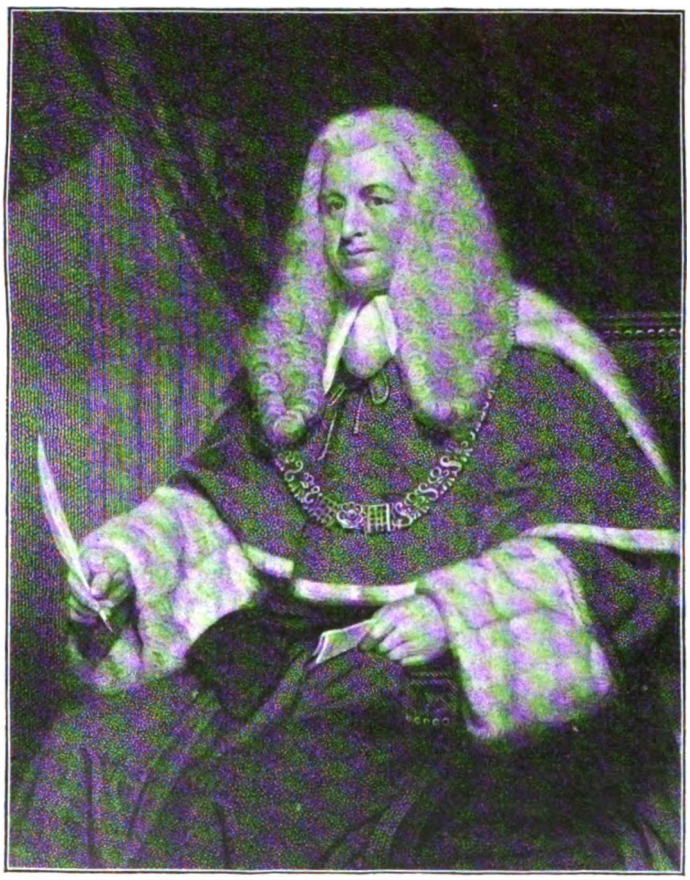
On the trial of Woodfall (20 St. Tr. 895), the original publisher of Junius' letter to the King, the jury adroitly avoided Mansfield's direction by finding the defendant "guilty of printing and publishing only," a verdict which the court held to be so uncertain as to necessitate a new trial.

A still more vigorous attack upon Lord Mansfield's doctrine was made by Thomas Erskine in the case of the Dean of St. Asaph (21 St. Tr. 847). The Dean was prosecuted for the publication of a *Dialogue on the Principles of Government*, which had been written by his brother-in-law, Sir William Jones. In view of the public agitation for a change in the representative system, the dialogue was designed to make plain the

JUSTICE BULLER.

fundamental principles of government. In a preface to the *Dialogue* the Dean said: "If the doctrines which it slightly touches in a manner suited to the nature of a dialogue be 'seditious, treasonable and diabolical,' Lord Somers was an incendiary, Locke a traitor, and the Convention Parliament a pandemonium. But if those names are the glory and boast of England, and if that convention secured our liberty and happiness, then the doctrines in question are not only just and rational, but constitutional and salutary; and the reproachful epithets belong wholly to the system of those who so grossly misapplied it."

Erskine defended on the ground that the publication was innocent; and he insisted that it was the province of the jury to determine the fact. Justice Buller charged the jury, however, in accordance with the rules laid down by his predecessors, that the only issues for them to determine were the fact of publication and the meaning of the innuendoes. If they found a verdict of guilty, it was still open to the defendant, he said, to move in arrest of judgment upon the ground that there was no criminality in the publication. The jury returned a verdict of "guilty of publishing only." Thereupon a long discussion ensued between court,



LORD CHIEF JUSTICE KENYON.

counsel and jury. Justice Buller told the jury that their verdict was not correct; if they added the word "only" it would negative the innuendoes, which they stated that they did not mean to negative. Erskine insisted that the verdict was similar to that given in Woodfall's case and should be recorded. In the end, however, the jury accepted Justice Buller's statement of their verdict. At the following term Erskine moved for a new trial, and upon the rule then granted he delivered before the Court of King's Bench a very elaborate and powerful argument in support of his views. But that argument was unsuccessful. Lord Mansfield asserted that the uniform practice, which Justice Buller had simply followed, was "not to be shaken by arguments of general theory or popular declamation." Erskine afterward succeeded in arresting judgment on the ground that the matter set forth in the indictment was not libellous.

In 1789 Erskine very skilfully secured the acquittal of Stockdale, a London bookseller, charged with the publication of a libel on the House of Commons (*22* St. Tr. *237*). The pamphlet in controversy was designed to answer the charges against Warren Hastings, which had been printed and circulated long before Hasting's trial. The writer of the pamphlet plainly asserted that the charges against Hastings had their origin in misrepresentation and falsehood; that the House of Commons, in the prosecution of some of the charges, was "a tribunal of inquisition rather than a Court of Parliament," and that the impeachment was carried on from "motives of personal animosity, not from regard to public justice." Although Lord Chief Justice Kenyon directed the jury in the usual way, Erskine secured an acquittal upon his theory that the pamphlet, as a whole, referred, not to the House of Commons as a whole, nor to the public conduct of its members, but to the proceedings of particular persons, and that the averments which were necessary to sustain the information were therefore untrue.

Three years later, through the efforts of Charles James Fox and of Lord Camden, the doctrine which Erskine had so eloquently advocated was adopted by statute in Fox's Libel Act of 1792.

The prosecution of Horne-Tooke, in 1777 (20 St. Tr. 651), for publishing a statement that the British troops employed against the Americans were murderers, deserves mention, in passing, for the cleverness, as well as the impudence, with which this experienced agitator defended himself. He displayed much skill in avoiding Lord Mansfield's rulings on the question of intent; and although he sorely tried the patience of the chief justice, he was allowed remarkable latitude in his energetic but unsuccessful efforts to avoid conviction.

WASHINGTON LETTER.

MAY, 1904.

S-M-Y-R-N-A, to the majority of us, spells "rugs." To Mr. Justice David Josiah Brewer it spells "birthplace." His parents were foreign missionaries at that place at the time of his birth. This fact would appear to be explanatory of his Scriptural names, but as a matter of fact his first name is that of his maternal grandfather, David D. Field (to whom not only this country, but the whole world, owes a debt of gratitude beyond computation), and his middle name is that of his father.

David D. Field was a Congregationalist minister of Massachusetts. He was also the father of the famous men of that name, the most famous of whom was Cyrus W. Field, upon the fruits of whose gigantic brain, unceasing perseverance, and indomitable will we feast twice a day. Justice Brewer was brought to this country during his early childhood by his parents. He attended school in Connecticut and college at Wesleyan and Yale, from which latter he graduated in 1856. After completing his law studies he located for a short time with his uncle, David Dudley Field. He subsequently went to Kansas, where he eventually settled. He was first elected to the Bench of that State in 1862, when he was but twenty-four years of age, and again two years later to the District Court for the first judicial district of Kansas. In 1870, again in 1876, and yet again in 1882, he was elected to the Bench of the Supreme Court of Kansas. In 1884 he was appointed Judge of the Circuit Court of the United States for the Eighth Circuit. His eminent attainments received their just recognition when in the month of December, 1889, he was appointed by President Harrison to the Supreme Court of the United States to fill the vacancy created by the death of Mr. Justice Matthews. At the time when Justice Brewer became the junior member of that tribunal, his uncle, Mr. Justice Stephen J. Field, was one of its senior members. Never before had an uncle and a nephew sat together upon that bench, and it is safe to predict that many years will elapse before the wheel of fortune again will effect such a combination.

Justice Brewer has demonstrated the correctness of at least two of the statements contained in the proverb that

"Early to bed and early to rise
Makes a man healthy, and wealthy, and wise."

He retires about nine o'clock and rises at the stroke of four, beginning the day (for many it would be ending the night) with a large cup of black coffee. His long service upon the bench and his varied experiences furnish him with an inexhaustible fund of anecdotes, which, with the assistance of an unusually keen sense of humor, lose nothing in the telling. Besides possessing this happy trait, he is an orator of no mean ability, and the tribute which he paid to Mr. Justice Harlan on the occasion of the dinner given to the latter in recognition of his twenty-five years of service upon the Bench, was a masterpiece of eloquence.

In his family and social relations he is charming; as a law lecturer he is unsurpassed; as a member of those international boards of arbitration upon which he has been induced to serve, he has evidenced the possession of qualifications which preëminently fit him for such work; as a jurist he has won the confidence, respect, and admiration of the entire Bar, and has earned for himself the right to be reckoned among the most distinguished of the celebrated family to which he belongs.

The President of the United States has again appointed a non-resident to the bench of the Supreme Court of the District of Columbia. This Court is composed of a Chief-Justice and five Associate-Justices. The Court of Appeals is composed of a Chief-Justice and two Associate-Justices. Of this entire number there are but two who were residents of the District of Columbia at the times of their appointments. Of the balance, three are from Maryland (two of whom still reside in that State), two are from Ohio, one from Texas, and one from North Carolina, who is to be succeeded by one from Vermont. The citizens of the District pay one-half of the salaries of these judges. Among other official positions filled by non-residents, appointed by the President or by the Commissioners of the District under Congressional "pressure," are the following: the Recorder of Deeds, the City Postmaster, the Superintendent of Insurance, the Sealer of Weights and Measures, the Superintendent of the Board of Associate Charities, and the Intendant of the Almshouse.

The salaries of all of these officials, except the city postmaster, are paid exclusively by the citizens of the district. With these facts in mind, it is not remarkable that indignation was expressed at a mass meeting of the Bar, convened for the purpose of uniting upon a candidate for a vacancy upon the District bench, when, in spite of the fact that the retiring justice was to remain upon this bench for at least a month; in spite of the fact that the Senate had adjourned; in spite of the fact that the President knew of the prospective meeting, he appointed another non-resident less than an hour before the time fixed for that meeting.

ANDREW Y. BRADLEY.

TO YOUNG LAWYERS.

BY GEORGE BIRDSEYE.

When you begin to study up your case,
Straight put yourself in your opponent's place.
For know the danger that you apprehend
Is always less a danger to defend.
Make all his points as tho' they were your own,
Then turn and fight each side yourself, alone.

Don't fear hard work, if you your brain would trust;
The brain will not wear out as soon as rust.
Don't stand upon another's legs; depend
On self alone, the safest, surest friend.
In all law business, to the weak, the rocks
Upon the road are merely stumbling blocks.
But to the strong, alert, the way is shown
To make of each an easy stepping stone.

LONDON LEGAL LETTER.

MAY, 1904.

THE case of Pollard *v.* Pollard, which has engrossed public attention for some weeks, is a peculiarly pertinent illustration of the admirable way in which jurisprudence is administered in England, and of the keen oversight which is exercised by the State to prevent the abuse of processes of law designed for the relief of innocent members of the community. In the United States the statutes of the various States providing for dissolution and annulment of marriages are, without exception, wise and equitable. In England a wife cannot obtain a divorce from her husband unless she can prove that he has been guilty of adultery and desertion, or of adultery and cruelty, while the husband may divorce his wife for adultery alone. Thus, although the husband may be guilty of extreme cruelty and the wife may suffer to the limits of her endurance both physical and mental tortures, the only relief the law affords is a decree of separation. The divorce statutes of the United States are conceived in a more liberal spirit, and afford either spouse relief in cases where the other by conduct or circumstances, such as cruelty, desertion, habitual drunkenness, conviction of crime or insanity, renders proper conjugal relations impossible. It is notorious, however, that these wise laws are, in many parts of the country, so carelessly and negligently administered as to constitute a scandal. In undefended cases the judge appears to take the view that he has no right to enquire into the *bona fides* of the applicant, but must enter a decree if upon the face of the pleadings it appears that he has jurisdiction and the *ex-parte* evidence satisfies the letter of the law.

In England, on the contrary, the judge in an undefended case submits the whole proceedings to the strictest scrutiny, and, if there is the slightest suspicion of irregularity, practically constitutes himself counsel for the absent respondent. Nor does the enquiry stop at the trial, for according to the English procedure there must elapse an interval of six months between the decree *nisi* and the decree absolute. During this time the King's Proctor takes it upon himself to enquire into every undefended case and if he discovers that there has been any irregularity in the proceedings, or any want of good faith on the part of the petitioner, or any collusion between the parties, or that anything has been kept from the knowledge of the judge at the trial, he promptly intervenes, and opposes the making of the decree absolute. He does not wait for the respondent to make complaint, or for third parties to object. On his own initiative he puts the power of the government into operation to prevent imposition upon the court and the miscarriage of justice.

In the case of Pollard *v.* Pollard, above referred to, Mrs. Pollard obtained a divorce decree *nisi* from her husband on the ground of his cruelty and adultery. There was no defence. Soon afterwards it came to the knowledge of the King's Proctor that the evidence against the husband had been obtained by a well-known detective agency called "Slaters." Although the wife was or had been, a waitress in a restaurant frequented by men in the business part of London, and the husband was living with his mother in Plymouth on a few shillings a week, sent to him by his wife, the money paid to Slaters for procuring the evidence against the husband aggregated the enormous sum of thirty thousand dollars. This was supplied by a wealthy young man, a friend of the petitioning wife. The Agency sent detectives to Plymouth to keep observation upon the husband in the hope of getting proof of his misconduct, but they were unsuccessful, and

so reported to their principals. A fresh detective was then put upon the quest, who, acting upon his instructions, took the husband, who was a dissipated, weak man to Jersey, got him intoxicated and conducted him to a house of ill-fame. He then brought him back to Plymouth, having paid the entire expenses of the trip, including those incurred in the house of ill-fame. One Osborne, the solicitor to the Agency, and who had the conduct of the divorce case, considered that it would not be safe to rely upon evidence obtained in this way, and he himself visited Plymouth to assist the detectives in getting sufficient evidence at that place. Through his exertions a woman of the town was found who was persuaded to say that she recognized Pollard as a man who had visited her. Upon this the petition for divorce was filed, with the result stated.

The trial of the case upon the King's Proctor's intervention involved the bringing to London of a large number of witnesses, from Jersey, Plymouth and elsewhere. It lasted eight or nine days, and, in addition to the Solicitor General, two leading juniors were briefed by the King's Proctor. The expenses which must have been very heavy were defrayed in the first instance by the government, although as the King's Proctor succeeded and an order for costs was made against Osborne and the proprietor of Slaters, much of the outlay was recovered from these persons. Nevertheless the government took the risk of this large expenditure in order to maintain the purity of its process.

The trial illustrates another feature in English procedure. The issue involved the gravest consequences to Slater's Agency, the profits of which, it was revealed at the trial, were very great, and also to Osborne, who if the charge of fraud was proved against him, would be struck off the rolls. It was therefore contested bitterly. Notwithstanding this not a single question was addressed to the jurors who were not sworn on their *voir dire*, and not an objection was made to any one of them. Twelve men were called into the box and sworn, and the trial began. Furthermore, although the case lasted eight or nine days, during which no less than 8,798 questions were addressed in chief or in cross-examination to the numerous witnesses, not a single exclamation of "I object" was heard during the trial. It should not be inferred from this that there were any infractions of the rules of evidence, or that less attention is paid in this country than in the United States to such rules. The absence of objections is attributable to two facts, first, that counsel are punctilious in avoiding the putting of any question which from any point of view is objectionable, and, second, that no bill of exceptions is necessary in case of appeal. A notice of appeal delivered to the other side is all that is necessary to obtain a hearing in the appellate court, and, once there, the judges will hear whatever counsel have to say as to errors at the trial, but in no case will a judgment or verdict be disturbed on the ground of the wrongful exclusion or admission of evidence, unless the appellate judges are satisfied that such evidence so admitted or excluded materially affected or might have affected the result of the trial.

The consequences of the Pollard case have, in fact, been most serious to those who were found guilty of making a fraudulent case against the husband. Slater and Osborne and three or four of the detectives have been arrested and will doubtless be shortly tried at the Old Bailey for interfering with the course of justice. Slaters' business will be ruinously affected, and Osborne will doubtless be struck from the rolls. The moral effect of the proceedings as a deterrent to those tempted to trifle with the Courts cannot be over-estimated.

STUFF GOWN.

The Green Bag.

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

NOTES.

NEAR-SIGHTED CLERK—You do solemnly swear to tell the truth, the whole truth and nothing but ——

Attorney—Hold on there! No! I'm the attorney for the defence.

"MISTER JEDGE," called out the colored witness, after he had been on the stand a full hour, "kin I say one word, suh?"

"Yes," replied the judge, "what is it?"

"Hit's des dis, suh. Ef you'll des mak de lawyers set down and keep still two minutes en giv me a livin' chance I'll whirl in en tell de troof."

THE judge of the police court was examining an important eye-witness of a fracas, with the following result:

"You were present when the assault took place?"

"Yes, your honor."

"And did you take cognizance of the bartender of the place?"

"I don't know exactly what they called it, but I took what the others did."

IN an Irish court an old man was called into the witness box, and being near sighted, instead of going up the stairs that led to the box, mounted those that led to the bench. The judge took the mistake good humoredly.

"Is it a judge you want to be, my good man?" he asked.

"Ah, sure, your honor," was the reply, "I'm an ould mon now and mebbe it's all I'm fit for."

A YOUNG Iowan who had been studying law at home for several years, recently presented himself, with a large class, before the Supreme Court and was examined for admission to the bar. When the result was announced the aspiring genius sent this telegram to the home folk, anxiously awaiting the result:

"Examination splendid; all judges enthusiastic. They wish for a second next year."

A CLEVER cross-examiner but a poor hand for remembering names and faces was recently cross-examining a witness of the opposition, with this result:

Lawyer—How long have you resided here?

Witness—All my life.

Lawyer—What, continuously?

Witness (hesitatingly)—Well, no, sir, not all the time.

Lawyer—Aha, I thought so; now tell us just where you were when you were not here.

Witness—I was in the penitentiary.

Lawyer—Good, that's what I thought. Now tell this jury why you were sent to the penitentiary?

Witness—You defended me, sir.

THE court crier of a certain United States Circuit Court recently made an amusing blunder by simply changing one word in the usual opening announcement, commencing with "Oyez, oyez," and concluding with "And God save this honorable court and these United States." The crier was a little rattled on the morning in question and when the august judge had appeared started his regular cry correctly but ended it with:

"And God help this honorable court and these United States."

The judge did not notice the alteration, although most of the auditors did. Afterwards the matter was reported to the court by the clerk.

"Oh," said the judge, "since he did not say 'And God damn this honorable court,' it is all right."

Two peculiar sentences have recently been pronounced in State court for criminal offences. Allen Brown, a Texas negro, convicted of attempted criminal assault, was sentenced in the district court of Cherokee county to 1,000 years in the penitentiary. If his time is reduced two months a year for good behavior Brown will be a free man in A. D. 2738. California furnishes the other instance. John H. Wood, leader of the convicts who escaped from the Folsom penitentiary last summer and who is now serving a life sentence, was recently convicted of murder in the second degree. Judge Hart did not impose another punishment, but ordered the prisoner to appear 100 years from that date to receive sentence.

Most Indiana lawyers during the past seventy years have heard the story of Cuppy's recognizance, but the tale has not travelled far out of the State, and, especially since it possesses the merit of truth, it is worthy of perpetuation in a wider field.

When, in 1835, Salamonie township in Jay, then Randolph county, was organized, one Henry H. Cuppy was chosen to sit as the local 'squire. His first case was about a dog. William Bunch had been offended by Philip Brown's dog and brought an action to require the owner to make the animal, which was reputed to be cross, keep the peace. Brown was arrested and brought to the magistrate's log cabin in the woods for a hearing. He admitted the charge, the law was laboriously examined, and an order was entered that the defendant should be bound over to the higher court.

But now the judge was in a great dilemma, for there fell upon him the necessity of drawing a recognizance. After long and diligent search, with the aid of the parties and witnesses, a form entitled "recognizance" was found in the vagrancy act. Cuppy, being but an indifferent scribe, invited the defendant, who had some education, to write the instrument, which he forthwith set himself to do. He soon came to the words "John Doe and Richard Roe" in the form and suggested to the 'squire that they did not seem to fit the case. Cuppy deliberated seriously for a spell and then decided.

"Them words is in the law. I didn't make the law an' I didn't put 'em thar. Ef it ain't right 'tain' my fault. You jest copy that thing like it's printed."

So John Doe was bound over to appear at the next term of court at Winchester to stand his trial for vagrancy on the charge of Richard Roe. The fictitious names of sureties employed in the printed form were solemnly written down and Brown went home. Having written the document himself Brown felt bound by it and in due season appeared for trial, but whether for his own vagrancy or that of the dog does not appear in the record.

A story is told of an eminent lawyer receiving a severe reprimand from a witness whom he was trying to browbeat. It was an important issue, and in order to save his cause from defeat it was necessary that the lawyer should impeach the witness. He endeavored to do it on the ground of age, in the following manner:

"How old are you?" asked the lawyer.

"Seventy-two years," replied the witness.

"Your memory, of course, is not so brilliant and vivid as it was twenty years ago, is it?" asked the lawyer.

"I do not know but it is," answered the witness.

"State some circumstance which occurred, say twelve years ago," said the lawyer, "and we shall be able to see how well you can remember."

"I appeal to your Honor," said the witness, "if I am to be interrogated in this manner; it is insolent!"

"You had better answer the question," replied the Judge.

"Yes, sir; state it!" said the lawyer.

"Well, sir, if you compel me to do it, I will. About twelve years ago you studied in Judge ———'s office, did you not?"

"Yes," answered the lawyer.

"Well, sir, I remember your father coming into my office and saying to me. 'Mr. D———, my son is to be examined tomorrow, and I wish you would lend me $15 to buy him a suit of clothes.' I remember also, sir, that from that day to this he has never paid me that sum. That, sir, I remember as though it were yesterday."—Philadelphia *Ledger.*

OVER in the rookery known as the New York County Courthouse, the clock in one of the trial rooms was being repaired. George C. Barrett, long a brilliant member of the local judiciary, chanced to be in the building at the moment and wandered, for auld lang syne, into the chamber where the chronometer in question hangs and where in former years he had dispensed justice.

"That clock and the repairing of it," he remarked to the attorney who accompanied him, "reminds me of a droll experience I had in this room with the late Counselor Nolan. It occurred shortly after this handsome watch was presented to me." And the jurist rehearsed it.

Nolan, who was one of the most eccentric and plausible of Irish-Americans, had a case on Judge Barrett's calendar, but did not arrive in the court-room until it had been called twice and marked "dismissed." On learning, to his consternation, what had happened, he made an earnest appeal to have the case restored.

"You are more than half an hour late," replied Barrett, pointing to the clock. "It is the duty of counsel who have cases on the calendar to be here when the calendar is called."

"Shure, your Honor, shure it is," said the "barrister," as he called himself, "but that clock there, your Honor, is one of the clocks put in by the 'Tweed ring.' Your Honor won't trust a Tweed clock against an honest man."

When the roar of laughter, in which the judge joined heartily, had subsided, Barrett pulled his new watch from his pocket, and retorted: "But, counselor, I find the clock shows the same time exactly as my watch."

"Thin," exclaimed the counselor, in his richest brogue, "I must make my confession. The reason I was half an hour late is that I was out around the court-house trying to collect the overdue subscriptions for your Honor's beautiful watch."

Nolan's case was put back on the calendar.—New York *Evening Mail.*

THAT well known legal light of the State of Washington, James Hamilton Lewis, is fond of telling of the vicissitudes he experienced during the days when he had first hung out his shingle.

"In Boise City, Idaho," says Mr. Lewis, "I was once called upon to undertake the defense of a Texan who during a visit to our city had in the course of an altercation rather seriously done up one of our prominent citizens.

"During the progress of the trial I observed that our Texan friend seemed not in the least worried as to the outcome. Things looked bad for him and I told him so. Yet he didn't worry a bit. One day I said to him:

" 'My friend, you're taking this matter a trifle too complacently. I desire to impress upon you the fact that there is a very fair chance that you'll be jailed for this.'

"Whereupon, for the first time, the Texan began to evince signs of alarm.

" 'Say, sport,' said he, 'is that right?'

" 'It certainly is,' I replied.

"At this the Texan began to stride about the room, all the time pulling fiercely at his big mustache. Finally he stopped and, bringing down his fist upon the table between us, he yelled:

" 'Then, by hell, I've got to get a lawyer!' "—New York *Press.*

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

Sir:—Does International Law permit neutral nations to supply coal to Japan or Russia? Is coal contraband?

Although the introduction of the use of coal into ships of war began early in the last century, the Crimean war was the first maritime struggle of importance in which such vessels were propelled by steam power. Confronted by new conditions, Great Britain, after stopping coal on the way to a Russian port, applied to that commodity the doctrine of conditional contraband, claiming that it was an article which was employed in a double capacity. When the question arose again in 1859, in the war between Austria and France, the British foreign office warned British merchants that "it appears to Her Majesty's government that, having regard to the present state of naval armaments, coal may, in many cases, be rightly held to be contraband of war, and, therefore, that all who engage in the traffic must do so at a risk from which Her Majesty's government cannot relieve them."

Mr. Lewis Cass, United States Secretary of State, writing in 1859, said on the question whether coal was contraband: "The attempts to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power have no just claim for support in the law of nations; and the United States avow their determination to oppose them, so far as their vessels are concerned." Again, in 1885, Mr. Bayard, Secretary of State, wrote: "It is also to be observed that the fact that certain articles of commerce are contraband does not make it a breach of neutrality to export them. There has not been since the organization of our government a European war in which, in full accordance with the rules of International Law, as accepted by the United States, munitions of war have not been sent by American citizens to one or both of the belligerents; yet it has never been doubted that the munitions of war, if seized by the belligerent against whom they were to be used, could have been condemned as contraband. The question, then, is whether furnishing to belligerents coal and life-shells, which appear to have composed the cargo of the British vessels which gave rise to this correspondence, is a breach of neutrality, which the law of nations forbids. The question must be answered in the negative as to coal, and the same conclusion must be adopted with regard to life-shells, which are said to be projectiles used in the bringing to shore or rescue of wrecks. Under these circumstances, it is not perceived why in the present case the United States authorities should intervene to prevent such supply from being forwarded to the open ports of either belligerent. Even supposing such articles to be contraband of war, and consequently liable to be seized and confiscated by the offended belligerent, it is no breach of neutrality for a neutral to forward them to such belligerent ports, subject, of course, to such risks. When, however, such articles are forwarded directly to vessels of war in belligenert service, another question arises. Provisions and munitions of war sent to belligerent cruisers are unquestionably contraband of war. Whether, however, it is a breach of neutrality by the law of nations to forward them directly to belligerent cruisers, depends so much upon extraneous circumstances, that the question can only be properly decided when these circumstances are presented in detail."

When the British neutrality proclamation, issued upon the outbreak of the War of the Rebellion, came up for discussion in the British House of Lords, the Foreign Secretary (Lord Granville), after referring to articles clearly contraband, said: "There are certain other articles, the character of which, can be determined only by the circumstances of the case"—a remark which seems to have been made more definite by Lord Brougham that coal might be contraband "if furnished to one belligerent to be used in warfare against the other," and by a still more precise statement by Lord Kingsdown, better known as Thomas Pemberton-Leigh, that "if coals are sent to a port where there are war steam-

ers, with a view of supplying them, they become contraband." In accordance with such ideas, coal has been listed by the British Admiralty as "conditional contraband." The same conclusion has been reached by our own government, and the Naval War Code declares coal conditionally contraband "when destined for a naval station, a port of call, or a ship or ships of the enemy."

The United States enjoyed the benefit of the English regulation in the matter of the Geneva award, in which it was held that "if an excessive supply of coal is connected with other circumstances which show that it was used as a veritable *res hostilis*, then there is an infraction of the second article of the treaty."

Germany, going even further than the United States and Great Britain, maintained during the war of 1870, with France, that the English government should not only regard as contraband all cargoes of coal bound for the French fleet in the North Sea, but that all exports of coal to French ports should be prohibited. It should be specially noted, however, that some European countries have always assumed a contrary position. In 1859, France declared that coal was not contraband, and she repeated that assertion in 1870. Among those who upheld her in that contention may be mentioned Russia, who, during the West African Conference at Berlin in 1884, vigorously protested against the inclusion of coal among articles contraband of war, declaring that she (Russia), would "categorically refuse her consent to any articles in any treaty, convention, or instrument whatever, which would imply its recognition" as contraband. But this view appears to have been adandoned, for the Russian rules of war, published officially at St. Petersburg on February 28th last (printed in New York *Times* of 29th), contain the following clause (H. of Rule VI): "Every kind of fuel, such as coal, naphtha, spirits, *etc.*, will be regarded as contraband of war."

LAWRENCE IRWELL.

Buffalo, N. Y., May 5, 1904.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book whether received for review or not.

FEDERAL EQUITY PROCEDURE: A Treatise on the Procedure in Equity in the Circuit Courts of the United States, including Appeals and Appellate Procedure. By *C. L. Bates.* 2 Vols. Chicago: T. H. Flood, and Company. 1901. (lxii.+1409 pp.)

A book published in 1901 can hardly be called a new law book. At any rate it should not call for extended notice, but the genuine excellence of Mr. Bates' work and the further fact, that it has not been reviewed in the columns of THE GREEN BAG may well justify a word of hearty praise.

The abolition of the system of common law and equity pleading has not destroyed the fundamental distinction, even in code States, between law and equity, although a simplified and single form of action has taken the place of the former elaborate and scientific forms of pleading in common law and equity courts. The knowledge of strict common law pleading is admittedly a great and abiding service even in code States, and this is equally true of equity pleading. It is, indeed, truer of the latter than of the former; for equity pleading in its technical provision and refinement subsists in our Federal Courts, uninfluenced by its recent modifications in England, from which the system was derived, and by its non-existence in many of the States of the American Union.

The history of equity procedure in the United States may be given in a few words, preferably taken from Mr. Bates (Sects. 13, 14, 15, 16): "The act of May 8, 1792, authorized the Supreme Court to prescribe rules to the circuit and district courts in suits in equity and admiralty, and this authority was employed and expanded by subsequent

statutes. . . . In March, 1822, the Supreme Court, under the authority given to it by the act of May 8, 1792, promulgated thirty-three rules to be the rules of practice for the courts of equity of the United States. . . . On March 2, 1842, the Supreme Court promulgated ninety-one equity rules . . . which, with a few amendments and additions, are now in force in the Circuit Court of the United States. . . . Equity rule 90, adopted March 2, 1842, is as follows: 'In all cases where the rules prescribed by this Court or the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England as far as the same may reasonably be applied consistently with the local circumstances and the local conveniences of the district where the court is held not as positive rules, but as furnishing just analogies to regulate the practice.'"

The Supreme Court has interpreted rule 90 in the leading case of Thompson *v.* Wooster, 114 U. S. 104, 112 (quoted by Mr. Bates, Sec. 17), which shows to what extent English procedure as existing in 1842 was adopted and the texts (Daniell's 1st edition of 1837 and Smith's Practice, 2d edition, 1837) in which that procedure was recognized as correctly and adequately embodied and expounded. If we bear in mind the vast extent and importance of the cases in the Federal Courts and if we remember that the present English Equity practice has changed since the promulgation of the rules of 1842, so that English treatises on Equity practice can have no great weight with us, the need of such a book as that of Mr. Bates is readily seen—a need hardly met by more than one American book on the subject.

In two introductory chapters Mr. Bates outlines the basis of equity jurisdiction, the system and sources of equity procedure, and passes to a consideration of the parties and places of bringing suit. Then follows a careful and detailed treatment of each step in the bringing and prosecution of a suit up to and including appeals. In each instance the rule of pleading and practice in the English Chancery is considered based upon Mitford (cited as Lord Redesdale), Daniell and Smith. Then follows the rule applied in Federal Courts as based upon or modified by statute, rule of court or judicial decision. In this way, step by step, practice and procedure are carefully, authoritatively and in an interesting manner placed before student and practitioner.

The work is well planned, admirably executed, and lays both bench and bar under a heavy obligation to this intelligent, industrious and thoroughly competent and informed author.

A Treatise on Special Subjects of the Law of Real Property. By *Alfred G. Reeves.* Boston: Little, Brown, and Company. 1904. (lxv+913 pp.)

This volume consists of some portions of a treatise which the author hopes to complete within three or four years. The complete work, which is planned to consist of two volumes, will cover the whole of real property. The parts now ready, and presented in this volume, contain, as the sub-title says, "an outline of all real property law, and more elaborate treatment of the subjects of fixtures, incorporeal hereditaments, tenures and alodial holdings, uses, trusts, and powers, qualified estates, mortgages, future estates and interests, perpetuities, and accumulations." The portions thus taken from various parts of the projected work are complete and useful in themselves and indicate clearly what will be the characteristics of the entire treatise. Either a cursory or a thorough examination of the present volume shows that here is the work of an unusually skilful hand. The materials used are both the old and the new cases, with due recognition of the relative importance today of old and new; and the result is both scholarly and practical. It is quite obvious that the labors of earlier writers have been utilized; but it is also obvious that such use has been thoroughly honest, and that this volume is the result of new labor. The clearness of the style and the carefulness of the analysis and defini-

tions render the volume useful to students; but the needs of students are certainly not unduly emphasized; for example, from their point of view the discussion of the Statute of Uses is disproportionately short, whereas from the point of view of practitioners this discussion accurately corresponds to the present importance of the subject. Indeed, here is a book that any one, whether beginner, practitioner, or teacher of law, can read with unusual satisfaction.

COMMENTARIES ON THE LAW OF TORTS. By *E. B. Kinkead.* San Francisco: Bancroft-Whitney Company. 1903. Two volumes. (xxx+1739 pp.)

As the title page calls this voluminous work "a philosophic discussion of the general principles underlying civil wrongs *ex delicto*," an obvious comment is afforded by the fatal discovery—if the table of cases is to be trusted—that the author is apparently unacquainted with three extremely pertinent cases of the highest consequence and greatest fame, namely Lumley *v.* Gye, 2 E. & B. 216 (1853), Allen *v.* Flood, 1898, A. C. 1, and Quinn *v.* Leathem, 1901, A. C. 495. The work is not useless, nevertheless; for although the author in his preface insists that this is a philosophic treatise and not a digest of cases, he happens to be wrong on both points, and the result is that the profession can find here a respectable guide to decisions—especially to those of recent date. The practitioner, but not the reviewer, may forgive the author for describing his work, both on the title page and in the preface, with unwarranted grandiloquence.

HISTORY OF THE CONSTITUTIONS OF IOWA. By *B. F. Shambaugh*, Professor of Political Science in the University of Iowa. Des Moines: The Historical Department of Iowa. 1902. (vi+352 pp.)

For the lawyer, this enthusiastic account of the origin and development of government in Iowa has at least one chapter of unusual interest. This is the account of the Squatter Constitutions—those rather inartistic and wholly extra-legal regulations whereby the early settlers of a neighborhood protected one another in the possession and ultimate purchase of lands upon which, in defiance of the laws of the United States, they had made their homes before sale by the United States, and possibly before survey, and in some cases even before the Indian title had been extinguished. All forms of extra-legal law are valuable as suggesting the reasons for the creation of government and for the recognition of property; and these Iowa regulations have uncommon claims upon the lawyer because of their completeness and because of their probable influence, as pointed out by Mr. Shambaugh, upon the provisions of the Preëmption and Homestead laws.

THE AMERICAN STATE REPORTS Vols 93 and 94. Containing cases of general interest and authority decided in the courts of last resort of the several States. Selected, reported and annotated by *A. C. Freeman*. San Francisco: Bancroft-Whitney Company. 1903, 1904. (1066, 1047 pp.).

In the earlier of these volumes the cases selected from recent reports in fifteen States cover even a wider range of subjects than is usual in volumes of this excellent series. The following topics are treated in the more important monographic notes: Constitutional Inhibition against Special or Local Legislation where a General Law can be made Applicable; Jurisdiction of Equity to put Party in Possession in aid of its Decree; Extent to which a Litigant may Control a Cause in which he has Appeared by Attorney; Expulsion of Trespasser; Liability to Corporations of Subscribers to their Capital Stock; Liability for Malicious Prosecution of Civil Action; Mode of Taking Advantage of Breaches of Conditions Subsequent; Liability of Physicians and Surgeons for Negligence and Malpractice; Prescriptive title to Water; Liability of Persons Communicating Contagious or Infectious Diseases to Others; and What Contracts with Newspapers are against Public Policy and therefore Void.

CURRENT LEGAL ARTICLES.

"THE Northern Securities Decision" is commented upon adversely by Professor George F. Canfield in an able article in the *Columbia Law Review* for May. Professor Canfield submits that the following propositions may be stated with reasonable certainty:

1. The Northern Securities decision is wrong on principle, involving a wrong interpretation of the Anti-Trust Act and a wrong interpretation of the powers of Congress under the Constitution; and, with all deference, the actual decree rendered, in its full length and breadth, is absolutely indefensible and violative of fundamental principles.

2. The United States Supreme Court, as now constituted, will not carry this decision to its logical consequences. The decision will be recognized, and more and more clearly as time goes on, as a piece of judicial legislation, resulting from the assumed necessity of suppressing what was supposed to be a great evil, and of averting greater evils of a similar character, which it was feared this one might produce.

3. The primary practical result of the Northern Securities decision will be simply that the Northern Securities Company itself will be practically suppressed and all similar plans of merger, if there were any such, must be abandoned; but the actual concentration of power and suppression of competition which the Northern Securities Company was supposed to secure will either continue to exist in the hands of the promoters of that enterprise or of those controlling a still larger combination of railway interests.

4. The Pennsylvania Railway Company, the New York Central & Hudson River Railway Company, and other large railway companies, which have consolidated with or bought control of competing railway companies, are safe from attack by the United States Government under the existing Anti-Trust Act.

5. The large industrial combinations, such as the Standard Oil Company, United States Steel Company and others, are also safe from attack by the United States Government under existing laws.

6. Joint traffic associations between competing railway companies are illegal, even though they provide simply for the maintenance of reasonable rates, because the union of railway companies is supposed to constitute a monopoly.

7. Joint selling agencies and associations for maintaining prices among competing manufacturing or trading companies are legal, if they are in all respects reasonable, and the companies are not so big as to constitute a monopoly. If they do, however, constitute a monopoly, then they are illegal, whether reasonable or unreasonable, because the test of reasonableness does not apply to monopolies. . . .

Some one has said that the Northern Securities decision was not only good sense, but also good law, and for the public welfare. It is respectfully submitted that the law is now good only so far as the Northern Securities Company itself is concerned and cases involving precisely similar facts, that the Government's law was bad both before the decision and since, as the court, while granting the decree asked for by the Government, rejected its legal propositions. As for the public welfare, it may be that the attack upon the Northern Securities combination checked the wild speculative spirit which preceded its formation; but would not natural forces have taken care of that, as they have taken care of Mr. Sully and his cotton bubble, and in times past of all the blowers of speculative bubbles? Whether it will have the effect of preventing the suppression of competition and the maintenance of rates between the Northern Pacific and Great Northern Railway Companies is yet to be determined.

So far as now appears, one of two things seems likely to happen: Either the practical concentration of power and control will remain in the hands of the promoters of the Northern Securities Company, or it will be superseded by a still more formidable concentration of power, namely, by the practical union of the Northern Pacific, Union Pacific and Southern Pacific Companies.

AN interesting discussion of the Merger Case is printed over the initials "J. C. G.," in the May issue of the *Harvard Law Review.* The writer, whom one may guess to be Professor Gray, reduces the case to its lowest terms. He says:

Three Jerseymen, whom we will call Morgan, Hill and Lamont, own each a cart and one horse. Their occupation is the carrying of eggs and chickens from the neighboring farmers to a market town over the New York border. They agree to form a corporation under the name of the Interstate Poultry Traffic Association. The only capital they turn in consists of their horses and carts, except a few dollars contributed to pay for their charter. Are they criminals liable to be fined $5000 apiece and imprisoned for a year?

This simple but typical case seems to serve better to test the doctrines laid down in the Merger decision than the sensational facts which were there actually before the court

There are two questions:

I. Could Congress declare such men to be criminals?

II. Has Congress declared them to be criminals?

I. Congress has full power over interstate commerce. The power to regulate commerce includes the power to destroy it by an embargo or by a prohibitive protective tariff, and such regulation can be enforced by criminal statutes.

Can Congress say to a person actually engaged in interstate commerce: "You shall not dispose of a share in your business in such a way as will put you under a temptation to carry on interstate commerce in a manner we deem injurious to the public?" Would an Act of Congress to that effect be constitutional?

Harlan, Brown, McKenna, and Day, JJ., hold that it would be constitutional, and so, perhaps, does Brewer, J.

Mr. Justice White (with whom it would seem that Fuller, C. J., and Holmes and Peckham, JJ., agree) thinks that it would not.

On this point, the first opinion seems correct, although the dangers of the abuse of the power are so great and so obvious that one reaches the conclusion with reluctance. . . .

II. Has Congress declared them to be criminals?

What does the Statute make criminal? *First:* It makes criminal "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." *Secondly:* It declares 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" shall be deemed guilty of a crime.

The prevention of competition is not criminal unless it is a restraint of trade or a monopolizing.

A contract in restraint of trade is something well known to the common law. It is a contract by which a person carrying on a business agrees with another to abandon or restrict that business.

Monopolizing a business is excluding outsiders from carrying on the business.

In our typical case, and in the case of the Northern Securities Company, there was no contract by which a person or corporation abandoned or restricted his own business. If a junction of interest is a restraint of trade, then two expressmen who have been carrying on business between the city of New York and Jersey City became criminals by forming a partnership. Such an intention is not to be lightly attributed to a respectable legislative body like Congress.

Neither was there any monopolizing of the business. If our egg-collectors had combined to drive or keep another person off their route, they would have violated the Act. If the Great Northern Railway Company and the Northern Pacific Railway Company had combined to keep another railroad out of the territory which they served, that would have been a monopoly.

Therefore, if it is an open question, the opinion of Judge Holmes, and of the judges who agreed with him, that there had been no violation of the Statute, seems the better.

Perhaps the position of Judge Brewer is the most significant feature of the Merger Case. He was with the majority of the Court in the Traffic Association Cases, and to the correctness of the result in those cases he adheres. He would, therefore, it is presumed, still hold that a contract limiting competition in interstate commerce, although neither a common law contract in restraint of trade nor a monopoly, might be within the Statute; but now, apparently shocked by the possible result of a doctrine which might send to prison two expressmen who had formed a partnership to carry between two towns in adjoining States, or the brakemen on an interstate railroad who had struck for an eight-hour day, he energetically declares that, in contradiction to what was said in the Traffic Association Cases, an agreement, in order to violate the Statute, must be in unreasonable restraint of trade.

Now that Judge Brewer has, in so marked a manner, repudiated the doctrine which was the ground of the opinions in the Traffic Cases, where he was with the majority, and that Judge Peckham, who delivered these opinions, is one of the minority in the Merger Case, the Traffic Association Cases must be considered, to speak familiarly, as having received a black eye, or rather two black eyes.

The Statute is still capable of being abused, but from the worst abuses the Supreme Court, as at present, constituted, will protect the community, and we can join in Judge Holmes' expression of satisfaction that only a minority of the Court adopt an interpretation of the statute which "would make eternal the *bellum omnium inter omnes* and disintegrate society as far as it could into individual atoms."

"THE Panama Situation in the Light of International Law" is the subject of an exhaustive article by William Cullen Dennis in the *American Law Register* for May. The Panama controversy arises under the thirty-fifth article of the treaty of 1846 between New Granada and the United States, this treaty being "in full force between the United States and Columbia" when the recent revolution took place. To quote from the paper before us:

Three substantive propositions seem to be laid down in the thirty-fifth article, *viz.:*

1st. New Granada guarantees to the United States the free and open transit of the Isthmus by all present and future means of transportation.

2d. The United States guarantee to New Granada the neutrality of the Isthmus to the end that the free transit may not be interrupted.

3d. The United States guarantee the sovereignty and property which New Granada has over the Isthmus.

After a detailed consideration of the puzzling questions which have arisen under article thirty-five the writer says in conclusion:

Summarizing the results of our investigations as to the proper construction of the thirty-fifth article of the treaty of 1846, it is submitted that they establish the following propositions:

1st. The guarantee of the sovereignty and property of New Granada over the Isthmus of Panama does not bind the United States to defend this sovereignty against domestic insurrection even if the revolution should result in the independence of Panama.

2d. The United States do guarantee the sovereignty and property of New Granada over Panama as against foreign powers, European or American.

3d. New Granada guarantees to the United States and their citizens the right of free transit over the Isthmus. This imposes upon New Granada the primary duty to maintain this freedom of transit.

4th. The United States guarantee the neutrality of the Isthmus in order that free transit may not be interrupted. This guarantee is effective against any interruption of the transit whether proceeding from domestic

difficulties or foreign wars.

5th. This guarantee is both a benefit and a burden to each of the contracting parties and may therefore be enforced on the initiative of either.

6th. Although the United States may enforce this guarantee, unasked, they must do so subject to the paramount rights of sovereignty and self-defence which are reserved to the local sovereign since nowhere expressly granted away.

7th. The ordinary rights of every nation to safeguard its interests and to seek redress for the violation of treaty rights are limited by the provision that neither party shall resort to self-help on account of any supposed violation of the above treaty rights until a statement of damages and a claim for redress has been made to the opposite party without obtaining satisfaction.

Applying these conclusions of law to the well-known facts of the revolution in Panama, we see that the United States were not bound to put down that revolution at the request of Colombia; that the United States were acting within their treaty rights in landing men to preserve the freedom of transit whenever it seemed necessary, with or without the permission of Colombia, but that the treaty does not give the right to the United States to exclude the forces of their ally and co-guarantor from her own territory because the presence of these forces is likely to render the task of the United States more difficult; and that the United States were therefore technically not justified by any or all the provisions of the treaty in preventing the Colombian soldiers at Colon from proceeding to Panama on the morning after the revolution. This was an act of political intervention; its justification must be found in considerations of ethics and expediency. It cannot be found in law.

"THE Latest Decision at The Hague" is commented upon by Edwin Maxey, Professor of International Law at the University of West Virginia, in the *Yale Law Journal* for May. Professor Maxey says:

The issue in the case before the Court was clearly this: Is a resort to force such a meritorious thing that it gives to the nation or nations resorting to it early a preferred standing in a Court created for the purpose of maintaining international peace and justice? The Allied Powers maintained the affirmative and the others, to wit: Holland, Belgium, Norway and Sweden, Denmark, Spain, Mexico, Venezuela, France, and the United States maintained the negative of this issue. Never before has a lawsuit included so many important nations as parties litigant.

It is difficult to see how a court established for the purpose of furthering the peace of the world could decide this issue in the affirmative and thus put a premium upon violence. But such was the decision of the court. A glance at the make-up of the committee of judges will help us somewhat in understanding the decision handed down by them. . . . It is natural that both the Russians and the Austrian should bring to the bench full-grown convictions as to the efficacy of force as a factor in the government of mankind and not equally enlarged conceptions as to the rights of weaker nations. .

Apologists for the decision attempt to justify it upon the ground of an analogy between the preferences given in courts of law to judgment creditors over ordinary creditors and the preference given in this case to the Allied Powers over the Peace Powers. At first blush this analogy seems sound. But let us examine it a little more closely. Whatever preference a judgment creditor has over his fellow-creditors he has secured not by forcibly seizing his debtor by the throat or by seizing or destroying or threatening to seize or destroy his property and thus compelling him to sign an agreement under duress, but rather by virtue of the fact that he has submitted his claim for judicial adjudication and has in advance of his fellow-creditors established the fact that he has a valid claim. Had the Allied Powers secured an award from an arbitration tribunal, while the other creditor nations were doing

nothing, they could then with reason claim a preference in the payment of the amounts due them. They would then stand in a position analogous to that of judgment creditors. . . .

If we were to admit that technically the law would permit of the decision rendered in the present case, we should still be forced to insist that the equitable rights of the parties demanded a different decision. The Court evidently took the view that it was a court of law only and not a court of equity as well. This is most unfortunate and will be especially so if it is followed as a precedent for future decisions. For, if this is not to be a court of equity as well as of common law jurisdiction, what provision is left for equity jurisdiction in the field of international justice? If there is in municipal law need for a "correction of that wherein the law by reason of its universality is inadequate," there is certainly an equal, if not greater, need for it in international law. Had the equities of the case been considered, the Court would not have held that the protocol of February 15th executed under duress was a sufficient basis upon which to rest a decision, and particularly as one of the conditions upon which the case was submitted to the Court was that said protocol should not be considered binding. That such is the fact appears from an impartial study of the negotiations.

Viewing the case as a whole, this much is certain: That if adherence to the rules of international law necessitated the decision rendered in this case, then there is an imperative need of a conference of the nations to amend the law upon this point. For it is inconsistent and irrational to hold, as civilized nations do, that peace is a thing to be fostered and at the same time enforce a rule in a peace court which encourages a resort to war.

"Foreign Investments in Time of War" are discussed by Robert Agar Chadwick, in *The Quarterly Law Review* for April. He says:

Whatever dangers war may have in store for the foreign investor, there is now little fear of his property being confiscated by the enemy State. Within recent years the old right of confiscation has only once been exercised, namely, by the Confederate States in 1861. Not only was the act condemned in Europe and in America, but sales under it have been held void. If the right still exist, "it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times."

Clearly, if the State do not confiscate the debenture loans and shares it would be grossly unjust to allow private individuals to do so. The law has never permitted this, and indeed it has been laid down in the United States that "war does not confiscate debts or property for the benefit of debtors or agents, but only suspends the right of action."

The two most important questions for a debenture-holder are:—

(1) Will he be in danger of losing his principal owing to the Statute of Limitations running during hostilities?

(2) Will he be able on the restoration of peace to sue for arrears of interest accrued on the debenture during hostilities?

With regard to the first question the Supreme Court of the United States in Hanger *v.* Abbott, after expressly considering the effect of the English statute 21 Jac. I. c. 16 and all the cases bearing upon the subject, held that

"Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period."

This principle has been followed in other American cases, but according to the English text-books it would appear that a different rule prevails in this country. . . . In spite of the text-books it is conceived that should the question really come before an English

tribunal, it would be held that the Statute of Limitations does not run during hostilities

With regard to the second question raised, unfortunately there are no opinions or decisions directly in point; but a few American cases require careful attention, as they deal with the legality of claiming after war interest accrued on debts during it. . . .

The point which it is desired to make is, that when interest is stipulated on an instrucent till maturity, that interest should be payable in any event. The interest up to maturity is the consideration for the immediate use of money, not for any forbearance to sue, as no suit can be brought till then, except perhaps in certain special cases provided for in the deed or instrument. If the loan matures during the war and there is no agent to whom payment can be made, it is submitted that the correct view to take is that interest should run up to that date and then cease. Such a view is not in any way repugnant to the principles laid down in the *dicta* of the judges, though it is not sufficiently emphasized in Brown *v.* Hiatts, [15 Wall. p. 177], and is to a slight extent at variance with the judgment in Hoare *v.* Allen, [2 Dall. p. 102].

Should this doctrine meet with approval, then the effect on debentures is most important. Sometimes debentures are redeemable on demand, as when they are given to a bank to secure the company's overdraft, but usually they are redeemable at some fixed date, such as five, ten, or twenty years from the date of issue, or upon the happening of certain events specified in the debenture or in the trust deed. It is submitted that in spite of the outbreak of war, interest will run up to the time fixed for payment. A difficulty may arise owing to a clause which is commonly inserted in debentures, whereby an option is given to the company to redeem at a slight premium at any time upon giving a certain number of months' notice. In such a case a company by giving notice just before the war might prevent interest running on debentures held by enemy persons. What the result of such action would be it is difficult to say, but it is possible that the Courts would refuse to recognize the validity of such notices, if they were clearly shown to be given only for the purpose of depriving the enemy debenture-holders of their interest and not in the ordinary course of the company's business.

As regards perpetual debenture stock it is conceived that the interest thereon will continue to run throughout the war.

In considering the effect of war upon commercial relations most of the jurists merely say that executed contracts are suspended so far as the right of action is concerned, executory contracts abrogated, and partnerships between enemies dissolved. . . .

It has already been submitted that a shareholder must continue to hold his shares. It is now submitted that he must remain a shareholder in fact and not only in name, and that he will be entitled to profits made and liable for losses incurred during the war.

THE "Obeah" in Jamaica is the subject of an interesting paper by S. Leslie Thornton in current number of the *Journal of the Society of Comparative Legislation.*

Regarded by those who believe in him as a sort of go-between them and the Evil One, the obeahman is usually nowadays only applied to when his clients are anxious to accomplish some unlawful desire, or to be relieved from some evil which a personal enemy has induced the Evil One to inflict on them. A common occasion on which resort is had to an obeahman is when there is some pending litigation, civil or criminal. In such cases one of the parties approaches the obeahman with the view of getting him to exert his influence over the other party or his witnesses, or even the police or the judge, and so to bring success to his side. Some unmeaning ceremonies are solemnly gone through, a little gibberish talked, and after some special instructions suited to the needs of the case are given, the obeahman takes his fee. . . .

To put a "duppy" or an evil spirit upon a person is the commonest form in which an

obeahman is credited with exercising his power; and as he is believed to be able to put a "duppy" on a person, so it follows that another of the trade has to be called in to exorcise the "duppy" so called into being. It is difficult in these cases to say whether the obeahman professes to act as a person in league with the Evil One, or rather as a medicine-man or ignorant quack. He frequently prescribes decoctions, usually harmless, of his own brewing from the native herbs that grow in the bush round his hut, as part of his treatment, but it appears to be essential in all cases that certain absurd ceremonies and incantations should be gone through; and it is to these latter rather than to the medicines that the patient looks for his cure. . . .

A gruesome case now under investigation affords an extreme illustration of the obeahman's mode of treatment in cases of this nature. The original statements on which the police took criminal proceedings, bald as they are, will tell the story better than any description of my own.

James Bailey stated: ". . . Mrs. Tyson asked me, 'What is the matter with the girl?' I replied, 'She is sick with pain in her head,' and she say that two women duppies are on her. Mrs. Tyson replied, 'I will get her better if you pay me 12*s*.' I consented, and paid her the 12*s*. Then she sent Thompson to a shop to buy a white pocket-handkerchief and a vial of ink and a quart of fine salt. When Thompson came Mrs. Tyson opened the vial of ink and poured it down Sarah's throat, then take the salt, scrubbed her head, face, and the bottom of her feet with it, and said, 'The ink and salt will make the duppies leave your sister.' Before doing this Mrs. Tyson and a tall man named Pa-Pa flogged my sister severely in the head and all over her body with some green lime and redwood sticks about the size of my finger and about a yard in length. . . . She gave her about eight floggings and wet her during the day and night. I saw Sarah sitting on the floor in Mrs. Tyson's house. She looked excited and weak. . . She grew worse after we reach home. She could not take anything to eat or drink, and continued in that condition until she died about 4 p. m. on September 23d."

Robert Samuels, while telling the same story, adds that after the payment of the 12*s*. "Mrs. Tyson took up a Bible and read it. After that, they sing, and whilst they were singing Mrs. Tyson began the flogging. After the flogging they put her (Sarah) in the sun to stand from about 12 noon until about 4 p. m. . . . On September 14th Mrs. Tyson sent Thompson to buy a tin of blacking. She and Pa-Pa took it and blacked Sarah's face with it, giving her some to eat. On the night of September 15th Mrs. Tyson called Sarah to prayer. She was stubborn and would not move. Mrs. Tyson and Pa-Pa held Sarah by her feet, turned her head down, and dropped her on her head, and wet her. Whilst Mrs. Tyson wetted her Pa-Pa placed one of his feet on her neck to keep her down. After they wet her, they left her same place lying on the floor until next morning." . . .

Other purposes for which the services of an obeahman are requisitioned are those in which some supernatural aid or protection is needed to ensure success in some lawful object. I remember one case in which an obeahman was asked to ensure a man's horse winning a race that it was being trained for. The measures recommended, however, after the fee was paid, were so absurd that the owner of the horse became indignant, and instead of following them reported the rascal to the police. In another the obeahman advised a young woman how she could get married to the gentleman she wanted. In the same way he is constantly being called in to advise how best a man's growing crops can be protected from the depredations of the prowling thief. In many a provision or vegetable ground I have seen suspended from a tree an old pint bottle, containing probably dirty water, or placed on the ground an old tin with some such relic in it as a bone or a rag. It seems hardly credible that the thieves, who in spite

of possible duppies and other terrors of the darkness will venture out on a marauding expedition, will be deterred by any such trumpery expedients; but there is no doubt they have a wonderful efficacy. When some years back I was on a visit to Granada, where obeahism was apparently quite as rife as in Jamaica, a magistrate there seriously assured me that his small cocoa plantation was systematically robbed until he had somewhat ostentatiously called in the aid of a local obeahman. This professor solemnly perambulated through the plantation, hung up a bottle of rainwater here and there, invoked curses and other evils on any future thief, and from that moment the depredations ceased.

"THE Teaching of Sir Henry Maine" is the subject of an inaugural lecture delivered at Oxford, March 1, 1904, by Paul Vinogradorff, and printed in the April number of the *Law Quarterly Review*. After a keen analysis of Maine's conceptions and a review of the influences which acted upon him, the article continues:

The topics which had the greatest attraction for Maine and those in regard to which his ideas, though contested and modified by later researches has been most fruitful, are, of course, the comparative history of kinship and of property in land. His views in this respect are so well known and so often quoted that I may be allowed to confine myself to mentioning his guiding principle, namely, that the development of law in this domain has to start not from the notion of the individual, of individual rights and duties, but from the notion of the group, first, the kindred, then the village community and admitting gradually and with considerable opposition individual rights within its sphere.

I may say once more that my object is not to analyse or criticize single doctrines, but to determine the points of view, and I think that even on the strength of our very brief survey we are entitled to state a few propositions as substantial in Maine's teaching, and, at the same time, as material for the conception of comparative jurisprudence even in its present state.

1. The study of law is not merely a preparation for professional duties and an introduction to the art of handling professional problems. It may also be treated as a scientific subject.

2. Two methods of scientific investigation may be applied to the study of law: the method of deductive analysis on the basis of abstractions from the present state of legal ideas and rules, and the method of inductive generalization on the basis of historical and ethnographical observations.

3. In the domain of inductive jurisprudence, law appears as one of the expressions of history, and history is taken in the wide sense of all knowledge as to the social evolution of mankind.

4. Insomuch, as every science ought to be directed to the discovery of laws, that is general principles governing particular cases, the historical method of jurisprudence is necessarily a comparative one.

I enumerate these articles not because they are new, but because I believe them to be true and am ready to subscribe them. They are comprehensive and efficient at the same time and ought to give a lead to many generations of searchers.

IN the *Michigan Law Review* for May John C. Donnelly of the Detroit Bar discusses "One Phase of Federal Power under the Commerce Clause of the Constitution"—that phase being the control of navigation—and considers especially the recent case of Scranton *v.* Wheeler, 179 U. S. 141, in which "the court, by a majority opinion, reached the conclusion that by virtue of its control of the navigable waters, the Federal Government might take possession of the bed of a stream where the water was too shallow for navigation, excavate a navigable channel through the same, mark the lateral lines thereof by permanent piers extending above the surface of the water, and of great length, and prevent the owner of the upland from enjoying his common law right of access to navigable

water, even though by the law of the State he owned in fee the bed of the stream, and it could do all this without making him any recompense, although the effect of it might be to entirely destroy the value of his property."

The doctrine declared in Scranton v. Wheeler (says Mr. Donnelly) in substance is that (1) The title which the riparian owner has in the submerged land is one limited, and qualified, and subject to the public right of navigation, even though the water be not deep enough at the point in question for practical use in commerce, and that Congress may take possession of the submerged land, and dig and remove the same for the purpose of creating a new and artificial channel. (2) That the right of access which attaches to the ownership of the upland may be wholly destroyed and the use of the upland rendered in a sense valueless. . . .

In a broad general sense, the provisions of the Constitution of the United States may be grouped into two grand subdivisions:—

(*a*) Those containing grants of power to the different departments of the Government.

(*b*) Those which might be called restrictive or protective provisions, by which the rights of persons and individuals are conserved, and which operate as limitations and restrictions upon the power of the government under the granting clauses.

The commerce clause of the Constitution comes within the first class. It makes a distinct grant of power, and its absence would have left the Federal Government with no jurisdiction or control over the subject matter. Provisions such as the Fifth Amendment, and those relating to personal liberty and the private rights and privileges of individuals, as well as those intended to preserve the social and political rights of citizens, constitute the second class, and have for their great purpose limitations and checks upon the exercise of the powers granted by the other clauses. It should be deemed a cardinal principle of constitutional interpretation that those grants of power, when applied to the subject of private rights, and of private property, and when in the exercise of power thereunder, the government comes in contact with the rights of individuals and rights of property, should first be measured up with those provisions of the second class, which have for their purpose the limitation of power and the conservation and protection of private rights, and, instead of a broadening and enlarging rule of interpretation being applied to the grant of power, by which many injuries are inflicted, such rule of interpretation ought to be applied to the protective and restrictive clauses.

THE May issue of *The Yale Journal* contains an able article by Frederick R. Coudert, of the New York Bar, on "Judicial Constitutional Amendment as Illustrated by the Devolution of the Institution of the Jury from a Fundamental Right to a Mere Method of Procedure." After noting the interpretation of the Constitution by the Supreme Court which has kept it "so closely in touch with modern ideas that our institutions have been gradually modified, and although they have perhaps ceased to be in accord with the ideas of the framers, they have become suited to the opinions of today," Mr. Coudert says:

This general tendency by which the Constitution is being constantly brought, as the French say *en rapport* with existing ideas, is no where, I believe, so well instanced as in the evolution of jury trial from a fundamental right into a mere method of procedure.

This proposition which, I believe, can be established by the examination of the cases on this subject in the Supreme Court of the United States is:

A right secured to the people by the Constitution in most positive language, treated by the framers of the Constitution, by the original State Constitutions, and by the public opinion of the time as a sacred and fundamental right, has in the course of a hundred years been relegated to the rank of a mere method of procedure. . . .

This important change has been accomplished without any formal amendment to the Constitution, but wholly under the guise of judicial interpretation. It has not been

brought about on any theory that the language or intention of the framers of the Constitution was ambiguous, but because the Court considered that law being a "progressive science," the opinion of today, not the intention of the framers, should fashion constitutional law.

What we have said has not been intended in any way as criticism, or as the slightest reflection upon the judicial knowledge, acumen and intellectual integrity of that great tribunal. In deciding as they have done it may well be that they have acted wisely and for the best interests of the nation. It is, however, necessary that we lawyers should appreciate exactly what is taking place in the domain of constitutional law; by comprehending the nature of the process and its results we are in a position to criticise intelligently at least, and criticism where lawyers are concerned is a law of life. . . .

The fact that we have written Constitution is an accident of our history. But we have developed and changed it no less radically and, perhaps, more so than the English have done their unwritten customary Constitution. This result has been reached wholly through the medium of judicial decision, save in the case of the three amendments following our civil war and designed to perpetuate its results.

But these judge-made changes have usually been in accord with and due to the spirit of the age; the Court really doing little more than registering the modifications of the national common consciousness. Hence, these changes in most cases have passed unnoticed. . . .

The respect heretofore shown by our people for the Constitution, and the almost veneration with which they have regarded it, is in itself a sentiment that must be fostered and preserved, as the utility of the Constitution and its endurance must depend upon the existence of such a feeling. Destroy that conservative sentiment and the Constitution itself would be of little value.

"THE Validity of Legislation limiting Hours of Labor" is discussed by *The Central Law Journal* (May 6), which says:

The only legal justification for such legislation which has been advanced with any degree of seriousness is that it is a legitimate exercise of the police power of the State in an attempt to promote the general health of the community. At this point, however, the advocates of the constitutionality of this character of legislation make their first fundamental error. The Legislature has the undoubted right to make all proper regulations designed to promote the health and safety of the community so long as they do not *prohibit* any legitimate business or interfere with any of the personal or contract rights of the citizen the exercise of which do not affect injuriously the interests of the public or any part thereof. . . . But a Legislature is not concerned with the man's use or abuse of himself so long as his actions do not injure others. The individual should be the keeper of his own conscience in regard to such matters. This is the fundamental and underlying conception of the right of personal liberty. . . .

In view of these considerations it is quite apparent that under ordinary circumstances, it would be a clear usurpation of power on the part of the Legislature to attempt to regulate the hours of private employment, and such a law is no more unreasonable than one defining the number of hours a man may sleep. . . . However, the best considered cases recognize the distinction to be observed in all this class of cases, *i. e.*, that as long as a man is not threatening injury to others he may toil as long as he pleases at any employment he pleases without interference on the part of the State.

IN the *Columbia Law Review* for May, Professor John H. Wigmore, of Northwestern University Law School, gives an interesting "Brief History of the Parol Evidence Rule" —or rather of a part of that rule.

The inquiry (says Professor Wigmore) is this. The modern rule being that when the

parties have embodied a transaction in a document, the writing is indisputable as to the terms of the transaction, how far back in our history does this rule go, and what were the circumstances of its origin and development? . . .

Our primitive system knew it not. Only towards the end of the middle ages does it come into being; and only in fairly modern times does it gain complete recognition. Its history falls, by a rough division, into three periods, I. from primitive times till the vogue of the seal in the 1200s; II. then, on English soil, till the staute of frauds and perjuries, in 1678; III. and thence, its modern recognition.

I. In the primitve Germanic notions of the time of the barbarian invasions and under the Merovingian and Carlovingian monarchies, there was certainly no notion of the indisputability of the terms of a document. . . .

In this stage, then, the *carta* merely plays a convenient part, first, by enabling the formal delivery of the land to be made symbolically away from the premises, and, next, by preserving against future forgetfulness the names of the witnesses. The important and unquestionable fact is that the tenor of the writing does not legally and bindingly establish anything. . . .

II. The rise of the seal brings a new era for written documents, not merely by furnishing them with a means of authenticating genuineness, but also by rendering them indisputable as to the terms of the transaction and thus dispensing with the summoning of witnesses. The vogue of the seal and of the transaction-witness wax and wane, the one relatively to the other. This legal value of the seal was the result of a practice working from above downwards, from the king to the people at large. It is involved, in the beginning, with the principle that the king's word is indisputable. Who gives him the lie forfeits life. The king's seal to a document makes the truth of the document incontestable. This leads, along another line, to the modern doctrine of the verity of judicial records,—to be noticed later. Here, for private men's documents, its significance is that the indisputability of a document sealed by the king marked it with an extraordinary quality much to be sought after. As the habitual use of the seal extends downwards, its valuable attributes go with it. First, a few counts and bishops acquire seals; and then their courtesies are sought in lending the impress and guarantee of their seal to some document of an inferior person, as serving him in future instead of witnesses. Finally, the ordinary freeman comes usually to have a seal; and his seal too makes a document indisputable—at least, by himself. This extension of the seal begins in the 1000s, and is completed by the 1200s. Thus the old regime of proof by transaction-witnesses disappears by degrees; by the 1300s they are almost superfluous. . . .

For mercantile contracts, the advance seems to be settled by the 1300s. But for land-transactions there is more tardy progress. . . . By the time of Coke's Commentary upon Littleton and of Sheppard's Touchstone, by the 1600s, on the whole—the modern rule of indisputability is established for all transactions affecting reality. . . .

But, meantime, what of the theory of the rule? At the outset, in the Anglo-Norman times, as already noticed, it arises merely as a testimonial rule; the writing replaces the transaction-witnesses as a mode of proof. But in its modern shape it is a constitutive rule; the writing itself is operative; the writing is the act, not merely one of the possible ways of proving the act. By what sequence of ideas was this transaction of theory effected?

(1) At first, the new principle appears merely as a waiver of ordinary proof, permitting the substitution of another. The man who has sealed a document is not allowed to bring his transaction-witnesses or his compurgators to prove what the transaction really was; he has in advance waived this right. . . .

(2) Alongside of this theory, but playing gradually a more important part, was the theory that a transaction of one "nature" cannot be overturned by anything of an in-

ferior "nature." This is the real lever which helps on the progress to the modern idea. But it appears early, and apparently as a borrowing from the Roman law. . . .

III. However, one step still remains to be taken. As yet—say, in the 1500s—this theory is applicable to "matter of a higher nature," *i. e.*, specialties, sealed documents, and not to writings as such. How and when did this last extension of ideas occur?

The Statute of Frauds and Perjuries, in 1678, seems to mark the modern epoch's full beginning. . . .

The significance of the statute for the present purpose, then, was in the main, first, that it abolished the practice of creating estates of freehold by oral delivery of seisin only, and, secondly, that it permitted the required document (for leases) to be a writing without seal. . . . The scope of these provisions was limited; but their moral and logical influence was wide and immediate. The statute now began to be appealed to, in all questions of "parol evidence," as setting an example and typifying a general principle.

The important consequence was that for that great mass of transactions which were not affected by the statute, but were none the less put into writing by the parties, though not sealed—*i. e.*, transactions for which by the older idea the writing would merely have benn "evidence,"—the writing now came to be treated and spoken of as the constitutive thing. The modern view had come into complete existence; and the period of this seems to be about the end of the 1600s.

"Accord and Satisfaction" is the subject of a scholarly discussion by Professor Samuel Williston in the May number of the *Harvard Law Review.* On one phase of the question Professor Williston says:

It seems obvious that nothing can operate as a satisfaction unless both debtor and creditor agree that it shall, but there is one commonly recurring state of facts where this principle seems to be lost sight of by many courts. The case is this: A debtor sends to a creditor whose claim is unliquidated or disputed a check with a letter stating that the check is sent in full satisfaction of the claim, and that if the creditor is unwilling to accept it as such he must return it. The creditor takes the check, but immediately writes a letter stating that he refuses to accept the check as full satisfaction, but will apply it in reduction of the indebtedness. Upon these facts the English Court of Appeal held that there was no satisfaction of the cause of action, and a few jurisdictions in the United States have made the same ruling. But the great weight of authority in the United States is to the contrary. It is said that the acceptance of the check necessarily involves an acceptance of the condition upon which it was tendered.

If the parties are dealing orally with one another and the debtor offer the creditor a check in full satisfaction which the creditor takes, it must be inferred that he assents to the terms. If the creditor refuses to receive the check in full satisfaction and yet takes it, either he must have assented to the terms, or the debtor must have assented to the creditor's refusal, for the voluntary giving of the check by one, and the taking it by the other, if neither misunderstood the words that were spoken, necessarily indicate assent, and it becomes a question of fact, what the bargain was to which they assented. But if the debtor laid down the check and departed, saying, if this is taken it is full satisfaction, it is hard to see why the creditor may not steal or convert the check. Doubtless, if he take the check, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent, and even if he indicate by some act or word at the time that he takes the check that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is an expression of assent unless informed to the contrary. But if as soon as the check is taken, notice is promptly given to the debtor that it is not taken as satisfaction, it seems impossible to find the elements of a bargain. The most forcible argument upon the other side is that the

creditor should not be allowed to assert his tortious conversion of the check, though the effect of such a ruling is to fix upon the creditor a bargain which he never made. The case of sending the check by mail is essentially the same as that just discussed, in that the creditor is given the power in fact to take the check without making an agreement with the debtor, though forbidden to exercise such power.

THE following classification of labor in Roman Law is given by Sir John Macdonnell in an article on the "Classification of Forms and Contracts of Labor" in the current issue of the *Journal of the Society of Comparative Legislation:*

Many of them are based on the Roman law. The bulk of the work performed in modern times by laborers and artisans was in ancient Rome done by slaves, who were let out by their masters. Their *operæ*, or *fructus*, were viewed in much the same light as the produce of machines, tools, hands, *etc.*, let out to hire. Labor by freed men was common; and it was often an implied term of emancipation that the slave should perform certain services for his former master. In the *Digest* are references to some of the problems which now occupy our Courts. But, for the most part, Roman lawyers dealt with questions as to work and labor which are now of little importance. The texts relating to the rights and duties of masters as to wages and hours of work are brief, few, and imperfect. In Roman law the hiring of land and the law of master and servant are alike treated under the head of *locatio-conductio.* Contracts for the labor and service of freemen for reward fell under the sub-divisions—*locatio-conductio operarum* and *operis.* As the landlord was the locator of a farm and the lessee the conductor, so the servant was the *locator operarum*, and the master the *conductor operarum.* If a workman had to do something in respect of goods or chattels supplied to him—*e. g.*, if he had to weave materials into cloth—he was called *conductor operis*, and the owner of the materials was *locator operis.* Another peculiarity of Roman law arising from the prevalence of slave labor was the distinction between *operæ illiberales* and *operæ liberales;* the former being the subject-matter of a contract *locatio-conductio operarum*, the latter not. According to Roman law—and the same is true of some modern codes—the contract of work and labor was treated as *locatio-conductio* or *mandatum*, according as the service was menial, mechanical, or intellectual, remunerated or gratuitous.

IN an article in the *Law Magazine and Review* for May on "The Right of the Subject to Personal Liberty in English Law," S. P. J. Merlin has this to say concerning villeinage and slavery:

Early in the reign of George III., there arose cases which drew much attention to the *status* of negro slaves in this country. The history of the various forms of servitude prevalent at different periods in our history is rather obscure. One of the many effects of the Conquest was to improve the condition of the Saxon *theows.* Until the Norman period the lot of this class was practically the lot of slavery, but hereafter the Normans, by totally disregarding the degrees of English dependence, raised the *theows* to a common level with the general body of *villeins.* During the Middle Ages villeinage gradually fell into desuetude, but was not finally and legally abolished until the decision in the aforementioned case of Pigg *v.* Caley. Traffic in English slaves in England was at an early date discountenanced by the Church. Owing chiefly to the benign influence of the Church, slavery as an institution gradually became obsolete in English law, though it was never abolished by any statute. In fact, the decision in the case of the negro Somersett was grounded more on policy than on express enactment. The essence of Lord Mansfield's famous judgment in Somersett's Case is, "that the state of slavery is so odious that nothing can be suffered to support it but positive

law; this state of slavery is neither allowed nor approved by the law of England, and therefore the black must be discharged." A few years prior to this, 1762, it had been held in the case of Shanley *v.* Harvey, "that as soon as a man sets foot on English soil he is free, and that he may have a *habeas corpus* if restrained of his liberty by his master." It must be noticed that these judgments only referred to cases where negro slaves were brought to England by their masters, and therefore claimed their freedom as Somersett and Harvey had done; if they omitted to establish their freedom, upon returning voluntarily to a country where slavery was legal, they reverted to their former condition of slavery. Their stay in England only put their liberty, as it were, into "a sort of parenthesis."

IN a second paper, printed in the *Michigan Law Review* for May, Professor H. B. Hutchins of the University of Michigan, continues the discussion of "The Physician as an Expert." He says, in part:

The competency of a physician to testify as to facts simply and also in the capacity of an expert is, at the present time, very largely affected by statutes that have in view the protection from disclosure of confidential communications between physician and patient. The common law affords no such protection. By the common law, a physician is not incompetent to give his professional opinion based upon facts learned by him while attending a patient professionally. . .

It is probably correct to say that, under the more recent rulings, whatever is communicated to the physician by the patient, and whatever is learned by the physician through his examination of the patient, while the professional relation exists, is privileged, if it would ordinarily be regarded from the medical point of view as information necessary to a comprehensive understanding of the case, even though some part of the information may not have been absolutely necessary for the proper treatment of the case.

The statutes usually in terms extend their protection to information that the physician may have acquired while attending the patient in a professional capacity. And the courts have very generally, and perhaps without exception, held that information gained through seeing or examining the patient, is quite as much within the protection of the statute as information communicated by the patient to the physician. . . .

The privilege arising out of this legislation is the privilege of the patient. The statutes have been enacted for his protection. It logically follows, therefore, that he may, if for any reason he desires to do so, waive the protection that has been extended to him. Some of the statutes provide expressly that the privilege exists unless waived by the patient. Others, and perhaps most of them, are silent in regard to the matter of waiver. But the right of waiver undoubtedly exists independent of any statutory provision in regard to it. . . .

Yet the circumstances may be such as to require the physician to refuse to testify excepting by direction of the court. If the patient concerned is not a party to the litigation and is not, therefore, so situated as to be able to interpose an objection, it is undoubtedly both the professional and legal duty of the physician to refuse to disclose confidential matter until directed to do so by the court. . . .

But while it is improper for the trial court in its instructions to the jury to give special prominence to the testimony of experts, the opposite extreme of disparagement should be avoided. It has been held to be error for the court to discredit the testimony of experts by charging that expert opinion is frequently unsatisfactory and in many instances unreliable, giving reasons, or that it is not evidence of as high a grade as the testimony of credible witnesses in regard to facts, or that it should be received and weighed with caution.

The conservative view is undoubtedly the correct one, and it may be summarized as follows: that the weight to be given to the

testimony of experts is a question to be determined by the jury; that such testimony should be considered by them as other testimony is considered, and such importance should be attached to it as the testimony itself seems to warrant, when viewed in connection with all the facts and circumstances developed upon the trial; that while jurors should never surrender their judgment to that of the expert or give a controlling influence to the opinions of the scientific witness simply because they are the opinions of such a witness, they should not, on the other hand, dismiss such testimony without consideration, as belonging to a suspicious class and as being rarely entitled to credit; that it is the duty of the jury to consider carefully all the testimony submitted, both ordinary and expert, keeping in mind that the object of the latter is to furnish to them aid in their deliberations by informing them in regard to matters that lie outside the domain of ordinary experience. A charge embodying the substance of the foregoing would probably, according to the general concensus of opinion, be proper, and some such instructions should usually be given. It is also proper for the trial court to advise the jury that in estimating the value of expert testimony, the standing of the expert, his opportunities for becoming proficient in the field of investigation that he claims as his specialty, and the means that have been open to him for gaining knowledge in regard to the case upon trial, should be taken into consideration.

Concerning "Malice as Ground for Civil Action," the May number of *Case and Comment*, after mentioning certain recent cases, annotated in L. R. A., says:

The exhaustive annotation accompanying these cases reviews the decisions bearing on the subject, and, out of their chaotic condition, evolves the rule that one's motive in exercising an absolute right cannot be questioned; but that, where the right is correlative, it must be exercised with due regard to like rights of others; and hence, one who exercises such a right for the sole purpose of injuring another is liable for the damage inflicted. The malice must be what has been denominated as "unmixed malice,"—that is, it must be the sole and exclusive motive that actuated the person committing the act complained of. If he receives any benefit from the exercise of the right other than the gratification of his malicious desires, he is not liable for the resulting damage. There is a third class of cases, in which the offending person is not engaged in the exercise of a right. Such conduct is clearly actionable. . . .

From the standpoint of reason, it seems right that the courts should regard malice as an important element in questions of tort. In the greater wrongs, which constitute crimes, malice is often the element of chief importance. If "malice aforethought" is to be considered a chief factor in a capital crime, what reason can there be why in the lesser wrongs, for which the only remedy is by civil actions, the element of malice should not be taken into account? Indeed, in a variety of cases this has always been done, as in cases of malicious prosecution, the malice that authorizes punitive damages, that which defeats a claim of privilege in libel, and in various other instances. It is equally false to say that malice will always make an act unlawful. The difficulty is to find a rule by which to determine when this will, and when it will not, be so. The rules stated above seem to be as definite as any that can yet be formulated.

The address on "Constitutional Law of the United States as moulded by Daniel Webster," delivered by Everett P. Wheeler, of the New York Bar, before the recent meeting of the New York State Bar Association, is printed in the *Yale Law Journal* for May and in *The American Lawyer* for April and May.

After reviewing the cases involving important constitutional questions which Webster argued before the Supreme Court, Mr. Wheeler closed his address in these words:

In every one of these leading cases, Webster successfully advocated the adoption of vital principles of constitutional law against

the adverse decisions of the Courts below. These principles underlie our whole American system. Without them we should not have been a Nation, but a chaos of individuals. Mr. Everett tells us that what gave to La Fayette his spotless fame was "the living love of liberty protected by law." What has given to this country its greatness is its well-ordered freedom, protected and secured by the Union; Liberty secure, Union equal. No individual or citizen of one State may have privileges secured to him by law, superior to the privileges of others. On the other hand, every citizen is secured by law in the acquisition of property and in the enjoyment of his personal rights. So long as American Courts respect the principles thus established, and America combines public freedom with individual security, so long shall a grateful people cherish the memory of the expounder of the Constitution, the farmer boy of Salisbury, the eloquent, far-seeing law-giver and lawyer, Daniel Webster.

In an excellent article entitled "English History and the Study of English Law," in the *Michigan Law Review* for May, Professor Arthur Lyon Cross, of the University of Michigan, asks "If something cannot be done to make the lawyer more of a scholar within his own field, to broaden his outlook, to interest him in the historic development of the system which he is studying for practical purposes, and to make more evident to him its relationship to the systems of other ages and countries, and to kindred branches of learning." This, he believes, can be done by "the study of history and the use of the historical method in the study of law."

It has been the purpose of this article (he says) to urge upon the student of law and the practitioner that history may be of use and interest to him. History, we have insisted, is not a mere congeries of dates and facts, but an inclusive record of all human thought and activity. While there is, properly speaking, no such thing as ecclesiastical, economic, legal, or political history, there are ecclesiastical, economic, legal, or political aspects of history, each of which may be studied by itself, or in its relation to the whole. From either or both standpoints the historical study of the law should appeal to every student of the profession. It may help him to understand much in his ordinary practice that would otherwise seem vague and inexplicable, it will certainly give him that broad outlook which distinguishes the educated man from the skilled craftsman, and, finally, what in itself should be a sufficient reward, it will tell him the strange and fascinating story of how the law which he knows emerged from the shadowy regions of the past, and perhaps inspire him to do his part to dispel the gloom which still envelops many stages of the progress.

Concerning "Legal Education in Italy" H. St. John-Mildmay, Barrister at the Court of Appeal at Milan, says, in *The Law Magazine and Review* for May:

The study of the law in Italy enjoys a following larger by far than that of any other branch of the liberal professions. Nevertheless, the actual number of practising lawyers is, comparatively speaking, small; the explanation of this apparently paradoxical proposition lying in the fact that, whereas a great number of students embark on an elementary course of legal studies, few care to persevere in them after having taken their *Laurea*, of first degree.

This is obtained after a course of four years at one of the universities. A comprehensive knowledge of the laws of the country has always been held by the upper classes in Italy to be the correct complement of a polite education, while the possession of the coveted title of *Doctor Juris*, by which the baccalaureate is designated, is a useful and often an indispensable qualification for admission to either the Civil or Municipal Service. It is, moreover, considered a necessary equipment towards a number of other professions, among which politics and journalism take the foremost rank. . .

At the end of the fourth year, when all the

examinations of the different courses have been passed, the undergraduate goes up for the final ordeal called *Esame di Laurea.* Three (and in some universities five) essays on subjects chosen by himself are submitted to a board of eleven examiners, and, like the student of the Middle Ages who used to nail his thesis to the college gate and challenge whomsoever to dispute it, he has in a subsequent *vivâ voce* examination to make good his propositions. If successful, he is proclaimed *Dottore in Legge.*

As in France, the legal profession in Italy is divided into two branches, the *Procuratori* (*avoués*) and the *Avvocati* (*avocats*). The *Procuratore* (who is somewhat akin to the English solicitor) need not have taken a degree; his term at the university is limited to two years; he cannot plead outside the jurisdiction of the Court of Appeal of the district in which his domicile is registered, and never in criminal cases before the Court of Appeal. He must be an Italian subject, and is sworn on his assumption of office. His fees are determined by law.

The *Avvocato* must have taken his degree; he can, with the assistance of a local *Procuratore,* plead before any Court of the kingdom (at the Supreme Courts of Cassation only after five years' practice). No oath is required of him, and he may be an alien. In some parts of Italy the two professions used to be distinct. . . . At the present day the distinction may be said to have almost ceased to exist, especially after the passing of the law providing that every *Procuratore* after five years' practice becomes *de jure* a barrister, and every barrister, after two years' practice, may enter his name on the rolls of *Procuratori.* . . .

Few faults can be found with this system of legal training in Italy, which strives not only to equip the student with an ample knowledge of the laws and institutions of his country, but also to broaden his mind by a sound and comprehensive general education. . .

A sweeping reform is . . . to be desired with regard to the expounding of the Civil Code. This monumental work, an enlarged and corrected edition of the *Code Napoléon,* consists of three books and 2147 paragraphs. The period of two years allotted to its study is entirely insufficient. The teaching of the Code practically resolves itself either into a hurried and perfunctory review of the law, or else into a monographical study of a single part, with the inevitable result of confusion in the first instance and deplorable blanks in the second.

It is an everyday occurrence that students leave the University in entire ignorance of such important matters as the law of Contracts, the law of Inheritance, or the law of Real and Personal Property.

A complete knowledge of Civil law is essential, and this object is only to be attained by distributing the study of the Code throughout the four years of the academic curriculum, with yearly or biennial examinations.

IN an article in *The Canadian Law Review* for May is given much interesting information about "An English Judge's Dress." For example:

The earliest representation we have of the official costume of the Bench is the seal of Robert Grimbald, a justice of the time of Henry II. He is depicted in a long tunic and mantle, with a round cap on his head and a sword in each hand. There is little doubt that these robes were already scarlet, although the exact period when the Bench had adopted scarlet in its official dress is not known to us. It has, it is true, been suggested that they wore green in the reign of Edward III., but this was only in virtue of their being likewise knights, green being the badge of knighthood. Even at that early period the robes seem to have consisted of a long tunic or colobrium reaching to the ankles, surmounted by a cope. . . . Gradually the closed cope came to be the distinctive dress of the judges.

The earliest notice of the robes of the judges occurs in a Close roll dated 1292. . . .

In an illumination of the time of Henry

VI. we see the parti-colored gowns and clothing of the sergeants, officers of the Court of Chancery, and others represented with great exactness. There are two judges in scarlet robes trimmed with white badger or lambskin, one of whom is uncovered and tonsured, as becomes a priest, the other, the Lord Chancellor and a layman—perhaps the first layman who held that office—wearing on his head a kind of brown cap. This suggests the very natural query, when did judges and lawyers first think it necessary to cover up their heads during professional hours? It probably coincided with the evolution of the lawyer from priest or deacon to layman, and was originally designed to conceal his character, which would have been revealed by the tonsured scalp, from the litigants and spectators. The general head-covering before the days of wigs was the coif, which, like the periwig of later times, enjoyed a vogue amongst laymen in the thirteenth century. When they abandoned it, it was continued by the priests and lawyers. It was originally of white linen, and tied under the chin like a child's night-cap. In the fifteenth century . . . its resemblance to a modern wig on the heads of the three sergeants at the bar is very striking. . . . The coif appears to have undergone little alteration until the advent of wigs at the Restoration. Then, as we shall see, it suddenly dwindled in size until today it is represented by an absurd black patch on the crown of the wig. . . .

There is still another indispensable and attractive adjunct to the costume of our higher judicial personages, which we have not yet adverted to. It is fully as ancient as the textile portion of the "C.J.'s" official attire. No one has yet correctly ascertained the origin of the collar of the SS. or Esses, but it probably appeared first in the reign of Henry IV. The earliest description we have is in a wardrobe account of 1391, in which there is an entry of one collar of gold with seventeen letters "S" made in the shape of feathers with inscriptions on them. . . . The collar, which is now bestowed by the sovereign, was anciently described as "the collar of SS. in England, wherewith esquires may be made." The letters S are, as will be seen by the portrait of Sir Edward Coke, linked together by knots and terminate with two portcullises and a pendent rose. It may be added that this identical order of Coke's was in the possession of and worn by the late Lord Coleridge on the bench.

OF "Malicious Cartoons" *Case and Comment* for May says:

Great latitude may well be allowed in the use of cartoons, as well as in the discussion of all public questions. On all public matters every point of view may properly be presented. Something may be allowed for overstatement and unfairness of presentation during the heat of a contest. But absolute misrepresentation, deliberate, dishonest, and malignant, ought to be regarded, not as a wrong to the individual victim simply, but as a greater wrong to the public. If a public man subjected to such misrepresentation cannot wisely take notice of it, or has no adequate remedy, the wrong to the public is of sufficient importance to require the public officials, without any private complaint or suggestion, to prosecute and punish the offender. A public prosecutor might render great service if, without any political motive or bias, he would impartially prosecute every conspicuous and aggravated case of criminal libel.

A VIGOROUS plea for "Reform in Criminal Procedure" is made by Everett P. Wheeler in the *Columbia Law Review* for May. He says:

In this country, as well as in England, the old severity of penal legislation has been altogether reformed. But the old traditions of criminal procedure remain. They are totally inapplicable to existing conditions and require revision as much as the sanguinary penal code of a century ago. . . .

1. The first rule which should be changed is that which requires the jury to be satisfied of the guilt of a prisoner beyond a reasonable doubt. This has enabled myriads

of criminals to escape just punishment. It may possibly in a few instances have saved an innocent man from undeserved punishment, but the impunity that it has given to actual criminals has undoubtedly caused the death or injury of many times the number of those whom it has judiciously shielded. . . . It is in the interest of justice that if the jury before whom he is tried are satisfied of his guilt by the fair preponderance of evidence he should be convicted.

2. Another rule which grew up during the Draconic legislation of the past was that it was better that ten guilty men should escape than that one innocent man should be convicted. This maxim overlooked entirely the duty of the State to give protection to the innocent men, who were likely to suffer from the escape of the ten guilty culprits, who, emboldened by impunity, would feel free to prey upon the community. These two maxims may be justly said to have caused the death of manifold more innocent persons than they have protected. . . .

3. One cause of delay in the trials of criminals and of punishment of crime was recently stated by Mr. Justice Woodward, of the Supreme Court of New York:

"It is impracticable in most communities to assemble a grand jury oftener than three or four times a year. If the crime is committed immediately after the sitting of one Grand Jury, the criminal, if apprehended, usually has from three to four months before another assembles and before he can be indicted. Until this time he cannot be lawfully tried. Then, for the first time he is formally charged with the crime, and he is then entitled to a reasonable opportunity to procure counsel. If he is unable to do so, the court assigns counsel. In such a case the counsel may be entirely unprepared to deal with the defense, and a decent regard for the rights of his client compels the granting of sufficient time to enable counsel to look into the case and determine upon a line of defense. In the meantime the court adjourns and the case of necessity goes over until the court reconvenes, which may be three or four months hence."

4. Another provision of law which has enabled many guilty persons to escape is that which gives to persons jointly indicted for a particular crime the right to separate trials. . . .

5. ["The gross abuses that exist owing to the readiness of appellate courts to grant new trials in criminal cases" should be ended.]

6. There is another technical rule in criminal pleading which should be repealed. It is thus stated by the Court of Appeals of New York, in People *v.* Stedeker:

"An exception in a statute must be negatived in pleading, while a proviso need not."

In this particular case the application of this technical rule discharged the criminal. What possible reason in the nature of the case can be given for the distinction thus stated by the court? In all cases it should be enough that the indictment state the crime with clearness sufficient to enable the defendant to understand the charge. All matters of defense or exception should be left for the proof.

"The Need of Creating Advocates or Defenders for the Accused" is strongly urged in the *Canadian Law Journal* for April, by W. D. Sutherland, who says:

At present, while there remain greatly preponderating advantages on the side of the Crown, no one can tell how any trial might result if only the Crown stood on something like the same footing in the contest and possessed only a parity, or as nearly as possible a parity, of advantages with the prisoner.

That such an officer as suggested is required cannot be doubted by any who give the question the least consideration. Those learned in the criminal law and skilled in all the ways and arts of the accomplished pleader should be selected and set apart solely for the work, whose duty it should be to assume the responsibility of the defence of prisoners *ab initio; i. e.*, as soon as they should be apprehended. No consideration of what it will cost the country should be allowed for a moment to enter into the question.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

AMERICAN FLAG. (DESECRATION—USE FOR ADVERTISING PURPOSES—CONSTITUTIONALITY OF STATUTE—POLICE POWER.)

NEW YORK SUPREME COURT.

In People *v.* Van De Carr, 86 New York Supplement 644, the constitutionality of Penal Code, Sec. 640, subd. 16, prohibiting the use of the United States flag for advertising purposes is determined.

The statute not only prohibits the use of the flag as a trade mark or label or for the advertisement of merchandise, but also prohibits its mutilation, defacement or defilement, and the displaying of any word, figure, mark or advertisement of any nature upon the emblem itself. In these latter particulars the statute is held constitutional, the court saying, "It was competent for the Legislature to make it a misdemeanor to publicly mutilate, deface, defile, trample on, or cast contempt, either by words or act, upon the national or State flag, and the mutilation of the flag may mean the printing of an advertisement on the ensign itself. Such legislation is within the police power of the State, for it relates to the preservation of the peace." But while this is true and that part of the statute may be separated from the other provisions, the court is led to the conclusion that such other provisions are unconstitutional. All parts of this statute must be upheld, if at all, on the ground that the legislation is within the police power of the State. It is elementary that to be within the police power the legislation must relate in some way to the public health, morals, safety, comfort and general welfare.

The prohibition of the use of the flag as a trade-mark or in connection with an advertisement of merchandise, it is said, in no way relates to any one of the legitimate subjects to which the police power extends.

The Federal government has not prohibited the use of the flag in connection with advertisements. Trade labels, of which it forms a part, are accepted at the patent office. Not being within the police power, this part of the statute is an unauthorized interference with the liberty of the citizen, which includes the right to engage in any lawful pursuit, and to use all customary and lawful agencies in the prosecution of such business, and it is not legitimate legislation to declare that one of those agencies shall become unlawful, unless its use in some way affects the public health, *etc.*

The statute made an exception in favor of the reproduction of the flag in newspapers, books, circulars, ornamental pictures, articles of jewelry or stationery, *etc.*, where it was not connected with an advertisement. This exception, the court holds, renders the statute class legislation, and obnoxious to the Fourteenth Amendment.

A number of cases are cited on general and collateral propositions, but no case is referred to which is directly in point.

ARREST. (HOMICIDE IN ATTEMPTING—RESPONSIBILITY OF OFFICER.)

UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

In re Laing, 127 Federal Reporter 213, was a proceeding in *habeas corpus* to secure the relator's release from confinement on an indictment for murder.

Relator was a member of a *possc* organized by the United States marshal, to effect the arrest of a striker charged with resisting an officer during the West Virginia coal strike in 1903. The striker had stated that he did not intend to be taken alive, and never intended to be arrested. The officers and *possc*, amounting in all to four persons, ap-

proached the striker's house, one officer taking a position in front and placing the others in the rear, to cut off all possible escape. The striker was given warning, and armed with a pistol ran from the rear of the house. The members of the *posse* called upon him to halt. He disregarded the call and continued to run, changing his course towards a tree, which the officers anticipated he intended to reach, in order to open fire upon them. They fired twice and killed him.

They were indicted in the State court. After holding that *habeas corpus* is a proper proceeding, the court proceeds to a discussion of the merits of the case, holding that there was an absence of malice, that the relator was attempting to execute the process of the court, and that the killing was in self-defense.

First Hawkins, P. C., p. 81, Sec. 11, is quoted to the effect that if a person having committed a felony will not suffer himself to be arrested, but stands on his own defense, or flies so that he can not possibly be apprehended alive, he may be lawfully slain by those who pursue him. This principle, the court says, has been held to be law in this country, citing State *v.* Garrett, 60 N. C. 144, 84 Am. Dec. 359. The conclusions reached are also said to be sustained by United States in Allison *v.* United States, 160 U. S. 203-216, 16 Supreme Court Reporter 252, 257, 40 L. Ed. 395, and Allen *v.* United States, 164 U. S. 493, 17 Supreme Court Reporter 154, 156, 41 L. Ed. 528.

ATTORNEYS. (DISBARMENT FOR ADVERTISING.)
COLORADO SUPREME COURT.

In People *v.* Taylor, 75 Pacific Reporter 914, the court makes absolute a rule to show cause why the defendant should not be disbarred for unprofessional conduct. The proceedings were brought on the relation of the Colorado Bar Association against an attorney of that State, who advertised, through the public press and otherwise, to secure divorces. The court states that such advertisements as were published are reprehensible, mischievous and detrimental to good morals, and libelous upon the courts of justice throughout the State. The court refers particularly to the case of People *v.* Maccabe, 32 Pac. 280, 18 Colo. 186, and states that the reasons which are fully set forth in that case govern the present one. In the case referred to, the attorney advertised to obtain divorces quietly which would be good everywhere. It is held that the ethics of the legal profession forbid that an attorney shall advertise his talent or his skill as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce when convinced that his client has a good cause, but for anyone to invite or encourage such litigation is reprehensible. An advertisement stating that divorce could be obtained quietly which would be good everywhere is against good morals, public and private. It is a false representation and a libel upon the courts of justice. Divorces *cannot* be legally obtained very quietly which shall be good anywhere. To say that divorces can be obtained quietly is equivalent to saying that they can be obtained without publicity. The statutes require certain public proceedings, such as the filing of the complaint, the summons, service of process, either personal or by publication in a newspaper; and to indicate that such public proceedings can or will be dispensed with by the courts having jurisdiction of such cases is a libel upon the integrity of the judiciary which cannot be overlooked.

COMMON LAW MARRIAGE. (WHAT CONSTITUTES.)
MISSISSIPPI SUPREME COURT.

In Blanks *v.* Southern Railway Company, 35 Southern Reporter 570, plaintiff sued for negligently occasioning the death of a man she claimed to have been her husband. She relied on a common law marriage made before the Code of 1892, requiring a formal celebration, took effect.

The plaintiff's story as detailed by the court is not devoid of interest. She was the

mother of a bastard child and was afterwards married to Lawson Parker, who, "inasmuch as he was not the father of the bastard, we may assume on matrimonial concerns was free from petty scruples."

The court then quotes from the record the plaintiff's testimony concerning this union in which she declares she did not know whether she was married or not, but that they had a preacher there who did something and she and her husband "went together under that head," that is as husband and wife. After two or three years, "Lawson, weary of well-doing, threw off the connubial yoke, and of his own motion, without disturbing the courts, left for parts unknown."

The plaintiff's courtship with decedent is then detailed. She was sitting in her door, when decedent who was a perfect stranger and whom she had never seen before came up. "He preferred he was lonely. I was sitting in the door there by myself, and he asked me if I was lonely, and I preferred, yes, I was lonely, and he asked then if I would like to be his wife, if I would be the mother of his child, and I said I thought I could, and he asked me if I could live in his house and treat him adjustably, and I told him I thought I could. Q. Did you tell him in what way you wanted to live? A. As his wife. That is the way I went to him. I did not reconsider myself to have any husband after Lawson left me, and I was living there from hand to mouth, and I wanted a husband, and he said he would be a husband to me, and I said as I was a woman I would accomplish to be his wife, and I went with him." The court continues, "On this primitive, prepluvial agreement they lived together for many years, and up to the time of Daniel's death. But after about a year of their cohabitation there was an unfortunate episode. Lawson Parker turned up! He appeared at Maggie's new home in quite a violent humor, and proceeded to abuse and beat her, without any interference from Daniel, so that she had him arrested and put under bond to keep the peace, and then he left again, and has been seen no more, and Daniel and Maggie continued to live together for ten years or more, until Daniel was killed by the railroad train. We cannot hold that she was Daniel's wife."

CONSPIRACY. (INJURY TO BUSINESS—COERCION —FINES.)

MASSACHUSETTS SUPREME JUDICIAL COURT.

In Martell *v.* White, 69 Northeastern Reporter 1085, the defendants were sued for conspiracy to injure plaintiff's business. It appeared that defendants, who were granite manufacturers in a certain city, formed an association, a by-law of which provided that any member having business transactions with any other such manufacturer in the city, not a member of the association, in relation to granite, should, for each transaction, contribute to the association's expenses from $1 to $500, the amount to be determined by the association. By means of fines from $10 to $100, on members for dealing with plaintiff, his business, which was quarrying granite, was ruined.

The court says the facts show a clear and deliberate interference with the business of a person with the intention of causing him damage, and the question is whether the defendants, in accomplishing their purpose, have kept within lawful bounds. The defendants contended that they were justified by the law applicable to business competition. The court says that in view of the considerations upon which the right to competition is based, it believes that defendants have failed to show that coercion or intimidation of plaintiff's customers is justified by the law of competition. It says: "It (the right of competition), is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. He may fight, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws. . . .

But from the very nature of the case, it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. . . . In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. . . . This method of procedure is arbitrary and artificial, and is based in no respect on the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based."

A large number of cases are cited and distinguished.

DEATH BY WRONGFUL ACT. (STIPULATIONS AVOIDING LIABILITY TOWARD FREE PASSENGERS.)

UNITED STATES SUPREME COURT.

In the case of Northern Pacific Ry. Co. *v.* Adams, 24 Supreme Court Reporter 408, is discussed the liability of a railroad company for the wrongful death of a passenger who was riding upon a pass, the conditions of which stipulated that the company would not be liable under any circumstances, whether of negligence of agents or otherwise, or for any injury to the person or loss or damage to the property of the passenger using the same. The death occurred in Idaho, and the statutes of that State provide that when death is caused by the wrongful act or neglect of another, his heirs or representatives may maintain an action for damages against the person causing the death, or if such person is employed by another who is responsible for his conduct, then also against the employer. The Circuit Court charged the jury that they were not to consider what was the duty of the railroad toward the person who was killed, but the duty which the road owed to his heirs, and the duty which the latter had the right to exact from the railroad in this case is the same duty which the railroad company owed to the public in general. The Supreme Court holds that it is error to maintain that although it should appear that the railroad company failed in no way in its duty toward the deceased, it could yet be held responsible, under the Idaho statute above mentioned, to his heirs for the damages they suffered by reason of his death. Wrongful act and neglect alike imply the omission of some duty, and that duty must be the duty owing to the decedent. It cannot be that if the death was caused by an unintentional act it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and can recover only in case he could have recovered had he been only injured. Upon the question of the liability of the road to a person riding upon a free pass, the court says that the question to be considered is, whether the company is liable in damages to a person injured through the ordinary negligence of its employés who at the time is riding upon a pass given as a gratuity and upon the condition, known and accepted by him, that the road shall not be responsible for such injuries. This question has received the consideration of many courts, and has been answered in different and opposing ways. The Supreme Court mentions the cases of Rogers *v.* Kennebec S. B. Co., 86 Me. 261, 29 Atl. 1069; Quimby *v.* Boston & Maine R. Co., 150 Mass. 365, 23 N. E. 285; Griswold *v.* New York & N. E. R. Co., 53 Conn. 371, 4 Atl. 261; Kinney *v.* Central R. Co., 34 N. J. Law 513; and others which hold that the company under these circumstances is not responsible. The following English cases are also referred to as holding to the same effect: McCalley *v.* Furness R. Co., L. R. 8 Q. B. 57; Hall *v.* Northeastern R. Co., L. R. 10 Q. B. 437; Duff *v.* Great Northern R. Co., Ir. L. R. 4 C. L. 178; and Alexander *v.* Toronto & N. R. Co., 33

U. C. Q. B. 474. Of the cases which hold that the company is responsible are cited Rose *v.* Des Moines Valley R. Co., 39 Iowa 246; Pennsylvania R. Co. *v.* Butler, 57 Pa. 335; Mobile & O. R. Co. *v.* Hopkins, 41 Ala. 486; and Gulf, C. & S. F. R. Co. *v.* McGown, 65 Texas 640. The court distinguishes certain of its own decisions, *viz:* Philadelphia & R. R. Co. *v.* Derby, 14 How. 468, and New World *v.* King, 16 How. 469, where, although the parties were free passengers, it did not appear that there were any stipulations concerning the risk, and the companies were also held guilty of gross negligence. The case of B. & O. S. W. R. Co. *v.* Voigt, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. Ed. 560, is relied on as decisive of the point under consideration. The Supreme Court holds that the judgments of the Circuit Court and the Circuit Court of Appeals, which permitted a recovery, must be reversed. Justices Harlan and McKenna dissent.

EXPERT TESTIMONY. (CONTRACT FOR CONDITIONAL COMPENSATION—ILLEGALITY.)
NEW YORK SUPREME COURT.

In Laffin *v.* Billington, 86 New York Supplement 267, the plaintiff, a physician, sued for services rendered to defendant's client as an expert witness, in a suit for injuries against a street railway company. At the trial he testified that he was to get ten *per cent.* if he helped work up the case; that he told defendant that he would take up the expert end if he got ten *per cent.* of the settlement or judgment, and that he wouldn't go ahead as an expert witness without defendant's personal guaranty, as he had no faith in the honesty of his client. A writing was introduced, signed by defendant's client, authorizing defendant to pay plaintiff's fees out of the recovery, and followed by defendant's written agreement to pay plaintiff ten *per cent.* of his client's recovery. The court holds that this bargain was illegal and void. Wellington *v.* Kelly, 84 New York 533, is quoted to the effect that an agreement by a stranger to furnish evidence to substantiate a claim or defense for a compensation depending upon the success of his efforts, is injurious in its tendency, as furnishing an inducement for perjury and subornation of witnesses. Lyon *v.* Hussy, 82 Hun. 15, 31 N. Y. Supp. 281 is also cited.

FIRE PROTECTION. (CITY PROPERTY—CONTRACT WITH WATERWORKS COMPANY.)
CALIFORNIA SUPREME COURT.

In Town of Ukiah City *v.* Ukiah Water & Improvement Co., 75 Pacific Reporter 773, it is held that a city which, under its power to conserve the general public good, contracts with a waterworks company for general fire protection, has no cause of action against the company for municipal property destroyed by fire, through the company's failure to supply a sufficiency of water. The case turns on the distinction between contracts made by municipal corporations in what may, with perhaps questionable propriety, be termed its private capacity, and those which it makes as a governmental agency of the State, for the benefit of the public at large. The contract in suit was held to belong to this latter class.

The opinion of the court below is set out in full and adopted by the Supreme Court, which distinguishes the cases of Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340, 12 Southwestern Reporter 554, 13 Southwestern Reporter 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; Gorrell *v.* Water Supply Co., 124 N. C. 328, 32 Southeastern Reporter 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; Planters' Oil Mill *v.* Monroe Water Works & Light Co., 52 La. Ann. 1243, 27 Southern Reporter 684; Watson *v.* Inhabitants of Needham, 161 Mass. 404, 37 Northeastern Reporter 204, 24 L. R. A. 287.

In the opinion of the trial court it is said, "It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual; but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and

the evidence here shows nothing more. The distinction between the powers conferred on municipal corporations for public purposes and for the general public good, and those conferred for private corporate uses, is clearly marked by the decisions."

MARRIAGE. (INCESTUOUS CHARACTER — ANNULMENT — PUBLIC POLICY.)

WEST VIRGINIA SUPREME COURT OF APPEALS.

Martin *v.* Martin, 46 Southeastern Reporter 120, was a bill filed to annul a marriage between complainant and defendant on the ground that, being related by blood as nephew and aunt they went to Pennsylvania to evade the law of West Virginia, in getting married, and with the intention of returning to the latter State to reside. This latter allegation as to the purpose to evade the West Virginia law was denied by the defendant.

The parties had lived together eighteen years, and had a son ten years old. The lower court concluded that "a court of equity ought not to entertain a litigant who vaunted his own iniquity and made that his sole ground of the decree asked from it." In reversing the decree below the court says that, though the hands of the parties may be unclean, it is the duty of a court of equity to permit them to clean them when it can do so, and not permit such uncleanness to continue as a stench in the nostrils of the people. While the rule is that equity will not entertain persons with unclean hands, yet there are just exceptions thereto, and the statutes of this State have mercifully provided that those who unwittingly enter into a marriage that leads to the continual violation of law, notwithstanding their original sin, may have such relation annulled, so that they may go and sin no more. Such transgressors should get from before the public gaze as quickly as possible.

Commonwealth *v.* Lane, 113 Mass. 458, 18 Am. Rep. 509, and State *v.* Brown, 47 Ohio State 102, 23 Northeastern Reporter 747, 21 Am. St. Rep. 790 are cited.

MASSEUR. (PRACTICE OF MEDICINE—WHAT CONSTITUTES.)

NORTH CAROLINA SUPREME COURT.

In State *v.* Biggs, 46 Southeastern Reporter 401, the defendant appealed from a conviction of practising medicine and surgery without a license. The jury found that he administered massage, baths, and physical culture, manipulated muscles and bones, and advised his patients what to eat,—all this without use of drugs.

The North Carolina Code, section 3124, requires that applicants for license to practise medicine or surgery shall stand an examination in anatomy, physiology, and various other branches. Laws, 1885, p. 180, ch. 117, § 2 made guilty of a misdemeanor any one who "shall begin the practice of medicine or surgery . . . for fee or reward," without such license.

Acts 1903, p. 1074, ch. 697, defines the expression, "practice of medicine and surgery," as meaning the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances or by any other method whatsoever."

It is this last statute that is particularly assailed, and which the court declares to be unconstitutional as conferring a monopoly. The court says that it is forbidden to relieve a case of suffering, physical or mental, in any method unless one is an M. D. It is not even admissible to "minister to a mind diseased" in any method, or even dissipate an attack of the "blues," without that label duly certified. It asks whether it is requisite that a man who treats a diseased ear should really be competent in obstetrics, or whether it is penal to treat a disease of the eye unless the operator understands chemistry, or whether it is indictable to remove corns or to plug teeth without a full knowledge of the *materia medica*, or to apply a fomentation without being able to "pass up" on therapeutics, or sell a little herb tea for the stomachache without being scientifically versed in pathology and physiology.

Christian Scientists are permitted to cure

diseases without passing an examination. By what process of reasoning can massage, baths, and the defendant be excluded? In the cure of bodies as in the cure of souls, "Orthodoxy is my doxy, heterodoxy is the other man's doxy." This is a free country and any man has a right to be treated by any system he chooses.

The court quotes the saying of Dr. Oliver Wendell Holmes, that if the whole *materia medica* were sunk to the bottom of the sea it would be all the better for mankind, and all the worse for the fishes, and also an eminent medical authority of North Carolina to the effect that out of twenty-four serious cases of disease, three could not be cured by the best remedies, three others might be benefited and the rest would get well anyway.

MALICIOUS PROSECUTION. (PROBABLE CAUSE —EXISTENCE OF COUNTERCLAIM.)
NEW YORK SUPREME COURT.

In Coleman *v.* Botsford, 85 New York Supplement 1, the fact that one brings an action on a valid claim, knowing that the defendant has a valid counterclaim for a greater sum, is declared not to make the action malicious, for want of probable cause. The court says that such an action cannot be deemed to have been instituted without probable cause, even though plaintiff was aware that if he sued, defendant could counterclaim her demand and obtain a judgment against him for the balance. The sole action which he prosecuted was to recover his own claim, and concededly he had a right to recover. It is true that the defendant would set up her claim against him and so judgment and execution would go in her favor instead of against her. But still plaintiff would by the very judgment so rendered have recovered upon his claim, and the action which he commenced would result in his favor to the full extent of the claim for which it was brought. Besson *v.* Southard, 10 N. Y. 236; and Anderson *v.* How, 116 N. Y. 336, 338, 22 Northeastern Reporter 695, and cited on the point that both malice and want of probable cause must unite to sustain the action.

MONOPOLIES. (SALE OF UNCOPYRIGHTED BOOKS —PROTECTION OF PRICE OF COPYRIGHTED BOOKS)
NEW YORK COURT OF APPEALS.

In Straus *v.* American Publishers' Association, 69 Northeastern Reporter 1107, an association of book publishers formed to protect the price of copyrighted books, but refusing to sell them or any books to dealers who cut the price, or permitted their customers to do so, is held illegal.

It is conceded that the copyright law creates a monopoly, and that, indeed, this is its very essence, but the refusal to sell books of any sort to dealers who cut the price on the copyrighted article is held to make the agreement a violation of Laws of 1899, c. 690, p. 1514, § 1, providing that every contract, agreement, or combination, whereby a monopoly in the manufacture or sale of an article of common use may be created or maintained, or whereby competition in the supply or price of such article may be restricted or prevented, or whereby the free pursuit of any lawful business is restricted or prevented for the purpose of maintaining a monopoly, is against public policy and void.

Park & Sons Co. Case, 175 N. Y. 1, 67 Northeastern Reporter 136, 62 L. R. A. 632, is distinguished. In a lengthy dissenting opinion Judge Gray thinks that the Park case is controlling and that the agreement should be upheld. Judge Bartlett agrees with Judge Gray, saying, "This case discloses one of the saddest phases of our modern business life. It is a well-known fact that the greatest department stores of the country have encroached upon many lines of trade, entirely distinct from the main and legitimate business in which they are engaged. As an illustration, a dry goods establishment, engaged in selling a vast number of articles legitimately related to its business, concludes, in order to promote its principal trade, to offer for sale books, furniture, druggists' sundries, and numerous other articles that need not be mentioned, at cut prices, representing only the cost of production, and oftentimes far below it. . . . The result is that a large number of the retail dealers in

the various kinds of articles thus undersold are driven out of business, many of them at a time of life when they are unable to reinstate themselves in some other calling. It also results in great damage to manufacturers, producers, and wholesale dealers in loss of customers who have been driven into insolvency. It is, of course, true that the proprietors of department stores have the legal right to offer to the public goods of any kind at prices below production, or, indeed, may donate them to their customers. It is, however, equally true that the manufacturers, producers, and wholesale dealers may say, to the men whose policy is thus carrying ruin and destruction to their business and that of their customers, that if you persist in this disastrous cutting of rates we will sever all business relations absolutely. These are mutual and inherent rights, in the nature of things, so long as self-defense and the privilege to exist survive among men."

NEGLIGENCE. (Injuries Resulting from Blasting.)

New York Supreme Court, Appellate Division, First Department.

In the case of Wheeler *v.* Norton, 86 New York Supplement, 1095, the question was raised as to the liability of the defendant, who was blasting for the new subway, for damages which resulted from the breaking of a water pipe and the subsequent overflowing of the property of the plaintiff. While the particular facts in this case are novel, there are many authorities in New York which hold that the throwing of rocks and other matter upon a person's property, causing him damage, makes one liable as a trespasser, and this irrespective of whether such person be guilty of negligence or not. The court cites the leading case of Hay *v.* Cohoes, 2 N. Y. 159, 51 Am. Dec. 279, in which the defendant was held liable for damages which resulted from fragments of rock which were thrown against the plaintiff's house while the defendant was blasting upon his own land. In this case there was no proof of negligence. The Hay case has been cited with approval in the cases of St. Peter *v.* Dennison, 58 N. Y. 416, Mairs *v.* Manhattan Real Estate Ass'n., 89 N. Y. 498, and recently in the case of Sullivan *v.* Dunham, 55 N. E. 923, 160 N. Y. 290. The court holds in the present instance that the breaking of the pipe was the direct and proximate cause of the injury to the plaintiff. If a section of the pipe had been thrown upon her premises, there would be no doubt, under the authorities cited, that the defendants would be liable as trespassers, and there seems to be no reason why a distinction should be made between iron thrown upon the property and water flowing thereon. The judgment of the trial court allowing a recovery is affirmed.

PHOTOGRAPH. (Admissibility in Evidence—Action for Death of the Wife.)

New York Court of Appeals.

In Smith *v.* Lehigh Valley Railroad Company, 69 Northeastern Reporter 729, the plaintiff sued for negligently causing the death of his wife and introduced her photograph, which showed her to have been a handsome woman. The New York Court of Appeals, speaking by Chief Justice Parker, holds that this was error. It says that into such a case the personal element does not enter; for the law does not compensate for grief or sorrow, but only for pecuniary loss. The introduction of the photograph could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury, awaken their sympathies and thus secure a larger verdict. Whether in thus championing the rights of the small number of plain looking women in the United States the judge had in view securing the support of the women suffragists in his presidential candidacy, would doubtless be an invidious inquiry; and in view of the fact that all husbands know their wives to be beautiful, the practical prudence of such a course is so questionable that the astute jurist ought not to be lightly accused of it.

Lipp *v.* Otis Bros. & Co., 161 N. Y. 559, 564, 56 Northeastern Reporter 79, is relied on as authority.

PUBLIC OFFICE. (PROPERTY RIGHTS THEREIN — LEGISLATIVE CONTROL.)

NORTH CAROLINA SUPREME COURT.

The case of Mial *v.* Ellington, 46 Southeastern Reporter 961, is notable in that the court therein overrules the doctrine which has always obtained in that State, that an officer appointed for a definite time to a public office has a vested property interest therein or contract right thereto, of which the Legislature cannot deprive him. This doctrine was first announced in the case of Hoke *v.* Henderson, 15 N. C. 1, 25 Am. Dec. 679, and has been many times reaffirmed in subsequent cases. It is stated in the opinion that North Carolina is the only State in the Union where such a doctrine has been upheld, and the majority opinion cites many cases, both State and Federal, and text-books where this doctrine is expressly repudiated. Chief Justice Clark in his concurring opinion states, "The court that decided Hoke *v.* Henderson did not deem themselves infallible, for they overruled divers of their own opinions as erroneous, and succeeding courts have overruled other opinions of that court. There is no peculiar sacredness attached to Hoke *v.* Henderson. No other court whatever, anywhere or at any time, has followed it as authority. All have concurred in disregarding it, and not a few have sharply criticized it, a few of which criticisms have been collected. See 127 N. C. 252, 253, 37 S. E. 263." There are dissenting opinions by Judges Montgomery and Douglas. The decision seems to be one of considerable political importance, several unsuccessful attempts having been made in the Legislature to secure a change in the doctrine.

RAILROADS. (INTERSTATE COMMERCE—AUTOMATIC COUPLER — LOCOMOTIVE TENDER — NEGLIGENCE *Per Se.*)

DELAWARE SUPREME COURT.

In Philadelphia & R. Ry. Co. *v.* Winkler, 56 Atlantic Reporter 112, a locomotive tender is held to be a car within the act of Congress, March 2, 1893, c. 196 sec. 2, 27 St. 53, 1 U. S. Comp. St. 1901, p. 3174, requiring cars used in interstate commerce to be equipped with automatic couplers. The point is not discussed. It is also held that a violation of the act by a carrier constitutes negligence *per se*, in view of the provision that the risk is not assumed by the employés continuing in the company's service.

REMOVAL OF CAUSE. (DISTRICT TO WHICH CAUSE MAY BE REMOVED — CONFLICTING JURISDICTIONS.)

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

In Hyde *v.* Victoria Land Company, 125 Federal Reporter 970, it is held that where, by reason of the subsequent organization of new counties after the establishment of Federal judicial districts in the State, one of the counties is found in two Federal districts, a suit originating in the State court of such county and removable to the Federal court, may be removed to either Federal district without regard to the district in which the county seat is located.

The decision turns on the Act of August 3, 1888, c. 866, sec. 3, designating the court to take jurisdiction "as the Circuit Court to be held in the district where such suit is pending." This means the district within the territorial limits of which the suit was pending in the State court. And the suit brought in the Circuit Court of the county was pending in the county as a territorial whole, and not alone at the county seat, or in any separate portion, so that it was thus pending in the territorial limits of both Federal districts. As that is the only judicial requirement, no other test can be imposed, and the two districts so embracing the county have concurrent jurisdiction. Knowlton *v.* Congress and Empire Spring Company, 13 Blatchf. 170, Fed. Cas. 7902, is cited, but not on the precise point.

SALESMAN. (ADULTEROUS CONDUCT—DISCHARGE FROM EMPLOYMENT.)

ILLINOIS SUPREME COURT.

In Gould *v.* Magnolia Metal Company, 69 Northeastern Reporter 896, the plaintiff

sued for a discharge from employment alleged to have been wrongful.

He was employed for one year, the contract providing that the employer might terminate it at any time for any conduct on the salesman's part reflecting discredit on the employer or injury to his business. The salesman had previously associated with a woman of bad character and it was for the purpose of breaking off this association that this provision was inserted in the contract.

After the contract was made the plaintiff renewed his association with the woman and with other persons of ill-repute, and the court holds that this conduct was a sufficient ground for discharge. The court also holds that the contract does not contravene public policy.

SPOTTER. (AGREEMENT WITH PROSECUTING ATTORNEY—PROSECUTION FOR GAMING—DEFENSE.)
TEXAS COURT OF CRIMINAL APPEALS.

In Gaines *v.* State, 78 Southwestern Reporter 1076, the defendant, who was prosecuted for gaming, defended on the ground that he had a prior agreement with the county attorney by which he was to induce other parties to engage in gaming, himself participating with any one who would play, and report them to the county attorney, and appear as a witness against them in prosecutions for the offenses.

A Texas statute releases from punishment, in prosecutions for gaming, witnesses who turn State's evidence, but the court says that this applies only where the offense has been committed. It finds no case and is cited to none based on a previous agreement to engage in the violation of law. The agreement in question is not within the statute. The county attorney and witness cannot enter into an agreement to bring about violations of law, and the witness plead the agreement in defense. The county attorney, by reason of his official position, has no right to induce parties to commit crimes, and neither he nor the party engaging in the crime by virtue of the agreement would be exempt from punishment.

WILLS. (WIDOW'S ELECTION—CONDITIONAL CHARACTER.)
MASSACHUSETTS SUPREME JUDICIAL COURT.

In Sterns *v.* Bemis, 70 Northeastern Reporter 44, it is held that under Rev. Laws, ch. 135, § 16, providing that the surviving spouse may file a writing waiving any provision made for him or her in decedent's will, or claiming that portion of the estate he or she would have been entitled to if decedent had died intestate, a widow's election must be unconditional; and one which is made to depend on the construction and legal effect to be given to the will, is insufficient.

The court says: "The surviving husband or widow is in as good a position to know the legal effect of a waiver as any one. If the law is plain in regard to the questions raised by a waiver, he ought to determine whether to file an effectual waiver. If the law is doubtful, he ought to resolve the doubt as well as possible for himself, and not to create a condition which gives rise to uncertainty, and then decline to act definitely until a suit has been brought by others, and the doubt dispelled by a decision of the court. . . . The statute contemplates a writing whose meaning is clear, and whose effect is to waive the provisions of the will. It assumes that the executors will know whether the estate is to be settled according to the law applicable when a waiver has been filed. . . . The writing filed in the present case does not purport to be an absolute waiver. It is a claim of a right to file a writing which shall leave undetermined the question whether the widow will waive the provisions of the will until it shall be decided what the law applicable to this will would be if an absolute waiver were filed. The filing of this writing was therefore of no effect."

The Green Bag.

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REMINISCENCES OF THADDEUS STEVENS.

By Thomas W. Lloyd.

THE first case ever tried in the courts by Thaddeus Stevens, the "Grand Old Commoner" of Pennsylvania, was one arising under the Fugitive Slave Law, and strangely enough, Stevens was against the fugitive slave. How much this may have had to do with shaping his future career as an uncompromising abolitionist and friend of the negro, it would be interesting to know. Certain it is, that next to Abraham Lincoln, he was the best friend the negro ever had, both in public and private life.

With all his unbending rigor and apparent sternness he was possessed of the kindest of hearts, as the following incident well illustrates. He was very fond of the game of draw poker, and frequently sat down to the enjoyment of a "little game" with a few congenial friends. One morning, as he was on his way to the Capitol, after an all night sitting, at which he had come out winner to the extent of one hundred dollars and which he had rolled up in bills in his trousers pocket, he was accosted by an old colored woman, who asked for alms. Without a moment's hesitation, Stevens pulled out the roll of bills and handed it all to her, remarking to his attendant, "God moves in a mysterious way his wonders to perform."

In the House of Representatives he was the unquestioned leader and he ruled it with a rod of iron. It was very dangerous to arouse him, as many a member learned to his cost, and any attempt to cross swords with him in debate, savored of rashness. His wit was as keen as a rapier, and few of his colleagues ever had the temerity to provoke it. Upon one occasion, however, a new member referred to Stevens in a rather sarcastic manner, and when he had finished the latter arose and drawled out: "Mr. Speaker, I did not know the gentleman had so much wit, but he has—just so much."

Upon another occasion, when a bill was under consideration prohibiting the sale of intoxicating liquors in the Capitol building, an amendment was offered, making it apply to *all* public buildings. "Ah, Mr. Speaker," said Stevens, "I know what the gentleman is after. He wants to put the bill in such shape as to be certain of having it vetoed." When it is remembered that Andrew Johnson then occupied the White House, whose fondness for the "cup that cheers" is well known, the point of the remark will be appreciated.

During his last illness, a number of Pennsylvania politicians called upon Mr. Stevens to pay their respects and in the course of the conversation, one of them remarked upon his appearance. "Ah, gentlemen," he said, "it is not my appearance that I am concerned about just now but my *dis*-appearance."

When they were about to take their leave, Stevens said to the gentlemen, "My friends, I am much obliged to you for this visit. I wish you could stay longer. I would like to talk to you about the political situation and the state of the country, but you may be assured that things are all right now, and when I am dead and buried and forty million worms have been poisoned by the medicine that Dr. Young has been stuffing into me, this Government will be standing as strong

as ever." This indulgence in wit was continued until his latest hour, and affords another instance of "the ruling passion strong in death."

Stevens was a unique figure in our legislative history; as absolutely so, in his particular sphere, as were Lincoln and Grant in theirs. They were a wonderful triumvirate, each seeming born for the niche he was destined to fill. There was nothing in the previous history or experience of Stevens to particularly point him out as the man who was to shape all the important legislation needed in the great crisis of our history. He was a lawyer, devoted to his profession, and not known as a man of affairs, and yet on his entrance into Congress, he went at once to the head, by a sort of mental gravitation, and no man questioned his supremacy.

His tactics were peculiar, notably so in the exceeding paucity and brevity of his remarks. He rarely made a set speech. The matters of legislation which he had in charge were perfected in committee, and he rarely permitted an amendment.

Upon one occasion an amendment was proposed to an appropriation bill. Stevens said, "Mr. Chairman, I am opposed to the amendment. I don't know what the amendment is, but I am opposed to it." It was defeated. On another similar occasion, he said, "Debate is exhausted on the amendment and everybody here is exhausted. Let's have a vote."

In replying to Brooks, of New York, whom he came as near hating as he could hate anybody, he said, "I do not think it is worth while to reply to the remarks of the gentleman from New York, because, according to his own statement, he has the sympathy of no party, stands by himself, speaks nobody's opinion but his own, and expects nobody to believe him." And on another occasion, in reply to the same member, he said, "Mr. Chairman, I do not very well understand how a gentleman on this floor can justify himself in occupying the time of the House and wasting the money of the country when he tells us, upon rising and upon sitting down, that he knows he is doing a vain thing and that he is expending time for nothing. If I thought that, sir, I would hold my tongue."

Stevens' adroitness of statement was shown on another occasion, when he and Washburn of Illinois got into an unseemly wrangle and a member from Michigan made a point of order on them and said that they were both old enough to know better. Stevens said, "Mr. Speaker, The gentleman from Michigan is right and I feel that I owe an apology to the House for the remarks made by the gentleman from Illinois." He said of Henry J. Raymond, who was accustomed to make a speech on one side of a question and then vote on the other, that he had the advantage of other members of the House in the matter of pairing, as he could always pair with himself.

Stevens was indifferent to public sentiment and never hesitated in his course from any apprehension of popular disapproval. He was totally lacking in personal magnetism; possessed none of the arts by which the masses are influenced; and carried men with him by pure unflinching logic, which convinced the reason rather than stirred the emotions. His like will probably never be seen again.

FINK v. EVANS.

11 PICKLE 413.

BY ALBERT W. GAINES,
Of the Chattanooga, Tennessee, Bar.

'Twis a starlit bright November night,
And the moon, with its shimmering beams,
Rose over the hills of old McMinn,
Silv'ring the woods and streams.
'Twas an ideal night for the chase of the fox
In the Mouse-Creek Country round,
And a single blast on the hunter's horn
Calls yelping forth many a hound.
Then away they fly with a hue and cry,
Through wood, o'er hill and dale,
Till the baying sound from a distant hound

Announces the strike of the trail;
Then vet'ran and pup take the leader's call up,
Till the cry of the howling pack,—
On the wings of the night, brings the hunter delight,
For the dogs are now hot on the track.

But Reynard was ever a sly, old fox,
And he deals in deepest disguise,
In the midst of the chase, an arch smile on his face,
He takes to the railroad ties.
The west-bound fast express was due—
Which was probably known to the fox—
Who now leaves his trail and the scent on the rail.
Just to get those dogs in a box.

So hound after hound, with his nose to the ground,
As the train thunders down the grade,
Along the track flies, fairly leaping the ties,
Not suspecting the trap that was laid.
O, horror to relate! 'tis as certain as fate,
There'll be a collision, unless
One gets off the track or the other goes back.
The dogs or the fast express.
With dogged, unyielding persistence, the hounds
Dispute the right to the track,
Till along come the cars, like the mad rush of Mars,
And kill about half of the pack.

Now the hunter who owned those valuable dogs—
Worth more because dead, I think—

Was sorely aggrieved at the treatment received,
So he sued the receiver—Fink.
Grave, serious, difficult questions of law
Rose before the honorable courts;
Fierce the battle was waged by the counsel engaged,
As we gather from Pickle's Reports.
One very vexed question arose in the case,
Whether, under the Tennessee laws,
Considering his acts and all of the facts,
The fox was the proximate cause.
For it may be admitted that, if as a fact,
The fox had not gone on the track
Those valuable curs, it surely appears,
Would not have been lost from the pack.

Then another difficult question arose
In the struggle to get redress,
In which of them lay the clear right of way,
The dogs or the fast express.
The cars had the right to the railroad track,
This point was perfectly plain,
But the right of the pack on the fox's track
Clearly clashed with the right of the train.
If a track's on a track, and a train and a pack
Have both of them rights of way,
Then the question of right becomes one of might,
So all the authorities say.

But what was the value of the dogs deceased?
A question of dire import,
And one that was vexing and very perplexing,
And that worried the honorable court.
The proof of the plaintiff established the fact,
That the dogs were young and fleet,
And that while ev'ry hound was good "all round,"
For the *possum* they couldn't be beat.
The plaintiff himself when he got on the stand,
Told the twelve as they sat in the box,
That a hound, as a rule, was worth more than a mule—
That is—for the chase of the fox.
The defendant made light of the proof thus adduced,
As foolish, absurd and thin,
And he proved without doubt that hounds were without
Any value in old McMinn.

But the court, considering all of the facts,
Held the hounds did not exercise

That care and forethought which the law says they ought.
Thus causing their own demise;
That a prudent hound-dog, in a case like this,
Would employ his gumption and brain,
When the whistle would blow he wouldn't be slow
In giving away to the train.

When the plaintiff was ~~told~~ the result of the suit,
And he figured the costs and the fees,
It is thought then and there the circumambient air
Felt quite a perceptible breeze.
When further informed, in a technical way,
That the learned Court, the *Curia*,
Had decided his case by applying the phrase
Of *damnum absque injuria*,
It is possibly true that he said that he knew
No Latin—and couldn't translate,
But he thought that he heard a strong English word
In the Latin which settled his fate;
To his feelings long pent he would have to give vent,
And he did it without any qualm,
For his feelings were best and most clearly expressed
In that Latin's first syllable—*damn*.

DECISIONS IN FRANCE.

By H. Cleveland Coxe,
Of Paris, France.

ONE of the first things an American lawyer asks, when visiting France, is "What are the decisions" on this or that point in connection with the interpretation of the Civil Code? When told that decisions of Courts are not binding, he is not unlikely tempted to compliment himself on being an American lawyer and living in a country where he can tell beforehand, approximately, how the Court is going to decide on many questions propounded by his clients. The American lawyer, however, resident and practising his profession in France, while, perhaps, flattering himself on his American judicial system, is sometimes puzzled to know how to explain superiority of his system to a Frenchman who asks "What is the American law?" on this or that point.

The American lawyer, of course, explains that in his country there are forty-five States and that each State being, in certain respects, quite an independent country, makes its own laws on this or that subject, and their Courts are independent one of the other. Then his French *confrère* is likely to smile politely and, without making open comparisons, will leave the American lawyer a vague impression that somehow the American system may be open to criticism after all.

Now, the fact is that both systems are good and that when you are accustomed to

any system, the keen edge of its defects are worn off by custom and habits of thought.

The French have a system of decisions, so to speak, but they look upon these decisions in an entirely different way from ourselves. The French barrister or advocate, in pleading before the Court, will say in effect to the Bench, "Your Honor, you will decide just how you want to, but here is how the Court at Lyons decided in a similar case once, or at Nancy or in Paris." But the advocate will not say to the Court, in effect, "Here is what your Court decided, or the Appeal Court decided, in a similar case, and so it is your duty to decide so and so.

The French judge has a pretty good chance to injure the causes of justice by his freedom from being obliged to follow precedent to the degree to which his American *confrère* is accustomed. The really sound education of the French judge is one reason why the system has not yet produced chaos.

"A judge must give judgment between parties to a suit. But there his functions cease. He is forbidden to go further than that, that is to say, explains Colmet de Santerre, 'to lay down principles for the future which would be applicable in all cases similar to that in which he has given judgment; for, to do so, he would be encroaching on the prerogatives of the Legislator.' 'This principle rests upon Article 5 of the Civil Code: Judges are not allowed to decide cases submitted to them by way of general and settled decisions.'"[1]

The meaning of this Article 5 of the Civil Code is, says Baudry-La-Cantinerie[2] "that the judge cannot perepetuate his views for all time in regard to his interpretation of the law—*i. e.*, interpret the law today in such a way as to interpret it for the future. So that if a judge has wrongly construed the law the first time, it is useless to continue in the same path. So that the cause of justice will suffer less from two contradictory decisions, than from a series of bad decisions which are consistent among themselves."

In early times French Parliaments rendered decisions on causes submitted to them which were called "*arrêts de règlement.*" These decisions were quite like our Court decisions of the present day in America. The king, however, overruled these "*arrêts*" whenever his caprices led him to desire to do so. The French Civil Code of today (Article 5 above quoted) clearly prohibits a judge from rendering "*arrêts de règlement*" and this system appears to give satisfaction generally in France. I do not suppose a French lawyer really worries himself about the advantages or disadvantages of the system. He is used to it. The young French practitioner of today will point out that the profession is not as exclusive now as in former times; that conservatism has many advantages; that the branches of *avoué* (attorney) and *notaire* (conveyancer) are unreasonable monopolies; that allowing women to plead as advocates is rather of an experiment; that it is very severe on an *avocat* (barrister) not to be able to charge for his services and sue for his fees if need be, and so on; but that the present system of rendering decisions in France should be exchanged for the American or English system, that the modest abstracts of cases which provide the French barrister with arguments should be swept aside in favor of our teeming shelves groaning under Reports, is as far from his imagination as to borrow judicial ideas from the tribes of Central Africa.

The fact that a certain question has been decided altogether differently in different parts of France does not trouble the French lawyer of today. He remembers that if this kind of thing is inconvenient nowadays, it was worse in "the good old times," when, as Voltaire said, a man travelling in his coach from one part of France to another, changed the system of laws under which he was gov-

[1] *Manual of French Law*, p. 87.
[2] *Précis de Droit Civil.*

erned as often as he changed horses. There is today what is called a "constant jurisprudence," much valued apparently, by professors and commentators, but this "constant jurisprudence" is merely what we call the "tendency" of Courts to decide in one way or another.

I see only one feature in modern French decisions which is characteristic of the present times—and that is an extraordinary development in the direction of deciding legal questions by—I know of no other expression better than "the rule of thumb." If anyone can tell me by what process of legal reasoning this new system of deciding legal questions is arrived at, I shall be in a better position to define the "rule of thumb."

Chief-Judge (President) Magnaud, of Château-Thierry, is responsible for introducing this system in France. This really talented, conscientious man, but extraordinary jurist, has for a number of years been the hero of a large number of his fellow citizens, though a source of embarrassment (almost consternation) to his colleagues. His decisions are founded on a wide knowledge of human nature and an excellent knowledge of psychological principles. But his decisions, from a lawyer's point of view are perplexing —to say the least. A number of his decisions have been collected and printed, and it is the second volume of these decisions recently published that I have now before me. "*Le bon juge*" of Château-Thierry, as M. Magnaud is called, is not alone. At Paris, there is another "*bon juge*"—M. Séré de Rivières, President of the 8th Correctional Chamber.

To give an example of M. Magnaud's decisions, let me cite a petition for divorce, 18 March, 1903. M. and Mme. F. made mutual petition after voluntarily living apart for ten years. Judge Magnaud granted the application, stating in the judgment "that under the circumstances, adultery, of which one of the petitioners complained, was so justified by nature and sentiments of the heart that it could not be considered as the fault of one but of both in voluntarily living apart for so long." Again, December 12, 1900, M. and Mme. T. mutually demanded divorce. Judge Magnaud declined to hear evidence, as useless, and granted the petition, giving as one of his reasons "that if divorce by mutual consent *was not yet the law of the land*, the Court, nevertheless, should take the reciprocal petition into consideration, for *two souls could not be enchained perpetually one to the other against their consent.*" These are only two decisions taken at hazard, but they will explain my meaning. That such a judge could keep his position is difficult to understand, except on the grounds of the individual worth of the judge and the substantial satisfaction he gives. What a dangerous power an unworthy judge might exercise, if he were to follow the "rule of thumb" principle is fearful to contemplate.

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

III.

The Conduct of the Powers in Respect to Their Neutral Obligations.

By Amos S. Hershey,
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IN a previous paper attention was called to the fact that "the present Russo-Japanese War promises to present an exceptionally interesting and important field for the application of certain principles of International Law, more especially of some of those modern rules governing the rights and duties of neutral States and individuals which are of comparatively recent origin and to the growth of which the United States has so largely contributed."[1] A number of delicate questions relating to the laws and principles of neutrality have already arisen; and, while we cannot hope to touch upon all such questions, or to enter upon an exhaustive discussion of any one of them within the limits of this paper, we may perhaps be able to throw some light upon doubtful points by an examination of past precedents and fundamental principles, and thus assist the reader in coming to an intelligent decision as to whether the conduct of the neutral Powers has thus far[2] been in conformity with their international obligations.

At the very outset of the struggle an extremely interesting question arose in respect to the proper treatment of the sailors of the Russian vessels (the *Korietz* and the *Variag*) whose crews had been rescued by neutral cruisers belonging to various nationalities[3] which were lying in the harbor of Chemulpo at the time of the sinking of these vessels by the Japanese fleet on February 8th. The Japanese, who appear to have feared that the rescued sailors would be surrendered to the Russians, at first demanded their surrender as prisoners of war; but at least the British Government insisted upon taking those under its charge into British territory with a view to interning them until the close of the war or until other arrangements could be made. The Japanese Government, however, at last generously consented to their release on parole, and a wise and easy solution of what seemed at one time to be a very perplexing problem was thus made possible. In the event of an unwillingness on the part of the Japanese Government to consent to such an arrangement, the obligations of neutrality would probably have best been fulfilled by interning them in neutral territory until the close of the war, in accordance with Premier Balfour's suggestion in the British Parliament.[4] This is now universally admitted to be the proper course to pursue in the

[1] See The Green Bag for May, 1904.

[2] June 25, 1904.

[3] These were the French cruiser *Pascal*, the British cruiser *Talbot*, the Italian cruiser *Elba*, and the American gunboat *Vicksburg*. The charge made by the Russian newspapers that Captain Marshall, the commander of the *Vicksburg*, refused to assist in the rescue of the Russian sailors from the sinking *Variag* was admitted to be false by the Russian Government, which expressed regret that the incident had created so much feeling.

The Russian Press also showed considerable irritation over the fact that the commander of the *Vicksburg* did not join in the protest of the captains of the other neutral vessels in the harbor of Chemulpo against the violation of Korean neutrality by the Japanese fleet. In so doing it is perhaps needless to say that the captain of the *Vicksburg* was acting clearly within his rights and that he was guilty of no impropriety or act of unfriendliness toward Russia. His conduct seems to have been entirely correct.

[4] See the *Evening Post* for February 25th, for Balfour's reply to an inquiry in the House of Commons. The Hague Conference of 1899 failed to agree upon the proper disposition of shipwrecked, wounded, or sick belligerents, landed at a neutral port.

analogous case of an army which has been forced to retreat into neutral territory. The surrender of these sailors to Russia under the circumstances would have furnished a just cause for protest on the part of Japan, and might have tended in future wars either to discourage rescue from a sense of humanity for fear of offending one of the belligerents on the one hand, or to have encouraged it from motives of partiality on the other.[1]

In the earlier period of the war there were frequent comments in the Russian press on what was called "American meddling."[2] These seem to have been largely inspired by the pro-Japanese tone of the American press, and also by the interest manifested by the Government and people of the United States in the fate of China. It goes without saying that expressions of opinion and sympathy on the part of neutral individuals, or of the newspapers, or even of public meetings, in behalf of either belligerent do not constitute a violation of neutrality. No Government can be required to interfere with such free expression of opinion or sympathy, and it is not desirable in a land animated by the traditions and spirit of freedom that it should attempt to do so. "It is a mere confusion of ideas to pretend, as Prince Mestchersky pretended a few days ago, and as some people in this country seem to imagine, that because it is our duty as a State to observe the legal obligations of neutrality, it is also our duty as a people to affect indifference toward both belligerents in the present struggle."[3]

The American sympathy for Japan seems also to have sought expression in several practical ways. For example, it was announced in February that sixty residents of Chicago (among them being a number of veterans of the Spanish-American War) in-

[1] A different course was followed by the British Government in the famous case of the *Deerhound*, a private yacht belonging to the Royal Yacht Association of England. The owner of this yacht, acting at the request of Captain Winslow of the *Kearsarge*, helped to rescue the officers and crew of the *Alabama* upon the occasion of the latter's sinking at the hands of the *Kearsarge* during the Civil War. To the surprise of Captain Winslow, the *Deerhound*, after picking up a certain number of men, largely officers (including Captain Semmes) of the *Alabama*, hastily and surreptitiously steamed off with its precious cargo to Southampton. Several of these had, as it seems, already surrendered themselves to the *Kearsarge* as prisoners of war, and there was some evidence of collusion between Captain Semmes and the owner of the *Deerhound*. To be sure, the *Deerhound* was a private yacht instead of a warship, but she seems to have had a sort of semi-official character as a boat belonging to the Royal Yacht Association. In any case, the British Government would probably have best performed its neutral duties by interning the officers and men of the *Alabama* as prisoners of war. For the facts of the case, see the Claims against Great Britain, Vol. III. pp. 261-308 (1st sess. 41st Cong. 1869). For a somewhat different view of the law and the facts, see Bernard, *The Neutrality of Great Britain During the American Civil War*, pp. 429-30.

[2] A loud outcry was raised by the Russian press late in February in consequence of a report that an application had been made to the United States Government by the Commercial Cable Company (presumably acting in the interest of Japan), for permission to connect Japan with Guam in the Philippine Islands (and thus with the rest of the world), by means of a submarine cable, it being feared that the two existing cables connecting Nagasaki with Shanghai would be cut by the Russians. In such a case Japan would have been cut off from telegraphic communication with the rest of the world.

In Russia the view was said to have prevailed that the granting of such a permit by the United States would constitute a breach of neutrality, although there seems to have been no official intimation or expression of opinion to this effect on the part of the Russian Government. Our Government appears to have been similarly noncommittal. In reply to an informal inquiry by Count Cassini, the Russian ambassador, at Washington, as to the truth of this report, Secretary Hay is said to have denied that the United States Government was at present considering such an application. (See Chicago *Record-Herald* for March 2, 1904). There thus appears to have been no official expression of opinion on either side, but it is interesting to notice that telegraph and telephone materials are included in the list of articles considered contraband of war published by the Russian Government on February 28.

The legality of propriety of laying such a cable would seem to depend upon the question of fact as to whether it was an enterprise in which the *animus videndi* or the *animus belligerandi* predominated.

[3] Slightly adapted from an editorial in the London *Times* (weekly ed.). for March 7, 1904. For some official utterances of American statesmen on this head, see Wharton's *Digest* III., §389.

tended to sail for the Orient in spite of an announcement by Japan to the effect that she desired no foreign troops, and numerous applications are said to have been made by American citizens for permission to enter the military and naval service of Japan. It was also reported in February that a movement was on foot at Atlanta to provide a warship for the service of Japan. At a mass meeting held in New York on February twelfth (at which the majority of those present were Japanese, but which was also attended by a number of American citizens—mostly Jews, it is said) a committee reported in favor of raising a Japanese war-fund of $5,000,000 by loans, gifts and contributions to the Red Cross Society. The question was raised as to whether American sympathizers could contribute to the Japanese war-fund without violating the neutrality laws of the United States or the obligations of International Law. The Japanese Consul General, M. Uchida, is reported to have said that he thought this point had not been definitely settled, although he declared that he should be ready to receive contributions; but he was of the opinion that there could be no legal objection to the purchase of Japanese war bonds as an investment, and he said that there was no question but that Americans could donate as much as they liked to the Japanese Red Cross Society.[1] The recent successful floating of a large Japanese war loan in England and the United States, as also the successful floating of a still larger Russian loan in France, also raises the question as to the legality of such loans.

In respect to the legality of foreign enlistment, it may be said that such enlistment is entirely and explicitly forbidden by the United States Neutrality Act of 1818 and by the British Foreign Enlistment Act of 1870, and, we presume, by laws or by proclamations of neutrality in most countries. Our own law prohibits all American citizens not only from enlisting or entering the military or naval service of either belligerent, but also from hiring another to enlist or from hiring another to go beyond the jurisdiction of the United States with intent to enlist.[2] The levying of troops within the borders of a neutral State or "anything like recruiting on a large scale"[3] is distinctly forbidden in modern times by the law of nations, and the failure to prevent these things would constitute a serious breach of neutrality. But on the other hand "a State is not expected to take precautions against the commission of microscopic injuries."[4] "It is not implied for a moment that the Government of a neutral country is obliged to keep watch over each unit of its population, and (that it) can be made responsible if a man here and another there crosses its frontier for the purpose of taking service with a belligerent."[5] Besides although there is no *right* of expatriation known to International Law, it is always open to any individual to renounce his nationality and enroll himself as a citizen or to enter the service of another State. The failure of the United States Government to prevent the departure of a certain number of her citizens for the Orient and the enlistment of these in the Japanese army could not be made a serious ground for complaint on the part of Russia, although such conduct on the part of our citizens would be a

[1] For a report of this meeting, see New York *Times*, for Feb. 13, 1904. M. Takahira, the Japanese minister at Washington, is said to have received numerous offers of large contributions to the Japanese war fund from Americans. It is not known whether these were accepted.

[2] It should, however, be remembered in this connection that the municipal laws of a State are not necessarily the measure or standard of its international obligations. "It is not the duty of a neutral government to prohibit the enlistment of its subjects in the service of a foreign belligerent, such service taking place beyond its territorial jurisdiction. The neutral ruler *may* punish by municipal penalty a subject so engaging, but, in default of treaty stipulation, he is under no international obligation so to do." Walker, *The Science of International Law*, p. 446.

[3] Lawrence, *Principles*, p. 533.

[4] Hall, *Treatise*, p. 601.

[5] Lawrence, *op. cit.*, p. 533.

violation of our own Neutrality Law.[1] On the other hand our Government could not permit the levying or recruiting of troops in this country by agents or friends of the Japanese Government.

Our Neutrality Law also forbids any one from "fitting out and arming," or "knowingly being concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service" of either belligerent. Since the incorporation of this principle in the Treaty of Washington in 1871 and the Geneva Award of 1872, no one is likely any longer to deny that this rule forms an integral part of International Law, and the proposal to present Japan with a war-vessel, if made, was on the face of it absurd. The Government of the United States would have been bound by its international obligations to have prevented the fitting out, arming, and the equipping within its jurisdiction, as well as the departure, of such a vessel, and every contributor to such a fund would have been liable to arrest and punishment for a violation of the Neutrality Act of 1818.

"The duties of neutrals happily do not impose any checks upon the humane impulses of the citizens of neutral countries, or upon the practical expression of their sympathies in case of the wounded, the widows, and the fatherless,"[2] and there can be no sound objection to contributions to any Red Cross Society, at least on the part of neutral individuals."

As to the question whether American sympathizers with Japan have a right to make gifts or voluntary contributions to a fund set aside for the purpose of assisting Japan to carry on the war, the case is by no means so clear. There can, however, be no real question as to the legality of the purchase of war-bonds as an investment. Of course it would be a flagrant breach of International Law if such a loan were in any way to be advanced, supported, or guaranteed by a neutral Government. Although the legality of loans by neutral individuals to belligerent States has been denied by some eminent publicists,[3] such a position is not in conformity with the practice of nations. "Money is a form of merchandise, and neutral individuals constantly trade in it with belligerent governments. It can be transferred with the greatest ease, far more easily in fact, than other commodities. Commercial transactions in it could not be prevented except by an amount of espionage and interference which would outrage human nature and render all trade impossible. No war of any magnitude takes place without a free resort by the combatant powers to neutral money markets. The stock in loans issued to provide funds for the conflict is bought and sold in other countries, just as freely as shares in foreign mines and railways. . . . When practice points entirely in one direction it is idle to pit against it a so-called rule

[1] This would only be the case if they actually enlisted or were hired or retained to go abroad with intent to be enlisted. It would not be a crime, under our neutrality law, for them merely to leave this country with intent to enlist. U. S. *v.* Kazinski, 2 Sprague 7. For official opinions on the subject of enlistment, see Wharton's *Digest* III., § 392.

[2] From editorial in London *Times* for February 13, 1904.

[3] *E.g.*, by Bluntschli, §768; Phillimore, III., §151; Calvo, §§2628-30 (5th ed.); and Halleck (Baker's ed.), II., p. 195. The cases De Wutz *v.* Hendricks, Common Pleas, 1824, 9 Moore, 586; Thompson *v.* Powles, Chancery, 1828, 2 Simon 194; and Kennett *v.* Chambers, U. S. Supreme Court, 14 Howard 38, upon which the view of these publicists seems to be founded, merely go to the extent of holding that contracts to raise loans for the purpose of aiding communites whose belligerency or independence has not been recognized are illegal or invalid. This is a good example of the excessive deference which is sometimes paid to the decisions of judges whose opinions are often mere *obiter dicta* or are given a more extended application than they deserve. In dealing with the decisions of courts we should always remember that they are necessarily of limited application both as to subject matter and in respect to nationality. We should never forget that International Law is based upon the general practice of nations. This is one of the greatest objections to the teaching of International Law by the main or exclusive use of the "Case System."

based on nothing better than the statement that gold is a prime necessity in war. It certainly is; and nearly all agree that a belligerent may lawfully confiscate any supplies of it he may find in a neutral vessel on its way to the enemy. Money is contraband of war, and must be treated like other articles in the same category. The neutral lender in it lends at his own risk, but he commits no breach of the common law of nations by lending, and his government is under no obligation to attempt the impossible task of preventing him."[1]

But it is claimed that gifts or voluntary subscriptions stand upon a different footing from ordinary loans. In 1823 the law officers of the British Crown, in response to an inquiry from the British Cabinet in respect to the legality of certain funds which were being raised in behalf of the Greek revolutionists whose belligerency had been recognized by the British Government, gave an opinion to the effect that "voluntary subscriptions of the nature alluded to were inconsistent with neutrality and contrary to the law of nations."[2] In commenting upon this opinion, Lawrence says, "Even in deciding, and rightly deciding that voluntary gifts and subscriptions were illegal, the British law officers took care to add that the belligerent against whom they were directed would not have the right to consider them as constituting an act of hostility on the part of the neutral government. Moreover, they abstained from recommending a prosecution of the subscribers on the ground that it would be almost certain to fail."[3]

But of what use, we may ask, is a prohibition in International Law which can not be made effective, or a rule for the non-enforcement of which a neutral State cannot be held responsible. The only apparently sound argument in favor of such a rule which occurs to us is one which is based upon the doctrine of intent. It might be urged that we ought to distinguish, as in the case of the sale, construction, or exportation of a war-ship, between a *bona fide* commercial transaction and an intent to render assistance to one of the belligerents. But the rules of International Law have fortunately not been devised to satisfy the demands of logic or of any system of classification, and the doctrine of intent, at least as applied to ships of war,[4] is one of very doubtful value and validity. For, as an able writer has well said, "in international wrongs . . . the intent is not the thing chiefly or primarily regarded."[5]

So far as can be ascertained, the people and Government of the United States have fully discharged their neutral obligations toward both belligerents in this war up to the present time.[6] President Roosevelt's Proclamation of Neutrality, issued on February 10th, was more than usually full and explicit and it takes advanced ground on all important questions. In accordance with the terms of our Neutrality Law, the acceptance of commissions and enlistment in the military or naval service of either belligerent are strictly forbidden.[7] In accordance with the requirements of International Law as well as of our Neutrality Act,

[1] Lawrence, *op. cit.*, pp. 522-23. Cf. Hall, p. 598.

[2] Lawrence, p. 523. For the documents, see Halleck (Baker's ed.) II., pp. 195-97. But with respect to loans, the learned lawyers declared that "if entered into merely with commercial views, we think, according to the opinion of writers on the law of nations and the practice which has prevailed, they would not be an infringement of neutrality."

[3] Lawrence, pp. 323-24.

[4] In respect to the construction, sale and exportation of ships of war, International Law would probably gain in efficiency as well as clearness if these acts were altogether forbidden. It is highly probable that this is now the rule. But this is a point which will be more fully discussed in a subsequent paper.

[5] Bernard, *The Neutrality of Great Britain*, *op. cit.*, p. 398.

[6] June 25, 1904.

[7] As has been noted above, these would not, strictly speaking, be offences in the eyes of International Law.

it also prohibits "the fitting out and arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either belligerent," as also the "increasing or augmenting of the force of any ship of war, cruiser, or armed vessel in the service of either of the said belligerents." For the same reasons it also prohibits the preparing or setting on foot of any military expedition or enterprise against the territory of either belligerent, and it forbids the use of our ports or territorial waters for any military purpose. It also directs the enforcement of the two twenty-four rules, *viz.*, the rule requiring that vessels belonging to either belligerent and entering a neutral port during the war be required to leave within twenty-four hours after their arrival except in case of necessity, and the rule which provides that an interval of at least twenty-four hours must elapse between the departure from a neutral port of vessels belonging to opposing belligerents. These rules are now so generally observed by neutral States that they are in all probability in process of becoming a part of the law or practice of nations, if, indeed, they do not already deserve that description. The same may be said of two other requirements, likewise inserted in the President's proclamation and now generally observed by the practice of nations, to the effect that ships of war belonging to either belligerent shall only be permitted to take in a supply of coal at any of our ports sufficient to take them to the nearest home port, and that the same vessel, after having once been furnished with coal, shall not receive another supply at any of our ports within three months,[1] unless she shall in the meantime have entered a port of the government to which she belongs.

In a subsequent executive order, issued on March tenth, President Roosevelt warned all officials of the Government, whether civil, naval, or military, not only to observe all obligations of neutrality during the present war between Japan and Russia, but "also to abstain from either action or speech which can legitimately cause irritation to either of the combatants." This proclamation is said to have produced a good effect in Russia and to have somewhat allayed the feelings of irritation of the Russian Government and people against the United States. Although doubtless an act of wisdom and discretion on the part of our President, this additional proclamation was not necessary from the point of view of our international obligations, and it can hardly be said to be binding upon the majority of those to whom it is addressed.

If the United States seems to have a clear record in the matter of the faithful observance of her neutral duties in this war, the same may be said of England and France. The Governments of both of these States appear to have performed their neutral obligations under somewhat difficult circumstances in an admirable spirit of fairness and impartiality.

France is said to have made an elaborate apology to the Japanese Government for having allowed the small Russian Mediterranean fleet to remain at Jibutil, a port in French Somaliland, for a longer period of time than the twenty-four hour rule per-

[1] It is perhaps too much to say that these are rules of International Law at the present time, but they are undoubtedly in process of rapidly becoming so. They have been incorporated into most of the recent Neutrality Proclamations, at least in those of the United States, Great Britain and France. It seems always to be assumed in current discussions that these rules are part and parcel of International Law. Where modern Governments as well as the general public are willing to take such advanced ground, it would seem to be unbecoming for publicists to lag too far behind. This is especially true of the rules limiting the supply of coal in neutral ports. In view of the supreme importance of coal under conditions of modern naval warfare, there can scarcely be any question but that only a very limited supply should be furnished to belligerent vessels at neutral ports.

mits;[1] but inasmuch as the Mediterranean fleet was ordered back to the Baltic, it may be inferred that it was not permitted to take on a sufficient supply of coal at French ports to enable it to reach itts destination in the East. It is difficult, however, to see why the French Government should have been obliged to apologize to Japan for a violation of the twenty-four hour rule inasmuch as the observance of this rule can scarcely be said, strictly speaking, to form any part of the requirements of International Law. The French Manifesto of Neutrality, moreover, makes no mention of a time limit after which the sanctuary of its harborage is forbidden to a belligerent vessel.[2]

England, on the other hand, has not only refused to supply Russian war and transport vessels with more coal than was necessary to take them to their nearest home port,[3] but, in accordance with the terms of her Neutrality Proclamation, she has insisted upon the enforcement of the twenty-four-hour rule in all parts of the British Empire.[4]

The only serious charges of a violation of neutral duties on the part of a great European Power lie against Germany, *viz.*, the failure of the German Government to prevent the sale to Russia of several transatlantic steamers belonging to its Auxiliary Navy, and the exportation of a number of torpedo boats to Russian territory; but, inasmuch as these transactions raise some very difficult and delicate questions which are inseparably connected with a great historical controversy, and inasmuch as the limits of this paper have about been reached, these charges must be reserved for our next paper.

[1] See New York *Independent* for February 25, 1904.

[2] At least so says the *Saturday Review* for February 27, 1904. This omission is all the more surprising from the fact that this rule was initiated by the French Government in 1861. See Walker, *op. cit.*, p. 455. We have been unable to find the text of the French Proclamation of Neutrality. The *Journal des Debats* (weekly ed.), for Feb. 19, 1904, states that it is less precise than those of former occasions.

[3] As in the cases of the Russian transport *Azoff* and the two torpedo boats at Port Said on February 10th. See the New York *Times* for February 11, 1904.

[4] As in the case of the Russian torpedo boats at Malta and Port Said. It is scarcely worth while to notice the charges against England of gross violations of neutrality which were made by the angry and excited Russian newspapers at the beginning of the war. So it was charged, *e. g.*, that the Japanese attack on Port Arthur had been made from Wei-hai-wei, a Chinese port leased by the British Government, and that two Japanese cruisers had sailed from Genoa under the British flag. For Lord Selbourne's clear and convincing refutation in the British Parliament of these and similar charges, see London *Times* (weekly ed.) for March 4, 1904.

A CASE OF PROFESSIONAL ETHICS.

By Jesse S. Reeves,
Of the Richmond, Indiana, Bar.

A SCORE of years ago the Nestor of the Blue Grass bar was Judge Marsden. When he died, full of years and honors, people came to Lexington from all over the State out of respect to his memory. "He was a true Kentuckian, sir," was heard, "brought up according to the best traditions of the Commonwealth."

However, the judge was not a Kentuckian by birth. "William Stackpole Marsden, B. A., 1823, Peconic Centre, Connecticut," was the entry in the small Yale catalogue for 1825. And in that year he was completing his course of study at the law school at Litchfield, that forerunner of the great law schools of today. At twenty-five years of age the world lay before him. Full of hope and ambition he turned to the great West;

avoiding the thickly settled centres of population east of the Alleghenies, he followed the stream of western migration and found himself the possessor of a sign, an office and a few books in Lexington, Kentucky.

He had brought no letters of introduction. His diplomas from the schools which had trained Calhoun were enough to admit him to the Kentucky bar. Old Judge Holcomb moved in open court his admission.

An hour afterwards bench and bar held a protracted session at Whitley's Tavern. Marsden proved himself as agreeable as his brothers were hospitable. That afternoon he had a client, a man who had been made the defendant in a pending damage suit.

Marsden went over to the clerk's office, got the declaration in the case and took it to his office. One reading showed him it was bad. No need to waste time upon that.

The next Saturday was court day. Marsden was on hand and when the case of Whipple *v.* Sykes was called he arose and entered his appearance for the defendant Sykes. "I file," he said, walking over to the clerk's desk, "a demurrer on behalf of the defendant to the declaration of the plaintiff Whipple."

The low buzz of conversation among the attorneys ceased. The judge looked over his glasses and said, "I note the entry of your appearance for the defendant, Mr. Marsden. What steps do I understand that you are about to take in this matter?"

"I desire on behalf of the defendant to file a demurrer to the plaintiff's declaration," repeated Marsden. The judge and the clerk exchanged glances. "If that is your determination, let the entry be made," responded the judge impressively.

The calling of the docket was over. The lawyers filed out one by one. There seemed to be an air of suppressed excitement about the place. Marsden went up the street to his office. Upon each corner as he passed was a group of two or three of his fellow members of the bar. In answer to his hearty "Good morning," a nod was all he received. No one came to his office that day. He boarded at the same tavern as did Attorneys Brown and Owens. At dinner they kept their eyes upon their plates when Marsden came into the dining-room.

During the following week Marsden found himself left severely alone. A chilly bow greeted him when he met another lawyer. Marsden became worried.

At last he called upon Judge Holcomb. The judge met him with a manner at once dignified and formal. "Judge," Marsden said, "you have been very good to me since I came here an entire stranger. I shall never forget your kind words when you moved my admission to the bar, and your kindness was shared by every other lawyer in this circuit. I felt at once that I was at home. But since last Saturday everything has changed. No one has come near me. When I approach another attorney he moves off and appears not to have seen me. I don't know what I have done to cause this change and I come to you, as one who has shown me more than ordinary courtesy and hospitality, to have you tell me, if you can, what is amiss and what I can do to repair matters. I am completely disheartened."

"Young man," answered the judge, "I took kindly to you from the first and so did all of us. Our first impressions of you were good, and we were only too glad to welcome you to Kentucky. But there are certain proprieties which you have wholly failed to observe. You may have been taught that way at that law school you came from, but here, sir, it won't do. All I have to say, sir,—and I say it in all kindness—is that in Kentucky, sir, no gentleman, sir, ever demurs to his brother's declaration."

The next Saturday Marsden withdrew his demurrer and filed an answer. He prospered thereafter and died, as has been said, full of years and honors.

RUSSIA AND AMERICAN JEWS.

By Edmund Arthur Dodge,
Of the New York Bar.

RUSSIA'S discrimination against American citizens of the Jewish faith has long been a subject of complaint on the part of our Government; and the Department of State has consequently ceased to grant, or permit the granting by our representatives abroad, of passports as a matter of right, to such citizens, who may desire to visit, or travel in the Russian Empire.

The law as to issuing passports is, indeed, permissory, and not obligatory, the decision being left with the Secretary of State, under section 4075 of the Revised Statutes, which provides that "the Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States." The "General Instructions" prescribed for our Ministers in foreign countries have been to the same effect. It is in the discretion of the Secretary to grant or not to grant, especially if he has reason to believe, as in the case of Jews, that the passport, though issued, will not be properly respected by the Government of the country in which it is particularly intended to be used.

Yet Russia has been, on the whole, uncommonly liberal in her treatment of foreigners. They may be landholders, and as such are eligible to membership in the rural provincial assemblies, with the right to vote; though foreigners are not permitted to own real estate—for obvious reasons—in the frontier governments of the west. Other wise foreigners—with the exception always of Jews—can do business in these provinces the same as native Russians; and though they are not allowed to enter the civil service, an exception is made "in favor of professional and scientific men, such as physicians, surgeons, apothecaries, architects, engineers, professors, and teachers of the arts and sciences, who may acquire in the service of the State the rank attached to their respective capacities, and receive decorations. . . . A foreigner may hold a commission in the Russian army, and take the several ranks in it; and, having the rank of Lieutenant-General, or full General, or of Field-Marshal, may be appointed Senator and member of the Council of the Empire." (Merrill, "Comparative Jurisprudence and the Conflict of Laws," page 81, note citing the Report of the English Naturalization Commission of 1869). Twenty years ago there were, in the sixteen western provinces of Russia—that is, in Lithuania, White and Little Russia, and Bessarabia—2,843,400 Jews, and about 432,000 in the five Polish provinces; and more than four-fifths of these were concentrated in the towns. In Russian Poland the Jews were in the proportion of one to seven inhabitants; and in the adjacent provinces they constituted about ten to sixteen *per cent.* of the population; while in certain districts the proportion was about one-third; in one, that of Tchaussy, reaching fifty *per cent.*

The results of the recent Russian census are not yet known; but a rough estimate has been made that at present the Jews constitute about three *per cent.* of the whole population of the Empire, or more than four millions—though this would seem to be too great a total as compared with twenty years ago—and, according to a partial census taken, there are over 2,800,000 in the western and southwestern provinces—of whom more than three-fourths live in towns—or over 11 *per cent.* of the population; 77,275 being in the three townships of Odessa (containing 73,389), of Kerch, and of Sebastopol—the proportion of Jews in Odessa being thus 35 *per cent.*; and 431,800 in five governments of Poland out of ten, or 11 *per cent.*

of the population. None but the wealthiest and best educated of the Jews are allowed to enter Great Russia—being, roughly speaking, northern and central Russia to the Urals and the White Sea—yet many are found scattered all through that portion of the Empire.

The only treaty between the United States and Russia containing anything applicable to the question of passports is that of December 6-18, 1832—negotiated during the the first administration of President Jackson, between James Buchanan, afterwards President, our Minister at St. Petersburg, and Count de Nesselrode, Vice-Chancellor of the Russian Empire. Article 1. of this treaty reads as follows: "There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective States shall mutually have liberty to enter the ports, places and rivers of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce." Article X., after providing for the free disposition by will or otherwise of real or personal property belonging to a citizen or subject of one of the high contracting parties, situated within the jurisdiction of the order, (except where such real property might descend to a person incapable, by reason of alienage, of holding it), concludes as follows: "But this article shall not derogate in any manner from the force of the laws already published, or which may hereafter be published by His Majesty, the Emperor of all the Russias." The treaty was to continue in force until January 1st, 1839; and was thereafter subject to determination upon one year's notice from either party. Such notice not having, so far, been given, it still stands. There is no treaty between the two countries for the protection of naturalized citizens; but, if provided with passports, such citizens of the United States would be entitled to receive, at the hands of this Government, all the protection in Russia due to native-born Americans.

Mr. Blaine, writing to our Minister at St. Petersburg in 1881, (MSS. Inst. Russia; For. Rel. 1881) said, that from the cases theretofore reported from that Legation, it appeared that the action of the Russian authorities towards American Jews, visiting Russia, had been either, *first:* absolute prohibition of residence in any of the cities of the Empire, because, it was claimed, the Russian law permitted no native Jews to reside there, and that the Treaty of 1832 gave American citizens visiting Russia no other rights or privileges than those accorded to native Russians; or, *secondly:* permission to reside and carry on business, conditionally on membership in the first guild of Russian merchants and taking out a license. He also said, that as the question was traced backward the conflict between these two courses of action became more apparent, and a connected understanding of the facts became more difficult.

"For every allegation, on the one hand, that native laws, in force at the time the treaty of 1832 was signed, prohibited or limited the sojourn of foreign Jews in the cities of Russia, I find, on the other hand, specific invitation to alien Hebrews of good repute to domicile themselves in Russia, to pursue their business calling under appropriate license; to establish factories there, and purchase or lease real estate."

Though Article I. of the treaty says expressly that "the inhabitants of their respective States shall mutually have liberty to enter the ports, places and rivers of each party wherever foreign commerce is permit-

ted"; that "they shall be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs"; and that they "shall enjoy to that effect, the same security and protection as natives of the country wherein they reside"; there remains, unfortunately, the provision: "on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce"; as well as the latent ambiguity in the words quoted, "the same security and protection as natives of the country wherein they reside"; for a little twisting might easily make these words mean, Russians and Russian Jews, as distinguished from each other; so that American Jews would only have the same measure of security and protection accorded them as Russian Jews would receive. Moreover, as this proviso in Article I. should be taken in connection with that at the end of Article X.—where, at first view, there appear to be no limitations placed upon the reciprocal rights of the citizens and subjects of either of the high contracting parties—stipulating that that Article is not to "derogate in any manner from the force of the laws already published, or which may hereafter be published, by His Majesty the Emperor of all the Russias to prevent the emigration of his subjects," the Russian Government might claim that this would apply to laws which might thereafter be passed for the expulsion of certain classes of its subjects, as well as those to "prevent the emigration" of certain other classes.

In 1895 difficulties arose owing to the refusal by the Russian Consul-General at New York to visé passports issued by this Government to citizens of Jewish faith; and Mr. Breckenridge, our Minister to Russia, received instructions from Secretary Gresham to present the views of our Government. Mr. Breckenridge thereupon addressed a note to Prince Lobanoff, Russian Secretary for Foreign Affairs (May 5-17, 1895) in which he said that Prince Lobanoff was aware it had long been a matter of deep regret and concern to the United States that any of their citizens should be discriminated against for religious reasons in Russia; that it was repugnant to our laws and the national sense "for a foreign official, located within the jurisdiction of the United States, to there apply a religious test to any of our citizens to the impairment of his rights as an American citizen or in derogation of the certificate of our Government to the fact of such citizenship"; that it was "not constitutionally within the power of the United States, or of any of its authorities, to apply a religious test in qualification of the equal rights of all citizens of the United States"; and that "no law or principle" was more "warmly cherished by the American people." Mr. Breckenridge then says: "It is therefore impossible for my Government to acquiesce in any manner in the application of such a test within its jurisdiction by the agents of a foreign power."

The Russian Foreign Office having thereafter been furnished, at its request, with an outline of the powers granted to, and limitations placed upon, the Federal Government by the Constitution and Amendments thereto, and particularly by the First Amendment, forbidding Congress to make any law "respecting an establishment of religion" or "prohibiting the free exercise thereof"; Prince Lobanoff, replying on July 8th to Mr. Breckenridge's note of May 17th, writes: "If it was at all the fact of belonging to the Jewish religion which was an obstacle for certain foreigners to be admitted into Russia, the law would extend the interdiction to all the members of that religion. Now, on the contrary, it recognizes formally the right of whole categories of Israelites to enter Russia, and the selection which it has made of these very categories proves that it has been guided in this question solely by considerations of an internal administrative character

which has nothing in common with a religious point of view." . . . "When, for motives of internal order, Russian law raises obstacles to the entrance of certain categories of foreigners upon our territory, the Russian consuls, who can neither be ignorant of nor overlook the law, are in the necessity of refusing the visé to persons who they know belong to these categories. . . . As to the American Constitution, I must confess that it seems to me to be here beside the question. The Article of the Constitution which you are good enough to mention, and which prescribes that no religion is prohibited in the United States, is, by the very nature of things, placed outside of all prejudice by the consular authority. He has neither to prohibit nor authorize the exercise in America of any cult; and the fact of his visé being accorded or refused does not encroach upon the article in question. The refusal of the visé is not at all an attack upon any established religion; it is the consequence of a foreign law of an administrative character, which only has its effect outside of the territory of the Union."

I make no apology for quoting this communication so fully, for it is a clear statement, and its arguments difficult to answer—that is, if one wishes to be frank.

But Mr. Breckenridge claims (as did Mr. Buchanan in 1832)—and, it is presumed, the Department also—that the Russian Foreign Office does not "understand our institutions." Thus he says, writing Prince Lobanoff on July 20th, "for in this difference, so radical, springing from institutions so different, and embarrassed somewhat by differences of speech, I have realized the obstacles to a complete mutual understanding of the issue." Now, Prince Lobanoff shows, in his note of July 8th, that he quite sufficiently grasps the theory of our institutions, and rightly fails to find that it affects the question at issue. As to "differences of speech," Mr. Breckenridge is, unfortunately, not the first of our diplomatic envoys who has been embarrassed at a time when fluency, in at least French, would have been most desirable. Though having an honorable record in the Halls of Congress, he certainly was—if there is anything at all in diplomatic experience—at a disadvantage as compared with the Russian Foreign Minister; for Prince Lobanoff, on the very day that Mr. Breckenridge sent his final note—on this subject—to him (December 6th, 1895), had attained the age of seventy-one years, having been from his twentieth year in the Russian diplomatic service. He had occupied successively the posts of Ambassador at Constantinople,—where the Czar Alexander II. had utilized his services in the negotiation of the Treaties of San Stefano and Berlin,—at London, and at Vienna; and in 1895, though named, and already *en route*, as Ambassador at Berlin, he was recalled to fill the place of Minister of Foreign Affairs. He only lived until the summer of 1896.

The position of the Department, in 1895, would no doubt have been stronger had its contention been made on the ground of rights accorded under the treaty of 1832; or, in default of any concession proved, it had claimed that it could not grant exequaturs if the Russian consuls were required to hold to their original instructions. At that very time, Secretary Olney's tone was firm and unyielding toward England in the Venezuela boundary matter; yet had he taken as equally firm and uncompromising tone with Russia his action might not have met with so much popular approval. Indeed, an examination of the Chinese Exclusion Law (as renewed for another ten years), will show that the same arbitrary acts alleged against the Russian Consuls in the case of American Jews, are authorized by the government of the United States where intending Chinese immigrants are concerned, not excepting those of a higher grade than, and of superior education to, the proletariat—of all of which

none is probably better aware than the Foreign Office at St. Petersburg. It is evident, then, that some other method must be adopted in order to bring the Russian Government to our point of view, even than the argument based upon the assumed rights of American Jews under the existing treaty; and that, if treaties are to be made with foreign Powers which shall stand any legitimate strain that may be put upon them, we must so change the requirements of our diplomatic system, in conformity with the best European models, that, by training and experience, our ambassadors and ministers—to say nothing of those of lower rank, and in the consular service—may be second tonone.

THE EVOLUTION OF A LEGAL SKY PILOT.

By W. Archibald McClean,
Of the Gettysburg, Pennsylvania, Bar.

SANTOS DUMONT with his dirigible balloon making a trip around the Eiffel Tower and back to the starting point has given a new impetus to the air sailing business. It is an expensive experiment or luxury at present, but with the new impetus and the new century no one is quite willing to commit one's self where it is all going to end.

If balloons or air ships are to be the vogue, if the automobile is to be made a back number and man is going to fly in dirigible vehicles through the sky, then it is time to see what the law is going to do and say on the subject. Law is so elastic that it can adjust itself to all new conditions and applying old principles make them answer arising needs. If the law knows any uncertainty on the matter Legislatures are called upon and they pile on the remedies and the panaceas until they are often worse then the disease. Without resorting to the law making power, the following is a speculation as to the ways with which the law will greet and treat a balloon or flying era.

The first thing a lawyer wants is precedent. Have the law and authorities ever said anything about a balloon? Very little, one old case and one as late as five years ago make up the entire law that can be found on the subject of balloons.

The first one tells of a defendant who ascended in a balloon near the plaintiff's garden and came down in the garden. Becoming entangled and being in a perilous situation, he called for help and the crowd who were pursuing the balloon broke into the garden, trod down the vegetables therein growing and extricated the defendant from his position. The owner of the garden sued the aëronaut in trespass for damages done his garden and inclosure by the defendant and the crowd rescuing him, amounting to ninetv dollars.

The court said the counsel for the defendant erred in supposing that the injury committed by his client was involuntary and that done by the crowd was voluntary and that, therefore, there was no union of intent. The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act causes the immediate injury whether it was intentional or unintentional, trespass is the proper action to redress the wrong. Where an immediate act is done by the coöperation or the joint act of several persons, they are all trespassers, and may be sued jointly and severally, and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others it must appear either that they acted in concert, or that the act of the individual sought to be charged, ordin-

arily and naturally produced the acts of the others.

In conclusion the court said, "I will not say that ascending in a balloon is an unlawful act, for it is not so, but it is certain that the aëronaut has no control over his motion horizontally; he is at the sport of the winds and is compelled to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff, at a short distance from the place where he ascended. Now if his descent, under such circumstances would ordinarily and naturally draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation—all this he ought to have foreseen and must be responsible for. Whether the crowd heard him call for help or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled perhaps by the double motive of rendering aid and gratifying a curiosity which he had excited. Can it be doubted that if the defendant had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the inclosure? I think not. In that case they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly liable for all the injury sustained."

This case came out of the city and State of New York, about the year 1822. The second case comes from near Richmond, Virginia, where the cause of action originated in 1893, and after being ventillated by lawyers and courts, reached an end in 1897.

In this case a street railway company was the defendant, and ran its cars to a park. This park was owned by the company, was under its control and management, was kept opened to the public and was made attractive in various ways, to induce people to make it a pleasure resort and thereby gain patronage for the street railway. The defendant employed and paid one Peter Blum, to go upon their park premises and make three balloon ascensions, on separate dates. The defendant advertised these performances in the newspapers, by handbills and otherwise, and in this manner extended to the public an invitation to visit its premises and witness the balloon ascensions. This invitation drew a large crowd to the defendant's premises, and on the evening of the last day advertised, there were many children present, among them the plaintiff's intestate, a little boy eight years and six months old.

In arranging for the balloon ascension, two poles, each about forty feet long, were placed in an upright position fifty feet apart and secured by guy ropes attached to stakes driven in the ground. A rope was run from the top of one pole to the top of the other, and the balloon was swung to this rope, until inflated and ready to ascend, when the guy ropes were released and the poles were thrown down. By the evidence it appeared that the crowd generally knew nothing of the danger they would be in from the falling of the poles and supposed the poles were fixed and stationary; that the grown people, as well as the children, had crowded around the poles, watching the inflation and other preparations for the ascension. As the balloon was about ready to go up, Blum made some effort to clear away for the first pole to fall, and a signal was given to look out. The people took this to mean that the balloon was about to go up and it created great excitement and running for better points of view. At this juncture the pole was released and fell, striking the plaintiff's intestate on the head and killing him.

The first proposition of law the above situation suggested, was that when one expressly or by implication invites others to

come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.

Next it was immaterial how the deceased went to the park, whether he walked or paid his fare on the street cars, or by some other mode of conveyance. The gravamen of the action is the negligent failure of the defendant to use proper care to protect the deceased from a danger on its premises while he was there at the defendant's invitation. It was the duty of the defendant to exercise due care in keeping its premises reasonably safe for those persons it had invited to come upon them to see a balloon go up.

When man flies, whither he listeth, there may have to be a radical change, or at least some modification in that old maxim, he who owns the soil owns it up to the sky. Owning it up to the sky, how is a balloon to fly without trespassing upon your or my flume of air? Will the flyer be required to purchase his right of way through the air from the proprietors, or will the adage be a legal fiction then so as to permit him to go free? While legally and necessarily according to this old maxim, the aëronaut must be a trespasser when he sails, yet he will be one who will do no damages in going into and out of my flume of air, hence we venture to predict that the law will never recognize any right of recovering for trespassing through my air shaft unless actual damage results therefrom.

There will be other questions to be determined in that flying era. Will the aëronaut be able to acquire a right of way in and out of your or my air flume by prescription, by occupation for twenty-one years, so that we might not be able to dislodge him after his right had become firmly and legally attached thereto by time? Suppose I shall own an acre or two across which some flyer will accustom himself to cross in starting from his station, and which would be recrossed in returning thereto. This passage might be at an altitude of a hundred feet. He would use this right of way for sufficient length of time to ordinarily give it to a user by prescription. At length I should decide to erect a twenty story house on that acre lot which would simply wipe out of existence his right of way through my air flume. Perhaps all of us will have to have twenty-story houses in that day from which to launch our flyers. Would the owner of the right of way of the dirigible, or what not, be able to restrain me from building my skyscraper, or would I, having built, be liable to him in damages for a trespass upon his right of way acquired by prescription, or will it be decided that no right of way can be acquired by prescription in air flumes, and that any user of the same may at any time be ousted by the owner of the soil underneath?

Another inquiry suggests itself. Suppose one air ship collides with another in my air shaft, and the machines ceasing to fly, sink to earth and in reaching it wreck valuable improvements upon my soil. Will the owners of the two machines be liable to me for the injuries done my property, or if the accident occurred through the fault of one of the flyers without any contribution on the part of the other, will lack of contributory negligence absolve the one flyer from all damages in dropping through space on me, and saddle the entire bill on the machine responsible for the accident? Or will the non-contributing machine be responsible for the reason of being a trespasser *ab initio* in my air flume? Will a right of way over my property by prescription be such laches on my part that I will assume all hazard of trespassing flyers? Or will I, in order to protect my property, be required to keep a reflector operating up my air flume signalling, "Stop, look, listen, no trespassing by flyers permitted."

The following are ventured as the answers of the legal sphinx in the era of the air ship to the flying riddles proposed. Flyers will not be compelled to purchase rights of way through the atmosphere, nor will rights of way be acquired by prescription. Flyers will not be trespassers on your or my air shafts as there will be no damages to you or me by the passing of the air ships through them. Flyers will have to have places of ascent and descent with egress and ingress to the same, and they will have to own enough soil to furnish this and prevent themselves from being built out of aerial stations by skyscrapers. The owner of any machine causing any accident will be responsible for its results. The owner of the soil will at no time assume the hazard of being upon the earth with machines in the heavens moving over his life, liberty and property.

The cases already cited determine that flyers will have to start from their stations with all the care and caution of a limited from a terminal. Necessarily they will have to advertise their business and movements. There will be persons impelled by curiosity, others as travelers to go where the flyer is preparing to fly. There will have to be a proper care to protect them from danger. The station and its neighborhood must be reasonably safe for mortals to be in. If the flyer be of eccentric habits, there will have to be due caution and care to provide against the risks of such eccentricities. If for the want of the same, one is injured, or if in starting the machine pulls over a few chimneys, digs a hole in a skyscraper, the law will compel the owner of the flyer to pay all damages. That is, if process can be obtained, for we venture to say that the laws regulating the service of all kinds of processes will have to be changed to meet the new order of things. Sheriffs will have to live in air ships and services will have to be good wherever caught, or there will be a deluge of bailiff jumping as to outdo anything the world has yet seen in that line.

In descending the navigator of the sky will not be able to come down in my garden and tear up all my vegetables, without paying me for the value. Ascending or descending there may be such perilous situations as may invite multitudes to go to the rescue. However, in extricating those in peril, the latter will have to pay as prize money all damages a multitude of heroic rescuers may do. If an anchor to an air ship is allowed to drag and go skipping across country, picking up to destruction a cow, part of a roof or anything else of value, the owner of the machine can expect to answer for the same.

It is to be expected that the operators of the flyers will largely perform their work subject to the hazard of their employment. If aught is done to the machinery or the gearing or any part of the flyer by the employé, whereby he meets with an accident, it will, of course, be such contributory negligence on the part of the employé as to make it impossible to legally resort to the employer. If the employé goes up in the discharge of his duties, and meets a tornado or simoon, which the weather bureau had not been able to get track of, and is stripped of a wing or the propeller is jammed, it will be an act of Providence, and in accepting the employment, the operator accepted the hazard of everything Providence might put in his way or do unto him. If, however, a wireless came out of the heavens telling that it was not safe for flying things to be abroad among the winds, and the employer, notwithstanding the wireless warning, sends the operator on a trip, the hazard will likely be transferred to the employer and the employé on such rare occasions will not be nonsuited.

As to passengers it may be surmised that those who have paid their fares for a safe journey will not only be entitled to what their tickets called for, but also a safe going up and coming down. Deadheads will take their lives in their hands when they step aboard a flyer. If having paid for a safe trip,

a passenger is placed in peril of his life, and crys aloud for help, so that some good flying Samaritan rushes to the rescue, and thereby does damages to the cabbages of a third party, surely the passenger will not be liable for the broken cabbage heads. His ticket will be held to pay to be rescued and the flying navigating trust of those days must answer for all trespasses committed in attempts to rescue him from any peril. The passenger will also be able to fall back upon the same concern for all injuries received on the fly, and his administrator or executor for the value of a long projected fly into immortality.

Suppose while on a trip a cyclone descended from nowhere, and gathered the flyer into its revolving bosom, will the trip be at the hazard of the passenger when the company has done the utmost in its power to provide for a safe journey? A point will undoubtedly be reached where the court will say that leaving earth was the voluntary act of every passenger and that to a certain extent they would take the risk of all hazards which could not be foreseen and provided for.

In those flying days it is even conceivable that there shall be lawyers, who, having made a specialty of the laws of moving things that be above the firmament, as well as that through which they move, will have well established reputations as legal sky pilots.

GOT THEIR NAMES MIXED.

By Edgar White.

THE lawyers of Lancaster, Mo., have a curious habit in making their statements and arguments to juries, of presenting a certain proposition to one man on the jury and making a personal appeal to him. For instance, Col. C. C. Fogle will say, when representing a much-abused defendant: "Don't you see, Tom, that in the light of this evidence, taking all the facts as they have been presented, that under no possible hypothesis could you find the defendant guilty. You see that, too, Bill, don't you? Of course, you do."

Tom and Bill, whose intelligence has been so earnestly appealed to, are jurymen. And during the speech every one of the twelve will be singled out in the same familiar way, and asked to find the defendant innocent and send him home a free man to his waiting wife and ten anxious little children. No man on the jury is missed. It would be dangerous to show marked attention to a few and let the balance go.

The county of Schuyler is small, and all the older attorneys there know about every man in it, and a great deal of his family history. But visiting attorneys do not enjoy this advantage, and as a result they frequently go down in defeat because of their inability to address the jury from the vantage ground of a long-time friendship.

A few years ago a farmer sued the Wabash road for the killing of an antiquated mule, whose natural death would have taken place in a few days if a merciful engineer had not knocked it some mile or so skyward, and relieved it of its sufferings. It was plainly an effort to sell the carcass to the railroad company, and the railroad was making a hot fight to keep from buying the valueless quadruped.

In his opening statement plaintiff's attorney pursued the usual tactics of appealing to the jurymen by their first names, and patting them familiarly on the knees to emphasize a point. The railroad attorney quickly gauged

the advantage promised by this course, and asked permission to poll the jury and get their full names. He had a diagram of the jury box on a card, and as the names were given he wrote down Tom, Jack, Bill, Luke or whatever the first name was, on his card, taking care to see that each was assigned to the proper place on it.

The case continued all afternoon, and there was an adjournment for supper. At the night session the road's attorney made the closing argument for the defendant, in which he very cleverly followed the home attorney's method of appealing to individual jurymen, he having evidently studied his jury diagram to good advantage.

The case was at last submitted to the jury. Everybody thought the defendant would get the verdict in short order, as it had pretty well established the plaintiff had driven his venerable mule on the right-of-way through a fence-gap of his own construction.

But there was a hitch somewhere. At midnight the court sent out for the jury. They came in red-eyed and vengeful looking. They were asked as to the probability of a verdict. Ten men shook their heads dejectedly, but the foreman, a stalwart lumberman from Red Brush, said:

"We ain't right together on the evidence, yet, your honor, but if you'll give us a little more time, I think I can get 'em to look at this thing right."

From this it took no seer to infer there were about eleven hard-headed men on that jury. The court studied the matter for a few moments and then ordered the sheriff to take them back. It was three in the morning when the jury voluntarily reported. The foreman's face wore a triumphant expression as he answered, "Yes," to the usual question as to whether a verdict had been reached. The decision was for the plaintiff and double damages were awarded him! On a poll of the jury the foreman and one other answered with decision that that was his verdict. The others were a bit weak in their responses. The verdict was filed and the jury was discharged.

The road's attorney stayed over to investigate. He got a juryman to one side and a flood of light was thrown upon the singular action of the peersmen.

"It was just this way," said the juryman, as a weary expression crossed his face; "the minute we took a vote on it there was ten of us for you, and two for the fellow who owned the old mule. At first the case looked to us plain enough for a Chinaman, but the trouble was, in talking to the jury you got Jim Dowell, that's the foreman—you got him and Lige Simpson mixed. Jim and Lige ain't good friends, having had a fallin' out over a calf last fall, and every time you said so and so, Jim, and called him Lige, why Lige cussed, and when you palavered to Lige and called him Jim, then Jim cussed. You see, after supper they changed seats, and I guess that made it come wrong on the card you had. It warn't your fault, and we was all for you, but Lige and Jim was agin you from the start. We didn't want to stay cooped up there all night, and so we got to thinking it over, and concluded they might be right after all, and so we let 'em 'convince' us that way. Some of the boys said Jim had a knife and Lige an old gun in his boots, but we didn't keer for that. We just let 'em arger us into it by 'reasonin'."

The railroad company, however, managed to get the best of the "reasonin'" in the Appellate Court, and the case was reversed.

JOHN PHILPOT CURRAN.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

VII.

FROM 1789.

By Van Vechten Veeder,
Of the New York Bar.

THE outbreak of the French Revolution was contemporaneous with the rise in England of another and more powerful means than the press for influencing and directing public opinion—public meetings and organized societies or associations. This new method of agitation is to be clearly distinguished from the earlier riotous and tumultuous agitations of which the proceedings of the Spitalfields silk-weavers in 1765 is an illustration. One of its earliest appearances was the general demonstration over the violation of the rights of the electors of Middlesex in the case of John Wilkes. Once established this form of agitation rapidly developed in influence through systematic organization. As these political societies multiplied in numbers, the principle of association was brought into active operation. Committees of correspondence were appointed, and delegates were sent to London to give concentration and force to their petitions for reform, and to keep alive the public agitation of grievances. In this way the people hoped to overcome the disadvantage of a very limited representation in Parliament. One of the earliest of these organizations was the "Revolutionary Society," formed to commemorate annually the Revolution of 1688. Another, "The Society for Constitutional Information," had been formed in 1780 to instruct the people in their political rights and to forward the cause of parliamentary reform. Pitt, Fox, Sheridan and many of the leading statesmen of the day were among the members of these organizations and participated in their proceedings. Upon the outbreak of the French Revolution, however, these associations were directed into new channels, and agitators like Horne Tooke assumed direction of their activities. New organizations of which the "London Corresponding Society" may be taken as a type, arose out of the excitement caused by events in France. This society, composed chiefly of working men, sought to redress all the evils of society. To promote their visionary schemes they carried on a system of correspondence, not only with affiliated societies in England, but with the National Convention of France and the Jacobins of Paris. Their arguments for universal suffrage were combined with all the abstract speculations and conventional phrases then current in France. Their proceedings alarmed the timid and provoked the severe measures of repression which ensued.

In May, 1794, in the preamble to the act suspending the writ of *habeas corpus*, Parliament declared that "a traitorous and detestable conspiracy had been formed for subverting the existing laws and constitution, and for introducing the system of anarchy and confusion which has so lately prevailed in France." The government at once proceeded to demonstrate the assertion. In October indictments for high treason were found against Thomas Hardy, John Horne Tooke and ten other leading members of the London Corresponding Society and the Society for Constitutional Information. The indictments charged the prisoners with conspiracy to break the public peace, to excite rebellion, to alter the government of the country, to depose the king, and put him to death. In pursuance of these traitorous designs, the prisoners were charged with having written and issued letters and addresses with the object of summoning a

convention of the people, and with having provided arms for the purpose of resisting the king's authority.

Thomas Hardy, the secretary of the London Corresponding Society, was first brought to trial (24 St. Tr. 199). Lord Chief Justice Eyre presided. Sir John Scott, the attorney general, prosecuted, and Erskine

THOMAS HARDY.

defended. Scott opened for the crown in a speech of nine hours' duration, and it became necessary to adopt the innovation of adjourning from day to day. This was the first trial for high treason in England which had not been closed at a single sitting. The crown brought forward a great mass of testimony, which had been industriously collected by secret committees of Parliament, to establish the existence and character of the alleged conspiracy, and to prove the prisoners connection with it. This evidence showed beyond doubt that there had been great excitement, intemperate language, popular organization and extensive correspondence in furtherance of reforms which were in many instances visionary. Many things had undoubtedly been said and done by individual members of these societies which probably amounted to sedition, but nothing approaching treason. Their chief offense in the eyes of the government consisted in their efforts to assemble a general convention of the people avowedly for the

purpose of parliamentary reform, but really, it was claimed, for subverting the government. It was sought to hold Hardy liable, not only for his own words and acts, but for all the proceedings of these societies and their members. With all its horde of spies and informers the crown was unable to prove the existence of any unlawful designs on Hardy's part by evidence of overt acts of

LORD CHIEF JUSTICE EYRE.

treason. It was only by straining the doctrine of constructive treason to a most dangerous extreme that a conviction was possible. This deplorable result was averted by the consummate skill and eloquence of Erskine. Erskine disclaimed all intention of vindicating anything that would promote disorder; but he maintained that "the worst possible disorder is when subjects are de-

prived of the sanction of clear and unambiguous laws. If wrong is committed, let punishment follow according to the measure of that wrong; if men are turbulent, let them be visited by the laws according to the measure of their turbulency; if they write libels upon government, let them be punished according to the quality of those libels; but you must not, and will not, because the stability of the monarchy is an important concern to the nation, confound the nature and distinctions of crimes, and pronounce that the life of a sovereign has been invaded because the privileges of the people have been, perhaps, irregularly and hotly asserted; you will not, to give security to government, repeal the most sacred laws instituted for our protection, and which are, indeed, the only con-

sideration for our submitting at all to government. If the plain letter of the statute of Edward the Third applies to the conduct of the prisoners, let it in God's name be applied; but let neither their conduct nor the law that is to judge it be tortured by construction, nor suffer the transaction, from whence you are to form a dispassionate conclusion of intention, to be magnified by scandalous epithets, nor overwhelmed in an indistinguishable mass of matter, in which you may be lost and bewildered, having missed the only parts which could have furnished a clue to a just or rational judgment."

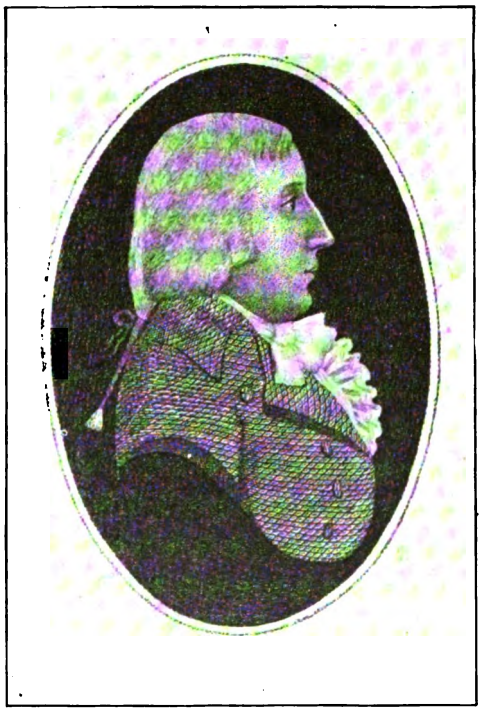
The government had strained every nerve to convict Hardy, and, not content with their defeat in that case, they determined to proceed with the trial of Horne Tooke (25 St. Tr. 1). Erskine was again successful in defense of the prisoner. The groundless alarm of the government, stimulated by spies and informers, was exemplified by the evidence in this case. For instance, Horne Tooke had received a letter containing the inquiry, "Can you be ready by Thursday?" This inquiry was supposed by the government to refer to a rising; but it appeared that it referred only to "a list of the titles, offices, and pensions bestowed by Mr. Pitt upon Mr. Pitt, his relations, friends and dependents." The result of these trials was most salutary. A conviction would have branded free speech as treason, and very likely brought about in reality the revolution which the government feared.

The prosecution of Thomas Walker in 1794 expressed all the fears of the government, and its issue exposed their extravagance. Walker, a respectable and wealthy merchant of Manchester, and six others, were charged with conspiracy to aid the French invasion and overthrow the government. The arms that were to have been used proved to be mere toys; and the firearms found in Walker's possession had been secured by him to defend his own house against a mob by which it had been attacked. The entire charge in fact was founded on the statements of a disreputable informer named Dunn, whose falsehoods were so plain that the prisoners were immediately acquitted, and Dunn was committed for perjury.

From the indulgence and release which had been extended to most of the prisoners after the acquittal of Hardy and Horne Tooke, Henry Redhead Yorke had been excepted. In April, 1794, at a meeting assembled in Sheffield, he had spoken in strong terms of the corruption of Parliament and the necessity of reform. He was immediately arrested on a charge of treason, which, after a long imprisonment, was at length abandoned, but in July, 1795, he was brought to trial on the charge of conspiring to defame the Commons, and inciting the people to sedition. Yorke was a mere youth who had engaged in political agitation with more zeal than discretion. He was possessed, however, of considerable ability, and ably defended himself. Justice Rooke admitted to the jury that the language used by the prisoner could only be construed to be criminal in connection with the circumstances of public excitement under which it was uttered. He was found guilty, fined two hundred pounds, and imprisoned two years.

The ridiculous measures in which the panic of the government manifested itself during this period are well illustrated by the prosecution of Crossfield for complicity in what was ironically termed the "Pop-Gun Plot" (26 St. Tr. 1). In 1794 the government discovered an alleged conspiracy among the members of the Corresponding Society to assassinate the king. The murderous instrument was a tube or air gun through which a poisoned arrow was to be discharged! When, at length, nearly two years later, the alleged conspirators were brought to trial, the ridiculous features of the case prevailed over the public alarm and the prisoners were all acquitted.

In Scotland the authorities had been much alarmed by the proceedings of several reform societies, and by the assembling in Edinburgh of a convention of delegates of the "associated friends of the people," from various parts of England and Scotland. The avowed purpose of this assemblage was to discuss universal suffrage and annual parliaments, and their proceedings were characterized by the usual extravagant language. The government at once proceeded to suppress all such discussion with barbarous severity. The trials of Thomas Muir, Palmer, Skirving and others (23 St. Tr. 391) were outrageous. Muir was a young advocate of high attainments who had been active in the agitation for parliamentary reform. As a member of the convention of delegates, he was brought to trial before the High Court of Justiciary for sedition. All the jurymen were members of an association which had expelled Muir from membership on account of his opinions; but his objection to them was met by the contemptuous reply that he might as well object to his judges, who had sworn to maintain the constitution. The crown failed to prove that Muir had made any seditious speeches; in fact, most of the crown witnesses bore testimony to his earnest counsel for law and order. Muir defended himself with great courage and ability, but his cause had plainly been prejudged. The lord advocate denounced the prisoner as a demon of sedition, and the presiding judge, Braxfield, charged the jury that agitation for parliamentary reform was criminal. The landed interest alone had a right to be represented, he said; "as for the rabble who have nothing but personal property, what hold has the nation of them?" Muir and his companions



THOMAS MUIR.

were convicted and sentenced to transportation for fourteen years. See, also, the contemporaneous cases of Watt (23 St. Tr. 1167) and Downie (24 *ib.* 1).

Meanwhile treason trials were rife in Ireland. The trials of the Drogheda Defenders in 1794, of William Jackson, in 1795 (25 St. Tr. 783), of Weldon, the Dublin Defenders, in 1795 (26 St. Tr. 225), and of Patrick Finney, in 1798 (26 St. Tr. 1019), in all of which Curran defended, led up to the actual hostilities of 1798. The government was enabled to obtain a conviction in Jackson's case, as in the trials of 1798, through the rule which allowed one witness to convict of treason in Ireland. Although Weldon was convicted and hanged, another prisoner named Leary was acquitted under precisely similar evidence. In Finney's case Curran so completely discredited the testimony of the notorious informer Jemmy O'Brien that the jury acquitted the prisoner.

In the case of O'Coigly (26 St. Tr. 1191) there can be no doubt that the law of treason was violently strained to meet the requirements of a particular case. O'Coigly was charged with having in his possession a treasonable paper with the intention and purpose of communicating it to the French government. This charge was not sustained by any legal and sufficient evidence. O'Coigly was one of the last victims of the odious doctrine of constructive treason. In England, Stone (25 St. Tr. 1155) was acquit-

ROBERT EMMET.

ted of complicity with Jackson in an alleged conspiracy to give information to the enemy.

The trials arising out of the uprising of 1798 began with the case of the brothers Henry and John Sheares, and was continued in the cases of M'Cann, Byrne, and Bond, in all of which Curran participated. The most conspicuous of these trials was that of the Sheares, in which the united efforts of Curran, Plunkett, and M'Nally were powerless to prevent a conviction. Throughout these cases Curran bitterly inveighed against the rule according to which one witness sufficed to convict of treason in Ireland; and emptied all the vials of invective upon spies and informers—"the forsaken prostitute of every vice who calls upon you with one breath to blast the memory of the dead and to blight the character of the living." "He measures his value by the coffins of his victims; and, in the field of evidence, appreciates his fame as the Indian warrior does in fight—by the number of scalps with which he can swell his triumphs. He calls upon you, by the solemn league of eternal justice, to accredit the purity of a conscience washed in its own atrocities. He has promised and betrayed—he has sworn and foresworn; and whether his soul shall go to heaven or hell he seems altogether indifferent, for he tells you that he has established an interest in both." It was at the trial of Bond that Curran, surrounded by the soldiery and interrupted by the clash of arms, declared, "You may assassinate but you shall not intimidate me."

Robert Emmet's mad attempt in 1803 arose out of the same conditions as the rebellion of 1798. The secret armament and sudden uprising planned by this youthful enthusiast never had the slightest chance of success; and how little influence Emmet had over the passions of his followers was plainly shown by the foul murder of Chief Justice Kilwarden. Within two months Emmet and his followers were tried and executed. They had been taken red-handed and there was no question of their guilt. The prisoners were prosecuted by Attorneys General O'Grady and Plunkett, and defended by Curran, Ponsby and M'Nally. The government sought to implicate Curran, but unsuccessfully. Emmet was attached to Curran's daughter, and had sacrificed his last opportunity to escape in his efforts to see her and bid her farewell.

A FORGOTTEN DRAMA OF WALL STREET.[1]

By H. Gerald Chapin,
Editor of "The American Lawyer."

THIS tells how the asp, unmindful of Aesopian moral, endeavored to exercise his natural propensities upon the file. Also what came of the attempt.

Mention the year '72 to any veteran of Wall Street and it will recall to him the "Sickles *Coup*." Press him further and he may incidentally refer to "Lord Gordon Abercrombie." Still the chances are that he will not, for the affair, while at the time, something more than a nine days' wonder, has now generally faded from recollection. As one of the greatest, if not indeed the most stupendous of criminal operations on record, the matter well deserves a chronicler. In the drama, some of the best known men of the time played leading rôles. Only through the good sense of the then Secretary of State, did the government escape being drawn into serious international complications.

ACT I. MINNEAPOLIS.

In the early summer of 1870, there appeared in St. Louis, where he remained but a short time, and from whence he afterwards moved to Minneapolis, a gentleman of distinguished appearance and of suave and courteous demeanor. Apparently possessed of ample wealth, he took up quarters in one of the finest of the hotels, registering simply as "G. Gordon." His unostentatious life invited no inquiry. Soon crested letters began to arrive, addressed to "Lord Gordon Gordon." The rumor that a member of the aristocracy of Scotland was honoring the city with his presence was circulated by the newspapers, and the supposed Lord became the lion of the hour. When taxed with his nobility, a direct answer was evaded. "Since all men are equal in this country," he said, "it makes very little difference what I am. As long as I am in America I prefer to be plain Mr. Gordon."

Quite needless to state, after that, nothing further was necessary to establish his title in popular estimation. "Lord Gordon Gordon" soon became "Lord Gordon, Earl of Abercrombie." With absolutely no letters of introduction, this modern Cagliostro had secured an entrée to the most exclusive circles of the city.

A half formed intention of purchasing a large tract of Western land, casually expressed to the individual who could be firmly relied upon to carry immediate report to those interested, bore expected fruit. Northern Pacific Railway officials eagerly swallowed the unbaited hook.

"My mind is not fully made up as yet," Lord Gordon said, in answer to their questions. "Still I have often thought of buying, say fifty thousand acres, in your beautiful country. Not for myself, for I have more than suffices for my own simple needs, but that my beloved sister may have an opportunity for the gratification of her benevolence. We have often talked of establishing a colony of our old tenants here."

"Princely magnificent," that phrase so dear to children of the stylus, was not altogether misapplied when St. Paul journals undertook to describe the expedition which started from that city in the latter part of August, 1870. Six teams, omnibuses, a private carriage for his lordship and an ambu-

[1] Those who may be desirous of investigating further this mysterious affair are referred to contemporaneous reports in the New York newspapers and to Mr. Edward Harold Mott's interesting work, *Between the Ocean and the Lakes—The Story of Erie*.

lance were in the train. Twelve men for manual labor, a French cook and negro waiters constituted his retinue. The markets of Chicago, St. Paul and Minneapolis were freely drawn upon. Champagne flowed like the proverbial water. The expedition returned in November and reported that Lord Gordon had been favorably impressed with a large tract lying in Otter Tail and Beaver counties. This "favorable impression" seems to have been the net result of the railroad company's fifteen thousand dollar expenditure, for nothing further was ever heard from Lord Gordon on the subject.

ACT II. NEW YORK.

The West becoming too restricted a field for the operations of this new star in the financial firmament, he moved to New York. In Minneapolis, he had made the acquaintance of Mrs. Belden, wife of a well known banker, who had spent some time there while on a pleasure trip. Whether his remark that he was a large stockholder in the Erie Railroad and his subsequent removal to the metropolis were in pursuance of a then conceived scheme to perpetrate the gigantic swindle which he afterwards attempted, is something which will never be known.

Assuming such to have been the case, his arrival could not have been better timed. The latter part of the year 1871 witnessed a truce to the historic strife which was being waged against Gould and Fisk, for control of Erie. There was a temporary lull in the Titanic battle where injunction had been heaped upon injunction, receivership upon receivership, charges of perjury, fraud and embezzlement upon counter charges. The triumph of the "Little Wizard" seemed complete. Firmly seated in the President's chair, he bade defiance to the allied interests which were persistently seeking his overthrow. Who could tell that the foundations of his throne were even then rocking, who forsee that six months would witness its overthrow?

"Lord Gordon Gordon" engaged a gorgeous suite at the Westminster Hotel, but subsequently removed to the Metropolitan, then one of the most exclusive of hostleries. Its proprietor was a son of the notorious Tweed. Seeking out Mrs. Belden, he renewed their acquaintanceship and was introduced to the principal men of the city. Such leaders as Horace Greely, Colonel Thomas A. Scott, vice-president of the Pennsylvania Railroad and Horace F. Clark, financier and son-in-law of Commodore Vanderbilt, became his intimate friends.

To the husband, William Belden, partner of James Fisk, Jr., vice-president of Erie, the clever imposter took occasion to incidentally mention the fact that he controlled some $6,000,000 of stock in that line. These 60,000 shares were in the hands of English investors.

The suspension of hostilities was of the most temporary character. It ended with the appearance on the scene of action of a new enemy to the established powers. As is well known, General Sickles, Minister to Spain, while at a dinner in London took umbrage at some remarks made by a discomfited shareholder, concerning the alleged impossibility of securing justice from the courts of this country After considerable solicitation, he consented to assume the leadership of a coalition of English stockholders in a second attempt to overthrow the existing management. Securing leave of absence, he returned to this country and obtaining the cooperation of dissatisfied American interests, locked horns with Gould in a life and death struggle for supremacy.

Every vote counted and the latter's friends were not slow in urging the importance of securing the good will of so potent an ally as Gordon was likely to prove. Belden in particular was unceasing in his endeavors to bring about an interview with his chief.

Manifesting that diplomacy which was characteristic of the man, Gordon haughtily

declined to make the first advances by calling on Erie's president. But Gould, slowly sinking, was ready to catch at straws. Taking as a card of introduction a telegram from Colonel Scott, he called at Gordon's apartments. Horace Greely was present at the well nigh historic interview.

In a state of abject panic, at his Lordship's demand, Gould agreed to cease all opposition to the repeal by the Legislature of the then famous "Classification Bill," to discontinue the entire series of actions in which Erie was involved, to renounce all operations on the stock market and procure the resignation of the existing Board of Directors.

He went even farther. Incredible as it may seem, he wrote out the following resignation and placed it in Gordon's hands:

"I hereby resign my position as President and Director of the Erie Railway Company, to take effect on the appointment of my successor. Yours, etc.,

"JAY GOULD."

"New York, March 9, 1872."

"By the way," Gordon insinuated, as the interview was drawing to a close, "I have been put to considerable expense in investigating Erie's condition. It amounts to fully a million. Now it seems no more than fair that the road should reimburse me at least half." Whereupon Gould actually handed to this social highwayman two hundred thousand dollars in cash and three hundred thousand dollars in negotiable securities.

For two weeks Gordon had this fortune in his possession. At any time he could have fled across the Canadian border. That he did not, is by no means the least mysterious feature of the transaction.

On March eleventh occurred the famous *coup*. In defiance of an injunction previously obtained by Gould, a stormy meeting of the Board of Directors was held.

The company's offices swarmed with police under personal charge of Superintendent Kelsoe and a band of private detectives and roughs headed by the notorious "Tommy Lynch." There was no hitch in the proceedings. "Brought like a bullock, hoof and hide," the directors, in the vernacular of today, were prepared to "deliver the goods." One by one they resigned, but two, Eldhide," the directors, in the vernacular of to-Gould. Their vacant places were immediately filled with partisans of the opposing faction. The "Little Wizard" was removed, and General Dix elected in his stead.

The details of this dramatic scene, have already been told often enough to do away with the necessity of repetition here. How the new board on adjourning found themselves locked in, the door guarded by Lynch and his band of Bowery toughs, how General Sickles was sent for and with the assistance of United States Marshal Kennedy broke down the door, how Gould intrenched himself in his private office and when the barricades were beaten down, evaded service of the papers notifying him of his removal by agilely leaping over desks, tables and chairs, finally taking refuge with his counsel Field and Sherman, and how the boy messenger, Crowley, hoisted over the transom, succeeded in handing the documents to the deposed president, who after sulking until the next morning, gave up the fight, is matter of almost common knowledge.

Had Lord Gordon possessed the voting power which he claimed, his assistance was now of no value.

Even then the ex-president delayed. He seems to have had not the slightest suspicion or to have made any attempt whatever to verify "Abercrombie's" story.

Finally on March 23, in the office of William M. Tweed, at 85 Duane street, Gould said to the latter:

"Tweed, I've made up my mind that Gordon is a scoundrel, and I think I'll make him give back the money and securities I gave him or have him arrested."

"You had better see Judge Shandley about it. He's in the next room," Tweed answered.

At half-past one in the afternoon, Gould, Shandley and Belden called on Gordon. With them went Superintendent John J. Kelsoe.

Belden sent in his card. He was admitted and according to Gould's version of the affair, said to Gordon.

"See here, Jay Gould with Judge Shandley and Chief of Police Kelsoe are in Tweed's room. Uuless you return at once the money and securities that Gould left with you, they will railroad you to prison before any one knows where you are."

The almost unparalleled audacity and *sang froid* which this prince of swindlers had hitherto manifested, suddenly collapsed. Without protest, he immediately disgorged his entire gains with the exception of some shares in the Allegheny and Oil Creek Railroad which he had previously placed in the hands of his brokers for sale. He wrote out an order for these.

The only hypothesis which will sufficiently explain Gordon's conduct is a belief that Gould possessed the power to fulfill Belden's threat of "railroading to prison" by Star Chamber methods, without the assistance of a jury in public trial. Without doubt a compromise of signal advantage to the criminal would have been effected, had he manifested some trifling tenacity. Still, Tweed's control of certain members of the judiciary, as revealed by subsequent investigation, rendered the threat not altogether an idle one.

The conspirators were themselves amazed at their success. Gould had remarked on the way over, that if he "got a hundred thousand back, it would be a streak of luck." One hour later, Belden, with what object cannot be imagined, took it upon himself to return to Gordon, apparently for the very purpose of expressing the surprise of all concerned that the latter "had given up so easily."

At which the psuedo Lord, plucking up a little courage, hastily dispatched a message to Philadelphia notifying his brokers not to honor the Alleghaney and Oil Creek order.

Too late. The imposture was fixed and on April ninth Gordon was arrested, charged with misappropriation. Gould simultaneously initiated a civil suit against the brokers, who in obedience to Gordon's subsequent directions, had refused to surrender the stock.

So much odium had been incurred by Erie's ex-president, that the general public persistently refused to credit his version of the affair, and the newspapers, when they made any reference to the matter at all, treated it as a mere squabble arising out of an ordinary stock transaction.

Is it not well nigh incredible that even at this late stage, no one seemingly made the slightest attempt to verify Gordon's title of nobility or test the truth of his tale of enormous estates in Scotland? Horace F. Clark and A. T. Roberts volunteered their services as his bondsmen, the former leaving his bed at midnight to qualify. Thirty-seven hundred dollars bail was exacted. Ex-Judge James K. Porter, John Graham, James H. Strahan, leaders at the bar, against whom not a breath of suspicion had ever been wafted, believed in and appeared for this self-styled "victim of a conspiracy."

Judge Joseph F. Brady after a number of adjournments set the case down for trial on September twentieth. A day or two before, Gordon disappeared.

ACT III. MANITOBA.

In 1873, Hay and Keegan, Minneapolis detectives, employed by the discomfited bondsmen, succeeded in tracing Gordon to Canada. Under then existing treaties, the latter was safe from extradition. Neverthe-

less, armed with papers which it was subsequently claimed, were honestly believed to be sufficient, they endeavored to forcibly remove the criminal to the United States. The enterprise proved abortive and the detectives found themselves confronted with a charge of kidnapping.

Governor Austin of Minnesota succeeded in working himself up into a fine state of frenzy over what was certainly a pretty plain case. Letters whose terms could scarce pass muster as diplomatic, were addressed to the Governor of Manitoba, and the aid of the State Department at Washington invoked to secure the termination of what was alleged to be the unlawful and wanton imprisonment of two inoffensive citizens of Minneapolis. Fortunately the good sense of the Federal officials to whom appeal was made, prevented this government from assuming an exceedingly ridiculous position, for the act of Hay and Keegan was as indefensible from the standpoint of international law as might well be imagined.

Governor Austin and Consul Taylor, after stirring up considerable of a teapot tempest and getting themselves thoroughly laughed at, finally subsided and concluded to let Canadian justice take its course. Whereupon, after three months' detention at Fort Garry, the prisoners were duly indicted, brought to trial and upon pleading guilty the judicial mountain was delivered of the unexpected mouse, in the shape of a sentence of twenty-four hours' imprisonment.

Gordon blustered considerably over the affair and made all kinds of menaces to sue everybody concerned. Apparently he thought better of it upon finding that no compromise money was forthcoming, in response to several threatening letters.

But the career of this accomplished swindler was now drawing to a close. He had been arrested at Fort Garry on charges of forgery and perjury, but was released through the failure of the Crown to prosecute. He then fled to the small and isolated village of Headingly, hoping to enjoy a short respite in which to perfect new schemes.

On the evening of August 1, 1874, two officers arrived and immediately placed him under arrest, exhibiting what purported to be warrants issued in Toronto, based upon charges of larceny and forgery committed in England and Scotland.

Gordon took the matter quietly enough, merely asking whether it was proposed to take him through the United States.

He was assured that this would not be done.

Thereupon, excusing himself for a few minutes, he stepped into an adjoining room, drew a revolver and blew out his brains.

An inquest revealed the fact that the warrants were spurious and but another attempt on the part of the bondsmen. After being severely reprimanded, the detectives were permitted to depart without punishment.

"Lord Gordon" certainly had reason to dread English justice. He is known to have been the son of middle class parents, living near the borderland of Scotland. Expensive tastes and a desire for luxurious living were scarcely susceptible of gratification on the salary of a junior clerk in a commercial house. Resigning his position, he began to pose as Lord Glencairn, a wholly fictitious member of the Scotch nobility, allied it was claimed, to the Duke of Hamilton, and the Marquis of Hastings, and possessed of a rent roll of some ten thousand pounds a year. His operations in the way of obtaining goods on credit, principally from jewelers, are said to have netted him some fifty thousand dollars. It was with this capital that he backed his venture here.

The Green Bag.

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

NOTES.

EX-SECRETARY Elihu Root was talking about the humanity of judges.

"They are humane men," he said. "I could tell you many moving stories of the pain that they have suffered in the infliction of severe sentences. It is not altogether pleasant to be a judge.

"That is why I cannot credit a story that was told me the other day about a judge in the West. A criminal, on trial before this man, had been found guilty. H was told to rise, and the judge said to him:

"'Have you ever been sentenced to imprisonment before?'

"'No, your honor,' said the criminal, and he burst into tears.

"'Well,' said the judge, 'don't cry. You're going to be now.'"—New York *Times*.

AN amusing feud between the bench and the press has arisen in Melbourne, according to the London *Chronicle*. One of the local morning journals alleged that the court hours were too short altogether, and that public inconvenience thereby resulted. Chief Justice Sir John Madden read that statement, and staggered counsel by sitting until six o'clock every day. A deputation of barristers waited upon him and remonstrated. He replied that so long as the public, as represented by the press, considered that the court was consulting its own ease he would continue to sit late. He has already converted the reporters.

A LEWISTON, Me., lawyer recently received the following epistle:

stratton Dec 9 1903

mr Hubbard the the international Paper Co Haint do eny Lumbering Here as i Can Find out tho is a Lions taking charge For Page Laurance & NewHall Place Called alder stream tha Live at shawmat me Lafe Bray is there agent i think your man is there it Franklin Co. so ther Papers Haint good it 25 miles From my Place there the trustee can bee served there send soon as Pasabll i got to go A Way a spell

yours Truly

AUGUSTUS WYMAN
Deputy sheriff

A proclamation for the arrest of King Charles II. was sold quite recently in London. It began: "*Whereas*, Charles Stuart, son to the late tyrant, with divers of the English and Scotish nation have lately in a trayterous and hostile manner, with an army, invaded the nation, which by the blessing of God upon the forces of the Commonwealth have been defeated."

The fresh looking sheet is 253 years old, and in the body it refers to the "malicious and dangerous trayter" and offers £1,000 reward.

A CERTAIN judge, who was chary of his words and syllables, was in the habit of cutting down the order "sustained," with which he ruled on objections, until it sounded like "stained." His little daughter was in court one day and that evening confided to her mother: "Mamma, papa chews tobacco so much when he's in court he has to tell the folks every now and then what's the matter with his shirt front."

C. L. A.

In a Southern State a disreputable citizen was on trial for murder. The evidence was circumstantial and insufficient to convict, but the jury, believing that the culprit was a vagabond and ought to be convicted of something, brought him in guilty of negro stealing.

The judge enlightened them a little, and again sent them out.

They came in with a verdict of horse stealing.

The judge, lecturing them soundly, sent them out once more.

The next verdict was perfectly satisfactory—at least to themselves.

"Guilty of manslaughter in the first degree, but we don't think he is the man."—Philadelphia *Public Ledger*.

A correspondent of the London *Times* says in a letter to that paper:

"Some time ago my firm had occasion to apply for letters of administration to the estate of a boy who had died at the age of 9. The papers were returned to be resworn because they did not state that he 'died without issue!'"

They tell a good story at the expense of W. B. Rodgers, the only lawyer at the Allegheny County Bar, or in the United States, for that matter, who holds the distinction of having been City Attorney of the three cities of one county at various times. He was counsel some time ago for a man charged with a serious offence, and on the day of the trial the defendant was in a condition that would certainly not have improved his chances of acquittal. Attorney Rodgers was worried, but he is a general in addition to being a political diplomat. He locked his client in a room in a downtown hotel and then studied out the knotty problem before him.

One of the most prominent oil operators of Pittsburg, and one of his most intimate friends, happened into his office shortly before he was ready to try the case. It was only a social call for a quiet chat, and Mr. Rodgers requested that his friend go into the courtroom with him. The oil operator sat beside Mr. Rodgers at the counsel table, and, during the progress of the case, he took little note of what was going on. He was not interested. Several times witnesses pointed in his direction, as did Mr. Rodgers, but the oil operator thought nothing of it. Mr. Rodgers tried to be indifferent. None of the witnesses appeared to know the operator, at least they said that they did not, and the prosecutor also stated that he did not know the man seated beside Mr. Rodgers. The jury naturally thought the man was Mr Rodger's client, and when the right bower of Bigelow, at the conclusion of the testimony, got up and said, "That is my case. This is not the man," not many minutes were wasted in bringing in a verdict of acquittal.

The oil operator accompanied Mr. Rodgers out of court, and it was not until they were a safe distance away from the seat of justice that Mr. Rodgers confided to his friend that he had posed as the defendant in the case. The operator was mad all through when he first heard of it, but the ridiculousness of the situation appealed to him and he took it as a huge joke and as a sample of the diplomacy of one who could pull a brand out of the burning. It is doubtful whether the brilliant city attorney would acknowledge the story, but his friends say it is true. —Pittsburg *Gazette*.

A counsel had been cross-examining a witness for some time with very little effect, writes "Sigma" in *Personalia*, and had sorely taxed the patience of the judge, the jury, and every one in court.

At last the judge intervened with an imperative hint to the learned gentleman to conclude his cross-examination. The counsel, who received this judicial intimation with a very bad grace, before telling the witness to stand down accosted him with the parting sarcasm: "Ah, you're a clever fellow, a very clever fellow! We can all see that!" The witness bending over from the box, quietly retorted, "I would return the compliment if I were not on oath."

The poem "Frink *v.* Evans," printed on page 447, was read at a recent meeting of the Tennessee State Bar Association, and was one of the most interesting features of the occasion.

A good example of Kansas justice in the early days of that bleeding State is shown in the following: In 1862 at a picnic near LeRoy two negroes were killed in a fight. All of the parties concerned were taken before Ahijah Jones, justice of the peace at LeRoy, for trial. Ahijah listened to all the testimony patiently, and then announced:

"A Philadelphia lawyer couldn't make head or tail of this row. It's too much for me and I ain't a-goin' to try to untangle it. The judgment of the court is that all of you be turned over to the citizens here assembled, for them to apply the law as made and provided."

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

Sir:—The right of capture at sea in time of war is one of the questions of International Law made of immediate interest by the reported captures by the Russian squadron in a sortie from Vladivostoc.

The object of captures at sea having been originally to make reprisals, and the right to make reprisals ceasing upon sufficient security having been taken to make good the damage concerning which letters of reprisal had been obtained from the sovereign power, it was a usual condition of letters of marque that the captures should be brought into port and submitted to the adjudication of a competent court in order that the validity of each capture should be determined and permission be granted or refused to the captor to convert the property to his own use. As a consequence, very different rules have been established in regard to maritime captures from those which are applicable to captures on land. The nature of hostilities which are carried on within an enemy's territory requires that an invading army should not encumber itself with booty, and accordingly, the commander of an army carries with him authority to make immediate inquiry and to determine summarily all questions of title to booty. In very early times the admiral of a fleet of armed cruisers determined in like manner the question of prize or no prize summarily. The capturing vessel conducted its capture to the admiral's ship, upon the deck of which inquiry was made by inspecting the papers of the captured vessel and interrogating her master and crew, and thereupon the vessel and her cargo were adjudged to be good prizes or were forthwith allowed to pursue their voyage. Under the present practice of warfare upon the high seas, it is the duty of the captors to send their captures to a convenient port of their own country or of an allied country, and to submit them immediately for inquiry and adjudication before a lawfully constituted prize court. If the captors should fail to do this, it is competent for the party who claims the ship and cargo to apply to a prize court of the captor's country for a monition against the captors to proceed at once to adjudication, in which case, if the captors should neglect to appear, and consent to adjudication, the court may order restitution with costs, and in some cases with damages. It is immaterial in such a case whether the captors have acted in good faith or not in making the capture. "If the captor," says Lord Stowell (1745-1836), as high an authority as can be quoted, "has been guilty of no wilful misconduct, but has acted from error or mistake only, the suffering party is still entitled to compensation, provided that he has not by any conduct of his own contributed to the loss."

The personal obligation of a captor to bring his captures into port for investigation and adjudication is founded upon the instructions which he has received from the government which has authorized him to make captures. The obligation of every government, on the other hand, to require its cruisers to bring their captures into port for judicial inquiry before a properly con-

stituted prize court rests upon the general law of nations. But this obligation under the common law of nations exists only with respect to vessels navigated under a neutral flag, the object of an inquiry before a prize court being to ascertain whether the captured property in each case belongs to a neutral or an enemy, and to restore the property if it belongs to a neutral, and so to restrain the captor in the eager pursuit of gain from doing injustice to innocent merchants whereby national complications might arise. Enemies, on the other hand, have no *locus standi* in a prize court under the general law of nations, and they cannot claim that their property, upon capture by a belligerent cruiser, should be taken into port for investigation and judicial action. Capture, of itself, divests an enemy of his property *jure belli*. Upon the surrender of a ship under an enemy's flag at sea, a belligerent may destroy her under the general law of nations, and if the captor is unable to bring her into port, he will be justified towards his own government in destroying her. The instruction of his own government may require him to bring into port every capture which he may make, but he may be actually engaged in a service which will not allow him to put a prize crew on board the vessel which he has captured in order that she may be taken into port. In such a conflict of duties, it would appear that nothing is left to the belligerent vessel but to destroy the hostile ship which she has seized, for she cannot consistently with her general duty to her own country, or under its express instructions, allow an enemy's ship to sail away unmolested. If it is certain that a vessel belongs to an enemy, and if it is not practicable to bring her to port, there is no option but to destroy her. When it is doubtful whether she is an enemy's property or not, and she cannot be taken to port, no obligation to destroy her exists, and the proper and safe course is to allow her to go on her voyage. When a ship is neutral, the act of destruction cannot be justified to the neutral owner and the neutral nation to which he belongs by the great importance of the act to the captor's own government. The neutral owner has a legal right to demand restitution in value.

An act of taking possession is not absolutely necessary in order to constitute a capture at sea. The real surrender of the captured ship is held to take place when she lowers her flag. It is the general rule for the commander of the vessel which has made a capture at sea to put a prize-master and prize crew aboard the seized ship; but many captures have been held to be effectual when this has not been done. But it is competent for a captor, if he places confidence in the promise of the captain of a captured ship, to retain possession of the prize against all subsequent captors by placing a single man on board of her.

The captor, when he restores a seized vessel to her commander under a contract of ransom, takes from the latter what is known as a ransom bill. The procedure under this contract, indeed the contract itself, is somewhat out of date at the present day. In this ransom bill the commander of the captured vessel binds himself and his owner, as well as the owner of the cargo, to pay a certain sum of money on some future day. The ransomed ship is allowed to proceed, after the bill has been signed, by a prescribed route and within a limited time. The captain of the ransomed ship, at the same time, delivers up to his captor one of his crew—usually his first mate—as a hostage for the payment of the money stipulated in the ransom bill. The practice of releasing captured ships on ransom being generally considered less beneficial to the belligerent nation to which the captor belongs than their detention and conveyance as prizes into port, and the power of ransoming vessels being liable to be abused by the captors to the detriment of neutral trade, it has been the policy of most nations for many years to restrain the liberty of the captors to ransom their captures.

LAWRENCE IRWELL.

Buffalo, N. Y., June 16, 1904.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book whether received for review or not.

THE ADMINISTRATION OF DEPENDENCIES: A Study of the Evolution of the Federal Empire, with Special Reference to American Colonial Problems. By *Alpheus H. Snow.* New York: G. P. Putnam's Sons. 1902. (vi.+619 pp.)

This book is not to any considerable extent controversial or theoretical. It is obvious enough, to be sure, that its author deems it both expedient and just for the United States to have permanent dependencies; but the reader with a contrary opinion will not find that the book is in the least inappropriate for his reading. What the author chiefly undertakes to demonstrate controversially is simply that Imperial possibilities inevitably must have been in the minds of the founders of the United States and actually were recognized in the Constitution, and that hence it is not revolutionary for the United States to undertake the administration of new dependencies.

The book is scholarly in tone; and its method is both analytical and historical. That the author is skilful in his analysis of ideas and clear in his use of language, is indicated by the following interesting passages: "Government so constituted that the depositaries of governmental power are persons of ordinary common sense, without expert knowledge and experience, is popular government. Government so constituted that the depositaries of governmental power are qualified to decide the problems by expert knowledge, investigation, and reasoning, and actually do so decide them, is expert government. . . . The possibility of the government being wholly popular or wholly expert exists in every kind of State. . . . As matter of fact, no States do commit themselves wholly to the theory that government is the expression of the popular will or wholly to the theory that it is a science. . . . A State and its dependencies, in whatever light the latter are regarded, constitute, according to the accepted public law of the civilized world, an Empire. The old conception of an Empire as a Kingdom composed of Kingdoms, and of an Emperor as a King who rules over other Kings, is passing away, and in its stead has come the conception of the Empire as a State composed of distinct and often widely separated populations or States, of which a State is the Central Government or Emperor. The State so acting as the Central Government or Emperor—whatever may be its inner constitution, whether monarchical, oligarchical, republican, whether federal or unitary—is called the Imperial State. The study of the administration of dependencies is in fact, therefore, the study of the form and nature of the Modern Empire."

Passing from the explanation of the general point of view and of the phraseology adopted, the author devotes the greater part of his book to a detailed history of the mode in which England has governed colonies both in America and elsewhere. There is also an adequate account of the mode in which our own Government has dealt with regions not included in the original or the new States. Less elaborate, but sufficient for the purpose, is the description of the theory and practice of colonial administration pursued by France and other Continental powers. Throughout, there is enlightening use of quotations from documents and treatises. The volume is, indeed, a storehouse of valuable information, thoroughly fitted for the use of the trained and laborious investigation, and carrying him as near as is possible to the original sources. Its defect—if so strong a word may properly be used—is not in execution but in plan; for the plan, praiseworthy in so many respects, fails to include—for the benefit of those who cannot be called trained or laborious, but who are numerous, to say the least—an occasional summary of the system ex-

isting under some one government at one time. In other words, the vast amount of detail might well be supplemented with occasional generalization. Yet this is a comparatively unimportant shortcoming in view of the merits already described.

It remains to add that the author works out a theory to the effect that the Constitution of the United States states the true principles of administering dependencies in the clause giving power to Congress "to dispose of and make all needful regulations respecting the territory or other property belonging to the United States," further "that the people and lands of the American Union and the people and lands of its dependencies constitute a Federal Empire, and that the people of the American Union, by their written Constitution, consented to by all the people of the Empire, have divided the governmental power under an unwritten Constitution, so that the Union is the Imperial State as respects the dependencies, standing in a federal and contractual relation to them, and having neither unconditional nor unlimited power over them, but only a power of disposition," and finally "that the habitual and daily administration of the dependencies of the American Union should be in the charge of the President, assisted by expert investigators and advisers, and that the superintendence and final control of the administration should rest with the Congress, subject only to the final judgment of the whole people of the American Union, expressed at the polls."

There is a temptation to give an abstract of the history embodied in this interesting and valuable book; but probably enough has been said to direct to it the attention of the persons for whose reading it is peculiarly fitted.

The imperative professional duties of this College Commencement season have demanded so much time of the reviewers that reviews of many new and valuable law books, which have been received, are necessarily deferred until our next issue.

CURRENT LEGAL ARTICLES.

ONE of the most important articles of the month is that of Professor A. V. Dicey, of Oxford, in the *Harvard Law Review* for June, on "The Combination Laws, as Illustrating the Relation between Law and Opinion in England during the Nineteenth Century."

The changes in the combination law (says Professor Dicey) are then attempts to fix the limits of the right of association in regard to trade disputes, and may be brought under four heads, which are the Tory legislation of 1800; the Benthamite reform of 1824-25; the compromise of 1875, represented by the Conspiracy and Protection of Property Act, 1875; the judicial interpretation of that Act, 1890-1904. Each of these changes bears a different character; each accurately corresponds with the opinion of the time when it took place.

After discussing in considerable detail the Acts of 1800, 1824, 1825 and 1875, Professor Dicey writes as follows of the judicial interpretation of the compromise of 1875, which act revolutionized the combination law:

The legislation of 1875 left many questions open: What was the true position of a trade union? What were the principles on which to determine whether a combination of any kind was a conspiracy at common law? Could an individual who suffered damage through a trade combination recover damages in an action where under the Conspiracy and Protection of Property Act, 1875, the combination was not indictable as a conspiracy?

These and other inquiries of the same sort were left to the decision of the courts. Trade unionists and many lawyers believed that they must all be answered in the way most favorable to the free action of the unions. Since 1885, however, cases requiring the interpretation of the compromise of 1875 have come frequently before the courts. The exact effect of the judgments delivered is in some degree a subject of dispute. The following principles, however, may (it is submitted) be deduced from decided cases.

1. An act lawful in itself is not by the mere existence of a bad *motive* converted

into an unlawful act so as to render the doer thereof liable to an action by a person who suffers damage from such act.

But note that the *motive* influencing the doer of an act is in itself a totally different thing, though often confounded with the *purpose* or *object* for the attainment of which he does the act.

2. Acts which are not in themselves unlawful when done by persons acting in combination, solely with the lawful object of protecting their trade and increasing their profits are not actionable.

3. A combination of X, Y and Z to do an act which, if done by X alone, would not be either criminal or wrongful, may be a conspiracy.

4. A combination of X, Y and Z to break or to cause others to break a contract with A, or (*semble*) to induce others not to enter into contracts with A, is, in the absence of distinct legal justification, a conspiracy, and gives A, if damaged thereby, a cause of action.

5. The Conspiracy and Protection of Property Act, 1875, s. 3, has nothing to do with civil remedies; a trade combination, that is to say, of X, Y, and Z, which is not indictable as a conspiracy, may yet, if it damages A, give A a right of action.

6. A registered, and probably an unregistered, trade union is liable to be used for torts committed by its agents; and also, it would seem, is competent to sue as a plaintiff.

The interpretation put by the courts on the compromise of 1875 is, it is submitted, from a legal point of view, thoroughly sound, and will commend itself to men of whatever party who still hold that personal liberty is the basis of national welfare. But this interpretation does undoubtedly deprive trade unionists of advantages which, in common with many lawyers, they believed that they had obtained under the Act of 1875. It is now, at any rate, abundantly clear that neither trade unions nor any other associations can under English law possess property without incurring that liability to pay damages for wrongs done by themselves or by their agents which attaches to all property holders. In a sense, therefore, the interpretation put by the courts upon the Act of 1875, and other enactments connected with it, does mark a reaction not against the provisions of that Act, but against the tendency so to construe them as to confer upon trade unions a position of privilege.

The causes of this reaction are to be found in the current of opinion, and indeed might be all summed up in the existence of the one word "boycott." The term, which has obtained a world-wide acceptance, came into being during the autumn of 1880. It spread far and wide because it supplied a new name for an old social disease which had reappeared in a new and most dangerous form. It bore witness to the pressing peril that freedom of combination might, if unrestrained, give a death-blow to individual liberty.

The results, then, of our survey can be thus summed up:

The combination law has from the end of the eighteenth century precisely corresponded with the course of opinion.

The Combination Act, 1800, represents the panic-stricken but paternal Toryism of that date.

The Combination Acts, 1824, 1825, even in their singular fluctuation, precisely correspond with the Benthamite ideal of free trade in labor.

The compromise of 1875 represents in the main the combined influence of democracy and collectivism.

The interpretation of that compromise by the courts represents the belief, still strong in England, in the sacredness of individual liberty and the sense of the peril to which personal liberty is exposed by an unrestricted right of combination.

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,

"today 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 be confused, it all the more accurately reflects the spirit of the time.

In discussing "The Anti-Trust Act and the Merger Case," in the *Harvard Law Review* for June, Victor Morawitz, of the New York bar, says:

In the case of the Northern Securities Company the precise question was whether a combination to acquire and hold a majority of the stocks of two railroad companies, the lines of which constituted main arteries of interstate commerce, and to create a community of interest in their ownership, was in restraint of commerce within the meaning of the Anti-Trust Act and could be prohibited by Congress. The ultimate effect of the combination in this case, undoubtedly, was to destroy the possibility of true competition between the owners of the two railroad properties, because the combination (*i. e.*, the Northern Securities Company) became the principal owner of both properties and acquired full control over their management, If, as decided in previous cases, a contract or combination suppressing competition between railroad companies in respect of interstate commerce is in restraine of interstate commerce and illegal under the Act, the majority of the court were right in holding that the combination in the case of the Northern Securities Company was illegal. In the prior cases the restraint of competition was only partial, while in this case the possibility of true competition was destroyed. The case, however, cannot fairly be distinguished from the case of E. C. Knight Company on the ground that the restraint of commerce in the one case was direct and in the other case indirect. The true distinction is that in the one case the combination restricted only competition between individual shippers and did not affect the public in the transaction of interstate commerce, while, in the other case, the combination imposed a restraint upon the transaction, by the public, of interstate commerce upon railroad lines, which Congress had power to keep open, at all times, as avenues of interstate commerce.

The Anti-Trust Act does not purport to prohibit acts in restraint of commerce performed under contracts or by combinations, but it prohibits the contracts or combinations themselves, if in restraint of commerce. It was, therefore, not necessary to show that any action was taken by the Northern Securities Company to advance rates or otherwise to hinder commerce upon the two railway lines. Assuming that a restraint of competition among interstate railway carriers is a restraint of commerce, as was held in the case of the Joint Traffic Association, a combination to acquire absolute power over competitive rates would, properly speaking, be "in restraint of commerce" though rates should not actually be advanced. Similarly, a government with autocratic powers would be said to be in restraint of liberty although it should be a benevolent autocracy and should not exercise its powers oppressively.

Mr. Justice White and the three justices who concurred in his opinion, appear to have assumed that the case of the government was based upon two propositions, *viz.*: (1) That the ownership of stock in two railroad corporations constituted interstate commerce if the railroad companies themselves were engaged in interstate commerce: and (2) that the authority of Congress to regulate interstate commerce embraced the power to regulate the ownership of property used in interstate commerce, including power to regulate the ownership of stock in corporations whenever such corporations were engaged in interstate commerce.

The case of the government does not appear to have involved either one of these propositions, whatever may have been claimed in the arguments. The Anti-Trust Act prohibits only contracts, combinations, and conspiracies in restraint of commerce, and it does not purport to deal with the ownership of property in any respect. It is the act of contracting, combining, or conspiring in restraint of interstate commerce that is prohibited, and the relief sought by the government was not to regulate the ownership of property, but to restrain the continuance of a contract, combination, or conspiracy that operated in restraint of interstate commerce. While Congress was not vested by the Constitution with power to regulate the ownership of stock in State corporations, or the ownership of any other property, merely becausse used in interstate commerce, Congress was empowered to prohibit obstructions and restraints of interstate commerce; and the power of Congress to prohibit persons from contracting, combining, or conspiring to obstruct or restrain interstate commerce would not fail merely because the contract, combination, or conspiracy was to be carried into effect through an acquisition of stock or other property.

IN the *Yale Law Journal* for June, Charles G. Morris made a vigorous assault on "The Inefficient Statute." Such statutes he divides into seven classes, under which he groups a surprisingly large number of unenforced or unenforceable Connecticut statutes. He says in conclusion:

If our Legislature after removing from the statutory list of crimes all injuries which are solely to the individual, should then provide adequate machinery for the apprehension of all whose misdeeds are a harm to the community as a whole, its session would perform a labor whose consummation would add more dignity to this State in the eyes of all the rest of the States of the Union, and represent a more notable achievement in genuine advancement of respect for law and order than has ever been accomplished since *Magna Charta.*

In our great Republic, with a population of the best and the worst elements from every race, our only hope for permanent institutions is that fundamental respect for law, because it is law, which is native and inborn in the Anglo-Saxon, and which the children of our citizens from other lands learn, without realizing it, in a generation or two, if they come into contact with it in its best form. Every time a law is consciously violated because it is not enforced, a blow is struck which tells most severely on our foreign-born citizens, but nevertheless undermines and weakens the best and most patriotic among us in direct proportion to our realization of what we are doing.

ONE of the American judges in the Philippines, W. F. Norris, contributes to the *Yale Law Journal* for June an account of an interesting Philippine criminal trial, and adds:

The Philippine Criminal Code carefully points out to the trial judge what he shall consider an aggravating and what an extenuating circumstance. If a bully meet a frail consumptive on the street and without provocation knock him down, the law obligingly instructs the judge that the aggressor took advantage of his superior strength, and that in imposing the penalty he must give consideration to this circumstance, and provides a scale of penalties to be fitted to the peculiar conditions of the transaction. The judge is presumed incapable of a fair consideration and comparison of all the evidence in the case. To supply the deficiency in the judicial intellect, a mechanical list of penalties are appended to the code, constituting a sort of Chinese puzzle, from which the court and attorneys figure out the fitting penalty at the close of the trial of a criminal case.

This Spanish-American-Filipino code is a constant irritation to the judge or practitioner from the United States. What any person of sufficient intelligence to keep out

of an asylum for the feeble minded would take into consideration as mitigating or aggravating the offense, is minutely designated by the code. The trial judge is unable to exercise a wise discretion, so essential to an impartial and exact administration of justice according to the judicial mind of the United States. Instead of being given latitude in the imposition of penalties he is hampered by the innumerable restrictions of this ridiculous code with its senseless minute classification. Turning to the tabulated list, we find a statement of penalties unknown to the American practitioner and which it is devoutly to be hoped will speedily be swept from the statutes, and among them, thirty-fourth on the list, *presidio correccional* in its minimum degree, denoting imprisonment from 6 months and 1 day to 2 years and 4 months. The next penalty, thirty-fifth on the table is *presidio correccional* in its medium degree, or imprisonment for 2 years, 4 months and 1 day to 4 years and 2 months. Then comes *presidio correccional* in its minimum and medium denoting a term of from 6 months and 1 day to 4 years and 2 months; *presidio correccional* in its medium and maximum, 2 years, 4 months and 1 day to 6 years; *presidio correccional* in its maximum 4 years, 2 months and 1 day to 6 years. Then follows *presidio correccional* in its minimum, medium and maximum, mixing in with *presidio mayor* with its minimum, medium and maximum and arrest *mayor*, *cadena perpetua*, *cadena* temporal, reclusion *perpetua*, reclusion temporal, *relegacion perpetua*, *relegacion* temporal, perpetual and temporal expulsion, *confiniemento*, banishment, public censure, caution, perpetual absolute disqualification, temporary absolute disqualification, perpetual and temporary, special disqualification. After the conclusion of the trial it is customary for the fiscal to ask the imposition of a certain penalty, which the counsel for the accused frequently opposes as too severe; then follows a prolonged search through the labyrinth attached to the criminal code to determine the penalty fitting the transgression, which ought to be decided by the judge from a comparison and consideration of all the circumstances as shown by the evidence, and from a clearly defined scale embracing a certain number of years as provided by the codes of the several States of the Union.

We return to the Alaska Boundary Commission (says the *Canada Law Journal*) merely to note that the carrying out of the settlement arrived at between Lord Alverstone and the United States Commissioners is, in some important respects, virtually impracticable. In the first place, as Mr. Dall, the United States expert, in describing the treaty's tortuous and zigzag course, says: "Let any one, with a pair of drawing compasses, having one leg a pencil point, draw this boundary on the United States survey map of Alaska. The result is enough to condemn it. Such a line could not be surveyed on the land. It crosses itself in many places, and indulges in myriads of knots and triangles. It would be subject to insuperable difficulties, and the survey would cost more than the whole territory cost originally." In addition to this the Canadian engineers say that the cost to Canada for marking this boundary on the territory would be $2,300,000. The United States engineers say that the cost to them would be $2,250,000; moreover, that it would take some fifty years to do the work. This would certainly be a very valuable result, and a nice place it would be for fugitives from justice to play hide and seek in. There is, in addition the fact that, as to a portion of the boundary, no settlement whatever has been arrived at. There is, therefore, still a large field for diplomacy to cover. We venture to think, however, that Canada will not then need the services of the learned Chief Justice who, last October, ventured to play a lone hand in a game which his opponents *did* understand.

In the *Central Law Journal* (June 3) Colin P. Campbell discusses the "Propriety of Direct Evidence of Intention," and says:

At the close of our discussion, then, we arrive at the general rule that the intention or motive of a party, when material to the controversy, are questions of fact, and, if unambiguous terms in a contract or the rights of others, who depend upon visible acts, are not involved, may be testified to directly by the party whose intention is the subject of the inquiry.

And this, if we admit the propriety of the legislative power authorizing parties to testify, is a valid and just rule. The law, with sufficient reason, requires the production of the best evidence of which the situation admits. The best evidence, therefore, of the party's intention should be admitted, and that best evidence must necessarily come from one who knows most about the intention. Facts and circumstances are certainly not as good, whatever may be the relative probability as to veracity.

The very fact that this question of intention is one which is difficult to answer is a reason why the one who knows most about it should be permitted to tell what he knows, and requires that the pains and penalties of perjury should be visited with the same rigor upon the false witness to intention or motive as upon a false witness to a fact or conduct visible to ocular sense. The jury are still permitted to determine the case from all the evidence, and are not in any sense bound by what he says his intention was; what he says is to be considered with the other facts and circumstances. If these show that he testified falsely, when he said he had a certain intention, then his testimony ought to be disbelieved, but if no discredit is thrown upon his testimony and he is a proper witness, there is clearly no impropriety in believing what he says his intention was.

THE "Australian Letter" in *The Law Times* (London), for May 28, gives some interesting information about industrial arbitration in one of the Australian colonies:

There has been in operation in New South Wales for about three years a Court of Industrial Arbitration, which was established to settle all trade disputes, to enable the lamb to lie down with and outside of the lion, to abolish strikes, and to link the arms of labor and capital in friendly brotherhood. For these purposes it was given plenary powers, but the exercise of these powers has brought about such a state of things that the lion still looks to having the lamb inside when he lies down with him, men will strike, and labor refuses to link a friendly arm with capital. The court is composed of a Supreme Court judge as president, together with two other non-professional men, one of whom is a representative of employers, the other of employés. The court has in reality become a board to fix wages, hours of work, and the class of labor to be employed. On the latter point it has in every case laid down the law that a member of a trade union must get the preference when a vacancy among workmen has to be filled. The result of the court's work, so far, has been to deter capital from investment in the State, as virtually, it regulates and directs the manner in which every industry shall be carried on. It has been, in a lean time, a welcome guest to lawyers, although, when first engaging in work, strenuous efforts were made by the powers of labor to exclude professional lawyers from practising before it. The condition of things brought about by an award of the court and a subsequent decision of it in the interpretation of its own award, in a dispute in the coal mining industry, will be an excellent object-lesson for those who desire an industrial arbitration tribunal to be sent up in those countries at present free from such a growth. Many months ago the miners in the collieries of the northern district of New South Wales united by their lodges to form the Colliery Employés Federation as a legal personality under the Arbitration Act, so that the machinery of the Act might be made applicable. The employers formed a similar union. The court was called on to give an award on disputed points between these two bodies, and it complied with the application, the

award settling, *inter alia*, a rate of one shilling and nine pence per ton as a hewing rate. The owners and miners were free to contract on the basis of the award. In January, 1903, the miners of the Rhondda Lodge, one of the lodges of the Employés' Federation—being dissatisfied with the above rate, downed tools without notice and went on strike, and threw idle the mines of Messrs. Sneddon and Laidley, Limited. These owners, parties to the award, proceeded against the federation for penalties fixed in the award. The proceedings were in the Arbitration Court, and it was admitted during argument that the officers of the federation had tried to dissuade the particular lodge from acting as it had done, and had reprobated the strike; also that it was customary, in the case of contracts in that industry, that fourteen days' notice was necessary in order to enable a master or a miner to legally terminate the contract of service. The court held that, as regarded the federation, no breach of the award had occurred. The fact that the officers of the federation, immediately on learning of the resolve of the Rhondda miners to strike, endeavored to get them back to work was held to be conclusive that the federation was not liable. There remained the miners of the Rhondda Lodge to be considered. The various points settled in and provided by the award had been observed. But the award had not made any provision to compel a continuance of the contract under the terms of the award. So far as the points settled specifically in the award were concerned, the miners had observed them, so that a refusal to continue to work, not having been provided for, was not a breach of the award. However, as the miners had struck work without giving the usual fourteen days' notice, they would be liable to prosecution as strikers under a provision of the Arbitration Act. The position caused by this decision is not such as was to be expected from the work of a court whose business it was to bring about a state of permanency in industrial matters. The expense and labor of finding an award was thrown away, as, on the judgment, it was in the power of either of the parties to terminate their contract under it by giving fourteen days' notice of their intention. And, if the miners chose to terminate the contract without giving such notice, then the employers could only prosecute them—a proceeding not of the most satisfactory nature. For it might be that in a given case there would not be sufficient gaol accommodation in the country to hold the strikers. The decision will also suggest possibilities in the way of keeping clear a party under an award from penalties, even when certain elements of that party should be guilty of breaches. For the employés, there seems to be a smack of the "heads I win, tails you lose" principle about the decision, from which there is no appeal, save to the ever-sitting court of public opinion. This court has expressed its decision very plainly, but it lacks the necessary machinery, at present, for executive action.

THE question of floating mines on the high seas (says *The Law Times*, London), for whose solution there are, on the admission of the Rev. Dr. Lawrence, lecturer on International Law at the Royal Naval College, Greenwich, "no precedents to guide us," brings home to the minds of jurists the fact, so difficult of realization, that, whereas successful efforts have been made to codify the rules of land war, little has been done to codify the rules and usages of war at sea, which are in a deplorably imperfect condition. An international naval war code cannot be found save so far as its beginnings may be traced in The Hague third "Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of the 22nd Aug. 1864," a convention which both the belligerents in the Russian-Japanese war have signed, and by whose rules they are accordingly bound: (see *Taylor's Treatise on International Public Law*, p. 495). Although the high seas, which are now almost the only example of "the territory of no one," like the territories of the belligerent Powers, constitute a legitimate the-

atre of war, "it is certain," in the words of Professor Holland, in his recent letter to the *Times*, whose views have been confirmed and enforced by Professor Woolsey of Yale, and Dr. Lawrence, "that no international usage sanctions the employment by one belligerent against the other of mines or other secret contrivances which would without notice render the navigation of the high seas dangerous" to neutrals.

The circumstance that there is no precedent which governs the case of mines adrift beyond the territorial limit is, of course, attributable to the very recent development of these terrible engines of destructive warfare; that their employment on the high seas, to the peril of neutral vessels and the infraction of the common right of mankind to free navigation in accordance with the rule of modern international law, subject only to well-defined modifications, constitutes a grave offence against international morality cannot be doubted. The trend of the development of international jurisprudence for the promotion of the safety of non-combatants may be used to gauge the gravity of the conduct of a belligerent Power in adopting a course of action calculated to endanger life and property in neutral shipping. To take a single illustration of the care for the safety of non-combatants, which applies more strongly in the case of neutrals, by which international morality in recent times is so nobly distinguished: All the nations represented at The Hague Conference, in view of the newness of the practice and danger of injury to other than combatants, agreed "to prohibit for a term of five years the launching of projectiles and explosives from balloons or by other new methods of a similar nature": (*Hill's Peace Conference*, p. 461). The argument by way of analogy against the floating of mines on the high seas, where they are liable to endanger neutral ships, is unanswerable.

CONCERNING the "Assumption of Risk Growing out of the Non-Performance of a Master's Statutory Duty," the *Yale Law Journal* for June, says:

That the common law places upon the master certain duties for the protection of his servant is fundamental; that these duties cannot be delegated so as to relieve the master from liability, although deducible from, is equally elemental with the first proposition. One of these common law duties is the furnishing of reasonably safe implements with which to work. The courts have, however, engrafted upon this principle a qualification, in that, although the master has not performed his full duty, thereby creating an additional risk which was both obvious and ordinary, yet the servant by continuing his employment with knowledge of such delict, was conclusively presumed to have accepted the increased hazard arising therefrom. That is the doctrine of "assumption of risk." If an injury accrued to him in such a contingency the servant was deemed to have waived the master's nonperformance of duty and no recovery was possible.

Do the same rules of law apply if the master is under a statutory duty to provide protection for his servant? The United States Circuit Court of Appeals has come to the conclusion recently that the doctrine of "assumption of risk" is equally applicable, whether the duty be statutory or of the common law. A statute of Missouri designed for the protection of employés provided that all exposed gearings, *etc.*, should be guarded. An employer complied with the statute, but for a period of six weeks prior to an injury to one of his employés he had allowed some of the guards to fall into disuse so that a pair of rapidly revolving cogwheels were left exposed. A servant, a girl of 20 years of age, was required to work at the machine containing these wheels, about ten or fifteen minutes each day, and in consequence of their unguarded condition was injured. The Circuit Court of Appeals holds that the servant is entitled to no recovery, since by continuing in her employment she had assumed the risk arising from the failure of the mas-

ter to comply with his statutory duty. In a strong dissenting opinion Judge Thayer takes an opposite view. St. Louis Cordage Co. *v.* Miller, 126 F. 495.

As to whether acquiescence by the servant under the above conditions will be regarded in law as a waiver of compliance by the master of a statutory duty, the courts differ. That there is no waiver and that the servant is entitled to recovery for an injury arising from the breach seems to be the rule in England, Illinois, Indiana, Missouri, Wisconsin and Tennessee. Some of these courts even hold that the servant's contributory negligence will not affect his recovery. On the other hand, the courts of Massachusetts, New York, Michigan, Alabama and Colorado agree that the risk arising from the breach of a statutory duty can be assumed as readily as that resulting from a common law obligation. . . .

It is submitted, that when a statutory duty is imposed on an employer for the protection of his servants, the better rule is that the servant does not waive compliance by the master, and assume the resulting risk by continuing in the master's service. The proposition is submitted on the following grounds: *First*, that the master is placed under a positive statutory duty which the servant has a right to presume will be performed. Quackenbush *v.* Wisconsin Ry.; Railway Co. *v.* Archibald, 170 U. S. 665. Any disregard of this duty is not a mere omission, but a tort, as it is a direct violation of a positive law. The master is, therefore, guilty of a wrong before any injury accrues to his servant. It is contrary to principle to allow the master to take advantage of his own wrong when the injury does accrue, because there may have been a tacit acquiescence in the master's wrong on the part of the servant. The master ought not to be allowed to rely upon his own neglect of duty as a defense against injuries arising from such neglect, especially when the more manifest the neglect, the more certain the defense. *Second*, any other construction would be against public policy in that it would in effect nullify the statute. Durant *v.* Lexington, 97 Mo. 62. The primary object of the statute is to secure proper protection to employés. If we adopt the doctrine of waiver, "the statute would furnish the employé little protection. The mere refusal of the owner to furnish the safeguards provided by the statute would then be sufficient to exonerate him from liability if the employé continued in his employment and sustained injury." Hochstetter *v.* Mosley, 8 Ind. App. 442.

In an article entitled "Corporation of Two States," in the *Columbia Law Review* for June, Professor Joseph H. Beale, Jr., of the Harvard Law School, discusses several interesting questions. For example:

When the consolidation of corporations of two States takes place not by means of a charter granted by a single State, but by permission given by both States, the position of the corporation is rather difficult to determine. In neither State, it is clear, is it a foreign corporation. Since two States, as we have seen, cannot create a single corporation, the consolidated body must at least constitute as many corporations as there are States concerned, each corporation being subject to the laws (as for instance those concerning taxation) of its own State, and having the powers of the constituent corporation of that State. And so where one of the States forbade a mortgage, such mortgage given by the consolidated corporation was void as to the property in that State.

Are these separate corporations merely the original corporations, which by the consolidation have been permitted to form an extra-legal business combination, or is there in addition a new corporation, or rather a set of new corporations, each succeeding to the business of an old corporation without effecting a dissolution of it, or entirely superseding it? This question is not easy to answer. It has been urged by high authority that the permission to consolidate, not being accompanied by a new charter from any one State, does not create a corporation; that the consolidated body formed in accordance with the permission of the States concerned

is at most a corporation *de facto*, or perhaps only a business union of the several companies under a common name, the old corporations still exercising their several powers in their respective States in the name of the consolidation. It is clear that the constituent corporations do not necessarily or generally cease to exist. But it is certain that no corporation *de facto* can be recognized if there can be no corporation *de jure*, and if they do cease to exist it must be because each State has so provided, which is not a natural interpretation, because neither State, in authorizing the consolidation, "can have intended to abandon all jurisdiction over its own corporation created by itself." But though the old corporations usually continue in existence, a new association of some sort is undoubtedly formed, a community of stock and interest between the companies; there is almost invariably a new set of books opened, new stock issued, new stockholders and new officers provided for the consolidated company. This, it would seem, is sufficient to create a new commercial entity, and since it results from permission given by law the new entity constitutes a legal person. But this new person is not created by the law of any one State. Concurrent legislation of all the States was essential to the completion of the consolidation. The new corporation is no more a corporation of one State than of the other, and as it cannot be created by the States jointly, it must be the anomalous association already considered,—a separate corporate body in each State, all however being as it were federated together, and in many respects capable of acting as one.

We must conclude then that when a number of corporations, created by different States, are allowed to consolidate by the States that created them, the constituent corporations may or may not be merged in the consolidated body and so lose their corporate existence, this depending in each case upon the will of the State of charter; but that by the consolidation new corporations are formed, equal in number to the number of enabling States, and each empowered to act in connection with the others. The consolidated corporation therefore does not differ in status from the corporation rechartered in another State than that which first created it.

One more complication may ensue. A corporation formed in one State may be rechartered in a second State, and then consolidated with a corporation of a third State; what is the effect of the consolidation upon the rechartered corporation of the second State? Is it federated with the original corporation still? And what if the original corporation is dissolved by merger in the consolidated corporation?

This question was raised by the case of Louisville Trust Company *v.* Louisville, New Albany and Chicago Railway. An Indiana corporation had been rechartered in Kentucky; and the Indiana corporation was then in accordance with legislation of both States concerned consolidated with an Illinois corporation. It was argued that since the consolidated company succeeded to all the property of the original company, and since the Kentucky company had no relation with the consolidated company, it ceased thereafter to exercise its franchises. But Taft, Circuit Judge, said:

"We do not perceive that this consolidation creates any difficulty. The Kentucky corporation, having been once established, could not die except by its own act or that of the State which gave it being. Everything it had acquired in the way of property remained in it after the consolidation of its constituent with the Illinois corporation. It was not and could not be ousted of its franchises thereby." . . .

From this opinion it would seem that upon the consolidation of the Indiana corporation with the Illinois corporation the rechartered corporation would *ipso facto* become federated with the consolidated company; a result which could be prevented only by the affirmative action of the Kentucky Legislature, thus exercising its power over its own corporation. . . .

One may, perhaps, on the authorities and the reason of the thing, reach the following

conclusions. An agent for the consolidated corporation may act for and bind all the members; and this would undoubtedly be true of an act done outside all the incorporating States. In one of the incorporating States, however, one should hold in strictness that it is the local corporation which is acting. But an act done anywhere binding one of the corporations will give a cause of action in either State of incorporation against the corporation in that State: whether because the corporations are to be taken as partners, or, more probably, because the State in incorporating it subjected it to such a liability;—created it to be dealt with as one corporation and not two, in the language of Judge Doe.

"FREEDOM of Contract," says Professor Clarence D. Ashley in the *Columbia Law Review* for June, "has been the fetish of our modern law for years."

"Every man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties." Probably this statement of Chief Justice Erle would strike any one as both sound and commonplace. Nevertheless it is believed that the statement does not accurately express the law, and that it may be as well that it does not. . . .

The subject of contract is still growing. Many of its principles are undeveloped and crude. This gradual growth is changing preconceived views, and the student or writer of this subject must grow with it or be left hopelessly behind. To most lawyers it seems axiomatic to say that in our system of law every simple promise must be supported by a consideration. Probably that is so, but how far has that advanced us? What is this so-called consideration? If Dean Ames is right in his able and interesting articles it would seem to be a steadily decreasing something which has about reached the vanishing point. So also, we may inquire what we mean by this universal test of mutual assent. This may be well enough expressed thus: "The first essential of a contract is mutual assent, and mutual assent means the consent of the parties to the terms of the contract, intent by both parties to enter into the proposed arrangement."

There seems no reason to change this general view, but nevertheless if too strictly and logically followed, it leads to situations which are intolerable and which the courts never have and never will strictly enforce. It is well enough for us to classify contracts as those obligations having their initiative in the intent and agreement of the parties, but when that preliminary has once taken place, there seems to be no essential reason why the courts cannot modify the obligation which thus arises, and why the mastery of a man over the contract he chooses to make should not be subject to rules and regulations applied by the courts and directly limiting the mastery of the parties. It is true that when a man bases his promise to pay upon the judgment of an eminent architect it is a somewhat strong proposition to suggest that he shall not have such safeguard, but shall be turned over to the judgment of twelve inexperienced men. To say that this is only done when the architect unjustly or fraudulently withholds the certificate is only saying in another form that the entire question is to be settled by the jury. Courts should disregard the expressed intention of the parties only in extreme cases and with great caution, but that it is sometimes beneficial to do so seems certain.

WE regret that lack of space this month makes it necessary to postpone, until our August issue, quoting from Professor James B. Scott's admirable article on "International Law in Legal Education," in the *Columbia Law Review* for June, from Mr. Chief Justice Mitchell's learned address on "Hints upon Practice in Appeals," and Henry Wolf Biklé's able "Review of the Northern Securities Decision," in the *American Law Register* for June, and the several interesting articles and correspondence in the current number of the *American Law Review*.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ANTI-TRUST ACT. (ACTION BY CITY FOR INJURY TO BUSINESS.)

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

The case of City of Atlanta *v.* Chattanooga Foundry and Pipe Works, 127 Federal Reporter 23, was an action brought by the city to recover damages incurred in its business by reason of a combination of pipe companies formed in violation of the Anti-Trust Act. The city was maintaining a system of waterworks, and furnished water to consumers, charging for the same in exactly the same way as would a private corporation. The evidence tended to show that the object of the combination was to prevent any other producer from bidding for plaintiff's business, and that practices were adopted intended to compel it to deal exclusively with the Alabama member of the association, and to pay a price settled by the combination in advance of any bid. For this privilege the Alabama corporation agreed to pay a large sum into the pool treasury, called a "bonus," which was to be divided in agreed proportions. An appearance of competition was to be maintained by bids put in by the others, such bids being higher in each instance than that made by the company to whom the contract had been assigned. The court holds that a municipal corporation engaged in operating gas, water or lighting plants, or street railroads, from which a revenue is derived, is in relation to these matters a business corporation, and can maintain a suit for injury to its business under the Anti-Trust Law. It is held to be no defense that no purchase was made by the city from either of the Tennessee corporations made defendant. Their guilt is held to be as great as that of the corporation from whom the purchase was made, for the reason that each is responsible for the torts committed by the others in the course of carrying out the illegal combination. The city is held to be entitled to recover the difference between the price paid for the pipe and the reasonable price which would have been paid under natural competitive conditions, and it is said that such recovery can be had for the injury to the business, whether such business is interstate or not, provided the transaction by which the purchase was made was interstate. The court further holds that an action brought under Section 7 of the Anti-Trust Law, which gives a recovery of three-fold damages, is not an action for a penalty or forfeiture, which, under the statute, must be brought within five years, but is a civil remedy, and is governed as to limitation by the statutes of the State in which it is brought. Upon this point the court refers specifically to the many authorities collected in the cases of Huntington *v.* Attrill, 146 U. S. 657, 13 Sup. Ct. 224, and Brady *v.* Daly, 175 U. S. 148, 20 Sup. Ct. 62, and also to the opinion of Judge Clark in the court below, reported in 101 Fed. 900. The court also governs its rulings by the opinion of the Supreme Court in the case of Addison Pipe Co. *v.* United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

ASSAULT. (ATTEMPT TO KISS—CONSENT OF PROSECUTRIX—INTENT TO INJURE—EXCESSIVE PENALTIES.)

TEXAS COURT OF CRIMINAL APPEALS.

In Chambless *v.* State, 79 Southwestern Reporter 577, it is held that where a man who reasonably believes that a woman will allow him to kiss her, makes the attempt to do so without intending to accomplish the act by force, he is not guilty of assault. To constitute an assault there must be an intent to injure, and where as in the case of a kiss

the injury is solely to the feelings the intent cannot be presumed. The conversation which the court holds warranted the belief that the prosecutrix was willing defendant should kiss her was of a highly salacious character. The court cites Fuller *v.* State, 72 Southwestern Reporter 184, where it was held that the giving of a kissing sign without any attempt to commit a battery did not evidence an assault.

In conclusion it is held that even had a conviction been warranted, a punishment of a fine of one thousand dollars and two years in jail was excessive, the only possible injury which the prosecutrix could have suffered being to her feelings.

AUTOMOBILE STATION. (MAINTENANCE IN RESIDENCE DISTRICT—NUISANCE.)

NEW YORK SUPREME COURT.

In Stein *v.* Lyon, 87 New York Supplement 125, it is held that the construction and maintenance of an automobile station or garage, for the entertainment of chauffeurs and their friends, in a neighborhood occupied by expensive summer residences, does not constitute a common law nuisance, the court saying that the business appeared perfectly lawful and legitimate.

BANKRUPTCY. (EFFECT OF DISCHARGE—JUDGMENT FOR DAMAGES FOR CRIMINAL CONVERSATION.)

UNITED STATES SUPREME COURT.

In Tinker *v.* Colwell, 24 Supreme Court Reporter 505, a judgment for damages for criminal conversation is held not to be affected by a discharge in bankruptcy, the decision resting on the construction of section 17, subdivision 2 of the Bankruptcy Act, which provides that a discharge shall release a bankrupt from all his provable debts, "except judgments in actions for frauds or for wilful and malicious injuries to the person or property of another."

A number of English cases are cited on the point that trespass *vi et armis* will lie to recover damages for committing adultery with plaintiff's wife; and such conduct is held to be an injury both to the person of the husband and to his property rights. Cregin *v.* Brooklyn Crosstown Railroad Company, 75 N. Y. 192, 31 Am. Rep. 459, Id. 83 N. Y. 595, 38 Am. Rep. 474, in which the right to the wife's society was held not to be property within the meaning of a statute providing for the survival of a cause of action for her injuries, is distinguished. It is then held that the injury to the husband in committing adultery with his wife is of a malicious character within the meaning of the Bankruptcy Act, though no personal malevolence towards the husband is involved. The court says, "It is also argued that, as the fraud referred to in the exception is not one which the law implies, but is a particular fraud involving moral turpitude or intentional wrongdoing. so the malice referred to is not a malice implied in law, but a positive and special malice upon which the cause of action is founded, and without proof of which the action could not be maintained. . . . The implied fraud which the court in the above-cited cases released was of such a nature that it did not impute either bad faith or immorality to the debtor, while in a judgment founded upon a cause of action such as the one before us, the malice which is implied is of that very kind which does involve moral turpitude."

Leicester *v.* Hoadley, 66 Kans. 172, 71 Pacific Reporter 318, is more nearly in point than any of the cases cited, it being there held that a judgment obtained by a wife against another woman for alienating her husband's affection was not released by the discharge of the judgment-debtor in bankruptcy.

CONSPIRACY. (COMMISSION OF ADULTERY—EXISTENCE OF CRIME—FEMALE'S MARRIAGE—KNOWLEDGE OF CO-CONSPIRATOR.)

IOWA SUPREME COURT.

In State *v.* Clemenson, 99 Northwestern Reporter 139, it is held under the Iowa Code, Sections 5059, 5093, that there is such a crime as conspiracy to commit adultery. These sections provide that if two or more conspire to do any illegal act injurious to public morals or to commit a felony they are guilty of a conspiracy; and define a felony as a public offence punishable by imprisonment in the penitentiary, adultery being so pun-

ishable. Adultery is said to be a public offence, notwithstanding the requirement of the Iowa Code that the prosecution can only be instituted on the complaint of the injured husband or wife. The court distinguishes this case from Shannon *v.* Commonwealth, 14 Pa. 226, and Miles *v.* State, 58 Ala. 390, in which the agreement of a married woman to have intercourse with a man other than her husband was held not to amount to a conspiracy to commit adultery because the consent involved was a part of the offence itself. The court says that one may aid and abet in adultery without actually participating in the act and it can discover no ground for saying that a combination to commit the unlawful act, which is not an agreement between the immediate parties to the intended crime, may not constitute a conspiracy.

But the defendant in this case escaped punishment on a most peculiar ground. While he, himself, was aware that the female with whom he contemplated intercourse was a married woman, his co-conspirators were not apprised of that fact and hence contemplated nothing more than fornication, which is not a criminal offence in Iowa. On this account the court held there was no conspiracy. It says, "While these parties may be presumed to have intended the natural consequences of their acts this does not involve knowledge concerning the status of this woman. Without such knowledge it is not perceived how they could have conspired with defendant to have committed this particular crime. . . . In the absence of any evidence of knowledge on the part of either of the co-defendants the accused should have been acquitted."

FELLOW SERVANT RULE. (STATUTE OF SISTER STATE—WHAT LAW GOVERNS.)

MISSOURI COURT OF APPEALS.

In Williams *v.* Chicago, Rock Island & Pacific Ry. Co., 79 Southwestern Reporter 1167, it is held that the Iowa Code of 1873, section 1307, abrogating the fellow-servant rule as applied to railroad employés, while governing a right of action in Missouri for negligent injury inflicted in Iowa, must be applied, not as construed by the Supreme Court of Iowa, but as construed by the Supreme Court of Missouri. The reason seems to be that under the Missouri Constitution the decisions of the Supreme Court of that State are binding on the Court of Appeals.

FRAUD. (LIMITATIONS—PROCURING DEED—RECORDING—NOTICE TO GRANTOR.)

IOWA SUPREME COURT.

In MacDonald *v.* Bayard Savings Bank, 98 Northwestern Reporter 1025, the court holds that the recording of a deed, attacked by the grantors therein as having been procured from them by fraud, is sufficient to start limitations running on the cause of action. How the grantee's act of tendering the deed for record and its entry in the official records could apprise the grantors of any facts not known before to them, or arouse any suspicion or provoke any inquiry which they did not already entertain or purpose, is not discussed. Two Iowa cases, Bishop *v.* Knowles, 53 Iowa 268, 5 Northwestern Reporter 139, and Gebhard *v.* Sattler, 40 Iowa 152, are cited, but in both the facts were radically different. In each of these it was held that the grantor of a deed of trust was charged with notice of fraud in the trustee's sale by the recording of the deed given by the trustee to the purchaser. In such a holding there is some show of reason, but the extention of the doctrine now made seems to be a judicial inadvertence.

HOMICIDE. (EFFECT ON *Jus Mariti*—FORFEITURE OF ESTATE—BILLS OF ATTAINDER—CONSTITUTIONAL PROVISIONS—ESCHEAT.)

TENNESSEE SUPREME COURT.

In Box *v.* Lanier, 79 Southwestern Reporter 1042, a controversy arose between the personal representatives of a wife and those of her husband over the proceeds of an insurance policy upon the husband's life. The policy had been made payable to the wife if she survived, otherwise to the husband's personal representatives. The husband delivered the policy to the wife with the statement

that it was hers and that she must pay the premiums on it which she did. The husband killed the wife and afterwards committed suicide. It was first held that the parol assignment of the policy to the wife vested in her the contingent interest remaining in the husband.

The important question then arose, whether the husband, having murdered the wife, could take her chose in action by virtue of the *jus mariti*. After an elaborate review of the authorities, the court holds that he could not. It concedes that the case of Riggs *v.* Palmer, 115 N. Y. 506, 22 Northeastern Reporter 188, 5 L. R. A. 240, 12 Am. St. Rep. 819, in which it was held that the general laws for the devolution of property by will or descent did not operate in favor of a murderer whether he claimed as devisee, legatee or heir-at-law, has been overruled by the later cases of Owens *v.* Owens, 100 N. C. 240, 6 Southeastern Reporter 794; Deem *v.* Milliken, 6 Ohio Cir. Ct. R. 357m, affirmed in 53 Ohio St. 668, 44 Northeastern Reporter 1134; Shellenberger *v.* Ransom, 41 Neb. 631, 59 Northwestern Reporter 935, 25 L. R. A. 564; Carpenter's Estate, 170 Pa. 203, 32 Atlantic Reporter 637, 29 L. R. A. 145, 50 Am. St. Rep. 765. The court relies on the case of Burt *v.* Union Central Life Ins. Co., 187 U. S. 362, 23 Supreme Court Reporter 139, 47 L. Ed. 216, in which it is held that the assignees of a life policy could not recover where the insured was hung for murder. It says: "It is true in the present case that the insurance company made no contest, but, conceding its liability, paid over the proceeds of the policy, and they await the determination of this suit. But can it be successfully contended that a claim resting upon a felonious act which might have been resisted by the insurance company has acquired more virtue when it is now asserted by the representative of the murderer to the proceeds of the policy? Can those who represent the husband, who first by the felonious destruction of the life of his wife, and then as a *felo de se* has accelerated the maturity of the policy, take the fruits of his crime under the doctrine of *jure mariti?*" Cleaver *v.* Mutual Reserve Fund Life Assn., L. R. 1 Q. B. Div. 147, in which the assignee of Mrs. Maybrick sought to recover on a policy on the life of Maybrick and in which the company successfully resisted the suit on account of Maybrick's death at the hands of his wife, is also relied on.

The provision of the Tennessee constitution (article 1, section 12) that no conviction shall work forfeiture of an estate, as well as that of the Federal constitution (article 1, sections 9 and 10) prohibiting bills of attainder, are held not to apply, since the proceeds of the policy never became a portion of the husband's estate. It is finally held that a refusal to permit a husband who murdered his wife to take the proceeds of a life policy which belonged to her, does not escheat the property to the State, but the title passes to her administrator.

ILLEGAL CONTRACT. (SALE OF COUNTERFEIT MONEY.)

COURT OF APPEALS OF KENTUCKY.

In the case of Chapman *v.* Haley, 80 Southwestern Reporter 190, action was brought to recover $300 paid to defendant to be invested, as the plaintiff testified in $3,000 worth of "good money." Plaintiff testified that the defendant told him that he was a member of the firm in Cincinnati that had this money, and that he could get $3000 for his $300. "He showed me some new bills, one, two and a twenty, and I think a five and a ten, and he had plenty others, apparently. The money I was to get was to be just like those he showed me, silver certificates, and not counterfeit. He told me to sit down here on the walls of the waterworks, and he would step right across the street and get it and be back in twenty minutes, and he never returned." The plaintiff protested that he did not intend to purchase counterfeit money, but that the defendant had told him that it was good money, and said that "there was one one trouble about it, and that when deposited in a bank two numbers running of the same date might be

detected." The court remarks that as the plaintiff did not seem to require the supervising care of a committee to conduct his case, his statement that he believed he was to get $3000 in good money for $300 in old, worn government bills, seems beyond belief, and they state that they doubt whether the law books contain a case which will parallel in audacity this case, excepting, perhaps, the famous case of Everett *v.* Williams, 9 L. Q. R. 197, which was a bill for an accounting of the partnership business of highwaymen, though the true nature of the partnership was veiled in ambiguous language. This bill set up the partnership between the plaintiff and the defendant, "who was skilled in dealing in several sorts of commodities; that they proceeded jointly in the said dealing with good success in Houndslow Heath, where they dealt with a gentleman for a gold watch; that the defendant informed plaintiff that F. was a good and convenient place to deal in, such commodities being very plenty there, and if they were to deal there, it would be almost all gain to them; that they accordingly dealt with several gentlemen for divers watches, rings, swords, canes, hats, clocks, *etc.*, to the value of 200 pounds and upwards; that a gentleman at Black Heath had several articles which defendant thought might be had for little or no money in case they could prevail on the said gentleman to part with said things; and that after some little discourse with said gentleman such things were dealt for at a very cheap rate. The dealings were alleged to have amounted to 2000 pounds and upwards." This bill was dismissed for scandal and impertinence. The solitictors were taken into custody and fined 50 pounds each for reflecting upon the honor and dignity of the court. The counsel whose name was signed to the bill was required to pay the costs, and both the litigants were subsequently hanged. It is pointed out that the fact that a like judgment did not overtake the parties litigant in this case marks the lapse of our modern procedure from that vigorous integrity with which the ancient judges administered the common law in its primitive virtue.

INDIANS. (SALE OF LIQUOR—SCOPE OF PROHIBITIVE STATUTE—CARLISLE STUDENTS.) UNITED DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

In United States *v.* Belt, 128 Federal Reporter 168, the defendant was indicted for selling liquor to Indian boys attending the United States Indian School at Carlisle, Pennsylvania. On a ruling for a new trial, the court held that the Act of Congress of January 30, 1897, c. 109, 29 St. 506, prohibiting the sale of liquor to "any Indian, a ward of the Government, under the charge of an Indian agent or superintendent, or any Indian, including mixedbloods, over whom the government—through its departments exercises guardianship," extends to Indian students at a school which is maintained at the expense of the Government under the direction of the Interior Department. The court says that there can be no doubt that this language extends to the Indian boys at Carlisle. "Temporarily transferred from the reservations to which they belong, which are themselves in the nature of schools, they are potentially if not actually under the superintendent or agent there in charge. And, maintained and educated as they thus are, at the expense of the government, under the direction of the Interior Department, they are the unquestioned wards of the nation which has as much concern to protect them from the debasing influence of liquor as if they were on the Western Plains."

The Act of May 20, 1886, c. 362, 24 St. 69, requiring the nature and hygienic effects of alcoholic drinks, *etc.*, to be specially taught to Indian pupils, is referred to as evidence of the concern the government has in this matter. Previous legislation on the subject of selling liquor to Indians is reviewed and the following cases cited: United States *v.* Holliday, 3 Wall. 407, 18 L. Ed. 182, United States *v.* Osborne (D. C.), 2 Fed. 58; United States *v.* Earl (C.C.), 17 Fed. 75; United States *v.* Hurshman (D. C.) 53 Fed. 543; United States *v.* Flynn, 1 Dull. 451, Fed. Cas. No. 15124; United States *v.* Burdick, 1 Dak. 142, 46 N. W. 571; Renfrow *v.* U. S. 3 Okl. 170, 41 Pac. 88.

INNKEEPER'S LIABILITY. (STATUTORY REGULATIONS—DEFINITION OF JEWELRY.)

SUPREME COURT OF TENNESSEE.

In the case of Rains *v.* Maxwell House Co., 79 Southwestern Reporter 114, a question arose as to the liability of the proprietor of a hotel for the loss of a watch and fob which a guest had left under his pillow. The Tennessee act provides that whenever the proprietor of a hotel shall provide a safe place for the keeping of any jewels and ornaments belonging to a guest, and the guest has not deposited them, the proprietor shall not be liable for their loss, provided he has posted a notice stating the fact that a safe and convenient place in which money, jewels, ornaments, *etc.*, may be deposited, has been provided. The court, after stating that the well-known common-law rule is that an innkeeper is absolute insurer of the property of his transient guest, reviews at length the decisions bearing upon the point in those States where the liability has been regulated by a statute similar to that in force in Tennessee. The earlier cases all hold that such statutes contemplate that a reasonable amount of money for traveling expenses and articles for personal use and convenience, although within the terms of the statute, are not to be considered as within its spirit, and that a guest by retaining such articles in his own possession instead of depositing them with the innkeeper, does not absolve the innkeeper from his liability. The first case to overthrow this doctrine was that of Hyatt *v.* Taylor, 42 N. Y. 258, in which the court held that the statute must be strictly enforced. The later case of Rosenplanter *v.* Rossette, 54 N. Y. 255, sustains the doctrine pronounced in the Hyatt case, as does also the case of Stewart *v.* Parsons, 24 Wis. 242. The Tennessee court holds that a watch and fob must be considered as embraced in the term "jewels and ornaments." The court says that Webster defines the word "jewel" as an ornament of dress, usually made of a precious metal having enamel or precious stones as a part of its design. They are of the opinion, however, that the sense in which it was used by the Legislature is the common meaning attributed to it as an ornament or useful article of value, and embraces a watch and fob used as a timekeeper and in which precious stones may or may not form a part. If a guest sees proper to keep his watch and money upon his person, he does so at his own risk, just as he does when he keeps it upon his person and in his possession when not in the hotel. In no prior Tennessee case does this point seem to have been squarely raised.

INSURANCE. (EMPLOYERS' LIABILITY—ACCIDENT—INFECTION WITH DISEASE.)

MISSOURI COURT OF APPEALS

In Columbia Paper Stock Co. *v.* Fidelity & Casualty Co., 78 Southwestern Reporter 320, the plaintiff sued on an employers' liability policy reciting that one of its employés had recovered judgment against it for injuries from accidental blood poisoning, caused by contact with material used in its business. The question was thus raised whether kidney disease produced in a servant by handling infected rags in the discharge of duties connected with her employment was within a policy which insured against loss from liability on account of bodily injuries accidentally suffered. The defendant's contention was that as the disease was produced by a known cause, it could not be accidental. After a somewhat extensive review of the authorities, the court rejects this view and holds that the disease was an accidental injury. Dezell *v.* Casualty Co., 75 Southwestern Reporter 1102; Lovelace *v.* Travellers' Protective Ass'n, 126 Mo. 104, 28 Southwestern Reporter 877, 30 L. R. A. 209, 47 Am. St. Rep. 638; Isitt *v.* Railway Passengers' Assur. Co., 22 Queen's Bench Division, 504; Travelers' Ins. Co. *v.* Melick, 65 Federal Reporter 178, 12 C. C. A. 544, 27 L. R. A. 629; Peck *v.* Equitable, *etc.*, Ass'n, 52 Hun. 255, 5 New York Supplement 215; Freeman *v.* Mercantile, *etc.*, Ass'n, 156 Mass. 351, 30 Northeastern Reporter 1013, 17 L. R. A. 753; McCarthy *v.* Travelers', *etc.*, Co., 8 Biss. 362, Fed. Cas. No. 8682; United States *etc.*, Ass'n *v.* Barry, 131 U. S. 100, 9 Supreme Court Reporter 755, 33 L. Ed. 60; Young

v. Accident, *etc.* Co., 6 Montreal Law Rep. 3; Martin *v.* Travelers', *etc.*, Co., 1 Foster & F. 505; North America, *etc.*, Co. *v.* Burroughs, 69 Pa. 43, 8 Am. Rep. 212; and Fetter *v.* Fidelity, *etc.*, Co., 174 Mo. 256, 73 Southwestern Reporter 592, 61 L. R. A. 459, are relied on, and the court distinguishes or disapproves the cases of Bacon *v.* U. S., *etc.*, Ass'n, 123 N. Y. 304 25 Northeastern Reporter 399, 9 L. R. A. 617, 20 Am. St. Rep. 748; Dozier *v.* Fidelity, *etc.*, Co. (C. C.), 46 Federal Reporter 446, 13 L. R. A. 114; Sinclair *v.* Maritime, *etc.*, Co., 3 Ellis & Ellis 478; Southard *v.* Railway, *etc.*, Co., 34 Conn. 574, Fed. Cas. No. 13,182; and Feder *v.* Iowa, *etc.*, Ass'n., 107 Iowa 538, 78 Northwestern Reporter 252, 43 L. R. A. 693, 70 Am. St. Rep. 212. The concluding portion of the opinion reads: "If, for example, in lieu of producing the more gradual and protracted infirmities of acute kidney disease or dropsical affection, the infected material submitted to defendant's workwoman had emitted poisonous gases or fumes, producing her instantaneous death, or resulting in immediate and violent convulsions, under numberless authorities the occurrence would, in legal contemplation and within the interpretation of policies insuring against accidents, be confidently pronounced accidental, yet such consequences would be disease produced by such known causes. In conclusion, after full consideration, upon a fair and legal construction of the terms of this policy, . . . the injury sustained by respondent's employé upon its premises in handling the infected rags and wall paper fell fairly within its true meaning and intent."

JUROR. (Misconduct—Sleeping During Argument.)

Texas Court of Civil Appeals.

In Slaughter *v.* Coke County, 79 Southwestern Reporter 863, it is held that an assignment of error, complaining of the misconduct of a juror, in that he slept throughout the greater portion of the argument of appellant's counsel, cannot be sustained, the court saying that the counsel should at least have asked that the juror be awakened.

The case starts an interesting train of reflection as to the soporific effects of arguments to the jury, and raises a query in the mind, whether, the court would not have been justified in applying the doctrine of estoppel.

LIBEL. (Retraction — Effect on Damages— Statutory Provision — Constitutionality— Due Course of Law.)

Kansas Supreme Court.

In Hanson *v.* Krehbiel, 75 Pacific Reporter 1041, section 18 of the Kansas Bill of Rights guarantying remedy by due course of law to all persons for injuries suffered in person, reputation, *etc.*, is held to invalidate Gen. St. 1901, c. 57b providing that before a civil action for newspaper libel shall be brought, plaintiff must serve notice on the defendants, who, if they make retraction in their paper in as conspicuous a manner as the libel itself was published, are to be liable only for actual damages, which the statute defines as those which the plaintiff shall show he has suffered in property, business, trade, profession or occupation. The general damages usually recoverable in a libel, designed to compensate for "that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation," are cut off. These damages were allowed at the time the Kansas constitution was adopted, and the court says it requires no argument to demonstrate that the act in question does deny remedy for a portion of the injury suffered from a libel. Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 Northwestern Reporter 731, 1 R. A. 599, 16 Am. St. Rep. 544 in which a similar statute was held invalid, is referred to, as is also Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 Northwestern Reporter 936, 3 L. R. A. 432, 12 Am. St. Rep. 707 in which such a statute was upheld.

The suggestion that the retraction required by the act is a fair compensation for the injury done and a reinvestment of the plaintiff with his good name, so that by its means all has been accomplished that would

be by a verdict of a jury, and hence that such retraction, if not due course of law, is an ample substitute for it,—is one which the court cannot entertain.

LOSS OF SERVICES. (COMMON LAW RIGHT OF ACTION.)

COURT OF APPEALS OF KENTUCKY.

In Gregory *v.* Illinois Central R. Co., 80 Southwestern Reporter 795, an action was instituted by the father of a 16-year-old infant, who had been killed by a railroad train, for damages resulting from the loss of his son's services from the time of his death until he would have reached the age of 21 years. The attorneys conceded that the action was not based upon any statute authorizing it, but on the common law right of the father to his infant son's services. The court points out that the common law allowed no such remedy by way of a civil action in the case of an injury causing the death of a human being. As such injury must necessarily precede the death, the law did not allow any cause of action for the injury to survive the person who was killed. The husband or master of the deceased was not allowed to sue because the only damage recognized by the law was the loss of services during the life of the servant, and the death of the infant, therefore, worked no injury to the master of which the law could take notice. And if the act causing the death amounted to a felony, the general rule of the common law forbidding any civil suit upon a felony would alone have sufficed to exclude a claim for damages. The court cites Shearman & Redfield on Negligence; Eden *v.* L. & F. R. R. Co., 14 B. Mon. 204; Covington Street Ry. Co. *v* Parker, 72 Ky. 455; Louisville & Nashville R. R. Co. *v.* McElwin, 98 Ky. 700, 34 S. W. 236; and Harris *v.* Kentucky Timber & Lumber Co., 43 S. W. 462, 45 S. W. 94, and distinguishes the cases of Gregg's Adm'r *v.* Lee, 14 B. Mon. 119, Gray *v.* Coons, 7 J. J. Marsh. 478, and Smith *v.* Hancock, 4 Bibb, 222, on the ground that they were actions for the value of slaves killed or injured by negligence or malice. It is pointed out that while the master was entitled to the services of the slave, the latter was a mere chattel, and the right to recover was based upon the same principle as would be the right to recover for the injury or destruction of a horse or other kind of property.

LOTTERIES. (ESTIMATES OF NUMBER OF CIGARS TAXED.)

NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

In the case of People *ex rel.* Ellison *v.* Lavin, 87 New York Supplement 776, the question was raised as to whether a guessing contest as to the number of cigars upon which the United States tax would be paid during a certain month was within the section of the Penal Code of New York prohibiting the advertising of lotteries. The contest was conducted by the Florodora Tag Company of Jersey City, and contemplated the distribution of over $140,000 in prizes, to be distributed among those persons who estimated nearest to the number of cigars on which $3.00 tax per thousand would be paid during the month of November, 1903, as shown by the sales made by the United States Internal Revenue Department. The prizes ranged from $5000 to a box of cigars, valued at $2.50. The amount to be given away was to be distributed among over 35,000 people, and in order to be entitled to estimate, it was only necessary that the estimate should be accompanied by 100 bands from certain designated cigars. The statute provides that any person who advertises or publishes an account of a lottery, whether within or without the State, stating how, when or where the same is to be, or has been, drawn, or what are the prizes therein, or any of them, or the price of a ticket, or any share or interest therein, or where or how it may be obtained, is guilty of a misdemeanor. The Penal Code further defines a lottery as a scheme for the distribution of money by chance among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise, or by some other name. The contention, of course, was

that the distribution in this case was not to be made by chance, and the court holds that the point is well taken. It is said that it is manifestly impossible for any one to know in advance the number of cigars upon which the tax will be paid in a given month. The period for presenting estimates closed on the last day of the month preceding that for which they were to be made, and in addition. the announcement of the contest included for the purpose of advertising those who intended to estimate information as to the number of cigars upon which the tax had been paid during each month for the years 1900, 1901, 1902. The court holds that many things must be taken into consideration in making an estimate in such a contest. The prizes are awarded as a means of advertising the cigars, in the sale of which the company is interested. It is evident that the price of these cigars is the same for those who preserve the wrappers and participate in the guessing contest as it is for those who do not. Sufficient information is furnished to afford them some basis for making an estimate upon which their right to the prizes may depend, and they may possess or acquire other information that may be of assistance. The court adds that it may be well for the Legislature to prohibit such forms of competition, by declaring enterprises of this character to be unlawful, but it is evident that the methods resorted to in recent years by merchants and traders engaged in ruinous competition were not foreseen in the early days when lotteries were prohibited, and therefore their prohibition is not within the purview of the lottery statute. In deciding the case, the court refers to many cases in which similar contests intended to evade the lottery law have been construed by the courts. Among others, Reilly *v.* Gray, 77 Hun. 402, 28 N. Y. S. 811, where it was held that pool selling did not constitute a lottery; People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, where it was held that prizes offered by an association to the winners of race horses was not a lottery; People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343. where the provision of the Penal Code making it a misdemeanor to induce the purchase of one commodity by giving the purchaser of a specified quantity other property was unconstitutional: Hull *v.* Ruggles, 56 N. Y. 424, in which it was held that selling candy in packages, some, but not all, of which contained tickets calling for silverware as prizes, was a lottery; Wilkinson *v.* Gill, 74 N. Y. 63, in which it was held that policy is a lottery; Horner *v.* United States, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237, in which it was held that a sale of bonds by the government of Austria, redeemable at a given time, but a number of which, to be selected by lot, were to be redeemable at figures far in excess of their par value, was a lottery within the federal statutes regulating the use of the mails. The court also cites a number of Canadian and English cases. A very similar case was that of United States *v.* Rosenbloom, 121 Fed. 180, in which it was held that prizes given to a person guessing nearest to the number of cigarettes on which internal revenue tax would be paid during a given month was not a lottery within the prohibition of section 3894 of the Revised Statutes of the United States.

MILEAGE BOOKS. (DEATH OF OWNER.)

SUPREME COURT OF NORTH CAROLINA.

In a short *per curiam* opinion it is held, in the case of Ninish *v.* Southern Railway Co., 47 Southeastern Reporter 432, that a mileage book could not be used for transporting the remains of the person to whom it had been issued. In this instance the mileage was presented by the husband of the deceased when transporting his wife's remains over the line which had issued the book. This payment was refused and the action was brought. In the court below nominal damages were given the plaintiff, from which decision both parties appealed. The Supreme Court holds that at the death of the one to whom the mileage is issued, the unused mileage must go to the personal representatives of the owner of the book. No authorities are cited.

MUNICIPAL CORPORATIONS. (GOVERNMENTAL FUNCTIONS—ESTABLISHMENT OF PESTHOUSE—NEGLIGENT CARE OF PATIENTS—CIVIL LIABILITY.)

KENTUCKY COURT OF APPEALS.

In Twyman's Adm'r *v.* Board of Councilmen of Frankfort, 78 Southwestern Reporter 446, it is held that the action of a city, pursuant to an authority given it to establish hospitals and make all necessary regulations for the protection of public health, in establishing a pesthouse and in removing thereto a person afflicted with smallpox and in caring for him there until he died, was performed by the city in its public or governmental capacity as an agency of the State, and not in its corporate and private capacity, and hence that it was not liable for negligence in the performance thereof. The distinction between the two classes of municipal functions is discussed at some length and the cases of Clayton *v.* Henderson, 44 Southwestern Reporter 667, 44 L. R. A. 474; Paducah *v.* Allen, 63 Southwestern Reporter 981 and McGraw *v.* Marion, 98 Ky. 673, 34 Southwestern Reporter 18, 47 L. R. A. 593 are distinguished. It is finally held that Ky. St. 1903, Sec. 6, conferring a right of action for death inflicted by negligence or wrongful act, does not give such right of action against a municipal corporation for the death of a person occurring as the result of an act done in the performance of a duty which the municipality owed to the public, and in the doing of which it had but exercised a governmental power.

PARTY WALLS. (EFFECT OF COVENANTS AS TO OWNERSHIP.)

NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

In the case of Schwenker *v.* Picken, 86 New York Supplement 681, the question was raised as to the effect of an agreement made by adjoining lot owners whereby one was to build a wall equally upon the land of each at his own expense, and the other was to have the privilege of using the same upon the payment of $500. The agreement further provided that it should be binding upon the heirs, executors and assigns of the parties, and should be construed as a covenant running with the land. After the wall was built both parties disposed of their property. When the wall was about to be used by one of the purchasers, the question arose as to whom payment therefor should be made. The court says that, under the contract under which the wall was built, the party of the first part became entitled to receive from the party of the second part the sum agreed upon when the party of the second part, or his assigns, erected a building upon the premises which made use of the wall. There is no allegation in the complaint that that right has been assigned to the purchaser. He acquires his right solely as the grantee of the property owned by the party to the agreement who built the wall. Whatever may be said to be the effect of the covenant as to the use of the party wall by the party of the second part, or his assigns, the right to receive payment was a right personal to the party of the first part. The court depends upon the case of Cole *v.* Hughes, 54 N. Y. 444, in which it was said: "The first question to be determined is whether the right to compensation is in the plaintiff or in the owner of the wall. It is claimed that it passed to the grantee of the lot on the ground that the covenant to pay ran with the land. When the conveyance was made, D. conveyed all his interest in the lot, and, as appertinent thereto, in the party wall. For this interest the grantee paid, and he got all he paid for. There is no reason in equity why he should also receive payment for some portion of the cost of building the party wall. The money to be paid was not for anything which had been done upon D's lot, but for something which had been done upon the other lot, and it no more passed to D's grantee than it would if he had built a house upon the other lot, using the party wall, and the other party had agreed to pay him whenever he or his heirs or assigns should occupy it." It is held, therefore, that the payment is due to the party to the agreement, and not to the grantee of the lot. The court is also supported in this holding by the case of Sebald *v.* Mulholland, 155 N. Y. 455, 50 N. E. 260.

CHARLES FITZPATRICK.

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CHARLES FITZPATRICK.

BY CHARLES MORSE.

IN undertaking to write his *Lives of the Chancellors*, Lord Campbell said that above all things his ambition was that a recital of the struggles and triumphs of many of the great lawyers of his race "should excite the young student of the law to emulation and industry, and confirm in his mind the liberal and honorable maxims which ought to govern the conduct of an English barrister." Despite the cynicism of a recent observation that every man is his own example in the twentieth century, it is somewhat of Lord Campbell's sentiment, as applicable to the profession in the New World, that influences the writer to set down briefly such of the more important facts as have come to his notice in the career of the Honorable Charles Fitzpatrick, K. C., at this time Minister of Justice and Attorney-General for the Dominion of Canada.

While only now in the prime of life, the subject of this sketch has achieved so large, and withal so genuine, a measure of success that his present biographer feels that while it may be well to apologize for forestalling to some extent any posthumous record of the distinguished lawyer's career, no extenuation will be demanded by the readers of THE GREEN BAG in respect of their interest in this brief story of his public life.

Charles Fitzpatrick was born in the city of Quebec, Dec. 19, 1853. After a preparatory training in the well-known "Quebec Seminary," he entered Laval University, where he received the degree of B. A. He then followed the law course in his *alma mater*, carrying off the Governor-General's medal in his final examination for B. C. L. in 1876. In the same year he was called to the Bar of his native Province. Three years later he was appointed by the Provincial Government Crown-Prosecutor for the City and District of Quebec. Speaking the English and French tongues with equal facility, possessing great industry, and with a natural gift of rhetoric enriched by literary studies, to which he has always been a devotee, the young advocate soon attained an assured place at *nisi prius*, especially in criminal cases. Speaking of him in this connection, a professional journal recently said: "To enumerate the criminal cases wherein Mr. Fitzpatrick has been engaged, whether for the prosecution or defence, would be to mention nearly every one of importance before the courts of the Province of Quebec for the last twenty years."

One of the earliest cases of importance in which he was engaged was *In re Eno* ([1884] 7 L. N. 360), in which he acted for the United States Government in certain extradition proceedings taken against John C. Eno, the defaulting president of the Second National Bank of New York. In the following year he led for the defence in the *cause célèbre* of *The Queen v. Louis Riel*, his client being the conspicuous figure, and indicted as the *fons et origo malorum*, in two armed rebellions (1870-1885) of the Métis in the Canadian Northwest. His first, though unsuccessful, defence of this unhappy zealot may be regarded as the cornerstone of Mr. Fitzpatrick's professional fame, for there he was not only pitted against two

of the greatest advocates in the annals of the Canadian Bar, Christopher Robinson, K. C., and the late B. B. Osler, K. C., but was hampered throughout in his theory of the defence, namely insanity, by the indignant and clever repudiation of it by the prisoner, whose *amour propre* was thereby wounded. Addressing the jury by the permission of the Court after Mr. Fitzpatrick's brilliant and forcible appeal for a verdict of acquittal, Riel said: "It would be easy for me today to play insanity, because the circumstances are such as to excite any man. . . . I have this satisfaction that if I die, I will not be reputed by all men as insane, as a lunatic. . . . My condition is helpless, so helpless, that my lawyers try to prove insanity in order to save me that way. Mr. Fitzpatrick, in his beautiful speech, has proved he believed I was insane. If I am insane, of course I don't know it."

Other defence than insanity, however, there was none; and, rejecting the theory of moral irresponsibility, the jury found the prisoner guilty of the crime of treason, for which he was subsequently executed.

Mr. Fitzpatrick was retained as counsel in some celebrated cases of a political nature which have occurred in recent years. In 1892 he successfully defended the Honorable Honoré Mercier and Mr. Ernest Pacaud (both since deceased) in the prosecutions which ensued upon the fall of the Mercier Administration in the Province of Quebec. The year previous he had appeared before the Standing Committee of the House of Commons, Ottawa, as counsel for the Honorable Thomas McGreevy, who was there charged with complicity in certain frauds connected with Government contracts. The proceedings before the Committee in this case, resulting as they did in the resignation of a Minister of the Crown and the retirement of the impugned member, were in many respects the most remarkable in the history of the Dominion Parliament. In 1897 Mr. Fitzpatrick represented the Dominion Government before the Judicial Committee of the Privy Council in an appeal from the Supreme Court of Canada in a special case touching the property, rights and legislative jurisdiction of the Dominion of Canada and the Provinces, respectively, in relation to rivers, lakes, harbors and fisheries in Canada. (See [1898] A. C. 700.)

Mr. Fitzpatrick has always taken a keen interest in public life, and has proved himself a staunch supporter of the Canadian Liberal party. He entered the Quebec Legislative Assembly in 1890 as the representative of Quebec county. In 1891 he was offered the office of Attorney-General for the Province, which he declined. On the formation of the Laurier Administration, following upon the defeat of the Conservative Government in 1896, Mr. Fitzpatrick entered Dominion politics as Solicitor-General, and was at once assigned a foremost place in his new sphere of usefulness by members on both sides of the House of Commons, as well as by the frequenters of the galleries. The important duties of Solicitor-General, both in and out of Court, were administered by him with great tact and ability; and beyond doubt the traditions of the office will bear the stamp of his personality for a long time to come. On the resignation of the Honorable David Mills, K. C., in February, 1902, Mr. Fitzpatrick was called to the Cabinet as Minister of Justice.

Early in 1897 he undertook a political mission to Rome in behalf of a settlement of the Manitoba School question, which affected the right of the Roman Catholics to separate schools in that Province,—and, whatever the effect of Mr. Fitzpatrick's mission was, this much is certain that the difficulty was thereafter solved by Sir Wilfrid Laurier's Government to the extent of its ceasing to be a present factor in practical politics.

It might be explained, by the way, that this stumbling-block to Dominion statesmen

arose in 1890, when the Provincial Government of Manitoba introduced and passed two bills through the Legislature, the practical effect of which was to close the Roman Catholic separate schools in the Province. The validity of this legislation was attacked by the Roman Catholics on the ground, chiefly, that it infringed the Constitutional Act of Manitoba, 33 Vict. (Can.) c. 3, sec. 22, inasmuch as it "prejudicially affected a right or privilege with respect to denominational schools," which the Roman Catholics enjoyed at the time Manitoba became part of Canada. A case testing the validity of the School Act of 1890 went to the Courts, and found its way ultimately to the Judicial Committee of the Privy Council where the Act was declared *intra vires* of the Manitoba Legislature. Thereupon the parties aggrieved petitioned the Governor-General-in-Council (the Dominion Executive), for relief under sub-sec. 2 of sec. 2 of the Manitoba Constitutional Act, which provides for an appeal to such body from any Act of the Provincial Legislature affecting any right or privilege of any religious minority in the Province in relation to education. After being advised by the Judicial Committee of the Privy Council that they had power to make an order looking to the relief of the parties aggrieved, Sir McKenzie Bowell's Administration, in March, 1895, passed what is known in political history as the "Remedial Order," granting the Roman Catholic minority in Manitoba, *(a)* the right to maintain separate schools as they did before the passage of the Acts of 1890, (*b*) the right to share proportionately in any grant made out of the public funds for the purpose of education, and *(c)* the right of exemption of such Roman Catholics as contributed to Roman Catholic schools from all payment or contribution to other schools. In these facts inhered the Manitoba School question.

In June, 1898, Mr. Fitzpatrick visited England as the representative of Canada in a proposed arbitration between the Governments of the United Kingdom and Russia in relation to the matter of compensation to the owners of Canadian sealing schooners seized in Behring sea.

Of Irish extraction, Mr. Fitzpatrick is an ardent advocate of the interests of his race in the old country, as well as at home. He was for some time president of the Quebec Branch of the Irish National League, and was one of the delegates to the Irish National Convention at Dublin in 1896. He has the enthusiastic support of the Irish wing of the Liberal party in Canada, and by his compatriots on both sides of politics is looked upon as a thoroughly representative man.

Before leaving the more active practice of his profession, Mr. Fitzpatrick enjoyed the honor of being twice elected to the position of *bâtonnier*, or president, of the Bar of the Province of Quebec.

In these various positions of prominence held at the Bar, Mr. Fitzpatrick has sought to maintain the best ethics, as well as the material welfare of the profession. Anyone coming to him with a suggestion for reform and betterment is sure of a ready hearing. Both by the native trend of his mind and his academical training he has been led to look upon the law as a science, and something more than a mere business or means of money-getting—seemingly espousing the view of Bolingbroke that his chosen profession is in its "nature, the noblest and most beneficial to mankind, in its abuse and debasement the most pernicious."

As to his personal qualities, the following observations, by one who knew him intimately, appeared in the Canadian press the while Mr. Fitzpatrick held the office of Solicitor-General for Canada: "Although able to give and take severe blows in party warfare, when debate is ended all hard words are forgotten. Animosity there never was.

Warm-hearted, generous, impulsive, he has all the best characteristics of his race. His success in piloting government measures through the Commons is owing, I should say, to his temperament, which always prefers the *suaviter in modo*, rather than the *fortiter in re*. In person he is about six feet high, straight as an Indian, with no surplus flesh. His movements are quick and vigorous, and one can well believe that in earlier years he was distinguished for his superiority in all manly sports and exercises. He has been known to swim across the St. Lawrence at Quebec, no mean test of his physical powers. His greatest delight in summer is to explore in his canoe the northern wilds back of his native city, and if a dangerous rapid can be run, his spirit exults in such an adventure. Mentally, he is noted for quickness of perception and readiness of wit. He furnishes an example of the amount of work an active, industrious man can overtake. His Parliamentary and official work as Solicitor-General alone would afford scope for all the energies of most men, but when you add to this the fact that he is the head of one of the leading law firms in Quebec City, that he has the largest counsel work in his Province, and is retained at every sitting of the Supreme Court at Ottawa in most of the Quebec appeals, some faint idea can be got of his industry and application, as well as of his success in the practice of his chosen profession."

It remains for Mr. Fitzpatrick to round out his professional career in the near future by accepting a nomination to the Bench; but it is conceivable that his colleagues in the Administration at Ottawa would not look with complacency upon the early retirement of so useful a man from political life, and hence may prevail upon him to serve the State in his present capacity for a longer period. *Nous verrons.*

SOME CURIOUS MUNICIPAL CUSTOMS.

IN Leicester, England, in days gone by, the mayor was chosen in this way: The aldermen sat round in the Town Hall, their hats filled with beans, and a sow was turned in. The first hat from which she took beans conferred on its owner the dignity of mayoralty.

In Great Grimsby three candidates were selected, representing the different political or social parties, and they stood in the market place, each holding a bunch of hay. A hungry calf was then turned into the market, and the first candidate approached by the calf to satisfy his appetite was declared mayor.

The Mayor of Newcastle-on-Tyne sails down the river to claim the rights of the city over the foreshore. When he lands he has to kiss the prettiest girl present, and give her a sovereign as a compensation.

At Bournemouth the new mayor has to be kissed by his predecessor, who is privileged in turn to kiss the wife of the newly-elected official.

A gold oar is given every twenty years, and silver oars every year to the mayors of Boston, Yarmouth and Southampton.

The newly-elected Mayor of Cork hurls a dart into the sea, as an assertion of his authority over the adjacent coast.

On last Easter Tuesday the quaint old custom of letting a piece of land at Bourne, Linconshire, England, was again observed. The piece of land is known as "The White Bread Meadow," and is let annually at auction. The auctioneer stands on a bridge at

East gate, and as each bid is forthcoming a boy is started to run to an inn at the other end of the village, and so long as the last boy has not returned, the auctioneer continues to take bids. The last bid which is unchallenged when the last boy returns, is declared to be the rent of the field for the ensuing year, and the bidder is the tenant. When the award has been made the company adjourns to the inn and a cheese and onion lunch is provided out of the funds of the field; the balance of the money is used by trustees for the purchase of white bread, a loaf of which is left at each house in the village of Eastgate.

JUST JUDGES.

By J. Edward Rickert,
Of the Philadelphia Bar.

Some years ago a most eloquent member of the Philadelphia Bar, then known as "the silver-tongued orator," was sitting in one of the Common Pleas court rooms, waiting to argue a case before the court in banc. The hand in which he held his papers was observed to be trembling.

"What's the matter?" he was asked. "Aren't you feeling well?"

"Never felt more physically fit in my life," he replied. "But every time I am about to stand up before those men in robes I have an attack of nervousness to overcome before I am again at ease."

The law it is a fearsome thing to laymen in its toil,
An ink-emitting Octopus that doth clear justice roil;
And oft the green young counsellor doth stand with stricken tongue
Before that image of the law whereon the black gown's hung.

O know ye not, young counsellor, that thrice upon a day
That awesome presence eats its meals like unto us, they say?
O know ye not, young counsellor, it may sleep on its back
And, like to us, the quiet night with rancous music rack?

It had a mother, sir, like you;—was once a prattling child,
And tore its pants and skinned its nose and wailed in accents wild;
It, too, passed through that gray ague when, wishing it were far,
It rose upon its weak hind-legs before that selfsame bar.

Though sodden deep with legal lore, no man may know it all;
Haply the court you may trip up and give a rousing fall.
The crow that seems immersed in thought may say no more than "Fudge!"
Remember, sir, the justest judge is only just a judge.

MODIFICATIONS OF THE JURY SYSTEM.

By John Burton Phillips,
Professor of Economics in the University of Colorado.

THERE has always been considerable agitation against the rule that a jury should be unanimous in the verdict it renders. Emlyn in 1730 argued for the abolition of the rule. Hallam in his Middle Ages wrote against it. Bentham and Francis Lieber are also on record in favor of its abolition. But a greater name than any of these in modern jurisprudence is that of Judge Cooley. In his edition of Blackstone, he says of the jury system as far as its unit rule is concerned, that it is "repugnant to all experience of human conduct, passions and understandings." He further says that "it could hardly, in any age, have been introduced into practice by a deliberate act of the Legislature." Justice Miller of the United States Supreme Court is also on record against the unit rule. He says, "I am of opinion that the system of trial by jury would be much more valuable, much shorn of many of its evils and much more entitled to the confidence of the public, as well as of the legal and judicial minds of the country, if some number less than the whole should be authorized to render a verdict."

It is peculiar that the unit rule in regard to the verdict of the jury is a thing that prevails in England and America alone.

In Scotland, before 1815, a verdict could be rendered by two-thirds of the jury. The English system of unanimous verdict was introduced in 1830, but it did not give general satisfaction. In 1854 it was modified by a law which provides that a verdict by nine jurors is sufficient after six hours' deliberation.

In France the jury system was introduced in 1771, and requires only a two-thirds vote for a verdict. In Italy and Germany a majority is sufficient, and in Austria, eight of the twelve are all that are required to agree. In British India, after reasonable deliberation if six are united in their opinion and the judge agrees with them they may render a verdict. Reasonable is interpreted by the judge. In the Bahama Islands, a verdict may be rendered by two-thirds of the twelve.

This is enough to show that the unit rule has been greatly modified by the countries of the old world. It has also been partly abandoned by the following American States:

STATES IN WHICH VERDICTS NEED NOT BE UNANIMOUS.

Arizona—Three-fourths in civil and misdemeanor cases. '91 ch. 5.
California—Three-fourths in civil cases. C. C. P. '97, § 618.
Colorado—Three-fourths in civil cases. '99 ch. 111. Unconstitutional. 28 Col. 129.
Idaho—Three-fourths in civil cases. Five-sixths majority in misdemeanors. Const. art. 1, § 7. '91, p. 165.
Kentucky—Three-fourths in civil cases. Statutes '94, § 2268.
Louisiana—Three-fourths in crimes not capital. Const. § 116.
Montana—Two-thirds in crimes not felonies. P. C. § 2142. Two-thirds in civil actions. C. C. P. § 1084.
Minnesota—Legislature may provide for verdict by five-sixths of jury after six hours' deliberation. Const. art. 1, § 4.
Missouri—Three-fourths in courts of record: two-thirds in other courts. Civil cases. '99, p. 381.
Nevada—Three-fourths in civil cases. C. L. '00, § 3270.
South Dakota—Three-fourths in civil cases. Ann. S. '99, § 6268.
Utah—Three-fourths in civil cases. Const. art. 1, § 10.
Washington—Ten of twelve jurors may render verdict in civil cases. Ballinger's S. § 5011.
Wyoming—Three-fourths in civil cases. R. S. '99. § 3651.

Some of the leading arguments for this reform of the jury system are given below. The principal one is, of course, the claim that the jury as at present constituted gives one man too much power.

Everyone is familiar with instances where one man has been able to set at naught the

opinions of eleven by refusing to agree with them in a jury decision. It is difficult for two men to see things alike and it is still more difficult for twelve men to come to the same conclusion. This is well known to lawyers. They have agents whose business it is to look up jurors and learn their mental characteristics and opinions on various subjects. In this way they are able to know whether or not they want these particular jurymen to sit on their cases. They know that one strongly prejudiced juror is enough to decide the case his way or else bring about a new trial by a disagreement. It has been pointed out that persons of certain nationalities are famous for seldom changing their minds. One such person on a jury is enough to make the verdict represent not so much deliberate conviction as the yielding of the others to the member of the obstinate nationality.

It is claimed that the abolition of the unit rule will tend to prevent the fixing of juries. It is rare that anyone attempts to bribe more than one juror because under the present rule if one juror is bought that is all that is necessary. He will be able to bring about a disagreement. Under a rule that would allow two-thirds or three-fourths of the twelve to render a verdict, the person desiring to fix the jury would have to bribe at least three, a thing which is well nigh impossible. It is not likely that there is very much bribing of juries, but that is no reason why all temptations in that direction should not be reduced to the minimum.

Everyone with experience in courts of justice knows that jury verdicts are very often not the results of the unanimous opinions of the twelve men. The verdicts are very often compromises. This is especially the case in actions for damages. Each juror has a different opinion as to the amount of money that should be paid for the wrong done. They are apt in such cases to strike an average and allow the result to stand as the verdict. It is not the opinion of anybody. Compromises sometimes occur when several persons accused of crime are tried together.

There are many things which induce the jurymen to compromise. Many of the jurors are actively engaged in business and are anxious to have the court matter settled so that they may return to their homes and affairs. They are very apt, therefore, to yield a few points in order to get their liberty again. Still further the prospect of remaining all night in the juryroom is not inviting to any man. Jurymen like all other human beings are fond of the comforts of home and good quarters in which to rest for the night. They like to have their meals at regular times and places. When confronted with the alternatives of sitting up all night in the juryroom or yielding a little in what one believes is the right, most individuals, unless endowed with a constitution stronger than the majority of the race, and more firmly set in their principles, are apt to yield a little in what they think is the abstract justice of the case. Says Pope:

"The hungry judges soon a sentence sign,
And wretches hang that jurymen may dine."

It has also been pointed out that the jury system with its unit rule puts a premium on obstinacy. The narrow-minded, obstinate and prejudiced man is given an exaggerated importance as soon as he enters the juryroom. He has made up his mind, perhaps, before the trial began, and his mental apparatus is of such a character that he cannot be persuaded by the arguments of the majority. He therefore feels his importance and will have the verdict his way or the jury will have to disagree. Cases are on record where one obstinate juror caused the disagreement and afterward went bragging about his achievement.

Again the jurors are not all of the same vitality. An obstinate person with abounding health and strength will be able to wear out

the other members of less physical endowment. It becomes a test of strength as to who can hold out longest. In such cases there is a presumption that the stronger man's influence with the jury is not measured by his intellectual capacity but by other things which are of very little value in weighing the merits and demerits of a case. The brute strength of the jurors becomes an element of great importance in their decisions. If the verdict were rendered by less than twelve, it would perhaps be rendered very soon after the jury entered the room and thus the element of brute strength would be eliminated. So also would be the now exaggerated importance of the narrow-minded and obstinate juror.

It has become a common saying that the best men in the country are not now serving on the juries. It is also a fact that there is such a person as the professional juryman. He is not a high type of man in any way. The men who are the real bulwarks of our society are too busy with their business to think of spending time wrangling with the narrow-minded and obstinate as is the present requirement of the jury system. We want the best men in the community in the jury box. If we must go into the courts as many of us must sometimes do and through no fault of our own, we want our case tried by the men who have proved by their ability in the actual business world that they have good common sense. We do not want cases of great importance intrusted to a set of men like the professional jurymen of the present time, men who have never shown that they have the ability to make a living except by conniving with court officers and getting drawn as jurors.

Such being the case, it is highly important that the ablest men in the community be made, in some way, to do jury duty. The exemptions from jury service at the present time are so many that almost anyone can get excused. It is indeed hard for the judge to refuse to excuse a man when he knows that the juryman cannot serve without great personal sacrifice. Even after the evidence is in and the case summed up by counsel, there is still the long wrangle in the jury room. It is possible that the abolition of the unit rule would make it likely that better men would more often consent to serve on juries than they do now. If less than twelve of the jury might render the verdict the time in the jury-room would be perhaps much cut down.

No man should be excused from jury duty except for the most urgent reasons. It is a thing each citizen owes to his country to familiarize himself with the working of its administrative machinery. Nothing is so important as human rights and no one should be excused from assisting in their establishment.

Another argument in favor of the abolition of the unit rule is that it would tend to expedite appeals to the higher courts. In this way, then, the administration of justice would not be delayed. When a jury fails to agree, the only alternative is to have another trial or to drop the case. One or the other of these two things is all that is left for the parties who are trying to secure justice. It is quite common for them to resort to both alternatives. After they have exhausted their means in a new trial, they let the case drop and neither party has obtained justice.

In modern practice it is very common for all cases that are of any particular importance to be carried to a higher court than the one which has the original jurisdiction. Before the case is begun both litigants have usually made up their minds not to stop till the matter is finally determined by the court of last resort. As this is the rule of modern litigation, it is of the greatest importance that as little hinderance as possible should interfere with the progress of a cause from the lower to the higher courts. Every time a jury disagrees, it is a checking of the progress of the suit to its final adjudication. It delays

the determination of justice by causing a new trial. If two-thirds or three-fourths of the jury were able to render the verdict, it is quite likely that fewer new trials would occur. There would be fewer disagreements and cases would be hastened on their way to their adjudication in the higher court.

In recent years there have been a number of suits growing out of elections or in other ways the results of actions of a political nature. They have been cases in which the actions of a political party were concerned. A verdict for the relator would in some way interfere with the party's prospects of success in the next election. Juries whose members have been of different political parties have often failed to agree when there was a chance that the verdict would result in injury to the success of the party candidates. Such was the outcome of the Laingsburgh election cases in the State of New York. The trial occupied thirty days and 750 witnesses were sworn, but the jury could not agree. They divided on party lines, nine for the defendant and three for the relator. Such has been the case with juries in other parts of the country when considering similar cases. It has become the current opinion that whenever there is a favorable opportunity a jury will be very apt to divide on party lines. It is clear that the disagreements that are now so common in the trials of a political nature would be greatly reduced if a verdict could be rendered by less then twelve of the jurymen.

Partisans of this reform also urge that it is in no wise inconsistent with the general character of the administration of justice as now carried on. Inconsistencies in the judicial system are pointed out. If a person brings a claim against a board it is allowed or rejected by a majority of the board. If he is dissatisfied with the award and takes the matter into the courts, there his claim will be decided upon by the unanimous verdict of twelve men. When originally presented to the board, he needed to convince only a majority of its justice; now before the court he must convince twelve men that he is in the right in his demands.

It has been said that the decision of questions of law is as important as the decisions of questions of fact. In courts that have more than one judge questions of law are always decided by a mere majority. The decision is never required to be unanimous. The same thing is true of all the leading governmental actions in countries where there is government by a body of men. The policy of the government as to peace or war is not necessarily determined by more than a mere majority. It is said that unanimity is a requisite of the jury room, but of no other place in the conduct of the government.

No one has advocated the abolition of the unit rule in the trial of criminal cases. It is unlikely that this rule will ever be dispensed with in such trials. In criminal cases the accused is entitled to the presumption that he is innocent till his guilt is proven. The law requires that before he may be declared guilty, there must be in the minds of the twelve jurors no reasonable doubt of his innocence. In a civil case on the other hand, the decision is made according to the preponderance of the evidence. There may be a reasonable doubt in the minds of the jurors, but that does not preclude them from rendering their verdict in favor of the litigant on whose side the preponderance of the evidence lies. It is therefore not so important in the civil case that there should be a unanimous verdict. It is not a matter of the guilt or innocence of anyone, but rather the determination of questions of *meum* and *tuum*. In such questions it is more important that decisions should be reached and the judicial machinery kept in operation than that abstract justice be obtained.

One of the strong arguments for the unanimity rule is that it tends to emphasize the importance of the individual juror, and in this way make him more attentive to the

matter in hand than would be the case if his individuality were sunk in the verdict by a majority. This is probably quite true. If the juror knows that unless he consents to agree with the others there can be no verdict, it is very likely that he will be careful in trying to make up his mind according to the evidence and render a just verdict. The inducement for him to do this is all the greater since in case he is the only one who will not agree to the verdict the other eleven wish to render, he must take the responsibility for the entire decision. Not many men care to go before the world with this responsibility unless they are fully persuaded that they are justified in holding to their opinion. Without carefully considering the whole matter they will not feel justified in taking this responsibility. Under a rule by which the majority decides, it is clear that the individual juror would not be likely to give the case so much attention. We are all aware of the comfortable feeling that comes over us as soon as we know that some other person will vote as we do. Our minds are at once relieved from the exertion of finding more arguments in support of our position. On the contrary when standing alone in our opinion, we feel the amount of energy we must spend in finding evidence to convince others that we are in the right. This is precisely what happens in the jury room. While the trial is going on each juror feels the necessity of paying close attention lest he be the one that will have the others against him and thus be compelled to produce the reasons for his position. It seems quite clear that the unit rule in this way tends to emphasize the individual juror's responsibility.

The principal argument against the abolition of the unit rule is that it is not a matter of very much importance. This is the leading argument that was made in the New York constitutional convention of 1894, where the question was discussed somewhat, though not at very great length. It is said that not many disagreements of juries are such that they would be prevented by the adoption of the unit rule. When a jury disagrees the vote usually stands either six to six, seven to five, eight to four, or nine to three. The cases are not many when one or two men hang the jury.

Again it has been shown that out of the whole number of jury trials the disagreements of the jury are comparatively few. Of 1104 jury cases tried in the superior court of the City of New York, there were but 35 disagreements. The Supreme Court in the first department of the State of New York, which includes the city, tried from 1889 to 1893, 3,460 jury cases. Of these there were but 22 in which the jury disagreed. It seems as though there is a mistake in the number of disagreements it is so small. Yet these are the figures given by the clerk of that court, and presented by Mr. Truax to the constitutional convention. From these figures it is clear that the question of the abolition of the unit rule is not as important as it might seem from reading the arguments that have been presented in its favor.

It should still further be added that these cases are not civil cases alone; the number includes the criminal cases as well. It is true that the disagreements of the jury are much more common in cases where a person is charged with crime than in civil cases where the action of the jury is not such as to deprive anyone of life or liberty. This is why jurors decide the cases submitted to them very quickly when nothing but the question of property is concerned. It is not in the cases that are concerned with the determination of line fence troubles that the jurors are kept out all night in the jury room. Only cases that are concerned with the lives and liberties of persons are sufficient to do that.

Such being the case, it is clear that the abolition of the unit rule will not tend greatly to diminish the number of disagreements in civil cases. This proves that there are

other reforms in the judicial system that are more urgently demanded than the abolition of the unit jury rule in civil actions.

The best results of the jury system are sometimes lost by the death or disability of one of the jurors. The general rule in such cases is to summon a new jury and have the entire case commenced again at the beginning. This is a serious defect in the judicial system. In important cases it is frequently difficult to get a jury. In one case in the city of New York, weeks were consumed in getting a jury and when the evidence was all in and the jurors were deliberating upon their verdict one became insane. Experts on insanity were called to examine him and testify as to his competency to render a verdict. The result was the usual one when experts are employed. The experts failed to appeals. In another case, a criminal case in the same city, one of the jurors became ill just as the evidence was being summed up. The result was a new trial. This cost the city of New York thousands of dollars, and occupied the attention of the court for many weeks. In another case one of the jurors died while waiting to render a verdict. The only thing that can be done in such cases is to begin at the beginning and have a new trial.

In civil cases this difficulty can be avoided if counsel are willing to go on with less than twelve jurors. In a criminal case, however, this cannot be done without express authority in the constitution. The courts have generally held that while the right to jury trial may be waived in civil cases, it cannot be waived in criminal cases, and that trial by jury means trial by a jury of twelve.

In the following States provision has been made so that death or disability of a juror does not interrupt the trial:

STATES IN WHICH ILLNESS OR DEATH OF JUROR NEED NOT INTERRUPT TRIAL.

Colorado—Civil cases. C. C. P. § 189.
Idaho—Civil cases. R. S. '87, §4381.
Iowa—Civil cases by consent of parties. Code '97 § 3713.
Michigan—Civil cases if nine jurors remain. Howell's S. § 7622.
Nevada—Civil cases. C. L. '00, § 3261.
North Dakota—Civil Cases. R. Codes '99, §5439.
Oregon—Civil cases by consent of parties. Hill's S. '87, § 199.
South Dakota—Civil cases. Ann. S. '99, § 6262.
Texas—Civil cases if nine jurors remain. R. S. '95, § 3229. Same in misdemeanors in district court. White, Crim. Code, § 745.
Tennessee—Civil cases by consent of parties. Code '96, § 4688.
Utah—Civil cases. R. S. '98, § 3157.
Washington—Civil cases by consent of parties. Ballinger's S. § 5000.

In the interest of economy it has been argued that a jury may safely consist of less than twelve. In the following States provisions for such juries exist:

STATES IN WHICH JURY MAY CONSIST OF LESS THAN TWELVE IN COURTS OF RECORD.

Arkansas—By consent of parties in cases less than felony. Statutes '94, §2121.
California—By consent of parties in civil actions and misdemeanors. C. C. P. '97, § 194.
Colorado— Six to twelve in civil cases on demand and payment of fees. '91, p. 83.
Connecticut—Nine or more in civil cases by written consent of parties. G. S. '88, §1103.
Florida—Twelve in capital cases, six in others. R. S. '92, §2854.
Georgia—Not less than five in all except city and superior courts. Const. art. 6, § 18. Code '95, vol. 2, § 4143.
Idaho—Less than twelve in civil cases by consent of parties. R. S. '87, § 3939.
Illinois—Twelve or six by agreement in trials of right to property in county courts. R. S. '99, p. 1274.
Indiana—Three to twelve by agreement in civil cases. Ann. S. '97, §521.
Kentucky—Less than twelve by agreement in all cases except felony. Statutes '94, § 2252.
Louisiana—When punishment may be hard labor, jury of five; when must be hard labor, jury of twelve. Const. § 116.
Montana—Less than twelve by consent in civil cases and criminal cases not amounting to felony. Const. art. 3, § 23.
Nevada—Not less than four by consent in civil cases. C. L. § 3256.
Oregon—Less than twelve by consent in civil cases. Ann. L. '87, § 180.
Utah—Eight jurors in all but capital cases. Const. art. 1, § 10.
Washington—Not less than three by consent in civil cases. Ballinger's S. § 4978.

THE OLD AND THE NEW COURT.

A Kentucky Judicial Episode.

By Philip Lindsley,
Of the Dallas, Texas, Bar.

OVER three-quarters of a century ago, a civic storm raged with unprecedented violence over the State of Kentucky, fraught with dangers and consequences of the gravest character. As the writer found, in a winter's sojourn in Kentucky in 1897-8, even after so long a lapse of time, the exciting scenes and events of this judicial episode, happily unparalleled either before or since in this country, were still a topic of conversation.

In defiance of the Constitution an attempt was made by the Legislature, a coördinate department, to supplant the old Court of Appeals by a new court. The grand juries of several counties found indictments against the majority of the Legislature for passing a "re-organization" act. Judges of the Court of Appeals armed themselves when they attended prayer meeting; a member of the Legislature was stricken down by the hand of violence as he left the hall, for words uttered in debate; three State elections, conducted with intense bitterness, widespread financial ruin, public discontent and distrust, bordering on warfare, were some of the features of this civic storm.

The moving cause of this controversy was an Act of the Kentucky Legislature of 1820. It provided that a plaintiff, on issuing an execution on his judgment, could endorse thereon that he will take paper of the Bank of the Commonwealth of Kentucky, in discharge of it; and in case he failed to do so, that the defendant may replevy the debt for two years. This Act was declared unconstitutional by the trial court of Clarke County, and Judge Clarke, who presided, was summoned to appear before the Legislature, in special session, that he might be removed. But this summary proceeding happily failed.

In Blair *v.* Williams, Vol. 4, Littell's Ky. Reports (1824), p. 34, it was urged this Act of the Kentucky Legislature was violative of the clause in the Federal Constitution: "That no State shall pass any law impairing the obligation of contracts." The learned court holds the contract between the parties in that case to be indisputably within the true meaning of this clause, and says: "There are but two questions which arise on this branch of the subject; *first*, what is the obligation of the contract between the parties in this case, and, *secondly*, does the Act of the Legislature in question impair that obligation?"

The court knew its decision would run counter to a wild clamor of then highly-excited public opinion, in which the debtor class were largely in the majority. And so the decision is supported by the ablest reasoning. It goes into the distinction of perfect and imperfect obligations, and notes the difference between moral and legal duty. It shows the connection between legal remedy and constitutional right. It suffers nothing by comparison with Chief Justice Taney's opinion, on the same subject, in Bronson *v.* Kinzie, 1 How. 311. An able and distinguished Kentucky lawyer, now dead, John Mason Brown, said, "It is fairly entitled to the praise of being a handsome and polished metaphysical essay."

The decision in Blair *v.* Williams and Lapsley *v.* Brashears, both decided the same term by the same court, was to the effect that this Act was unconstitutional. The political excitement which these decisions caused, is better understood by referring to the financial condition of Kentucky at that time.

The memory of the experience of Continental paper money long kept alive a prejudice against a like currency. In the absence of any form of money, barter took its place, such as fur or tobacco. Of land there was abundance, and the traffic was largely in this. As Judge Bates said, of the early days of Missouri, it was almost the only article of export. But this prejudice died with those who personally knew of its ills. Free banking sprang into existence, through legislative enactment. Forty-six separate banks, with a total capital of $8,720,000, were created in 1818. These were soon wrecked and caused the Old Bank of Kentucky, the only solid bank in the State, to suspend specie payment. Then, in 1820, the Legislature annulled these forty-six charters, leaving the majority of the people of the State as broken financially as the banks. Again the Legislature tried to create relief The wise few were overrun by the ruined many. It is said history repeats itself, but it does so more frequently on financial than on other lines. The Bank of the Commonwealth was organized, and its unique and far-reaching powers were intended to stem the tide of disaster, and revive prosperity. It had a capital stock of $2,000,000, with power to issue $3,000,000 circulating paper, which was made a legal tender for all debts, but for which the holders could not demand specie payment. Then the directors of the Bank of Kentucky were removed by legislative enactment, and fiat money men took their place. The good credit of this bank was used to float the bills of the new bank. The result but added to the people's woes, and inaugurated a struggle unparalleled in the history of the States.

Nor need criticism too severely condemn what had occurred, and what followed, on financial lines. The State was then isolated and sparsely settled. That the principle of exchange is hard of understanding, by the majority of the people of a State, is shown by universal experience; barter of goods can readily be comprehended, but add to it a designated standard of exchange, and the question is too difficult for ordinary comprehension. The measure of value, assumes, in popular belief, a mysterious agency of more than human power. The value of coin, as represented by a bank note, is a problem not readily comprehended by the people.

The Legislature did not declare the bank notes legal tender. But it sought to secure the same results by the duress of delay upon the creditor.

The political excitement that followed was intense. The Old Court had its friends, who vehemently applauded its action. Those of opposite views denounced the decisions and the judges in unmeasured terms. The very lawyers who appeared in the cases, thereby became leaders of stormy political parties.

The Chief Justice's associates on the bench were Owsley and Mills. Kentucky's ablest lawyers argued the case. On one side was James Haggin, Wm. T. Barry and John Rowan. On the other was Robert Wickliffe and Joseph C. Breckenridge, the latter father of John C. Breckenridge.

The political agitation that seethed throughout the State suddenly grew into a revolutionary determination to abolish the old court, and to establish a new court, whose judges would yield to the will of the people as expressed through a newly-to-be-elected Legislature.

The Legislature, first, by solemn resolution, denounced these decisions as subversive of the dearest and most invaluable political rights, and asserted in effect that ministerial officers of the State Government should treat them as a nullity. But the preamble to these resolutions was the remarkable part of the proceeding. It covered twenty-six pages. It informed the court that it had transcended its powers. It concluded with the following eloquent appeal to the people:

"The members of the Legislature, while

they admit the power of the court to declare any law unconstitutional and void *which is obviously and palpably so,* feel themselves reluctantly constrained by the most solemn obligation of duty to themselves, to their constituents and posterity, and to the principles of rational liberty throughout the civilized world, to make their deliberate protest against the erroneous and usurping doctrines of these Decisions."

On December 24, 1824, the newly elected Legislature passed an act re-organizing the Court of Appeals. Its avowed purpose was to get rid of the judges who rendered the obnoxious opinions. The protests of the minority against these illegal measures were refused a place on the journals of both Houses. That minority, however, was great enough to save the judges of the Old Court from removal by impeachment, as would surely have been done, could their impeachment have mustered a two-thirds vote. The oath required of the judges of the new court. stipulated they "will not bend to men in power."

Among the ablest opponents of the reorganization scheme in the Legislature, was Ben Hardin, uncle of Hon. Watt Hardin, whom Governor Bradley, Republican, defeated for governor. His argument against it, while eloquent and unanswerable, had it been addressed to impartial minds, also partook of extreme bitterness in its attack on the opposite side. So intensified was the resentment he engendered, that at the close of the sitting as he emerged from the hall, he was stricken insensible by a blow on his head, from unknown hands. and was so carried to his room, and only recovered by a narrow margin.

Governor Desha, elected as the new court candidate, promptly appointed the judges provided for in the re-organization act. These met and organized into a court. But the members of the Old Court were not of the stuff to yield their places without a struggle. They repudiated the legislative enactment as unconstitutional. They held their own court as usual. Their mandates were in most cases obeyed. Then the new court solemnly recorded the old court to be in contempt and a nullity. It imprisoned the clerk of the Old Court for refusal to deliver up Records to their appointee. Then the Old Court declared the new appointee in contempt.

The clerk of the Old Court went before the people in a stirring personal attack upon the new judges. Others took up the warfare in the prints, over such inspiring signature as the "Spirit of '76." The cry of assassination was in the air, and one of the judges constantly wore his pistols, when he went to prayer meeting. The newspapers were full of the arguments of the opposing factions.

Again the whole question went to the people in the next popular election of 1825, and when the succeeding Legislature met, a repeal of the re-organization act passed the lower house by a good majority, but the hold-over members of the Senate defeated it, with the help of the casting vote of the Lieutenant Governor. Public excitement thereafter climaxed into fever heat. Both the old and the new court held regular sessions. A military force actually guarded the records of the new court. Bloodshed seemed imminent, but was prevented by the moderation and wisdom of the Old Court judges, in a new appeal they inaugurated to the people.

The lawyers generally began to show distrust of the new court; the election of 1826 gave a decided majority in both branches of the Legislature in favor of the Old Court, and at its first session, the re-organization act was speedily repealed, and the new court, with all its possibilities of danger to the public welfare, stepped down. It lives today in tradition, and not by its records. Every actor in those stirring scenes has gone to his reward. The Repealing Act, passed in 1826, is found in full, in Monroe's

Ky. Repts., Vol. 2, p. 3. The preamble is here given, as an instance of one of the most striking and wholesome revulsions in public opinion in American history. The reader will note, that any reference to the "Old Court's Decisions" is conspicuously absent from the act. "The good people," and not the judiciary, are accorded all the credit, by a solemn act of Legislature. Compare it with the severe criticisms passed upon the judges of the old court, in the preamble of the act re-organizing the Court of Appeals, and the very refinement of political dodge is apparent.

"*Whereas,* the Court of Appeals of Kentucky was created by the Constitution of the State, and the judges thereof hold their offices during good behavior, and cannot be removed therefrom in any other mode than by impeachment or address. And *whereas,* the Legislature attempted to abolish the Constitutional Court, and erect one on its ruins by two acts of the Assembly, entitled, *etc.* And *whereas,* the above recited acts, have been decided by the good people of this Commonwealth, at two successive elections, to be dangerous violations of the Constitution, and subversive of the long tried principles upon which experience has demonstrated that the security of life, and property depend, and the present Legislature concur most solemnly with the people in the belief of the unconstitutionality and evil tendency of said acts," *etc.*

Honesty in the management of public affairs, which was the real question before the people, again assumed control in Kentucky. And, as "survival of the fittest," lived the "Old Court" for all time by its records. Its able and fearless judges, mindful of their oath of office, and their constitutional rights, held the judicial helm, all along down the wild current of fiatism, and landed the ship of State at last in a calm and safe harbor. To their lasting credit, be it said, when the storm finally ceased, "the good people," through its Legislature, crowned the "Old Court" with laurels, by redeeming the issue of the Bank of the Commonwealth, back of which was no security, but the public honor. And today, the "Old Court" is referred to in Kentucky, as the court that was cool, when passion reigned, courageous, when politicians quailed, and which was guided by a wisdom and a learning marvelous in a then thinly settled and remote State, and far reaching in its effect for the public good.

THE SURE WAY.

By George Birdseye.

For breach of promise she her suitor sued,
And found herself ten thousand to the good.
How did she get it? Law fees are not small:
Married her lawyer, and so got it all.

MOB LAW IN AMERICA.

By Duane Mowry,
Of the Milwaukee, Wisconsin, Bar.

A WRITER in an English magazine a few years ago[1] had occasion to make the following observations: "More than one thousand men and women have been lynched in the United States during the last ten years. Mob violence is spreading. It is not confined to the district south of Mason and Dixon's line. New York State and the Quaker State have suffered the mob to murder blacks within their borders, and have made no effort to punish the lynchers. In 1882 there were 52 negroes murdered by the mob; in 1892 there were 160. Last year (1893) the number must have reached 200. In South Carolina last year there were thirteen lynched, in Georgia sixteen, in Alabama twenty-seven. The atrocities perpetrated during the present year justify the opinion that if the remaining eight months maintain the record of the opening four months of the year, 1894 will stand out as the worst year, in point of numbers and bloodthirstiness, since the days of the Ku Klux."

And yet the average American is strong in the conviction that he is an integral part of a liberty-loving, law-abiding people. And it is within the easy reach of the memory of a large contingent of the living, that the claim has been made and insisted upon as literally true that we, as a nation, are, pre-eminently, and without qualification, an enlightened, civilized and humane people. To say that a different condition exists, or to charge that a different sentiment prevails, to any considerable extent, would be at once disputed and construed to mean a libel on the good name and fame of our country.

Nevertheless, there is reason to claim that the statements of the writer quoted are, unfortunately, too true; that our boasted love for law and order and fair-play, is not an universal sentiment by any means; that, in practice, the very reverse is frequently more nearly representative of the real situation. Proof of this may be found by reference to the almost daily violations of the criminal statutes by whole communities, including the actual burning of negroes for alleged crimes, without a hearing, with scarcely a passing protest, and often with open and shameless justification.

Statistics dealing with mob violence in this country are exceedingly difficult to obtain. The Census Office does not furnish them. And they are only obtainable in a disjointed, often incoherent, sometimes irresponsible, and always unsatisfactory manner. Even then there is more or less coloring of the facts. Local pride will sometimes attempt to suppress them. Some communities appreciate the awful disgrace which attaches to mob law in their midst, and they would gladly minimize the stigma which must rest on their neighborhood. Political and social reasons will contribute to distort and misrepresent the incident. And it is generally admitted that little is gained by publicity, certainly nothing for law, order and good government.

The attorney-general of the United States, in a recent report to Congress, says that in the last twelve years the number of homicides in this country has risen from four thousand to ten thousand five hundred *per annum;* that of the number represented by the last figures, in round numbers, one hundred were convicted of murder by the courts, and two hundred and forty were executed by lynch law. In some of the States this proportion is less; in others it stands three lynchings to one conviction for homicide and rape.

[1] *Contemporary Review*, p. 823 (June, 1894).

The Chicago *Tribune* began in 1882 to keep a table of the lynchings of negroes by mobs in this country. The figures thus secured, while probably not absolutely accurate, closely approximate the true situation. Mrs. Ida B. Wells-Barnett, of Chicago, herself an educated colored woman of ability, has interested herself for many years in the wholesale murdering of members of her race by Judge Lynch, publishing several pamphlets on the subject. In one of these, commenting on the figures obtained by the Chicago *Tribune* of lynchings of her people, she says: "Of these men and women who have been put to death without judge or jury, less than one-third of them have been even accused of criminal assault. The world at large has accepted without question the statement that negroes are lynched only for assaults upon white women. Of those who were lynched from 1882 to 1891, the first ten years of the tabulated record, two hundred and sixty-nine were charged with rape; two hundred and fifty-three with murder; forty-four with robbery; thirty-seven with incendiarism; four with burglary; twenty-seven with race prejudice; thirteen quarreled with white men; ten with making threats; seven with rioting; five with miscegenation; in thirty-two cases no reason was given, the victims were lynched on general principles. Of the one hundred and seventy-one persons lynched in 1895 only thirty-four were charged with criminal assault; in 1896, out of one hundred and thirty-one persons who were lynched, only thirty-four were said to have assaulted women; of the one hundred and fifty-six lynched in 1897, only thirty-two were so charged; in 1898, out of one hundred and twenty-seven persons lynched, twenty-four were charged with the alleged "usual crime;" in 1899, of the one hundred and seven lynchings, sixteen were said to be for crimes against women."[1]

[1]Ida B. Wells-Barnett, *Mob Rule in New Orleans*, (pamphlet), pp. 46-47.

The analysis of this shocking record by Mrs. Wells-Barnett is presented to show that the claim made by Southern editors, that criminal assaults made upon white women by negroes, is the main cause of the presence of lynch law, is not borne out by the facts; and that the charge that the negro is a moral outlaw is a false one, evidently made for the purpose of creating public sentiment against him and otherwise injuring his prospects. Indeed, one editor himself admits that the prevalence of rape as a moving cause for mob rule is greatly exaggerated. Nevertheless, it is freely given out, not only in the South, but elsewhere in this country, that the commission of the crime of rape is mainly the incentive to action by the mob. Mrs. Barnett's study of the figures establishes the fact that this is not true, so far as her own race is concerned. Of course, she goes no further into the question than it relates to her own people. But whatever the reason for the administration of Judge Lynch, the *Tribune's* figures represent an appalling condition of affairs, one diametrically opposed to the genius of our institutions.

If we connect the facts and figures submitted by the Chicago *Tribune* with the report of the attorney-general, together with the discussion prepared by Mrs. Wells-Barnett, are we not brought face to face with a condition of affairs in this country which calls for something more than passing protest or calm denunciation? Is there not plainly visible in the figures submitted, confessedly not wholly reliable, enough to show that the American people are losing, perhaps not rapidly, but steadily, that respect for the due administration of the law, which belongs to a truly loyal, law-abiding and great nation? When we stop to consider that the conviction of the mob under the present order of things is practically impossible, are we not confronted with a condition of affairs which require a high order of pat-

riotism and statesmanship? And is it possible to minimize the importance of the question from even an humane point of view?

It has been intimated that there is a growing want of respect for the legally constituted authorities in this country. It is argued that the statistics submitted justify the making of this claim. The increase in the number of homicides, annually, during the last decade, and the decrease in the number of convictions for the same, through the courts, go far to sustain that claim. The increasing frequency of the reign of Judge Lynch, practically unmolested, also sustains the same view. The adoption of exceedingly cruel and unusual methods of punishment by the mob, as that of burning the defenceless victims, still further confirms the lawless tendencies of the times. These conditions would not, could not, exist, if public opinion did not assure immunity from adequate punishment to the murderous hordes who participate in these lawless and brutal proceedings. We cannot escape the conclusion that the reign of lawlessness is securing a firm hold in this country, is upon us with a strong and relentless grip.

It is undoubtedly true that whole communities are wrought up to a high state of frenzy and fear over the commission of atrocious crimes. And it is but a short step from this feeling to the crime of the mob itself. If, however, the mob knew that certain and adequate punishment would quickly follow its breach of the peace, it may well be doubted if it would so willingly and unblushingly violate it. As conditions exist today, the mob entertains little fear of punishment at all, never any such dread of the infliction of a penalty as the enormity of the offence committed warrants. So the mob undertakes to be the self-appointed conservator of law and order at the very expense of good government itself. This condition has been steadily growing from bad to worse until today the situation is little less than alarming.

It was Thomas Jefferson who once wisely said of mob law: "It is more dangerous that even a guilty person should be punished without the forms of law than that he should escape." There is much need for the preachment of this doctrine. Not that there is anything particularly sacred or magical around the term law, but because it comports exactly with the best that all human governments and civilized life afford.

Passing from a mere academic consideration of the question, let us see if there is any adequate remedy for the existing evil.

It has already been said that the mob feels secure against any punishment being inflicted upon it by the constituted authorities for its crime. The history of all trials for riot amply justify the making of this statement. It is apparent, therefore, if punishmen is to be visited upon the mob, some change in the criminal law and procedure will have to be made.

The constitutional provision requiring that every person accused of crime shall have a speedy trial by a jury of his peers in the county where the alleged offense is said to have been committed, will, as it appears to the writer, have to be amended. This is necessary because no jury of the accused's peers, in the county where the alleged offence is said to have been committed, will, in almost every case, render other than a verdict of *not* guilty. Public opinion demands such a verdict and the jury responds to that demand, at the sacrifice of both law and justice.

The proposed amendment should make mandatory that the place of trial of the mob should be far removed from the place where the alleged crime is said to have been committed. The purpose of this amendment is not to secure a certain conviction of the mob, but to obtain a jury of fair, impartial and unprejudiced men, who will protect

alike the rights of the accused and of the State, a thing demonstrably impossible under the existing order. The interests of the State and the behests of the social order imperatively demand this.

The trial judge and the prosecuting officer should not come from the territory where the offense is said to have been committed; certainly not if they are elective officers. These officers of the court should be named, perhaps, by the governor, with or without the concurrence of the law department of the State. Local sentiment is so strong and so indifferent to the impartial administration of the law, that some unusual and extraordinary plan must be invoked in order to eliminate anything like local or political pressure in the trial of the mob.

The venue should be determined by law. Possibly affidavits should be submitted by the prosecution showing the necessity for the change. The right to the change of the place of trial should rest with the State. In no case should the place of trial be in the county where the offence is said to have been committed, nor in an adjoining county. The right to a speedy trial should be continued and preserved. But neither party should be forced, unreasonably, to go to trial.

These regulations should be supplemented with others looking to less stringent rules of evidence on the part of the State. Whether the doctrine of reasonable doubt ought to prevail in the trial of the mob, or whether, as in civil cases, a preponderance of evidence ought to be sufficient to warrant the jury in rendering a verdict of guilty, is a question which is worthy of careful and thoughtful consideration. The purpose should be to give the accused a fair hearing certainly, but also to make the due administration of justice in this extraordinary class of criminal cases reasonably certain, never very doubtful, as now it seems to be.

In every case of lynching, a money judgment should go to the legal heirs of the victim against the county where the offence was committed. The amount of this judgment should be fixed by law, say at $5,000, and should be obtained without much expensive litigation. It should be paid out of the State Treasury, and the State should be reimbursed by the county by taxation of the latter. Proof of the lynching should be sufficient to warrant the court in entering judgment, the time and place of the same, of course, accompanying such proof.

These suggested changes would, in the writer's opinion, exert a marked influence in favor of restraining the intending acts of the mob. A few convictions would certainly wipe out this stigma on America's fair name. The plan suggested would make convictions possible, one of the strongest deterrents to the commission of crime.

The experiences of the past make some such change as has been herein indicated necessary. The possible dangers of the future make some definite and positive action imperative.

COL. EDWARD MARCUS DESPARD,

At the place of Execution upon the New Surrey Goal just as he appeared when addressing the Spectators a few minutes before the Platform dropped

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

VIII.

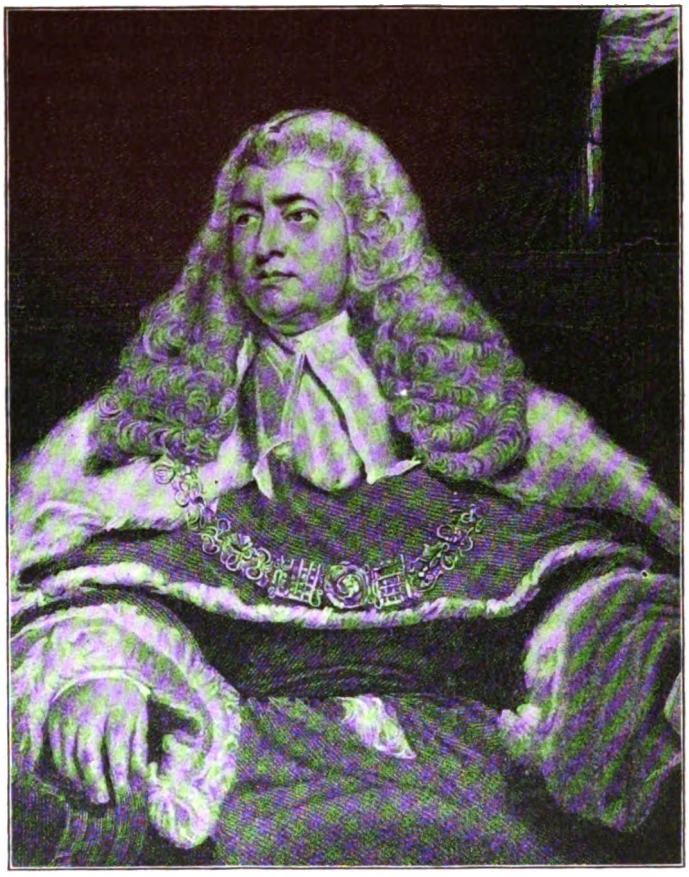
By Van Vechten Veeder,
Of the New York Bar.

AT the opening of the century the satisfaction of the nation with the success of its arms, and the hopes entertained of the union with Ireland, were sadly diminished by the condition of the working classes. The sudden cessation of the extravagant expenditures entailed by war without a corresponding fall in the prices of the necessaries of life, spread discontent and disaffection among the laboring classes, while the disbanding of soldiers added to the ranks of the idle and dangerous element. Addington's government was hopelessly weak, and only a leader was needed to reveal the widespread disaffection. Out of such conditions arose Despard's crazy attempt to murder the king and overthrow the government (28 St. Tr. 345). Colonel Despard had rendered brave and meritorious services in the army, and smarting under a bitter grievance arising out of his discharge, had embarked upon the stormy sea of politics. Having been under suspicion during the Irish rebellion of 1798, he was imprisoned for three years without ever being apprised of the charge against him. With his mind unbalanced by such treatment he had identified himself with a band of conspirators, some of whom, at all events, were bent upon murder. It may well be doubted from the evidence whether he was privy to the reckless designs upon the king's life, or the wild attempts testified to by spies and informers. The overt acts of treason with which he was charged were seduction of soldiers, administration of illegal oaths among his followers, and illegal meetings. It was urged in his defence by Sergeant Best that mere words, however treasonable, could not be regarded as overt acts, if not joined with acts. But Lord Ellenborough ruled that if such words were used at meetings held for the purpose of forwarding treasonable designs, and addressed to others to incite them to such acts, such words were themselves overt acts. Colonel Despard was convicted and executed.

In Ireland the unsatisfactory conditions made themselves manifest in the criminal outrages of the Threshers in 1806, and of the rival Caravats and Shanavests in 1810. These organizations were in no way connected with religious or political questions; they were mere roving bands of discontented rioters. The abuses arising out of the mode of assessing and levying tithes in Ireland, and the failure of the government to give any relief, were responsible for the long continuance of violence and crime. The government had no remedy beyond trials and executions (30 St. Tr. 1; 31 *i. b.* 413).

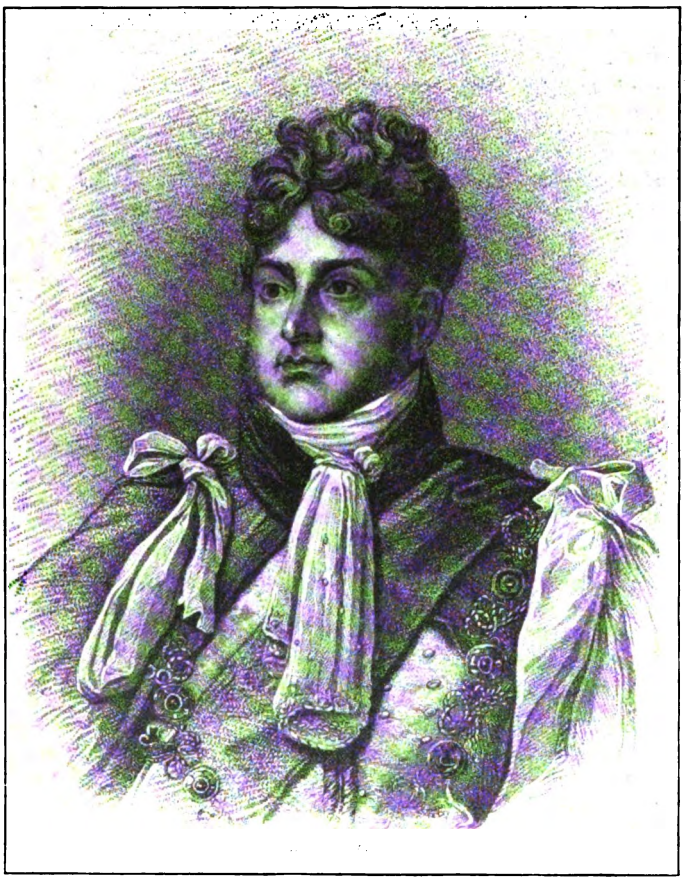
In England the strain of overthrowing Napoleon, which had been borne with some loss when England monopolized the trade of the world, became oppressive when peace returned and commerce gradually settled into its accustomed channels, and the necessities of war expenditure ceased to find employment for home manufacturers and producers. The ensuing commercial and agricultural distress was at the bottom of the activities of the Luddites from 1811 to 1813. Taking its name from a crazy individual named Ludd, who at the close of the previous century had in a fit of irritation destroyed a couple of stocking looms, it eventually developed into an organized conspiracy for the destruction of machinery in the midland counties, and formed the active principle of

violence which pervaded the reform riots of 1817 and the agrarian outrages of later years. The penalty for their favorite outrage was at once raised from transportation to death, and the government rigorously prosecuted the offenders. But Luddism, put down for a time, broke forth with renewed violence in 1816, increasing the prevalent distress which formed the excuse for its revival, and causing the destruction of much property. The government policy had only the usual effect of temporarily checking outrages upon persons and property, whilst leaving the source of disaffection to work with more dangerous secrecy. Out of these conditions gradually arose the organized agitation for parliamentary reform. Parliamentary reform had already been discussed at intervals in the large cities, but the agitation now acquired consistency and importance. It was no longer a catch-word for the opposition, but became a household word. Spencean and Hampden Clubs were widely established, the former advocating the partition of land and other visionary schemes, and the latter having for its principal tenets universal suffrage and annual parliaments. Probably most of the members of these clubs and associations honestly relied upon constitutional methods; but there were, of course,



LORD ELLENBOROUGH.

many who advocated the use of force, and as time went on and the government's policy of rigorous repression became more and more severe, and the system of spies and informers became more and more odious, the lawless element became stronger, especially



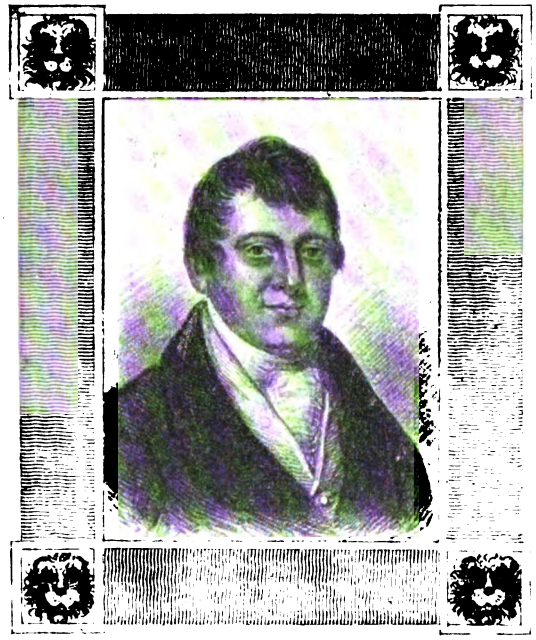
THE REGENT, AFTERWARDS GEORGE IV.

in the provinces, where the members were mostly workingmen.

The first conflict took place in the Spa Fields' riot of December 2, 1816. A mass meeting had been called at this place for November fifteenth, for the avowed purpose of petitioning the Regent. At this meeting, at which Henry Hunt was the leading speaker, the proposed petition was adopted, and the meeting adjourned to December second to receive the Regent's answer. At the adjourned meeting, before Hunt's arrival—whether by arrangement, or on the spur of the moment, is uncertain—a mob was led by William Watson into the city, where they ransacked the gun-shops and made a ridiculous demonstration before the Tower, but quickly dispersed at sight of a small detachment of the garrison. For their violence and robbery the minor actors were promptly punished, and Watson, Thistlewood, and two others were held, as leaders,

for riot. Subsequently the government resolved to change the charge to treason. Watson was accordingly placed on trial for treason in compassing the king's death, in intending his deposition, in levying war upon him, and in forcing him to change his measures and counsels (32 St. Tr. 1.). The prosecution was conducted by the law officers, Shepherd and Gifford, and the defense by Copley and Wetherell. According to the evidence, the placard calling the second meeting was headed, "England expects every man to do his duty."

After stating that the object of the meeting was to receive the Regent's answer, it went on to call attention to the distress of the millions and the luxury of the few. "Arrogance and folly have brought the nation to this. Firmness and integrity can alone save the country." "After the last meeting," continued the notice, "some disorderly people were guilty of attacking property or individuals. They were ill-informed of the object of their meeting; it was not to plunder persons suffering in these calamitous times in common with others; the day will soon arrive when the distress will be relieved. The nation's wrongs must be redressed." With the exception of the vague attempt to seduce the Tower garrison there was, however, nothing in the facts of the case to warrant the charge of treason. The ease with which the mob was checked showed that it was destitute of cohesion. Aside from some suspicious papers found on the prisoner, the prosecution relied mainly upon the testimony of an informer named Castle. This man was a typical specimen of a class much in evidence in the State prosecutions of the time. He professed to be a smith, but had not worked at that trade for twelve years past. He had previously been twice under arrest, once for passing forged bank notes, and in both cases had turned informer. Ser-



HENRY HUNT.

geant Copley's *exposé* of this prosecuting witness told strongly in Watson's favor, and, in spite of Lord Ellenborough's strong, but not conspicuously unfair charge, the prisoner was acquitted. The government did not dare to put Castle on the stand again, and proceedings against the other prisoners were dropped.

The government could see nothing in the ravings of the suffering and half-starved people but political sedition, and, as theretofore, thought of no remedy but repression. The Regent was panic stricken. The famous Six Acts were rushed through Parliament, the writ of *habeas corpus* was suspended, and individual liberty was as effectively suppressed as it had been in the days of the Stuarts. The Six Acts covered the ground with thoroughness. They dealt with the prevention of arming and training, with the suppression of public meeting and discussion, with restriction of the press, and provided for summary dealing with conspiracy and sedition of all kinds.

Spies and decoys were the natural allies of the government in the execution of these remarkable acts. Coercion, not sympathy, was the express policy of the government, breeding as a natural consequence mutual distrust and fatal enmity. The disaffection of the people fermented in secret and inevitably manifested itself in violence.

ARTHUR THISTLEWOOD.

The Nottingham riot of 1817, with its destructive violence and foul murder, was the consequence of forcing discontent into lawless channels. Though sufficiently formidable in its earlier stages, this conspiracy really collapsed before the military force was brought to bear upon it. Brandreth and his leading associates were at once brought to

trial for treason, and as the evidence was clear, they were all convicted (32 St. Tr. 755). Though Brandreth was a daring enthusiast, there was a well-founded suspicion that the whole conspiracy had been planned and promoted by the government spy, Oliver. This accusation was made by Sir Samuel Romilly, among others.

meeting was held at Birmingham to adopt a remonstrance to the Regent. The meeting was not interfered with, and passed off quietly. At other meetings more or less inflammatory language was used, and after one or two trials for sedition the government issued a proclamation denouncing these meetings as illegal. Nevertheless, a meeting was

J. SCARLETT.

At the beginning of the year 1819 the government was so well satisfied with the effect of its repressive measures that some of the most objectionable enactments were repealed. Public meetings were thereby rendered possible, though still closely restricted. In the early part of the year a large mass

called for August sixteenth in St. Peter's Field, Manchester, to elect a legislative attorney and representative for that town. From early dawn to past midnight of the appointed day numbers of men, estimated at sixty thousand, marched in from the surrounding country. Henry Hunt presided

and made the principal speech. In the midst of these proceedings the militia appeared and attempted to disperse the gathering. A riot ensued, in which six persons were killed and some seventy others seriously wounded. In the violent public excitement which followed, the conduct of the magistrates was strongly denounced; it was generally thought that they were directly responsible for this bloody affray, henceforth known as the "Peterloo Massacre." Hunt and other radical leaders were, of course, arrested. Lord Eldon was for trying them for treason. His construction was that numbers constituted force, force terror, and terror illegality. Obviously, on this theory, any large public meeting for the purpose of agitating reform of any kind would be an act of high treason. But the plan to indict for high treason broke down—the judges would not have it. Hunt and his associates were finally indicted for conspiracy to alter the constitution by force of arms, and unlawful assembly. They were tried in March, 1820, before Justice Bayley and a special jury. Scarlett conducted the prosecution. Hunt defended himself. No evidence was allowed concerning the conduct of the authorities and soldiers; the case was rigidly confined to the meeting itself. Hunt presented over fifty witnesses in his

WILLIAM CUNNINGHAM PLUNKETT.

defense, many of them persons of recognized standing and influence. They concurred in the peaceable conduct of the great mass of the people, of their non-resistance to the yeomanry, and of the absence of those missiles which the crown witnesses had said were flying about when the militia appeared. None of them saw any cause for alarm while the meeting was in progress. Justice Bayley's able charge was a model of fairness. He cited Sergeant Hawkins' well-known definition of an illegal meeting: "A great number of people meeting under such circumstances as cannot but endanger the public peace and raise fears and jealousies among the king's subjects is an unlawful assembly, as no one can foresee what may be the event of such an assembly." But mere numbers, he told the jury, did not make a meeting illegal; a number of persons might meet under such circumstances as were not calculated to raise terrors, fears or jealousies in the minds of the people of the neighborhood. But in an assembly so constituted, and met for a perfectly legal purpose, if any individuals introduced themselves illegally in order to give to the meeting an undue direction, which would produce terror, then they would be guilty. He was not prepared to say that the appearance of immediate danger was necessary to constitute the offense, and therefore, if, from the peaceable demeanor of the people, and the presence of women and children, the meeting was not calculated to produce a feeling of immediate danger, he recommended that the jury find a special verdict to that effect. Notwithstanding this charge the jury, after long deliberation, found Hunt and three others guilty, as charged. Hunt was sentenced to twenty-nine months' imprisonment.

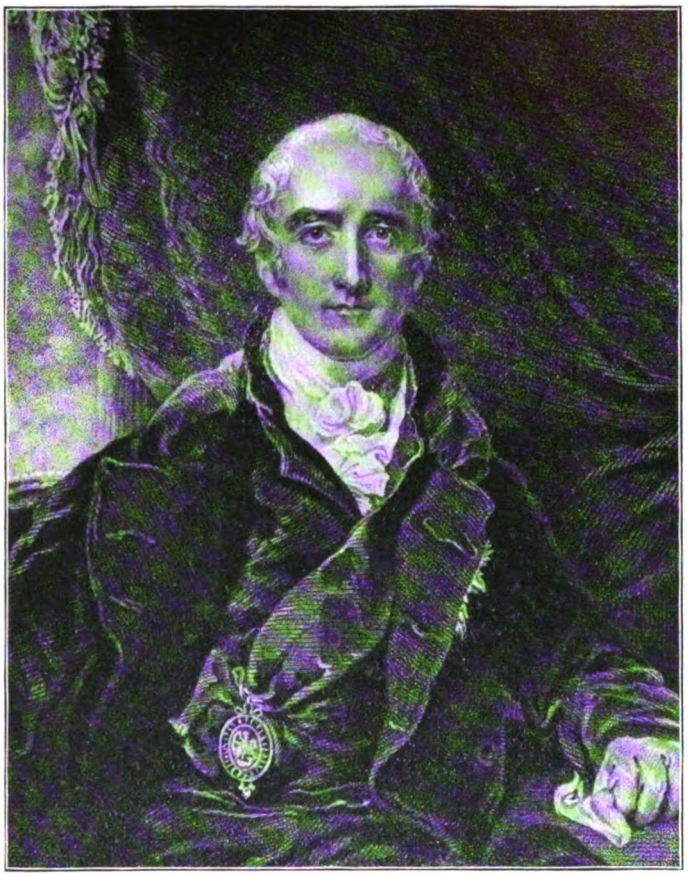
One curious incident of this interesting trial may be mentioned. In the debates in Parliament following the meeting, Scarlett had been foremost in denouncing the conduct of the authorities. "What was the unavoidable inference," he said, "but that opinions, however absurd or preposterous, were to be put down by the bayonet, and that ministers intended to act on a system of military coercion?" At the trial, Hunt was much incensed when Scarlet quoted from Hunt's prior speeches, not connected with the Manchester meeting. In retaliation he proposed to cite Scarlett's speech in Parliament as a basis for asking a witness whether he thought such a speech likely to incite violence. Justice Bayley admitted his right to do so, but requested, as a matter of delicacy, that the question be not put. Hunt thereupon withdrew it.

The Cote street conspiracy of 1820 was a more serious affair. It apparently involved the murder of the ministers, the seizing of the Bank and the Tower, and the setting up of a provisional government. But with all its horrors, the conspiracy was really confined to a few ignorant men, and it is by no means certain that the plot would have so far matured had it not been accelerated by government spies. The leading conspirator was Thistlewood. After his acquittal along with Watson, in 1817, he had sent a challenge to Lord Sidmouth, for which he was imprisoned a year. Released during the excitement over the Peterloo Massacre, he fell in, according to his own story, with Edwards, the government spy, and became a willing instrument in the latter's hands. At all events, Edwards actively participated in the plot, and then exposed the result of his efforts to the government. Thistlewood was convicted and executed (33 St. Tr. 681).

Meanwhile, the government prosecutions in Scotland and Ireland had, as usual, surpassed those at home. In Scotland, M'Laren, a weaver, and Baird, a grocer, were tried in Edinburgh, in 1817, for sedition. The weaver had made an intemperate speech in advocacy of parliamentary reform, which the grocer had been concerned in printing. Although it was shown that petitions ex-

pressed in language at least strong had been received by Parliament, the defendants were convicted (33 St. Tr. 1). The same fate almost befell Neil Douglas, a Universalist preacher, who sought to enliven his pulpit deliverances with political exhortations. Spies who had been sent to observe him reported that he had drawn a seditious parallel between the afflicted king and Nebuchadnezzar, King of Babylon, and between the prince regent and King Belshazzar. It was made plain by the evidence that the crown witnesses had failed to comprehend the strong dialect and fervid delivery of the eccentric preacher, and he was acquitted (33 St. Tr. 101). Three years later Hardie and others were convicted of treason by a violent stretch of the law of treason (1 St. Tr., N. S. 609). In all these cases the defense was ably conducted by Francis Jeffrey.

The notorious "Bottle Conspiracy" of 1822 illustrated the condition of affairs in Ireland (1 St. Tr. N. S.). The expectations which had been aroused by the appointment in 1821 of Wellesley and Plunkett—both advocates of Catholic emancipation—were not realized. Irritation between Catholics and Protestants broke out anew, which, amid the prevailing distress and starvation, soon led to turbulence. It was while this feeling pre-



LORD WELLESLEY.

vailed that Lord Wellesley announced that he would prohibit by military force the usual decoration on November fourth by the Orange Societies of William's statue in Dublin. This action naturally aroused the anger of the Orangemen. When, therefore, shortly afterwards, Lord Wellesley attended the theatre in state, the Orange fanatics were on hand in force to hoot his lordship. During the disturbance thereby created a bottle was thrown on the stage, and part of a child's rattle, pitched from the gallery, struck near the vice-regal box. The rioters were turned out, and Forbes and other ringleaders were arrested. That the hooting was preconcerted was plain, and if Forbes and his companions had been punished as common rioters the affair would have ended at once. But Wellesley and Plunkett persuaded themselves of the advisability of filing a criminal information against Forbes and ten other members of the Orange lodges who had taken a prominent part in the disturbance, not only for riot and for intent to injure the lord-lieutenant, but for a preconcerted criminal conspiracy to effect such purposes—and this, too, after the grand jury had refused to find an indictment. The trial of the information was a ridiculous fizzle, utterly unworthy of the ability displayed in the prosecution. The testimony of a customs clerk and of another witness who was an applicant for government patronage, on which the prosecution relied to prove the intent to inflict personal injury, utterly failed, and the remainder of the evidence was equally trivial and improbable. The jury disagreed and the prosecution was finally dropped.

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

IV.

The Construction, Sale and Exportation by Neutral States and Individuals of War Ships, Submarine Boats, and Other Vessels Adapted to Warlike Use and Intended for Belligerent Service.

By Amos S. Hershey,
Associate Professor of European History and Politics, Indiana University.

In a previous paper[1] reference was made to the fact that "the only serious charges of a violation of neutral duties on the part of a great European Power lie against Germany, *viz.*, the failure of the German Government to prevent the sale to Russia of several transatlantic steamers belonging to its auxiliary navy, and the exportation of a number of torpedo boats to Russian territory." "These transactions," it was said, "raise some very difficult and delicate questions which are inseparably connected with a great historical controversy." These we shall now proceed to consider.

[1]See The Green Bag for July, 1904.

The charge has been freely circulated in the newspapers, and has even been made on the floor of the German Reichstag[2] that the Russian Government has purchased several vessels (notably the Füst Bismarch of the Hamburg-American Line), belonging to a great German transatlantic line, whose vessels are auxiliary cruisers of the German navy. In reply to the strictures of Herr

[2]By Herr Bebel, the famous leader of the Socialists. See N. Y. *Times* for Apr. 15, 1904. For other reported sales see, *e.g.*, London *Times* (weekly ed.) for Apr. 15th and May 13th, and N. Y. *Times* for May 11th. It was also reported that Japan had bought eight steamers belonging to the North German Lloyd Co., but this report has been officially denied by the Japanese Government.

Bebel, who maintained that "such sales accomplish indirectly the reinforcement of the Russian navy," Chancellor von Bülow is reported to have defended them on the ground that, "according to the principles of International Law hitherto prevailing, the sale of the vessels of a private firm to a foreign State was admissable." "At any rate," he declared, "the question was a doubtful one." He admitted that "the principle of neutrality forbids a neutral State from giving direct or indirect support to either belligerent through furnishing ships for war transportation purposes." However, "in the case of the Russian transports, it was not to a State, but to private firms that the vessels were sold. There could not be any question of taking sides against Japan, since she also had full liberty to buy vessels from Germany."[1]

It has also been charged on the floor of the German Reichstag,[2] as well as in the newspapers, that the German Government has permitted the exportation of a number of torpedo boats and destroyers for the use of the Russian navy. It is charged that, for the purpose of disguising these transactions, "the several parts of the vessels are being exported as half-finished manufactures and put together in Libau, Russia," whither, it is reported, a large number of German workmen have been sent. It is also asserted that these submarine boats were originally built for the German Government which refused to take them because the terms of the contract (*i. e.*, the stipulations as to time limit), under which they were built had not been strictly observed.

It appears, however, that Germany is not the only country in which Russian agents have been busy in making and soliciting contracts for the purchase or construction of vessels for the Russian navy or for the use of Russia in the present war, but that Russian agents have also been busy in other countries, and that the Japanese have also been active in a similar direction. Germany appears, however, to be the only State in which such acts have been defended, if not encouraged, by the official or responsible head of the Government.

It is reported that Russia has ordered five armored cruisers to be built at Trieste,[3] where Japan was said to be busy negiotiating for the purchase of a number of vessels at an earlier period[4] of the war. Russia is also said to have purchased a number of fast cargo vessels in England. These, it is supposed, are to be altered so as to enable them to be used as transports.[5] It is also stated that several new battleships had been ordered by Japan in England prior to the beginning of the war, and that these are now being built.[6] The Russian and Japanese Governments are said to be competing sharply for the purchase of transports in Holland and Belgium,[7] and we have heard repeated rumors to the effect that agents of both the Russian and Japanese Governments have been negotiating for the purchase of cruisers of several South American States, more particularly with the Government of the Argentine Republic.[8] It has also been vaguely rumored that Turkey has been purchasing ships on Russia's account.[9]

Nor is this all. It has even been asserted that Japanese (and possibly also Russian) agents have been at work in the United States. It is reported that a contract has been awarded the Newport News Shipbuilding Company of Newport News, Va., for the

[1] For reports of these somewhat puzzling utterances, see N. Y. *Times* and Chicago *Tribune* for Apr. 15, 1904.

[2] By Herr Bernstein, the anti-Bebel Socialistic leader. See, *e.g.*, N. Y. *Times* for May 5th, and editorials in N. Y. *Tribune* for May 14th and Hartford *Courant* for May 5th.

[3] Chicago *Tribune* for June 1, 1904. This report has since been contradicted by the Vienna correspondent of the London *Times*.

[4] *Ibid.* for Apr. 14, 1904.

[5] N. Y. *Times* for May 28, 1904.

[6] Chicago *Record-Herald* for Apr. 10, 1904.

[7] N. Y. *Times* for May 25, 1904.

[8] See especially H. W. Wilson in London and N. Y. *Times* for May 26, 1904. It has recently (June 20th) been reported that the negotiations with Argentina have failed.

[9] N. Y. *Times* for June 13, 1904.

construction of four Lake submarine boats destined for service in the Japanese Navy in the present war.[1] A stockholder of the Lake Submarine Torpedo Boat Company of Bridgeport, Conn., is reported to have stated, in April, that negotiations had been practically completed for the sale of the submarine topedo boat *Protector* to representatives of the Japanese Government, the Japanese agent having outbid the agent of the Russian Government.[2] This torpedo boat is since supposed to have been shipped as cargo on board the Norwegian steamer *Fortuna*, bound nominally for Cork, but really for Japan;[3] and a Russian newspaper (the *Novoe Vremya*) has expressed the hope that the United States Government will make a detailed explanation of why the boat was allowed to leave the territory of the United States.[4]

These reports may be more or less wanting in accuracy and authenticity, but, assuming that they are substantially correct, they may serve to give a foreground of life to our discussion as to whether the construction, sale, and exportation on the part of neutral States and individuals, of warships, torpedo boats, and other vessels adapted to warlike use and intended for belligerent service constitute a violation of neutral obligations, and to what extent or under what circumstances a neutral State can be held responsible for such violation.

It, of course, goes without saying, that the direct sale of a war vessel by a neutral State to either belligerent would be a gross breach of neutrality, for which ample redress or reparation by the injured State ought at once to be demanded, and, if necessary, exacted.

[1] N. Y. *Times* for May 11. 1904.

[2] Chicago *Record-Herald* for Apr. 28, 1904. Another stockholder has recently (June 15th) claimed that the *Protector* was sold to Russia.

[3] N. Y. *Sun* for June 10 and 14, 1904. The *Protector* appears finally to have turned up in Kronstadt, Russia. See N. Y. *Times* for July 8, 1904. Several other lake sub-marine boats are since reported to have left the United States for Russia.

[4] Chicago *Tribune* for June 12, 1904.

Since the settlement of the famous "Alabama Case" by the Treaty of Washington in 1871, and the Geneva Award of 1872, there can scarcely be any more room for doubt but that the fitting out and departure from, as well as the arming and equipping[5] in, a neutral port of a vessel intended for the use of either belligerent is a serious violation of neutrality, if knowingly permitted by a neutral government. The First Rule of the Treaty of Washington declares that "a neutral State is bound to use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace, and also like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use."[6]

Although the principles incorporated into this rule have not won the unreserved approval of all English publicists,[7] and have

[5] The arming and equipping of such a vessel, as also the augmentation of the force of a war vessel in a neutral port, had been prohibited by International Law, as well as the British and American Neutrality Acts, many years before.

[6] For the Three Rules of the Treaty of Washington, see, *e.g.*, Wharton's Dig. III., p. 630.

[7] *e.g.*, Hall (§225 and notes) and Lawrence (§§262 and 263). Hall, although he insists that this is not the law, was of the opinion that such a usage is in course of growth. He seems moreover to have looked upon such a rule or usage as healthy and desirable, if not based upon the doctrine of intent in place of which he suggests the alternative principle of the character of the vessel. Lawrence thinks "the question is still far from settlement." He says that "the old principles have been thoroughly discredited and the maritime Powers have come to no agreement upon new ones." That the First Rule of the Treaty of Washington is probably a rule of International Law is admitted by Walker (Manual, §65) "provided a fair interpretation be accorded to the phrase 'due diligence.'" "The general consensus of opinions of publicists, with some dissent in England, is that they (the Three Rules of the Treaty of Washington) are a correct statement of existing International Law." Foster, *American Diplomacy*, p. 429.

not been formally accepted by the Powers,[1] they may now be regarded as forming an integral and important part of the correct practice of International Law. They have, generally speaking, found favor in the eyes of continental jurists,[2] and they were adopted, although in somewhat altered language, by the Institute of International Law in 1875.[3] They have long since been incorporated in the Neutrality and Foreign Enlistment Acts of the United States and Great Britain,[4] and the British Foreign Enlistment Act of 1870, which has been pronounced by a leading authority to be "perhaps the best and fairest expression of the modern rule anywhere to be found in public law,"[5] goes at least one step farther than our own Neutrality Act and the Treaty of Washington. It prohibits not only the commissioning, equipping, and dispatching, but also the building or construction, of "any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State."[6]

True it is that there is a long line of American jurists and statesmen who have held, in the language of Judge Story,[7] that "there is

[1] The United States and Great Britain agreed, according to the terms of the Treaty of Washington, to abide by these rules in their future relations with each other, and to invite other maritime Powers to accede to them, but this has never been done. The failure to invite or secure the adhesion of the maritime Powers does not, however, destroy their validity or impair the value and importance of the decision of the Geneva Board of Arbitration as a precedent. Additions to International Law are usually the result of a natural growth rather than of formal legislation, and if all such additions had to wait for the formal sanction of the Powers, there would be, comparatively speaking, little growth or progress. If the decisions of national prize courts constitute an important source of International Law, how much greater should be the value of the decisions of International Courts of Arbitration as precedents.

Although the value and importance of the decision of the Geneva Board of Arbitration as a precedent can scarcely be called into question, there is still some difference of opinion in regard to the correct meaning of the phrase "due diligence"; there are serious objections to the American doctrine of intent; and all of the decisions of the Geneva arbitrators (or rather the reasoning on which some of these decisions was based) have not been fully accepted on all sides.

[2] See, *e.g.*, Calvo in *Revue de Droit International*, VI., pp. 453 ff; Bluntschli in the same review, II., pp. 452 ff; Calvo, *Le Droit Int.* IV., §2,623; Blunttoine's trans.) III., §1,555; Rivier, II., §68, pp. 405 ff.

[3] *Tableau Generale de l'Institut*, pp. 161-63. Cf. *Annuaire* for 1877. p. 139.

[4] The United States Neutrality Acts of 1794 and 1818 and the British Foreign Enlistment Acts of 1819 and 1870. The British Act of 1819. like the United States Act of 1794 and 1818, prohibited the fitting out, as well as the arming, of any vessel with intent, *etc.*; but the administrative and preventative powers (*viz.*, those requiring bond and authorizing detention for probable cause) of the tenth and eleventh sections of the United States Act of 1818 were omitted in the British Act of 1819. The evidence required in order to convict under the British Act of 1819 had to be sufficient to satisfy a jury of the probable violation of the provisions of the statute, and such evidence was, of course, extremely difficult to obtain. The defects in the British Act of 1819, were probably due to lack of effective procedure or a want of proper administrative machinery rather than to any lack of good intention on the part of the legislature. To those administrative defects there was added a certain inertness or indifference in the execution of the law, if not of positive sympathy with the Southern Confederacy, on the part of the governing classes of England which lamed the energies of the British Government and caused its failure to strictly observe its obligations of neutrality during our Civil War.

[5] Snow's Cases, p. 438, Cf. Scott's edition, p. 720.

[6] §8 of the British Foreign Enlistment Act of 1870. See 33 and 34 Vict. 90. For a convenient abridgment of the British and American Neutrality Acts, see Scott's edition of Snow's Cases, pp. 692-95.

[7] In the *Santissima Trinidad*, U. S. Supreme Court, 1827, 7 Wheat. 283. For a digest of leading American cases involving a breach of our neutrality laws, see Dana's Wheaton, note 215, pp. 543-557. For opinions of American statesmen and judges, see Wharton's Dig. III., §§393 and 396. See especially the opinions of Sec. Clay and those of Judges Betts and Nelson in the case of the *Meteor*. Sec. Clay was of the opinion that "if the neutral show no partiality; if he is as ready to sell to one belligerent as the other; and if he take, himself, no part in the war, he cannot be justly accused of any violation of his neutral obligations." But then Mr. Clay does not seem to have been absolutely sure that it was a violation of neutrality for the head of a State to sell, to a belligerent, ships of war completely equipped and armed for battle. Mr. Clay, Sec'y of State to Mr. Tacon, Wharton's Dig. III., p. 521.

nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." The American view that vessels built or sent out with the *animus vivendi* are mere contraband of war, but that any vessels fitted out or dispatched with the *animus belligerandi* constitute in effect a proximate hostile expedition which it is the duty of the neutral government to prevent, if possible, by the use of a reasonable diligence is one which was long insisted upon, especially by American statesmen, judges, and publicists, and which still holds a place in some important works on International Law.[1] But this view can scarcely be maintained any longer in the face of the First Rule of the Treaty of Washington, and of the increasingly sensitive and ever-growing sense of neutral obligations on the part of modern nations. As one of our best American authorities, the late lamented Dr. Freeman Snow, has well said: "In considering this question, it should be remembered that, by the introduction of steam as the motive power of ships, and of iron and steel as the material of their construction, the conditions of maritime warfare have been very radically changed. What might have been a reasonable rule as applied in the time of sailing ships, might now, in the age of swift ironclads, be intolerably oppressive. In the cases of the *Santissima Trindad*, U. S. *v. Quincy*, and the *Meteor*, the courts were dealing with small sailing vessels, which had been converted into privateers, the possession of which by one or the other belligerent made very little difference in the general result of the struggle: whereas, the possession of an ironclad ship might well turn the scale one way or the other, as indeed it did in the war between Chili and Peru, in 1880-1881. This great power of inflicting injury upon one of the belligerents, it is fair to say, ought not to be permitted to neutral citizens, and the neutral nation is alone in a position to restrain them.

"In view of these facts, it is believed that the doctrine set up by the United States Neutrality Act and by the Federal Courts, that the 'intent' of the owner or shipbuilder is the criterion by which his guilt or innocence is to be judged, is wholly inadequate: it would not for a moment stand the test of the rule of 'due diligence,' as applied by the Geneva tribunal."[2]

[1] The best and most authoratative statement of this view is by Dana. See Dana's Wheaton, note 215, p. 563. A recent defence of this view may be found in Taylor, *International Law*, V., c. 2.

[2] Snow's Cases, note on "The Three Rules of the Treaty of Washington" on pp. 437-38. This note has been reproduced, with the addition of a few references, in the recent enlargment and revision of Dr. Snow's work, entitled "Scott's Cases," p. 720. The value to the student of this otherwise excellent work is greatly impaired by the fact that it is impossible to distinguish in respect to the notes between the contributions of Dr. Snow and those of Dr. Scott except by a comparison of the two texts. We trust that this fault may be corrected in a subsequent edition.

The American doctrine of intent has also been justly and severely criticised by a number of English writers. Walker (*The Science, etc.*, p. 500) points out that it "leaves open to fraud a wide and open door. Who may know the intent of a crafty and secret mind? A thousand tricks and devices may be employed to disarm suspicion. An unarmed vessel may be dispatched from a neutral port, arms and men from another, and the intent with which these elements were prepared and gathered together may only become apparent on their combination at some spot far beyond the bounds of the neutral jurisdiction." Lawrence (p. 548) says, "nothing is more difficult to prove than intentions. They have frequently to be inferred from actions of an ambiguous character. Moreover, the two intents—that of selling and that of making war—may co-exist in the same mind." Bernard (*Neutrality*, p. 389) declares. "In international wrongs . . . the intent is not the thing chiefly or mainly regarded; and in international wrongs of this particular class the only intent and the only inadvertance which are really material are, *first*, that hostility in the persons who constitute or direct the expedition which makes it noxious instead of harmless; and *secondly*, that connivance or negligence on the part of the neutral Government which makes the nation

In view of the unsatisfactory and inadequate character of the older body of doctrine, would it not be well to take a step or two even beyond the First Rule of the Treaty of Washington and broadly assert that a neutral State is bound to use due diligence (*i.e.*, a kind and degree of diligence reasonably sufficient under the circumstances),[1] to prevent not only the fitting out, arming or equipping, and departure of anv vessel intended for the use of either belligerent, but also the construction, sale and exportation

responsible for the noxious enterprise." Dana (cited above), the leading champion of the doctrine of intent, admits that "the act is open to great suspicions and abuse, and the line may often be scarcely traceable." Hall (p. 619, note) remarks upon this passage, "It is eminently inadvisable in matter which may lead to international controversy to adopt as the test of the character of an action anything so indeterminable as to be 'often scarcely traceable.' No intent other than that which is inferred from acts of a broadly marked character can be safely so used." Cf. Lawrence, p. 548.

The complexity which surrounds this doctrine of intent and the fine distinctions to which it may lead in practice may be seen by consulting the case of the U. S. *v.* Quincy (Supreme Court of the U. S., 1832, 6 Peters, 445). In that case a distinction was made between a fixed and present intent on the one hand and a conditional or contingent intent on the other. It was held that if the intent was to send the vessel in question to the West Indies in search of funds with which to complete her armament, with no present or fixed intention of preying upon the commerce of a friendly State, but with a mere conditional or contingent intent or wish to fit her out after her arrival there, it was not an illegal transaction. On the other hand the older English doctrine to the effect that a ship adapted for war is a mere article of contraband unless she left the neutral port in a condition capable of committing hostilities the moment she entered upon her voyage was wholly unsatisfactory and absurdly inadequate. This view presupposed innocence on the part of the owner or shipbuilder unless she was at least partly armed and equipped in the neutral port. This was in substance the doctrine laid down in 1863 in the case of the *Alexandra* (Att. Gen. *v.* Sillem, Hurlstone and Coltman, 2 Excheq. Rep. 11, 431) by Chief Baron Pollock and Baron Bramwell. On the *Alexandria*, see specially Bernard, *Neutrality*, pp. 353-54 and note, and Walker, *The Science*, p. 499.

[1]There has been considerable controversy as to the true meaning of the phrase "due diligence." The American contention at Geneva was that it meant diligence "commensurate with the emergency or with the magnitude of the results of negligence." The British case set forth that "due diligence on the part of the sovereign Government signifies that measure of care which the Government is under an obligation to use for a given purpose. This measure, when it has not been defined by international usage or agreement, is to be deducted from the nature of the obligation itself, and from the considerations of justice, equity, and general expediency on which the law of nations is founded." Anything more vague and unsatisfactory that this definition can scarcely be imagined. The Geneva arbitrators adopted in substance the American definition, although couched in somewhat different language. They held that due diligence should be "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part."

This definition has been criticised (*e. g.*, by Lawrence, pp. 538-39) on the ground that it accepts the principle of a "changing standard" of neutral obligations, and "imposes different degrees of responsibility upon different neutrals in the same war, and thus destroys that impartiality which is the essence of neutral duty." But it is doubtful whether any definition which has been or which might be framed would be wholly free from difficulty or to which serious objection might not be made. Lawrence suggests (p. 540) that "the kind and amount of diligence which a strong and careful Government would use to put down smuggling ought to be used by neutral States to fulfil the obligations of their neutrality." This suggestion would certainly seem to furnish a good practical working rule or standard of neutral obligations, but it may be doubted whether even this would give us the precise and absolute standard which Lawrence seems to be in search of. Certainly some account should also be taken of the "emergency" and of the "risks" or "magnitude of the results of negligence." For example, the same degree or amount of diligence would scarcely be required in the case of a small submarine boat as in the case of a large war ship or of a number of these. For a severe criticism of the definition of "due diligence" adopted by a majority of the arbitrators, see an article by Rolin Jæquemyns in the *Revue de Droit Int.* VI., pp. 567 ff.. For citations from the opinions of the Geneva arbitrators, see Wharton's Dig. III. 402a and Moore's *History of Arbitration*, IV., c. 68. For a full and complete history of the "Alabama Case" and the Geneva Award, U. S. Diplomatic Correspondence for the years 1863-1871; Papers relating to the Treaty of Washington; Case of Great Britain with Appendix; Claims of the U. S.; Case of the U. S. For a good abridgement of the proceedings of the Geneva Board, see Moore on Arbitration, I., c. 14. For a good short history of the "Alabama Case," see Walker, *Science of International Law*, pp. 458-502. For an excellent summary of the controversy from the British point of view, see Bernard's *Historical Account of the Neutrality of Great Britain during the American Civil War*. For a summary of the controversy from the American point of view, see Cushing's *Treaty of Washington*.

of any war ship whatsoever for or to anv other than a *bona fide* neutral purchaser? Nay, would it not be well to go still farther and insist that a neutral State is bound to use due diligence to prevent the construction for, or sale to, a belligerent purchaser, or the exportation to a belligerent destination,[1] of any vessel which is adapted or readily convertible to warlike use? It will be said that this is an invasion of the commercial rights of neutral individuals who depend upon shipbuilding for a livelihood or for profit, and that it imposes onerous and difficult burdens upon neutral States. Besides, "if a distinction is to be made between vessels serviceable for warlike use and other vessels, where, it may be asked, are we to fix the line?[2] It is very doubtful whether our shipbuilding interests[3] would greatly suffeer by an adoption of these principles; but, even supposing that this were the case, have communities or nations ever hesitated to sacrifice the vested rights or commercial interests of certain individuals, or even classes, to the general welfare of society as a whole? If they have not hesitated to exact these sacrifices in the interest of particular communities or nations, how much less hesitation should there be when the welfare of humanity at large or the collective interests of civilization are at stake! But, it may be asked, should we not go still one step farther, and, as has frequently been suggested, prohibit all trade in arms and ammunition or implements of warfare between belligerents and neutrals? To this piece of apparently unanswerable logic we may reply that to compel neutral States to assume such responsibilities would indeed involve the imposition of such burdens that they might in some cases prefer the status of belligerency to that of neutrality. In framing rules of International Law we must be careful never to exceed the limits of the practical, and we must avoid the mistake into which our Legislatures so often fall of framing rules which are to difficult or which are impossible to enforce.

Would the prohibition of the construction for, or sale to, a belligerent purchaser, or the exportation to a belligerent destination of all vessels adapted or readily convertible to warlike use be impossible of execution or too difficult to enforce? Some at least of our modern States have already burdened themselves with considerable responsibility in this direction. According to our own Neutrality Law, such a vessel might indeed be built and sold as an article of commerce, but it could not be suffered to depart from any of our ports if intended for the use of either belligerent. In England, since the enactment of the British Foreign Enlistment Act of 1870, such a vessel could not even be built or contracted for. According to the older statutes, the *Alabama* might have been built and sold as an article of commerce, if she had not been directly intended for the service of the Confederacy. But, as an able writer has well said: "It is clear that proof of an intention hostile in fact, or constructively hostile, in the builder of a ship or his workmen, or in

[1] In case the destination were nominally neutral, but really belligerent, the doctrine of "continuous voyage" might be made to apply.

[2] Bernard, *op. cit.*, p. 395.

[3] As stated in the text, it is very doubtful whether these interests would suffer to any considerable extent. Even under the interpretation given to our present law, it is rather difficult to imagine a case where such a vessel might be so disposed of (if sold to a belligerent purchaser or dispatched to a belligerent destination) as to free the neutral trader or builder from all taint of suspicion of being engaged in an illegal venture or an unlawful transaction (see, *e.g.*, the cases of the *Meteor* and the U. S. *v.* Quincy, cited above). In practice it is very difficult to distinguish between a belligerent and a commercial intent. It only opens the door to fraud. There is no attempt at such a distinction in the case of contraband of war where the character of the articles or the belligerent destination furnishes the essential justification of capture. The main difference between the two cases would be that in the case of contraband the right of capture belongs to the belligerent; in that of vessels adapted to warlike use and intended for a belligerent destination, the duty of prevention would rest on the neutral, as it indeed already does to a very considerable extent.

the maker or purveyor of guns or ammunition, has really little or nothing to do with the question whether the belligerent nation has sustained injury from the neutral. To the United States it was of no consequence at all what were the intentions of Laird or Miller, or their riggers or ship carpenters, or whether these persons, or any of them, were animated by partiality to the Confederates, or were merely working, in the exercise of their respective trades, for what they could get. What was of consequence to the United States was the intention with which the vessels were dispatched from England by those who had at that time the real control of them. . . . Nor did it matter to the United States whether the vessels were purchased ready-made or were built to order. . . . In a word, as between nations, the intent which impresses on an armed ship dispatched from a neutral port the character of a hostile expedition is the intent which governs the dispatch of the ship, not the intent which presided over its preparation."*

In respect to the difficulty of distinguishing between vessels serviceable for warlike use and other vessels, it must be admitted that this is a real and serious difficulty; but it is one which might, we think, be overcome by the exercise of proper care and exertion on the part of the neutral government. [2]

[1] Bernard, *op. cit.*, pp. 196-97. This argument was used by Bernard against the American claims, but it merely proves the inconsistency or inadequacy of the American doctrine of intent. This doctrine is now mainly open to criticism because it does not go far enough. It is too narrow and restricted in its scope. By prohibiting the commercial as well as the belligerent intent, much of the difficulty and doubt to which it has given rise vanishes.

[2] This is a question for experts. Hall (p. 620) says: "Experts are perfectly able to distinguish vessels built primarily for warlike use: there would therefore be little practical difficulty in preventing their exit from neutral ports, and there is no reason for relieving a neutral Government from a duty which it can easily perform. But it is otherwise with many vessels primarily fitted for commerce." Hall calls especial attention to the fact that "mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient calibre to render the ships carrying them dangerous cruisers against merchantmen." He remarks that these vessels "melt insensibly into other types," and he thinks that "it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralysing the whole ship-building and ship-selling trade of the neutral country." Part of this argument has been dealt with above. Hall certainly exaggerates the injury to ship-builders. We would not presume to say to what extent experts can distinguish between the different classes of vessels. In order to secure a proper enforcement of the law, guarantees or bonds might be exacted from ship-builders and ship-traders, such, *e.g.*, as are required by the terms of our own Neutrality Act. The burden of proof should be thrown upon the ship-builder as is done by the British Act of 1870. He is liable if he has "reasonable cause to believe, etc." See above.

There can be little question (provided the facts have been stated correctly) but that the German Government has been guilty of a violation of neutrality, especially in the matter of the torpedo boats. The fact that these were not fully completed in neutral territory, but were exporter in ports to Russia, ought not to free the German Government from responsibility (provided it had knowledge) any more than the fact that the *Alabama* received her armament in Portuguese waters absolved the English Government during our Civil War. Besides, both the First and the Second Rules of the Treaty of Washington seem expressly to cover this case. The fact is, that any kind of a modern war vessel is a weapon with such tremendous possibilities of destruction that it approximates to a hostile expedition, and that the exportation of such vessels, in whole or in part, for the use of a belligerent from a neutral port amounts in effect to the use of neutral territory as a base of military operations, or the origination of a proximate act of war on neutral soil—acts which are clearly forbidden by International Law.[3]

In respect to the sale of the German transatlantic steamers, there is, perhaps, more

[3] "No proximate acts of war are in any manner to originate on neutral ground." Sir W. Scott in the "*Twee Gebroeders*," 3 C. Rob. 164.

room for doubt. The sale of merchant vessels by neutral individuals to belligerents has generally been upheld in spite of their adaptability to warlike purposes,[1] although the original arming and equipping, as well as the augmentation of the force of such vessels after having been armed and equipped in a neutral port, has generally been deemed unlawful. The fact, however, that these vessels are alleged to have been auxiliary cruisers of the German Navy would seem to put a different face on the matter. In view of the close and intimate relations which must subsist between these companies and the German Government, the sale and exportation of such vessels would seem to be impossible without the consent or connivance of the German Government; and it can hardly be contended that such consent or connivance could be given without a serious breach of neutral obligation.

In any case, the reported contention of Chancellor von Bülow to the effect that the sale of the vessels of a private firm to a foreign State or to a private firm is admissible cannot be maintained if it is meant that the neutral government is free from responsibility in all such cases. It has been suggested that Germany would not be guilty of any breach of neutrality if she simply played the part of an "honest broker,"[2] and sold ships of all kinds impartially to both belligerents: but this notion is based upon a wholly erroneous conception of the real nature and scope of neutrality. "Neutrality does not consist in the mere impartial treatment of opposing belligerents, but in the entire abstinence from any assistance of either party in his warfare," and "a neutral government is bound not only to abstain from affording any direct attention to the combatant force of either belligerent, but to exercise a reasonable diligence in compelling the like conduct on the part of all persons within its jurisdiction."[3] Total abstinence—not mere impartiality—is in these matters the real extent of neutral obligation.

In the case of the submarine boat *Protector*, which was shipped as cargo on board the Norwegian steamer *Fortuna*, and which cleared from New York early in June, the Government of the United States could in no wise be held responsible whatever her destination, although the owners or builders might, under certain circumstances, be indicted under our neutrality laws. As Mr. Cass, Secretary of State, said in 1860: "A government is responsible only for the faithful discharge of its international duties, but not for the consequences of illegal enterprises, of which it had no knowledge, or which the want of proof or other circumstances rendered it unable to prevent."[4] "The case of the submarine is distinctly one in which our Government neither actually had knowledge nor was 'charged' with it. . . . To make sure that no submarines were building in the United States, we should have to maintain a constant inspection of every shipyard and boatyard in the country, which is, of course, out of the question."[5] It is one of the duties the diplomatic representatives of the belligerent States in neutral countries to call the attention of such and similar violations of neutrality on the part of neutral individuals to neutral Governments. "If the attention of our Government were called, however, by the Russian or the Japanese representative at Washington to the fact that a submarine was building, supposed to be intended for use against his country, our effective responsibility would then begin. That

[1] See, *e.g.*, the opinion of Sec. Clay to Mr. Rivas Salmon in 1827, Wharton's Dig. III., p. 520. This is not, however, in accordance with the newer, and, as we believe, the sounder rules.

[2] See editorial in N. Y. *Tribune* for May 14, 1904, and the opinion of Chancellor von Bülow, cited above. This seems also to have been the opinion of Sec. Clay. See Wharton's Dig. III., p. 520.

[3] Walker, *The Science, etc.*, pp. 374 and 388.

[4] Mr. Cass, Sec. of State, to Mr. Molina, 1860. See Warton's Dig III. P. 603.

[5] See an excellent editorial on this subject in the N. Y. *Times* for June 13, 1904.

would make the case parallel to that of the *Alabama*. In that case, the Geneva tribunal found from all the facts, that the 'British Government failed to use due diligence in the performance of its neutral obligations, and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States, to take in due time any effective measures of prevention.' When such a case as that is made out in favor of Russia or of Japan (it does not appear for or against which Power the submarine is expected to be used) we may have reason to apprehend another *Alabama* case, at least when some other conditions have been complied with, such as proof that it really was a submarine, and proof that it has really done some damage to one of the belligerents."[1]

[1] From the editorial, cited above. Proof of actual injury, as well as actual knowledge and lack of due diligence, would probably have to be furnished by the injured belligerent in order to justify a claim for damages, although the duties of a neutral Government would begin long before that point had been reached; but evidence of hostile intention would under certain circumstances, justify a prosecution under our neutrality laws.

PARIS LETTER.

JULY, 1904.

THE far-reaching results of the well-planned and admirably carried out policy of the Government towards disestablishing the Church from the State are becoming more and more apparent. By many, this policy is considered as a deliberate war between the Continental Free Masons and their well-known antagonist, the Catholic Church. It would be incorrect to consider the matter from this point of view exclusively. The Masonic Body in France has, no doubt, been energetic in uniting a great mass of politicians, but their efforts would have been nugatory without the moral and active support of the great mass of Frenchmen. The taxing of Church property, abolishing State subsidy to the Church and making the public school system the basis of national education cannot but appeal to the practical, thrifty French taxpayer. Compulsory schooling has done for France what nothing else could do. The silent, or almost silent, revolution which has been going on in France, is one of the most gratifying signs of the times, and is due to education alone. Such extraordinary steps have been taken by France in a forward direction without bloodshed, and, after all, without much clamor, that great hopes may be entertained for the future of this country. The advancement of free State education in France has its lessons for Americans, while bearing flattering proof of the splendid example set by the United States in this respect.

Nor are signs wanting of a very serious awakening of a spirit of progress towards realizing more perfectly and more practically the fruits of the Revolution of 1789. I had occasion to refer to this matter, not long ago, in the *Yale Law Journal*, and recent events support my contentions and hopes as set forth in that article.

M. Jules Roche has come forward with a bill for the revision of the Constitution. He says: "The events of the past few years amply demonstrate how incomplete and insufficient our institutions are to assure and guarantee French citizens their civil rights, and to prove that the Republic is only a name to conjure by. These events also show that a state of things exist which is an absolute negation of the principles of the French Revolution. It is, then, urgently necessary to put an end to this state of things by the

only effectual means within our power—that is to say, the revision of the Constitution."

If M. Jules Roche's resolution for a revision be approved, in principle, by Parliament, the following will be presented to the National Assembly:

1. The *Déclaration des Droits de l' Homme* and of the citizen shall be reproduced and placed at the head of the first article of the Constitutional law of February 25, 1875, dealing with the organization of public powers. The article shall then terminate in the following clause: "The Chambers cannot pass any law which diminishes and arrests the excercise of these rights."

2. In case the new revision is required by the President of the Republic, the new articles of the Constitution cannot be adopted except by a majority composed of two-thirds of the members of each Chamber.

3. A Supreme Court is to be established which shall decide cases brought before it by citizens for violation of their Constitutional rights by the Parliament or the Executive power. The *Cour de Cassation* (its various Chambers united), shall be raised to this Supreme Court.

4. Article 8 of the Constitutional law of February 25, 1875, relative to the organization of the Senate, shall conclude as follows:

"However, no proposition or motion tending to open up a credit or implying an expenditure on the part of the State, the Departments, or Communes, shall be allowed in the Chamber of Deputies or the Senate outside of the demands made by the Government."

The above proposal for a revision of the Constitution, it must be admitted, do not go far, but that the question of agitating for a revision of the Constitution with the professed object of securing the blessings of the Revolution more effectively, has come up at all is a hopeful sign. What seems incomprehensible is the national reluctance to revise the Constitution so as to provide specifically for the protection of citizens by the adoption, for instance, of the *Habeas Corpus* Act. This is the real trouble, the real defect in the French Constitution. But, as matters stand, France does not possess a Constitution properly so-called.

H. Cleveland Coxe,
Officier d' Académie.

LONDON LEGAL LETTER.

July, 1904.

AMERICANS who follow with interest either the system for which the judiciary is appointed in England or the personnel of the bench, must have remarked the regularity of the working of the promotions from the bar whenever vacancies occur. In this respect the English judiciary follows with equal precision military promotions in a well-regulated army. Volumes have been written upon the unhappy experiences of the briefless barrister. His lot is the occasion of many jokes and furnishes the plot of innumerable novels. It is true that he may have to serve without compensation a number of years before he can earn enough to pay his ordinary living expenses, and many young men of brains and ambition fail in the ordeal. Those who survive fill in their time by "deviling," an occupation which brings them no pecuniary compensation, but serves to give them an opportunity to demonstrate their abilities to other barristers and to the chance acquaintances they may thus make among solicitors, who ultimately become their clients. Once they have got into the full tide of junior practice the next step is to

aspire to a seat "within the bar," or in other words, to "take silk" and become a King's counsel. This is a momentous step. Many juniors who have acquired a large clientele and who are apparently justified in thinking that their powers of advocacy will command work as a leader find that they have made a fatal mistake. The qualities that enabled them to settle pleadings with success and to advise safely in the preparation of a case for trial are not always those which ensure success in the conduct of the case at the bar of the court. If, however, the step is successful they may then properly indulge the ambition of ultimately being called to the bench.

The appointing power is vested solely in the Lord Chancellor, who is accountable to no individual and no law in making his judicial selection, but to public opinion alone. Theoretically, he selects the best available man to fill the vacancy occasioned by the death or resignation of a judge. He is himself a political officer and a member of the government of the day, and therefore retires when a political change occurs. He may, if he likes, appoint only his favorites or his partizan friends, and as appointees hold for life an office of great power and dignity, and an emolument of $25,000 a year; the natural instinct of the politician would, in some countries, be likely to influence his choice. But fortunately, in England, such a result very rarely occurs. The present Lord Chancellor has, within the past few days, completed, in two terms, a period of service of fifteen and a half years, and has, therefore, held office for a longer time than any of his illustrious predecessors save only the eminent Lord Eldon. He has had the privilege of appointing to the bench no less than thirty-two High Court judges and an even greater number of County Court judges. With the exception of possibly four of the High Court justices no appointment of his can be traced to political influence or partizan pressure. On the other hand, several of the High Court appointments have been of men, who prior to their elevation to the bench, were extreme partizans of the opposition, while nearly half of the County Court judges were Liberals in politics. It is a tradition of the bar that once a judge is appointed he must know nothing of politics, and so strictly is this observed that it would puzzle the present generation of active juniors to ascertain what, if any, political sympathies the majority of the present bench had prior to their elevation to that dignity. The Lord Chancellor has acted in accord with the sentiment which requires that the best available talent at the bar be promoted to the judiciary. Within a comparatively few weeks a new judge has been appointed to the Chancery bench who was a Liberal, and a new judge to the Common Law bench who was a Conservative, and in neither case was politics considered, but simply the conspicuous fitness of the appointees. A vacancy has occurred during the present week by the resignation of Mr. Justice Wright, who is in a precarious state of health, and it is rumored that Mr. Justice Wills, the senior Common Law judge, who has had nearly twenty years of service, will resign on account of his advancing years. To fill these vacancies it is generally understood that two eminent lawyers, one a King's counsel, and one a junior, will be appointed, one of whom is a Liberal and the other, if he has any politics at all, is a Conservative.

While upon the question of judicial appointments it may be noted with interest that the six Lord Justices of office who sat in the appelate courts, have each served on the *nisi prius* bench, having between them an average of eight years' experience in the lower courts before being promoted to the higher. What the gain to the bar is by the appointment of men of ripe experience as lawyers to the *nisi prius* bench and of tried and tested judges to the appelate courts, can only be properly estimated by those earn-

est, busy and conscientious lawyers in America who have had to patiently teach popularly-elected judges their duties, or who have seen the judiciary acquire the science of judgment at the expense of their clients.

The Government has introduced a bill founded, in some respects, upon the example of legislation in America to restrict the influx of undesirable immigrants into this country. It is claimed that at the present time there are thousands of aliens in England, who, coming from Russia and southeastern Europe, with the hope of ultimately reaching America, have settled here, because, either by reason of lack of health and constitution or money to pass the requirements of the American immigration act, have settled down in the East End of London, where they are adding to the normal state of social congestion. It may seem strange to an American that a measure of this kind should meet with opposition, but thus far the proposed act has encountered such strenuous objection from the opposition that practically no progress whatever has been made in committee with it. The ground of objection is, that as England has always afforded an asylum for oppressed of all lands, it would be unfortunate to close the doors in the face of refugees driven by harsh political conditions in their own country to seek shelter here.

Just now the discussion provoked by the bill has received additional interest from the problem that must be raised by the influx into American ports of what are here known as the "two-pounders"; that is, immigrants who are availing themselves of the two-pound steerage fare across the Atlantic. Happily, the political danger in unrestricted immigration is not as great in England as it is in America, owing to the great care with which the Naturalization Act is enforced. In England, as in America, five years' residence in the country is a pre-requisite to naturalization, but here the application must be made to one of His Majesty's Secretaries of State, and the Home Office, or what answers in a measure to the Department of the Interior, is vested with authority to administer the law. The applicant must support his application by affidavits from two resident householders, that they have known him to be an actual resident of the country for the full term of five years, and from two other persons of position that they deem the applicant to be, in their judgment, a proper person to be admitted to the privilege of citizenship. These affidavits are not mere matters of form, but are scrutinized with care, and if the zealous officials who administer the law are not thoroughly satisfied with the facts disclosed in the affidavits or question the position of the affidavits, an independent inquiry is made by officers of the department. As a result of such inquiries, numerous prosecutions have been instituted, one of which occurred within the past few days, resulting in the conviction and exemplary punishment of all of the parties concerned.

STUFF GOWN.

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, THOS. TILESTON BALDWIN, 53 State Street, Boston, Mass.

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

NOTES.

AN important criminal case was being tried in a western territory and great care had been exercised to get an impartial jury with no preconceived opinions. Every prospective juror had been carefully asked if he had formed any opinion or had any bias in the matter and all on the panel had responded in the negative.

The case had proceeded to trial and the State had made a strong case, when one of the jurors arose and asked to be excused from the further hearing of the case. The court asked his reason and the conscientious juror responded:

"Well, judge, you see I swore, under oath, a while ago, I didn't have any prejudice in this case, and that was so then, but from what I've heard since then I believe I've got such a prejudice I can't render a fair and impartial verdict."

The juror was retained.

IN the early days of Missouri there was a man named Jackson Vilolet who became deranged and tried to kill his wife. He had read in the Bible, he said, that without the shedding of blood there was no remission of sins, and he was seeking to obtain remission. He was brought to the county seat and the question of his sanity submitted to a jury of which Colonel Arnett was the foreman. After hearing the evidence and retiring the jury returned the following verdict which which was written and read by the foreman:

"We, the jury, empanelled and sworn well and truly, to inquire into the consanguinity of Jackson Vilolet, do hereby concur in the affirmative."

One of the jurors hunched the foreman and said: "Colonel, that is not right."

"Why not," said the Colonel.

The answer was, "you are not trying consanguinity now."

Then said the Colonel to another juror: "Squire Easley, is it consanguinity or insanguinity?"

Easley replied: "It is neither, sir."

"Then," said Arnett, "we'll put it *non compis mentis*," and he so wrote it.

AT a certain term of the Brookville Court, Major Bloom, the Nestor of the Bar, frequently interrupted his Honor one day by asking the crier to call one Billy Brown.

"Did he answer?" the Major would query with stately dignity.

"No," the court-crier would respond.

"I don't understand it; he ought to have answered," the Major would observe. "I want to see him on important business—very important business."

In a little while he would again order the crier to call Billy Brown, only to be disappointed by the failure of Billy Brown to answer the summons.

Finally, a titter began to run through the court-room at which the Major would scowl, stamp his foot and with a furious twirl of his eye-glass resume his seat.

The least sign of renewed restlessness on his part provoked the mirth of his associates. "He's about to call Billy Brown again," they would observe.

Late in the evening, when the Major had been silent longer than usual on the subject of Billy Brown, his Honor suddenly looked up from his writing and asked: "Isn't it

about time you were calling Billy Brown again, Major? What do you want with him, anyhow?"

"If your Honor, please," replied the Major striving hard to be both stately and steady, "the miserable scoundrel promised to bring me a quart of whiskey here today, and he hasn't done it. He ought to be indicted for perjury." It is needless to relate that court was forthwith adjourned.

GILES Jackson, the celebrated negro lawyer of Richmond, in defending one of his clients in the Police Court, began to read from the Code. The Police Justice seemed to suspect that Mr. Jackson was reading something which was not there, and interrupted the lawyer, saying, "Mr. Jackson, I never heard of any such law as that." "Well," said the lawyer, "is you 'gwine to hold my client responsible for the ignorance of this court?"—*Virginia Law Register.*

JUDGE.—"You are a freeholder?"

Prospective Juryman.—"Yes, sir."

Judge.—"Married or single?"

P. J.—"Married three years ago last month."

Judge.—"Have you formed or expressed any opinion?"

P. J.—"Not for three years past."—*The New Jersey Law Journal.*

MR. Justice Bingham's latest part is that of champion of the English language against the American invader (remarks the London *Daily Chronicle*). Reproving counsel for using "combine" as a noun, he maintained that the good English word "combination" was preferable to that Americanism. It is quite a new Americanism, too, as the judge did not add. The *Century Dictionary* can trace no public use of it earlier than the trial of a New York alderman for bribery in 1886. Dr. Murray's research, however, has unearthed the premature employment of "combine" as a noun in our own country as early as 1610, when one Folkingham used it in the sense of "combination" or "plot." The use is so familiar now that we can understand the ingenious theory of the American tourist in Switzerland, to whom the Grand Combin was pointed out. He guessed that Mr. Pierpont Morgan must have bought and named that mighty mountain.

AT the banquet of the Illinois Manufacturers' Association recently, Mr. William C. Brown, discussed our great railroad growth. . . . The speaker recalled the vigorous opposition to the building of the first railroad bridge across the Mississippi river at Rock Island, which was completed in April, 1856. A citizen of St. Louis filed a bill in the District Court against the bridge company, declaring that the bridge was a "nuisance and an obstruction to navigation," and praying that it be abated and removed. The court adjudged the bridge a nuisance and ordered it removed before the first day of October, 1860. The decision was finally reversed, however, by the Supreme Court.

In the trial of this issue, Abraham Lincoln was one of the counsel for the bridge company, and in closing his eloquent appeal for his client he ventured the prediction that the time would come in the growth an development of the great West when "the number of passengers crossing the river would equal and perhaps exceed those traveling up and down the river in boats."—*American Industries.*

JUSTICE Barrett, sitting in Trial Term of the Supreme Court the other day, was passing the excuses offered by talesmen who wished to escape jury duty, when the clerk handed up an affidavit on which the name and excuse had been filled in on the printed form with the following result:

"John Smith personally appeared before me and made affidavit that he died on June 16."

"That's curious," remarked the clerk

"Not more curious," remarked the Judge dryly, than that I have to indorse it 'Excused.'"—New York *Times*

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book whether received for review or not.

COMMENTARIES ON THE LAW OF MASTER AND SERVANT. By *C. B. Labatt.* In three volumes. Volumes I. and II. Rochester Lawyers' Co-operative Publishing Company. 1904. (lii+2639 pp.)

Here are two volumes of vast size; and the series is to be completed with a third. So huge a work comes in such a questionable shape that the practitioner opens it with suspicion. The members of the profession have paid large sums for knowledge of the ways of publishers and of authors. Do thick volumes mean large type and heavy paper? Sometimes; but not on this occasion. Do they mean grand larceny from previous text-writers? Such improper respect for the works of predecessors has been shown by some persons; but not by Mr. Labatt. Do they mean long quotations from judicial opinions—a sort of undigested expansion? Such extracts have been made by more than one author, and have been advertised as virtues upon the specious, but false, ground that thus the reader gets the very doctrine of the courts; but in these volumes one finds neither laziness nor dishonesty, and the text is the author's own deduction from the actual decisions, as distinguished from the words of the judges. The text is, indeed, not very long, and the size of the volumes is due chiefly to the elaborate foot-notes. The foot-notes present an apparatus wherewith the reader can test and supplement the text. The foot-notes attempt to cite all the pertinent cases; and they go far beyond mere citation. They frequently contain, by way of quotation, the pith of the opinion; but, quite as frequently, they give the author's own condensation of the facts, pleadings, opinion, and result. The foot-notes are so well done that they may well serve as the brief-maker's best guide to cases actually in point.

The two volumes now ready deal exclusively with the employer's liability to his servant. The first volume has for its special topics the duties of the master and the assumption of risk by the servant; and its chief peculiarity lies in the author's return to the widely discarded belief that contributory negligence and *volenti non fit injuria* are essentially identical in principle. The second volume has for its special topics the fellow-servant rule, the vice-principal doctrine, and employers' liability acts; and its chief peculiarity is an attempt to retain under the head of vice-principalship—though with a careful explanation of all distinctions—the cases which discard any test of relative dignity of servants and which lay stress exclusively upon the fact that the negligence of the so-called vice-principal relates to such personal duties of the master as are incapable of delegation.

The author believes that the doctrine of assumption of risk and the fellow servant rule have caused great injustice; but the plainness of his speech upon these points does not in the least diminish the worth of his book as an accurate presentation of existing law.

A natural fear is that the one volume which is to come cannot cover the remaining ground with the same minuteness. Yet it seems probable that the author does not intend to cover the whole subject of Master and Servant, but intends to omit the parts wherein the law of Master and Servant is merely an application of the doctrines of the more general subject of Agency. At any rate, there is not at present an indication that this series will treat of the duties, whether contractual or tortious, of the master or of the servant to a third person. Indeed, the two volumes now ready are exclusively devoted to the master's duty to the servant, and the third volume seems likely not to go beyond this class of topics, as it is

simply announced as intended to deal with "relation, hiring and discharge, compensation, strikes, *etc.*" It thus seems probable that the entire scope of the series is the rights and duties of master and servant *inter se.*

In a work so vast and devoted to a subject so prolific of differences of opinion, it would be easy to pick flaws; but it is much more just and useful to say simply that here is an honest and accurate piece of work, indispensable within its chosen field.

CORRESPONDENCE.

To the Editor of The Green Bag:

Sir:—A considerable agitation is arising in Suffolk and other counties of the Commonwealth regarding the appointment of young women as official stenographers in the superior court. The practice is expanding and the displacement of experienced men appears to be designed, not because the statute fixed compensation of the young woman is less, but for some reason not apparent to the ordinary observer.

However, the selection of women for work of this nature, has not been made without protest from some of the most prominent attorneys. It is declared that even in actions like suits against common carrier corporations for personal injury, the evidence as to the past and present health of suitors is almost invariably of such character that no woman should be asked or expected to take it down and read it aloud in open court. Often in Boston, Dedham and in Cambridge, lawyers have indicated in private conference with the presiding judges that they apprehend embarrassment in submitting evidence about to be introduced, in the presence of female official stenographers.

Such a case occurred in one of the sessions in Pemberton square not long ago, and on a prearranged request of counsel for both parties, the young woman in attendance was excused and a male stenographer brought in.

The embarrassment of such instances is naturally felt by members of the bar and not less by the presiding justices, it may be assumed. And it is to be said that the close and exacting labor of taking down verbatim case after case unceasingly in court for five days each week—for all cases are recorded in full, no matter how small the issue—involves an expenditure of nervous energy which taxes the vitality of strong manhood, to say nothing of the precarious health of young women.

It is a significant circumstance that in no other large city of the United States are women thus engaged in the higher courts; nor has the subject even been given consideration in England. Law reform, in matters of procedure, in the British Isles is ever a living subject of discussion, but we may be sure that the sight of a woman acting as the official recorder of all sorts of testimony will not be visible in any English court in our day or generation. In Massachusetts formerly, as is well known, capital cases and divorce proceedings came only before the Supreme Court. The Superior Court considers all them now; and slight reflection will persuade any parent, at least, of the impolicy of introducing young women into the atmosphere of such distressing controversies and the vulgarities that sometimes develop in the course of searching cross-examinations. I would not undertake to limit the hope of women for wider fields of effort, and yet it may well be considered whether labor of this sort had not better be left to the sturdier and stronger sex. There is, too, a deepening conviction among lawyers and judges that for rapid work, the taking of technical medical testimony and matter involving machinery and all sorts of trade terms and commercial usage, a man's report is uniformly better than a woman's.

Client and council alike, of course, ought to be given the best practicable service in the trial of causes, with the fewest uncertainties and inaccuracies in the record of the court's proceedings, and if there is any frailty to be dreaded in the work of women, that of her labors in the complexity of law courts is surely not the least.

Boston, July 14, 1904. W. B. W.

CURRENT LEGAL ARTICLES.

IN an article on "Courts of Last Resort" *Law Notes* says:

New Jersey, the sixteenth State in matter of population, according to the census of 1900, has the largest number of judges, in its court of last resort, of any of the States. Its Court of Errors and Appeals consists of the chancellor, chief justice and eight associate judges of the Supreme Court, and seven lay or special judges, seventeen in all. Not all, however, sit in any one case. Next in order is the United States Supreme Court, with one chief justice and eight associate justices. A total of eight judges each comprises the courts of Maine and Maryland. In California, Illinois, Kansas, Kentucky, Massachusetts, Missouri, New York, Oklahoma, Pennsylvania and Vermont the courts are composed of seven judges. In New York, however, the constitution empowers the governor, at the request of a majority of the judges of the Court of Appeals, to designate not more than four justices of the Supreme Court to serve as associate judges of the Court of Appeals. Two additional justices, so designated, are now sitting, but it is expressly declared by the same provision of the constitution that no more than seven judges shall sit in any case. In Delaware, Georgia, Iowa and Ohio there are six judges. In the latter State, there are two divisions of three judges each, but cases are heard by the full court when a unanimous decision is not reached in either division. Alabama, Arkansas, Connecticut, Indiana, Louisiana, Michigan, Minnesota, New Hampshire, New Mexico, North Carolina, Tennessee, Virginia, Washington, West Virginia, and Wisconsin each have five judges. Arizona, Indian Territory, and South Carolina have four judges each. Colorado, District of Columbia, Florida, Idaho, Mississippi, Montana, Nebraska, Nevada, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, and Wyoming have each three judges. In Texas there are two courts of last resort, the Supreme Court and the Court of Criminal Appeals, each of which is made up of three judges.

From these figures it may be seen, first, that the consensus of opinion in the various States is in favor of having an uneven number of judges constitute the court of final appeal. In only nine States does the even number prevail. Again, the figures three and five would seem to indicate the favorite numbers of judges. But it must be noticed that the fifteen States having three judges are, as a whole, inferior in population to the fifteen States having five judges, and that the latter States are also inferior in population to most of the States having a still greater number of judges. Thus the rule would seem to be that the size of the court is proportionate to the number of inhabitants of the jurisdiction.

In the matter of terms of office the judges of the two Federal courts, the United States Supreme Court and the Court of Appeals of the District of Columbia, hold their offices during good behavior, as do also the judges of three New England States—Massachusetts, New Hampshire and Rhode Island. Pennsylvania, however, follows close with a term of twenty-one years, and Maryland and New York have terms of fifteen and fourteen years respectively. The judges in California, Delaware, Virginia, and West Virginia hold office for twelve years; in Michigan, Missouri, and Wisconsin for ten years; in Colorado, Illinois and Mississippi for nine years; in Maine for seven years; in New Jersey, the Chancellor and Supreme Court judges for seven years and the lay judges for six years; in Alabama, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Minnesota, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Texas, Utah and Washington for six years; in Arizona and Oklahoma for four years, and in Vermont for two years.

The term of six years has been adopted by eighteen States, exclusive of New Jersey, and six years may therefore be said to be the most popular and approved length of

time that a judge of the court of last resort should sit.

THE frequency of resignations from high positions in the government service suggests the query whether an official is under any moral obligation, after accepting a public office, to continue therein until the expiration of his term, or at least as long as the appointing power wishes. If an official is of any account at the head of a department, it must certainly be a disadvantage to have a rotation in the office. Attention has recently been called to the numerous changes that have taken place in the cabinet of the present President. Of the eight cabinet officers inherited from his predecessor in office less than four years ago, five have resigned; and a new cabinet position created last winter has already had one change of head.

The proper management of a great department at Washington requires time to learn, and length of service should mean efficiency. A year's time is not too much to master the details. Yet some cabinet officers are hardly warm in their seats before they are out again, their official connection made an asset in securing another position. A man is certainly not to be deprived of the prestige that high public position gives him. But is the public service entitled to no consideration? Of course, if cabinet officials are merely political advisers, it may matter little how often they are changed. The departments can run as well with one as with another. But that is not what the government pays them for. Public opinion should frown upon these selfish resignations from public posts, and particularly when a man is taken from the head of a great department of government to manage a party campaign. It belittles high position and renders public service inefficient.

A change was recently made in the office of Attorney-General of the United States. The accumulated knowledge and experience of the former head of that department is lost to the government. His successor will have to serve his apprenticeship, though it is openly announced that he expects to resign within a year and enter a large law firm Another member of the cabinet is said to be holding on to his office merely as a stop-gap until after election, when the position he holds is to go to a man who has recently resigned a cabinet position to engage actively in politics. This is keeping the letter of the civil service law but doing violence to its spirit. If public office is a public trust, the trustee should not throw aside the duties of his office at the first opportunity of private or party gain.—*The Law Register.*

LORD Curzon is reported to have exhorted the Eton boys about the necessity of making the office of the Indian Viceroy permanent. It is only appropriate that Lord Curzon should reserve such novel ideas for an assembly of schoolboys. Lord Curzon is an accomplished speaker. But the one great drawback of his speeches is that they never convince anybody. Even a schoolboy might have pointed out to him how the Roman pro-consuls often got beyond the control of all constitutional authority. The taste of irresponsible powers made them hanker for empires for themselves. The history of India tells the same tale. Most of the permanent Viceroys under the Moghul Empire become Sovereigns themselves. The English constitution, which is almost the ideal of the whole world, has, therefore, been far-sighted enough to make the governorships of the Colonies and of India terminable every five years. Countries with an organized form of government have no necessity for a permanent ruler. The infusion of fresh blood into their constitution by the party in ascendency in England serves only to keep them from decay and degeneration. But Lord Curzon believes only in his personal rule and little cares for any constitutional form of government. It is, therefore, only natural for him to long for the permanent Viceroyalty of India. This unconstitutional craving on his part ought to be sufficient reason for cancel-

ling his extension of office rather than for prolonging it. Instead of giving the schoolboys his own views, Lord Curzon might have more usefully read to them the last chapter in Mill's *Representative Government.* —*The Calcutta Weekly Notes.*

To the *Columbia Law Review* for June, Professor James B. Scott, of the Columbia Law School, contributes the first of two articles on "International Law in Legal Education."

After pointing out that the law of nations is " a part of the common law of England. and by the Consititution of the United States it is, therefore, a fundamental and integral part of our jurisprudence," and that it was settled by the case of the Paquete Habana *v.* United States (1899) 175 U. S. 677, "that International Law is law; that it is part of our municipal law; that our courts take judicial notice of it as such," Professor Scott maintains that International Law is of value to the practitioner, and that, for him at least, it should be taught as law, in the law school.

Finally Professor Scott asks:

Should International Law be required for the law degree? That may depend in part upon the organization of the school. If a certain course is prescribed, all of which is required, it might well find a place alongside of Constitutional Law in such a course of study. It. would round out the lawyer much in the same way as does Constitutional Law; it would make him a more intelligent citizen, a broader man, and therefore a better practitioner. While, therefore, I hesitate to state categorically that it should be prescribed in a law course, I do not think its inclusion would be improper or objectionable. But if only the first year's work be prescribed, and the work of the second and third years be elective, as is the case in not a few of the larger and older schools, I would have no hesitation in saying that International Law should not be required. . . .

Should International Law be required at the Bar examinations? To this question, much the same answer may be given as to the query should International Law be required in a law course. If it be the purpose of the Bar examination to cover exhaustively the whole field of law, the answer might be in the affirmative, because a knowledge of any branch of the law would be of advantage to the practitioner. It would, therefore, not be improper to examine the applicant for admission in International Law, if such a course should commend itself to the examining board. It would be largely a question of expediency. If the examiners should decide to make the examination cover all branches of the law, and of a very thorough nature, it could not be objectionable; for the State has an undoubted and constitutional right to regulate the terms upon which the door should be opened to applicants. Expediency rather than right would largely enter into their determination, and local conditions might well be controlling. No one has a vested right to follow a public or quasi-public calling or profession. The police power is very broad and far reaching in its extent; but it seems to me that it would be inexpedient to require International Law, and while thoroughness of preparation and the question of usefulness in the citizen-lawyer might well justify an examination, nevertheless the weight of argument seems to me to forbid the requirement. . . .

Expediency, experience and the nature of things would seem to indicate that International Law should well be studied and accepted for the degree of Bachelor of Law in law schools; but that it be not required for admission to the Bar.

JAPAN, says *The Law Times* has two of her most eminent international jurists at the front with the troops in order to advise the generals. One of them, there is good reason to believe, is Dr. Sakaye Takahashi, Professor of International Law in the Imperial University of Tokio, who accompanied the Japanese fleet at the time of the war with China. His work as legal adviser furnished the material for the volume of Cases on International Law during the Chino-Japanese

War, which was introduced to English students by Professors Holland and Westlake. The book formed a companion to the work published in Paris with the title *La Guerre Sino-Japonaise au Point de Vue de Droit International*, by Professor Ariga, who was with the land forces in the same campaign. Professors Ariga and Takahashi took a leading part in the formation of the International Law Association, which was founded in Tokio in March, 1897. It works upon the same lines as older branches of the Institut de Droit International. It will be recognized, therefore, that the study of international law has been undertaken with that thoroughness which has characterized the accession of Japan to a place among the leading nations of the world. In the course of the war several points have arisen which are to be dealt with by The Hague Court of Arbitration. Before that tribunal Japan will be represented by the well-known jurisconsult, Professor Deschamps, who took an important part in the deliberations of the Conference as one of the representatives of Belgium.

We confess (says the *Canada Law Journal* for July) to a good deal of surprise in reading the recent decision in the Supreme Court of the United States to the effect that in the absence of Congressional enactment therefor American citizens in the Philippines have no right to trial by jury in criminal cases. This is contrary to the English doctrine of the transference of the "birthrights of the subject" where new possessions, lacking effective legal institutions, are acquired by conquest; and, with submission, we think it incompatible with the theory of the great expounders of the American constitution touching the rights of citizenship. It is certainly at variance with all Anglo-Saxon traditions. . . .

The majority of the court consisted of Fuller, C.J., and Brewer, Peckham and Holmes, JJ. Mr. Justice Harlan, however, dissented. In the course of his very able dissenting opinion the latter considers that the judgment of the Supreme Court simply amounts to "an amendment of the Constitution by judicial action." . . .

Judge Harlan's views commend themselves to our reason. The opinion of the majority of the court in this case if pressed to its logical boundaries would mean that Congress must expressly legislate in behalf of the Filipinos the whole body of rights and remedies comprising the liberty of the subject. Such a conclusion would lead to a juridicial *impasse* until Congress could be persuaded that this conclusion was a correct one, and found time to enact a Filipino code with all the necessary infinitude of detail. Again, we ask, if a man may be indicted for a common law offence in the Philippines without Congressional authorization therefor, why in the name of common sense should he be denied a fundamental common law method of trial upon such indictment?

In reviewing the recent Turner decision *Case and Comment* says: The general power of Congress to exclude aliens from the United States, to prescribe the terms and conditions on which they may come in, and to provide for deporting those whose entrance is in violation of law, has been established beyond question by a series of decisions. It seems, therefore, to follow that it rests in the discretion of Congress to determine what classes of persons shall be excluded. As the general power belongs to Congress, it seems clear that any limitation thereon, or any exceptions thereto, must be a matter for Congress, and not for the court, to determine, unless the limitation or exception is based upon some constitutional provision. On what grounds the exclusion of merely philosophic anarchists could be held unconstitutional does not appear. The attempt to take them out of the statute because their teachings would not be harmful and their presence would not be dangerous, even if these contentions are conceded, would seem to be an attempt to give the court, instead of Congress, the right to determine what aliens should or should not be permitted to enter this country. The wisdom

of the act of Congress as applied to such a class of persons might be open to question. Its power to enact the law does not seem to be subject to reasonable question.

The constitutional guaranty of the equal protection of the laws is invoked by Turner's counsel, as well as that of due process of law. These provisions are invoked to show that his imprisonment under the warrant based on the statute is illegal. But the decisions have established that the deportation of an alien entering in violation of law does not deprive him of liberty without due process of law. It is clear that, if Congress has the right to exclude an alien from this country, such exclusion does not deny him the equal protection of the laws. The sole question, therefore, seems to be whether or not it is within the power of Congress to say what classes of aliens shall be permitted to enter this country.

In the *American Law Register* for July Professor George Wharton Pepper, in the first of a series of articles on "Irregular Association," discusses in an able manner the important and difficult question of the liability of the associates. Are they liable without limit as principals?

On this point he says in conclusion:

It being the fact that limited liability is by modern custom accorded to many debtors, and it being conceded that limited liability is nowadays an incident of regular statutory organization, the important question is whether limited liability can be attained by irregular as well as by regular organization? To answer the question in the negative is to refuse recognition to the conditions which result from the American decisions. To give an affirmative answer is (excepting where the defendant's immunity can be explained on agency principles) to recognize the possibility of incorporation by the private act of the associates. To choose between these two alternatives is a responsibility which courts cannot escape. Longer to make fictional applications of a collateral attack theory and an estoppel doctrine is inconsistent with intellectual self-respect. To develop the contract theory is to give the name of contract to an obligation not really consensual. Therefore it is necessary to choose between adherence to the common-law principle of unlimited liability and a view which enables associates to limit their liability but leaves the State free to regulate the conditions under which the limitation may be lawfully effected. Frankly to abandon the unhistorical concession theory and to limit the function of the State to the regulation of associations formed by the parties is to furnish a rational explanation of a mass of cases in which collateral attack and estoppel and contract are at present mingled in distressing confusion. . . .

It remains for the courts to recognize and avow the real significance of their own decisions or else render those decisions obsolete by enforcing liability in every case in which there has not been substantial compliance with a constitutional statute. By 'substantial' is meant such compliance as would be regarded as sufficient to prevent a judgment of ouster from going against the associates.

To make a wise choice between these alternatives requires that a judge should consider the economic consequences of an abolition of unlimited liability. To remove the sanction of unlimited liability is to do in the field of law that which is analogous to the weakening, in the domain of ethics, of the sense of personal accountability. In the opinion of the writer, legislative grants of limited liability have been far too freely made in this country. The courts have only aggravated the evil by conceding immunity in cases of irregular organization. A judge may, however, well conclude that as a practical matter the mass of precedent cannot be disregarded and that he will recognize incorporation by private act and leave it to the legislature to punish those who limit their liability without a license. Upon this view of the situation the inquiry in each case should hereafter be whether the associates have in fact organized a group in a form for

which a charter or license might be had upon proper application and for a purpose not inimical to the welfare of the community. If they have, the next inquiry should be whether they have actually begun business and acted through the agencies common to associates of their type. If so, limited liability and such other privileges as will be licensed upon application should be recognized as pertaining to the associates. Their status should be assimilated to that of a man and a woman who, without license or ceremony, cohabit and announce themselves as husband and wife. Their children are legitimate and the consequences of marriage follow in respect to their property rights. To regulate marriage, however, is an important duty of the State, and to punish unlicensed marriage is an unquestionably sound policy. So likewise is it of the utmost importance that the State should regulate association and incorporation. The formation of statutory groups otherwise than in accordance with statutory provisions should be made a penal offence and the penalty should be strictly imposed.

Concerning "The Decadence of the Criminal Jury," *The Australian Law Times* says:

If a jury should, however, after a careful deliberation of the evidence utterly fail to agree, is it to the best interests of justice that it should be further pressed? The jury, as a rule, resents dictation at the hands of the judge as to the verdict at which it should arrive. The invariable experience in such cases is that it is not the stubborn and unreasonable man who gives way. Where the jury ultimately comes to an agreement, it is usually because the weak-minded man has been overborne. By sheer weariness he is often led to lose confidence in his opinion properly formed, and induced to give the prisoner the benefit of a doubt he may not have previously felt.

Disagreement certainly involves the expenses attendant upon a further trial, with a preliminary presumption in favor of the prisoner from the very fact of the previous disagreement. There is no doubt that it might very rapidly become a crying evil, that would call for some amendment of the system. In Scotland a majority verdict is taken in criminal as well as civil trials; but English sentiment has always been against such a course. It will, therefore, require an overwhelming case to be made out against the principle of the unanimous verdict before any alteration in this direction would be possible, even if desirable. On the whole, we are inclined to think that the advantages of the present system continue to outweigh the disadvantages. It may be by accident, or by miracle, but it still works reasonably well.

If A's tree overhangs B's land and causes damage, can B obtain an injunction to restrain A from allowing this state of things to continue (asks *The Law Journal*, London), or is B's only remedy to cut down the overhanging branches of the tree? In other words, must B incur the trouble and expense of cutting them down, or can he compel A to do so himself? This is the question which the Divisional Court had to determine in Smith *v.* Giddy, and there is no previous case in which the exact point had to be determined. It was established by Crowhurst *v.* The Amersham Burial Board, 48 Law J. Rep. Exch. 109; L. R. 4 Exch. Div. 5, that where the owner of land allows a poisonous tree to project over an adjacent field, and cattle grazing there eat of the tree and die, the owner is liable; and the court thought, though the question of an injunction did not arise, that the burden of trimming was an operation which ought not to be cast on the adjacent owner. It seems to follow, logically, from this decision, that where an overhanging tree is causing damage, an injunction ought in a proper case to be granted to prevent a continuation of the damage. Accordingly the Divisional Court, with some reluctance, held that the plaintiff was entitled to the order for which he asked. Apparently it is the damage done by an overhanging tree, not the encroachment on the neighbor's

land, for which an action will lie. The House of Lords held in Lemmon *v.* Webb, 64 Law J. Rep. Chanc. 205; L. R. (1895) App. Cas. 1, that the adjacent owner may, at his pleasure, cut down the overhanging branches even without notice, and even though they have overhung for more than twenty years. But there is no suggestion that he can sue for a trespass.

An interesting article by Charles Claflin Allen, of the St. Louis Bar, on "National Control of the Pollution of Public Waterways," is the leading article in *The American Law Review* for May-June. Referring to State of Missouri *v.* State of Illinois, 180 U. S. 208 (1901), Mr. Allen says:

The decision by the Supreme Court of the United States in what is popularly known as "The Chicago Drainage Canal Case" holding that injunction would lie against pollution of the Mississippi river, presents an interesting situation of the law from several points of view. Of these, the two most interesting represents, on the one hand, the results of the case from the strictly judicial point, and on the other, the probable future results on what may be broadly termed the political side of the subject. That is to say, the case is interesting, first, because it applies to a cause of action between two sovereign States the well-defined principle of law that a riparian owner is entitled to have the water of the river come to him in a pure state, and that any material impairment of the purity of the water can be the subject of injunction against the one who pollutes it Second, the case opens the door to a recognition of the principle that the national government has jurisdiction of the great interstate rivers in respect of the "quality" of the water for drinking purposes, and the right to prevent the pollution of that water, as well as the uses for navigation or other commercial purposes.

First. It is interesting to note that the authorities which sustain the right of the riparian owner to have the water of the stream come to him in its natural purity, are singularly uniform. An examination of all the cases which may be found upon this subject discloses practically no contradiction or substantial exception to this rule. . . .

Whatever may be the result of the trial upon the merits . . . the rule of law is laid down that one State cannot cause injury to the inhabitants of another by polluting the waters which flow from one to the other, and at any time an injunction may be obtained, upon a proper showing, from the Supreme Court of the United States.

Second. The future consequences of this decision are more interesting to the country at large than the immediate results of the case are to the State of Missouri and city of St. Louis. It has become a pivotal case, which will have the tendency to bring about new conditions along the doubtful lines in constitutional interpretation. It establishes a rule of law affecting all of the Great Lakes and interstate rivers upon which so many people in so many States depend for the water they drink. The health and welfare of the public, coupled with the fact that no State authority can control the situation, will necessarily lead to national control of the great waterways, in regard to the purity of the water, as well as in other respects in which the Federal government now asserts control over them.

In discussing the "Validity of Acts Prohibiting the 'Docking' of Horses' Tails," the *Central Law Journal* for July 1 says:

The power of the legislature to enact such legislation being vindicated, the question arises how far can they go in providing a punishment for the offence. This question is very learnedly discussed in the recent case of Bland *v.* People, 76 Pac. Rep. 359, where the Supreme Court of Colorado, in upholding a law prohibiting the docking of horses' tails, declared that not only might the legislature punish the person who docks a horse's tail or the person who procures the same to be docked, but may also prohibit the use or trading of unregistered docked horses. It appears that the Legislature feared that it

would be as difficult to prove who docked a horse's tail as it would be to determine who killed certain wild game in the prohibited season, and so as in the latter any person having in his possession game animals is guilty of a violation of the law, so also in the former case the Legislature of Colorado has made it a violation of the law to in any way use or trade in unregistered docked horses. The registration feature is added to protect those having horses with "docked" tails at the time of the passing of the act.

In an able address entitled, "Hints upon Practice in Appeals," Mr. Chief Justice Mitchell of Pennsylvania gave to the students of the Law Department of the University of Pennsylvania much excellent advice. Among other things the learned speaker said (we quote from *The American Law Register* for June):

Your profession will require of you the study and use of language with accuracy. Whether in an argument on the interpretation of a statute, the meaning of a contract, or perhaps, most of all, the construction of a will, there will be no time in which you will not be required to make close study of the accurate use of words, and along with accuracy, hand-in-hand should go propriety and even elegance. There is no collateral accomplishment that will better repay your time and attention than the acquirement of a habit of correct and even elegant use of your native language. The men who made the reputation of the Philadelphia bar were as careful of their style as they were of their law. In fact, one of the master orators who survived to my day, David Paul Brown, carried this feeling perhaps to excess, and I think would have been more mortified by a slip in pronunciation than by a slip in the statement of a legal proposition. It was their proud feeling that the standard of the language of the bar did not yield to the standard of the stage even in the palmy days of Garrick and Kean and the Kembles. It is not uncommon to hear it said that the day of oratory is over, but it is a mistake. The day of mere declaration has gone by, but the day of oratory is unending. Style has changed, but the art has not perished or lost its power. Oratory. at least of the bar, no longer aims at entertainment, but confines itself to its true purpose to persuade or convince. For these ends it was never more needed than now, and never more potent. Clear, orderly, and forcible statement is the first step to victory today, as it always has been and always will be. The stage has largely degenerated into burlesque and slang, and literature tends to run into slovenly newspaper English. All the more reason is there that you, the young men of the day, to whom we look to maintain the ancient reputation of this bar, should strive to do it in your clear and correct use of language, as well as in the learned and accurate statement of the law.

Francis D. Winston, in an address recently delivered before the North Carolina Bar Association and printed in *The American Lawyer*, gives the following interesting schedule of rates for food, drink and lodging, to be observed by ordinary keepers, established by Court of Pleas and Quarter Sessions in Bertie County, North Carolina, in 1744:

West India rum, per gallon, and so in proportion for a greater or smaller quantity	£ 4.0
New England rum, per gallon, and so in proportion,	2.8
Country made brandy, per gallon, and so in proportion,	2.8
New England, New York and Hughes Crab Cider per gallon, and so in proportion..	.10
Other cider, country made. per gallon, and so in proportion,	.5
A gallon of punch with a quart of West India rum, loaf sugar, and lime juice, and so in proportion.	2.0
A gallon of do. with a quart of New England rum and brandy with brown sugar, and so in proportion,	1.4
Maderia or Portugal wine, per quart	1.0
Dinner, with wheat bread, cider and small beer,	7s 6d
Breakfast of supper,	5s
Lodging, per night for a bed and clean sheets to himself,	5s
Pasturage for a horse for 24 hours,	2s 6d
Corn, or oats, per gall	4s

Of the state of the currency during the Revolutionary War, Mr. Winston says:

The guardian, administration and official bonds indicate the depreciation of the currency. Let me cite a few instances: At November term, 1781, Thomas Averit gives bond as guardian of his brother, in the sum of four hundred thousand pounds proclamation. At this term the bond of the tax gatherer for Windsor district is fixed at five hundred thousand pounds, current money, and they did not use the £ for pounds, but they spelled it out—p-o-u-n-d-s—as though they were the very rags of which the bills were made. . .

The climax was reached when George Ryan, Esq., appeared at May term, 1782, and gave his sheriff's bond in five million pounds, current money. The farce was complete; George Evans, John McGlauhan and Stevens Gray qualified and were accepted on the bond. Then were we indeed the first American millionaires! The tavern rates show clearly the cheapness of the currency. At May term, 1780, the court fixed these rates as follows:

For a hot dinner, of good provisions.....	$12.50
Breakfast of tea or coffee, bread and butter.	6.00
Supper of meat.....	8.00
If of coffee or tea.....	6.00
Night's lodging	2.00
For a gill of good West India rum.....	10.00
Country brandy, whiskey and taffey, per gill.	5.00
24 hours' pasturage for a horse.....	4.00

These prices vividly recall one other period in our country's history, when it was remarked by a Confederate soldier to his comrade in March, 1865, that he would give a thousand dollars for the horse his friend was riding. "A thousand dollars the devil," said his friend, "I have just paid two thousand dollars to have him curried."

THE opinion of Judge Emory Speer, delivered June 28, 1904, in the District Court of the United States for the Western Division of the District of Georgia, in Jamison *v.* Wimbish, merits the commendation of all those members of the bar who believe in a humane system of criminal law.

This action was a petition for a writ of *habeas corpus* brought in behalf of a respectable colored man who, "without any indictment, accusation, or written charge of any kind having been preferred against him" and without trial by jury, had been sentenced by the City Recorder of Macon, Georgia, to a term of two hundred and ten days in the chaingang. The offense charged was drunkness and disorderly conduct. The case (to quote the opinion) "involves the question whether the Recorder of Macon can, without any sort of criminal pleading, and without the intervention of a jury, convict a citizen twice, for one violation of a minor municipal ordinance and sentence him to seven months at hard labor on the public chaingang, the punishment to be suffered in a branch of the State penitentiary. Here also is the question, can it be maintained in the light of the Constitution, that one man, under any form of procedure, devised or to be devised by local legislation, consign men, women and children to a chaingang for such trivial offenses as are within the jurisdiction of a police magistrate?"

The court held, in the first place, that the order that a person should serve a term in the chaingang was a sentence to infamous punishment. That this finding was justified is shown by the following description of the chaingang by the court:

The sufferers wear the typical striped clothing of the penitentary convict. Iron manacles are riveted upon their legs. These can be removed only by the use of the cold chisel. The irons on each leg are connected by chains. The coarse stripes, thick with the dust and grime of long torrid days of a semi-tropical summer, or encrusted with the icy mud of winter, are their sleeping clothes when they throw themselves on their pallets or straw in the common stockades at night. They wake, toil, rest, eat and sleep, to the never-ceasing clanking of the manacles and chains of this involuntary slavery. Their progress to and from their work is public,

and from dawn to dark, with brief intermission, they toil on the public roads and before the public eye. About them as they sleep, journey and labor, watch the convict guards armed with rifle and shot gun. This is to at once make escape impossible, and to make sure the swift thudding of the picks and the rapid flight of the shovels shall never cease. If the guards would hesitate to promptly kill one sentenced for petty violations of city law should he attempt to escape, the evidence does not disclose the fact. And the fact more baleful and more ignominious than all, with each gang stands the whipping boss, with the badge of his authority. This the evidence discloses to be a heavy leathern strap about two and a half or three feet long, with solid hand grasp, and with broad, heavy and flexible lash. From the evidence we may judge that the agony inflicted by this implement of torture is not surpassed by the Russian knout, the synonym the world around for merciless corporal punishment. If we may also accept the uncontradicted evidence of the witnesses it is true that on the Bibb county chaingang for no day is the strap wholly idle and not infrequently it is fiercely active. One witness, who served many months, testified that if the gang does not work like "fighting fire," to use his simile, the whipping boss runs down the line, striking with apparent indiscrimination the convicts as they bend to their tasks. Often the whipping is more prolonged and deliberate. At times, according to another witness, also uncontradicted, the victims when at the stockade are called into the "dog lot." All present, the whipping boss selects the victims in his judgment worthy of punishment.

They are called to the stable door, made to lie face downward across the sill, a strong convict holds down the head and shoulders and the boss lays on the lash on the naked body until he thinks the sufferer has been whipped enough. It is but just to Mr. Wimbish to record his statement that he knew nothing of this ceremony. It may be judged from the evidence that it is a whipping more formal and dramatic than any other inflicted. Since this is done at the stockade, we may presume that the spectators and guards are the only witnesses, but on the public roads, in the presence of wayfarers and by-standers, often the convict, to use an expression of a witness, "is taken down and whipped." The evidence gives us the account of two white persons who were thus whipped, one, a boy with but one arm. For this reason, it was not necessary to hold him. He stood and cried as the boss applied the lash. The other white boy was compelled to place his head between the legs of a burly negro convict and was thus immovably held. The punishment will mark the lad with infamy in the minds of his fellows as long as he may live. The offense of one of these lads was "loitering in the depot." Nor does the Recorder sentence to this punishment men who commit crimes against the laws of the State. By explicit decisions of the State courts this official has no jurisdiction to sentence but must commit such offenders to the appropriate State court for jury trial. The punishment here described is inflicted upon those who are convicted of minor municipal offenses, such as disorderly conduct, violations of the bicycle ordinances, walking or standing on the park grass, loitering in the depot or in the railroad yard, careless driving and the like.

After discussing authorities the court said:

Indeed it may be with entire accuracy declared that the voluminous and exhaustive preparation of the city attorney, and the subsequent examination by the court has evoked no shred of authority, either American or English, where a sentence for petty offenses, by a police magistrate, to a public chaingang, with the ignominious accessories of fetters, the stripes, lash, and of the degradation of convict life, has been sustained or even palliated. Under the American system the chaingang has no place in the jurisdiction and procedure of police courts where trial by jury is not a right of the accused.

The court ordered the discharge of the petitioner from custody.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

AMUSEMENT PARK. (INJURIES CAUSED BY FIREWORKS — LIABILITY OF OWNER.)

SUPREME COURT OF NEW YORK.

In Deyo *v.* Kingston Consol. R. Co., 87 New York Supplement, 487, it is held that an owner of a public amusement park, to which an admission fee is charged, is not liable in damages to a patron who is struck by a rocket while witnessing an exhibition of fireworks given by an independent contractor. The owner of the park, when he invited the public upon its ground, had no reason to apprehend that any injury would result from the discharge of the fireworks. It was not a condition which it knew or ought to have known threatened injury to those attending. "There are instances, and this may be one of them, which would seem to indicate that sound public policy should require that whoever invites the public to witness an entertainment on his premises, for a compensation, should be held liable for the negligent act of any one who takes part in exhibiting it; but, on the other hand, I can conceive of instances where such a rule would be a harsh and unjust one. I do not find that the courts have, as yet, settled upon such a rule as the law of the land, and I am not disposed to declare it to be the law in this case."

ASSAULT AND BATTERY. (FRIENDLY SCUFFLE — LIABILITY FOR ACCIDENTAL INJURY.)

KANSAS CITY COURT OF APPEALS.

Gibeline *v.* Smith, 80 Southwestern Reporter, 961, involved the question whether an action would lie for an injury which was accidentally received in a friendly scuffle. Defendant was a collector for a brewery. He drove around to different saloons one or more times a week to collect accounts arising from the sale of beer. Plaintiff kept a lunch counter in one of these saloons. They had been friends for many years, and were in the habit of joking one another and scuffling together in a playful way. In a scuffle of this nature plaintiff was injured. Afterwards this action was brought to recover damages for the injuries received. In stating its conclusions that damages were not recoverable for injuries accidentally received in a friendly scuffle, the court says: "It is our opinion that if the parties to this controversy each voluntarily engaged in a friendly scuffle, and the defendant, without intending so to do, accidentally hurt the plaintiff, no action will lie. The mutual and lawful character of the act of the parties prevents liability attaching for an accident which may result to either. We do not say that a lawful act resulting in unintentional injury necessarily excuses the party committing it. But if the act is lawful, and is invited and participated in by another, and an injury unintentionally results, no liability arises. To hold otherwise would be to say that all untoward results from the play of men or boys in which they mutually engage would furnish a cause for an action by the injured party. Play, even though rough or dangerous, if mutually engaged in, is not unlawful, otherwise athletic games now and always common to the people would not have had the sanction which ages have given them."

CONTRACT NOT TO ENGAGE IN BUSINESS. (BREACH — INJUNCTION AGAINST THIRD PARTIES.)

COURT OF CHANCERY OF NEW JERSEY.

In Fleckenstein Bros. Co. *v.* Fleckenstein, 57 Atlantic Reporter, 1025, it was determined that where a proprietor of a business has sold the same, and has covenanted not to engage in that business as agent or servant, strangers to the contract, who es-

tablish a similar business under the name of the wife of the covenantor, may be enjoined, at the instance of the purchaser of the business, from causing the covenantor to violate the contract by employing him, and holding him out as their active agent and superintendent, with knowledge that the purchaser is thereby being injured, and obtaining a corresponding advantage to themselves in their business. In support of this holding the Vice Chancellor cites Stone *v.* Goss, 55 Atl. 736, 63 L. R. A. 344, which he considers as in many respects analogous.

CORPORATIONS. (REDUCTION OF CAPITAL STOCK — DISTRIBUTION OF SURPLUS.)

COURT OF CHANCERY OF NEW JERSEY.

In Continental Securities Co. *v.* Northern Securities Co., 57 Atlantic Reporter, 876, the court holds that the corporation which has decided to reduce its capital stock can retain a portion of its assets. In support thereof the court cites Strong *v.* Brooklyn R. R. Co., 94 N. Y. 426, Williams *v.* Western Union Tel. Co., 93 N. Y. 163. In this case, which involved the right of the Northern Securities Company to distribute the railroad shares held by it among its stockholders, the court also holds that in making a reduction of the capital stock, where the surplus thus created is invested in railway shares, it is not necessary to reduce such shares to cash before the distribution. On the contrary, the directors of the corporation have the power to divide the property other than money among the shareholders. In support of this Ehle *v.* Chittenango Bank, 24 N. Y. 548, Leland *v.* Hayden, 102 Mass. 542, are cited.

DAMAGES. (RECOVERY FOR MENTAL SUFFERING ALONE.)

SUPREME COURT OF NEVADA.

In Barnes *v.* Western Union Tel. Co., 76 Pacific Reporter, 931, the court holds that damages are recoverable for mental suffering unconnected with physical suffering. If mental suffering can be allowed for in any case, what difference would it make whether there were physical suffering or not. Suppose by reason of the negligence of a defendant, damages resulted to a plaintiff, said damages coming from two sources: 1st, physical suffering, $100, and 2nd, mental suffering accompanying physical suffering, of $100, making in all $200. If the second element, to wit, the $100 allowed for mental suffering accompanying the physical suffering was allowed, what difference would it make if the said or similar mental suffering existed by reason of a defendant's negligent act unaccompanied by physical suffering. The reason given in some of the cases why damages cannot be allowed for mental suffering alone is that the just estimation of such damages is so difficult. But if such mental suffering accompanied by physical suffering can and must be estimated, cannot and should not mental suffering unaccompanied by physical suffering be estimated and allowed for in damages. Clearly, if so in one case, logically and reasonably it must be so in the other. The court then cites numerous authorities to the effect that damages for mental suffering are recoverable.

DIVORCE. (WHAT CONSTITUTES CRUEL TREATMENT.)

COURT OF CIVIL APPEALS OF TEXAS.

In Varner *v.* Varner, 80 Southwestern Reporter, 386, the court holds that the mere finding that a wife habitually refuses to accede to her husband's request for sexual intercourse is not cruel treatment of such nature as to render their living together unsupportable. The court says that if it be conceded that a case might be presented in which refusal to grant sexual intercourse would constitute such cruel treatment as would authorize divorce under the Texas statute, this would, to a large degree, depend upon the husband's physical condition as well as upon the condition of the wife. As the mere fact that the husband made solicitations for sexual intercourse was all there was in the record indicating his physical condition, the court says that it may have been shown concerning him that

"The way of his life
Has fallen into the sear, the yellow leaf."

Old age and infirmity may be upon him, his virility may be greatly diminished; his amorous desires may be few and feeble, and the failure to have them gratified a matter of no great importance. If such be his condition, whatever might be held as to a husband differently situated, we are of the opinion that the wife's conduct, though wrongful, was not such an excess, cruel treatment, or outrage as to render their living together unsupportable.

ELECTRIC LIGHTS. (LIABILITY OF ELECTRIC LIGHT COMPANY FOR INJURIES RESULTING FROM DEFECTIVE LIGHT.)

SUPREME COURT OF SOUTH DAKOTA.

Fish *v.* Kirlin-Gray Electric Co., 99 Northwestern Reporter, 1092, was an action to recover from an electric light company for injuries to a person attending church by the falling of an electric arc light lamp suspended from the ceiling of the church. The electric company had sold the arc light to the church under contract by which it was to furnish electricity and keep the light in repair. Under such a contract the electric company was liable for any injuries resulting from its negligence in suspending, care and management of such light. The case of Excelsior Light Co. *v.* Sweet, 57 N. J. Law, 224, 30 Atl. 553, the court considers as somewhat analogous. It also considers the principle laid down in Thomas *v.* Maysville Gas Co., 56 S. W. 153, 53 L. R. A. 147, as controlling.

GLASS OF WHISKEY AND SANDWICH CONSTITUTE A MEAL. (LIQUOR TAX LAW—SELLING ON SUNDAY—VIOLATION.)

NEW YORK SUPREME COURT

In re Cullinan, 87 New York Supplement, 660, was a proceeding to revoke and cancel a liquor certificate on the ground of a violation of the Liquor Tax Law by selling liquor on Sunday. Respondent conducted a hotel at Coney Island, and claimed the privileges accorded by clause k, section 31 of the Liquor Tax Law (Laws of 1897, p. 233, c. 312), which permits the keeper of a hotel who holds a liquor tax certificate to sell liquor on Sunday to his guests with their meals. It was admitted that whiskey was sold on Sunday, but it was claimed that there was no violation of the law inasmuch as a sandwich was served with each glass of whiskey, a glass of whiskey and a sandwich constituting a meal. In regard to this claim the court says: "There can be no reasonable doubt that under some circumstances a sandwich and a drink of whiskey or other beverage constitute a meal, under our modern Bohemian system of living. Many men in clubs, at restaurants and elsewhere confine their eating at certain periods of the day to a single dish—to a bowl of soup, to a plate of beans, or a sandwich—and there is no particular kind or quantity of food which the law demands for a meal, so far as we have been able to discover; it all depends upon the person to be served and the condition of the appetite." The court, however, in this case, came to the conclusion that as the purchasers of the whiskey expressly stated that they did not wish the sandwiches, and that as they did not eat them, a meal was not served in good faith, as required, and hence the statute was violated.

INTERSTATE COMMERCE COMMISSION. (HEARING BEFORE COMMISSION — POWER TO COMPEL PRODUCTION OF PAPERS.)

UNITED STATES SUPREME COURT.

Interstate Commerce Commission *v.* Baird, 24 Supreme Court Reporter, 563, was a proceeding to compel the production of papers and the giving of testimony before the Interstate Commerce Commission. The Interstate Commerce Commission filed its petition for an order to compel respondents to produce contracts under which railroad companies engaged in carrying coal from the anthracite regions in Pennsylvania to tidewater, or coal companies owned by the railroads, purchased coal from independent operators engaged in mining in that district, for which payment was made on the basis of a fixed percentage of the average price at certain tide points of coal of the same quality and size. Respondents contended that

to require the production of these contracts would be to compel witnesses to furnish evidence against themselves which might result in forfeiture of estate, in violation of the fifth amendment to the Constitution, and would subject the parties to unreasonable searches and seizure of their papers, contrary to the fourth amendment. The court, however, says, that as to the objection based on the fifth amendment to the Constitution, the Interstate Commerce Act, as amended Feb. 11, 1893 (28 Stat. at L. 443, c. 83, U. S. Comp. Stat. 1901, p. 3173), expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. Therefore, the court did not consider that objection as tenable. As to the objection based on the fourth amendment to the Constitution, the court cites Boyd *v.* U. S. 111. U. S. 616, 26 L. Ed. 746, 6 Sup. Ct. Rep. 524, wherein Justice Bradley pointed out the analogy between the fourth and fifth amendments, and the object of both to protect a citizen from compulsory testimony against himself, which might result in his punishment or the forfeiture of his estate or the seizure of his papers by force or their compulsory production by process for a like purpose. With this analogy of the fourth and fifth amendments in mind, the court came to the conclusion that as the statute protected witnesses from such use of the testimony given as would result in their punishment for crime or the forfeiture of their estates, testimony given under such circumstances presented scarcely a suggestion of an unreasonable search or seizure within the meaning of the fourth amendment.

LIBEL. (Privileged Communications — Malice — Burden of Proof.)

Supreme Court of Texas.

In Cranfill *v.* Hayden, 80 Southwestern Reporter, 609, it was held that a showing of any degree of actual malice in the motives inspiring the publication of a conditionally privileged communication was sufficient to justify a recovery for libel, though there might also be a lawful motive for the publication. It was also held that the fact that a communication forming the basis of an action for libel was conditionally privileged, did not shift the burden of proving its falsity to the plaintiff.

MASONIC REGALIA. (Bankruptcy — Exemption of Regalia as Wearing Apparel.)

United States District Court, District of Vermont.

In re Everleth, 129 Federal Reporter, 620, was a proceeding in bankruptcy. The bankrupt had, among other things, masonic regalia, consisting of a hat, belt and sword, which he claimed to be exempt as wearing apparel. The court says that a question as to articles similar to the masonic regalia was before the supreme court of Vermont in Sawyer *v.* Sawyer, 28 Vt. 249. It was there held that a sword and belt of an intestate, worn by him when in uniform as a purser in the United States Navy, were not a part of his wearing apparel, and did not pass as such to the widow, but that the epaulets, with the coat on which they were, should go as wearing apparel to the widow. That question as to the meaning of the words "wearing apparel" on decreeing distribution between the widow, the heirs and creditors, the court considers similar to the one involved in this case as to the meaning of the same words in setting off property between the bankrupt and his creditors. The court therefore came to the conclusion that the belt and sword were not exempt as wearing apparel, but that the hat was exempt, as it was understood to be such a hat as when worn would answer all the purposes of a hat.

MASTER AND SERVANT. (Fellow Servant Rule.)

United States Supreme Court.

Northern Pac. Ry. Co. *v.* Dickson, 24 Supreme Court Reporter, 683, involved the

question as to whether or not a telegraph operator was a fellow servant of a locomotive fireman. Justice Brewer, writing the majority opinion, cites Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994, 16 Sup. Ct. Rep. 843, wherein it was held that a foreman of a repair gang was a fellow servant with the men of the gang, and Northern P. R. Co. *v.* Hambly, 154 U. S. 349, 38 L. Ed. 1009, 14 Sup. Ct. Rep. 983, in which a laborer employed in a section gang and a conductor and engineer of a train were held to be fellow servants, and comes to the conclusion that a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station is a fellow servant of a fireman on the train. Therefore, the negligence of the telegraph operator in reporting the movement of trains to the train dispatcher, which caused the death of the fireman, was a risk which the fireman assumed on entering the railway company's employ. In a dissenting opinion by Justice White, in which the Chief Justice and Justices Harlan and McKenna concurred, it was said that as the train dispatcher, to whom the erroneous report was sent, and who issued the order for the movement of the train on which the fireman was killed, was either a vice principal of the railway or performing a positive duty of his master, the negligence, however occasioned, was the act of master and not the act of a fellow servant.

MUNICIPAL CORPORATION. (TREASURER'S BOND — LIABILITY OF SURETIES FOR MONEY ILLEGALLY COLLECTED.)

SUPREME COURT OF MONTANA.

City of Philipsburg *v.* Degenhart, 76 Pacific Reporter, 694, was an action by the city against the sureties on the official bond of the treasurer of the city to recover for a deficiency in his account. It was shown that the treasurer had received and receipted for the moneys in question, as city treasurer and had acknowledged the receipt and holding of said moneys as moneys of the city by his monthly reports and accounts to the city; but the defence was that as the money was collected from various gambling houses and houses of prostitution, which the officers and agents of the city had no right to collect, the city had no right to the money received from such sources, and the conversion and investment of such moneys was only the conversion of money not belonging to the city. The court says, that, however reprehensible the conduct of the city officials was in collecting the money, there was no showing, but that the money was paid voluntarily, and therefore could not be recovered from the city by the parties paying the same. Although illegally collected it was nevertheless the money of the city. It was paid to the treasurer, and he embezzled or converted it. The sureties on his bond contracted with the city against such conduct of the treasurer. It does not lie in their mouths to say that the money was paid illegally, and therefore does not belong to the city, or that it was so tainted with corruption that it would be violative of public policy to allow the recovery against the treasurer's bond. The mere fact that the money was collected without authority can make no difference in the liability of the sureties. This question has been practically decided in the cases of Smith *v.* Lovell, 2 Mont. 332, and Meagher County Commissioners *v.* Gardner, 18 Mont. 110, 44 Pac. 407. The court also cites Sutherland *v.* Carr, 85 N. Y. 105; Wylie *v.* Gallagher, 46 Pa. 452; Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833; Detroit Savings Bank *v.* Zeigler, 49 Mich. 157, 13 N. W. 496, 43 Am. St. Rep. 456; Galbraith *v.* Gaines, 10 Lea, 568.

NEGLIGENCE. (OBSTRUCTION OF STREET — NEGLIGENT DEATH — PROXIMATE CAUSE.)

COURT OF CIVIL APPEALS OF TEXAS.

Shippers' Compress & Warehouse Co. *v.* Davidson, 80 Southwestern Reporter, 1032, was an action to recover damages for the death of plaintiff's husband. Defendant had erected an inclined gangway across a street in violation of law. While plaintiff's hus-

band was driving over this gangway in a closed buggy, his horse was frightened by the noise made by one of the defendant's servants going down the gangway with a truck, and ran away, overturning the buggy and inflicting injuries on him from which he afterwards died. It was contended that as the death was caused through the negligence of the servant, with the truck, defendant was not liable, no matter if it had been guilty of negligence in constructing the gangway across the street. But the court says that defendant violated the law in building the gangway across the street, and the accident would never have occurred but for that unlawful act. The act of moving the truck rapidly down the gangway, producing the noise that frightened the horse, was inseparably connected with the unlawful structure. Without the gangway the accident was impossible. It required the gangway as well as the moving of the truck to produce the result. The intervening act of the servant in rolling the truck immediately behind the buggy and frightening the horse did not supersede the original unlawful act in putting the obstruction in the street. If the gangway had not been on the street, the servant could not have run the truck at such rate of speed as to create sufficient noise to alarm the horse. The two causes were so closely enjoined that the one could not exist without the other, and when the negligence of the defendant concurred with the negligence of the servant, it became as liable as though its negligence had been the sole moving cause of the disaster.

PUBLIC SCHOOLS. (BIBLE READING — RELIGIOUS EXERCISES.)

SUPREME COURT OF KANSAS.

The question as to whether the reading of the Bible in the public schools is a violation of the clause in the Federal Constitution guaranteeing religious liberty has been tested in several of the States during the past few years, and was again brought up in Billiard *v.* Board of Education, 76 Pacific Reporter 422. Here it was alleged that the reading of the Lord's Prayer and the repeating of the Twenty-third Psalm by the teacher was a violation of Section 7 of the Bill of Rights, guaranteeing to every person the right to worship God according to the dictates of his own conscience, and also of Section 8, article 6 of the Constitution, which provides that no religious sect or sects shall ever control any part of the common school or university funds of the State. It is further alleged that the General Statutes of 1901 are violated, which prescribe that no sectarian or religious doctrine shall be taught or inculcated in any of the public schools of the city. The teacher testified that the general opening exercises of the school consisted of repeating the Lord's Prayer, the Twenty-Third Psalm, and reading selections from natural history, and occasionally singing a selection found in the music book. It seems that none of the pupils were required to take part in these exercises, but they were required to refrain from their regular studies and preserve order during such time. The plaintiff's son protested that he was conscientiously opposed to these exercises, because they were a form of religious worship. Upon his refusal to maintain order during this period, he was excused from attending the exercises, but later persisted in attending the exercises and disobeying the rules. He was afterward expelled, and the board of education, in upholding this action on the part of the principal of the school resolved that the pupil should not be reinstated until he expressed a willingness to comply with the rules. *Mandamus* was then brought to compel the reinstatement of the plaintiff's son. The court holds that while the statutes which the plaintiff depended upon clearly prohibit all forms of religious worship, the facts in the case did not show that they had been violated in this instance. The reading of the Bible is not prohibited, and the court adds that every pupil who enters the public school has a right to expect and the public has a right to demand of the teacher that such pupil shall come out with a more acute sense of right and wrong, higher ideals of life, a more independent and moral character, a higher and truer moral sense of his

duty as a citizen, and a more laudable ambition in life than when he entered. The noblest ideals of moral character are found in the Bible. To emulate these is the supreme conception of citizenship. It could not, therefore, have been the intention of the framers of our Constitution to impose the duty upon the Legislature of establishing a system of common schools where morals were to be inculcated and exclude therefrom the lives of those persons who possessed the highest moral attainments. The court adds that the evidence shows that the teacher made no effort to inculcate any religious dogma. She repeated the Lord's Prayer and the Twenty-third Psalm without response, comment or remark. The pupils who desired gave their attention and took part; those who did not were at liberty to follow the wanderings of their own imagination.

SECRET SOCIETY. (INITIATION OF MEMBER — PERSONAL INJURY — LIABILITY OF ORDER.)

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

Jumper *v.* Sovereign Camp Woodmen of the World, 127 Federal Reporter 635, was a suit by one personally injured in an initiation into a local lodge of the defendant order. The portion of the initiation which resulted disastrously was not prescribed by the ritual or authorized by the Sovereign Camp. It was nevertheless participated in by the lodge members during a regular session, and, under the authority of Kinver *v.* Phoenix Lodge, I. O. O. F., 7 Ontario Reports, Q. B. Division 377, would be the act of the lodge itself. In that case, however, the action was against the local lodge, while in State *v.* Williams, 75 N. C. 134 the members of the local lodge were prosecuted for an assault. The present case failed because plaintiff did not adequately show that the Sovereign Camp and the local lodge sustained towards each other any such relationship of master and servant or principal and agent as rendered the Sovereign Camp responsible. The authority to collect dues was not regarded as creating such an agency.

STATUTE OF FOREIGN COUNTRY. (EVIDENCE THEREOF — TRANSLATION — DEPOSITION OF LAWYER OF SUCH COUNTRY RESPECTING CONSTRUCTION OF STATUTE.)

UNITED STATES SUPREME COURT.

In Slater *v.* Mexican Nat. Railroad Co., 24 Supreme Court Reporter, 581, the question as to the admissibility of the deposition of a lawyer of a foreign country respecting the accepted or proper construction of a statute of such country was determined. It was contended that as an agreed translation of statutes of a foreign country was in evidence, the deposition of a lawyer of such country as to the construction of the statutes was not admissible, the translation being the best evidence. The court says that the translation was no doubt the best evidence so far as it went, but the testimony of an expert as to the accepted or proper construction of the statutes was admissible upon any matter open to reasonable doubt. With only the bare statutes before the court, many doubts were left unresolved. A solution of them could be furnished by a deposition of a lawyer as to the accepted and proper construction of the statutes.

TENANTS IN COMMON. (EFFECT OF JUDGMENT OBTAINED BY ONE OF THE CO-TENANTS SETTING ASIDE A DEED EXECUTED BY A COMMON ANCESTOR.)

SUPREME COURT OF NORTH CAROLINA.

Allred *v.* Smith, 47 Southeastern Reporter, 597, was a partition proceeding. In this case the question was raised whether cotenants could take advantage of a judgment obtained by one of them setting aside a deed by their common ancestor for want of mental capacity on her part to execute it. The court says it is well settled that tenants in common are not privies. They do not claim under each other, but may claim their several titles and interests from entirely different sources. They are therefore not bound by judgments rendered in actions brought by one of their co-tenants respecting the common property, and this is illustrated by the cases in which it is held that they are competent witnesses for their co-tenant. The court distinguishes this case from those in which

it is held that an action of ejectment for possession of the property by one of the co-tenants inures to the benefits of all the co-tenants. In such cases only the possession of the property is involved, but where the title to the common property is in question, the co-tenants cannot take advantage of a judgment in favor of one of them.

WAGES. (PAYMENTS REDEEMABLE IN MERCHANDISE — CONSTITUTIONALITY OF STATUTES — FREEDOM OF CONTRACT — POLICE POWER.)
SUPREME COURT OF MISSOURI.

State *v.* Missouri Tie & Timber Co., 80 Southwestern Reporter, 933, was a prosecution for issuing orders and evidences of indebtedness not redeemable at their face value in lawful money of the United States. Rev. St. Mo. 1899, Section 8142, prohibits any person, firm or corporation, from issuing, in payment of wages, any order not negotiable and redeemable at its face value in lawful money of the United States. Section 8143 requires all persons issuing such orders during business hours to be ready to redeem them in lawful money, and section 8144 provides that a violation of the preceding section shall constitute a misdemeanor and render the party violating the same liable to fine or imprisonment or both. A conviction was had under the above statute, and on appeal it was contended by defendant that the statutes were unconstitutional, because they invaded the constitutional right to contract. The court cites State *v.* Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789, wherein Rev. St. Mo. 1889, section 7058 and 7060, which made it a misdemeanor for any corporation, person or firm, engaged in manufacturing or mining, to issue, in payment of wages, orders payable otherwise than in lawful money of the United States, unless the same were negotiable and redeemable at their face value in cash or in goods or supplies at the option of the holder, were held unconstitutional on the ground that they were not "due process of law" within the meaning of the Constitution, and on the further grounds that they were an interference with the right to make reasonable and proper contracts in conducting legitimate business. Though the statutes involved in this case are not, like the statutes involved in the Loomis case, open to the objection that they are class legislation, yet the court is of the opinion that they are unconstitutional on the ground that they invade the right to contract. The state, however, contended that the statutes should be upheld on the ground that they were lawful police regulations by virtue of the state's police power. But to this contention the court replied that it was of the opinion that, under the great weight of authority, the act in question could not be upheld, in so far as defendant and its adult employes were concerned, for it could not be said that the defendant, in operating a tie and timber business, was in any way pursuing a public business, or devoting their property to a public use. The right to labor or employ labor and make contracts with respect thereto upon such terms as may be agreed upon is both a liberty and a property right, and is included in the guaranty of the Constitution, which provides "that no person shall be deprived of life, liberty or property without due process of law." The court further says that though the right to contract may be subject to limitations growing out of duties which the individual owes to society, such limitations must be upon some reasonable basis, and not arbitrary. In support of this the court cites Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315.

Lewis Cass.

The Green Bag.

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LEWIS CASS AS A LAWYER.

BY EUGENE L. DIDIER.

THE siren politics has allured many promising lawyers from the bar to the forum, and from the bench to legislative halls. In the early days of the republic, the majority of the intellectually ambitious young men sought the law as the surest road to fame and fortune.

In the first decade of the nineteenth century, Lewis Cass, the son of a brave New Hampshire officer in the American Revolution, like so many New England youths, set out to seek his fortune in the then almost unknown region now comprised in the great State of Ohio. Arriving at Pittsburg, the outpost of civilization, one hundred years ago, he descended the Ohio River in a flat boat, and, in October, 1800, reached Marietta, the pioneer settlement of south eastern Ohio. With the energy of the sturdy Puritan stock and the enthusiasm of youth, the young man of seventeen entered upon the study of the law in the office of the Hon. Return I. Meigs. At the end of two years he was admitted to the bar, being the first lawyer admitted in the State of Ohio. He began the practice of his profession at Zanesville. Business was slow in coming, at first, but the young lawyer was patient and studious, and, within three years after graduating, he had acquired sufficient practice to enable him to marry. Soon after this, he was elected to the Ohio legislature, and took his seat in December, 1806. The first business that came up was a special message from Governor Tiffan, in relation to the object of Aaron Burr in gathering boats, men and arms on the Ohio River. A committee, of which Mr. Cass was a member, was appointed to investigate the matter. He drafted an address, in which he proclaimed the attachment of Ohio to the union, which Burr was suspected of a design of dividing by making the Alleghanies the western boundary of the United States. President Jefferson, who pretended to be greatly alarmed by Burr's movements, expressed the highest appreciation of Mr. Cass's services, and appointed him United States Marshal for Ohio. The duties of the office were light, and left him ample time to continue his profession.

In 1812, he was retained as counsel by two State judges who were impeached by the lower House of the Ohio legislature for having decided that a State law was unconstitutional and void. His able and successful argument in this case, which attracted no little attention in the western country, greatly added to his reputation as an advocate. His practice was profitable for the time and place, and, when he was appointed Governor of Michigan, in 1815, and removed to Detroit, he was able to purchase a homestead of five hundred acres, for which he paid in cash, $12,000. This purchase was deemed extravagant at the time, but it proved a very excellent investment, for, by the rapid growth of Detroit, it made him a very wealthy man.

Lewis Cass's experience as a young pioneer lawyer, was at times more exciting than agreeable. His practice was *exten-*

sive, for it included several counties; courts were held hundreds of miles apart, necessitating long and often dangerous journeys on horseback through the pathless woods, over Indian trails. Ten days were sometimes required for a journey, during which the traveler was glad to find shelter in a log cabin, where he could pass the night wrapped in a blanket on the floor. This was a luxury not always possible, as it occasionally happened that a piece of dry ground was the only place for the weary traveler to rest for the night, lighted by the stars shining above him and lulled to sleep by the cries of wild beasts in the neighboring forest. Strolling Indians sometimes crossed the path of the traveler, and, again, swollen rivers had to be swum. Cass described the "dripping spectacle of despair" which he exhibited when his faithless horse threw him and his luggage into Scioto Creek, the horse landing on one side and his master on the other. Long afterwards, he laughingly recalled his early experience, remembering how the troubles of the day were frequently "recompensed by the comforts of the evening, when the hospitable cabin and the warm fire greeted the traveler—when a glorious supper was spread before him,—turkey, venison, bear's meat, fresh butter, hot corn bread, sweet potatoes, apple sauce, and pumpkin butter."

Courts were held wherever it was convenient: a log cabin court house was a luxury; a room in a tavern was sometimes improvised for the purpose; even a room in a backwoodman's hut was, in an emergency, used, his Honor sitting on the bed instead of on the bench. There were few of what Shakespeare calls "the law's delay" in those primitive times. There were no "dilitory tactics," which, now, too often stop the wheels of justice.

Lewis Cass proved himself an able and ready advocate. His natural capacity enabled him to grasp legal distinctions and to master details, while his great industry, and regular business habits were important factors in contributing to his success at the bar. His reputation spread from county to county, and by the time he had been at the bar ten years, he was one of the leading lawyers of Ohio. He was often opposed by old and able men who were recognized as the foremost members of the bar of the northwest. In the matter of the impeachment of the judges, already mentioned, the State employed Henry Baldwin, the famous Pittsburg lawyer, to prosecute the case. The trial attracted wide attention on account of the standing of the accused, the great reputation of the counsel, and the importance of the issues involved. A vast crowd of people was present at the hearing. Baldwin, inspired by the extraordinary occasion, put forth all his powers of learning and eloquence, and, when he had concluded his great effort, the friends of the accused thought the door of hope was closed against the judges, and that their conviction must follow. The young advocate for the defence rose in the midst of a profound silence, and, after a few preliminary remarks, he entered into an unanswerable argument which carried away the court, the jurors, the people, and secured a complete victory for the accused judges.

After this great triumph, Lewis Cass had all the business he could attend to, as every person who got involved in the toils of the law thought himself safe if he could secure him as his advocate. With a great legal career opening before him, Lewis Cass turned away from the serene and peaceful life of intellectual renown to pursue the stormy but fascinating path of political honor. At first the military spirit took possession of him, and he was commissioned a colonel in one of the Ohio regiments raised in the war of 1812. His services were rewarded by being made a brigadier general

in the regular army. With his military career and political life this article has nothing to do. His active life as a lawyer ended at the age of thirty. Cass was a better lawyer than Clay, but he did not possess the wonderful eloquence of the great Kentuckian. Retiring from the bar so early in life, he did not have the opportunity to reach Webster's commanding position at the bar.

Lewis Cass was first, last and always an American, whether at home or abroad—whether fighting the English and the Indians on the frontiers of Canada, or fighting diplomatic battles in Europe—whether as the Democratic leader of the Senate, or as the chief of the War department, he had his country's best interest at heart.

This pioneer lawyer was a constant reader, and a strong, accurate writer on political, literary and historical subjects. During his long public life as Governor of Michigan, Secretary of War, Minister to France, United States Senator, and Secretary of State, he always turned to his books with pleasure, and his happiest hours were passed in the congenial atmosphere of his library.

HENDRICKSON v. COMMONWEALTH.

85 Kentucky 281.

By Henry Palmer.

"The sow is in the parlor, Man,
Get up and chase her out."
So spake the wife of Hendrickson,
A woman large and stout.

The night was cold, and Hubbie, rolled
In blankets warm, in bed,
Believed his spouse the sow could oust,
And that was what he said.

Now Wifie heard, with rage, his word,
And filled with awful grouch
She gave her love a horrid shove,
Which threw him from the couch.

That was enough. Hub, up to snuff,
Arose, and grabbed Wife's hair.
With wild shout, he pulled her out,
And *bit*, where she was bare.

Up jumped the wife; in heat of strife,
She seized the iron shovel.
She beat Hub's head until it bled;
Then *sat* on that poor devil.

But when he swore—He'd have her gore,
He'd cut her dog gon'd neck,
She fled in fright, out in the night,
Her night gown was a wreck.

Hub closed the door. A log or more
He placed to keep it shut;
Then he turned in, with a happy grin
And slept within the hut.

Next morning Wifie's corpse was found,
Frozen stiff upon the ground.

'Twas held—The Commonwealth must show,
The wife, by *fear*, was caused to go;

And that her fear was founded quite
On *reason's* grounds, not foolish fright;

And that her death, from these events,
Was quite the *natural* consequence.

This proved, then Hub would guilty be
Of Womanslaughter. Q. E. D.

THE LAW AT WADE'S FERRY.

By George O. Blume.

FOLK across the river in the town of Woolwich spoke lightly of their neighbors at Wade's Ferry when discussing topics which held a point of law, the reason being that the town of Wade's Ferry had been compelled by virtue of an old lawsuit to maintain a suitable ferry for transportation of all cattle, merchandise and human beings from said town of Wade's Ferry to Woolwich and *vice versa*. This obligation had been so irksome to the Ferry folk on account of the attitude of the citizens of Woolwich that the service had been sadly crippled, and each day added some fresh reason why the affairs should be straightened out satisfactorily to citizens of both towns. Although the town of Woolwich had the law with it, Wade's Ferry had the means of getting back and forth across a half-mile of sometimes roughish Kennebec River water. Needless to say that folk in Wade's Ferry had several times endeavored to have this decision set aside on account of the privilege not being appreciated, but without result. Thus things were when one hot day in August Uncle Asa Simpson drove down to the landing on the Woolwich side of the river and signalled for the ferry to take him across. This was done by hauling a white flag with a red centre aloft on a long pole.

Uncle Asa was the man who twice a week collected the cream for the creamery at Litchfield. This had to be ferried across the river and put on the cars at Wade's Ferry. The cream had been well iced, but the heat of the day had melted the ice, and Uncle Asa was anxious lest the cream should spoil. So after putting up the signal he spread a thick canvas over the cans to protect them from the sun's rays, climbed the lookout and waited. Lem Briry, who was detailed to act as ferryman, showed no sign of putting off. In fact this conversation was being held over in Wade's between Lem Briry and Nate Small, who had come down in the hopes that he might hook a "barss." "Who's washin' terday, Lem? Ain't hed much time ter dry yit, hez it?" "I 'low et ain't," says Lem; "don't seem ez ef them folks ever hez much washin'; they don't hang out more'n one piece et a time." After more than an hour had been spent in this manner, Lem spoke with, "Guess I'll go over 'n' help 'em tek it in ennyhow" meanwhile making preparations to hoisting the big sail and casting off, while Nate got out the big oar by which the craft was managed. There was no breeze and the motive power was furnished mainly by Lem and Nate by sculling with the long oar. However, they made the landing and were greeted by these words from Uncle Asa, backed up by Jed Peters and old Ma'am Hopkins, who had joined him shortly after his arrival at the landing. "I tell you whut, Lem Briry, ez fust selectman uv ther town uv Woolwich I'm a-goin' ter hev this thing looked into. I've been settin' here on this waggin nigh onto two hours arter I histed thet flag, with ten five gallon cans uv cream a-spilin' and whut ain't now fit fer nothin' but hogs." These remarks were supported by Jed Peters and Ma'am Hopkins, in much the same vein, but no reply was vouchsafed from either Lem or Nate as the party made ready to cross to Wade's Ferry. About a week after this occurrence suit was brought against the town of Wade's Ferry for damages; and an injunction also was asked restraining said town from operating said ferry by help furnished by citizens of said town. Law cases were uncommon in these parts, but whatever came up were ably handled by Trial Justice Kent, who presided in this instance. Court was held at Litchfield Plains, about a mile further up the Kennebec and where his Honor resided. The eventful day arrived late in August and the town meeting-house was crowded with citizens of the neighborhood eager to give testimony, discuss the case, or swap a "likely lookin' critter." The judge mounted to the bench, adjusted his steel rimmed glasses, and after expectorating an enormous quantity of tobacco juice slowly delivered himself of the following. "You fellows frum Wade's Ferry and Woolwich hev been knawing on this ferry bone fer quite a spell. There hain't no need uv callin' any witnesses 'cause ther court air already 'quainted with the facts. Bein' ez how one side 'lows et hez a privilege 'thout bein' able to exercise it, while t'other side contends they hadn't oughter hev any privilege. I've allus held thet folks et Wade's Ferry wuz like putty much in the same fix ez Sinbad the sailor and ef they hev carried the folks at Woolwich back an' forth doin' all ther work, payin' ther bills, an' abidin' by a decision which 'pears ter me warn't accordin' ter the statoots an' never did hold water anyhow, then I 'lows thet Wade's Ferry folks hez been the parties injured. Moreover, I shud 'vise folks et Woolwich ter build theirselves a ferry an' do their own ferryin'."

This was taken as final and so ended the case of Woolwich *v.* Wade's Ferry.

THE PARRICIDE AND JUSTICE.

An Historical Sketch.

By Charles Green Cumston, M.D.,
Of Boston.

IN glancing over the history of various nations, it will be readily seen that the extension given to the word parricide varies, and that usually it includes crimes that one would be astonished to find united under this rubric, if the etymology, which evidently signifies the murder of a father or a mother, should be accepted literally. Thus, for example, at Rome all kinds of murders were included under the word "parricidium," but it is, nevertheless, true, as we shall show, that the law had special applications for the chastizement of those who killed their father or their mother. At a later date, the word parricide became more precise in its meaning, and was confined to the murderer of members of his family and a curious enumeration of crimes qualified as parricide will be found in a work entitled *Praxis Rerum Criminalium*, by Damhouder, who lived in the 16th Century. This authority says that "Jurisprudence terms a parricide the murder perpetrated on relatives such as a father, mother, grandfather, grandmother, brother, sister, uncle, aunt, first cousin, wife, daughter-in-law, son-in-law, father-in-law, mother-in-law, *etc.* and all those who by a direct connection or by marriage may be assimilated to the preceding ones."

At the present time, the word parricide has become still more limited in meaning, and may be defined for all practical purposes as the murder of legitimate, natural or adopted fathers or mothers or of any other legitimate ascendant. The parricide is, consequently, the murder of legitimate direct ascendants, no matter what may be their degree, or persons holding a similar relationship, such as natural or adopted parents.

In antiquity several races were accustomed to kill their old, and this occurs at the present time among the savage tribes; but among all these people it is from love that the son kills his father, and it is filial piety that causes him to put an end to suffering in order to send his parent to join the shades of his ancestors in a better world. Among these people the parricide is usually a precept of religion, and among certain races, both ancient and modern, it is just this sentiment of filial piety that causes children to eat the flesh of their parents, as Herodotus told us of the Massagetæ, and as Letourneau has more recently shown of the Battas of Sumatra, who piously eat the bodies of their parents after having killed them. All these acts of savage tribes of the present time, which at first sight may appear revolting, simply indicate with what great respect they hold their ascendants.

If now we turn to the civilized nations, it will be immediately seen that filial love is no less deep, but that on account of civilization it shows itself quite differently in the form of an instinctive and universal horror of the parricide. In Greece, for example, this horror is expressed in the popular legends.

The *pater familias* was the direct and authorized descendant of the protecting gods of the family, and he was the pontiff of this religion, and for that very reason one can understand the respect that all members of the family had for him. Then again, when it is called to mind how great was the fear of the gods among the ancients, the exceptional rarity of the parricide can be easily imagined. This is so true that at a later date, when this antique cult of the ancestors disappeared, parricides began to increase in numbers.

The respect for the creators was so intense

that it would appear that the parricide was unknown in the early days of civilized society, and we will show further on that the Hebrew law, like the Grecian and Roman laws, did not take this crime into consideration, esteeming that it was an impossibility. At Athens, the first mention of a law for the punishment of a parricide only appears at the time of Solon. At Rome, this crime was unknown for a long time, if we may believe the most authentic historians. Plutarch and Seneca say that for nearly ten centuries this crime was exceedingly infrequent, if in reality it ever occurred, and Titus Livius goes as far as to affirm that the first parricide was committed by Publicius Malleolus, who killed his mother in the Roman year of 653. But beginning with the century of Augustus, parricides became so frequent, that in less than a century after the execution of Malleolus, Seneca wrote: "*Pessimo loco pietas fuit, postquam sæpius cullcos quam cruces vidimus.*"

The example of this most odious crime came from one of high birth, for Nero endeavored to rid himself of his mother by every possible means. Three times he tried to poison her and failed; he endeavored to drown her, and she saved her life by swimming. At last, he had her stabbed.

The study of the legislation of the various civilized people, at different epochs of their history, show that, if all the societies have invariably punished criminal acts by variable penalties, there is not a single crime, excepting regicide, during the troubled epochs of the formation of States, which has been more severely repressed than that of parricide.

It is so true that this crime has been considered the most odious, that the primitive people appear never to have known it, as I have already pointed out, so much so that they had not conceived the possibility of such on act. The Jewish laws do not mention it, but one can judge what might have been the chastizement of a parricide when one takes into consideration the punishment inflicted upon sons who were wanting in respect for their parents. A son who was guilty of serious disobedience to his parents was stoned (Deut. xxi. 18); he who injured his parents or attacked them in any way was punished by death (Exod. xxi., 17.; Levit. xx., 9; Deut. xxvii., 16). It was the same in Egypt, where the supreme crime, after that of outraging the gods, was to leave one's parents without a tomb. The Athenian laws are also dumb on the subject of parricide. Solon, that great legislator and philosopher whom history ranks highest among those who have made the social education of the Grecian race, formulates no law for this crime, which was reputed an impossibility, at a time, nevertheless, when a father had the right to sell his children.

At a later date, however, this monstrous crime began to be perpetrated; and according to Plato, the punishment was as follows:

"If anyone is unfortunate enough as to dare to voluntarily and with premeditation snatch the soul from the body of his father or of his mother, of his brothers or his children, such is the law that the mortal legislator will apply against his; he shall be condemned to death by the judges; the magistrates will have him executed by the public executioners, and his body will be thrown out of the city in a naked condition in a space designated for this purpose. All the magistrates, in the name of the entire State, shall carry a stone in the hand, and then throw it at the head of the cadaver, and will thus purify the entire State. He will then be carried beyond the limits of the territory, and there will be left without a tomb, according to the order of the law." This last disposition of the body was the most rigorous, because among the Greeks, as with several other nations, the supreme chastizement was to leave a body without a tomb, and it was to avoid this ignominious shadow cov-

ering his brother, Polynices, that Antigonus, that model of fraternal piety, buried the corpse in face of the orders of Creon, King of Thebes, and was condemned to be buried alive.

The parricide was quite as severely punished at Rome, but the law of the Twelve Tables had a special and particularly severe sentence for the one *qui parentem necaverit* by limiting in the sense of the law the word *parentem* to the father or the mother. The criminal had his eyes bound, and after having been sewn into a sack made of leather, was thrown into the Tiber or the sea.

At a later date, the law Pompeia increased the severity of the sentence in cases of parricide. The criminal, after having been beaten until blood flowed, was placed in a sack, and with him a dog, monkey, rooster and a viper, and he was then thrown into the Tiber or into the sea. Corvin, an old authority, has attributed a symbolic signification to the choice of these animals. For, according to him, the dog was the symbol of rage, the monkey represented man deprived of reason, the rooster was the symbol of wickedness because he often beats his mother, and the viper represented cruelty because when born it rends asunder the belly from which it is born. In whatever way one may accept this interpretation, it is none the less true that this punishment was both unique and exceptional. It was exclusively reserved for the parricide, and for a long time such criminals knew no other kind of death, but after a time they were condemned to be turned over to the beasts or burned at the stake so that these three kinds of punishment co-existed, and it would appear that they were the only ones employed during the early part of the Christian era.

During the Middle Ages, the horror inspired by the parricide did not diminish and the punishments inflicted were not lessened. Generally speaking, all the Latin countries used the same punishment as employed at Rome; the laws transported into the provinces of the empire by the Romans were preserved by tradition and custom governed the law. Other races, who were more fortunate, had their own codes, but regarding the punishment of the parricide, these codes generally copied the Roman law. Thus, in Spain, the Partidas, which date back to the 13th Century, simply reproduced the law of the Twelve Tables. In Italy the same ancient penalties were applied. However, at this time, they began to torture the guilty at the wheel and by fire.

In Germany, the parricide was punished according to the Roman custom. In Saxony especially, the ancient Germanic custom of delivering the parricide to his relations for the application of justice finally put took the place of Roman tradition. The criminal tied in a leather sack was thrown into a deep bog, which, according to an old journal, signifies that this custom was a symbolic one, namely, that the body of a parricide should not soil the sight of man, nor that of the sun. moon, the day or the night.

In France, as in Judea and in Athens, the ancient laws were silent regarding the parricide. The Capitularies of Charlemagne do not mention it, and a contemporary of Feudal France has said that there was no law which expressly mentions the crime of parricide, so that there were no other rules to follow than those established by the jurisprudence of decisions. As to the decisions, they closely followed the Roman tradition. It is probable that this was also the condition of the law in France in the 15th Century. We have more precise and complete notions relative to the matter given us by Damhouder in the work already alluded to, where it will be found that even at the end of the 16th Century nothing had been changed relative to the punishment of parricides either in France or in Holland. The applications of the law Pompeia and of Canon law, which was only a reproduction of the former as re-

gards the parricide, was still in vigor, but the difficulty of procuring the animals designated by the Roman law made it obligatory to submit the criminal to other chastizements.

They were often given over to wild beasts, but more commonly they were tied to a horse's tail or placed on a hurdle and were led in this detestable condition to the place of execution, where they were beheaded and then fixed to an elevated wheel. At the same time, their belongings were confiscated. It was even left to the initiative of the judge to increase the torture, if on account of the gravity or the circumstances attending the crime, it was considered necessary. Damhouder also tells us that the same penalty was applied in cases where death did not result from the criminal attempt, and even in those cases where there was only intention on the part of the criminal without the commencement of the execution of the crime. It is quite curious to note that the accomplices, particularly the druggist or the physician who gave the poison to the parricide for his crime, were also punished by the same sentence.

On the other hand, anger or weakness of the mind were not admitted as excuses for the crime, but were considered as implying a condition of irresponsibility, in which case the sentence of death was replaced by imprisonment. The latter punishment was only the means employed for the prevention of similar acts being again undertaken by the criminal.

Towards the end of the 16th Century, a considerable progress will be found to have been made in the jurisprudence of the parricide. In the 17th and 18th Centuries, the evolution which occurred in French society had its repercussion in the codes, and as a result it caused the barbarous antique laws to lose part of their influence, and it finally ended in the formation of the old French jurisprudence which was completely renovated at the Revolution. The sentences were still numerous and varied according to the atrocity of the crime and the social standing of the culprit of the parricide was always severely punished. In the first place, he was obliged to make an honorable attonement, and his right hand was cut off; then he was usually beaten until the blood ran; his body was burnt, and his ashes thrown to the winds. Oftentimes his lips were split open and his tongle cut out. Out of public decency, women were not submitted to punishment by the wheel; they were either hung or burnt. A few years before the Revolution, the Marquise de Brinvilliers was beheaded and was then thrown into a fire.

The terrible punishments and mutilations, old souvenirs of the ancient times, ceased to exist with the Revolution, and the death sentence was abolished under the Republic from the day of the publication of general peace, a promise that the law of 1791 never realized.

The sentence of death was still retained, and was even increased by other chastizements. The criminal who was condemned to death for parricide was conducted to the place of execution in his shirt, his feet bare and head covered with a black veil. He was exposed on the scaffold, while a sergeant read the conclusions of the court relative to his sentence to the people and immediately afterward the condemned was executed

If one examines the contemporary legislation of various countries, it will be found that parricide is more rigorously punished than other crimes. It is evident that the legislation in our own country, in England, Germany or Holland, have no special sentence for the parricide, treating the case as one of voluntary homicide, or murder in the first degree, but numerous other countries, whose codes take into consideration the bonds which unite the son to the father. consider them as a cause of increase of the severity of the punishment. For example,

in Italy, the crime of murder committed by a person aged from eighteen to twenty-one years, is punished by reclusion; from twenty-one to twenty-four years of age the murderer of an adopted father is punished by the same sentence, while the murder of a legitimate or natural father is punished by the sentence of hard labor until death, because capital punishment no longer exists in Italy. In Spain, the murder of the legitimate, natural or adopted parents, is punished by death, as is assassination, while ordinary murderers are only sentenced to life imprisonment in chains. In Austria the sentence for an ordinary murder is from five to ten years, while the parricide receives a sentence from ten to twenty years, when it is a case of murder in the second degree, but when there has been premeditation, he is condemned to death. The Swedish legislation considers the murder of parents as an aggravating circumstance, taking into consideration the bonds which unite the victim and his assassin.

FISHERMEN AND THE LAW.

By John J. O'Connor,
Of the Boston Bar.

EVER since the McGuire Act has called the attention of the great American public to the scandalous abuses which were in vogue on American vessels, the tendency of modern times has been along the lines of remedial legislation. Congress has time and again placed upon the statute books laws which provide for a revolutionary change in the treatment meted out to seamen in the past. The doctrine of involuntary servitude, which was in vogue, no longer holds sway over the lives and liberties of those who "go down to the sea in ships." By concerted action on the part of the sailors employed in our merchant marine, they have, through the instrumentality of their organized unions, worked out their own salvation. Now a fisherman is a sailor whose peculiar avocation calls for expert knowledge in that particular line, so that as well as being skilled in navigation, and the handling of sails, and doing all the work of an able-bodied seaman before the mast, he has to know how to catch fish in the most approved and expeditious manner. Then again, the contract between the master and the fisherman differs materially from the usual shipping articles which the sailor in the merchant marine signs before going on board his vessel; the latter contracts to give his services as an able-bodied seaman on board the vessel, and in return he is to receive a monthly wage which is agreed upon; he is to be accommodated with suitable quarters on board the vessel, and the food which he is to receive each day on the voyage and in port is fixed by acts of Congress; a scale of provisions so-called, is set out, and a copy thereof is hung up in the sailors' quarters of every American vessel; failure on the part of the master to supply the food as provided by the acts aforesaid and on proper demand by the seaman, is punishable by extra compensation to the seaman, which can be recovered as wages in the usual manner by proceedings *in rem* against the vessel, or by a suit against the master in *personam*. There is also a provision in our Federal laws against undermanning—which provides that "In case of desertion or casualty resulting in the loss of one or more seamen, the master must ship, if obtainable, a number equal to the number

of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or rating and equally expert with those whose place or position they refill."

Now the contract which the master of a fishing vessel makes with the fisherman, makes no stipulation as to a monthly wage; it is agreed that the fisherman shall receive an individual share of the profits of the sale of the fish caught on the trip; that is, the net profit after the expenses are deducted, and the owners' share is also taken out, so that the outfit and provisions are all supplied by the owner, and these are charged up against the general account and deducted as expenses for the running of the vessel.

Now if the trip should prove unsuccessful, as sometimes happens, instead of having any money due to them for their services, the members of the crew will be in debt to the owner. So we see the fisherman's life is a precarious one, and his share of the profits at the end of the voyage depends altogether on the amount of fish taken; and, of course, incidentally this is an incentive to concerted action and master and crew work with willing hands to get the biggest "take" possible, and get their cargo to market in the shortest possible time; the scale of provisions provided for on board American vessels does not apply to fishing or whaling vessels. Of course this would be explained to a certain extent, by showing that the sailors and captain on board of a fishing schooner are more or less co-partners, with the exception of a certain percentage which the captain receives from the owner of the vessel—otherwise he shares alike with the seamen. So that the provisions being charged to the general account, and everyone being interested, there is rarely, if ever, any cause for complaint in the matter of food supplies on fishing schooners. The provision in the Federal statute against undermanning does not apply to fishing schooners or vessels of any kind in the fishing trade.

The laws in relation to deserters are practically the same as on board all other vessels, the penalty being forfeiture of all clothing and effects, and all pay earned up to date, and, of course, in the fishing trade, a forfeiture of any share of any public allowance which may be paid as the result of the voyage.

One salient feature which marks a great difference is the different law in regard to the master's lien on the vessel in shipping on fishing vessels and in all other kinds. In the merchant marine, of course, the doctrine is a cardinal one, in regard to the wages of the seaman: he is the ward of the admiralty courts, and from time immemorial the learned judges sitting therein, in England and America, have promulgated this well-known doctrine: that the seaman's claim is regarded as a first lien on the vessel, which "adheres to it as long as a plank is left afloat;" hence, the greatest protection is given to the seaman, and the courts mindful of the proverbially careless happy-go-lucky character of the sailor, and his ignorance of business affairs such as shipping articles and the like, have examined with great care these contracts for seamen's wages, so as to safeguard the poor unwary seaman from the malicious designs of conniving, unscrupulous skippers, who would prey upon his credulity and ignorance. Who would seem to have the greatest reason to be entitled to more consideration than the seamen? We may well answer, the captain. He is the responsible party; his watchful eye has to see everything; the whole management of the vessel, and her best interests are intrusted to his control; and on his efficiency depends, in a great measure, the success of the voyage; when the storm is raging, and all the elements combined seem to make a terrific onslaught on the doomed vessel, and

word is given to lower the boats, and the cry is "*sauve qui peut*," the captain stands sadly on the deck of his loved vessel, which perchance under his watchful care has weathered many a gale, and sees that everyone else is saved before he leaves the ship.

Yet of all the seamen, cooks and firemen, engineers, *etc.*, the master is the only one who has no lien on the vessel for his wages and services. The general admiralty law denies to the master the lien it gives to the cabin-boy and to the sailor before the mast. But here we encounter another radical difference in the law in relation to vessels engaged in the fishing trade. The Federal statute provides that the master has a lien on the vessel, in common with all the others on board, who have a claim against it for wages or services.

This applies to a case where the usual contract has been made, and any fish caught on board a vessel are delivered to the owner, or his agent for cure, and sold by such owner or agent; then such vessel shall, for the term of six months after such sale, be liable for the master's and every other fisherman's share of such fish, and may be proceeded against in the same form and to the same effect as any other vessel, liable by law, may be proceeded against for the wages of seamen in the merchant service. This action in the admiralty courts does not preclude the fisherman, in common with all other mariners, from having his action at common law, for his share or shares of fish or the proceeds thereof.

Thus we see that in the case of fishermen there is a marked difference from that of the ordinary seamen in the merchant marine. A good deal of remedial legislation will be required to bring the status up to the level where every man will have a fair wage and good working conditions. From time immemorial the men who follow the sea have been the prey of the crimps and the land sharks, whose only interest in the sailor was to get his money in the most expeditious manner possible. But thanks to themselves and their organizations, sailors have, within the past few years, made wonderful strides toward success, and there are brighter and better days in store for them in the future. As there is no more dangerous calling, no occupation where the chances of disaster are more apparent, so it would seem meet and just that all men who love justice and fair play, should see with pleasure the trend of modern times, which gives those who follow this avocation a chance to fight life's battle like every other self-respecting wage earner, and to get a fair day's pay for a fair day's work. As one of the secretaries of the International Seamen's Union expressed it to me a short time ago, "the sailor is well cared for nowadays; the sailor's havens and missions, *etc.*, take care of his soul, and we take care of his body."

If the combined efforts of the two will help to uplift a most deserving open-hearted class of workers, and make life better and sweeter for them, they will have earned the undying gratitude of all those who love justice and are interested in the welfare of those who follow "a life on the ocean wave."

THE PENAL LAWS OF SAVAGE RACES.

By Andrew T. Sibbald.

IN legal customs analagous to those of the savage, or rather semi-civilized world, the legal institutions of civilized countries, their methods of procedure, of extorting truth, of punishing crimes seem to have their root. Similar interest attaches to the legal institutions of modern savages as attaches to the laws of the ancient Germanic tribes; the interest, that is, of descent or relationship.

The oath, for instance, of our law courts, presupposes in the past, if not in the present, precisely the same state of thought as the oath customary in Samoa; and the same virtue inherent in touching and kissing the Bible leads the Tunguse Lapp to touch and then kiss the cannon, gun, or sword, by which he swears allegiance to the Russian crown. The Highlander also, of olden time, kissing his dirk, to invoke death by it if he lied, is a similar instance of the survival of the primitive conception that physical contact with a thing creates a spiritual dependence upon it. The ordeal, the judicial test of witchcraft, still retains a foothold of faith among the English country people, as is proved by the fact that in 1863, an octogenarian died in consequence of having been "swum" as a wizard at Little Hedingham, in Essex. Then in the English law no person could inherit an estate from anyone convicted of treason, or from a suicide, which shows how naturally the savage law of collective responsibility, in reality so unjust, may survive into times of civilization, whilst the ignominy still attached to the blood relations of a criminal shows with what difficulty the feeling is eradicated.

If, then, the original standard of punishment was just that amount of severity which would suffice to prevent individuals seeking satisfaction by their private efforts, and avenging their own wrongs, it is intelligible that penal customs should be cruel in proportion to their primitiveness. It is distinctly stated that in Samoa fines in food and property gradually superseded more severe penalties. Yet, in the face of the greatly varying penalties found in very different conditions of culture, it is a subject on which it is difficult to lay down any rule. Sometimes murder alone is a capital crime, sometimes theft, witchcraft, and adultery as well; sometimes all or some of them are commutable by fine. Nor does it seem that, wherever an offence is punishable by fine, the penalty has been mitigated from one originally more severe. In some cases, the chief judges may have found it to their interest in assessing a more humane, and to themselves a more profitable, forfeit than that of life or limb; but savages living in the most primitive conditions seem to have been led by their natural reason alone to observe fitting proportions between crime and retaliation. For their punishments, in default generally of imprisonment or banishment, are not as a rule gratuitously cruel; and slavery, so common a punishment in Africa, far from being essentially cruel, is rather a sign of an amelioration of manners, of willingness to take the useful satisfaction of a man's labor in lieu of the useless one of his life. It would, indeed, seem that the severity of the penal code is rather a concomitant of growth in civilization, of stronger and deeper moral feelings, of a sense of the failure of milder means, than of a primitive savagery.

On the whole continent of America no savage tribe ever approached the Aztecs in cruelty of punishment, nor is it with people like the Mandans that we should ever find a death punishment assigned alike for the lightest as well as for the gravest crimes. It would be erroneous to suppose, because the laws of savages are unwritten or depend on usage alone for their preservation, that there-

fore they are entirely uncertain and arbitrary. On few points are the statements of travelers less vague than on the details of native penal customs. What the Abbé Froyart says of the natives of Loango may be said of all but the lowest tribes: "There is no one ignorant of the cases which incur the pain of death, and of those for which the offender becomes the slave of the person offended."

The laws of the Caffre tribes are said to be a collection of precedents of decisions of bygone chiefs and councils, appealing solely to what was customary in the past, never to the abstract merits of the case. There appears, it is said, to be no uncertainty whatever in their administration, the criminality of different acts being measured exactly by the number of cattle payable in atonement. So the customs reported from Ashantee manifest a sense of the value of fixed penalties. An Ashantee is at liberty to kill his slave, but is punished if he kills his wife or child; only a chief can sell his wife, or put her to death for infidelity; whilst a great man who kills his equal in rank is generally suffered to die by his own hands. A wife who betrays a secret forfeits her upper lip, an ear if she listens to a private conversation of her husband. The forms of legal procedure manifest no less regularity than the laws themselves.

In Congo, the plaintiff opens the case on his knees to the judge, who sits under a tree, or in a great straw hut built on purpose, holding a staff of authority in his hand. When he has heard the plaintiff's evidence, he hears defendant and witnesses. In default of witnesses the affair is deferred, spies being sent to gather ampler information and ground for judgment from the talk of the people. In the public trials of Ashantee the accused is always fully heard, and is obliged either to commit or exculpate himself on every point. On the Gold Coast a plaintiff would sometimes defer his suit for thirty years, letting it devolve on his heirs, if the judges, the *caboccros*, from interested motives, delayed to grant him a trial, and thus obliged him to wait, in hopes of finding less impartial or else more amenable judges in the future.

Several rules of savage jurisprudence betray curiously different notions of equity from those of more civilized lands. The Abbé Froyart was shocked that, on the complaint of the missionaries to the King of Loango of nocturnal disturbances, round their dwellings, the King should have issued an ordinance making the disturbance of the missionaries repose a capital crime. The reason the natives gave him for thus putting slight offences on an equality with grave ones was, that in proportion to the ease of abstinence from anything forbidden, or of the performance of anything commanded, was the inexcusableness of disobedience, and the deserved severity of punishment. Again, impartiality with regard to rank or wealth, which is now regarded among English speaking people as a self-evident principle of justice, as a primary instinct of equity, is by no means so regarded by savages; for not only is murder often atoned for according to the rank of the murderer as on the Gold Coast or in old Anglo-Saxon law, on the basis, apparently, of the value of his loss in death, but such difference of rank sometimes enters into the estimate of the due punishment for robbery.

Thus the Guinea Coast negroes thought it reasonable to punish rich persons guilty of robbery more severely than the poor, because, they said, the rich were not urged to it by necessity, and could better spare the money-fines laid on them. The Caffre law distinguishes broadly and clearly between injuries to a man's person and injury to his property, accounting the former as offences against the chief to whom he belongs, and making such chief sole recipient of all fines, allowing only personal redress where the man's property has been damaged. Thus

Caffre law divides itself into lines bearing some analogy to those of our criminal and civil law; such offences as treason, murder, assault, and witchcraft entering into the criminal code, and constituting injuries to the actual sufferer's chief; whilst adultery, slander, and other forms of theft, enter, as it were, into the civil law, as injuries for which there are direct personal remedies.

The almost universal test amongst savages of guilt or innocence, where there is a want or conflict of evidence, is the ordeal.

The identity of many ordeals among different peoples, such as that by fire and water, is probably due to the readiness into which such tests would suggest themselves to the imagination. He who, holding fire in his hand, said the Indian law, is not burnt, or who, diving under water, is not soon forced up by it, must be held veracious in his testimony on oath; and the same was the idea in China and Africa, as well as in Europe. That these ordeals were traditionally preserved by the shamans or priests as one of the sources of their power, derives probability from their close analogy to the judicial ordeals invented and administered by the priests of early Europe. As in Europe after the fifteenth century the oath of canonical purgation gradually displaced the older systems of ordeals, so it would seem that in savage life, too, the judicial oath succeeds in order of time the judicial ordeal.

The witness in a modern English law court invoking upon himself divine wrath if he swears falsely by the book he kisses, preserves with curious exactitude the judicial oath of savage times and lands.

To understand the binding force of oaths among savages it is necessary to observe how closely connected they are with savage ideas of fetichism. The hair or food of a man, which a savage burns to rid himself of an enemy, is no mere symbol of that enemy so much as in some sense that enemy himself. The physical act of touching the thing invoked has reference to feelings of causal connection between things, as in Samoa, where a man to attest his veracity would touch his eyes, to indicate a wish that blindness might strike him if he lied, or would dig a hole in the ground to indicate a wish that he might be buried in the event of falsehood. In Kamschatka, if a thief remains undetected, the elders would summon all the ostrog together, young and old, and forming a circle round the fire, cause certain incantations to be employed. After the incantations the sinews of the back and feet of a wild sheep were thrown into the fire with magical words, and the wish expressed that the hands and feet of the culprit might grow crooked, there being apparently a connection assumed between the action of the fire on the animal's sinews and on the limbs of the man. And in Sweden there are still cunning men who can deprive a real thief of his eye, by cutting a bow and arrows into the representative feature. Perhaps the best illustration of this feeling is in the practice of the Ostiaks, offering their wives, if they suspect them of infidelity, a handful of bear's hairs, believing that, if they touch them and are guilty, they will be bitten by a bear within the space of three days. Among the Nomad races of the north, three kinds of oaths are said to be common.

Firm, however, as is the savage belief that the consequences of perjury are death or disease, escape from the obligation of an oath is not unknown among savages. On the Guinea Coast recourse was had to the common expedient of priestly absolution, so that when a man took a draught-oath, imprecating death on himself if he failed in his promise, the priests were sometimes compelled to take an oath, too, to the effect that they would not employ their absolving powers to release him. In Abyssinia, a simpler process seems to be in vogue; for the cross, thus addressed his servants: "You see King, on one occasion, having sworn by a

the oath I have taken; I scrape it clean away from my tongue that made it." Thereupon he scraped his tongue, and spat away his oath, thus validly releasing him from it.

In conclusion, I would state that savage penal laws appear to be as fixed, regular, and well known, as inflexibly bound by precedent, as often improved by the intelligence of individual chiefs as penal laws are in more advanced societies.

TWO JERSEY TALES.

By Lladnyt.

DOWN in Cumberland County, there is an incident, oft related by both lawyers and laymen with great dramatic effect, which concerns the De Vecnion brothers, who, during their lives were at the head of the Maryland bar. When Thomas died, his administrator found his books in a rather confusing condition. One unsettled claim was for a large sum against a client for whom the deceased had labored long and successfully and to the detriment of other business. During the trial to recover payment, the defendant took every opportunity to belittle and scoff at the recognized ability and integrity of the dead lawyer. No attention, however, was paid to him by the other side. Finally, the brother arose to sum up. He related in detail the services of his brother and the estimation in which they were held by the community. At almost every word he was interrupted by the sneers, hisses and scoffing of the heartless defendant. Finally, unable to longer endure the taunts of the dead man's defamer, De Vecnion turned his livid, grief-stained face toward the defendant, and with tears coursing down his cheeks, exclaimed: "*Sneer if you will, for the brain that thought for men; the tongue that talked for men; and the hand that wrought for men are now at rest beneath the sod of the valley.*" De Vecnion sank down overcome with grief. It seemed to those present as if the spirit of the maligned man had come from the earth and solemnly spoke the word.

In Eastern Jersey, the quick-witted exploits of a certain county prosecutor with a military handle to his name are still told with zest by his professional brethren. One day the General was pursuing his favorite sport, hunting, in season and out of season, but a few miles from his home and had bagged several quail and rabbits when an old and irate farmer came up and demanded the game and damages. The General was willing to pay for the trespassing and for the game but would not release his booty. The farmer then took the General by the shoulder and walked him to the office of a justice of the peace and made a complaint. But to the farmer's horror, his prisoner declared emphatically that he had not been trespassing. He, himself, and none other, was the owner of that farm; and he made a countercharge against the real owner for disorderly conduct. The justice was about to proceed with the hearing when the General declared that since the title to land was in question his court would have no jurisdiction and he must send it up to the court of common pleas. Amazed beyond expression the irate farmer engaged a lawyer and learned that it might cost him five hundred to conduct his suit and that if he did, it would possibly throw a cloud on his title. That anyone should question his title to his own land, worked for fifty years by himself, was a puzzle to the yeoman; and he gladly sought out the General and compromised. Nor was his astonishment the less to find his prisoner the Prosecutor of the Pleas for his county.

JUSTIFIABLE RESCISSION.

By Joseph M. Sullivan,
Of the Boston Bar.

THE little court-room at Barry's Corner was crowded to the doors with village folk, and one and all eagerly awaited the calling of the court calendar. The clerk called the case of Hannah Donovan against Timothy McCauley, and both sides answered ready. Lawyer Tim O'Rouke read the pleadings, and in a simple way told the court of the heartlessness of the defendant. Attorney Barney Gilligan for the defendant admitted the promise to marry, but said that he would offer evidence of a justifiable rescission of the contract.

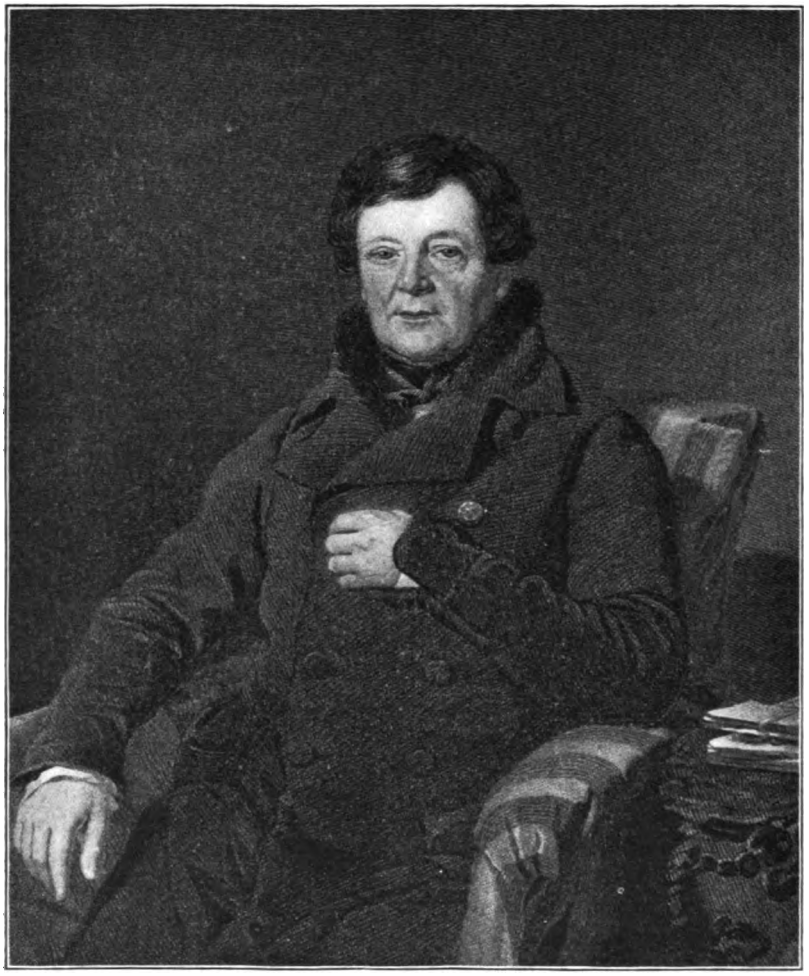
"Hannah Donovan, the plaintiff," testified that she was ready and willing to marry the defendant and that he made an unconditional promise to marry her, which promise the defendant grossly violated.

Cross-examined by Lawyer Gilligan for the defence, the plaintiff admitted that she desired her three maiden sisters to reside with her after her marriage, to which proposition the defendant objected, and in consequence thereof the marriage fell through.

"The plaintiff in the action," began Judge Houlihan, in summing up, "admits to an age iv thirty-eight years, an' is clearly at the harvest period iv love. She is just hangin' on to the gutter iv the house iv love, and the feller she scorned whin she was twenty-two, she will hould in a vise at thirty-eight should he happen to put in an appearance. Some fellers' hearts are like doughnuts; whin Cupid slings his darts they go through the hole, an' don't find any resting place. There are two fellers you can't bate making love an' winning hearts; it is the lad who carried her slate to school, an' the star boarder or lodger who pays his way in advance. They are professionals at wimmins' hearts; all the rest iv us are novices. Ivery one gits a dowry iv some soort; if the bride is rich, you git the money; if she is poor, your father-in-law will settle the rist iv the family on you to support. Wimmin can git around a man like a cooper round a barrel; they pritind to give a man his own way just to pacify him, but in reality he is only in the same condition as a tethered animal, he occasionally gets to the ind iv his tether, but the wimmin retain complete control iv all his actions unbeknownest to himself.

"Laundries and delicattessen stores are to blame for the increase in old bachelors; the wimmin dodge the washing, and that manes a hundred dollars a year more for washing, or the equivalent iv four months' rint, an' they are beginning to dodge cooking, an' a twentieth-cintury groom wakes up an finds himself without a laundry or a larder at home, an' for all intints an' purposes he might as well be wedded to a Chinese laundry or a frankfurt establishment.

"Now ivery man knows that whare three ould maids are to live under the one roof there's bound to be throuble; they would be chattering like magpies all the day long, and poor Tim would eventually have to ind his days in an asylum. Hannah encountered a legal Norman's Woe whin she put conditions on a contract which was otherwise absolute; she should have performed her part iv the contract an' thin had her sisters come to live wid her afterwards, but not doing so, I must find that she did not offer her heart in fee simple to Tim, but gave him a contingint remainder, an' my finding must be that there was no mating iv minds an' there must be judgment for the defindant."



DANIEL O'CONNELL.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

IX.

By Van Vechten Veeder,
Of the New York Bar.

AFTER an era of comparative tranquility the Chartist movement appeared. The Reform Bill of 1832 was really a class movement, and the vague discontent among the mass of the people soon concentrated in the movement for further reform, to which Daniel O'Connell gave the name "Chartism." The principal points of the "charter" were manhood suffrage, annual parliaments, vote by ballot, abolition of the property qualification for members of Parliament, payment of members, and division of the country into equal electoral districts. The movement was backed by much enthusiasm and intelligence, accompanied, as usual, by an undercurrent of feeling in favor of violent measures. In connection with any considerable external complications this agitation might have attained serious proportions. But the government, profiting by past experience, met the emergency, upon the whole, with good sense and discretion. Reasonable reforms were conceded, and in so far as its claims were visionary and unreasonable, Chartism died from public exposure.

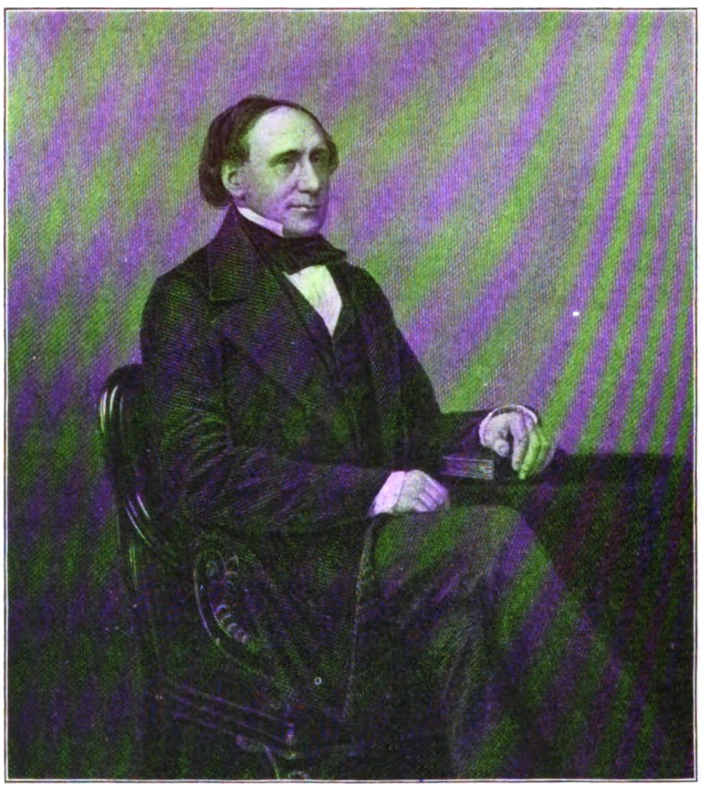
The judicial history of Chartism may be said to begin with the trial of Frost in 1839. Vincent's imprisonment at Newport in that year was the occasion of an attempted rescue which certainly approached armed rebellion. On November 4, 1839, a force of nearly ten thousand workingmen, most of them armed in some way, marched to Newport, apparently without any definite design. But eventually, some five thousand men, under the leadership of Frost, attacked an inn occupied by a small detachment of troops. The mob was dispersed with a loss of thirty lives, and Frost and two others were brought to trial for treason (4 St. Tr., N. S. 85).

Frost was a respectable trader of Newport, who had been a local magistrate, but had been deprived of his commission in consequence of his intemperate participation in the Chartist movement. His trial is in every way interesting. Chief Justice Tindal presided with a dignity and fairness worthy of the best traditions of the English bench. Attorney-General Campbell, Solicitor-General Wilde, and Sergeant Taulford prosecuted for the crown. Sir Frederick Pollock and Sir Fitzroy Kelly defended Frost. The indictment contained the usual counts charging levying war against Her Majesty, with intent to depose her and to compel her to change her measures. In spite of the very able and impassioned defense the prisoners were convicted. The jury undoubtedly took the view that there was sufficient ground to suppose an ulterior purpose of setting in motion a great rebellious movement. In consequence, however, of an irregularity in the delivery of the list of crown witnesses, the death penalty was commuted to transportation for life.

In the Chartist prosecutions from 1839 to 1843, the law relating to seditious conspiracy and unlawful assembly was formulated upon modern lines by such judges as Patterson and Rolfe. Whenever a body of persons meet together in such a manner and under such circumstances as reasonably to excite terror and alarm in the neighborhood the assembly is unlawful. The most instructive trials are those of Stephens (3 St. Tr., N. S. 1149), Feargus O'Conor (4 *ib.* 935), and Cooper (4 *ib.* 1249).

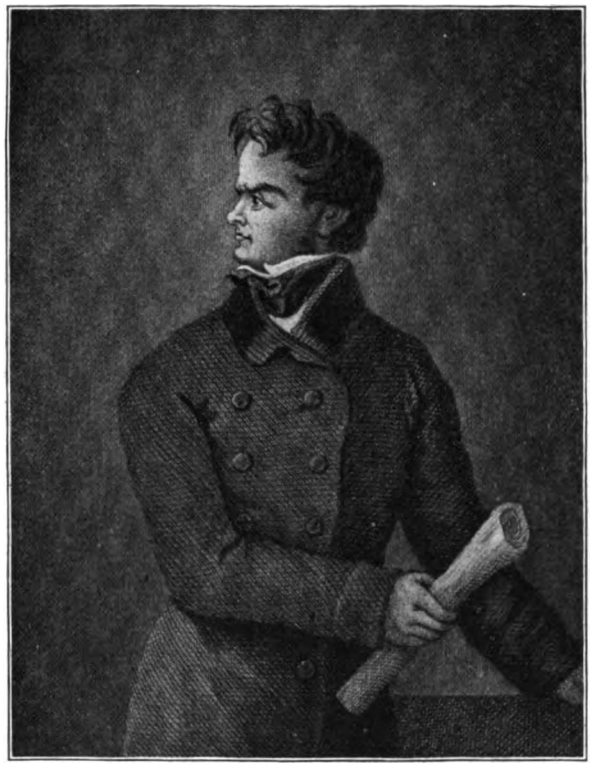
As long as there were no foreign complications Chartism aroused no serious fears in England. But the condition of affairs in

Ireland in 1843, taken in connection with the disturbances at home, alarmed the government and caused it to make a false move. The agitation in Ireland for repeal of the union with England had been conducted under Daniel O'Connell's guidance, through monster meetings, but without violence. The government at last determined to interfere with these assemblies, and issued a proclamation prohibiting a proposed meeting at Clontarf, in October, 1843. O'Connell acquiesced and instructed his people to obey, and the meeting was not held. While this act of O'Connell's showed his power, it undoubtedly impaired his influence with the younger and more turbulent element, which afterward organized the Young Ireland movement of 1848. Not content with suppressing public meetings the government foolishly prosecuted O'Connell and eight others for conspiring to raise disaffection and hatred of the government (5 St. Tr. 1). Their trial in the Irish Court of Queen's Bench in 1844 was in every way a great cause. The indictment itself covered fifty-eight folio pages, and charged fifty-eight overt acts. Sixteen counsel appeared for the defense. The attorney-general spoke eleven hours in opening the case. Counsel for the defense spoke for eight days. The solicitor-general closed with an argument lasting nearly three days. Chief Justice Pennefather's charge to the jury occupied a day and a half. Having agreed upon their verdict, after five hours' deliberation, the jury occupied nearly as much time in settling it so as to conform to the eleven



JAMES WHITESIDE

counts of the indictment, and succeeded so badly in their uncommon pains as to make their verdict void. From the very beginning of the case the government's procedure was unfortunate. The prosecution objected to all Catholics whose names were called as jurors. An error on the part of the sheriff in making up the jury list had already materially reduced the number of Catholics entitled to serve, so that in the end a great Catholic leader was tried by a jury composed of Protestants. O'Connell addressed the jury in his own behalf, but his speech lacked his usual power. Some of the speeches for the defense are worthy of the best traditions of Irish eloquence. Richard Lalor Sheil was dramatic, sparkling and epigrammatic; Jonathan Henn and Richard Moore were deep, logical and convincing. But the crowning effort of this great cause was the speech by James Whiteside; impassioned but philosophical, although fervent, always pertinent and persuasive, this is one of the greatest arguments ever made in a court of justice. In the end the jury returned a verdict of guilty, and O'Connell was sentenced to one year's imprisonment, and fined £2000. O'Connell carried the case to the House of Lords, where the English judges were consulted. The voluminous indictment contained counts which all the judges of the Court of Queen's Bench in Ireland held good and all the English judges pronounced bad. As judgment had been entered and sentence passed upon good and bad counts alike, Denman, Cottenham and Campbell, a majority of the law



RICHARD LALOR SHEIL.

peers (Lyndhurst and Brougham dissenting) held that the whole judgment was vitiated, and O'Connell was discharged (5 St. Tr., N. S. 1).

Animated by the continental revolutions of 1848 a young and enthusiastic Irish element broke away from O'Connell's peace policy and openly advocated revolution. The plan was to excite the passions of the people to such a pitch that the government would be forced to arrest the leaders of the movement, when the people would rise to rescue them. In consequence of John Mitchell's fulminations in the *United Irishman*, the government passed the Treason Felony Act of 1848, making all written inducement to insurrection or resistance to the low felony, punishable with transportation. Mitchell, O'Doherty, Martin and others were tried under this act and sentenced to various terms of transportation (6 St. Tr., N. S. 599 *et. seq.*). O'Brien, Meagher, and other leaders, soon came into open conflict with the authorities, and were forthwith tried and convicted of high treason (7 St. Tr., N. S. 1). Absorbingly interesting as these trials are in almost every other respect, they present no conspicuous legal problems. The prisoners had been taken in open rebellion, and although Whiteside made an impassioned argument on the theory that the uprising was for personal, rather than for general public purposes, there could be no doubt of their guilt. They were perfectly frank in their statements. When O'Brien was asked if he had anything to say why sentence of death should not be passed upon him, he replied: "My lords, it is not my intention to enter into any vindication of my conduct, however much I might have desired to avail myself of this opportunity of doing so. I am perfectly satisfied with the consciousness that I have performed my duty to my country; that I have done only that which, in my opinion, it was the duty of every Irishman to have done; I am prepared now to abide the consequences of having done my duty to my native land. Proceed with your sentence."

"Even here, where the thief, the libertine and the murderer have left their footprints in the dust—here on this spot where the shadows of death surround me, and from which I see my early grave in an unconsecrated soil is opened to receive me—even here, encircled by those terrors, the hope which beckoned me on to embark upon the perilous sea upon which I have been wrecked, still consoles, animates, enraptures me. Judged by the law of England, I know that this crime entails upon me the penalty of death; but the history of Ireland explains this crime, and justifies it. Judged by that history, I am no criminal; you [turning to McManus] are no criminal; you [turning to O'Donaghue] are no criminal; and we deserve no punishment. Judged by that history, the treason of which I stand convicted, loses all its guilt, has been sanctified as a duty, and will be ennobled as a sacrifice."

During the next few years following the Irish insurrection of 1848, Chartism and the Young Ireland movement crossed each other, and there were several State prosecutions for conspiracy and unlawful assembly in which the prisoners were often implicated in both. The principal cases were those of Fussell (6 St. Tr., N. S. 723); Jones (*ib.* 783); Dowling (7 *ib.* 381); Cuffey (*ib.* 467); O'Donnell (*ib.* 637), and Rankin (*ib.* 711.) The Fenian movement of 1866 was simply a repetition of Irish insurrection of 1848.

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

V.

War Correspondents, Wireless Telegraphy and Submarine Mines.

By Amos S. Hershey,
Associate Professor of European History and Politics, Indiana University.

THE Russo-Japanese War has given rise to several interesting and important questions bearing upon the rights and privileges of neutrals in warfare which are wholly new and unprecedented in the history of International Law. In dealing with these questions it may be well to call attention to the fact that the discussion of such topics must necessarily be more or less tentative in its nature, inasmuch as we cannot appeal, in support of our views, to the authority of eminent publicists or jurists or to the force of precedents in international practice. In the absence of such guides we must fall back upon the general or fundamental principles of our science or seek for analogous cases in the history of International Law.

The first of these questions relates to the rights of war correspondents and the use of wireless telegraphy in neutral waters.

The head of our State Department must have been considerably surprised to receive the following note from Count Cassini, the Russian ambassador at Washington, on April 15, 1904. "I am instructed by my Government, in order that there may be no misunderstanding, to inform your Excellency that the Lieutenant of his Imperial Majesty in the Far East[1] has just made the following declaration:—In case neutral vessels, having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwan-tung, or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes."[2] It is believed that a similar, if not identical, note was communicated to the other Powers,[3] which was thus in the nature of a general notification to the whole world. After a careful consideration of this announcement on the part of the Russian Government that it proposes to treat as spies any newspaper correspondents falling into its hands who have been engaged in the collection or transmission of news on the high seas by means of wireless telegraphy, our Government appears to have wisely decided to defer action or formal protest until a case

[1] Admiral Alexieff

[2] For the text of this note see the London *Times* (weekly ed.) for April 22, 1904. Cf. N. Y. *Times* for April 16th. The two versions differ slightly in phraseology, but not in purport.

[3] This is true, at least in the case of the British Government. The British note does not seem to have been given to the Press, but on April 22d, Earl Percy, Under-Secretary of State for Foreign Affairs, gave an account of Admiral Alexieff's order in the House of Commons which differed from the American version in a very important respect. He spoke of "correspondents who *are* communicating information to the enemy," instead of "who *may* communicate, *etc.*" "There is," as Lawrence (*War and Neutrality in the Far East*, p. 85) says in commenting upon this apparent discrepancy, "all the difference in the world between being in a position to do an act and actually doing it." In the latter case, *i. e.*, if the war correspondent on board the *Haimun* had actually communicated news to the Japanese, he would have been guilty of having performed an unneutral service for which he would have rendered himself liable by way of penalty to the loss of his ship and apparatus, although even in this case, he would not have been subject to the treatment of a spy. We have accepted the American version and assumed throughout our discussion that there is no question of unneutral service.

of violation of neutral or American rights had actually arisen.[1]

The Russian note to the Powers appears to have been provoked by the presence in the Yellow Sea and adjacent waters of a British war correspondent equipped with a De Forest wireless telegraph apparatus[2] on board the Chinese dispatch boat *Haimun*. This vessel, which is in the joint service of the London and New York *Times* and which flies the British flag, had been cruising about the Gulf of Pe-Chi-li and adjacent waters as near to Port Arthur as practicable and was sending its dispatches by means of wireless telegraphy to a neutral station at the British port of Wei-hai-Wei whence they were transmitted to London and thence to New York. The *Times'* correspondent declared that his messages, being in cipher, could not be recorded either by Russian or Japanese instruments, that they all went to a neutral cable office, that he had never been in Russian waters, and that all of his dispatches had been sent either in neutral waters or on the high seas.[3]

War is now regarded as an abnormal or exceptional relation between States, and the presumption, even in time of warfare, is always in favor of the laws of peace and therefore of the rights and privileges of neutrals in their peaceful relations with each other and with belligerents. "Unless proof to the contrary is shown, neutral States and their subjects are free to do in time of war between other States what they were free to do in time of universal peace."[4]

If we apply this fundamental principle of the Law of Neutrality to the subject under discussion, it will at once be seen that not a word can be said in favor of this absurd and monstrous innovation upon the rights of neutrals. The Russians appear to have defended Admiral Alexieff's order on the ground that "the correspondent on board the *Haimun* regularly transmitted to Che-Foo intelligence of all the outgoings and ingoings of the Russian fleet at Port Arthur" and that "the information thus conveyed might obviously have been of the highest value to the Japanese."[5] It also appears from Count Cassini's note that the fact that the use of

[1] The Russian Foreign Office was notified, however, that "the United States reserves all the rights she may have under International Law in the event of any American citizen being affected." This notification did not involve a protest on the part of our Government against the Russian proclamation. The United States Government is said to have been the only one to reply to the Russian note, although this can, of course, not be a matter of definite knowledge. Russia appears to have given assurances to the British and American Governments that she did not contemplate any immediate action in respect to the execution of her threat. It is not definitely known whether the British Government has made any representations to Russia in regard to this matter, but Lord Lansdowne is reported to have expressed the opinion that the attitude of Russia is "unjustifiable and altogether absurd." See N. Y. *Times* for April 22. 1904.

[2] Several of the operators are said to have been Americans.

[3] See his letter in the N. Y. *Times* for April 19. 1904. It is worth noting that the Japanese have also attempted to control, or at least influence the movements of the *Haimun*. In a communication printed in the N. Y. *Times* for May 16th, the *Times'* correspondent says that on April 17th he received a communication from the British Minister at Tokio to the effect that he was requested by the Japanese military authorities not to proceed north of the Che-Foo—Che-mul-po line until further notice. He remarks that his position is difficult in the extreme. He is threatened with capital punishment by one belligerent and warned off the high seas and neutral waters by the other. He chose, however, to submit to the wishes of Japan out of deference to former courtesies on the part of the Japanese. These restrictions on the movements of the *Haimun* appear subsequently to have been at least partially removed by Japan.

[4] Lawrence, *Principles*, p. 474. It is unnecessary to multiply references upon this general and fundamental principle of the Law of Neutrality, which may be regarded as fully established since the close of the eighteenth century. "Till then belligerents were, on the whole, more powerful than neutrals, and were able to carry on their wars with slight regard to the sanctity of neutral territory or the convenience of neutral commerce." Lawrence, p. 475. For the earlier practice and theory, see especially Hall, Pt. IV., c. 2.

[5] From the *Novoe Vremya*, quoted in the N. Y. *Times* for June 8, 1904.

wireless telegraphy had not been "foreseen by existing conventions" seemed to the Russian Government to afford ample justification for such an unwarranted attack upon the rights of neutral individuals. In other words the presumption is assumed to be in favor of the rights of belligerents and against the rights of neutrals—a total misconception and reversal of one of the fundamental principles of modern International Law. Under existing law it would as a matter of fact require an International Convention to prohibit, or even to restrict, the use of wireless telegraphy on the high seas or in neutral territory.

In view of their ever-growing importance, it is somewhat surprising to note that the status of war correspondents is one which is seldom even touched upon by publicists on International Law.[1] The "Instructions for the Armies of the Government of the United States in the Field," prepared by Dr. Francis Lieber and issued by the Secretary of War in April, 1863, declare that "citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such."[2] This provision was incorporated into the "Rules of Military Warfare" adopted by the Brussels Conference of 1874.[3] The Code adopted by the Institute of International Law at its Oxford session in 1880 merely declares in favor of detention in case of necessity. It provides that "persons who follow an army without forming part of it, such as correspondents of newspapers, sutlers, contractors, *etc.*, on falling into the power of the enemy, can only be detained for so long a time as may be required by strict military necessity."[4] The "Regulations Respecting the Laws and Customs of War on Land" adopted by the Hague Conference in 1899, declare that "individuals which follow an army without directly belonging to it—such as newspaper correspondents and reporters, sutlers and contractors—who fall into the enemy's hands, and whom the latter see fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army which they were accompanying."[5]

It will thus be seen that, according to existing international practice, the severest treatment which can possibly be meted ont to a war correspondent captured on belligerent

[1] The only publicists amongst those consulted by the writer who even refer to the status of war correspondents are Bluntschli (§§594-96 and notes), Hall (note on p. 404 of 3d ed.), and Lawrence (p. 336). Bluntschli says that a military occupant (or invader) has the "right to detain persons, who, without belonging to the army and exercising pacific functions, are dangerous to the army of occupation," amongst whom he includes journalists whose opinions are hostile. He is also of the opinion that non-combatants, *e. g.*, newspaper correspondents, contractors, etc., attached to an army which has surrendered or to troops which have been captured. may be made prisoners at least provisionally, but he thinks they ought not to be retained as prisoners of war unless "their presence in the camp of the enemy constitutes a support to the latter or a danger to the Power which has captured them." Hall seems to think that newspaper correspondents should only be detained for special reasons. Lawrence suggests that "probably the worst that could happen to them if captured in civilized warfare would be expulsion from the lines of the captors."

[2] Section III., §50 of the "Instructions." For the text of these Instructions, see *e. g.*, the Appendices to Tucker and Wilson's *International Law* and Snow's *Cases*.

[3] "Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, *vivandiers*, contractors, *etc.*, may also be made prisoners of war. These persons should, however, be furnished with a permit, issued by a competent authority, as well as with a certificate of identity." Art. 34 of the Rules of the Brussels Conference. For the English text, see App. III. to Tucker and Wilson.

[4] Pt. II., §22, of Hall's translation of the Oxford Code. For text, see App. II. in Wilson and Tucker. Cf. §21, of translation in App. to Snow's *Cases*. For the French text of the Oxford Code, see *Tableau Générale de l'Institut de Droit Int.*, pp. 173-190.

[5] Art. 13. See Holls *Peace Conference*, 148.

territory, who conducts himself properly and who has been furnished with the proper credentials, is that to which prisoners of war are entitled. In no case can he possibly be treated as a spy. "An individual can only be considered a spy if, acting clandestinely, or under false pretences, he obtains, or seems to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."[1] The business of a newspaper correspondent, at least as usually conducted, answers none of these requirements. In fact this definition of a spy adopted by the Hague Conference—expressly, or at least impliedly, excludes them from this category.

But it may be said that the use of wireless telegraphy introduces a new factor into this problem. War correspondents have hitherto been more or less subject to control, and it is clearly within the right of a belligerent either to exclude them altogether from belligerent territory or to place them under such supervision as may be necessary in order to control their actions. But the invention of wireless telegraphy has made it possible for them, under certain circumstances, to operate either on the high seas or on neutral territory[2] to an extent which was impossible before. If the use of wireless telegraphy on the high seas may be injurious to belligerent interests, might we not also conceive cases in which it would be equally injurious if operated on neutral soil? Now would any one go so far as to maintain that a war correspondent, operating either by means of wireless telegraphy or any other system on neutral territory, could be seized and treated as a spy, or even held as a prisoner of war? A belligerent has undoubtedly the right to prohibit or prevent the transmission of cable messages (and wireless telegraphy is only a means of accelerating the transmission of messages) on belligerent territory (including the three mile limit). So he would also probably have the right to interrupt submarine telegraphic cables extending between enemy and neutral territory at any point within his own territorial jurisdiction or within that of the enemy. But he would have no right to interfere with submarine telegraphic communication between two neutral territories.[3]

But in view of the possible injury which may result to belligerents from the use of wireless telegraphy on the high seas or on neutral territory, some concessions should perhaps be made to military necessity provided neutral rights and interests are not seriously impaired. Interference with wireless messages on the high seas might under certain circumstances be permitted to belligerents, as also the seizure and confiscation of wireless telegraphy apparatus as contraband of war,[4] and neutrals should certainly refuse

[1] Art. 29 of the "Regulators Respecting the Laws and Customs of War on Land," adopted by The Hague Conference. See Holls *op. cit.*, p. 153 Cf. the definitions of a spy contained in the American Instructions (§88), and the Rules of the Brussells Conference (§19). They are couched in terms almost identical with those employed by The Hague Conference.

[2] It has been reported on newspaper authority that the Russians have been trying to use the Chinese port of Che-Foo for the transmission of wireless messages from Port Arthur. See *e. g.*, New York *Times* for June 9 and 11, 1904. This is a case of the use of neutral territory by a belligerent for a military purpose, but newspaper correspondents might conceivably make similar use of a neutral station.

[3] See Art. 5 of the Naval War Code, prepared by Captain Stockton of the United States Navy, and issued as General Orders No. 551 on June 27, 1900. For text, see App. VI. in Wilson and Tucker. Cf. the rules on submarine cables adopted by the Institute of International Law in *Annuaire*, XIX., p. 331.

[4] It may be noted that M. Pillet, Professor of International Law at the University of Paris, is quoted as having expressed a similar opinion in respect to the liability to seizure and confiscation of wireless telegraphy apparatus as contraband of war. See *Army and Navy Journal* for June 4, 1904. The same opinion is expressed in the *Saturday Review* for April 23, 1904. It is worthy of especial notice in this connection that Russia has placed telephone and telegraph material in her list of contraband of war.

Lawrence (*War and Neutrality in the Far East*, p. 92) suggests that "power should be given by

to permit the use of their territory for military purposes.[1]

The second question relates to the menace to neutral rights and the danger to the safety of neutral persons and property which, it is feared, exists from the placing of submarine mines in Eastern waters.

In the latter part of May it was reported that the Russians at Port Arthur had sown the whole strait of Pe-chi-li with floating blockade mines. "Not only have these diabolical machines been placed off their own shores and in their own waters, but it is reported that launches and junks have been sent out to drop mines at night or in fogs in waters likely to be used by the Japanese war ships and transports. These mines have drifted into the high seas and Chinese waters where they constitute the gravest danger to neutral shipping."[2] It is feared by experts[3] that these mines may be a menace to the lives and property of neutrals for some time to come, and that they may get out into the great ocean currents and drift into all or any portions of the Pacific Ocean.

These charges against the Russians cannot be said to be fully proven, but there is certainly a strong presumption of carelessness in the laying of these mines or of negligence in controlling them after they were laid. It is true that our information is unofficial, but there appears to be sufficient evidence of the existence of such mines in the open sea.[4]

international convention to exclude the vessels of correspondents for a time from any zone of sea in which important warlike operations were in process of development." "Each belligerent," he says, "should have a right to place an officer on board a newspaper steamer to act as censor of its messages, and the penalty for persistent obstruction and refusal to obey signals should be capture and confiscation." We do not see the necessity for such an extension of the rights of belligerents and encroachment upon the rights and privileges of neutrals. The phrase, "zone of warlike operations," is very vague, and the penalty appears to us to be unduly severe. Why punish an act which is harmless and innocent in itself by means of a penalty which is usually reserved for those engaging in unneutral service?

[1] Lawrence (*op. cit.*, p. 200) also properly suggests that neutral Powers ought to prevent the receipt of messages on their territory from a blockaded garrison, as in the case of the alleged Russian communication between Che-Foo and Port Arthur. He cites the refusal of the British authorities of a request by the United States for permission to land a cable at Hong Kong from Manilla during the Spanish-American War in 1898, on the ground that "to grant such facilities would be a breach of neutrality." But it may be well to call attention to the fact that this refusal to permit the use of neutral territory for military purpose rests upon a well-established principle of International Law, and would not apply to the use of neutral cable stations by war correspondents.

For useful or suggestive discussions or editorials on "War Correspondents and Wireless Telegraphy," see especially *Harper's Weekly* for April 30, 1904; *Army and Navy Journal* for May 21; New York *Times* for April 16-19; London *Times* (weekly ed.) for April 22d; A. Maurice Low in *The Forum* for July-September, and Sir John Macdonnell in *Nineteenth Century* for July, 1904 See also Lawrence, *War and Neutrality in the Far East*, pp. 83-93 and pp. 199-202.

[2] Special cablegram to the London and New York *Times*, published on May 23, 1904.

[3] See, *e. g.*, *The Scientific American* for June 4, 1904, and the *Army and Navy Journal* of the same date.

[4] The *Haimun* claimed to have passed two of these mines within two miles of Wei-hai-Wei, *i. e.*, nearly one hundred miles from Port Arthur, on May 22d. Twenty-one similar mines are said to have been discovered by vessels in various parts of the Gulf of Pe-chi-li and the Yellow Sea. The correspondent of the London *Express* at Wei-hai-Wei estimated in the latter part of May that there were some four hundred mines floating in or near the Gulf of Pe-Chi-li. The Japanese, judging from newspaper reports, seem to have been kept busy for some weeks in removing Russian mines from these waters, but the correspondent of the Chicago *Daily News* reported the discovery of a freshly-painted contact mine in the Gulf of Liaotung as late as June 20th. Insurance rates in London are said to have risen in consequence of the increased risks resulting from the fear of these mines. See New York *Times* for May 26, 1904.

The Japanese battleship *Hatsuse* is generally supposed to have been blown up by such a mine on May 15th, at a distance of ten miles from Port Arthur, although it has also been suggested that this vessel may possibly have been destroyed by a Japanese mine or by a mine accidentally adrift. It has been pointed out that such a disaster might equally have happened to a neutral trading vessel cruising in those waters. The Russian battleship *Petropovlovsk* had been destroyed by a Japanese mine on April 13th, but this occurred on the outer roadstead of Port Arthur, *i. e.*, in territorial waters.

Either these mines were deliberately laid or set adrift on the high seas, or they were insecurely fastened in territorial waters and drifted from their anchorage out into the open sea.[1]

There appears to have been no official or semi-official denial of these charges on the part of the Russian Government, although they cannot be said to be fully established. Russians are said to justify such action on the ground that everything is permissable in war except those things which are specifically forbidden by convention or International Law.[2] It has also been suggested that, because of the immensely increased range of modern guns, it is necessary to enlarge the three mile limit for purposes of defence. It is argued that "if ships can now lie eight or ten miles away and yet reach the coast with their projectiles, the defenders have a perfect right to take such military measures as they choose within the range of the enemy's guns."[3]

In reply to the Russian argument that everything is permissable in war except those things specifically forbidden by International Law or Convention, it is sufficient to repeat that, as in the case of the proposal to prohibit or punish the use of wireless telegraphy on the high seas or of any other new and unauthorized interference with the rights of neutrals, the presumption should always be in favor of neutral rights and privileges or of the laws of peace. In order to render such acts unlawful, it is not necessary that they be specifically forbidden; for their *prima facie* illegality may be deduced from general and fundamental principles. The sea is the common property and highway of all nations. It is open to belligerents and neutrals alike; but, in cases in which there is a conflict of rights or interests between the two, the presumption ought always to be in favor of neutrals.

All authorities on International Law[4] who

[1] It may be that the Japanese, too, are not wholly free from guilt in this matter of laying mines on the high seas or of negligence in securely fastening them in territorial waters; for it is known that they have been laying mines for the Russian fleet at several points outside Port Arthur (whether inside or outside the three-mile limit is not clearly stated), some of which are said to have been improperly anchored and found adrift in April and May. See New York *Times* for April 17th and May 20th. But it would be absurd to suppose that the Japanese would have filled the Gulf of Pe-chi-li and adjacent waters with mines to their own great danger and inconvenience. Indeed, they seem to have been put to no small expense and effort in freeing these waters from these obstacles to the freedom of their movements.

It appears that our State and Navy Departments have instituted an investigation in order to ascertain whether and to what extent it is true that these mines constitute a menace to neutral navigation. Our ministers at St. Petersburg and Tokio have been instructed to look into the matter, and our naval attaches are supposed to be engaged in finding out what truth there is in these reports. This information, it is said, is to be placed in the hands of the General Naval Board, which is then to submit its views to the President, who will, if deemed advisable, make the proper representations to the belligerents. See New York *Sun* for May 25, 1904

[2] This is according to the St. Petersburg correspondent of the London *Express*. See Chicago *Tribune* for May 25, 1904. It appears, however, that M. de Plehve, the late Russian Minister of the Interior, in an official communication issued privately, protested vigorously against the alleged action of the Japanese in laying floating mines in the roadstead of Port Arthur, on the ground that "the wholesale scattering of these engines of destruction at points where they may easily drift into the path of the marine commerce of the world, to the common danger, can in no wise be regarded as admissible." St. Petersburg dispatch to the St. James *Gazette*, published in the New York *Times* for May 26, 1900.

[3] St. Petersburg dispatch in Indianapolis *Journal* for May 27, 1904.

[4] The following is a list, as complete as we have been able to make it, of those who are reported as having expressed opinions on this subject: Admiral Horsey, Sir William Walrond, M. P., Professor Moore of Columbia, Professor Woolsey of Yale, Professor T. E. Holland of Oxford, Dr. Arnold Jarvis, Sir John Macdonnell, Sir Frederick Pollock, Bart, Rev. T. J. Lawrence, and M. Pillet of the University of Paris. See London and New York *Times* for May 24-28, 1904. For the opinion of M. Pillet, see the *Army and Navy Journal* for June 4th.

For useful editorials or newspaper discussions, see London and New York *Times* for May 24-31, 1904; New York *Evening Post* for May 24th, or New York *Nation* for May 26th; New York *Sun*

have thus far been quoted on this subject are, so far as we are aware, unanimously of the opinion that if either or both of the belligerents in this war have been guilty of deliberately sowing any portion of the high seas with floating mines, they have, to put it mildly, been guilty of a gross violation of the laws of civilized warfare and of International Law. The majority of these authorities seem to be of the opinion that this is the case whether the mines were anchored or intentionally set adrift outside of the three mile limit. If neutrals were to suffer injury from mines which are accidentally adrift or which have floated out into the open sea in consequence of having been insecurely fastened in territorial waters, there would seem to be good ground for a claim to damages; if, on the other hand, it should be proved that the mines had been deliberately placed there, severe measures should be taken by neutral Powers.

There can, of course, be no question, in the present state of license in the use of submarine mines and torpedo boats[1] and other highly destructive weapons of modern warfare but that states have a right to employ these devices in their own harbors and territorial waters (as also in those of the enemy) within the three mile limit, provided that the life and property of neutrals and non-combatants be not carelessly or wantonly jeopardized.[2] It is also probable that they have the

for May 26th; Indianapolis *Journal* for May 27th; London *Spectator* and *Saturday News* for May 28th; *Army and Navy Journal* for May 28th and June 4th; *Scientific American* for June 4th; *Bradstreets* for May 28th; *Public Opinion* for June 2d; *Berliner Nachricht* for May 29th, and *Die Woche* for June 4th.

"If these mines were deliberately floated into waters where they would be liable to endanger neutral ships, the act was undoubtedly inadmissable." Professor Moore in New York *Times* for May 25th. "Mines, whether anchored or intentionally set adrift in the Strait or Gulf of Pe-Chi-li, beyond the coast sea limit, constitute an undiscriminating attack upon neutral and belligerent alike, and are, therefore, illegitimate." Professor Woolsey in the New York *Times* of the same date.

"The laying of mines in the open sea beyond the territorial waters would seem, not only inhuman, but a breach of International Law and practice. . . . If it should prove true that the destruction of the *Hatsuse* was effected by a mine wilfully placed in the open sea, ten miles from land, the act appears to me one of wholesale murder, and its perpetrator *hostis humani generis.*" Admiral Horsey in London and New York *Times* for May 24th.

"It is certain that no international usage sanctions the employment by one belligerent against another, of mines or other secret contrivances which would, without notice, render dangerous the navigation of the high seas." Professor Holland in London and New York *Times* for May 25, 1904.

"Every belligerent is free, I take it, to destroy his opponent's vessels in territorial waters or on the high seas by all customary means, including the use of mines. If, in an attempt to sink an enemy's ship, he accidentally destroys neutral property, there would be an unanswerable claim for damages done on the high seas. . . . If, on the other hand, and I hesitate to believe it, mines are scattered broadcast in waterways outside territorial limits, neutrals who suffered would have just cause to complain. Such conduct, if persisted in, would afford ground for remonstrance, and, it might be, extreme measures." Sir John Macdonnell in London and New York *Times* for May 25th.

"If a mine-field was deliberately created out in the open ocean by the Russians, in such a position that it was as likely to destroy a peaceful neutral as an enemy's warship, words fail to express the reprobation with which the act must be regarded. It is not only illegal, but cruel to the highest degree." Lawrence, *War and Neutrality in the Far East*, p. 107.

The only discordant note which we have detected in this general chorus of denunciation, at least on the part of British and American authorities, is that voiced by Admiral Sir Cyprian Bridge of the British Navy. See London and New York *Times* for May 31st. Officers of the British Navy are said to be opposed to any limitations upon the rights of naval warfare. Officials of our own War and Naval Departments do not seem to entertain such fears or prejudices. See New York *Times* for May 25th.

[1] Count Mouravieff's proposal to "prohibit the use, in naval warfare, of submarine torpedo-boats or plungers, or other similar engines of destruction," and of "new explosives, or any powders more powerful than those now in use," did not meet with the approval of the majority of the States represented at The Hague Conference. See Holls, *Peace Conference*, p. 26 and pp. 94-95. This does not, however, affect neutral rights, as the New York *Nation* (May 26th) seems to think.

[2] Neutrals using or approaching these ports or waters are entitled to notice or warning. Whether such notice or warning should be general or specific would probably depend upon circumstances.

right to use these weapons outside of territorial waters, *i.e.*, on the high seas, with the specific aim of injuring or destroying, or of obstructing and impeding, the movements of an enemy fleet, provided no injury which can possibly be avoided result to neutrals.[1]

Centuries of practice show that belligerents have an undoubted right to engage in battle on the high seas. Neutrals must take cognizance of this right and keep out of the range of the guns, as well as abstain from impeding or obstructing the movements of the vessels of either belligerent. Belligerents cannot be held responsible for injury to a neutral resulting from the latter's own carelessness or intrepidity. On the other hand the belligerent should be held to strict account for any injury to neutrals which has resulted from his (the belligerent's) own carelessness or negligence, or from the use of weapons, such as sub-marine mines, the existence of which, in that particular locality the neutral had no knowledge. Even if notified; neutrals could hardly be expected to take cognizance of the existence of mines on the high seas within what has loosely been termed the "theatre or zone of warlike operations." This would be a new and hitherto unheard of restriction on the rights of neutrals which could not be imposed without an international agreement, the enactment of which should be resisted to the utmost by all seafaring nations.[2]

In respect to the argument that, owing to the increased range of modern artillery, the three mile limit ought to be increased for purposes of defence, it may be admitted that there is much force in this contention. For the protection of besieged fortresses like Port Arthur, it would certainly seem only fair to the besieged that the three mile limit be extended in their behalf and that they be allowed every means of defence (and these include mines) permitted by the laws of warfare at any point within the range of modern guns. Such is not the law[3] however, and a change in the law would require an international agreement or a complete change in international practice.[4]

The three mile limit or the marine league was originally based upon the principle first clearly enunciated by the Dutch jurist Bynkershoek[5] in the early part of the eighteenth century to the effect that the sovereignty or jurisdiction of a State over the seas extends no farther than its power to defend the sea coast by force of arms extends—*terrae dominium finitur ubi finitur armorum vis, i. e. quousque tormenta explodunter.* The range of the cannon of that day seems to have been about a marine league or three geographical miles and this distance became the generally, if not universally, recognized limit of territorial waters in the course of the eighteenth

[1] Such injury, if not due to the fault of the neutral, would undoubtedly justify a claim for damages. There is, I think, this difference between the rights and privileges of neutrals on the high seas and in territorial waters. On the high seas it is a right, and the presumption is in favor of the neutral; in territorial waters, it is a privilege, and the presumption is in favor of the belligerent.

[2] It may be that there are exceptions to the principles enunciated above. For example, a belligerent would probably have the right to defend the anchorage of its vessels or to block up the ships of the enemy by the use of mines.

[3] But even if this were the law, it would not justify the placing of mines in the open sea, *e. g.*, in the neighborhood of Wei-hai-Wei, or such acts as the blowing up of the *Hatsuse* ten miles southeast of Port Arthur.

[4] "The United States cannot admit that Spain, without a formal concurrence of other nations, can exercise exclusive sovereignty upon the open sea beyond a line of three miles from the coast. . . . It cannot be admitted that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. This right to a jurisdiction of three miles is derived, not from his own decree, but from the law of nations." Sec. Seward to M. Tessara, Dec. 16, 1862, and Aug. 10, 1863. See Wharton's Dig. I., §32, pp. 102-103.

[5] De Domino Maris, c. 2. This work was published in 1702 or 1703. Cf. the vaguer statements of Grotius (Lib. II. c. 3, §§ 13, 14) and Vattel (Liv. I, c. 23, §289).

century. In the course of the nineteenth century the rule of the marine league appears to have completely supplanted the principle upon which it was originally based and, instead of being extended to meet the demands of new modern guns of ever-increasing range, it remained always the same until it is now as fixed and unalterable as the laws of the Medes and the Persians in spite of the protests of publicists and the efforts of statesmen.[1] There can be no doubt but that an extension of the three mile limit for all territorial purposes would be highly desirable. The marine league no longer satisfies the demands of modern requirements of defense. An extension to meet these requirements is certainly favored by an ever-increasing majority of modern publicists and has been strongly recommended by the Institute of International Law.[2]

It is highly desirable that these questions and many others, more particularly those relating to neutrality, contraband, and naval warfare, be discussed and, if possible, settled, by an International Congress or Conference before or soon after the close of the present war while the interest in such questions is still keen and the memory of its events fresh and vivid. In respect to the questions immediately under discussion in this paper, it may be said that any claims for damages which may arise should be referred to arbitration, preferably to the Hague Tribunal;[3] but to wait until injury has actually resulted to neutral individuals or to neutral property before laying down the rule to be followed in such cases would not seem to be the part of wisdom or sound policy. Precautions should be taken in time and any evil consequences which might follow upon uncertainty as to the rule ought to be averted, if possible. In respect to the laying of submarine mines, the very least that neutral States have a right to demand is that these highly dangerous explosives be restricted to territorial or belligerent waters; or if they are placed upon the high seas for any purpose whatsoever, that they be anchored in such a way that they can not possibly become a menace to neutral vessels. In all such cases neutrals should receive due notice and the mines should be carefully removed after the special purpose for which they have been placed there has been fulfilled.

[1] The majority of modern publicists appear to favor an extension of the three-mile limit, but some of them do not seem clearly to distinguish between the present three-mile rule and the principle upon which it was originally based. Amongst those who may be cited as favoring an extension of the present rule or as holding that Bynkershoek's principle is, or ought to be, the ruleof International Law, are Beuntschli, §302; Fiore, §788; Calvo, I., §356; P. Fodere, II., §§630ff; Hautefouille, I., 89, 239; Ortolan, I., c. 8; Heffter, §75; Rivier, I., Liv. III., c. 1, §10; Phillimore, Pt. III., c. 8; Hall, §41; Taylor, §247.

In 1806 the American Government attempted to obtain a recognition of a six-mile limit from England, but refused to acknowledge the validity of a claim of six miles made by Spain to the coast of Cuba in 1863. But in the following year (1864) Sec. Seward proposed a zone of five miles to the British Legation at Washington. The British Government has, however, always insisted upon the three-mile limit.

The three-mile limit has the sanction of a considerable number of State and International Acts or Conventions, *e. g.*, the Russian Prize Rules of 1869, the British Territorial Waters Jurisdiction Act of 1878, the North Sea Fisheries Convention of 1882. the Convention of Constantinople relating to the Suez Canal of 1889. For list of treaties, see Calvo, I., p. 479.

[2] The Institute of International Law, at its Paris session in 1894, after an exhaustive discussion of this question, gave a decisive majority (there was no division of opinion as to the desirability of extending the three-mile limit) in favor of a zone of six marine miles for all territorial purposes and of permitting neutral States to extend it still farther in time of war for the purpose of defending its neutrality against a belligerent Power, provided the range of cannon was not exceeded. The maritime Powers were recommended to hold an International Congress for the purpose of adopting these and other rules but no such Congress has ever been held. See *Annuaire de l'Institut de Droit International* for 1894-95, pp. 281-331.

[3] The Hague Tribunal is an international court for the decision of actual disputes between nations. It has power to declare law, but not to legislate in the ordinary sense.

THE LAW AND PROCEDURE IN "THE MERCHANT OF VENICE."

By J. B. Mackenzie.

THE first point which occurs to a controversialist, pursuing this not unprofitable, if academic, theme, is: would an action for the default chargeable against Antonio have lain at the Jew's instance? Could he possibly have appealed to the maxim—progenitor of the action on the case—*Ubi jus ibi remedium;* or, as we have this article in our Palladium of civil rights expressed in Coke upon Littleton, *Lex non debet deficere conquerentibus in justitia exhibenda*—a free translation of which is,—the law wills that, in every case where a man is wronged and endamaged, he shall have a remedy?

It has been generally conceived that Shakespeare, whenever he deals with legal matters, imports English jurisprudence into his plays. We cannot reasonably impute to him such a knowledge of the more abstruse principles of law as would qualify him to determine whether or not a grievance, redress for which might be obtained from a court of justice, had an adequate basis of fact for its support. In this particular case, the comedy itself, as well as the origin of the plot, supplies evidence that the dramatist had not the temerity to bring his own country's law into request for the maintenance of his infirm position. Under that law, the plaintiff would have been rudely impaled on both horns of the prescription, *ex turpi causa, ex dolo malo, oritur non actio.*

Portia, immediately after her salutation by the Duke, observes to Shylock, "Of a strange nature is the suit you follow; yet in such rule that the Venetian law cannot impugn you, as you do proceed." Again, when Bassanio implores her to abate the law's rigor, she replies, "It must not be; there is no power in *Venice* can alter a decree established; 'twill be recorded for a precedent, and many an error, by the same example, will rush into the State; it cannot be." She utters finally, in the speech adjudging confiscation of Shylock's wealth, and asserting his life to be at the Duke's disposal, the formula, "It is enacted by the law of *Venice.*"

It will, doubtless, be answered that, as nobody was concerned with any law but such as might exist in Venice, Portia, as mouthpiece for the Duke, would naturally speak as she did. The writer, notwithstanding—efficacy no less distinct being attainable through an unspecific declaration—believes that Shakespeare, meant to do nothing more at best than retail his understanding of the Venetian Code.

Now, it cannot be affirmed, with any certainty, that so novel a wrong as that for which Shylock demanded compensation was cognizable by a court of Venice. One would imagine that, with the moral sentiment imparted by such a centre of erudition as Padua—a quarter to which every nation of the world looked for instruction—a suitor advancing a plea grounded in virulence as great as that exemplified by the Jew's claim, could hope for no relief from any forum acknowledging its influence, or espousing its ideals.

In the English *Gestæ Romanorum*, a chronicle prepared in the reign of Henry VI., there is a story, from which it has been confidently declared that Shakespeare borrowed his conception, "of a knight who loved a lady" having applied to a merchant for money, and secured a loan, on the condition "that thou make to me a charter of thine owne blood, in condicion that yf thowe kepe not the day of payment, hit shalle be lefulle to me for to draw away alle the flesh of thy body froo the bone with a sharpe sword."

This will be observed to be a much handsomer benefaction than the Shylockian penalty; but there is no means, of course, of telling whether the account records a genuine transaction. Presently, coming a suppliant to the judge for her lover, she is reminded by him that it is law of the Emperor "*that whosoever bindeth him with his own proper will and consent, without any constraining, he should be served so again.*"

It would seem to be going pretty far to interpret such a proposition as upholding the theory that a man, as the foundation of a contract between them, may consent to his own death at the hands of another. It is one thing to affirm that a person may, by some voluntary act, relieve a fellow-being of criminality, in the matter of injury to fall upon himself, and another to maintain a civil court to be open to him, where he might enforce his right against the person licensing him to do the injury. Portia, indeed, by the judgment she delivers towards the end of the trial-scene, makes it clear that Shylock, on this very ground, never had any status as a litigant proceeding under his bond. She lays it down that "if it be proved against an alien that by direct or indirect attempts he seek the life of any citizen, the party against which he doth contrive shall seize one-half his goods, the other half comes to the privy coffers of the State, and the offender's life lies in the mercy of the Duke only, 'gainst all other voice; in which predicament, I say, thou stand'st; for it appears by manifold proceeding that indirectly, and directly, too, *thou hast contrived against the very life of the defendant.*" All must concede the necessity, by way of anti-climax, for a dramatic, irrevocable turning of the tables upon Shylock; and this the playwright may not have been able, by any less radical method, to achieve.

The writer leaves this branch of the speculation by tendering his opinion that the barrier to enforcement of the forfeiture interposed at an early stage of the trial by Portia was the sheerest puerility.

Had Shylock possessed a remedy at law, the mere incident of the shedding of blood, in pressing it, would have been treated as a condition, *of necessity*, before the minds of the contracting parties when the bargain was made. More than this, Portia is found to remark "this bond doth give thee here no jot of blood." Would not the true doctrine be, that, in the absence of words in the instrument prohibiting the drawing of blood, such inevitable consequence of a knife's dividing the flesh must be read into it?

The next element is the jurisdiction. Passing over the point that he united in his own person executive and judicial functions —a thing sanctioned, perhaps, by the period, but which has not been illustrated among civilized nations for many centuries—the judgment, surely, could have been avoided on the ground that the Duke, even though the fact may have been unknown to him, was guided by a partial assessor. Portia, wife of the man for whom Antonio became surety —a circumstance enough in itself to have disqualified her—goes over the matter privily with Bellario—her cousin, as we are told in the play—who had not only been apprized of her intimate concern with the business, but agreed, moreover, to be a party to the deception—if there was deception—practised on the Duke by accrediting a woman as his substitute. In the letter which Portia dispatches to the learned Doctor, she begs him, as the instructions given to her servant reveal, to vouchsafe her both his mental and sartorial furniture; "and look what *notes* and *garments* he doth give thee bring them, I pray thee, with imagin'd speed, unto the trancet, to the common ferry which trades to Venice."

He could not, in any event, have doubted that he was not treating with a member of the bar, or even one of his own sex. The

ranks of the profession in Venice or Padua were not so overcrowded as to make it possible for him to be ignorant that a fraud was being played upon him by Portia. The underhand game that was resorted to leads to the inquiry, could the judgment have stood after it had been made to appear that the assessor—the real judge—was incapacitated, both through her course of action, and by reason of her gender, from discharging the duties of the office? There lurks a suspicion in the writer's mind that the Duke had not been left in the dark with regard to Portia's designs. How did she learn, in advance, that Bellario was to be his assessor? And could he, any more than Bellario, have been unaware that *Portia* was *not Balthazar?* The identity of a practitioner, "the greatness of whose learning," as Bellario's letter says, "I cannot enough commend," and of whom her encomiast adds that he "never knew so young a body in so old a head," ought not to have been difficult to verify. It rather looks as if the Duke had allowed Portia to name the assessor; and that she fixed upon Bellario as one whom—if not already manipulated by her—she felt satisfied she could bend to her purposes; that, in reality, the Duke knew every detail of the arrangement.

But the palpable bias exhibited by the character of the sentence forms the strongest argument for the belief that he was in her confidence throughout. When Antonio prefers the monstrous request that Shylock should change his faith, in return for the merchant's partial relinquishment of his right to a moiety of his creditor's possessions, the Duke at once falls in with it, backing his compliance with the announcement that, unless the Jew does so, "I do recant the pardon that I late pronounced here."

THE EARLY WATCH.

THE establishment of those people who are obliged to keep watch in the streets of cities during the night belongs to the oldest regulations of police. Such watchmen are mentioned in the Song of Solomon, and they occur also in the Book of Psalms. Athens and other cities of Greece had at least sentinels posted in various parts; and some of the *thesmothetæ* were obliged to visit them from time to time, in order to keep them to their duty. At Rome there were *triumviri nocturni, cohortes vigilum, etc.*

The object of all these institutions seems to have been rather the prevention of fires than the guarding against nocturnal alarms or danger; though in course of time attention was paid to these also. When Augustus wished to strengthen the night-watch, for the purpose of suppressing nocturnal commotions, he used as a pretext the apprehension of fires only. The regulations respecting these watchmen, and the discipline to which they were subjected, were almost the same as those for night-sentinels in camps during the time of war; but it does not appear that the night-watchmen in cities were obliged to prove their presence and vigilance by singing, calling out, or by any other means. Signals were made by the patrols alone, with bells, when the watchmen wished to say anything to each other. Singing by sentinels in time of war was customary, at least among some nations; but in all probability that practice was not common in the time of peace.

Calling out the hours seems to have been first practised after the erection of city gates, and to have taken its rise in Germany;

though, indeed, it must be allowed that such a regulation would have been very useful in ancient Rome, where there were no clocks, and where people had nothing in their houses to announce the hours in the night time. During the day people could know the hours after water-clocks had been constructed at the public expense, and placed in open buildings erected in various parts of the city. The case seems to have been the same in Greece; and rich families kept particular servants, both male and female, whose business it was to announce to their masters and mistresses certain periods of the day, as pointed out by the city clocks. These servants, consisted principally of boys and young girls, the latter being destined to attend on the ladies. It appears, however, that in the course of time water-clocks were kept also in the palaces of the great; at any rate, Trimalchio, the celebrated voluptuary mentioned in Petronius, had one in his dining-room, and a servant stationed near it to proclaim the progress of the hours, that his master might know how much of his lifetime was spent; for he did not wish to lose a single moment without enjoying pleasure.

There were no clocks among the ancients which struck the hours, as has been already said; and as water-clocks were both scarce and expensive, they could not be procured by laboring people, to whom it was of most importance to be acquainted with the progress of time. It would, therefore, have been a useful and necessary regulation to cause the watchmen in the streets to proclaim the hours, which they could have known from the public water-clocks, by blowing a horn, or by calling out.

It appears, however, that people must have been soon led to such an institution, because the above methods had been long practised in war. The periods for mounting guard were determined by water-clocks; at each watch a horn was blown, and every one could by this signal know the hour of the night; but there is no proof that these regulations were established in cities during the time of peace. Cicero, comparing the life of a civil with that of a military officer, says: "The former is awakened by the crowing of the cock, and the latter by the sound of the trumpet." The former, therefore, had no other means of knowing the hours of the night but by attending to the noise made by that animal.

With the exception of Paris, the police establishment in cities is more modern than one might suppose. It appears that night-watching was established in the above-mentioned city, as at Rome, in the commencement of its monarchy. De la Mare quotes the ordinances on this subject of Clothaire II., in the year 595; of Charlemagne, and of the following periods. At first the citizens were obliged to keep watch in turns, under the command of a *miles queti*, who was called also *chevalier*. The French writers remark on this circumstance that the term *quet*, which occurs in the earliest ordinances, was formed from the German words *wache*, *wacht*, the guard or watch; and in like manner several other ancient German military terms, such as *bivouac*, *landsquenet*, *etc.*, have been retained in the French language. (Bivouac, from the German *beiwacht*, is an additional night-guard during a siege, or when an army is encamped near the enemy. *Landsquenets* were German soldiers added by Charles VIII. of France to his infantry, who were continued in the French army until Francis I. introduced his legions). In the course of time, when general tranquillity prevailed, a custom was gradually introduced of avoiding the duty of watching by paying a certain sum of money, until at length permanent *compagnies de quet* were established in Paris, Lyons, Orleans, and afterwards in other cities.

The establishment of single watchmen, who went through the streets and called out

the hours, was peculiar to Germany. In Berlin, the Elector John George appointed watchmen in the year 1588, but in 1677 there were none in that capital, and the city officers were obliged to call out the hours. Montaigne, during his travels in 1580, thought the calling out of the night-watch in German cities a very singular custom. "The watchmen," says he, "went about the houses in the night-time, not so much on account of thieves as on account of fires and other alarms. When the clocks struck, the one was obliged to call out aloud to the other, and to ask what it was o'clock, and then to wish him a good night." This circumstance he remarks also when speaking of Innspruck. Mabillon likewise, who made a literary tour through Germany, describes calling out the hours as a practice altogether peculiar to that country. The horn of the watchmen seems to be the *buccina* of the ancients, and was at first an ox's horn, though it was afterwards made of metal. The rattle, which was most proper for cities, as horns were for villages, seems to be of later invention. From the name of this instrument, called in some parts of Germany a *ratel*, arose the appellation of *ratelwache*, which was established in Hamburg in 1671.

The Chancellor Von Ludwig deduces the common form of watchmen's cry, "Hear, my masters, and let me tell you," from the Romans, who, as he says, were most liberal with the word "master;" but the Roman watchmen did not call out. The city servants or beadles were most likely the first persons appointed to call out the hours. These, therefore, called out to their masters, and "our masters" is still the usual appellation given to the magistrates in old cities, particularly in the central and southern portions of Germany and Switzerland.

Watchmen who were stationed on steeples by day as well as by night, and who, every time the clock struck, were obliged to give a proof of their vigilance by blowing a horn, seem to have been first established on a permanent footing in Germany, and perhaps before watchmen in the streets. In England there were none of these watchmen; and in general they were very rare beyond the boundaries of Germany. That watchmen were posted on the tops of towers, in the earliest ages, to look out for the approach of an enemy, is well known. In the times of feudal dissension, when one chief, if he called in any assistance, could often do a great deal of harm to a large city, either by plundering and burning the suburbs and neighboring villages, or by driving away the cattle of the citizens, and attacking single travellers, such precaution was more necessary than at present. The nobility, therefore, kept watchmen in their strong castles stationed on towers; and this practice prevailed in other countries besides Ireland and Burgundy. It appears by the laws of Wales that a watchman with a horn was kept in the king's palace. The German princes had in their castles, at any rate in the sixteenth century, tower watchmen, who were obliged to blow a horn every morning and evening.

At first the citizens themselves were obliged to keep watch in turns on the church steeples, as well as at the town gates, as may be seen in a police ordinance of the city of Einbeck in the year 1573. It was the duty of these watchmen, especially where there were no town clocks, to announce certain periods, such as those of opening and shutting the city gates. The idea of giving orders to these watchmen to attend not only to danger from the enemy but from fire also, and after the introduction of public clocks to prove their vigilance by making a signal with a horn, must have naturally occurred; and the utility of this regulation was so important that watchmen on steeples were retained even when cities, by the prevalence of peace, had no occasion to be apprehensive of hostile incursions. After this period persons were appointed for the particular pur-

pose of watching; and small apartments were constructed for them in steeples. In most, if not in all German cities, the town-piper or town musician, was appointed steeple watchman, and lodgings were assigned to him in the steeple; but in the course of time, as these were too high and too inconvenient, a house was given him near the church, and he was allowed to have one of his servants or domestics keep watch in his stead. This is the case still at Göttingen. The city musician was called formerly the *hausmann*, which name is still retained here as well as at the Hartz, in Halle, and several other places, and the steeple in which he used to dwell and keep watch was called the *hausmann's thurm*. These establishments, however, were not general, and were not everywhere formed at a period equally early. If we can credit an Arabian author, whose travels were published by Renaudot, the Chinese were accustomed, so early as the ninth century, to have watchmen posted on towers, who announced the hours of the day as well as of the night by striking or beating upon a suspended board. Marco Polo, who in the thirteenth century, travelled through Tartary and China, confirms this account, at least in regard to the city which he calls Quinsai, though he says that signals were given only in cases of fire and disturbance. Such boards are used in China even at present; and in St. Petersburg the watchmen who are stationed at single houses or in certain parts of the city, are accustomed to announce the hours by beating on a suspended plate of iron. Such boards are still used by the Christians in the Levant to assemble people to divine service, either because they dare not ring the bells or are unable to purchase them. The former is related by Tournefort of the inhabitants of the Grecian Islands, and the latter by Chardin of the Mingrelians. The like means were employed in monasteries, at the earliest periods, to give notice of the hours of prayer, and to awaken the monks. Mahomet, who in his form of worship borrowed many things from the Christians of Syria and Arabia, adopted the same method of assembling the people to prayers; but when he remarked that it appeared to his followers to savor too much of Christianity, he again introduced the practice of calling out.

The steeple-watchmen in Germany are often mentioned in the fourteenth and fifteenth centuries. In the year 1351, when the council of Erfurt renewed that police ordinance which was called the *Zuchtbrief* (letter of discipline), because it kept the people in proper subjection, it was ordered, besides other regulations in regard to fire, that two watchmen should be posted on every steeple. A watchman of this kind was appointed at Merseburg and Leisnig so early as the year 1400. In the beginning of the seventeenth century the town-piper of Leisnig lived still in apartments in the steeple. In the year 1563 a church steeple was erected in that place, and an apartment built in it for a permanent watchman, who was obliged to announce the hours every time the clock struck.

In the fifteenth century the city of Ulm kept permanent watchmen in many of the steeples. In the year 1452 a bell was suspended in the tower of the Cathedral of Frankfort-on-the-Maine, which was to be rung in times of feudal alarm, and all the watchmen on the steeples were then to blow their horns and hoist their banners. In the year 1476 a room for the watchman was constructed in the steeple of the Church of St. Nicholas. In the year 1509 watchmen were kept both on the watch-towers and the steeples, who gave notice by firing a musket when strangers approached. The watchman on the tower of the Cathedral immediately announced, by blowing a trumpet, whether the strangers were on foot or on horseback, and at the same time hung out a red flag towards the quarter in which he observed

them advancing. The same watchman was obliged, likewise, to blow his horn on an alarm of fire; and that these people might be vigilant day and night, both in winter and summer, the council supplied them with fur cloaks, seven of which, in the above-mentioned year, were purchased for ten florins and a half.

LONDON LEGAL LETTER.

AUGUST, 1904.

To the American lawyer getting up his case who has constant occasion to consult the *English Law Reports*, it may be of interest to know how these reports are compiled. It should first be stated that while there are four different sets of reports covering practically the same ground, published every few years in England, *viz.*, the *Law Reports*, the *Law Times Reports*, the *Law Journal Reports*, and the *Times Law Reports*, the first named alone are quoted as the *Reports*. They are all reliable, but the *Reports* is quoted much more frequently than all the others put together, and is the only one that is not published by private enterprise. The *Times Law Reports* occupies an unique field, as it is a carefully-edited compilation of the reports of the different courts made by qualified barristers. For this reason these reports are cited with authority and received as such by the judges, and being published daily in the *Times* newspaper, and in weekly parts, they are naturally kept closer up-to-date than is possible in the volumes of the other reports, although these, too, are published in parts.

The *Law Reports* are published by the Incorporated Council of Law Reporting for England and Wales. This council consists of three ex-officio members, *viz.*, the Attorney-general, the Solicitor-General and the President of the Law Society; two members from each of the four Inns of Court; two members appointed by the council on the recommendation of the General Council of the Bar, and two members appointed by the Law Society, which is the organization representing the solicitors' branch of the profession. The reports are edited by Sir Frederick Pollock, and seven volumes are produced each year, *viz.*, one of Statutes, one of the Appeal Court, two of the Chancery, two of the King's Bench, and one of the Admiralty, Probate and Divorce Court. The interesting fact is, that over £22,000 a year is received for subscriptions for the reports; that the trading account shows a profit of £2649 for 1903, and that the Council has an accumulated reserve and contingency fund of over £50,000. The subscription for the seven volumes is four guineas a year. It is not improbable that a distribution of the fund may soon be made to the subscribers in the way of an abatement of the subscription price, and if this occurs English lawyers will enjoy a cheaper issue of the reports of the courts than can probably be obtained in any other English-speaking community.

STUFF GOWN.

The Green Bag.

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

NOTES.

A MODERN Mrs. Malaprop was on the witness stand testifying in behalf of a neighbor woman who was suing for a divorce.

"Now, Mrs. Smith," interrogated the attorney, "you say Mrs. Jones was so abused by her husband that her health was undermined."

"Yes, sir?"

"Did she suffer from any illness or complaint as a result?"

"Yes, sir."

"What was that?"

"Nervous prostitution."

"Do you know, a justice court marriage doesn't seem like a marriage at all," confided a sweet bride, who had tried the experiment, to her friend.

"No, why not?" asked the friend.

"Well, you see, it's a good deal like a lawsuit. You have the feeling all the time that you can appeal to a higher court whenever you become dissatisfied with the verdict."

AN enterprising soap company inserted the following advertisement in a legal periodical:

"He who comes into Equity must do so with clean hands."

Use JONES'S SOAP.

A WESTERNER was suing a railroad company for damages as the result of an accident which had killed his wife and deprived him of her company and services. He took the stand in his own behalf and was severely cross-examined by the counsel for the defense.

"Now, Mr. Jones, how old did you say your wife was when she was killed?"

"Forty-five."

"And been in feeble health a good deal of the time and cost you quite a bit to keep her in medicine and things."

"Yes."

"Well, since she died I believe you have married again."

"I have."

"And how old is the present Mrs. Jones?"

"Thirty."

"Is she stout and healthy and able to do a good day's work about the house?"

"Yes."

"Cost much for medicines and stuff like that?"

"Not a cent."

"Then Mr. Jones, you just tell this court how you were damaged by the removal of your first wife."

The defense won the case.

IN the year 1281 a writ of protection was granted to the Bishop of Waterford. There were two kinds of writs. One was styled *cum clausula volumus*, the other *cum clausula nolumus*. The latter was given to a spiritual company, principally to secure their cattle from being taken by the king's ministers.

The *cum clausula volumus* was of four kinds: *First*, it was given to one who was to pass the seas in the king's service; *secondly*, it was given to one who was abroad in the king's service; *thirdly*, it gave protection to the king's debtor until the king's debts were paid; *fourthly*, it gave protection against suits to one beyond the seas, or the marches of Scotland.

THE denunciation of "mixed bathing" by a Russian priest at Odessa, who has declared that such a practice is calculated to make the fishes blush, will recall one of O'Connell's most celebrated retorts at the Bar. He was making a motion that a witness should be examined by commission at Killarney before the Irish King's Bench. The motion was opposed by a Mr. Scriven, a gentleman of somewhat morose temperament and a bitter opponent of O'Connell on public questions. O'Connell remarked jocosely that, if the motion were granted, his learned friend would have an opportunity of seeing the famous Lakes of Killarney, which he would be glad to show him. "You would," said Mr. Scriven, "like to put me at the bottom of one of them." "Oh, no," said O'Connell, with the utmost apparent seriousness: "I would not be so inconsiderate. Why should I frighten the poor fishes?"—*The Law Times.*

A PRISONER tried before a certain eminent judge for larceny had admitted his guilt when apprehended, but at the trial was defended with great obstinacy by his counsel.

"Gentlemen," said the judge, sarcastically, to the jury, "the prisoner says he is guilty. His counsel says he is not. You must decide between them."

Then, after a pause, he added:

"There is just one thing to remember, gentlemen. The prisoner was there and his counsel wasn't.—*The Boston Herald.*

A. S. L. SHIELDS, Philadelphia's well-known criminal lawyer, once turned a case in his favor by the happy inspiration of a side remark.

George S. Graham, then district attorney of the Quaker City, was making his plea to the jury. Suddenly pointing to the prisoner, he shouted, "He has been in politics too long to be honest!"

He paused for a moment to let the full significance of the words sink home, when in a quiet but penetrating voice, Mr. Shields, leaning toward the speaker, said:

"You've been in politics some little time yourself, haven't you, George?"

The jury shook with laughter, Mr. Graham sat down discomfited, and a few minutes later the twelve good men and true brought in a verdict of not guilty.—*The Law Student's Helper.*

LAST week a strapping negro woman was up before a magistrate, charged with unmercifully beating her boy.

"I don't understand how you can have the heart to treat your own child so cruelly," said the magistrate.

"Jedge, has you been a parent of a wufles yaller boy like dat ar cub of mine?"

"Never—no, never" (with great vehemence—and getting red in the face.)

"Den don't talk; you don' know nuffin about it."—*The Public Ledger* (Philadelphia).

COL. T. M. Argo and Capt. "Bill" Day, lawyers representing Judge Robert B. Peebles of Raleigh, N. C., in his contempt fight with the Robeson County lawyers, met a few friends on Fayetteville Street, among whom was a typical hayseeder whom no one of the crowd knew. The talk was of course on the contempt case, and Day said to the crowd: "What do you think about it?" Some answered and some didn't, and finally Day said to the hayseeder:

"My friend, where are you from?"

"I am from Robeson County, and am attending the Federal Court as a juror."

"What do you think of your county contempt case?"

"It is nothing but a petty squabble between a parcel of lawyers; there is no gentlemen mixed up in it, and I certainly don't care whether it is the Judge or the lawyers that go to jail."—New York *Times.*

ONCE it happened that a wagon was so clumsily driven as to crush a donkey against a wall and kill it. The owner of the donkey claimed damages, and a lawsuit was the result. His chief witness was the driver of the

poor animal. This man, a simple sort of country fellow, was no match for the lawyer on the other side, who browbeat and bullied him mercilessly. Then the Judge made things worse by directing him to answer the questions properly and hold his head up.

"Hold up your head, witness. You hear what his lordship says. Look up; can't you look as I do?"

"Noa, sir, I can't, for you squint;" which was true, though the barrister could not help that.

At last Sergeant Cockle, the counsel on his master's side, came to his help.

"Just tell the Court how the thing happened; where the wagon was, where the donkey was; just tell us in your own way."

After a little hesitation the man said:

"It was just loike this, my laard judge: First of all, you"—turning to Sergeant Cockle— "are the wall."

"Yes, yes," said counsel, "I am the wall."

Changing his place, the witness next said: "And I am the wagon."

"Very good," quoth the judge; "go on."

"Yes," proceeded the man, "lawyer's the wall; I am the wagon; and your laardship's the ass."

This illustration, given quite seriously, so convulsed the Court that the witness was now allowed to leave the box.—London *Tit Bits.*

THE police authorities in Belgium have found a new use for the dog (says *The Law Times*). They have trained him to the duties of a policeman. There is no more sagacious creature than the best type of shepherd dog, and a course of three months serves to transform him into a first-rate thief-tracker and guardian of the peace. The dogs learn to distinguish the honest citizen from the tramp, and the night prowler from the simple diner-out. In a street fight they part the combatants by springing between them. They find lost children and lead them to the police-station. They fetch constables into noisome alleys and assist them to put things right. They stop runaway horses by dashing at the reins. Apparently, there are few duties of a policeman which they are not equal to. The dogs go on duty at 10 p.m., and are on the beat until 6 a.m. The American town of Philadelphia makes similar use of the St. Bernard. These dogs, after very careful selection, are examined by the veterinary surgeon, who tests their lungs, sight, hearing and sense of smell; and the animals that are passed as absolutely sound are then sent to the kennels to be trained. Such guardians would probably give a good account of themselves among our own hooligans.

THE Paris detective has a great reputation for tracking down the criminal. He has achieved that distinction, *first*, by his native wit and resource; *secondly*, by the extended use he makes of the informer, who may be of the criminal class himself. Numerous are his disguises. One day he has the clothes as well as the speech and manners of a *voyou;* the next he is on the race-course, his accent changed as well as his outward appearance—a *chic Monsieur*—engaged in watching the doings of a turf syndicate. As an instance of the modern methods of the Paris Sureté, one may mention the half-dozen motor-cars which it possesses, and which are always at the disposition of the force to proceed at once, to the scene of a tragedy or robbery. The other day the automobile was used with effect in a case of burglary of a *château* at Versailles. The police had news that the burglars themselves were mounted in an automobile. They gave chase, proceeding by side roads, until they came up with the offenders, who were promptly arrested and their motor-car run off to La Fourrière, the police pound of Paris, where is gathered together the lost, stolen or strayed of the domestic animal world, as well as the oddest assortment of police trophies.—*The World's Work.*

PRISONER at the bar—Your worship, would you mind getting my case done quick? If I've got to go to jail I'd like to get there in time for dinner.—*Scraps.*

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book whether received for review or not.

ADDRESS OF SIR FREDERICK POLLOCK, AND OTHER ADDRESSES. (Delivered on the Occasion of the Dedicatory Services of the Cincinnati Law School Building, October 17, 1903.) Cincinnati: The University of Cincinnati. 1904. Pamphlet. (23 pp.)

The Cincinnati Law School is of unusual interest on account of its age and the eminence of many of the past and present instructors. It is much the oldest existing law school west of the Alleghanies, and indeed there are now only three older American law schools—Harvard, Yale, and the University of Virginia. The Cincinnati Law School began about 1834, under the care of instructors educated at the old Litchfield Law School, by Reeve and Gould; and at Harvard, by Story and Ashmun. At the beginning it had among its instructors Timothy Walker, author of the volume on "American Law" which still retains popularity. Other instructors of more than local reputation have been Bellamy Storer (Judge), John W. Stevenson (Governor of Kentucky and Senator), George Hoadly (Judge and Governor of Ohio), Manning F. Force (Major-General and Judge), Jacob D. Cox (Major-General, Governor of Ohio, and Secretary of the Interior), J. D. Brannan (Professor in the Harvard Law School), Lawrence Maxwell (Solicitor General), Gustavus H. Wald (author of valuable notes to Pollock on Contracts), and William H. Taft (Judge, Solicitor-General, Governor of the Phillippines, and Secretary of War). There have been many other instructors whose local repute has been quite as high as that of the few distinguished men just now named. The graduates also have been numerous and distinguished. The school further prides itself on being one of the earliest to introduce the case system, and apparently in this reform it is antedated by none but Harvard, the University of Iowa, Columbia, Western Reserve, and Northwestern.

Thus it happens that any one interested in the history of legal education should enjoy reading the historical addresses with which this pamphlet opens. The address by Sir Frederick Pollock is devoted, naturally enough, not to the history of this law school, but to the history of the law, and, though very short, it has all the clearness and grace that make every line of Sir Frederick Pollock's productions good reading. As Sir Frederick Pollock here says: "It is certainly a commonplace historical fact—so obvious that at first sight it is hardly worth stating—that what this school is now doing on the banks of the Ohio is a continuation of that which was begun more than six hundred years ago on the banks of the Thames."

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by *William Mack*. Volumes XI., XII., New York: American Law Book Company. 1904. (1194, 1197 pp.)

These two volumes cover subjects under the letter "C" beginning with an article of three hundred pages on Costs, by William Alexander Martin. The subject of Countries is treated at about the same length by S. Blair Fisher, while the important article of four hundred pages on Courts is contributed by Joseph A. Joyce and Howard A. Joyce. Counterfeiting, Court Commissioners, Action of Covenant and Covenants are the other articles in the earlier volume.

In volume XII. the shorter articles cover Creditor's Suits, by Judge Roderick E. Rombauer, Crops, Curtesy, Customs and Usages and Customs Duties. The bulk of the volume is given over to an exhaustive treatment of Criminal Law by H. C. Underhill and William Lawrence Clark. Beginning with consideration of "The Nature and Element of Crime, and Defenses," the general subject is treated under such heads as "Jurisdiction," "Venue," "Former Jeopardy,"

"Preliminary Complaint, Affidavit, Warrant, Examination," "Commitment and Summary Trial," "Evidence," "Trial," "Motions for New Trials and in Arrest of Judgment," "Judgment, Sentence and Final Commitment," "Appeal, Writ of Error and Certiorari,"—to mention only the more important headings. Matters relating to particular crimes are to be looked for in other volumes, under their respective titles.

PROBATE REPORTS ANNOTATED. Containing Recent Cases of General Value decided in the Courts of the Several States on Points of Probate Law. With Notes and References. Edited by *George A. Clement.* Volume 8. With Index to Volumes 1 to 8 inclusive. New York: Baker, Voorhis and Company. 1904. (838 pp.)

This volume contains about one hundred and twenty recent probate cases, to some of which the usual excellent notes of this series are attached, as, for example, a note on "Paraphenalia" following Mains *v.* Webber's Estate, 91 N. W. Rep. 172 Mich., and one on "Costs and Attorney or Counsel Fees" following Becker *v.* Chester, 115 Wis. 90.

The value of this particular volume is increased by the presence of a good General Index covering volumes 1 to 8 inclusive.

THE AMERICAN STATE REPORTS Containing the Cases of General Value and Authority decided in Courts of Last Resort of the Several States. Selected, reported and annotated by *A. C. Freeman.* Volumes 95, 96. San Francisco: Bancroft-Whitney Company. 1904. (1059, 1122 pp.)

In these two volumes jointly are reported recent cases from half of the States of the Union. In volume 95 are cases from 3-5, Id., 202 Ill., 159 Ind., 109 Ky., 129 Mich. 81 Miss., 172 Mo., 174 N. Y., 132 N. C., 11 N. Dak., 42 Or., 65 S. C. 25, Utah and 115 Wis., the more important monographic notes being those on "Liability of Ministerial Officers to Private Individuals for the Non-performance and Mis-performance of Official Duties," "Ademption of Legacies," and "The Effect of a Conveyance or Encumbrance of the Homestead by one only of the Spouses."

The principal notes in volume 96 deal with the subjects of "Application of Payments," "The Reversal of Judgments," "Acceptance of Goods to Satisfy the Statute of Frauds," and "Statute of Limitations in Actions against Officers and Stockholders of Corporations," the cases reported being found in 136 Ala., 139 Cal., 75 Conn., 6 Id., 203 Ill., 30 Ind., 118 Iowa, 110 Ky., 173 Mo., 68 N. J. Law, 175 N. Y., 68 Ohio St., 24 R. I., 41, 42, 43, Tex. Crim., 31 Wash., and 116 Wis.

REPORT OF THE TWENTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Held at Hot Springs, Virginia, August 26, 27 and 28, 1903. Philadelphia. 1903. (822 pp.)

This volume of the Transactions of the last annual meeting of the American Bar Association contains, as usual, much good reading. The principal addresses and papers are the address of the President, Francis Rawle, Esq.; the annual address on "Law and Reasonableness," by Judge Le Baron B. Colt; and the papers on "English Law Reporting," by Sir Frederick Pollock, of William A. Glasgow, Jr., Esq., on "A Dangerous Tendency of Legislation," of Lawrence Maxwell, Jr., Esq., on "Examinations for the Bar," and of Professor James B. Scott's on "The Place of International Law in Legal Education."

A CLEAR summary of the French Judicial System and Procedure has been issued in pamphlet form by *Béla D. Eisler*, of the New York Bar.

Mr. Eisler notes, in passing, "a curious habit of the French Bar and one which has existed since its foundation, that some time prior to the hearing of a case, all the original documents and papers are exchanged between counsel without receipt and with a mere memorandum on the envelope of the number of documents contained therein; on the eve of trial these documents so interchanged are returned to the respective counsel, and the loss of a document so confided to the adversary's care has never been known."

CURRENT LEGAL ARTICLES.

Of the resignation of Chief Judge Parker, *The New York Law Journal* says:

The Bar of the State are deeply sensible of the loss sustained by the Court of Appeals through Chief Justice Parker's resignation. It would be entirely superfluous to recall his judicial services in detail. Suffice it to say that for a long period, as Surrogate, as Justice of the Supreme Court, as a member of the former Second Division of the Court of Appeals, and finally, as Chief Judge of the Court of Appeals, he has uniformly displayed wide legal knowledge, an acute faculty of analysis, unflagging industry and an urbanity that made practising before him a personal pleasure. He leaves an enviable monument of his efficiency in the books.

Although the circumstances leading to Judge Parker's retirement are not open to discussion in this place, we would be recreant to duty if we did not speak a word of appreciation of the respect he has shown during the past few months for the high office he held and, indeed, for the judicial office itself and its best traditions. Off the Bench he has always been most genial and democratic. In his court-room the intercourse between Bench and Bar has been mutually respectful but entirely natural and unstilted. No one, however, ever doubted that Judge Parker had a perfect sense of judicial decorum. This has been strikingly manifested by his reticence as to political matters while his connection with that court lasted, after he had finished the official work he had on hand. We have been glad to notice expressions of approval of his conduct in newspapers that are opposed to his political party and present candidacy. He has offered an example of judicial propriety which in itself constitutes an important and valuable public service.

Few decisions of greater importance or of more far-reaching effect have been given than that of the House of Lords in General Assembly of the Free Church of Scotland *v.* Overtoun, the judgments in which were delivered recently, says the *Law Times* (London). In 1900, by a majority of 643 against twenty-seven, the General Assembly of the Free Church of Scotland effected a union with the United Presbyterian Church, under the name of the United Free Church of Scotland. The minority, however, claimed that they were the Free Church of Scotland, formed at the Disruption, and so were entitled to the whole of the funds and property of the Free Church of Scotland; and they further claimed that the union of the Free Church of Scotland and of the United Presbyterian Church was invalid, and could not be consistently carried out with the standards and constitution of the Free Church. After two hearings, occupying no less than seventeen days, the House of Lords has upheld this contention, reversing the judgments of the Lord Ordinary and the Court of Session, the effect of the decision being that the whole of the funds and the property and buildings of the Free Church of Scotland, amounting to several million pounds, is diverted to a small minority, who, from the first, have protested against the union of 1900.

Some severe words in condemnation of "police meddling" were spoken by a Brooklyn judge recently in respect to the arrest of league baseball players for playing baseball on Sunday, says *Case and Comment.* The judge said, as reported: "Here is no one trying to stir up an obscure and obsolete statute . . . except those who rule the police." "There are many minor offenses which should be left for redress to the coming forward of a private accuser before the magistrates or other authorities, as our laws and the procedure of our courts contemplate. The accusatory method of enforcing the criminal laws is open to every citizen. The community can take care of itself in such matters without any police meddling." This is rather startling language. It is a somewhat novel proposition that the police authorities are to be condemned for enforcing the statutes. What the judge calls the "ac-

cusatory method" of enforcing the criminal laws requires some individual to put himself in the position of an accuser and take upon himself personally the burden of enforcing the laws in behalf of the public. The unfairness of compelling a private citizen to assume such a burden, and to subject himself to the annoyance and the personal antagonisms that are likely to result from it, is obvious. Laws that all good citizens wish to have enforced may for a long time be practically obsolete in a community if their enforcement can be had only when some private citizen volunteers, solely for the public good, to encounter the unpleasant experiences that he must undergo if he becomes the prosecutor. If private citizens, instead of becoming accusers in court, bring pressure to bear upon the police, or "those who rule the police," they have certainly done all they ought to be expected to do. When such citizens urge the police to enforce the laws, is it proper for a judge to call them meddlers?

The wisdom of the statute is a question distinct from that of the duty of the police to enforce it. Whether wise or not, the idea that the police authorities deserve sharp rebuke by a judge for enforcing it is certainly novel. The assumption that the officials are the only persons who wanted the law enforced, and were not urged to its enforcement by any of the people of the community, does not seem very probable. If pressure was in fact brought upon the municipal authorities by citizens to obtain the enforcement of the law, that was certainly as legitimate a method of procedure as it would be for them to make individual complaints, and personally to become accusers of the defendants.

NOT so very long ago, says the *Central Law Journal*, the Supreme Court of Missouri by an *obiter dictum*, revived in their own favor that old relic of monarchical government, the offense of *scandalum magnatum*, an offense not differing in principle from that of *lèse-majesté*, being only an extension of the latter offense in order to protect the other branches of the government, outside of the executive, from scandalmongers and extravagant critics. The Supreme Court of Missouri in the case referred to held, that to scandalize the court and bring upon it the ridicule and contempt of the people (no matter how deserved such ridicule might be, or whether it affected a cause pending before the court), constituted the offense of *scandalum magnatum*, which the court, thus scandalized, could punish summarily, without trial, as for contempt. State *v.* Shepard, 76 S. W. Rep. 79, 57 Cent. L. J., 101, 402.

It was not to be expected that such a ridiculous revival of ancient despotism, so contrary to the very spirit and genius of American institutions, should be permitted to stand unrebuked. The first note of protest, therefore, comes from the court of criminal appeals of the state of Texas, where it is distinctly and unequivocally held that no matter how defamatory of a court or judge a publication may be, it cannot be regarded as a contempt of court unless it be written and published with reference to a case pending. *Ex parte* Green, 81 S. W. Rep. 723.

IT is imperative, says *The Law Times* (London), to determine the important question, What is contraband of war?

Both these cases, and other instances of Russian seizures, bring into strong relief the important question, which it is imperative should be determined—namely, What is contraband of war? Naturally, there are many articles which are absolute contraband; but, on the other hand, there are a large number of commodities which only become contraband if destined for use by the armed forces of a belligerent. It is now sought by Russia to define as contraband—absolute and not conditional—all things which might be used for warlike purposes or for the support of the armed forces of Japan if consigned to the unblockaded ports of that country. That is to say, that all cargoes of provisions, food stuffs, iron, steel, and railway material, if consigned to Japan, may be treated by Russia as absolute contraband,

and the penalty for carrying such freight would attach to the neutral vessels carrying the same. This is a position which cannot be accepted for one moment by this country, and is absolutely inconsistent with international law and practice. The point is well summed up by the *Times* in a leading article as follows: "To entitle a belligerent to treat goods as contraband there must be a fair presumption that they are intended for warlike use, and such a presumption does not arise from the mere fact that they are consigned to a belligerent port. In other words, non-blockaded ports should be open to the legitimate trade of neutrals, and belligerents who . . . have not the power to establish an effective blockade cannot be suffered to attain the objects of such a blockade by an . . . extension of the definition of contraband."

"JAPANESE Prize Courts" are thus described in *The Law Times* (London):

The Act of 1894 set up a Court of First Instance and a Court of Appeal. The former consisted of a presiding judge drawn from the judges of the Court of Appeal and six assessors—a naval officer, two judges, and officials of the Admiralty, the *Bureau de Législation*, and the Foreign Office. By the Act the Appellate Court was to be formed of nine members, including two Privy Councilors, of whom one was to be president. Two admirals, three judges of the *Cour de Cassation*, and two departmental officials complete the court. To both courts were attached two officers (*Commissaires du Gouvernement*), with duties in some respects similar to the marshal of our prize courts.

By the rules of procedure, the commander of a vessel who effects a capture is to proceed, or send a representative, with the prize to port. On arrival a report is drawn up, stating the circumstances and facts justifying the legality of the capture, and accompanied by all the documents received from the captain of the captured vessel. The court then appoints one of the assessors to make full inquiry from the commander, crew, and, if need be, passengers of the captured vessel. After a complete examination, the assessor reports his decision on the case, with observations. Together with all the preceding papers, it is sent to the marshals, in order that they may write an opinion. If not completely satisfied upon any point, the marshals may ask the assessor to make further inquiry. When the marshals report that the capture should be released immediately, then the prize court, if satisfied also makes a report to that effect and sends it to the marshals. But when the marshals hold that there has been a valid capture, or the prize court decide against their opinion upon the necessity for immediate release of the vessel, then a different procedure is required by the rules. A notice inserted in the official *Gazette* allows thirty days' notice, in order that interested parties may petition to be heard before the court gives judgment. The marshals appear on one side, and the petitioner may be heard by counsel on the other. The prize court possesses the same power as the marshals of ordering the assessor to obtain further information or evidence. Either the marshals or the petitioners may appeal from the judgment of the prize court within twenty days. The Appellate Court may order the prize court to obtain further evidence through one of the assessors, but, before taking into consideration, the marshals and petitioner are to have an opportunity to express any observations they may desire to make upon the fresh evidence. The Appellate Court pronounces judgment upon the documents alone without any verbal hearing. The marshals carry out the judgment. . . .

It will have been remarked that the Japanese courts contain a strong legal element. In a letter to the *Times* (the 26th July), Professor Holland mentions incidentally that "under rule 54 of the Russian Naval Regulations of 1895, a 'Port Prize Court' must, for a decree of confiscation, consist of six members, of whom three must be officials of the Ministries of Marine, Justice, and Foreign Affairs respectively. An 'Admirals Prize Court,' for the same purpose, need

consist of only four members, all of whom are naval officers." It appears, therefore, that the Russian Appellate Court does not contain any lawyer, so that a disregard of the rules of evidence may be expected, and the Russian courts will continue to be stigmatised, in words which have been used already, as "caricatures of prize courts."

RECENT occurrences in the Far East draw from *The Law Journal* (London), the following observations:

The destruction by the Russian ships of their Japanese prizes may give rise to a somewhat difficult question, if any of them should have neutral property on board. The Declaration of Paris provides that neutral goods, other than contraband, are not liable to capture under the enemy's flag. Does it follow that when a captured enemy's ship carries neutral cargo, it would be a violation of the obligation imposed on the States adhering to the Declaration to sink the ship, when it is impracticable to send her into port, and therefore that the only alternative is to release her? We think not. Article III. of the Declaration of Paris was intended to make it clear that a belligerent has in general no right to confiscate neutral property. It was not intended to prevent the exercise, against an enemy, of a recognized belligerent right. Is the owner of the neutral goods then entitled to compensation if his property has been destroyed together with the ship? The correct answer is probably that when he shipped his property on a vessel sailing under a belligerent flag, he knew that he incurred the risk of its being destroyed under certain circumstances together with the ship, and therefore that he must be deemed to have taken the risk of such a loss upon himself. This was the position taken up by the French Prize Court when a claim for compensation was made by the neutral owners of the cargoes of two German ships which, during the war of 1870, were sunk by their captors.

Russia will apparently seek to justify the sinking of the *Knight Commander* on the ground that it was impossible to take her to Vladivostock, and that the Russian Naval Prize Code warrants the destruction of prizes under such circumstances. It cannot be disputed, in our opinion, that the destruction of ships captured from the enemy is permissible in certain cases enumerated in the Russian Code. But, as we have already had occasion to point out (and Mr. Balfour's statement in the House of Commons last week shows that the legal advisers of the Government hold the same view), the captor of a neutral ship has no right to destroy her or any property on board of her. He is only entitled to take her to a port of his own country, so that a Prize Court may decide whether the ship or cargo is subject to condemnation. The provisions of the Russian Code may, perhaps justify the action of the *Skrydloff*, as between her commander and his Government; but, as between Russia and a neutral Power, they cannot rightly be invoked in defence of an act which is contrary to a recognized principle of International Law. The conduct of the Confederates is cited by some Russian writers as a precedent for that of the Vladivostock squadron. The *Alabama* and other Confederate cruisers did no doubt sink their prizes, because the blockade of the Southern coasts made it impossible to send them to a Confederate port. These prizes, however, were American ships. The Confederates did not venture to destroy any vessels belonging to a neutral country.

IN the *American Law Review*, the late Seymour D. Thompson presents the following astonishing picture of the Swedish legal system, his article being based on a recently published work by one of the Deputy-Judges of Sweden:

Herr Fahlcrantz points out, that in the ancient Swedish legal procedure, the parties were bound to lay the full and real truth before the judge. Gustavus Adolphus, in the law of procedure which he enacted in 1615, had given each party the right to claim from the other a discovery upon oath, wherein he was "not to hide the truth but openly to con-

fess it"; and Charles XI., said to be the equal of Gustavus Adolphus in moral greatness, ordained, in the year 1682, that no one should have the right to bring his case before the King's court (where the King presided in person), without binding himself upon oath to plead the case "as an impartial man." But the general law of procedure enacted in 1734 introduced a formal or technical rule or theory of evidence, according to which, in the absence of written documents, every conclusion was made to depend upon the testimony of two witnesses, against whom no objection could be made, grounded on the fact of relationship to the parties or of interest in the case. The testimony of a party was rejected as unworthy of belief, as it was in common law countries until a recent period, unless he were testifying against himself. In place of the ancient oral trial there was substituted a system which somewhat resembles that of an American court-martial, under which all the processes, pleadings, motions, documentary evidence, oral evidence, in short, every step in a case, was taken down in a long document called a *protokoll*. Sessions of court were held at irregular intervals, and long periods of time might supervene between one joint of this protokoll and another. Then the judge would take the record or protokoll home to his house and study it, and when he got through studying it, he would assemble court and would tell the "twelve good men and true," as the English and Americans would say, that, according to certain hard-and-fast rules of evidence, their conclusion must be so and so. Whereupon they would all duck their heads in assent. If, however, some of them should have the courage to dissent, then if the judge could get a single one of the twelve on his side, he carried the day against the other eleven. To this crowning absurdity has degenerated a system under which, without doubt, the jurors were the original triers of the facts upon their oaths and their consciences, as they are now in England and America. This system has degenerated to such scandalous results, if we may believe the denunciations which Herr Fahlcrantz has put it, that a party to a lawsuit is at liberty to speak or to hide the truth, or to tell a half truth or a whole lie, quite according to his pleasure.

Herr Fahlcrantz thinks that the very first condition for restoring the Swedish legal procedure to what it ought to be, is to restore the sense of the people and of the legislators to the conception that the truth, and the truth without any restriction, must prevail in every forensic controversy. If we may credit his severe denunciations in these pages, we must conclude that in this country not only the opinions of lawyers, but even those of laymen, have become so warped and distorted with respect to this question, that it is thought to be an unnatural hardship to claim the truth from the parties to a litigation, and that such a claim is impudent, fantastical and almost immoral,—it being, they say, the natural right of every defendant to deny, and the right of every plaintiff to prove his case, in the "legal" way. This prejudice against the truth in the administration of justice seems to be, in his country, as inelastic and unyielding as the wooden shoe on the foot of a Dutch peasant, and clung to with equal fondness.

But it seems that these honest Swedes—honest and morally sound in all private matters—as soon as they begin to direct their thoughts into the channels of a lawsuit, become absolutely indifferent to the claims of truth and honesty. A merchant, a farmer, a bank director, who, in private life and in business, never tells a lie, or does a dishonest act, needs only to hear the word "summons" in order to alter his entire behavior. Before the court he denies that he received the summons which was served upon him; he denies that he knows who are the members of the plaintiff firm, when sued by a partnership; he denies having received letters from his opponent; he repudiates witnesses of whose honesty he, as a man, has no doubt; he refuses to show books and documents upon which the right of the opposing party depends; he refuses to say whether he

has signed his name or not,—and all this in oblivion at once of good faith and sound sense: conduct for the commission of which an English judge would treat the man as a rascal or as an idiot.

THE following interesting account of the recent "Königsberg Trial" is given in *The Law Journal* (London):

Besides the interest in all things affecting Russia at the moment, the trial just ended at Königsberg, in Germany, brings to memory the great trials five years ago of Zola and Dreyfus in France, and the brilliant defences therein by M. Labori. All three trials bear much similarity, the powerful political bias of the prosecution and the remarkable importance and success of the defence, redounding to the credit, power, and independence of the Bar. Nine accused persons belonging to the humbler classes lay under arrest for nine months on the following charges: *First*, with being concerned in a conspiracy or secret society for purposes unknown to the authorities. *Secondly*, that they being German subjects were guilty of acts against the Russian Empire and the Czar, which would have been accounted high treason if directed against a German State or prince, in that they did circulate books and pamphlets inciting to murder the Czar and overthrow the Russian Constitution. *Thirdly*, that they rendered themselves guilty of *lèse-majesté* against the person of the Emperor Nicholas II. by circulation of such books and pamphlets. The trial all along was represented by the non-Socialist press, the Minister of Justice, and the German Chancellor as a determined attempt to stamp out a nest of dangerous Anarchist and Nihilist conspirators, and so strike a severe blow at all Social democracy in Germany. The 200 pages in the indictment, the numerous witnesses for the prosecution, the exaggerated statements of Russian officials, and the harsh intimidations of the Presiding Judge and of the Public Prosecutor, revealed nothing more pernicious or dangerous than that these nine accused persons were a simple band of illiterate smugglers. Only on the count of conspiracy did the Court condemn six of the accused to terms of imprisonment from two weeks to three months, and the defence have already lodged an appeal in the High Court for remission of these small sentences. A journal wittily compares the service rendered to the Russian Government by the German authorities with that of a tame bear which, in trying to kill a fly on the forehead of its sleeping master, inadvertently crushes his skull.

The course of the trial (which lasted about a fortnight), the consistent hostility displayed by the presiding judge, the Bench, and the prosecution, towards the accused and their counsel, will be of interest to legal readers, and especially the singular tact, moderation of attitude, and marked ability of Herr Haase, the leading counsel for the defence, Socialist deputy for Königsberg to the German Reichstag. Several interesting incidents arose during the course of the trial. One of the contentions of the defence was that the seditious pamphlets found among the bales of Socialist writings at the homes of the accused were added to their contents after confiscation. This point, however, the defence was unable to bring home to the authorities. The following, however, was very clearly brought home to the Russian Consul at Königsberg. When the bundles of books and papers were confiscated by the police, selections were sent to the Russian Consul to translate for the German authorities. He was called by the defence, and protested when in the witness-box that he was a very busy man and that he had merely "hastily glanced at the books after dinner." Certain passages of an incriminating nature was then read out to him which he himself had translated from the confiscated papers, and then he was requested to find these passages in the original text. Some of the quotations were found to be purely imaginary, and others were mutilated and distorted so as to represent the Russian official view of revolutionary doctrines. For example, when the original text arraigned the absolutism of monarchic government in Russia, the Con-

sul had substituted the personal designation of "Nicholas II." With biting irony the counsel for the defence observed that "the after-dinner glance" which permitted the mutilation of whole passages and the insertion of others, must have been "hasty" indeed. Another interesting incident occurred during the trial. Among the confiscated papers were a number of prints and pictures, chiefly caricatures of the Czar. One of these the President of the Court held up as deserving of particular execration, and condemned it as an example of the means by which the Social Democrats poisoned the minds of the illiterate. Herr Haase informed the presiding Judge that the picture was a well-known caricature that had appeared in the German comic paper *Simplicissimus*. Another striking incident was the evidence of the Russian Professor Herr von Reussner, Professor of Civil and Criminal Law at the University of Tomsk, a most distinguished legal authority, who has received from the Czar the Order of St. Anne, who voluntarily resigned his chair when censured by the Russian Government for protesting against the wanton ill-treatment of his students by Russian soldiers. At the trial he gave a detailed account of the inner social and political life of the Russian Government. His evidence was a remarkable indictment of the abuses and brutalities of the system. His evidence, which occupied the greater part of one day's sitting, read like a page out of the history of the Middle Ages, and is regarded as the great event of the trial. The object of calling him as a witness was to prove the accuracy of a number of allegations against the method of the Russian Government which were contained in the confiscated pamphlets. Another witness nearly as impressive was M. Buchholz who spoke as a man of affairs who had practical experience of the grinding tyranny he described. He told several stories of injustice and cruelty, and pointed out that the murderers of Ministers were the deliberate avengers of their victims, that punishment followed their tyrannous measures as inevitably as effect followed cause. The whole legality of this prosecution for sedition is questioned by lawyers. The Russian Consul-General at Königsberg supplied the German authorities with a translation of the Russian Criminal Code, showing that the essential condition of the validity of legal proceedings in Germany for sedition against the Czar and his empire is that reciprocal treatment shall be meted out by the Russian Government for similar offences within its jurisdiction. The Russian Consul-General omitted, however, the saving clause, which demanded that the reciprocity in question must be explicitly guaranteed by act, statute, or treaty. Such an understanding only exists between Russia and Austria. The German authorities blindly accepted the Consul-General's assurances without further inquiry, and on the seventh day of the trial the testimony of experts proved that reciprocal treatment was not guaranteed, and frantic inquiries to all the Foreign Departments of State confirmed the discovery.

The real defendants in this remarkable trial were not the nine poor prisoners in the dock, but the Czar and his Government, and all interest during this trial was diverted from the peasant prisoners to the internal state of Russia. This change of interest was the work of the admirable Bar employed for the defence. In legal acumen, in dexterity in catching a point and manipulating it, in all the qualities that go to make able cross-examiners and forceful advocates, they were the superiors of the Crown lawyers, and in knowledge of law—German and Russian—they were the superiors of the Bench.

An electrocution at Sing Sing is thus described in the *Law Times:*

The toilet of the chair is a somewhat dread ordeal. First comes the barber, who crops the hair close to the scalp, and shaves on the left side of the head a space about the size of a five-shilling piece. A bath follows, and the prisoner is next led to a cell where he puts on the last suit he will ever wear. The right leg of the trousers has the outer seam ripped

from about the ankle to the mid-thigh. And now give him fortitude, for his hour is verily come.

The incandescent lamps blazing in the death chamber testify that the great dynamo 200 yards away is ready to do the bidding of the executioner. As the condemned man enters, these lamps are turned off, and the current now brings darkness. In the middle of the room stands the chair, furnished with solid straps, and the metal cap at the back to receive the head. A few seconds and the man sits pinioned in the chair; he can move but a fraction of an inch. Behind the chair stands Davis, the executioner, who draws back the murderer's head and fits the cap over it. Not a word is heard except the chaplain's recitation of the service for the dead. When the head is made fast, and the face compressed by a band, Davis steps to the front of the chair and rapidly surveys the body straps. All is complete. The warden's signal to the executioner is scarcely perceptible, and Davis throws the lever on the switchboard. Behind a screen another official turns on the power, and the current of death flows through the rigid frame in the chair. The flesh and muscles of the murderer suddenly swell, and the leather bindings groan. Silence succeeds, and a doctor now comes forward to the chair. Fifty seconds pass, and at a sign from the doctor the current ceases and the stethoscope is applied. Two doctors join the first; the result of their conference is reported to the warden, who makes his silent signal as before, and a second time the figure in the chair—inanimate to all appearance now—is swept by that resistless current. This time there is no response. Is the victim dead? No one truly knows, but it is seemingly a corpse that falls from the loosened fastenings, and it is certainly a corpse that is laid some hours later on the dissecting-table.

THE unfortunate position of "The Dog before the Courts" calls forth the following protest from *The New York Law Journal*:

There is a custom—more honored in the breach than the observance—for judges when a dog case comes into court to try to be funny. Some passable humor has been evolved, but most of the effusions are trite and flat. We respectfully suggest to the judiciary of the land that the traditional obligation of writing a "comic" in every dog case be now considered fully discharged, and that from this time forth man's best animal friend, when he is haled into court, be treated with the seriousness and respect which he would demand and which really are his due.

In matters of legal substance also a cavalier and inconsequential spirit has been indulged. The dog has too often been viewed as an outlaw among domestic animals. There has been considerable casuistry and quibbling whether a dog can be considered property. Some courts hold that at common law a dog does not constitute property; other courts say that he constitutes a qualified kind of property; while the courts of some of the newer States, that are least embarrassed by precedent, have inclined to look upon the dog as property in the ordinary sense. We think the latter view is the only rational one. . . .

Where the courts of a State hold that dogs are not property the law should be changed by statute. There is no sound reason why the owner of a dog should not be able to reclaim him by replevin, or recover damages for his conversion, or for his injury or destruction if the same occur without contributory negligence on the owner's part.

THE Foreign Office (says the *Journal of the Society of Comparative Legislation*), has collected some interesting information as to the financial support given in foreign countries from State or municipal funds to dramatic, operatic, or musical performances. There is hardly a country, it would appear, in which such aid is not given in some form or another. France has, in Paris alone, four national theatres, which, in addition to occupying buildings rent free, receive by way of subsidy: the Opéra £32,000, the Opéra Comique £12,000, the Théâtre Francais

£9600, the Odéon £4000, subject to certain conditions. In the provinces popular concerts are also subsidised. In Germany, the Royal Prussian Opera House and Play House in Berlin receive £54,000 from the revenue of the Crown. In Italy, La Scala at Milan receives £3900 a year (for fifty performances), and the theatre at Naples £3200. Portugal has two theatres in Lisbon belonging to the State. Sweden has its Theatre Royal at Stockholm, receiving about £3330, and a Royal Academy of Music; Norway its national theatre at Christiania, receiving £1111 a year. In Switzerland most of the cantons grant subsidies for music. Spain supports a "Conservatorio of Music and the Drama" at Madrid at a cost of about £7300 a year. In Belgium, most of the large municipalities subsidise one or more theatres, and in many cases own them, the management being subject to strict regulations. The Opera House at Vienna was built out of State funds at a cost of more than half a million, and receives a subsidy of £24,000 a year. Hungary has four subsidised theatres. In Egypt, an annual subvention of £5000 is given to the Société Artistique for sixty representations (thirty-six opera, twenty-four comedy) at Cairo and Alexandria. Athens keeps up the tradition of Pericles—*intervallo*—by a subsidy of £125 to £250 a year. Denmark and Russia are the two countries which take the subject most seriously. In Denmark, the Royal Theatre, Copenhagen, is under the management of the Ministry of Religion and Education and the aim is to produce impartially the best dramatic works of ancient and modern authors and composers. Sad to relate, this elevation of aim results in an annual deficit of about £10,000. In Russia also the theatre is looked upon as an educational institution which ought to be within the reach of all. It is possible to enjoy the opera for 5*d.*, Russian plays for 3*d.*, and French and German plays for 9*d.* or 10*d.* To this end three Imperial theatres are supported by the Emperor at St. Petersburg, and three at Moscow, at a cost of £300,000. A sort of People's Palace—"Nazodny Dom"—is also maintained at St. Petersburg, Warsaw, and Kieff, under the direction of the temperance societies at a cost of £300,000 a year.

In the *Law Times* (London), Wyatt Paine says of "Justice of the Peace in the Olden Times":

The average wage of a skilled artificer or shop assistant in the year of grace 1703 was £4 per annum. A best manservant got £5, a best womanservant, £3, 'second sort not above' £2 10s., 'the other sort' (alas! how well the average mistress of the present day knows that 'other sort') not above £2. A generous magistracy accorded a master carpenter and plumber, working as a jobber, the princely wage of 1s. 6d. per day without provisions, or 'with meat' 9d. 'The second sort,' 1s. a day, or 'with meat' 6d. Nor was it possible for a generous employer to give higher wages, even if he felt, in the language of Mrs. Gamp, 'so dispoged,' the schedule ending: 'None shall give greater wages than these, so rated as aforesaid, on pain of £5, and ten days' imprisonment without bail. The servant convicted of taking more wages than so rated shall suffer twenty-one days' imprisonment without bail.' Multifarious and strange were the general duties of magistrates in the days when Queen Anne was not dead, and legislators had yet to learn that religion cannot be regulated by an Act of Uniformity, or morals by the gentle persuasions of pillory and whipping at the cart's tail. Amongst other things, justices (perhaps because under an earlier dispensation some people had entertained angels unawares) were required to impress upon their neighbors the sacred obligations of hospitality by Act of Parliament, it being provided by 1 Jac. 2, c. 10 (under penalty of 40s.), that none of the royal servants 'in their progresses shall be compelled to pay above 6d per night for a bed for themselves, nor above 3d. for a bed for their servants; and where they pay for their diet, or provender for their horses, lodging shall be provided for them and their servants for nothing.'

Religious persecution was rife everywhere, and prosecutions for ecclesiastical offences numerous, consequently due enforcement of the penal Acts of the period against 'dissenters and such-like vermin' must have occupied a considerable amount of the time and attention of the worthy administrators of the law. . . .

As may be expected, eating flesh in Lent or on fish-days was a heinous offence, punishable by fine or imprisonment, during the happy Carolinian period of English religious freedom; and by 35 Eliz., c. 7 (not then repealed), 'any person suffering such offence in his house and not discovering it forfeited 13s. 4d.' Where, however, a person, 'being sick and in physick and much inclined to sickness and of a weak constitution of body, could not eat or feed upon fish or restrain from eating of flesh,' the archbishop, or the vicar of the parish as his deputy, might grant the invalid a special license rendering him no longer liable to penalties. If however, the interesting invalid, in search of health, ventured to travel on a Sunday and fell among thieves during his journey, his lawful penalties against the hundred were forfeited as a punishment for his wicked and illegal peregrinations.

General warrants at this period were still in vogue, and any two justices desirous of 'flushing a covey' of vagabonds had only to issue a precept under 7 Jac. 1, c. 4, to the constable and headboroughs of the district in which he resided to secure sufficient delinquents to satisfy any reasonable being's judicial cravings. The condign punishments ordinarily inflicted by 'Mr. Justice Shallow' were, however, sometimes tempered by economical considerations, and his wrath against beggars on the highway seems to have applied to the flagitious act in his own immediate neighborhood rather than to begging in the abstract; a special license to beg, under 22 Hen. 8, c. 12, being occasionally granted to 'a very poor man' upon an information that 'the town where he resided is at present charged with more poor and impotent folk than it is able to relieve.' Two hundred years since, in spite of the startling lesson of the 30th Jan. 1649, the doctrine of Divine right still flourished, and the healing power of the Creator's vicegerent in cases of scrofula was fully believed in, and often implored by the sick; though, in order that virtue should not go out of the sacred body of the monarch twice, a magistrate's certificate that the ailing child had not already been touched was requisite before the health-giving finger of royalty could be impressed on the unfortunate sufferer from King's Evil.

In spite, however, of this precaution, the supply was not equal to the demand, and Charles II., by Order in Council, established a close time for monarchs, during which their healing virtues were allowed to accumulate. . . .

Even the majesty of death was not exempt from magisterial jurisdiction, a special statute enacting (30 Car. 2, c. 3), under penalty of £5, recoverable by distress, that no corpse should be shrouded for burial in any material save pure wool only. And, in order to prevent any evasion of this *post-mortem* encouragement of the wool trade, the poor body could not receive the last rites of the Church, or rest in holy ground to wait the great awakening, without a magistrate's warranty that it had been duly enwrapped in proper taxpaying cere clothes.

THE following Lawyer's Funny Stories are related by Eli Perkins in the *Sunday Magazine:*

They told me a story up in Oldtown, Maine, about Chief Justice Melville W. Fuller.

Young Fuller belonged to the Oldtown Debating Club. One evening the debate was for and against capital punishment. The deacon of the church was for hanging, and young Fuller opposed him in the debate.

Deacon Skinner began his debate with a knock-down argument. He held up a big family Bible, saying: "I will read to you debaters who oppose capital punishment what God said to Moses: 'Who so sheddeth man's

blood, by man his blood shall be shed.' That's what God said and Moses wrote. Now, boys, come on with your Blackstone and Chief Justice Marshall!" Then, after throwing his bombshell, the old deacon sat down like a victorious gladiator.

Then up rose young Fuller. "Deacon Skinner," he said, "the law that you and Moses indorse is nonsense. It has no logic in it. Your Mosaic law is that if a man kills a man another man must kill him. See what a logical deduction such a law would bring you to. Here one man kills another; another man kills him—and so on till we come to the last man on earth; who's going to kill him? He can't kill himself, for the law forbids suicide. Now, deacon, what in thunder are you going to do with that last man?"

Twenty years after this, Lawyer Fuller made another wise and witty answer before Judge McArthur when he was practising law in Chicago.

In his speech before the Judge, Mr. Fuller pleaded his client's ignorance of the law in extenuation of an offense he had committed.

"But, Mr. Fuller," said the Judge, "every man is presumed to know the law. Ignorance of the law is no excuse, you know."

"Yes, your Honor," responded Mr. Fuller, "I am aware that every shoemaker, tailor, mechanic and illiterate laborer is presumed to know the law—yes, every man is presumed to know it—except the Judges of the Supreme Court, and we have a Court of Appeals to correct their mistakes."

In Elmira, New York, the old home of ex-Governor Hill, the lawyers tell a good story about "one Dave Hill," as they call him there.

"Governor Hill is a lawyer," said Congressman Ray of Norwich, "but he has always kept it quiet. However, he had one quite famous case. He defended a man named Gibson for defrauding the revenue. It was a tobacco case, and went to two Courts, Supreme and Superior. Everybody was surprised that Hill could take it so high; but he did. Well, Gibson finally was convicted and was sent to Sing-Sing for ten years.

"Then," continued Congressman Ray. "Hill sent in his bill for a thousand dollars. Gibson's family kicked at this. They thought that the charge was too high. The Governor was a little sensitive about this. He is a fair man in his dealings, and looked around to get the opinion of his brother lawyers about fees in revenue cases. In New York, the next day, Governor Hill met William M. Evarts, the great constitutional lawyer who defended Andrew Johnson and Henry Ward Beecher.

"'You're just the lawyer I want to see, Mr. Evarts,' said Hill, grasping his hand enthusiastically. 'You've had a good many internal revenue cases, haven't you?'

"'Oh, yes, a good many,' said Evarts.

"'Well, Mr. Evarts, what is the custom about lawyers' fees in those cases?'

"'Oh, just the same as with any other law,' said Evarts. 'We simply charge according to the work we do.'

"'Now, Mr. Evarts,' said Hill confidentially, 'do you think I charged Gibson too much. Did I really charge him too much?'

"'Well, Governor,' said Mr. Evarts, deliberately, 'the thought occurs to me, Mr. Hill, —simply occurs to me, you know—that p-e-r-h-a-p-s Gibson might have been convicted for—for less money.'"

The last time I met William M. Evarts, our late great lawyer and diplomat, was on the Boston & Maine train going up to his old Windsor, Vermont, farm.

"Have you seen your son Sherman today?" I asked, holding up a newspaper with a quarter-page cut in it.

"No, I can't see anything you know; I'm almost blind."

It brought tears in my eyes to see the great statesman open his blind eyes and still not be able to see Roger Sherman Evarts, the boy he worshiped.

As we passed New Haven I asked the lawyer how one ought to lie in the Pullman to sleep well—head to the engine or feet?"

"You shouldn't come to a lawyer with such a question as that, Eli," he said. "That's a railroad question. You should go to a railroad man with that. You should go to Depew."

"But Depew is a lawyer, isn't he?" I said.

"Well, y-e-s, Depew is a lawyer—he is a lawyer; but all the law Depew knows wouldn't bias his answering any question."

A moment afterwards Evarts smiled dryly and said: "When you ask me whether you should lie on the right or left side to sleep well, perhaps I ought to say that in your case, Eli, you will lie anyway."

When Depew asked Evarts what he thought eventually would become of all the thoroughly wicked and depraved, he said:

"Well, Mr. Depew, they all probably will practise law a little while, then eventually go into politics and become Congressmen or Senators."

Robert Ingersoll was a good lawyer, and powerful in cross-examinations. The great agnostic was such a devoted husband that infidelity on the part of a husband always infuriated him. He held that a man's love should be given sacredly to his wife first, last and all the time.

In a divorce case in Peoria Mr. Ingersoll believed that the defendant had been untrue to his wife, and he opened upon him with a severe and scathing cross-examination.

"You say, sir," he began, fastening his searching eyes on the witness, "that you have always been faithful to your marriage vows?"

"Well—yes," hesitatingly.

"But you have associated with other women?"

"I presume so."

"Knocked around town with the boys to see them, I presume?"

"No, sir."

"Oh! They came to see you—in your own house? You look like it. Now what women came to your house? No dallying—what woman—?"

"Judge," appealed the witness, "must I answer these foolish questions?"

"Yes, answer," said the Judge, sternly.

"Now," said Ingersoll, feeling that he had the man in his grasp, "what woman, other than your wife came to your house in your wife's absence?"

"Well—ah—"

"Answer! Don't prevaricate!" said Ingersoll, pointing his finger right into the man's face. "Answer! Who was it?"

"Judge," said the witness with an appealing look, "must I answer?"

"Yes, go on, answer!" said the Judge.

"Out with it!" hissed Ingersoll. "Who was that woman?"

"She w-was—" the witness answered.

"Out with it!" cried Ingersoll. "No lying now, shame-faced man!"

"She was," lisped the witness, with a quiet wink at the jury, "she was my mother-in-law."

Judge Brady, for many years a popular city Judge in New York, could tell hundreds of legal stories, especially about Irish witnesses.

"One day," said the Judge, "O'Rafferty was up before me for assaulting Patrick Murphy.

"'Mr. O'Rafferty,' I said, 'now, why did you strike Mr. Murphy?'

"'Because, yer honor, Murphy would not give me a civil answer.'

"'What was the civil question you asked him?'

"'I asked him as polite as yez plase, yer honor, says I: Murphy, ain't your own brother the biggest thafe on Manhattan Island, excepting yourself and yer uncle who is absint in the penitentiary in Sing-Sing?

"'And what rude answer did he give to such a civil question?'

"'He said to me: Av course, O'Rafferty, prisint company excepted, so I said: Murphy, you're another, and thin, yer honor, I struck him wid me fist, I did!'"

The most laughable and dignified anti-climax perhaps ever made was made by Mr. Evarts when he was "swinging around the circle" with President Hayes. Mr. Evarts and a few friends drank the champagne and

did the speechmaking during that famous journey across the continent, while President Hayes and Lucy, his wife, entertained the temperance people and Y. M. C. A's.

In Omaha a dinner was given to the President and his party, and as usual it fell upon Mr. Evarts to make the after-dinner speech. In this speech, of course, he complimented the West and ended up his line of sweet sayings in the following anti-climax, delivered in the great orator's most dignified and impressive manner.

"Yes, gentlemen and ladies of Omaha, I like your great and growing West. I like her self-made men; and the more I travel West, the more I meet her public men, the more I am convinced of the truthfulness of the Bible statement that the wise men came —came from the East!"

Then came a great cheer, ending in shouts of laughter.

"The only thing that saved you," said Editor Rosewater of the "Bee" as he grasped Evarts' hand, " is the fact that there really are not ten men in this audience that didn't come from the East. Your anti-climax is taken as a compliment."

Horace Porter, lawyer and Ambassador to France, told me this story on Bishop Potter: It seems that Bishop Potter engaged a worldly coachman who formerly was employed by Bishop Farley of St. Patrick's, and afterward by Richard Croker, the patron saint of Tammany Hall.

"On Sunday morning," said General Porter, "the new coachman drove Bishop Potter to the rear entrance of Grace church on Fourth avenue, and then started for a saloon across the way.

"Here, Patrick," said the surprised bishop, "don't go in there! Come back!"

But Patrick went right into the saloon, stayed a moment, and came out wiping his mouth on his sleeve.

"Didn't you hear me call you, Patrick?" asked the bishop sternly.

"Yis, yer reverence, I did—indade, I did!" said Pat regretfully.

"But why didn't you come back?"

"I would have stopped, yer reverence," said Pat humbly; "but on me soul—bad luck to me—I didn't have the price fer but one drink!"

In his second article on "Irregular Associations," Professor George Wharton Pepper discusses "The Right to Act in the Common Name" and "The Right to Sue in the Common Name." On the first of the questions he says:

Summing up the discussion of the topic under consideration, the following conclusions may be stated: that in no case will a court either of law or equity inquire at the instance of a private citizen into the right of associates to act in corporate form; that in no case will a court of equity, even at the instance of the attorney-general, inquire into the right of associates to act in corporate form; that either a court of law or a court of equity will at the instance of a private citizen inquire whether or not associates possess the substantive right to do acts directly affecting the interest of the plaintiff; and that where a statute exists expressly recognizing the right of a court to inquire into the authority for corporate action it will be so construed as to limit the inquiry to questions of substance as distinguished from questions of form; and, in the case of substantial rights, to an investigation only of their acquisition by the associates and not to a consideration of whether the associates have rendered themselves to a judgment of forfeiture.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ATTACHMENT. (SEIZURE—PROCEDURE—SERVICE.)
SUPREME COURT OF LOUISIANA.

In Lehman & Co. *v.* Rivers, 35 Southern Reporter, 296, it was contended that an attachment of the rights of a debtor in a suit which he had pending was not legally levied so as to entitle the attaching plaintiff to a lien on the right, the attachment defendant subsequently being declared a bankrupt. This contention was based on the fact that though notice of the attachment was served on the clerk of the court and on the creditor of the right, no notice was served on the debtor of the right until garnishment proceedings wre commenced after judgment had been obtained in the attachment proceedings. To this contention the court replies: "While we think that in seizure of a right in suit notice should be served upon the debtor of the right, as well as upon the custodian, we do not think that we should hold that the lien recognized, as before mentioned, is lost because there was delay in notifying the debtor, when there was none in notifying the custodian." The court cites Citizens' Bank *v.* Miller, 45 La. Ann. 493, 12 South. 516, to the effect that a creditor seizing a right in litigation by his debtor is bound by the decree rendered in the suit instituted by him. Therefore, the court does not think that the debtor of the right has any interest in having the date of the attachment changed so as to defeat the lien claimed by the attachment plaintiff, especially where the creditor of the right has filed an answer and thus appeared in the attachment proceedings.

CARRIERS. (RIGHTS OF DELAYED PASSENGER.)
SUPREME COURT OF SOUTH CAROLINA.

Miller *v.* Southern Ry. Co., 48 Southeastern Reporter, 99, was an action by a passenger against a carrier to recover damages for a delay. It appeared that plaintiff was informed that the train was due to leave 20 minutes late, and did so leave, but only proceeded a short distance down the yard when it stopped and remained there 10 hours; and that the conductor of the train refused to give the passengers any information as to the probable extent of the delay or the cause thereof. The court held that under these facts, plaintiff had a cause of action and might recover exemplary damages, as a railroad company is chargeable with damages for delay in running its trains according to schedule time, unless such delay cannot be prevented by the exercise of reasonable care; but that actual damage for inconvenience, loss of time, or fatigue caused by the delay could not be recovered unless some pecuniary damage or personal loss had resulted to plaintiff.

CEMETERIES. (BURIAL LOT—RESIDUARY DEVISE—DESCENT.)
SUPREME COURT OF RHODE ISLAND.

In re Waldron, 58 Atlantic Reporter, 453, was a proceeding for an opinion as to whether or not a burial lot in a cemetery passed under a general residuary clause to testator's widow. The court cites Derby *v.* Derby, 4 R. I. 414, wherein it was held that an executor empowered to sell all the testator's real estate to pay pecuniary and residuary legacies was not warranted in selling a burial lot, unless specially directed by the will, and notes the implied approval of this doctrine in Gardner *v.* Swan Point, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897. Attention is called to the improbability of a testator having in mind a burial lot when making a residuary devise. It is further noted that a burial lot, where bodies have ben buried, cannot be mortgaged for a debt, and that

a deed of it carries only a right to use it for burial purposes. With these facts and authorities in mind the court says: "While we do not mean to say that a burial lot is not property, yet all of these limitations tend to show that it has been shorn of so many of the ordinary attributes of property as to raise the presumption that it is not intended to be passed under a general devise in which it is not specially mentioned. A strong reason for this is found in the right to control the corpse, as between a widow and next of kin, as shown in Pierce *v.* Swan Point, 10 R. I. 227, 14 Am. Rep. 667, and Hackett *v.* Hackett, 18 R. I. 155, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762. The right of custody of the remains and the right of property in the burial lot should go together, where it is possible. Following the doctrine of Derby *v.* Derby, 4 R. I. 414, and the implied approval of it in Gardner *v.* Swan Point, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897, a burial lot does not pass under a general residuary devise, but it descends to the heirs as intestate property. It is a family burial lot. It is that fact alone which gives a peculiar limitation to its tenure. The heir takes it subject to all the conditions for which the ancestor held it. A sort of trust attaches to the land for the benefit of the family. Neither the widow nor the child can be excluded from it for want of title, yet such a result might follow if the tenure was like that of the other real estate. Children could exclude a widow, or a widow could exclude children, by virtue of ownership of the land. The view therefore, taken in Derby *v.* Derby, *supra*, was founded in sound reason and policy, and it has been regarded as the law in this state for a long time. It did not quite touch the point involved here, because the question was whether the lot should be sold to pay debts or legacies. Still we do not hesitate to follow its doctrine."

Accordingly the court was of the opinion that a burial lot does not pass by a residuary clause in a will, but descends to testator's heirs as intestate property.

DAMAGES. (ASSESSMENT ON DEFAULT.)
SUPREME COURT OF RHODE ISLAND.

Dyson *v.* Rhode Island Co., 57 Atlantic Reporter 771, is a learned and scholarly opinion delineating the practice in assessment of damages on default from the earliest times to the present. The Court reviews the authorities on this point and quotes extensively from Coke, the Year Books and other authorities. As a result the court comes to the conclusion that the court has authority to assess damages on default, with or without the aid of a jury, and that in case a jury is called in to determine the damages the court has inherent power to award more or less than the jury award. For those desiring to brush up on their Latin and law French this opinion is of special interest as is contains numerous quotations from the authorities in the original. As the opinion may, perhaps, be unavailable to many of our readers, who nevertheless desire to be up on legal forms, we quote the form of a *writ ad inquirendum de damnis* as given in the opinion. This writ is as follows: "*Rex vic' salutem. Ostensum est nobis ex parte P. de L. quòd cum B. de S. in curia nostra, etc., sum' esset ad respondend' eidem P. de placito quare cepit unum equum ipsius Petri in separali ipsius Petri, & cum injuste detinuit contra vadium & pleg', & idem B. venisset in eadem curia & dixisset quòd ipse cepit averia illa in damno suo pascentia separalem pasturam ipsius Bernardi & partes hinc inde posuissent se in juratam patriae, per quam postea in eadem curis nostra convictum fuit quod praed' Bernardus averia cepit in damno suo in separali pastura insius Bernardi, ita quod idem Bernardus per considerationem curiae nostrae haberet retornum averiorum praedictorun: Praefatus Bernardus licèt praedictus Petrus rationabiles & sufficientes emend' pro damnis & transgressione praedictis sae ius ei obtulerit. praedicta averia detinet imparcata, contra legem & consuetudinem regni nostri, ad damnum ipsius Petri non modicum & gravamen. Et quia nolumus quod praedictus Petrus injurietur hac parte, tibi praecipimus quòd in praesentia eorundem Petri & Bernardi ad hoc praemonitorum si interesse voluerint, per sacramentum*

probor & legalium hominum de visnetu illo neutri parti suspector, diligenter inquiras quae damna praedictus Bernardus habuit occasione transgressionis praedictae. Et quàm citius dictus Petrus eidem P. satisfecerit de damno illius juxta taxationem eorundem juratorum, praedicto averia eidem Petro sine dilatione liberari facias juxta eundem valorem & precium cujus fuerunt tempore quo fuerunt eidem Barnardo retornata. Et qualiter, etc. Et habeas, etc."

DOCKED HORSE. (CONSTITUTIONALITY OF STATUTE PROHIBITING USE OF UNREGISTERED DOCKED HORSE.)

SUPREME COURT OF COLORADO.

In Bland *v.* People, 76 Pacific Reporter 359, it was contended that Laws Col., 1899, p. 175, c. 93, prohibiting the use of unregistered docked horses was in derogation of Const. U. S. Amend. 14, providing that no state shall deprive any person of property without due process of law, and Const. art. 2, ¶3, providing that all persons have natural, essential and inalienable rights, among which is the right of possessing and protecting property. It was further contended that the statute in question was an unreasonable exercise of the police power. This statute prohibited the docking of horses and provided for the registration of horses that were docked at the time the statute went into effect but prohibited the use of unregistered docked horses. The court says that the docking of a horse's tail is cruelty, not only because of the torture inflicted by the operation, but because by depriving the horse of the use of the tail he is deprived of the use of a weapon supplied him by nature for his protection from the myriads of winged pests that infest the land. Numerous authorities are cited to the effect: (1) That it is within the police power of the state to prohibit cruelty to animals, because such prohibition is a protection to the animals and tends to conserve the public morals; (2) That in the exercise of the power the Legislature may adopt such reasonable means as are necessary to accomplish the purposes of the statute; (3) That to the Legislature is confided a large discretion in declaring the public policy, and that, unless the legislation is clearly and palpably in violation of the fundamental law, it will be sustained; (4) That all property is held under the implied obligation that the owner's use of it shall not be injurious to the public. The court then says that these propositions, being established by abundant authority, it remains to be determined whether the means adopted by the Legislature for the purpose of preventing the species of cruelty forbidden by the statute can be regarded as a reasonable exerise of the power confided to the Legislature. As it provided for the registration of horses docked at the time the statute went into effect, the court considered it reasonable to prohibit the use of unregistered docked horses. The character of the offense prohibited by the statute is such that something more than the mere prohibition of the docking was necessary to accomplish the purposes of the act, and the means employed by the Legislature are probably the most efficient that could be devised to prevent the docking. "The whole scheme and purpose of the act would probably fail if the use of the docked animal were not prohibited, and as the act is clearly intended to conserve the public morals and to protect the horses, and as the means employed by the Legislature to effectively prevent the cruelty prohibited by he statute are reasonable and consistent with the policy of the state as declared by the act, and are measures necessary for the protection of the interests of the public, it becomes our duty to uphold the statute."

EMINENT DOMAIN. (EXERCISE OF RIGHT—ELECTRIC RAILROAD THROUGH RURAL DISTRICT—DEFLECTION FROM HIGHWAY.)

SUPREME COURT OF ILLINOIS.

Hartshorn *v.* Illinois Valley Traction Co., 71 Northeastern Reporter 612, was a proceeding by an electric railroad incorporated under the general laws of Illinois of 1872 (Laws 1871-2, p. 625) to condemn private property for a right of way. As the contemplated road was in the main to deflect

from the highway in its course the question arose as to whether or not the railroad company could exercise the right of eminent domain. The court quotes from Harvey *v.* Aurora & Geneva R. R. Co., 174 Ill. 95, 54 N. E. 163, to the effect that a street railroad is a road constructed on a street or highway for the purpose of conveying passengers living upon or having business on such street or highway; that its main object is to accommodate street travel; that though it may diverge from the street or highway where the confirmation of surface or the position of streams make it necessary, yet it may not like a steam railway, locate its route across the country, without reference to the accommodation of local travel along the highways in order to reduce time and distance for passengers traveling from city to city or town to town. The court then says: "So far as the street railroads are authorized to travel through the country districts, it is upon the theory that they will be of benefit to the rural inhabitants, and not that only those living in towns, where regular stations shall be maintained, shall be the beneficiaries. As was said in the Harvey Case, *supra*, they are presumed to follow the highways, making all the stops necessary for the accommodation of the people living along the highways. The fact that they have adopted electricity as their power, instead of the horse or dummy, cannot enlarge their powers or lessen or change their duties. If the country districts are so sparsely settled that the traffic along them will not support such roads following them, then their construction is not a public necessity, and the power of eminent domain, upon the theory that they are to exercise a public function, cannot be called into action in their behalf. If they seek to travel across the country as do steam railroads, disregarding highways and disregarding the interests and conveniences of the country people, let them organize under the law regulating steam railroads, and be subject to the regulations or the statute and the burdens cast upon such railroads. On the other hand, if they wish to avoid these burdens and to avail themselves of the greater freedom and the right to burden the highways, then they must be willing to observe and perform the duties that they owe to the public as such."

ESTOPPEL. (SIGNING INSTRUMENT AS WITNESS.)
SUPREME COURT OF LOUISIANA.

In Brian *v.* Bonvillain, 35 Southern Reporter 632, the court holds that a person may be estopped by signing as a witness an act in which third persons contract with each other and with reference to rights in which he has an interest.

FRAUDULENT CONVEYANCES. (INNOCENT MOTIVE.)
SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Matthews *v.* Thompson, 71 Northeastern Reporter 93, involved the validity of a conveyance by an insolvent, made without motive to defraud. A husband conveyed to his wife practically all of his property on consideration of love and affection, being at the time, to the knowledge of both parties, insolvent. The conveyance was in trust with power to sell and apply the proceeds to the payment of taxes and of such other debts and personal expenses of the grantor as it might seem judicious to the grantee to pay, and on the grantor's death to sell any part of the property then remaining unsold and distribute the net proceeds among the persons and in the manner and proportions designated in the grantor's will, and in default of such will, among the persons who would have inherited the premises had the grantor died seized thereof intestate. In other words, no provision was made for the payment of the grantor's debts except such as the grantee might elect to pay. The court says that the mere fact that a conveyance is voluntary, especially if it is founded on a consideration of love and affection, as in the case of a gift from a husband to his wife, or from a parent to his child, does not necessarily render it fraudulent against creditors. But on the other hand it is generally, if not universally held, that freedom from moral turpitude, and

an innocent and honest intention to accomplish a good object in the disposition of the property, are not enough to relieve a transaction of this kind from its fraudulent character in reference to its effect on the legal rights of the creditors. The court then comes to the conclusion that the conveyance in this case was fraudulent as to the grantor's creditors and cites in support of its holding Kimball *v.* Thompson, 4 Cush. 441-446, 50 Am. Dec. 799; Marden *v.* Babcock, 2 Metc. 99-104; Norton *v.* Norton, 5 Cush. 524-528; Winchester *v.* Charter, 12 Allen, 606-609; Gray *v.* Chase, 184 Mass. 444, 68 N. E. 676; Bullard *v.* Briggs, 7 Pick. 533-537, 19 Am. Dec. 202; Jaquith *v.* Massachusetts Baptist Association, 172 Mass. 439, 52 N. E. 544.

HIGHWAYS. (RIGHTS OF OWNER OF SOIL TO GAME THEREON.)
SUPREME COURT OF MINNESOTA.

L. Realty Company *v.* Johnson, 100 Northwestern Reporter 94, was an action brought by an owner of land over which a highway passed to enjoin another from shooting wild fowl in their passage over and across the highway. The only question at issue was in what respect the right of possession and control by the owner of the soil over the game on its premises was changed by the fact that the public had acquired a right of passage across the land. The court says that the law is well settled that the easement in a public street or highway is the public and common right to use the same for the passage of persons and property and the purposes incidental thereto. But the killing of game belonging to the adjacent premises and found temporarily in the highway is in no manner connected with or incidental to the right of public passage and transportation. In Lamprey *v.* Danz, 86 Minn. 317, 90 N. W. 578, it was held that inasmuch as every person has exclusive dominion over the soil which he absolutely owns, an owner of land has the exclusive right of hunting and fishing on his land and the waters covering it. This being true, the court says that it necessarily follows that in dedicating a highway to the public the owner of the soil reserves to himself all of the other privileges and rights pertaining to the premises which include the right to foster and protect for his own use the wild game thereon, and that such right and privileges are in no manner surrendered to the public in granting the easement. It also follows that the public in accepting the easement thus granted acquires no right to kill or molest the game inhabiting the property while it is passing to and fro across the highway.

IMMIGRATION. (PORTO RICAN NOT AN ALIEN.)
UNITED STATES SUPREME COURT.

In Gonzales *v.* Williams, 24 Supreme Court Reporter 177, the question was involved as to whether or not a native of Porto Rico who was an inhabitant of the island at the time of its cession to the United States could be detained as an alien on arrival at New York. Counsel for the government contended that the test of Gonzales' rights was citizenship of the United States and not alienage, but the court did not think so. On the contrary, it was of the opinion that as Gonzales was not an alien within the meaning of the Act of Congress of March 3, 1891, which provides for the detention and deportation of alien immigrants likely to become public charges, he could not be detained on arrival at the port of New York. Having narrowed the question down to whether or not Gonzales was an alien within the meaning of the act of 1891 the court says: "We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States; and is enforced through officials sworn to support the Constitution of the United States,—are not 'aliens,' and upon their arrival by water at the ports of our mainland are not 'alien immigrants,' within the intent

and meaning of the act of 1891." The court further calls attention to the fact that the immigration laws of the United States were put in force and effect in Porto Rico by section 14 of the act of April 12, 1900, and hence do not operate externally and adversely to the citizens of Porto Rico.

INTOXICATING LIQUORS. (INTERSTATE COMMERCE — POWER OF STATE TO TAX BAR ON VESSEL.)

SUPREME COURT OF TENNESSEE.

In Harrell *v.* Speed, 81 Southwestern Reporter 840, plaintiff contended that a vessel belonging to a corporation of Arkansas and plying between a port in Arkansas and one in Tennessee was not subject to the license tax imposed by the laws of Tennesee for running a bar while the vessel was at its landing within the jurisdiction of Tennessee. It is admitted that the Legislature of Tennessee cannot impose a privilege tax on the corporation for disembarking its passengers and discharging its cargoes of freight at the wharf in the city of Memphis, or for gathering passengers to be transported across the river to the state of Arkansas. This exemption rests on the fact that receiving and landing passengers and freight are incident to their transportation. Therefore, a tax on this privilege would be a burden on interstate commerce, and unenforcible. But the court is of the opinion that the same thing cannot be said as to a privilege license required for maintaining a bar for the sale of spirituous liquors on a boat. The court cites a long list of cases wherein is affirmed the general proposition that the regulation of the manufacture and sale of intoxicating liquors is peculiarly within the control of the States, and within their police power, which has not been surrendered to the federal government, and holds that the imposition of a license on a vessel maintaining a bar for the sale of liquors while moored at a landing within the State is not an infringement of the right of interstate commerce, especially in view of the provisions of the Wilson Bill. By this holding the court differs from the view taken by the Supreme Court of Louisiana in State *v.* Frappart, 34 La. Ann. 140.

PARTY WALLS. (AGREEMENT BY OWNERS TO BUILD — RIGHT OF VENDEE TO ASSUME THAT WALL IS PAID FOR.)

SUPREME COURT OF MISSISSIPPI.

In Mayer *v.* Martin, 35 Southern Reporter 218, the question arose as to whether or not the vendee of a lot on which a party wall has been erected may assume that his vendor has paid his share for the erection of the wall. The court in the first place says that it is the law that the contract by a lot owner to pay half the value of a party wall when erected does not run with the land. Furthermore, it is settled by Kells *v.* Helm, 56 Miss. 700, that the purchaser of a lot finding a party wall thereon has the right to assume that any compensation as between his vendor and the owner of the adjacent lot has been paid.

PERSONAL INJURIES. (LIABILITY FOR AGGRAVATION OF EXISTING AILMENT.)

KANSAS CITY COURT OF APPEALS.

Basham *v.* Hammond Packing Co., 81 Southwestern Reporter 1227, was an action by an employe to recover damages for injuries caused by the fall of an elevator in which he was riding. It was claimed that plaintiff was at the time of his injury suffering from certain ailments, and that a person in sound health would not have suffered any effects from the accident. Therefore, it was contended that plaintiff was not entitled to recover any damages. The court calls attention to the fact that a carrier is liable for injuries to an invalid passenger, though it be probable that the passenger would have sustained no injuries had he been in robust health. On this point the court cites Mathew *v.* Railway Co., 78 S. W. 272; Owings *v.* Railway Co., 195 Mo. 182, 8 S. W. 353, 6 Am. St. Rep. 39; Brown *v.* Railway Co., 66 Mo. 588; Fleming *v.* Railway Co., 89 Mo. App. 140; Allison *v.* Railway Co., 42 Iowa 274; Purcell *v.* Railway Co., 48 Minn. 139, 50 N. W. 1034, 16 L. R. A. 203. This being

the rule, the court concludes that defendant was liable, if negligent, even though it did not know of plaintiff's delicate condition at or previous to the time of the injury. On the point whether ignorance of plaintiff's condition would excuse defendant, the court cites Fell *v.* Railway Co., 44 Fed. 248.

PROSTITUTION. (LEGISLATION CONCERNING—CONSTITUTIONALITY.)

SUPREME COURT OF WASHINGTON

In Zenner *v.* Graham, 74 Pacific Reporter 1058, it was urged that Act, Washington, March 16, 1903 (Laws 1903, p. 230, ch. 123), making it a felony for a male person to live with, or accept earnings of a prostitute, was in conflict with the 14th amendment of the Federal Constitution, and was class legislation because it discriminated between male and female persons by making it a felony for a male person to live with or off of, or to accept the earnings of a prostitute, while a female might do these acts without criminal liability. To this contention the court replies: "The privileges and immunities referred to by the fourteenth amendmnt are such as are lawful in their character. Prostitution is unlawful, and against public policy and good morals, and is subject to police regulation, and the Legislature may therefore restrict it to such classes or prohibit it by such penalties as may be deemed necessary, without infringing upon the constitutional provisions referred to." State *v.* Considine, 16 Wash. 358, 47 Pac. 755; *in re* Considine (C. C.) 3 Fed. 157; State *v.* Nichols, 28 Wash. 628, 69 Pac. 372; Seattle *v.* Barto, 31 Wash. 141, 71 Pac. 735; State *v.* Sharpless, 31 Wash. 191, 71 Pac. 737.

SHERIFF'S NOTICE. (VALIDITY OF PUBLICATION IN SOCIALIST PAPER.)

SUPREME COURT OF NEBRASKA.

In Michigan Mutual Life Ins. Co. *v.* Klatt, 98 Northwestern Reporter 436, it was claimed that the publication of a sheriff's notice of sale in a socialist paper was insufficient. It was contended that as the paper in which the publications were made was an exponent of socialism and its circulation confined to the believers in such doctrine, whose political tenets forbid private ownership of property, the publications were of no avail. But as it was not disputed that the paper had a general circulation and the publication otherwise complied with the requirements of the statute the court regarded the publication as sufficient, saying: "While it appears by the affidavits of defendant's attorney that the paper is an exponent of socialism, and its editor a disciple of Karl Marx, and that 'it has no circulation outside of that little bunch of proletariats who are disciples to the doctrines of socialism,' publication in its pages seems to be a sufficient compliance with the Nebraska statutes, and there is no complaint of any inadequacy in the amount realized by the sale. The socialists apparently did not live up to their beliefs any more consistently than other people do."

SWINDLING. (PRETENSE OF DEATH TO SECURE PAYMENT OF LIFE INSURANCE POLICY.)

COURT OF CRIMINAL APPEALS OF TEXAS.

Hunter *v.* State, 81 Southwestern Reporter 730, was a prosecution for swindling. It was charged that defendant having insured his life for a large sum for the benefit of his sister pretended to have been drowned and left the state and secreted himself; that the insurance company denying the death, the sister brought suit on the policies and recovered and collected a judgment thereon; that defendant's acts constituted a fraudulent representation to the insurance company and induced his sister, as innocent agent, to institute suit, by these means using the court and procuring a judgment on the policies. The court says that in a prosecution for swindling under the statute the pretense or representations under which the property was obtained must be shown to have been made to some one and it must also be shown that the pretenses so made were relied upon; that the party to whom they were made was induced to part with the ownership of the property on the faith of such representa-

tions; that they were false and that the party making them knew they were false when he made them. As the insurance company in this case refused to believe that the assured was dead and as the beneficiary had to resort to the courts to compel a payment of the policy the court says that there could be no connection between the false representations and the obtaining of the property unless the court in which the judgment against the insurance company was obtained could be deemed the agent of the company. But in regard to this the court says: "If the principle of agency here contended for shall come to be the law, it may, as a result, deter much litigation, as an honest man with a good cause might hesitate to invoke the action of a court, for, although successful, he might find himself imperiled in the toils of a criminal prosecution. The doctrine contended for would in a measure destroy the integrity of judgments in civil cases when they could thus be attacked by a criminal prosecution. We do not believe the doctrine of agency here contended for accords with sound legal principle. The courts of the country are not to be thus involved in private prosecutions, nor can the integrity of their judgments be jeopardized by characterizing them as a part of the machinery in the consummation of a fraud. The courts of the country are independent agencies of the government, and their judgments are presumed to speak the truth. Nor will it be permitted that their judgments be assailed as the instruments of fraud, or as an agency in the perpetration of a swindle. In the very nature of things, they must stand aloof from any connection with the parties as their agent, save as a function of government—as the final arbiter between all parties, for the determination of the right and the truth as between them. We hold that, whenever their power is invoked between the attempt and execution of the purpose to swindle, it is the intervention of an independent moral agent, which cuts off any criminal prosecution assumed to be consummated in the judgment."

TELEPHONES. (Discontinuance of Service for Non-payment of Toll — Set-off.)

Supreme Court of Indiana.

In Irvin *v.* Rushville Co-operative Telephone Co., 69 Northeastern Reporter 258, it was contended that a telephone company could not discontinue its service to a patron for the non-payment of tolls if the patron had a claim against the telephone company. This contention the court regards as untenable and quotes the opinion of the appellate court on a former appeal of the case: "It cannot be denied that a rule of the company requiring these monthly payments to be made in advance would have been a reasonable rule, and that upon refusal so to pay service could be denied. The company must protect its plant, and keep up its efficiency, and may enfore a rule that insures a reasonable revenue and its prompt receipt. It can maintain an efficient service only through prompt payments of its dues and tolls, and because of that fact it may use the summary remedy of denying service for non-payment. It cannot be said it may be denied the benefit of this rule because a patron claims the company is indebted to him. It cannot be required to stop and adjudicate claims held against it. The law compels it to furnish service. A patron may take service or not, as he chooses. It must furnish efficient service to all alike, who are alike situated, and must not discriminate in favor of or against any one. For failure the extraordinary remedies of *mandamus* and injunction may be successfully invoked. It may be said that the courts are open to the company to collect its claim, but as to this the company and the patrons are on an equal footing. The fact that the patron is solvent aids nothing in determining a rule which must apply to solvent patrons alike. Keeping in view the nature of the company's duties, and the services it may be compelled to render, it must be held that the company may enforce the payment of its current dues and tolls by the summary remedy of denying service regardless of the fact that the subscriber claims the company is indebted to him."

JAMES BUCHANAN.

The Green Bag.

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JAMES BUCHANAN AS A LAWYER.

BY EUGENE L. DIDIER.

THE distinction which James Buchanan acquired as United States Senator, as Secretary of State, as Minister to England, and as President of the United States dimmed, if it did not totally eclipse, his early fame as a lawyer. The persevering industry of his father enabled him to give the future President a classical education, and he graduated with high honors at Dickinson College, Pennsylvania, in 1809. Within a few months of his leaving college he began the study of the law, and was admitted to the bar on November 17, 1812. He had been a hard student, and he was fully equipped for the practice of his chosen profession. The War of 1812, in which he volunteered for the defence of Baltimore, interfered with his professional business; also, the two terms in the legislature of Pennsylvania, 1814-15, during which he was a zealous supporter of every measure of national defence. At the close of his second legislative term, he retired from public life with the determination to devote himself exclusively to the law.

His practice increased rapidly, and, considering the time and place, was quite lucrative. From a memorandum kept by him, it appears that the first year he was at the bar, his fees were nine hundred and thirty-six dollars. They continued to increase steadily, year after year, excepting in 1820, until they reached $11,297, in 1821, when he had been at the bar only eight years. After he went into politics, in 1820, his professional income fell off rapidly, and, in 1829, his last year at the bar, his fees amounted to a little more than $3000. Once only after his retirement did he appear again at the bar, and that was to defend a poor widow who was threatened with ejectment from her only piece of property. He succeeded, after considerable difficulty, in establishing her claim, much to the astonishment of every one, and to the great joy of the poor woman, who overwhelmed her benefactor with thanks, and with offers of money, but Mr. Buchanan declined to accept any pay for his services.

In 1816-17, Mr. Buchanan gained great distinction by his able defence of the Honorable Walter Franklin and his associates on the bench of the Court of Common Pleas, in the district comprising the counties of York, Lancaster and Lebanon, who were brought before the Senate of Pennsylvania on articles of impeachment. The case, which attracted great attention at the time, was, in brief, this: In July, 1814, the President of the United States made a requisition on the Governor of Pennsylvania for the services of certain regiments of the State militia. The troops were accordingly mustered into the service of the United States. One Houston, a citizen of Lancaster, refused to serve, and was tried by a court martial under the State authority, and fined. He brought suit in the Court of Common Pleas against the members of the court martial, and the officer who had collected the fine. On the trial, Judge Franklin, who was the only lawyer on the bench,

ruled that when the militia had been mustered into the service of the United States, the control of the State and the power to punish ceased. The plaintiff, therefore, recovered a verdict. Then followed the impeachment of Judge Franklin. A gentleman who was present at the trial, and who watched the proceedings with great attention, said that Mr. Buchanan's argument was conducted with great ingenuity, eloquence, and address, and the effect of the impression produced by the argument was so strong that the managers of the impeachment asked for an adjournment before they replied to it. Judge Franklin was acquitted. In reference to this case, Mr. Buchanan afterwards wrote: "I alone defended Judge Franklin and his associates. I never felt the responsibility of my position more sensibly than when, a young man between twenty-five and twenty-six years of age, I undertook alone to defend Judge Franklin."

When James Buchanan had reached the age of thirty he showed that he possessed a legal mind of the first order, and it is said that, even at that early age he commanded a practice more enviable and more extensive than that of any other lawyer in the State. It should be remembered that he came to the bar when Pennsylvania was distinguished through the United States for the ability and high standing of its members. It included such great names as the Gibsons, the Dallasses, the Duncans, the Semples, and others, who were not only an honor to their State, but whose fame extended through the country. With such eminent lawyers James Buchanan was obliged to cope in the struggle for success at the bar. His rise was rapid and brilliant. Triumph followed triumph, from the time of his admission until, at the early age of forty, he retired from the legal profession.

Elected to Congress in 1820, Mr. Buchanan was appointed Chairman of the Judiciary Committee of the House of Representatives, and, in the performance of the important duties of the position, displayed remarkable ability, especially in introducing and advocating a bill to amend and extend the judiciary system of the United States. Daniel Webster had been the Chairman of the Judiciary Committee when he was a member of the House.

While Mr. Buchanan held the position, a matter came before it which was regarded as one of the most important that can fall to the consideration of a legislative body. This was the celebrated impeachment case of James H. Peck, Judge of the District Court of the United States for the District of Missouri. To impeach a judge is one of the most solemn duties that a legislative body is ever called upon to perform, embracing as it does points of constitutional law of the most delicate character. Mr. Buchanan was the chairman of the managers; the others were George McDuffie of South Carolina, Ambrose Spencer of New York, Charles Wickliffe of Kentucky, and Henry R. Storrs of New York. The case involved the liberty of the press, and has been briefly stated as follows: In December, 1825, Judge Peck decided against the claims of the widow and children of one Antoine Soulard to certain lands in the State of Missouri and the then territory of Arkansas. Luke E. Lawless, of St. Louis, had been one of the counsel for prosecuting the claim, and when the decision was rendered, he published an article in a newspaper, citing, in respectful language, certain errors into which Judge Peck had fallen. Upon this the judge had him summoned, and not only deprived him of the right to act in his profession, but actually committed him to prison. Mr. Lawless made complaint to the House of Representatives, and the impeachment of Judge Peck followed. William Wirt and Jonathan Meredith of Baltimore

appeared for the defendant. The trial, which was conducted with marked ability on both sides, is one of the most celebrated in the annals of American jurisprudence. In closing the case, Mr. Buchanan confined himself strictly to the legal and constitutional questions involved. The Senate refused to punish Judge Peck owing to some technical objections that stood in the way of his conviction, but soon afterwards it passed an act removing those objections, and so changed the law that no judge has since ventured to render himself liable to be impeached for a similar offence.

Mr. Buchanan's standing at the American bar is shown by the fact that President Van Buren offered to make him the Attorney General of the United States upon the resignation of Felix Grundy in 1839, but the future President of the United States preferred to remain in the Senate, of which he was one of the Democratic leaders. After Mr. Buchanan was elected to the United States Senate, in 1834, he never resumed the practice of the law, but he led a busy and active life, during the ten years he was in the Senate, the four years he was Secretary of State, under the administration of President Polk, the three years he was minister to England, in the administration of President Pierce, and, finally, as President of the United States.

THE BUNYAN WARRANT.

THE original warrant under which John Bunyan, the author of *Pilgrim's Progress*, was arrested, was sold by Mr. Quaritch in London in April of this year for £305. The warrant is signed by thirteen Justices of the Peace, of whom six were baronets and seven esquires. The warrant runs as follows:—

To the Constables of Bedford and to every of them

Whereas informacon and complaint is made unto us that (notwithstanding the King Majties late Act of most gracious gen'all and free pardon to all his Subjects for past misdemeanors that by his said clemencie and induljent grace and favor they might bee moved and induced for the time to come more carefully to observe his Highenes lawes and Statutes and to continue in theire loyall and due obedience to his Majtie) yett one John Bunnyon of yor said Towne Tynker hath divers times within one Month last past in contempt of his Majties good Lawes preached or teached at a Conventicle Meeteing or assembly under color or p'tence of exercise of Religion in other manner than according to the Liturgie or practice of the Church of England. These are therefore in his Majties name to command you forthwith to apprehend and bring the Body of the said John Bunnion bee fore us or any of us or other his Majties Justice of peace within the said County to answer the premisses and further doe and receave as to Lawe and Justice shall appertaine and hereof you are not to faile. Given under our handes and seales this ffowerth day of March in the seaven and twentieth yeare of the Raigne of our most gracious Soveraigne Lord King Charles the Second Ao q'. Dui juxta, *etc* 1674.

Bunyan was arrested March 15, 1674, and his imprisonment in Bedford Jail lasted six months, during which period he thought out, and, it is generally believed, began his immortal work.

DOG-LAW IN DOGGEREL.

By Charles Morse,
Assistant Editor of the *Canada Law Journal.*

I. DOGS AND TRESPASSERS.

SARCH v. BLACKBURN. 4 C. & P. 297.

REGULA: Contra nocentem tenere canem non est culpa.

I sing the old Ford watchman: (What better name than Sarch
For him who spent his vigils in dogging mischief's march?)

But Fate, with her grim ironies, ne'er lets us go unflogged;
And this dog's tale unfolds to us how doggers may be dogg'd.

Defendant was a milkman; and, lest his patrons saw
How milk and water coalesce, he kept a canine jaw

To fright away all trespassers; and up this legend nailed:
"Beware the dog!"—a sign before all hearts but Sarch's quailed.

'Twas not so much that Sarch's nerve proclaimed heroic breed,
As that the plaintiff in his youth had not been taught to read.

One summer morn, his duties done, the plaintiff left his beat,
And plann'd to cut through Blackburn's lot and save his weary feet.

In vain kind Phœbus threw his rays on that portentous sign;
Unletter'd Sarch maintained his march past pigs, and fowl and kine.

The kennel's near, yet no one warns—the men are in the mews,
A moment more and Towser's teeth are fastened in his trews!

Though homespun's tough, 'twas not enough those sharp teeth to enmesh,
A lucky Shylock Towser proved—he *got* his pound of flesh!

Nota.—By no exercise of poetic license may a dog be set down as able to remove a pound of carnous tissue at one fell bite, hence we feel it incumbent upon us at this juncture to unhorse the reporter from Pegasus, and bid the latter go to grass, the former to prose, so that Sarch and his cause may be reported aright.

The following proposition of law is a fair deduction from the instructions of Tindal, C. J., to the jury in this case: *A person is justified in keeping a dog in his yard for the protection of his premises, and if one in the act of trespassing upon such premises is bitten by the dog, he has no right of action against the owner.* But the learned Chief Justice said that a man has no right to keep a ferocious dog in such a situation, in the way of access to his house, that a person coming there for a lawful purpose may be injured by it. In such a case, the owner of the dog could not excuse his liability by showing that he had posted up a danger notice by which the person injured might have been put on his guard had he read it. (See also Brock *v.* Copeland, 1 Esp. 203; Curtis *v.* Mills, 5 C. & P. 489.)

In the United Sfates it is no defence for the defendant in an action for keeping a vicious dog to show that the plaintiff was at the time trespassing upon the defendant's property, for the purpose of hunting (Loomis *v.* Terry, 17 Wend. [N. Y.] 496); or of picking berries (Sherfey *v.* Bartley, 4 Sneed [Tenn.] 58); or for no particular purpose (Pierret *v.* Moller, 3 E. D. Smith [N. Y.] 574). Concerning a householder's right, in general, to protect his grounds, Cowen, J. said in Loomis *v.* Terry *(supra)*: "As against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that, in these and the like cases, the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way." See the Quebec case of Dandurand *v.* Pinsonnault (7 L. C. J. 131), decided under the Civil law, but enunciating practically the same doctrine as that of the above cases in the American Courts.

II. THE SCIENTER IN DOG-LAW.

Sing, tuneful Muse, from your Pierian dell,
(You'll have to help me for I don't sing well!)
Please sing the *Canidæ*, you will not weary us—
We're sober lawyers, though our star's not Sirius!
('Tis pale Astraea beckons us to Heaven—
Adumbrative in Coke, but clear in Beaven.)

What dearer theme than dogs our pen bestirs?
Man loves them all—both thoroughbreds and curs.
Perchance they've souls—now, prithee, don't say "Pshaw"!—
Hathaway *v.* Tinkham, 148 Mass. 85. *Mens rea's* theirs in Massachusetts' law.
'Tis true that legislation frets them now;
But that's because their ranks unduly grow
In cities, where our nerves get such ill-usance
They oft regard sweet singing birds a nuisance.
But dogs at Common Law were treated well
If honest truth the old Reporters tell.
Ferae naturae non, the cases say,
Mason *v.* Keeling, 12 Mod. 332. Down from the time of Sir John Holt, C. J.
"*Bad law*," you cry, with Towser at your calf;
"*Yet law*," replies his owner with a laugh.
You go to Court, the dog is cleared amain:
Fleeming *v.* Orr, 2 MacQ. H. L. C. at p. 25. "He's bit but once—and may not bite again";
Ibid., at p. 23. "A dog, forsooth," (thus runs the Court's advice)
"Is mansuete till he's lunched upon you twice!"
Beck *v.* Dyson, 4 Camp. 198; Vrooman *v.* Lawyer, 13 Johns (N. Y.) 339. But after that he's no experimenter,
Spring Co. *v.* Edgar, 99 U. S. at p. 654. He's *ferus*, and you set up the *scienter*.
So far from mercy then the dog recedes
Per Lee, C. J. in Smith *v.* Pelah, 2 Strange 1264. He may be hung for his carniv'rous deeds;
And in his dining he can't wait for curries,
Parsons *v.* King, 8 T. L. R. 114. A half-hour's fatal twixt to single worries.

Nor, if provoked to make bite "number two,"
Will that avail to shield him from his rue.
Aye, more, once Towser bites, he may be brought,
In proprio corpore, before the Court;
There to assist the drowsy jury's mind
In judging if his owner deemed him kind;
And if the jury learn he has been chained,
Thus the *scienter* they may find maintained.
In self-defence a bite's within the law,
But let the dog bite quick or hold his jaw;
If he delays and later vents his spite,
He's simply slept upon his legal right.
"If I am bitten, I may kill!" you say;
Not so if Towser bites and runs away.
(The Muse digresses—but not ours to damn:
Que voulez-vous? Peste! C'est méthode de femme.)
A man may keep a vicious dog to guard
His curtilage—but let him be in ward;
If *licensees* are bitten when they enter,
A judgment's theirs *sans* proof of the *scienter*.
But *trespassers* at night fare not so well,
They risk the canine being kind or fell.
Tho' when *you* trespass, with your dog appendant,
His bite will throw all burdens on defendant.
E'en harbouring a dog you do not own
Will mulct you if his viciousness be known.

Smith *v.* Pelah (*supra*); Fake *v.* Addicks, 45 Minn. 37.

Line *v.* Taylor, 3 F. & F. 732.

Jones *v.* Perry, 2 Esp. 482; Webber *v.* Hoag, 8 N. Y. Supp. 76.

Keightlinger *v.* Egan, 65 Ill. 235; Linck *v.* Scheffel, 27 Ill. App. at p. 20.

Morris *v.* Nugent, 7 C. & P. 572.

Smillie *v.* Boyd, 24 Sc. L. R. 148; Muller *v.* McKesson, 73 N. Y. 195.

Sarch *v.* Blackburn, 4 C. & P. 297; Loomis *v.* Terry, 17 Wend. (N. Y.) 497.

Beckwith *v.* Shoredike, 4 Burr. 2092; Green *v.* Doyle, 21 Ill. App. 208.

McKone *v.* Wood, 5 C. & P. 1; Wood *v.* Vaughan, 28 N. B. 472.

EPILOGUE.

And so the doctrine runs at Common Law,
When mortals suffer from the canine jaw.
So, be he bitten, 'tis beyond dispute
A man is worser off than a dumb brute.
For when of sheep your dog proves a tormenter
The plaintiff need not set up the *scienter;*
You're liable by statute, and are fined
Whether you knew the culprit fierce or kind.
The moral is: *Guard Towser all you can;*
But when he bites, pray let him bite a man!

NAMES OF LITERARY COMPOSITIONS.

By Bernard C. Steiner,
Dean of the Baltimore Law School.

THE name of a literary production is not protected by copyright, but is an appendage to the production.[1] A number of decisions of the courts speak of the name as property[2], but there is some authority against this view[3], and it seems better to rest the remedy for improper use of the name on the ground of fraud. Here, as in other cases of competition, the fraud is to be proven, in case the defendant simulates a name composed of a word or words not arbitrary but descriptive in character, and is presumed, when he imitates words distinctly used by the plaintiff. After all, it is the literary production, *i. e.*, the book or periodical of which the name is the symbol, and not the name itself which is protected. Names may be divided into two classes; those of single books and of periodical publications. In the case of the latter, there is a continuance of issue, which gives rise to good will attaching itself to the name of the periodical rather than to the place of publication. The probability of the title continuing to attract custom in the way of circulation and advertising patronage gives a value which may be protected and disposed of.[4] In the case of the former, the good will preserved is that attaching to the sale of additional copies of what has been already published, rather than to the future publication of new matter under the same name.

Of course, the plaintiff must establish his title by proof of use in publication. When publication occurs, is sometimes a question of difficulty. In the case of a professor who delivers lectures orally in a class room, the British cases hold that he does not so communicate them to the world so that one may publish them without his consent and that there is an implied contract with the hearer not to publish the notes without the lecturer's consent. Even a third party, to whom the notes are sold and who published them, has been enjoined.[5]

Publication of a literary production like dedicating a private road to the public, is abandonment[6]; unless there be copyright; but the abandonment is only to the fair use

[1] Jolie *v.* Jacques, Fed. Cases 1437; Kelly *v.* Hutton, 37 L. J. Ch. 297; L. R. 3 Ch. Ap. 703; Dicks *v.* Yates, 18 Ch. D. 76. A series of valuable articles on this subject appeared in 1880 in 10 Cent. L. J. 82, 104, 123.

[2] Name is property: Met. Nat. Bank *v.* St. Louis Despatch Co., 149 U. S. 436; Gannett *v.* Ruppert, 119 Fed. 221; Rose *v.* McLean, 24 Ont. A. R. 240; Walter *v.* Head, 25 Sol. J. 742, 757; Giblett *v.* Read, 9 Mod. 459. "It is as much a part of the proprietor's property as his counting room or printing press." Gannett *v.* Ruppert (CCA), 65 Pub. Wkly. 68; Reid *v.* Bishop. 4 N. Z. L. R. 222; Munro *v.* Toucey, 129 N. Y. 38.

[3] Bowen said in Walter *v.* Emmott, 53 L. T. N. S. 437, the "name is not property, but the value of the name is the reasonable expectation of using it profitably in business." Black *v.* Ehrlich, 44 Fed. 793; "neither author nor proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work, but any other person can with impunity adopt it and apply it to any other book, or to any trade commodity, provided he does not use it as a false token to induce the public to believe that the thing to which it is applied is the identical thing it originally designated."

[4] Met. Nat. Bank *v.* St. L. Dispatch Co., 149 U. S. 436. The rights to publish newspapers are goods and chattels; Foss *ex parte*, 30 L. T. O. S. 354, on appeal 2 De G. & J. 230; and may be assigned Kelly *v.* Hutton, 37 L. J. Ch. 297 L. R. 3 Ch. Ap. 703; and then other persons may be enjoined from using the name of the paper, or a similar one, at suit of the assignee; Lawrence *v.* Times Printing Co., 90 Fed. 24. In a curious case the defendant agreed to publish a magazine, and the plaintiff enforced a clause in the contract that he might use the name and prohibit the defendant's use of it, if the latter failed to bring out the numbers on time. N. Y. Polyclinic School *v.* King, 57 N. Y. Supp. 796.

[5] Abernethy *v.* Hutchinson, 3 L. J. O. S. Ch. 209 (1825); Caird *v.* Sime, 13 Ct. Sess. Cas. 4th Ser. 23, reversed by 12 A. C. 326.

[6] Jeffreys *v.* Boosey, 4 H. L. C. 965.

of the public. To carry the metaphor further, the public may not use the road so as to damage the land on the side.

The publication must be complete, so that there is not only adoption, but also an actual use of the name by the plaintiff. Even an intention to publish, registered at the copyright office, is held insufficient to protect against the use of the same name by another.[1] Exclusive right to use a name, as a title of a publication, can not be acquired by public advertisement of an intention to use the name, or by the expenditure of money in preparation for publication. Only actual publication can give title. Expenditure by a man on a work not given to the world can not create a right against the world and the person advertising his intention to use a name may change his mind and never do so. If protection were given without publication, a man might take a valuable tradename and, like a dog in the manger, obstruct others, while not using the name himself. A person, however, who published a magazine called *Belgravia* before another, whom he knew to have advertised his intention to use the name for that purpose, may not restrain the other from such use.

The resemblance of the defendant's article to the plaintiff's must be such as to justify the belief that there was an intent to pass off his goods for the plaintiff's. If such resemblance is established, equity will protect the wronged trader.[2] This principle comes frequently into use in connection with the names of newspapers and periodicals. Where they are different in times of publication, size, shape and arrangement, it is difficult to convince the court that one wrongs the other and practically impossible to obtain a preliminary injunction. Thus *Inquire Within for Everything*,[3] a copyright work formerly issued as a book, then as a monthly, and finally in weekly parts, was not infringed by a weekly magazine, entitled *Inquire Within*; the *Birmingham Daily Mail* was not infringed by the *Morning Mail*[4]; the *Contemporary Review* by the *Nineteenth Century*,[5] the *New Northwest* by the *Northwest News*,[6] the *Morning Post* by the *Evening Post*[7]; the *Triweekly Mail* by the *Morning Mail*[8]; *Our Young Folks' Magazine* by *Our Young Folks' Illustrated Paper*[9]; the *Monthly Railroad and Engineering Journal* by the *Weekly Engineering News and American Railway Journal*[10]; the *Newcastle Chronicle* by the *Sporting Chronicle*, published at Newcastle[11]; the *Plumber and Decorator and Journal of Gas and Sanitary Engineering* by the *Decorator, Plumber and Gasfitters' Journal*[12], or by the *Plumbing and Decorating, Sanitary, Water, Gas, Engineering Chronicle;* the *Democratic-Republican New Era* by the *New Era*[13]; *London Society* by *English Society*[14]; the *Princess Novelettes* by the *Princess*[15]; the *National Advocate* by the *New York National Advocate*[16]; *The Era*, in which appear articles signed "Touchstone," by *Touchstone*, or the *New Era*[17]; *Punch* by *Judy*, or by *Punch and Judy*[18]. In the last case, all three were humorous papers of the same size and appearance, but the covers and price of the third

[1] Maxwell *v.* Hogg, 12 Jur. N. S. 17, s. c. 15 W. R. 467.

[2] Am. Grocer Pub. Asso. *v.* Grocer Pub. Vo., 5 How. Pr. 402.

[3] Houlston *v.* Morley, 90 L. T. Jour. 40.

[4] Jaffray *v.* Emmett, Sebastian 4th ed. 296.

[5] Strahan *v.* King, 10 Cent. L. J. 124.

[6] Duniway *v.* N. Y. Pub. Co., 11 Or. 322.

[7] Borthwick *v. Evening Post*, 37 Ch. D. 449.

[8] Walter *v.* Emmott, 53 L. T. N. S. 437.

[9] Osgood *v.* Allen, Fed. Cas. 10603.

[10] Forney *v. Engineering News*, 10 N. Y. Supp. 814. *Semble* the Baltimore *Herald*, a weekly, is not damaged by the daily Baltimore *Morning Herald*; Smith *v.* Herald Co., 2 Md. L. Rev. 81.

[11] Cowen *v.* Hutton, 46 L. T. N. S. 197.

[12] Dale *v.* Smith, 1882, W. N. 185; Dale c. Gen'l Co., 17 T. L. R. 177.

[13] Bell *v.* Locke, 8 Paige Ch. 75.

[14] Clowes *v.* Hogg, 1870, W. N. 268.

[15] Brett *v.* Bowles, Sebastian 296.

[16] Snowden *v.* Noah, 1 Hopk. 347.

[17] Ledger *v.* Ray, Cox Dig. 550.

[18] Bradbury *v.* Beeton, 39 L. J. Ch. 57.

were different. The *Commercial Advertiser*[1], though frequently known as the New York *Commercial Advertiser*, is not infringed by a journal of the latter name, especially, since the defendant's paper is dissimilar in type and arrangement, has another title in conspicuous letters below the principal one, and is an evening paper devoted to general news, while the plaintiff's paper is a morning one, confined to commercial, financial and shipping news. In many of these cases, the court distinctly says there is no fraudulent conduct on the part of the defendant such as to mislead the public and supplant the plaintiff in the use of his good will[2]. When we come to consider the names which have been enjoined, we shall find that it is difficult to reconcile the decisions and must remember that the allegations of the pleadings, the sufficiency of the evidence, and the forcible presentation of the case by an able advocate, often explain why a decision is made for one party or another.

The character of the public to which the periodicals appeal must be considered, and so *La Cronisa* receives no redress against *El Cronista*[3], as Spaniards, for whom the papers are intended, would not be deceived. Likewise, the *United States Investor*, published at Boston, is not infringed by *Investor*, a financial guide to Southern California, published at Los Angeles under a different form[4].

There are a number of cases in which a name of newspapers has been protected by the courts[5]. For example, the owners of the *Real John Bull*[6] had injunction against the use of that name by another, either alone or in connection with the word "old"; the *National Police Gazette*, frequently known simply as the *Police Gazette*, is infringed by the *United States Police Gazette*[7]; the *Bedfordshire Express and General Advertiser* for the counties of Cambridge, *etc.*, is infringed by the Bedfordshire *Express and General Advertiser* for the county[8]; the *Grocer and Oil Trade Review*, published at London, is infringed by the *Grocer and Wine Merchant* and *Irish Brewer and Distiller*, published at Dublin, though the latter represented a different branch of the trade[9]; the *Commercial Traveller*, often referred to as the *Traveller*, is infringed by the *Traveller*[10]; the *Plumber and Decorator, Gas and Sanitary Engineering Journal* is infringed by the *Decorator and Plumber*[11]; the Edinburgh *Correspondent* is protected[12]; the London *Journal* is infringed by the London *Daily Journal*[13]; the *Summit Record* is also protected[14]; and injunction was granted against the *Grocer* at the suit of the *American Grocer*, which was formerly known as the *Grocer*, and often still so called[15]. The last-named case is a typical one of fraud, though the price of the defendant's paper was less, it was of about the same form and size, the defendant had formerly been connected with the plaintiff's paper, located his office in the same block and on the same side of the street as the plaintiff, and removed when he did. An English court held that *Bell's Life in London and Sporting Chron-*

[1]Coml. Adver. Ass. *v.* Haynes, 49 N. Y. Supp. 938.

[2]*E. g.*, defendant expressly says his paper is a new one, Snowden *v.* Noah, 1 Hopk. 347.

[3]Stephens *v.* De Conto, 4 Abb. Pr. N. S. 47, La Cronica was dead anyway.

[4]Investor Co. *v.* Dobinson, 82 Fed. 56.

[5]The use of similar type (Corns *v.* Griffiths 1873 W. N. 93) and the undue prominence given a similar catchword are elements in favor of restraint of defendant's conduct. Chance *v.* Sheppard, 10 Cent. L. J. 124.

[6]Edwards *v.* Benbow, Dig. 33 (1821).

[7]Matsell *v.* Flanagan, 2 Abb. Pr. N. S. 459.

[8]Lodges *v.* Ray, 10 Cent. L. J. 124.

[9]Reed *v.* O'Mara, 21 Ir. L. R. 216; see Licensed Victuallers' Newspaper *v.* Bingham, 38 Ch. D. 139.

[10]Carey *v.* Goss, 11 Ont. R. 619.

[11]Dale *v.* Smith, 17 T. L. R. 177.

[12]Edinburgh Correspondent Newspaper Re., 1 Ct. Sess. Cas. 1 407n.

[13]Ingram *v.* Stiff, 5 Jur. N. S. 947.

[14]Lane *v.* Smythe, 46 N. J. Eq. 443.

[15]Am. Grocer Ass. *v.* Grocer Co., 25 Hun. 398.

icle price five pence[1], might have an injunction against *Penny Bell's Life and Sporting News*, as the use of such descriptive word as "penny" did not take away the infringement.

"The name or title of a work may be considered as a kind of trademark, which no person, other than the proprietor of the work, can use so as to damage him." If a name practically the same as that used by plaintiff is used by defendant, they may steal not only his purchasers, but also his advertisers. So the Canada *Bookseller* was held an infringement of the *Canadian Bookseller and Literary Journal*[2]. The Federal Circuit Court of Appeals[3] held that *Home Comfort*, a magazine published in New York, chiefly concerned with the care and hygiene of infants, infringed *Comfort*, a magazine of somewhat more general character, published in Maine. The name was considered as one arbitrarily selected, and suggested the purpose and errand of the paper, while not descriptive. Judge Coxe, in the court's opinion, said: "A person publishing a newspaper, or a magazine, may give it a name by which it is known and by which its authenticity is attested. This name is entitled to the same protection, as if it were affixed to other articles of merchandise. The purchasing public knows it by that name and no other. The name is a badge of origin and genuineness. . . . A rival publisher has no more right to appropriate the name of the periodical than the individual name of the owner." Other cases have referred to the analogy between a trademark and a newspaper's name[4].

[1]Clement *v.* Maddicks, 33 L. J. 117.

[2]Rose *v.* McLean, 24 Ont. A. R. 240; reversing 27 Ont. R. 325. The court held that these names were so alike that the difference in the appearance of the two journals was immaterial. Defendant's name was formerly *Books and Notions.*

[3]Gannett *v.* Ruppert, 65 Pub. Wkly. 68 (CCA.) reversing 119 Fed. 221.

[4]*E. g.* Correspondent Co. *v.* Saunders, 11 Jur. 540.

Though the name of the editor is not a part of the title[5], yet a former editor of one magazine may not use his name deceptively with another magazine, and a former editor of the Edinburgh *Philosophical Journal* was prohibited from publishing *No. 1 New Series Edinburgh Philosophical Journal*, conducted by Dr. Brewster[6]. No one may falsely represent his journal as the successor of another, so that the purchaser of the *Britannia* and the *John Bull*, who carried them on under their joint names, had an injunction given against the assignor of the former newspaper[7], who began the issue of the *True Britannia*, alleged that it continued the *Britannia*, and endeavored to obtain the plaintiff's subscribers and advertisers. In another early case[8], the plaintiff was proprietor of the *Wonderful Magazine*, of which defendant's name was used as the publisher. Falling out with the plaintiff, the defendant began publishing *Wonderful Magazine New Series Improved*, copied ornaments on the cover, took up same continued article, printed picture promised in last number jointly published, and gave an index to the earlier numbers. The resemblance was such that both magazines must be procured to see which was the true continuation, and the defendant was properly enjoined.

Another interesting case[9] was that in which the plaintiff had published for eight years a weekly newspaper, *The Iron Trade Circular (Ryland's)*, and the defendant had published, for a longer period, a weekly re-

[5]Crookes *v.* Petter, 6 Jur. N. S. 1131. But a man may by contract restrict himself from associating his name with that of a magazine. Ainsworth *v.* Bentley, 14 W. R. 630; Ward *v.* Beeton, 23 W. R. 533.

[6]Constable *v.* Brewster, 1 Ct. Sess. Cas. III. 215.

[7]Prowett *v.* Mortimer, 4 W. R. 519. See Primrose Agency *v.* Knowles, 30 Sol. J. 338.

[8]Hogg *v.* Kirby, 8 Vis. 215; where defendant used plaintiff's periodical's name, volume and number falsely, injunction follows. Investor Co. *v.* Simons, 82 Fed. 56.

[9]Corns *v.* Griffith, 1873 W. N. 93.

port, not a newspaper, *Iron Trade (Griffith's) Weekly Report.* The defendant then began to publish a newspaper, similar to the plaintiff's, called *Iron Trade Circular*, edited by Samuel Griffiths, established in 1849, and was enjoined for so doing. He changed the title to the *Iron Trade Exchange*, which was suggested by the Court and accepted by the plaintiff.

In another case[1], the proprietor of the *Times* secured a prohibition of the issue of *fac similes* of earlier issues of his paper and of feigned future numbers, with advertisements for the defendant's benefit inserted on the last sheet.

Turning from periodicals to books and omitting such cases as come more properly under the head of fraudulent substitution[2], we find that where both parties place substantially the same literary matter and similar portraits in their work, there is no remedy where there is no passing off and the two books are so different in cover, outside title and title page that no one of ordinary intelligence could confound them[3]. Thus the plaintiff published *Nansen's Furthest North* at $10, and defendant was not restrained from publishing for $2, *The Fram Expedition, Nansen in the Frozen World.* The plaintiff had no monopoly right to publish books about Nansen. It is not unfair competition to reprint uncopyrighted books[4], nor to use a title which has been used before, if there is no deception. Thus the publisher of Miss Braddon's novel, entitled *Splendid Misery*, did not infringe the right of Hazlewood's or Surr's previously printed novels with the same title.[5] On the other hand, an injunction was earlier granted, at the request of one man who wrote a novel, entitled *Trial and Triumph*[6], against another who published one with the same name. The chief question is the deceptiveness of defendant's action, and where there is no deceptiveness there is no remedy. So the *Little Red Book*, describing a medicine, is not infringed by the *Red and White Book*[7], describing a similar medicine, nor does Charles Eustace Merriman's *Letters of a Son to His Self-made Father* infringe the rights of George Horace Lorimer's *Letters of a Self-made Merchant to his Son*[8].

In New York it was held that the use of the figure of Sleuth (a detective), on a design changed in the frontispiece of each book cannot be a trademark. A lower court held that City Sleuth, California Sleuth, and Silent Sleuth should be restrained as infringing Old Sleuth, but the Court of Appeals, in another case, said that Sleuth and Young Sleuth did not infringe Old Sleuth.[9]

Deceptiveness and fraud lead to restraint, so the publishers[10] of the *Official Guide, European Edition, to the World's Columbian Exposition* had injunction against another publication called *Official Directory or Guide to the World's Columbian Exposition.*

Beatty's New and Improved Headline Copy-books[11] were restrained at the suit of the owners of *Beatty's Headline Copy-books*, though the books were dissimilar in appearance, and Beatty himself prepared the former, as well as the latter. The court said that the name was more important, in case

[1]Walter *v.* Heard, 25 Sol. J. 742. 757.

[2]*E. g.*, The *Webster Dictionary* cases.

[3]Harper *v.* Lare, 66 Fed. 481; 93 Fed. 989; 103 Fed. 203.

[4]Sheldon *v.* Houghton, Fed. Cas. 12, 748.

[5]Dicks *v.* Yates, 18 Ch. D. 76.

[6]Weldon *v.* Dicks, 10 Ch. D. 247. Plaintiff's novel was out of print.

[7]Talcott *v.* Moore, 6 Hun. 106.

[8]Lorimer *v.* Herald, 63 Pub. Wkly. 1387.

[9]Munro *v.* Tousey, 129 N. Y. 38; Munro *v.* Beadle, 46 Off. Gaz. 448; 55 Hun. 312; Munro *v.* Smith, 55 Hun. 419.

[10]Reuter *v.* Int. Guide, 94 L. T. Jour. 437, 460. *The Good Things of Life* was infringed by *The Spice of Life*, both books being collections of jokes from the magazine of that name. Stokes *v.* Allen, 2 N. Y. Supp. 643.

[11]Canada Pub. Co. *v.* Gage, 11 Can. S. C. R. 306; appeal fr. 11 Ont. A. R. 402. So *Social Register* was protected as applied to a list of persons selected at will by the compiler, "because of" personal social standing. Social Register Co. *v.* Howard, 67 Off Gaz. 1448.

of a "subject of a *quasi* mechanical nature," and when no new theory of writing is taught in the new edition, than in case of a learned work, such as a "legal and scientific treatise on a subject, varying with the decisions of judicial authorities, or with the increased enlightenment or information of the world." A similar case[1] was that in which the publisher of *Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor,* was enjoined though Hemy had prepared the defendant's work. The court held that facts that showed intent to pass off were that Jousee's book was an almost forgotten one and had not been in the market for twenty years, while Hemy's name was placed more conspicuously than Jousse's on the title page. So the owner of *Gent's Comprehensive Instruction Book for the Violin,* by J. D. Loder, and of *Violin School,* by J. D. Loder, had his rights infringed by *J. D. Loder's Celebrated Violin School,* edited, revised and enlarged by T. Westrop[2].

Sometimes the case is one of copying other points of likeness beside the name, making the case one of "dressing up;" thus *Birthday Scripture Text-book* was infringed by *Children's Birthday Text-book*[3], and *Royal Calendar* by *Imperial Calendar,* containing the same lists[4]. The man who stole the most of the material of the year book of the National Liberal Club and called his book the *Liberal and Radical Year Book,* because of his lack of equity could not have an injunction against the *Liberal Year Book,* registered five days after his[5]. The publishers of *Chatterbox* won a number of cases[6], in which the question of accumulated resemblances was involved. In these cases the name, style, and arrangement of the plaintiff's juvenile publication had been copied and the plaintiff was given redress.

Of course, to advertise books as written or revised by authors, which were not written or revised by them, is a fraud which the courts frown upon[7]. A peculiar case was that in which the purchaser of the exclusive right to publish articles written by one of the survivors of the terrible Mont Peleé disaster restrained another magazine publisher from displaying on the cover the survivor's name, as author of an article the defendant printed written from a newspaper interview with the survivor[8].

The fact that one publisher issued a Maude Adams Calendar decorated with pictures of the actress does not prevent another from issuing a calendar of similar character, but very dissimilar in appearance[9]. However, the publishers of *Gruber's Hagerstown Almanac* had injunction against another publisher who imitated their first page closely and their last page exactly[10].

The name of a song has also been protected. Mme. Anna Thillon sang a song, entitled "Minnie," at Julien's Concerts, and her publisher was given an injunction against another publisher, who issued the same melody with the same name, representing it as sung by the same person, but using words different from those used by her[11]. In a second case he had injunction against the publisher of "Minnie, Dear Minnie[12]."

Dramatic compositions have received like

[1]Metzler *v.* Wood, 38 L. T. N. S. 541.

[2]Hutchings *v.* Sheard, 1881, W. N. 20. This was also a copyright case, as part of plaintiff's work was protected.

[3]Mack *v.* Petter, 20 W. R. 964.

[4]Longman *v.* Winchester, 16 Ves. 276.

[5]Talbot *v.* Judges, 3 T. L. R. 398.

[6]Estes *v.* Williams, 21 Fed. 189; Estes *v.* Leslie, 27 Fed. 22, 29 Fed. 91; Estes *v.* Worthington, 22 Fed. 223, 30 Fed. 465, 31 Fed. 154; Estes *v.* Belford, 30 Off. Gaz. 99.

[7]Byron *v.* Johnston, 2 Meri. 20 (1816); Besant *v.* Moffat, 84 L. T. Jour. 152; Clemens *v.* Such Dig. 429.

[8]Leslie *v.* Walker, 62 Pub. Wkly. 16.

[9]Frohman *v.* Stokes, 63 Pub. Wkly. 946.

[10]Robertson *v.* Berry, 50 Md. 591. See Spottiswoode *v.* Clarke, 10 Jur. 1043.

[11]Chappell *v.* Sheard, 2 K. & J. 117.

[12]Chappell *v.* Davidson, 2 K. & J. 123.

protection. It is established that playing a composition is not such publication as to make it public property and that another than the owner may not avail himself of the merits and popularity of the play. So the name "Erminie" was protected for a comic opera, and it was held that the publication of the songs without orchestration gave no right to have the name applied to any other libretto, dialogue, or orchestral parts. The name and dramatic composition were so blended that the former identified the latter to the public[1]. On like ground of deception of the public, the producer of "Sherlock Holmes" had an injunction against the production of "Sherlock Holmes, Detective"[2], and the producer of "L'Aiglon" against the use of the same name for a play with different text[3]. On the other hand, descriptive names, where there is no bad faith, may not be protected, and the producer of one composition called "Charity" had no redress against another who produced a different play with the same name[4].

[1]Aronson *v.* Fleckenstein, 28 Fed. 75.

[2]Hopkins *v.* Frohman, 57 Cent. L. J. 109.

[3]Frohman *v.* Peyton, 68 N. Y. Supp. 849.

[4]Isaacs *v.* Daly, 39 N. Y. Super. Ct. 511. "Charley's Uncle" does not infringe "Charley's Aunt" as the name of a play, Frohman *v.* Miller, 29 N. Y. Supp. 1109.

BED AND BOARD.

By Joseph M. Sullivan,
Of the Boston Bar.

BUSINESS was dull at the little court on the avenue, and Judge Houlihan was about to adjourn the court for the day, when Lawyer Tim O'Rouke interrupted him, saying: "Yir honor, I have a separate support case which I wish you to hear."

"Are both parties represinted by counsel," inquired his honor.

"Yir honor, I appear for the petitioner, Honora Callaghan, and I am advised that the respondent is unrepresented by counsel," replied Lawyer Tim.

"Mr. Clerk, call the respondent," sternly ordered his honor.

"Timothy Callaghan, Timothy Callaghan, come into coort, and answer unto a petition iv Honora Callaghan filed agin you, or your default shall be recoorded."

"Yir honor," interrupted Lawyer Tim, "I am informed that the defindant is confined in the county workhouse under sintence."

"Why didn't you tell me that fact at first," angrily replied his honor, "don't you know we can't default a man who is confined in jail?"

"I beg pardon, yir honor, it wuz an oversight on my part," was the humble apology of Lawyer Tim.

"Your ignorance is excoosable this toime," began his honor, "I really thought that you were playing thruant from the lunatic asylum. It's shockin' intirely the ignorance iv litigants; an overwurrked jidge like meself has to do all the thinkin' for litigants, thry all their cases for them, an' taich law to counsel whom an axaming boord turns loose upon the public. If I could only sell my brains to the public, on account iv the numerous bad heads, I couldn't satisfy the demand for thim, an' alongside iv my revenue Carnegie and Rockefeller would be mindicants. I don't think any attorney practisin' in my coort will ever be killed by a train iv thought. Most iv the bar practisin' before me are on a mental track thirteen an' a washout. Go on wid the case, Mr. O'Rouke."

Honora Callaghan was called, and proved a case of non-support satisfactory to his honor.

"Whin did your husband work last, and what pay did he receive?" inquired his honor, preparatory to making his decree.

"Yir honor, he has not worked for the past two years, and I have not received a penny for my support. Most of the time he has been in jail," meekly answered Honora.

"Honora Callaghan," began his honor, in summing up, "I'm sorry I can't issue a decree compellin' your blackguard husband to support you, an' pay you so many dollars per week, because I'm no partner iv Uncle Sam an' have no conniction wid the United States mint, because no judge can manufacture assets, an' love an' affiction can't be bought in the open market 'cept by boys in love who buy their affiction at candy counthers, ice-cream stands, and sody-wather fountains.

"Marriage is a pecooliar institootion; whin a man marries he ties himself up to a wharf, an' his wife is an anchor which holds him fore and aft. If he gits a good wife she will sarve him as a paddle wheel down the throublesome strame iv life, but if he gits a poor one, instid iv a warm corner he simply buys himself a refrigerator; that is, she simply hands her husband a snowball instid iv the Gulf strame iv affiction. The decree iv the coort is that you may lave your husband's a *minsa et thoro*."

"What is a *minsa et thoro?*" impatiently asked Honora.

"Excuse me, madam," replied his honor, "a *minsa et thoro* is tall English, wich, iv coorse, you don't understhand; thranslated into common phraseology they manes bed an' board."

"But, yir honor, I can't lave my husband's bed an' board bekase he's confined in jail, an' I niver had any desire to share it," interjected Honora.

"The coort can't allow ignorint people to insthruct it in law, an' the coort sthands adjourned," angrily replied his honor.

FEAR OF PREMATURE BURIAL.

THE will of Miss Frances Power Cobbe, who died in April of this year, contained a remarkable clause. Miss Cobbe, whose fame as authoress, social reformer, and philanthropist, is world-wide, had an intense horror of being buried alive, and her will contained a strict and solemn charge to her medical attendant to perform on her body "the operation of completely and thoroughly severing the arteries of the neck and windpipe, nearly severing the head altogether, so as to render any revival in the grave absolutely impossible." In order to make the clause binding she added: "If this operation be not performed and its completion witnessed by one or other of my executors, and testified by the same, I pronounce all the bequests in this will null and void." As Miss Cobbe was fairly wealthy the executors strictly obeyed the injunction.

Miss Cobbe's fear of premature interment has been shared by many notable people. Daniel O'Connell ordered his heart to be removed from his body and sent to Rome. Harriett Martineau bequeathed her doctor £10 to see that her head was completely severed from her body. Lady Burton, the wife of the distinguished African traveler, scientist and author, directed that her heart should be pierced with a needle and her body submitted to *post mortem* examination. Meyerbeer left instructions that his body should be left undisturbed for "ten clear days," and that "bells must be fastened to my feet, and veins opened in my arms and legs."

THE STUDENT ROWS OF OXFORD, WITH SOME HINTS OF THEIR SIGNIFICANCE

I.

By Louis C. Cornish.

THE student in our colleges today inherits privileges, which appear to him as having always existed. No matter how far distant his home may be, he journeys from it in safety. Even though he be the only representative from his State or city, he is entitled to all the rights of citizenship in his university. And not only does his college town give to him all the benefits which she allows her townspeople, she not infrequently offers him special inducements to dwell within her borders.

But the time was, and it was not so long ago, when these privileges were by no means assured to the man who would study at a university. In the middle ages the student came to the university at his own peril, or it may be protected by a "safe conduct" from the King. There he found himself a member of a group that was either superior or inferior to the other students of the university according as his section of the land was numerically represented, but in either case he had to fight his way to his privileges. If his nationality — Welsh or Scotch for example—held the balance of power, then he must fight to maintain it. If he belonged to a small group, he needs must fight to live at all within the university. And then his feud with his fellow students was but incidental to the feud which all the students had with the town, which was seeking either to expel the university from its gates or to exploit the scholars for its own benefit. The student must fight both his fellow students and the town.

The privileges which the student of our own time enjoys as his right, in the twelfth and thirteenth centuries belonged to the "projected efficiency" of college life. And the students of those centuries were busily engaged in projecting their efficiency.

It is proposed to show in these articles how the contentions among the students from about the time of the Conquest down to the reign of Richard II. did really project the privileges which we of today somewhat heedlessly enjoy. And it is also proposed to suggest the significance of this new chapter of Oxford history, now beginning with the Rhodes Scholarships, as it appears in the light of these old time contentions and their issue.

In order to understand these long and bitter struggles, it is necessary first to know something of the university life at Oxford at the beginning of the thirteenth century; the number of students, their habits, the conditions of the town which they infested, and the powers outside the university to which the disputants constantly appealed.

Both teachers and pupils came to Oxford from all peoples, nations and languages, from England, Wales and Ireland, and from the continental possessions of the English crown. There were Spaniards, Swedes, Bohemians and natives of Hungary and Poland, there were Scotchmen who held a "safe conduct" from the English King, and there were Parisians whose coming was for many years the subject of special clauses in the Anglo-French treaties.[1]

This concourse of foreign students would seem to indicate a large body of men in the University, and yet there is hardly a point in its early history more difficult to determine than its size. The Archbishop of Armagh, Richard Fitz-Ralph, declared before the Papal Consistory at Avignon in 1357

[1] S. F. Hulton, *Rixæ Oxonienses*, p. 8.

that in his early days there were at Oxford some thirty thousand students.[1] This statement has been quoted by many writers, especially those of early date, and it has been urged in its support that evidence shows there were no less than three hundred inns and halls, each capable of accommodating a hundred students, and that the student body included "barbers, copyists, writers, parchment preparers, illuminators, book-binders, stationers, apothecaries, surgeons and laundresses,"[2] in short all persons in any way connected with the gown rather than with the town. Then in his account of the temporary expulsion of the university from Oxford by Henry III., in 1264, William of Rishanger tells us that at the time "the number of clerks whose names had been inscribed in the registers of Masters (*in matriculus rectorum*) was upwards of fifteen thousand."[3] And after the riot of 1298, we learn from the townspeople that the clerks mustered rather more than three thousand strong. So we hardly are justified in thinking that there were less than four thousand students[4] gathered at Oxford between 1200 and 1300.

But if we accept only this smaller number, the elements brought together by four thousand young men in those riotous days must have been a severe tax on the endurance of even a mediaeval community. Some we are told "lived under no discipline, having no tutors, saving him who teacheth all mischief;"[5] while others "thieved and quarrelled all day and only for fashion's sake thrust themselves into the schools at ordinary lectures."[6] They dwelt where they pleased, living singly in the houses of the townsfolks, or in halls which a number of them rented together. They had no appreciation of the rights of person or of property; they pillaged each others' rooms, killed citizens and even sacked monasteries. They spent their time with "dibs, dice and cards,"[6] and we learn that they enjoyed "ball-play

THE ORIGINAL SEAL OF BALLIOL COLLEGE, OXFORD.

[1] Lyte, p. 94.
[2] Huber, I., pp. 67 and 403.
[3] Walsingham, p. 514.
[4] Boderick, p. 14: "No more than 2000, or at most 3000."
[5] Fuller, *History of Cambridge*, I., p. 34.
[6] Hulton, p. 12.

in the private yards and gardens of the townsmen." We also find that athletes "practysed themselves in shootinge with the bow and arbelstre, to play with the sword and buckler, to runne, to just, to play with the poleaxe, and to wrestle; and they began to bear harneys, to runne horses, and to approve them, as desyringe to be good and faithful knightes to susteyne the faith of God; for youth, emulous of glory, seeks these exercises against the time that war shall demand their presence." [1]

at Oxford we find this custom prevailing in the early days. We hear of the "Northern Nation," including the Scots and northern English, of the "Irish," the "Southern" and the "Welsh." From the first the nations lived in the neighboring halls for reasons of protection, and afterward they frequented certain colleges. For instance, later on, we hear that Exeter College "was much troubled with Welshmen." These nations fought bitterly among themselves about theology and everything which appealed to the aca-

OXFORD UNIVERSITY SEAL, ABOUT 1200 A.D.

In such a community obviously quarrels must have been frequent and quarrels in the early days of the university invariably meant battle, as is seen in the warfare between the students. In the continental universities the students were grouped in corporate bodies according to countries, and these divisions—we might almost call them fighting fraternities—had definite university privileges and were known as "nations." So

demic mind, and their riots help us to understand the fury of the strife between the town and gown. The account of two battles may serve as an illustration.

"In 1258, on the feast of Holy Trinity, fell out a sad dissension between the scholars of divers nations. The Northern and Welsh joined together against the Southern, and had banners and flags among them to distinguish each division. They also pitched their field near Oxford, in that of Beaumont as

[1] Hulton, p. 13.

it seems, where each party trying their valor fell together in such a confusion with their warlike array, that in conclusion divers on both sides were slain and pitifully wounded. This bloody conflict during among them for some time, the event thereof was this, that the Northern Scholars with the Welsh, had with much ado the victory."[1]

The second battle, selected like the first from the records of many others, occurred in 1388, more than a century later. "On Thursday in the fourth week in Lent in the twelfth year of the reign of Richard II., Thomas Speeke, Chaplain, and John Kirby with a multitude of other malefactors, appointing captains among them, rose up against the peace of the King, and sought after all Welshmen abiding and studying in Oxford, shooting arrows before them in divers streets and lanes as they went, crying out 'War, war, war! Fle, fle, fle! The Walsh doggys and her whelyps, and ho so looketh out of his house, he shall in good soote be dead'; and certain persons they slew and others they grievously wounded, and some of the Welshmen who bowed their knees to abjure the Town, they, the Northern Scholars, led to the gates, causing them to kiss the gates in dishonorable fashion. But, being not content with that, they, while the said Welshmen knelt to kiss it, would knock their heads against the gate in such an inhuman manner that they would force blood out of the noses of some, and tears from the eyes of others."[2]

Nor was there any greater harmony among the older men in the University world, among the Masters and Monks, for here as between the town and gown certain principles were working themselves into clearer definition within the social consciousness. Rivalry existed between the different monastic orders. The monks and the official clergy of the University were continually at odds. Wycliff, writing at about the time of the battle just described, speaks of every friar as "a dead carcass come out of his sepulchre, bound up in funeral clothes and egged on by the devil to act among men." And the townsfolk may have taken seriously his ingenious theory that the damp and fogs of Oxford were due to the fact that "the Mendicant Friars being inordinately idle and being commonly gathered together in large numbers caused a whole sublunary unseasonableness."[3]

Meanwhile the town of Oxford was no inconsiderable borough. In early days it had been the meeting place of national assemblies. In the immediate neighborhood were wealthy religious houses, such as Abingdon, Enysham, Oseney and S. Frideswyde's, and just outside the city gates were royal residences where two kings were born, Richard at Beaumont Place, and John at Woodstock. Down to 1305 tiltings and tournaments were regularly held in the town, although the picture of them which has been preserved for us is not wholly attractive. "Many sad casualties were caused by these meetings, though ordered with the best caution. Arms and legs were often broken as well as spears. Much lewd people waited upon these assemblies, light housewives as well as light horsemen repaired thereto. Yea, such was the clashing of swords, the rattling of arms, the sounding of trumpets, the neighing of horses, the shouting of men all day-time, with the roaring of riotous revellers all the night, that the scholars' studies were disturbed, safety endangered, lodging straitened, charges inlarged, all provisions being inconscionably enhanced. In a word, so many war horses were brought together hither, that Pegasus himself was likely to be shut out; for where Mars keeps his terms, there the Muses may even make their vacation."[4]

Over its own heterogeneous members and this mixed population within the town the infant University, fully engaged in fighting its battles as a body, could have but little con-

[1] Quoted from Wood, in Hulton, p. 18.
[2] Wood; quoted by Hulton, p. 24.
[3] Wood; quoted by Hulton, p. 88.
[4] Hulton, p. 11.

trol; and the fact that the Muses did not "make their vacation" and that Mars continued to "keep his terms" at Oxford for some centuries to come accounts for the feuds which inevitably followed from such conditions.

It should be remembered also that every riot of note in the university world brought into conflict all the elements of feudal life, town, crown and church: the town, usually with justice, seeking only its own welfare; the church and crown and university contending for larger principles, of which doubtless they were quite unconscious. A monkish doggerel tells us truly what often happened:

> Chronica si penses;
> Cum pugnant Oxienses,
> Post paucos
> Volat via per Angligenses.[1]
> When Oxford scholars fall to fight
> Mark the Chronicles aright,
> Before many months expired
> England will with war be fired.[2]

Before proceeding to the account of the actual hostilities between town and gown, it may be well to note further some of the causes for which they persistently fought, for these issues gave rise to the hatred of which the riots were only the indication. House rent and food are naturally first among them.

For several generations after the founding of the university, it owned no property, and if it so desired could move easily to another town. Scholars and teachers alike were poor and even the richest among them at short notice probably could have carried away with them all their worldly goods. Only the wealthiest could boast that he had

> "At his beddes hed
> Twenty books clothed in black or red
> Of Aristotle and his philosophie."[3]

So if the thrifty merchant of Oxford collected his rent, he must needs have been a hard landlord, and that he was bent on collecting his dues is shown in the constant trouble over the lodgings. But this trouble was so divided between the owners of different halls and houses, that it does not lend itself to our study so readily as does the contention over the market.

"As concernng the first rise of the Market of Oxon and when it began, it is beyond all record to deliver,"[4] and the same may be said concerning the market contention. Nowhere else has there been such a constant struggle for the supremacy between the two rival corporations, the town and the gown. From Edward III. to George III. the dispute never ceased. There was jealousy from the earliest days, the town anxious to sell everything as dear as possible, the gown angry at the system of two prices—the cheaper price for townsfolk and the higher for the students —and no doubt unduly anxious to reduce the cost of living to the lowest possible expense.

For a long time the University had no claim whatever over the market, but in 1214 the Papal Legate, in withdrawing an interdict laid on the town (for hanging three clerks of which we shall speak further on), gave it the right to be represented at the Assize. And this right gradually drew to itself more important privileges.[5]

In 1275 we find the King writing to the Mayor and Burghers "that they carefully observe the assize and the price of victuals, wine and other vendible things, lest the Scholars should be abused in their mercats. For now the Mayor was Clerk of the Mercat, and when any assaying was made by him of vendibles or potables the Chancellor or deputy was only present or a looker-on."[6]

In 1290 we learn that "the Chancellor and Scholars, as well as the Mayor (who before had the sole authority), had the power granted to them of the Assize of Victuals, & also

[1] Wood, I., p. 258.
[2] Chaucer, *Prologue, Canterbury Tales.*
[3] Oxford Hist. Soc. Pub., XV., p. 469.
[4] Ogle's *Oxford Market.* Oxf. Hist. Soc. Pub. XVI., p. 46.
[5] Ogle, p. 47.

the Power of determining about weights and measures."[1]

From this time on the town continued to lose certain of its market privileges. Five years later, in 1295, for some unstated reason the town refused to pay their fee-farm rent for the market to the Crown, and consequently "King Edw. the 1st did seize upon the Clerkship of the Mercat to the use of the Exchequer, and let out the same sometime to the Constable of Oxford, and sometimes to others who should pay for it."[2]

Thus far the records seem to show the city suffering under persecution, in which the gown aided by the crown was snatching away its rights. And no doubt this is a true picture of much that was happening; but the other side of the question, the provocation for royal interference in behalf of the gown, is seen in two letters from the King addressed to the City, under the dates of 1330 and 1331. The first orders that "Wine should not be sold dearer in Oxford and the suburbs thereof than in the City of London,

ARMS OF OXFORD UNIVERSITY

From the East Window of the Bodleian Library. This escutcheon combines the three mottos, used in succession, of the University.

The town naturally was exasperated at being deprived of the Clerkship, but a worse trouble was to come, for we learn that, "Whereas King Edw. ii. had before in a Charter of his join'd the Chancellor and Mayor together absolutely in the custody of the Assize, as aforesaid, Edw. iii. now joined them together herein: for upon the Mayor's Non-Complyance herewith the Chancellor alone was to have the custody of the said Assize."[3]

[1] Ogle, p. 48.
[2] *Ib.*, pp. 49 and 13.
[3] Ayliffe, *History of Oxford*, I., p. 100.

unless it be a half penny in every quart";[4] while the second appoints a commission to inquire into and redress "the unusual and uneven selling of Wine and Victuals in Oxon by the Baillives and others."[4]

This inquiry appears to have brought about an agreement, in 1348, between the two corporations to hold a joint assize of weights and measures, but any good results it might have had were lost after the riot of St. Scholasticas' Day, when a large number of students were killed.

[4] Ogle, p. 52.

The town for a time lay in disgrace under interdict and the schools were all but empty. To appease the scholars a new charter was given to the University in 1355, assigning to it the sole right to the assize of bread, beer and wine, as well as of weights and measures; and only the fines and forfeits remained to the Town, in aid of their feefarm rent to the Crown.

Seventeen years later, 1372, the King renewed his grant to the University "for the Correction of Victuals," and other evidence indicates that the "correction" of all marketable articles was passing into the hands of the gown.

Soon after this last grant we find the University seeking to extend its privileges over the sales of a monastery by laying claim to the assize of certain vendables at the Frideswyde Fair, but the Canons explained to the King and the claim of the University was disallowed. No doubt this was a check to the pretensions of the gown, but it was only temporary.

How far the University had progressed during the next fifty years in claiming jurisdiction over all vendables is shown by an action of the Chancellor, who, in 1428, summoned before the University Convocation the Mayor, Aldermen and Bailiffs, and severally censured them "for wresting from common Victuallers certain vendables to the prejudice of the King's University, damage of the public Markat, unjust detriment of the Community of Students, and against the due course of conscience."[1] And, in 1445, the Chancellor fined and imprisoned a butcher, whom he had convicted of selling bad meat, though under what power of imprisonment he acted does not appear, as no authority is quoted. In the following year a baker was similarly convicted, and was imprisoned in Bocardo, *"propter defectum ponderis panis equini."*

CITY SEAL, OXFORD.

Perhaps the most dramatic scene in the triumph of the University over the Town in the control of the market—and it marks

[1] Ogle, p. 54.

the end of the contention so far as our purpose is concerned, for henceforth the influence of the University is dominant—is the general "*inquisito*," or assize of victuals, held before the Chancellor, Gilbert Kymer, in 1449, at which he summoned before him, in his own quarters in Durham College, all the butlers and manciples and investigated the condition of things. And the condition was not wholesome, for the record says that "every one of the bakers about the University made only bread that was bad in taste, color and in smell, and their loaves were underweight"; and we learn further that they "gave only twelve to the dozen to Clerks, Whereas they gave Thirteen to the dozen to townsmen." In which testimony we see a custom that still lingers among us in the familiar phrase, "baker's dozen."

The following incident shows the unfair advantage which the University had over the Town in this struggle and which enabled it to gain the mastery. In 1530, Michael Hethe, Mayor of Oxford, refused to take oath to observe the privileges of the University, the privileges in question relating principally to the market. Bedells summoned him to the Vice-Chancellor, but he refused to go, saying, "Recommend me unto your Master, and shew him I am here in this town, the King's gracious lieutenant for lack of a better, and I know no cause why I should appear before him. I know him not for my ordinary; if there be any cause between the University and the Town, I shall be glad to meet him at a place convenient."[2]

This courageous answer has a sound of modern independence which leads us to wish that the outcome might have been more favorable to the Mayor, but he was fighting against overwhelming odds. Again he was summoned before the Vice-Chancellor, and again he refused. Then the Vice-Chancellor, acting not as a contending official but as a priest—the two offices were conveniently blended in those days—promptly excommunicated him, adding a curse on all who should eat or drink in his presence.

No one man in the little town of Oxford could stand against this power of the Church, and we find "forasmuch as so long as said curse lasted, he was to be deprived of several privileges, he was sorely troubled in mind and could take no rest. At length, considering the sad estate he was likely to endure, he humbly required of the Commissary and Proctors absolution, which being promised, was at length by the said Commissary and others given; but with this condition, that he should perform his corporal oath, '*de stando juri et parendo mandatis Ecclesiae.*'"[3] This power of excommunication was not infrequently used by the University in connection with the market quarrels.

For many years the struggle continued with only slight variation. The Town occasionally gained a point, or recovered one already lost, but usually paid dear for it by some royal grant of a new privilege to the University. Nearly a century after the Chancellor held the assize in his chamber in Durham College, we find a curious record of the evil practices on both sides. In 1531, the Town complains to the King about the University. The Deputy Commissioner seized a quarter of beef from a butcher, we are told, "and then he said these words, 'Clare, thou hast forfayted thy quarter of beefe,' and so extorciously took it from him and dyd ette it in Lingcolne College, and never payd for it." The Commissioner answered that the "meat was regratid" (*i. e.*, it had been sold twice in the same market), and that he had paid for it, "for the beefe, or the value thereof, Every Pennyworthe was Bestowid apoun pore prisoners, and other pore people, where he might have converted yt to the Common profyte of the University, according to the privilege of the sd Universitie, if it so had plesid him."[4] The fact that the value of the

[1] Hulton. p. 98.
[2] Wood, *Annals*, II., p. 37.
[3] Ogle, p. 58.
[4] *Ib.*

beef had been given to charity, granting that such had been the case, could have been but cold comfort to the butcher; and surely the arbitrary power of the Commissary was such as constantly to cause friction. Three years later, 1534, the Mayor and Council of Oxford "boldly affirme that the sayd Chaun'r Schollers be not Clarks of the Markett, and that they have never used it peacably, but by wrong usurpation," and they also affirm that the University should not be allowed "to set the price of coneys, nor of other things wh they buy of ye freemen of the Towne."[1]

But again we see against what conditions the University was fighting in an item from "The Particulars of the University Petition to the King in 1661," which reads: "Euery browne baker to sell iij horse loves for a penny, and they to wey according to the Statute in that behalffe provided & the same loves to be made most of beanes and not all of branne, uppon payne of forfetinge of Xs so often as any of the sayd bakers do offend in any of the premises, besides further punishment as before."[2]

So the struggle continued, with complaints and petitions from both town and gown until 1771, when Parliament passed an act for "Removing, Holding and Regulating Markets within the City," and under this Act, as amended successively in 1781, 1812, 1838 and 1888, the Market of Oxford is still administered.

Such is the history in brief of one main point of contention between town and gown, in itself perhaps hardly worthy of so long a digression, but important, because it shows the sources of constant strife and the never-ending opportunities for quarrels and hand-to-hand battles.

[1] *Ib.*

[2] Ogle, p. 69.

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

VI.

Russian Seizures of Neutral Merchantmen—The Right of Visit and Search, of Capture, and the Alleged Right of Sinking Neutral Prizes.

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THE most important questions of International Law bearing upon the rights of neutrals which have thus far[1] arisen from the Russo-Japanese war have grown out of the exercise of the right of visit and search and from the seizure of neutral vessels in the Red Sea by several crusiers of the Russian Volunteer Navy, as also the seizure and (in two cases) the sinking of neutral prizes in the Pacific Ocean by the Vladivostok squadron during the month of July.

Complaints were heard almost at the very beginning of the war of the searching and detention of neutral merchantmen by the Russian Mediterranean fleet in the Red Sea and of the detention of several British and American ships at Port Arthur.[2] The temporary detention of the British and American vessels at Port Arthur, whether due to

[1] August 25, 1904.

[2] It was also reported by Admiral Alexieff that the German cruiser *Hansa*, engaged in transporting German subjects from Port Arthur, was fired upon by Japanese warships; but the circumstances were not described, and, according to Admiral Alexieff's own admission, the vessel appears to have harbored Russians in the guise of Germans. The incident appears to have attracted but little attention. From the military correspondent of the London *Times*, February 17, 1904.
A British steamer (the *Fu Pung*) was also fired upon by a Russian guardship as it was leaving Port Arthur. This was said by Admiral Alexieff to have been due to a misunderstanding.

the fact that they harbored Japanese refugees[1] or whether caused by motives of military expediency,[2] does not seem to have been regarded as a serious matter by either of the neutral governments concerned, although there appears to have been some diplomatic correspondence and, in one case at least, a claim for the payment of demurrage.[3] It is probable that the temporary detention for military purposes of neutral merchantmen in a beseiged or blockaded port, more particularly at the beginning of a war, would be regarded with a certain degree of leniency by friendly neutrals. A payment of demurrage by the belligerent government to the neutral owners is probably the utmost that would be expected by the neutral Government[4] under these circumstances.

A much more serious matter was the stopping and searching of a number of neutral merchantmen in the Red Sea by the Russian Mediterranean fleet on its return from its projected voyage to the Far East during the second week of the war. Three neutral colliers[5] laden with steam coal, which was doubtless destined either directly or indirectly for Japan, were seized and brought as prizes into the Gulf of Suez within Egyptian territorial waters. Here they were detained for about four days, and in the meantime these waters were used as a base of anchorage from which to overhaul neutral vessels in spite of the protests of the Egyptian Government. The colliers were soon released however, in response to a telegraphic order from the Czar on the ground that these captures had been made before the Russian Government had formally declared coal contraband of war.

The return of the Russian Mediterranean fleet to the Baltic, the continued inactivity of the Baltic fleet, and the practical bottling up or blockade of the Russian fleet at Port Arthur almost ever since the beginning of the war, left the control of the high seas and of contraband trade in the hands of the neutral nations and the Japanese except for an occasional sortie by the Vladivostok fleet which inflicted some serious damage upon Japanese transports. There seems, however, to have been no interference with neutral trade until the seizure of the *Allanton* on June 16 and the *Cheltenham* early in July[6] for the carriage of contraband.

These seizures had excited some interest and controversy when the world was suddenly electrified by the news that two cruisers, the *Peterburg* and the *Smolensk*, belonging to the Russian Volunteer fleet in the Black Sea, had passed out of the Bosporus and the Dardanelles into the Mediterranean as merchantmen early in July (one of them flying the Red Cross flag), had passed through the Suez Canal, and were holding up and seizing neutral vessels in the Red Sea.[7] These vessels had apparently passed through the Straits (as, indeed, appears to have been their custom for some years past), without protest from Turkey or the Powers;

[1] As reported in the case of the British steamer *Wen Chow*. See London *Times* (weekly edition), February 19, 1904.

[2] The American steamship *Pleiades* was by some supposed to have been detained for strategic reasons. See New York *Times* for February 14, 1904.

[3] We note that the Russian Government has granted compensation to the owners of a British vessel—the steamer *Foxton Hall*—for loss sustained during her detention at Port Arthur in February. See New York *Times* for August 4, 1904.

[4] It would, of course, be different in the case of a war vessel.

[5] Two of them, the *Frankly* and the *Ettrickdale*, were British, and one, the *Matilda*, was Norwegian. For a summary of the facts, see Lawrence, *War and Neutrality*, pp. 114f. The Russian Government has since agreed to indemnity by the owners of the British colliers *Frankly* and *Ettrickdale*. See New York *Times* for September 10, 1904.

[6] These seizures will be discussed in our next paper.

[7] It was also learned that the Russian guardship *Chernomoretz*, a gun vessel belonging to the regular Black Sea fleet, had been sent through the Straits on July 16, but it was subsequently stated that this vessel had gone to the Piraeus in Greece on its usual voyage.

but a terrible storm of indignation was excited in England when it was learned that the British liner *Malacca*, belonging to the Peninsula and Oriental Navigation Company and bound for Yokahama *via* Hong Kong, had been arrested by the *Peterburg* in the Red Sea on July 13[1] on a charge of carrying contraband, and was being brought to Port Said through the Suez Canal as a prize. At about the same time much excitement was created in Germany by the news that the German mail-steamer *Prinz Heinrich* had been stopped by the *Smolensk* on July 15 and that a portion of her mail destined for Japan (two mail bags for Nagasaki) had been confiscated, the remaining portion having been transferred to the British steamer *Persia* which was forcibly detained for that purpose.[2]

Both the British and German Governments at once entered vigorous protests against what they regarded as violations of neutral rights. The German Government claimed that, while "the exercise of the *droit de visite* in the case of mail-steamers may perhaps be justifiable, the confiscation of mail bags directly contravenes the provisions of International Law."[3] It asked for a disavowal of the *Smolensk's* action and the return of the captured mail sacks. These demands were readily agreed to by the Russian Government, and the German Government is said to have been assured that the confiscated mail bags would be returned as soon as possible and that the German mails would not again be molested by the Russian auxiliary cruisers. Russia also agreed to indemnify the German shippers and consignees for any losses sustained on account of the seizure of German ships and the detention of German mails.

The British Government, in addition to a protest and a demand for the immediate release of the *Malacca* which appears to have amounted to an ultimatum, is said to have instructed the British Mediterranean fleet under the command of Admiral Domville[4] to patrol the Red Sea and prevent any further molestation of British steamers by Russian merchantmen suddenly transformed into warships. Charges of "piracy" were freely made by the most conservative London newspapers, and public opinion in England appears to have been a unit in support of the firm attitude of the British Government.

The British protest against the seizure of the *Malacca* was partly based upon the ground that the contraband which the steamer was alleged to be carrying consisted of 300 tons of British Government stores (each case of which was marked with the broad arrow or Government stamp) consigned to the British naval station at Hong Kong and intended for the use of the British China squadron. Sir Charles Hardinge, the British ambassador at St. Petersburg, is also said to have presented a general protest against the exercise of the right of search and seizure by vessels of the Russian Volunteer Navy, the question of the right of these vessels to pass the Bosporus and Dardanelles not having been raised.[5] The Russian officials contended on the other

[1]The news did not reach the public before July 17. Several British vessels had been visited and searched prior to the seizure of the *Malacca*, but these had merely been detained for a short time.

[2]A section of the English press had commented very strongly upon the detention and search of the British mail steamer *Osiris* by the Russian gunboat *Krabri* early in May. See Lawrence, *op. cit.*, p. 185.

[3]See London *Times* (weekly edition) for July 22, 1904. Germany does not seem to have raised the question of the status of the *Smolensk*.

[4]Admiral Domville is reported to have detached two of his cruisers with orders to proceed to Port Said, with a view of retaking the *Malacca*, in case an effort were made to take her to a Russian prize court. They fortunately failed to reach Port Said before the departure of the *Malacca* from that port.

[5]The British Government appears to have raised the question of the status of the vessels of the Russian Volunteer fleet rather than to have charged Russia with a violation of the Treaties of Paris and London.

hand that the *Malacca*, in addition to British Government stores, had on board munitions of war intended for the use of the Japanese, and that the captain of the *Malacca* had refused to show the manifest of his cargo.[1]

The Russian Government, acting, it is said, in accordance with the personal wishes of the Czar and upon the advice of the French Government, finally (on July 21) consented to release the *Malacca* upon the assurance of the British Government that the war munitions on board the vessel were British Government stores, after a perfunctory or *pro forma* examination of the cargo by a British and Russian consul.[2] Russia also promised that no similar incident should occur in the future and agreed to instruct the officers of her Volunteer Navy to refrain from interference with neutral shipping in the future on the ground that "the present status of the Volunteer fleet was not sufficiently well-defined, according to International Law, to render further searches and seizures advisable." There was no agreement in principle on the broader question of the right of the passage of the Straits on the part of these vessels,[3] and considerable excitement was caused in both England and Germany by the subsequent seizure of one German and several British ships[4] in the Red Sea; but these seizures seem to have been due to a failure on the part of the Russian Government to convey to the captains of the Russian cruisers a new set of instructions in time to prevent such action. They were speedily released on the same terms as in the case of the *Malacca*.

No sooner had the cases of the Russian detentions and seizures in the Red Sea been thus practically disposed of, than there was renewed excitement in consequence of the news that several neutral as well as Japanese merchant vessels had been sunk on July 23 and 24[5] by the Vladivostok squadron in one of its occasional sorties on the Pacific Ocean, --*viz.*; the *Knight Commander*, a British

[1] This is, however, emphatically denied by the Secretary of the Peninsular and Oriental Navigation Company. See letter to the London *Times* for August 5, 1904.

[2] This examination was held at Algiers on July 27, and the vessel was released in accordance with this agreement.

[3] This is based on Premier Balfour's statement to the House of Commons on July 28. See *e. g.* New York *Times* for July 29, 1904.

[4] The German *Scandia* and the British *Ardova* and *Formosa*. The *Ardova* is said to have contained military supplies consigned to the United States Government at Manila.

As we write, the news reaches us that several British steamers have again been stopped and visited by cruisers of the Russian Volunteer Fleet. We are also informed of the extraordinary statement made by Premier Balfour to a deputation of the London Chamber of Commerce to the effect that the British Government had ordered two cruisers from the squadron at the Cape of Good Hope to locate the Russian Volunteer steamers *Smolensk* and *Petersburg* without delay and convey to them the orders of the Russian Government that they must not further interfere with neutral shipping. He stated that this action was taken at the request of the Russian Government. See New York *Times* for August 26, 1904. These orders have since been conveyed to the Russian cruisers by British vessels, and no further trouble is anticipated from their source.

[5] The British steamer *Hipsang* is also reported to have been torpedoed by the Russians in Pigeon Bay, near Port Arthur, on July 16; but this act, which occurred in belligerent waters, does not seem to have excited much interest or controversy, and it belongs to an entirely different order of phenomena from those discussed in the text. One reason given by the Russians for the destruction of the *Hipsang* was that the steamer refused to stop when ordered to do so. (See special cable to London and New York *Times* from Shanghai, July 26); another was that they mistook her for a Japanese vessel. (See Associated Press dispatch in New York *Times* for August 5.) A British naval court of inquiry has exonerated the captain of the *Hipsang* and has found that he acted correctly in all respects. It is denied that he refused to stop when ordered to do so, and it is claimed that there was no contraband, and that there were no Japanese on board the vessel. See New York *Times* for August 24 and London *Times* (weekly ed.) for August 26, 1904.

It will be seen from the above scattered and fragmentary reports that it is not at all clear what the charges against the *Hipsang* really are. In any case, whether carrying contraband or engaged in an unneutral service, she should not have been destroyed, except in case of necessity or of continued or obstinate resistance to arrest. If the finding of the British naval court of inquiry is correct, it would seem that the owners of the vessel are entitled to indemnity and the British Government to an apology.

steamer with an American cargo (including flour and railway materials) from New York consigned to various Eastern ports, and the *Thea*, a German merchantman with a cargo of canned fish consigned to Japanese ports. At about the same time (July 25), news was received of the capture (on July 22), of the *Arabia*, another German vessel with an American cargo of flour and railway material consigned to Japanese ports, and the seizure of the British steamer *Calchas*, with a cargo of flour and machinery destined for Japan, on July 26.[1]

The sinking of the *Thea* appears to have excited very little interest in Germany, but the sinking of the *Knight Commander* created a storm of indignation in England which almost rivalled, if, indeed, it did not surpass that caused by the seizure of the *Malacca*. It was condemned on all sides as a gross outrage on the rights of neutrals and a serious violation of International Law.[2] The British Government entered an energetic protest against the sinking of the *Knight Commander* at St. Petersburg on the ground that "it is not proper that, on the authority of the captain of a cruiser, goods alleged to be contraband of war should be taken from a merchant ship without trial."[3] It is believed that the Russian Government was requested to make ample amends by way of apology and reparation for this "outrage," and that it received an intimation from the British Government to the effect that a repetition of acts similar to the seizure of the *Malacca* and the sinking of the *Knight Commander* would not be tolerated by the English people. A strong protest against the Russian doctrine of contraband was also made by the British as well as by the American Governments.

The Russian Government in its reply appears to have expressed its willingness to make reparation provided it were shown to have been guilty of a violation of any principle of International Law, but to have strenuously insisted at the same time that there had been no such violation. It justified its right to sink the *Knight Commander* on the ground that the vessel contained contraband of war in the way of railway material and machinery, and because her captor was "unable to bring her to the nearest Russian port without manifest danger to the squadron, owing to her not having enough coal."[4] It was also urged that such action was entirely in accord with the Russian Prize Regulations as well as the principles of International Law. Owing to the strong position taken by the British Government, the Russian Govern-

[1] These cases, which involve the question of contraband, will be considered in the next issue of THE GREEN BAG.

[2] Even Premier Balfour stated in the House of Commons that it was "contrary to the practice of nations in war time," and Lord Lansdowne characterized it as a "serious breach of International Law," and an "outrage" in the House of Lords. See New York *Times* for July 29, 1904.

[3] See Premier Balfour's statement in the House of Commons, cited above. He added: "The proper course, according to international practice, is that any ship reasonably suspected of carrying contraband of war should be taken by the belligerent to one of its own ports, and its trial should there occur before a prize court, by which the case is to be determined. Evidently, if it is left to the captain of a cruiser to decide on its own initiative and authority whether particular articles carried on a ship are or are not contraband, what is not merely a practice of nations, but what is a necessary foundation of equitable relations between belligerents and neutrals would be cut down to the root." "Under no hypothesis," said Lord Lansdowne in the House of Lords, "can the Government conceive that a neutral ship could be sunk on the mere fiat of a cruiser's commanding officer, who assumed that the cargo of the vessel included articles which were contraband."

[4] See the report of Vice-Admiral Skrydloff in the New York *Times* for August 3, 1904. See also the Russian official report in London *Times* (weekly edition) for August 12, 1904. It is also charged that the *Knight Commander* did not stop until after several blank shots had been fired. (Admiral Skrydloff's report says *two*, the Russian official report says *four* shots were fired.) Such resistance might, if proven, be held to justify condemnation, but could not possibly justify the sinking of the vessel except as the result of a struggle.

ment agreed, however, to have the case reviewed by a special Admiralty Court at St. Petersburg[1] and consented to modify its instructions to its naval commanders on certain points. They were accordingly instructed on August 5 "not to sink neutral merchantmen with contraband on board in the future except in cases of direst necessity, but in cases of emergency to send prizes into neutral ports."[2]

These seizures and the destruction of neutral prizes raise a number of very important questions in International Law, but it is our intention to reserve the most important of these, *viz.*, those connected with the great subject of contraband of war for a separate discussion in our next paper. We shall, therefore, confine ourselves for the present to questions relating to the right of visit and search, of capture, the seizure of mails, and the destruction of prizes on the high seas.

The most important question of International Law arising from the seizures in the Red Sea is that of the *status* of the cruisers belonging to the Volunteer Fleet of the Russian Navy. It was not, as frequently stated in the newspapers, the question as to whether these vessels had the right to pass through the Bosporos and the Dardanelles with or without the distinct purpose of being converted into warships. That is a question of international policy and treaty interpretation rather than of International Law.[3]

The right of visit and search of all neutral merchantmen on the high seas by all lawfully commissioned[4] warships of a belligerent Government is one which has never, so far as we are aware, been denied by any one, least of all by Great Britain, the great champion of belligerent rights on the high seas. As Lord Stowell, perhaps the greatest prize court jurist the world has ever seen, said in 1799 in the famous case of the *Maria*,[5] "the right of visiting and searching merchant ships on the high seas, whatever be the ships,

[1]The Vladivostok Prize Court rendered a decision justifying the sinking of the vessel. See London *Times* (weekly ed.) for August 12, 1904. The British Government refused, however, to be satisfied with this verdict.

[2]Chicago *Tribune* for August 6, 1904. In her reply of August 12 to the British representations, Russia is reported to have refused to recede entirely from her position as set forth in her "Prize Regulations," and to have reserved the right to destroy, in cases of emergency, neutral vessels carrying contraband. At the same time she is said to have assured Great Britain that no more neutral vessels would be sunk unless circumstances should render it impossible to bring them before a prize court. St. Petersburg dispatch to the Chicago *Tribune* for August 12, 1904. The British Cabinet still adheres to its original contention. Russia's recent reply to the British protest on the subject of contraband is said to include a refusal of the British demands in the case of the *Knight Commander*. It is understood that Russia still continues to maintain that her admiral was justified in sinking the vessel. See New York *Times* for September 20, 1904.

[3]According to a series of great international treaties, warships are not permitted to pass through the Straits, but merchant vessels are expressly permitted to do so. The present rule goes back to the London Treaty of 1841, which sanctioned the ancient rule of the Ottoman Empire forbidding all foreign ships of war from entering these waters. These stipulations were reaffirmed by the Treaty of Paris (1856), the London Conference (1871), and the Treaty of Berlin (1878). It has been claimed that Russia and Turkey entered into convention in 1891 or 1901 (?) to permit the passage of the Straits by these vessels, but Premier Balfour recently disclaimed all knowledge of such an agreement in the House of Commons. Certain it is that Russia has been in the habit for some years of sending these vessels through the Straits under her merchant flag. The British Government appears to have been saving its rights by protests.

The vessels of modern Volunteer Fleets or Auxiliary Navies occupy a new and somewhat anomalous, although fully established, position in modern warfare and International Law. They are in theory merchantmen when nations are at peace, but may readily be converted into warships in time of war. Those belonging to Russia have crews which are subject to naval discipline and are under the control of officers of the Russian Navy. Originally built by a great voluntary subscription, shortly after the Russo-Turkish war of 1877-78, they are at all times in the service of the State to which they belong, and are used for military, as well as for commercial purposes.

[4]"In the absence of a commission, a right of search and capture does not exist as against neutrals." See Taylor, *International Public Law*, p. 497, and the cases there cited.

[5]1 Robinson, 359.

whatever be the cargo, whatever be the destination, is an incontestable right of the lawfully commissioned ship of a belligerent nation. . . . This right is so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured it is impossible to capture." "It is," admits Premier Balfour, "undoubtedly the duty of a Captain of a neutral ship to stop when summoned to stop by a cruiser of a belligerent and to allow, without difficulty, his papers to be examined."[1] Resistance whether real or constructive (as in the case of convoy),[2] to the attempted exercise of this right entails condemnation and confiscation.

After this statement of the law and the facts so far as these can be ascertained, we may conclude that it is impossible for Russia

[1]Premier Balfour in the House of Commons on July 28, 1904. In his remarks to the House of Commons on August 11, Premier Balfour admitted, however, that "in these days of huge ships, there were difficulties in the way of examination of cargo which did not exist formerly; and this examination, though not forbidden by International Law, was made almost impossible by the difficulty of the operation." The right of visit and search must not be confounded with the right of capture, which is much less absolute and which is only justifiable under certain conditions which we need not enumerate. Of course, the right of visit and search is also limited in several ways. In the first place, it is strictly a *belligerent* right, and unless there is a strong suspicion of piracy, it cannot be exercised in time of peace. In the second place, it is restricted in its application to *merchantmen* alone. In the third place, the right of search should be exercised in such a way as to cause the least possible inconvenience or injury to neutrals. In other words, as much regard should be paid as possible to the susceptibilities and interests of neutrals. On the limitations of the right of visit and search, see especially Woolsey, §208, and Wharton's Dig. III., §325.

[2]See especially the cases of the *Maria*, 1799; Robinson, 340; The Schooner *Nancy*, 1812, 27 Court of Claims, 99; and The Ship *Rose v.* U. S. 1901, 36 Court of Claims, 291; also the dissenting opinion of Judge Story in the *Nereide*, 9 Cranch, 440; and the opinion (*obiter dicta*) of Justice Johnson in the case of the *Atalanta*, 3 Wheat. 424. The judges do not always distinguish clearly between neutral and enemy convoy.

In view of the suggestion which has been made in some quarters that Great Britain send her merchant vessels to the Far East under the convoy of her warships, it may be of interest to present the results of my investigation of the subject of convoy.

It is still a matter of controversy whether neutral merchantmen under convoy of warships of their own nation are bound to suffer visit and search. The English doctrine is best set forth by Lord Stowell in the case of the *Maria*, above cited. American jurists have generally followed the English decisions. In the case of the *Nancy*, it was held that the presence of an enemy convoy is constructive resistance and a denial of the right of search, which authorizes seizure and consequent condemnation. See also the dissenting opinion of Judge Story in the *Nereide*, 9 Cranch, 440. English and American writers are also generally agreed that "International Law does not prohibit search of convoyed vessels nor substitute the word of the commander for actual search." Dana's Wheaton, note 242, p. 695. Cf. Hall, §272; Lawrence, §268; Kent, Com. Lect. VII., p. 154; Wheaton, Elem., §§525ff; Phillimore, III., §338. Woolsey appears to be alone in expressing the opinion that the right of convoy is destined to become a part of International Law.

Continental publicists are, on the other hand, almost unanimously in favor of exemption from search in the case of convoy. See, *e. g.*, Bluntschli, §§824 and 826; Calvo, V., §§2969ff, and the authorities there cited; Ortolan, *Dip. de la Mer* liv., III., c. 7; Hautefeuille, *Droits des Neutres*, Tit. XII., c. 1; Heffter, §170; Perels, *Droit Maritime*, §56; Bonfils, *Manuel*, §§1597-1605.

Nearly all the maritime Powers of Europe have instructed their naval commanders to respect the word of the commander of a convoy, and many of them have incorporated the principle of freedom from visit of ships under convoy into treaties. Great Britain, on the other hand, still maintains her old position of opposition to this innovation on the rights of belligerents, and has always refused to recognize this right, even in treaties.

The United States occupies a sort of intermediate position on this question. While her writers and jurists have, as a rule, sanctioned the English doctrine, the Government had accepted the principle of freedom from search under convoy in no less than thirteen treaties, mostly with American States, prior to 1872. (For list, see Hall, p. 729.) Article 30 of our Naval War Code, issued in 1900, declares that "convoys of neutral merchant vessels, under escort of vessels of war of their own State, are exempt from the right of search, upon proper assurances, based upon a thorough examination from the commander of the convoy." If the support or example of the British Government could be secured, the principle of freedom from search of vessels under convoy of ships of war of their own nation would, with certain restrictions, have an excellent chance of becoming incorporated among the undoubted principles of International Law. For the present such a pretention must be denied.

to escape from one of two alternatives. Either she violated a long line of solemn international compacts by sending commissioned warships through the Bosporos and the Dardanelles in the guise of merchantmen, or she violated one of the most cardinal principles of International Law by permitting or authorizing merchant vessels to exercise the strictly belligerent right of search on the high seas. If the *Peterburg* was a lawfully commissioned warship, she had a perfect right to visit and search the *Malacca* on the Red Sea. This being the case, if it is true that the Captain of the latter vessel refused to show the manifest of his cargo upon being requested to do so, the Captain of the *Peterburg* was fully justified in assuming that she carried contraband, in seizing her as a prize of war, and in bringing her through the Suez Canal[1] on his way to a Russian port. If, on the other hand, as seems more probable,[2] the *Peterburg* was *not* a lawfully commissioned warship, the Captain of the *Malacca* had a perfect right to refuse to show his manifest to the Captain of what might, technically speaking, be regarded as a piratical vessel. In any case, whether the *Peterburg* was a lawfully commissioned warship or not, if, as claimed by him, the Captain of the *Malacca* did not refuse to show his manifest and if the British Government stores on board the *Malacca* were misaken for contraband, then the seizure was a serious mistake and a blunder for which the Russian Government owed ample amends and reparation to all concerned.[3]

Another important question raised by these seizures is whether the right of search applies to mail-steamers and whether mail sacks may be regarded as contraband. The law on this subject is by no means as clear as could be wished. The best rule is probably that laid down in the United States Naval War Code prepared by Capt. Stockton of the United States Navy and issued by the Secretary of the Navy on June 27, 1900. "A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure. Mail steamers under neutral flags carrying such dispatches in the regular and customary manner, either as a part of their mail in their mail bags, or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect to contraband, blockade, or unneutral service, in which case the mail bags must be forwarded with seals unbroken."[4]

Hostile dispatches, military orders, and the like (excepting diplomatic communications, which are privileged)[5] are, of course, subject to capture, and the vessel carrying

[1]The fact that the Suez Canal is neutralized by an international treaty does not, as some have supposed, prevent its use by belligerents for the transportation of their prizes. See Articles IV and VI of the treaty, which is printed in Holland's *Studies in International Law*, pp. 289f.

[2]It is difficult to see how and where the *Peterburg* obtained her commission. She is said to have passed through the Straits as a merchantman on July 7, to have entered the Suez Canal on July 9, and was busy holding up neutral vessels on July 11 or 12. If she did not have a *bona fide* commission, it is difficult to avoid the conclusion that from a purely technical point of view, she was guilty of an act of piracy when she captured the *Malacca*. The *Official Messenger* of St. Petersburg stated on August 2, 1904, that the *Peterburg* and *Smolensk* had received a *special* commission; the term of which had expired by August 2. In that case they were undoubtedly warships, but as such they had no right to pass through the Straits.

It has been suggested that she was a privateer, but privateering was abolished by the Declaration of Paris in 1856, to which Russia was a party, and it is not alleged that she possessed letters of marque.

[3]The real facts will probably never be fully known, both because the dispute was largely a political one and settled on grounds of policy, and because the examination of the cargo of the *Malacca* was a mere matter of form.

[4]Article 20 of Stockton's Code, p. 406 of Wilson and Tucker's *International Law*.

[5]See Lord Stowell's decision in the case of the *Caroline*, 6 Robinson, 464.

them, being engaged in an unneutral service, is liable to confiscation.[1] On the other hand the owners and captains of neutral mail steamers, by virtue of the nature of the trust imposed upon them, cannot be supposed to have knowledge of the contents of all the various communications entrusted to their charge. "In recent times usage[2] has grown up of exempting packet-boats, not merely from condemnation, but also from visit, search, and capture." This immunity from search and capture has, however, been "granted by belligerents as a matter of grace and favor" rather than of law, and is by no means absolute or unlimited.[3]

In view of the great variety in practice and the uncertainty of the rule, it is highly desirable that this matter of the right of belligerent search of mail-steamers be referred for discussion and settlement to an International Conference at the close of the war and that, in case of a dispute on this subject arising which cannot be settled through the ordinary channels of diplomacy, it be referred to The Hague Tribunal for an authoritative decision. In the case of the *Prinz Heinrich*, it would appear that the German Government was correct in claiming that the Russians had no right to remove mail bags in a mass from the steamer. The *Prinz Heinrich* was, however, subject to visit and search if there was reasonable ground

[1]The cargo is also confiscated in cases where the "owners are directly involved in the knowledge and conduct of the guilty transaction." Lord Stowell in the case of the *Atalanta*, 6 Robinson, 460.

[2]During the Mexican War, British mail-steamers were permitted to pass in and out of Vera Cruz. During our Civil War the British Government demanded that the United States should adopt the rule that "all mail-bags, clearly certified as such, shall be exempt from seizure and violation." A few days later (October 31, 1862), the United States Government issued instructions to the effect that "public mails of any friendly or neutral Power, duly certified or authenticated as such," found on board captured vessels, "shall not be searched or opened, but be put, as speedily as may be convenient, on the way to their designated destination. This instruction, however, will not be deemed to protect simulated mails verified by forged certificates or counterfeited seals." See Dana's Wheaton, note 229, pp. 659-60. It is to be noted that these instructions merely relate to "public mails, duly authenticated." For the diplomatic correspondence bearing on this subject, see Bernard, *Neutrality*, pp. 319-23. In 1870, France "insisted upon the condition that an agent of the neutral State should be in charge of the mail-bags and declare them to be free from noxious communications." Lawrence, p. 627. At the outbreak of the Spanish-American War in 1898, President McKinley declared that "the voyages of mail-steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect to contraband or blockade." (But the Spanish Government granted no such concession to neutrals.) A similar indulgence to neutrals was granted by Great Britain during the Boer War in South Africa.

"On the other hand, many modern cases may be mentioned where no indulgence, or a very limited one, was given. For instance, in 1898, Spain did not duplicate the American concession, and in 1902, Great Britain and Germany would not allow neutral mail-steamers to pass through their blockade of Venezuelan ports, but stopped them instead, and, after overhauling their correspondence and detaining what seemed noxious, sent the rest ashore in boats belonging to the blockading squadron." Lawrence, *War and Neutrality*, p. 191. It is, however, to be observed that this is a case of a blockade, and has no bearing on the subject of search on the high seas.

[3]Lawrence, *Principles*, p. 627. Hall (p. 681f) is of the opinion that mail-steamers, "although at present secure from condemnation, are no more exempted than any other private ship from visit; nor does their own innocence protect their noxious contents, so that their post-bags may be seized on account of dispatches believed to be within them." But he thinks that "the secrecy and regularity of postal communication is now so necessary to the intercourse of nations, and the interests affected by every detention of a mail are so great, that the practical enforcement of the belligerent right would soon become intolerable to neutrals. . . . At the same time, it is impossible to overlook the fact that no national guarantee of the innocence of the contents of a mail can really be afforded by a neutral Power." He concludes, "probably the best solution of the difficulty would be to concede immunity as a general rule to mail-bags, upon a declaration in writing being made by the agent of the neutral Government on board that no dispatches are being carried by the enemy, but to permit a belligerent to examine the bag upon reasonable grounds of suspicion being specifically stated in writing." Taylor, the most recent American authority on *Public International Law* (§668, pp. 750-51), says: "The fact that the neutral carrier is permitted to convey certain classes of mail matter does not deprive the belligerent of the right to search his mail-bags in order to ascertain whether or no he is engaged in the transport of noxious dispatches."

for suspicion of the presence of noxious dispatches, in which case the mails should have been opened in the presence of the ship's officers and the objectionable dispatches removed. The mail bags should then have been re-sealed and the vessel allowed to proceed on her voyage.

In respect to the question raised by the sinking of the *Thea* and the *Knight Commander*, the modern rule is reasonably clear, although it might be wished that some of the authorities[1] had made a clearer distinction between the right of neutrals and belligerents in this matter. It is that neutral vessels or neutral cargoes must not be destroyed except in cases of extreme necessity and that, in case of such necessity, the ship's papers must be preserved for purposes of adjudication and indemnification of the owners of the ship and cargo who are entitled to full and adequate compensation for their losses. Prizes belonging to the enemy[2] may be destroyed for good military reasons, but the destruction of neutral property can only be justified on grounds of extreme necessity, since it involves the destruction of a part of the evidence on which alone the capture can be justified and inasmuch as neutral property does not vest in the captors until after it has been adjudicated upon.

It is true that the Russian Prize Regulations[3] permit the destruction of prizes in a considerable number of contingencies, *viz.*, unseaworthiness, danger of recapture, shortage of coal, difficulty on account of distance, and danger to the success of war-

[1]The authorities are not fully agreed as to whether a neutral prize can ever be destroyed, but they all appear to limit the right, if it exists, to extreme cases of necessity. Hall (p. 741) says, emphatically, that "a neutral vessel must not be destroyed." He observes that "the principle that destruction involves compensation was laid down in the broadest manner by Lord Stowell, who said that "where a ship is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own State; to the neutral it can only be justified by a full restitution in value."

Dana (see note 186 to Wheaton, p. 485) is of the opinion that "necessity will excuse the captor from the duty of sending in his prize. If the prize is unseaworthy for a voyage to the proper port, or where there is impending danger of immediate recapture from an enemy's vessel in sight, or if an infectious disease is on board, or other cause of a controlling character, the law of nations authorizes a destruction or abandonment of the prize, but requires all possible preservation of evidence, in the way of papers and persons on board. And, even if nothing of pecuniary value is saved, it is the right and duty of the captor to proceed for adjudication in such a case, for his own protection and that of his Government, and for the satisfaction of neutrals." Lawrence (p. 406) observes that "a broad line should be drawn between the destruction of enemy and neutral property," a distinction which Dana fails to make.

Taylor (§ 557, p. 573) says "it is generally agreed that neutral prizes should never be burned." He does not seem to contemplate the possibility of sinking them.

Professor Holland, in a letter to the London *Times* (see New York and London *Times* for August 5, 1904), gives the following summary of Lord Stowell's opinions on this subject: "An enemy's ship, after the crew has been placed in safety, may be destroyed. When there is any ground for believing that the ship, or any part of her cargo, is neutral property, such action is justifiable only in cases of the gravest importance to the captor's own State after securing the ship's papers and subject to the right of neutral owners to receive full compensation."

[2]Enemy prizes were systematically destroyed during the American Revolution and the War of 1812. The destruction of enemy prizes by the Southern Confederacy has generally been justified on the ground that there were no non-blockaded ports to which they could be taken. Neutrals have nearly always, and enemies have generally, been exempt from such treatment. In 1870 the French burned two German vessels and refused restitution in spite of the fact that they had neutral goods on board. Captain Semmes of Alabama fame, who seems to have turned his cabin into a prize court, was in the habit of releasing ships whose cargoes were plainly neutral, on ransom. "But in a large number of the cases of those condemned and burned, there were claims for the cargoes as neutral property. Captain Semnes seems to have condemned the cargo, unless there was positive proof of its neutrality. This practice was carried on by him for four years, and was acquiesced in by neutral nations, who permitted their ships to be searched and their property adjudicated upon by these commanders." Snow's *Cases*, pp. 519-20. For a reproduction of these investigations of Dr. Snow's, see Scott's *Cases*, note on pp. 932-33. Cf. Bernard, *Neutrality*, p. 420.

[3]For a reprint of the Russian "Prize Regulations" from the London *Gazette*, in so far as they bear on the destruction of prizes, see the New York *Tribune* for August 8, 1904.

like operations. These are reasons which might perhaps justify the destruction of *enemy* prizes; but none of them seem sufficient to justify the destruction of *neutral* prizes with the possible exception of unseaworthiness and danger of recapture. The Russian Regulations are plainly at variance with the principle of International Law, as stated above.

It is not alleged that the *Knight Commander* was unseaworthy or in imminent danger of recapture, or even that it was impossible to bring her into port. Still less was there an overpowering or extreme necessity for her destruction. It was not even vital to Russia's military interests that that portion of her cargo which consisted of railway material be destroyed or prevented from reaching its destination. Under the circumstances we must pronounce the sinking of the *Knight Commander* a serious and wanton attack upon neutral rights and an undoubted violation of International Law.

EAST TENNESSEE LAW STORIES.

By Charles D. McGuffey,
Of the Chattanooga, Tennessee, Bar.

THERE have been, and are still, strong men among the Bar of East Tennessee. Anyone familiar with the Courts at Knoxville in the sixties and seventies can remember much of interest. Aside from the local Bench and Bar, the Supreme Court, chosen from the three divisions of the State and sitting at Knoxville for East Tennessee cases, brought lawyers from a distance. Some of the men of that day still live at Knoxville, others have gone to other places, not a few have ceased practice unless before "Heaven's high Chancery."

Horace Maynard, distinguished as a lawyer, had been by that time so claimed by public life that but little was seen of him in court. For many years in Congress, afterwards Minister to Turkey and Postmaster-General, a fine scholar, man of irreproachable private life, elder in the Presbyterian Church, he was a standing refutation of the thoughtless claim sometimes made that no one can succeed in politics without dirty work. He has long since joined the great silent majority. One of his sons, now a retired rear-admiral, captured the first prize in our late war with Spain. It is told of Mr. Maynard that on one occasion, probably at a country court, being assigned by the court to defend a woman, he read from the court Bible the story of Christ's reply to those who accused the woman taken in adultery, telling the jury that that was the oldest and best law book, and asking them to govern themselves accordingly, with the result that the woman was acquitted. Another story is told of his exasperating an opponent in court to the extent of a personal attack, by merely shaking his forefinger at him and exclaiming in his sarcastic tones, "I am *not* mistaken, sir!" There was a legend that he had Indian blood, to which color was given by his straight figure, straight black hair, complexion and cast of features, and the name "The Narragansett" (he came from Massachusetts) was as well understood as is now "The Sage of Wolfert's Roost."

Associated in some stories of this olden time were two genial gentlemen, Colonel T. R. Cornick, one of the older members of the Bar, long since departed, and Colonel Will A. Henderson, one of the younger set, now for many years Assistant General Counsel of the Southern Railway, with an office at Washington, one of those happy

men whose spirit will keep young even if the body that holds it should pass the century mark.

Colonel Cornick was a man of learning and travel, an interesting talker and good lawyer, but prone to follow off on a side trail suggested by any interesting question which might arise.

The two gentlemen were on opposing sides in the famous Haynes-Swan case in the Supreme Court, one of the points in which was that Haynes had been for a time insane. As proof of insanity testimony had been taken showing that he had claimed property that did not belong to him. Cornick conceived the idea that the evidence was intended to establish ownership, and proceeded to combat the idea that the claim was any evidence of title. "Why, if your Honors please," he said, "Mr. Henderson says Mr. Haynes claimed this property. What if he did? I remember many years ago, if the Court please, I was passing through your city, (and, by the way, it was not a city then, it was a small town), and I went out into the forks of the river to the home of my friend Captain Boyd (the Trustee of your County, a relative of mine), and, if your Honors please, the captain was not at home, but his negro man, Remus, proposed to show me what he called *his* farm, and *his* horses, and *his* cows, as he called them, this negro man Remus, if your Honors please, himself the property of my friend, Captain Boyd. And he took me down to the pen to show me what he called *his* hogs. And, by the way, they were really very fine hogs indeed, and this, if your Honors please, was before this new fangled disease had got among the hogs, 'trich*ee*nae' or 'trich*ei*nae', I don't know how they pronounce it; I believe Mr. Cocke is not present." (Mr. Cocke posed as the Admirable Crichton of the Bar, infallible alike in law or literature.) "Most remarkable disease, if your Honors please, this trichinae, baffles all the skill of the most scientific men of the nineteenth century. Worms in 'em! Worms in 'em! It gets into the flesh of the hog, and it gets into the flesh of the man that eats the hog. The brightest minds of Europe and America are unable to unravel the mystery, and,—if your Honors please,—as I was about to remark," here he ran his hand through his hair and paused, "if the Court will indulge me a moment,——as I was about to say—— if your Honors please, the precise point that I was about to illustrate has escaped me, but every statement I have made is true, *on the honor of a man!*"

Despite this losing the trail Colonel Cornick's side was victorious in this case. But the result was otherwise on an occasion when he and Henderson were opposed, and Cornick, having a hopeless case, was vehemently eloquent. Citing Freeman's authority he closed his argument by shouting at the Court, "If your Honors please, if Mr. Henderson is correct, Freeman's a fool, Freeman's a fool!" The judges, including Judge Thomas J. Freeman, put their heads together consulting whether they should render a decision at once or, from courtesy to Colonel Cornick, take the case out. Being a little hard of hearing, Cornick asked Henderson what the judges were saying. The Court heard the question, also Henderson's reply, which was, "They want to know which Freeman you allude to." Instantly Cornick was on his feet and convulsed the Court by shouting, "If your Honors please, I meant the *California Freeman.*"

Colonel Cornick, who though a secessionist did not relish criticism of the country by a foreigner, was travelling over a Swiss mountain in a diligence with an English lord, who told him that his country had all gone to pieces. "And," said the colonel, "I had a great mind to slap him in the face, but thunder! he weighed two hundred and

fifty pounds, and I thought it would not pay!"

It is told of him that once, sallying out on the street after a retirement of several hours, he enquired the time, and being told it was four o'clock, laid his finger aside his nose with the words, "Query? Morning, or evening?"

Colonel Henderson enjoyed a joke far too well to suppress it merely because he was himself the victim. Returning from the Confederate army, impecunious and arrested twice for treason before he got up town from the station, he gladly accepted an offer of a hundred dollars to go into North Carolina to take some depositions, though the trip was by no means a safe one. Equipping himself with a blue overcoat for protection if he fell in with Union troops and depending on other means to get along with the Confederates, he started out with a comrade, and one night at a widow's was roused by hearing the house hailed by a party in pursuit of two horse thieves. They described one of the miscreants as a chunky fellow with a blue army overcoat and a black hat, which fitted with Henderson's dress, and "a mean-looking countenance." The hostess finally persuaded the party that those they sought were not there, but next morning at the breakfast table remarked, "Mr. Henderson, they described you *exactly*."

Henderson had to a rare extent the faculty of making fun without making the victim angry. L. A. Gratz was a German who had borne a major's commission in the Federal army, married and settled in Tennessee, studied law and practised successfully, though not for some time thoroughly at home in the American surroundings. The following story I heard many years ago, and never knew it questioned till quite recently, when I was told that Major Gratz says it is without foundation. But it is so true to life to the ears of those who knew the parties and the community and the presiding judge, the late L. C. Houk, that it is at least true in the sense in which Shakspeare's creations are real, and I must appeal to my friend the major to withdraw his plea of not guilty. He came into the court-house of the little county-seat of the mountain county of Morgan just at the close of a suit about a hound, and Henderson suggested that he make a speech in the case. Objecting on the ground that he did not know the facts, Henderson told him that one mountaineer had given another the hound pup in settlement of damages for breach of warranty in a jackass, and then replevied the pup. Henderson proposing that Gratz should speak, the court consented, and Major Gratz launched into a glowing oration on dogs, including the St. Bernards of the old world, and finally said, "And now, gentlemen of the jury, I come to what you've heard so much about in this case, the jackass." This being the first mention of the animal, jury, court and spectators became much interested, while the orator, encouraged by attention and applause, and judging by the peals of laughter which soon greeted him that he was succeeding eminently in his efforts to be witty, soared in describing the failure of the jackass and the utter lack of his progeny throughout the hills and valleys of the county. He closed in a blaze of glory and self-satisfaction, and when the noise had subsided the judge, after wiping his eyes, remarked, "I was not aware before that there was any jackass in this case, but since Major Gratz has appeared I see I was mistaken."

Court was about adjourning, and judge and lawyers were soon on their way. Gratz and Henderson rode, horseback, side by side, out of the town in silence. Finally, after full meditation, Gratz remarked, "Vell, Henderson, if it vasn't so good a joke I would challenge you."

WILLIAM COBBETT.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

X.

By Van Vechten Veeder,
Of the New York Bar.

THE steady advance toward liberty of opinion which had been made the first half of George III.'s reign was rudely checked by the violence of the French Revolution. The widespread alarm that was felt throughout the civilized world at the excesses of the French revolutionists was further aggravated in England by the extravagances of a small but turbulent body of social and political agitators. The first of the repressive measures which have already been referred to warned the people against the seditious writings which were being circulated among them, and commanded the magistrates to apprehend their authors, printers and promulgators wherever found; and the reactionary period thus begun, which will now be illustrated by reference to the public trials, was not finally terminated until the passage of the Reform Bill in 1832. During this period freedom of speech was severely restrained, and criminal prosecutions abounded. The number of State prosecutions for political libels and seditious words during the years 1792 and 1793 was only one less than the total number of such trials from 1704 to 1789. Brief reference to some of them will indicate the extravagant activity of the government.

The notorious Lord Gordon was prosecuted for composing and circulating among the prisoners in Newgate a crazy harrangue which was construed to be a libel on the judges (22 St. Tr. 175). Duffin and Lloyd, two inmates of the King's Bench prison, were prosecuted for posting this placard in the prison: "This house to let. Peaceable possession will be given by present tenants on or before 1st day of January, 1793, being the commencement of the first year of liberty in Great Britain." (22 St. Tr. 317). Winterbotham, a Baptist minister, who had spoken favorably in a sermon of the French Revolution, and had asserted that the taxes were oppressive, was found guilty of sedition, although seven witnesses testified that he had not used the language imputed to him. (22 St. Tr. 875). Thomas Brillat was charged with having said, in conversation at a public house, that there could be no reform without revolution, and that he wished there were no kings. On conflicting evidence he was convicted, imprisoned twelve months, and fined one hundred pounds. (22 St. Tr. 909). Dining with a friend at a coffee house, Dr. Hudson had proposed some toasts: "The French Republic," "The System of Equality," *etc.* He was overheard by others, and in consequence was convicted of sedition, imprisoned two years and fined two hundred pounds. (22 St. Tr. 1019). See also, the cases of Holt (22 St. Tr. 1189), Whyte (*ib.* 1237) and Binns (26 St Tr. 595).

It is refreshing to find that the government occasionally overreached itself in these ridiculous prosecutions, which only served to bring odium upon the administration of justice. Daniel Eaton, who had been twice prosecuted for publishing Paine's works (22 St. Tr. 753, 785), was put on trial in 1794 for the publication of a contemptible pamphlet entitled, *Politics for the People, or Hog's Wash*, in which the king was supposed to be typified under the character of a game cock. The whole affair was so trivial that the prisoner escaped punishment (22 St. Tr. 753). In 1795 John Reeves, the author of

a learned *History of English Law*, was tried on a criminal information filed by order of the House of Commons for the publication of a speculative essay on the origin of Parliament, entitled "Thoughts on the English Government." The passage particularly offensive to the Commons represented the King as the ancient stock of the constitution, while the Lords and Commons were mere branches which might be lopped off without fatal injury to the constitution itself. Although the jury expressed their dissent from these ultra-Tory principles, they declined to regard Reeves as a criminal (26 St. Tr. 529).

Three great cases of this period, in all of which Erskine continued his noble efforts for free speech, deserve especial notice.

In 1792, in the midst of the fears excited by the French Revolution, the government brought Thomas Paine to trial for the publication of his *Rights of Man* (22 St. Tr. 357). Erskine braved the displeasure of the king and the solicitations of his friends in appearing for the defense. He did not seek to vindicate Paine's book on its merits, but contended that according to the law of England a writer is at liberty to address the reason of the nation upon the constitution of the government; such a writer is criminal only if he seeks to excite them to disobey the law or caluminates living magistrates. Opinion is free; conduct alone is amenable to the law. Paine was therefore not to be punished because the jury disapproved of his opinions, unless it was also believed that their character and intention was criminal. Erskine showed from the writings of Locke, Milton, Burke and other speculative writers, how far abstract opinions upon government had been expressed without legal restraint. Although Paine was

THOMAS PAINE

found guilty, the principles of liberty and toleration so eloquently expounded by Erskine in this case are the foundation upon which liberty of opinion is now established. "If, in the march of the human mind," he said, "no man could have gone before the establishments of the time he lives in, how could our establishment, by reiterated changes, have become what it is? If no man could have awakened the public mind to errors and abuses in our government, how could it have passed on from stage to stage, through reformation and revolution, so as to have arrived from barbarism to such a pitch of happiness and perfection that the Attorney-General considers it a profanation to touch it further, or to look for any future amendment? In this manner power has reasoned in every age; government, in its own estimation, has been at all times a system of perfection; but a free press has examined and detected its errors, and the people have from time to time reformed them."

Whatever justification there may have been for the prosecution of Paine, the trial and conviction of John Frost (22 St. Tr. 471) was an unmitigated outrage. Frost was a respectable attorney who had been formerly associated with Pitt and others in promoting parliamentary reform. For saying in a coffee house, while he was more or less under the influence of wine, that he was for equality and no king, and that the constitution of the country was a bad one, he was convicted of speaking seditious words, and sentenced to six months' imprisonment, to stand in the pillory at Charing Cross, and was struck off the roll of attorneys.

The case of Lambert and Perry, publisher and proprietor respectively of the *Morning Chronicle* (22 St. Tr. 953), was the first trial under the Libel Act of 1792. The defendants had published in their paper an address of a society for political information, entitled, "An Address to the Friends of Free Inquiry and the Public Good." The substance of the paper was that deep and alarming abuses existed in the government, which called for reform in representation; but that free inquiry was suppressed by prosecutions. It was argued for the crown that, in view of the turbulence of the times, the motive of the defendants in publishing the article must have been criminal. Erskine's powerful advocacy was successful in overcoming this scandalous prosecution. The jury at first returned a verdict of "guilty of publishing, but with no malicious intent," which Lord Chief Justice Kenyon refused to receive. Thereupon the jury found a general verdict of not guilty.

The repressive measures of the government culminated in the last year of the century. Between the license and excesses of one party, and the fears and arbitrary actions of another, liberty of opinion was completely suppressed. The government and the mass of the people were brought into painful conflict, and the severity of the authorities was met by sullen exasperations and violent denunciation on the part of the people.

The trial of Gilbert Wakefield in 1799 is a striking illustration of this painful conflict of public temper. We find Wakefield, an eminent scholar, seeking in inflammatory language, to dissuade the people from resisting foreign invasion of their country, and suffering therefor an imprisonment which was equivalent to a death sentence (27 St. Tr. 679).

Cuthell's case illustrates the extent to which book-sellers and publishers were held criminally liable for acts of their servants done under general authority and without actual knowledge. Cuthell was a book-seller who had never read the work for which he was condemned, and did not even know that it was a political work (27 St. Tr. 641).

This suppression of free speech received a novel application in the prosecutions for libels upon foreign potentates. In 1799 Vint was prosecuted for a libel on the Emperor of Russia (27 St. Tr. 627). He had said, in substance, that the Emperor of Russia was rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. It was on this trial that Lord Chief Justice Kenyon announced the pusillanimous doctrine that free speech in England was to be limited by fear of the displeasure of foreign powers. "When these papers went to Russia," he said, "and held up this great sovereign as being a tyrant and ridiculous over Europe, it might tend to his calling for satisfaction as for a national affront if it passed unreported by our government in our courts of justice."

A more celebrated case of this kind was the trial of Peltier in 1803 for a libel on Napoleon Bonaparte. Peltier was a French refugee who had sought safety in England after the massacres of 1792. He was prosecuted for three libels which had been published in his serial entitled, *L'Ambigu, ou Variétés, Atroces et Amusantes, Journal dans la Guerre Egyptienne.* One was an ode, ascribed to Chenier, containing references to

JAMES PERRY.

the dagger of Brutus and the fate of the Bourbon monarch. A piece of verse entitled, "The Wish of a Good Patriot," was even more suggestive in its intimations. The third libel was another long and labored bit of verse, modelled on the attack of Lepidus against Sylla in the Roman Senate,

JOHN FROST.

entitled "An Address to the French Nation," in which, though containing no suggestion of assassination, there was plain incitement to rebellion. Lord Chief Justice Ellenborough charged for a conviction, but open hostilities ensued shortly afterwards, and Peltier was never called up for judgment. The case is mainly remembered for Mackintosh's eloquent and scholarly argument for the liberty of the press.

Meanwhile events in Ireland brought about several State prosecutions for libel there. The Government's proclamation in the autumn of 1792 against the Volunteers had been answered by the United Irishmen in an address written by Dr. Drennan and signed by Hamilton Rowan as secretary. They were immediately prosecuted for seditious libel. In their defense Curran made his first conspicuous public appearance, and began, with an argument of surpassing eloquence, his brief and stormy career. His sentiments were worthy of better considera-

tion than they received. "Where the press is free and discussion unrestrained," he said, "the mind, by the collision of intercourse, gets rid of its own asperites; a sort of insensible perspiration takes place in the body politic, by which those acrimonies, which would otherwise fester and inflame, are quietly dissolved and dissipated. But now, if any aggregate assembly shall meet, they are censured; if a printer publishes their resolutions, he is punished. . . . If the people say, let us not create tumult but meet in delegation, they cannot do it; if they are anxious to promote parliamentary reform in that way, they cannot do it; the law of the last session has for the first time declared such meetings to be a crime. What then remains? The liberty of the press only—that sacred palladium which no influence, no power, no minister, no government, which nothing but the depravity, or folly, or corruption of a jury, can ever destroy. And what calamities are the people saved from by having public communication left open to them? . . . In one case, sedition speaks aloud and walks abroad; the demagogue goes forth—the public eye is upon him—he frets his busy hour upon the stage; but soon either weariness, or bribe, or punishment, or disappointment, bears him down or drives him off, and he appears no more. In the other case, how does the work of sedition go forward? Night after night the muffled rebel steals forth in the dark and casts another and another brand upon the pile, to which, when the hour of fatal maturity shall arrive, he will apply the torch" (22 St. Tr. 1033.)

Three years later Curran was called upon to defend Peter Finnerty, the publisher of *The Press* for printing Deane's strictures upon the Lord Lieutenant's treatment of William Orr, and again he was unsuccessful (26 St. Tr. 901).

The conduct of the Irish authorities in connection with Robert Emmet's trial provoked much hostile criticism on the part of English radicals. In later times such comments would be passed over in silent contempt; but the government, in its irritation, allowed itself to be provoked into active hostility against the offending *Political Register* and *Anti-Jacobin*. Cobbett had printed in his *Political Register* some letters from an anonymous Irish correspondent, signed "Juverna," which reflected with bitter personalities upon the Lord Lieutenant, Lord Hardwicke and others. In these letters the legend of the wooden horse of Troy was applied to the imputed woodenheadedness of Lord Hardwicke, and various other imputations were made against Lord Chancellor Redesdale and Plunkett. Early in 1804, therefore, Cobbett was prosecuted before Lord Chief Justice Ellenborough for libel (29 St. Tr. 1). Cobbett's defense of good character, and his contention that the attack was political, were unavailing. Two days later Plunkett obtained a verdict of five hundred pounds damages in a civil action against Cobbett (29 St. Tr. 53). But neither the criminal nor the civil judgment against Cobbett was followed up. The government prosecuted Cobbett only for the purpose of discovering the real author of the letters. When it was finally ascertained that they had been written by Justice Johnson, of the Irish Court of Common Pleas, Johnson was at once called to account (29 St. Tr. 81). In a very interesting trial before Lord Ellenborough, Johnson was convicted. But the notorious "Trojan Horse libel" ended with a bare verdict. Johnson was never called up for judgment, and soon retired from the bench on a pension.

The contemporaneous action of Archbishop Troy, of Dublin, against the propri-

etor of the *Anti-Jacobin*, by which he had been accused of complicity in Robert Emmet's plans, also resulted in a verdict for the plaintiff. All the foregoing cases were tried with a display of ability out of all proportion to their intrinsic importance.

LONDON LEGAL LETTER.

SEPTEMBER. 1904.

NOTHING for many years past has so deeply stirred English feeling as the events connected with the romantic story of Adolf Beck. It has by many writers been likened to "L'Affaire Dreyfus." Certainly both incidents have this in common, that the two men, Beck and Dreyfus, were the victims of a cruel miscarriage of justice in consequence of which they each suffered a long term of imprisonment before they could persuade the authorities of their innocence. There is nothing of which an Englishman is rightfully more proud than English justice. Here, if anywhere in the world, the Courts are free from corruption. In fact, so far as the personnel of the bench and the bar having to do with criminal affairs is concerned, the system is ideal. And yet, notwithstanding this fact, a shocking miscarriage of justice has occurred which has convinced the great majority of thinking people, that there is something radically wrong with the administration of the law in England.

Adolf Beck's case, in outline, is as follows: As far back as 1877 a man who gave the name of John Smith was tried and convicted at the Old Bailey for robbing a number of women of rings and other articles of jewelry. They were women of the "unfortunate" class whom he had accosted on the street, representing himself to be "Lord Willoughby." He asked leave to call at their houses or rooms, told them he wanted a housekeeper for a "nice little house in St. John's Wood"—a part of London which at one time contained many houses where women were "kept." If those whom he accosted, as was nearly always the case, agreed to his proposition, he made out a list of clothes they were to purchase and gave them bogus checks on a certain well-known bank with which to do their required shopping. He then at parting "borrowed" their rings "to get better ones made of the same size." He obtained in this way rings and jewelry of considerable value from no less than seventeen women. Upon being found guilty he was sentenced to five years' penal servitude. The policeman who arrested him and who worked up the case against him was a man named Sparrell, and the counsel who prosecuted him was Mr. Forrest Fulton.

Smith came out of prison in due course, and nothing more was heard of him. But in 1896, no less than nineteen years after the first series of crimes, the same thing began again; a man defrauded a number of women in exactly the same way, telling them the same story, except that he now passed as the "Earl of Wilton" and once as "Lord Wilton de Willoughby." The same house in St. John's Wood was offered, the same clothes, the same bogus checks were given upon the same bank, and again rings were borrowed and never returned.

On this new series of charges the police arrested Adolf Beck. He was brought before a stipendiary magistrate, and the policeman, Sparrell, gave evidence, saying in the strongest terms that he had been present at the trial of John Smith in 1877 and that "the prisoner is the man." Beck was sent to the Old Bailey for trial and by a curious coin-

cidence the Mr. Forrest Fulton who had been prosecuting counsel when John Smith was convicted was now Sir Forrest Fulton, and the judge before whom Beck was tried. The prosecution made no attempt to identify Beck as John Smith. On the contrary Sparrell was not called as a witness, and all evidence on this point was excluded, the Judge ruling that "the question whether the prisoner was or was not the man convicted in 1877 was not admissible." This ruling was doubtless right although it was of the most fatal consequence to Adolf Beck, for the reason that he had an *alibi* which would have cleared him of the 1877 charge, so that if the prosecution had tried to show his identity with Smith he would have broken down their case, for three highly respectable witnesses, one of them a member of the royal household of the King of Denmark, came forward prepared to swear that Beck was in Peru in 1880, at the very time when Smith was serving his sentence of penal servitude. A number of witnesses swore that he was the person who had robbed them, and upon this evidence he was convicted and sentenced to five years' penal servitude. Unfortunately this was not all, for the prison authorities, although there had not been a scintilla of evidence at the trial to show that Beck and John Smith were the same person, marked Beck's clothing with the letters "D. W," the former signifying "Convicted in 1877" and the latter "Convicted in 1896." It has been justly observed that the fact that the Court should have refused to raise the question whether he was Smith or not and that he should then have been sent to prison as identical with Smith, is one of the strongest points in the whole case.

While serving his term of penal servitude, Beck petitioned the Home Secretary several times, and, at last happening to hear that Smith was a Jew, and that the body marks kept by the police proved this, he pointed out that he was not a Jew, and that the police knew it. This was conclusive even to the authorities, who thereupon took a most extraordinary course. They directed that the letter "D" should be removed from his prison clothes, but peremptorily refused to reopen the question of his guilt or innocence, or to make any inquiries as to his identity. He was officially declared not to be Smith, but to be guilty of a series of crimes the exact duplicate of Smith-crimes of so unique a character that it is a tax upon human credulity to believe that the person who was guilty of those committed in 1877 was not guilty of those committed in 1896.

Adolf Beck came out of prison in 1900 or 1901, naturally, much broken in health and spirits, and financially and socially a ruined man. He was by profession a mining engineer and had theretofore held an excellent position and had accumulated property worth a few thousand pounds, which, if he had been able to manage it personally, might have yielded a large fortune. Among other things he owned shares in some mining ventures upon which calls were made while he was in prison, and which were forfeited for non-payment of the calls. He lived quietly after his release, working to get his affairs to order again and never losing the hope that his name would be cleared. But a few months ago a further extraordinary thing happened. The same crimes again began to be perpetrated upon women of the same class, and again Beck was arrested. Again women came forward to swear that he was the man who had accosted them and "borrowed" their rings, and again he was convicted at the Old Bailey, this time before Mr. Justice Grantham, who, upon the reserved protest of Beck to the authorities that he was the victim of mistaken identity, wrote a letter saying he agreed with the verdict, but he considerately reserved sentence until the next term of court, and in the interval the

final incident of this strange drama occurred. The real man, the John Smith of 1877, now calling himself Thomas, a Jew. was caught red-handed at his old game. Among those who heard of his arrest was a well-known inspector of police who seems to have had more art, and certainly more compassion, than any officer previously connected with the case. He knew, of course, as did very many more connected with the police courts, the history of these strange crimes and how energetically Beck had protested his innocence. He saw the importance of the arrest of Thomas, followed it up and brought facts to light which quickly caused the release and pardon of Beck.

Fortunately, the victim of this remarkable case of mistaken identity had, among numbers of others, one friend, a journalist of large experience and great popularity and a dramatist whose plays for years past have been almost nightly produced all over the kingdom, George R. Sims. Mr. Sims entreated the coöperation of his associates of the press in Beck's behalf, and, as a result of the application the Government has offered Beck as a solatium of his sufferings at the hands of justice the very considerable sum of £2000. It is stated that not more than ten or twelve times in the past hundred years has any grant been made from the national treasury under similar circumstances, and that the sum offered, so far as the amount is concerned, is still more exceptional. But large as the amount is it has not up to the present been accepted, as the offer has been accompanied by a condition that Beck shall receive it not merely as a solatium but in consideration of his refraining from any further agitation of the matter. This his friends are unwilling he should agree to, and that he may not suffer loss by continuing to give further publicity to the stupidity of the police authorities, a well-known newspaper proprietor has, it is understood, offered to pay him a like amount for his assistance in continuing the agitation. What is demanded by the public is that there shall be a searching inquiry into the circumstances under which the case against him was got up by the police and the reasons why his petitions for a reopening of it, particularly when he was able to convince the authorities that he was not John Smith, were so contemptuously disregarded. In this the press and the public alike unite.

In other quarters there is strong agitation, backed up by High Court Judges of great influence and by many members of the bar, in favor of a court of appeals in all criminal cases. It may seem remarkable to an American that there is now practically no such right of appeal. A convicted man has only one course open to him. He may send an appeal to the Home Secretary asking for a further investigation, and stating circumstances which he thinks were not sifted at the trial. This petition does not act as a stay and while it is pending the prisoner is sent to one of the prisons to begin the term of his sentence. The petition is sent by the Home Office to the Judge who tried the man, who reports whether he considers there is ground for further inquiry. If he thinks there is the Home Office refers the matter to the public prosecutor. In other words the Home Secretary takes his cue—or the officials of the department under him take their cue—in such a matter from the learned Judge who tried the case and by whose summing-up, it is only fair to assume, the jury were largely influenced in arriving at this verdict. Even if the authorities come to the conclusion that the case was not presented in an altogether satisfactory way, they have no right to order a new trial or to grant a rehearing. They must either pardon the condemned, or let the matter rest. It is stated that the Home Secretary receives in the course of each year petitions from over 3000 prisoners. He is an

over-worked official, a member of the cabinet, with heavy parliamentary duties and with no time to give personal attention to a twentieth of these petitions. He is also a lawyer and, he must of necessity refer all these applications to subordinates. It is, therefore, not remarkable that it is only in the very worst cases that he decides to overrule the judge and the jury who tried a prisoner and set him free. It will be remembered that in Mrs. Maybrick's case the application for her release was continued for years—almost to the very last day of her term. It is impossible to believe that if it had been possible for any one of the Home Secretaries who received her petitions or petitions on her behalf, to have ordered a new trial, such a course would not have been taken. But it was only possible to order her release or in other words to grant her a pardon. Beck did not want a pardon for a crime which he had not committed. He simply wanted a chance to prove his innocence, and in the whole system of English jurisdiction there was no machinery open to him or to the public for such a trial.

STUFF GOWN.

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, THOS. TILESTON BALDWIN, 53 State Street, Boston, Mass.

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

NOTES.

"EDUCATION is a great thing."

"Yes, it turns out some mighty intelligent criminals."

JUDGE—Have you anything to say, prisoner?

The prisoner—No, your honor, I expect what you say'll be plenty.

MAGISTRATE—The evidence clearly shows that you threw a stone at this man.

Prisoner—Sure an' th' looks av th' man shows more than that, yure honor. It shows thot oi hit him.

AT one of the registration places in his State, Congressman Bankhead, of Alabama, stood listening to the election officers testing a colored man's qualifications for exercising the right of suffrage. The negro was unusually intelligent and one of the officials said quietly to the congressman, "That's a very smart darky. He has answered every question correctly."

"Ask him to explain a writ of *certiorari*," suggested Mr. Bankhead.

This was done and the negro, after scratching his head, said: "'Deed, boss, I guess you done got me. I doan know whah dah is, 'less it's somethin' to keep a nigger from votin'."

THE following anecdote is told of Mr. Chief Justice Waite:

During the late seventies, an old man of rustic simplicity stepped into the Supreme Court room at Washington, and seated himself on one of the benches set apart for visitors. He listened attentively for a short time to the arguments of counsel in a case then before the court. Presently, edging over to the attendant at the door, he whispered:

"What is the Chief Justice's name?"

"Waite," answered the doorkeeper.

The old gentleman nodded his head, and with a puzzled expression said, "All right," and resumed his seat. After a short while he returned to the attendant and again whispered:

"Now do you mind tellin' me who the Chief Justice is?"

"Waite, I told you," rejoined the doorkeeper, this time with a surly snarl.

This proved too much for the visitor. In a hoarse whisper, audible throughout the entire court room, he said:

"See here, now, young man, you've tol' me to wait twice, but I've ben a watchin' you, and you h'aint ben a doin' a blamed thing. I'll see whether I've got to wait your convenience."

With that outburst the old man trudged angrily out, leaving the doorkeeper in a fit of laughter that threatened the loss of his position.

PATRICK A. COLLINS, Mayor of Boston, tells a story of a negro who was arrested for stealing. He had been caught helping himself to the contents of the cash drawer in the store of a Mr. Appleton. The magistrate before whom the negro was brought knew him, and was much surprised to learn the charge against the prisoner. Looking at the negro earnestly, he said: "Sam, I'm

sorry to see you here. Didn't you know that no good could come from stolen money? There's a curse on it."

"Well, jedge," replied the prisoner, "I didn't know Mistah Appleton stole dat money. I couldn't tell dat by jest lookin' at it."—*Exchange.*

A GEORGIA judge (says an exchange) was accosted by an old darkey.

"Mornin', jedge," began old Sam.

"Howdy."

"Say, jedge, I'se like tu be on de nex' ticket for justice uv de peace," continued Sam.

"You a judge!" replied my friend. "Why what do you know about the law?"

"Mos' eberythin'."

"Well, now, Sam, if we should elect you and a man was brought before you charged with committing suicide what would your judgment be?"

This caused Sam some deep meditation, and after a considerable wait he replied:

"Well, under de circumstances, I guess I'd make him support his wife."

REPRESENTATIVE BOURKE COCKRAN was seated in his law office one day recently when one of the clerks announced a visitor. The orator was very busy, but the man refused to tell his business to a clerk, insisting that it was a personal matter and he must see Mr. Cockran himself.

"Well, show him in," said the lawyer finally, in disgust.

"I want to get some legal advice, Mr. Cockran," said the visitor, "and I came to you because I am a poor man and cannot afford to pay a real lawyer."

"What do you mean?" thundered the representative, indignantly.

"Well, I mean that as a politician you will not be hard on one of your constituents. Besides, I have another claim on you. My aunt does washing for one of your cousins."

"My dear sir," said the lawyer in his most withering tones, as he ushered the visitor out, "you don't want to see a lawyer; you want to see a nerve specialist."—*New York Herald.*

A STORY, said to be true, is related of the late Senator "Matt" Carpenter, of Wisconsin. The Senator was once arguing a case before the State Supreme Court, and before he was half through with his argument, the judges made up their minds that the Senator did not have a case, and informed him that he might as well conclude, as the decision would go against him. Carpenter sat down and as the opposing counsel, who was very deaf arose to speak, the Chief Justice said: "I don't think it will be necessary to hear from you." Seeing that he was being addressed, the lawyer turned to Carpenter. "What did the Chief Justice say, Matt?" he whispered. "He said he would rather give you the case than to listen to you," replied Carpenter, aloud.—*Chicago Law Journal.*

THE cross-examiner had kept the witness on the stand for some time, and the witness naturally was getting weary.

"If you would only answer my questions properly," said the cross-examiner, "we would have no trouble. If I could only get you to understand that all I want to know is what you know, we—"

"It would take you a lifetime to acquire that," interrupted the witness.

"What I mean is that I merely want to learn what you know about this affair," the lawyer said, frowning. "I don't care anything about your abstract knowledge of law or your information in regard to theosophy, but what you know about this case."

"Oh, that isn't what you want," said the witness in an off-hand way. "I've been trying to give you that for some time, and—"

The lawyer got in an objection and the witness had to stop.

"If I don't want to know what you know about this particular case and nothing else," inquired the lawyer later, "what do you think I do want to know?"

That seemed so easy that the witness laughed as he said:

"It isn't what I know that you want to know; it's what you think I know that you're after, and you're trying to make me know it or prove me a liar."

Then it was that every one in the court-room knew that he had been on the witness stand before.—*New York Press.*

THE Hon. Elihu Root, who has returned to the practice of law in New York city, has engaged a new office boy. Said Mr. Root: "Who carried off my paper basket?"

"It was Mr. Reilly," said the boy.

"Who is Mr. Reilly?" asked Mr. Root.

"The janitor, sir."

An hour later Mr. Root asked, "Jimmy, who opened that window?"

"Mr. Lantz, sir."

"And who is Mr. Lantz?"

"The window cleaner, sir."

Mr. Root wheeled about and looked at the boy. "See here, James," he said, "we call men by their first names here. We don't 'mister' them in this office. Do you understand?"

In ten minutes the door opened and a small, shrill voice said: "There's a man here as wants to see you, Elihu."—*Cleveland Plain-Dealer.*

"I—I've bought a farm about ten miles out of town," said the man with the black eye, as he entered a lawyer's office.

"Exactly—exactly. You've bought a farm and you've discovered that one of the line fences takes in four or five feet of your land. You attempted to discuss the matter with the farmer, and he resorted to arms."

"Yes."

"Well, don't you worry. You can first sue him for assault. Then for battery. Then for personal damages. Then we'll take up the matter of the fence, and I promise you that even if we don't beat him we can keep the case in court for at least 25 years. Meanwhile, he'll probably hamstring your cows, poison your calves and set fire to your barn, and you can begin a new suit almost every week. My dear man, you've got what they call a pudding and you can have fun from now on to the day you die of old age."—*Chicago Law Journal.*

The late Senator Vest was a clever lawyer as well as an orator and statesman. In his younger days, it fell to his lot to defend a man indicted for murder. There were circumstances, not strictly legal, that made the crime less heinous in fact than in name. Vest was sorely puzzled to find a defense for his client, but at length told him that his only hope was that the jury would find him insane, and he instructed his client not to speak from that time forth to the end of the trial. The case proceeded, the State presented its evidence and rested. Vest made little defense, and waited for the summing up of the State's attorney. Then he started in with an address to the jury in which he demonstrated that his client was an utter imbecile, entirely incapable of planning and carrying out the crime for which he was indicted. He made his client out worse than a degenerate—a pitable human wreck mentally, the veriest imbecile. The jury was convinced and acquitted the prisoner. Not so the prisoner. With ill-concealed rage he sought out his lawyer, and calling him to one side gave him to understand that if ever again in trouble and Vest should employ that kind of defense to free him, the lawyer would hear from him in an emphatic way.—*The Law Register.*

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

The custom of a belligerent nation prohibiting all trade with its enemy is of very ancient date. We have records of such a practice as early as the beginning of the thirteenth century. It seems to have been usual in that and the next following century for belligerent nations on the outbreak of war to issue proclamations warning all men not to attempt to import food or any merchandise whatever into the enemy's territory, and, thereupon, to arrest and confiscate the vessels and goods of any persons

who might contravene such warning, as the property of individuals who were in reality in league with the enemy. The States General of Holland appear to have maintained this practice without any serious dispute on the part of the other nations as late as the beginning of the sixteenth century; but it came to be questioned towards the end of that century as an immoderate exercise of belligerent right, since which time it has been generally disclaimed, and may now be regarded as obsolete. Upon the other hand, the practice of intercepting all merchant vessels trading with the enemy's coast is as old as war itself.

It has been observed that the usage of belligerents to forbid by proclamation all trade with the enemy, and to confiscate the property of parties contravening their proclamation was successfully impugned in the seventeenth century, as an unreasonable exercise of belligerent force, and may now be regarded as having no sanction from the modern practice of nations of the first rank. We may trace back to the same century the first systematic attempt to regulate the belligerent right of blockade, which originated with the Dutch. "On the question of blockade," says Lord Stowell, "three things must be proved—(1) the existence of an actual blockade; (2) the knowledge of the party; (3) some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade." The point, therefore, which must be considered is, what constitutes an actual blockade? It was one of the objects of the Armed Neutrality—a confederacy against England, formed by Russia, Sweden and Denmark in 1780—to establish a more precise rule than had previously prevailed for determining when a port was actually in a state of blockade, in order that an obligation to abstain from trading with such a port might be imposed upon the merchants of neutral countries. In pursuance of that object, Russia communicated to the various European powers a declaration of the principles of the Armed Neutrality comprised in four propositions, the fourth of which was to the effect that in order to determine what characterised a blockaded port, that term shall only be applied to a port where, from the arrangement made by the attacking force, there is evident danger in entering the port. Great Britain acceded to this definition of a blockaded port at her convention with Russia in 1801, and the principles generally affirmed by the great nations of the world may be said to be in harmony with it. At the beginning of the Crimean war (in 1854), France and England may be considered to have affirmed the same principle when they declared their intention "to maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's ports, harbors or coasts." Upon the conclusion of peace—it will be remembered that both England and France were supporting Turkey against Russia—the subject of belligerent blockade came under the consideration of the Powers assembled at Paris in the Congress of 1856, when it was agreed to remove all uncertainty among themselves by declaring their view of the maritime law on the subject, and by inviting all other nations to accede to a common declaration. The proposition which was adopted by the Congress was as follows: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

A knowledge of a blockade, however acquired, will preclude the captain of a neutral ship from any claim to receive a direct warning from the blockading squadron, even if the ship should have sailed from the port where she had shipped her cargo without a knowledge of the blockade. The general notoriety of a blockade will be presumed after it has been publicly notified and *de facto* maintained for any considerable period.

Yours very truly,

LAWRENCE IRWELL.

Buffalo, New York, September 3, 1904.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book whether received for review or not.

THE LAW OF CONTRACTS. By *Theophilus Parsons*. Ninth edition, edited by *John M. Gould*. Boston: Little, Brown and Company, 1904. Three volumes. (cccvii +646+xx+974+ix+749 pp.)

As the original edition appeared in 1853, the present edition celebrates approximately the fiftieth anniversary of this popular work. That this edition is the ninth indicates clearly the estimation in which the work is held by the profession. It is hardly conceivable that there is an American law office of any consequence which does not contain at least one edition, for Parsons on Contracts is probably the only rival of Greenleaf on Evidence for the highest place in the estimation of the American bar as a work of practical value.

From the point of view of theoretical science, the author is extremely easy to criticise. At the very outset he claims for his favorite subject a jurisdiction over very nearly the whole field of law, and thus raises the question whether he is not too careless of legal distinctions. Here are his words: "The Law of Contracts, in its widest sense, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or rather, is, the continual fulfilment of contracts. Even those duties, or those acts of kindness and affection, which may seem most remote from contract or compulsion of any kind, are nevertheless within the scope of the obligation of contracts. The parental love which provides for the infant when, in the beginning of its life, it can do nothing for itself, nor care for itself, would seem to be so pure an offering of affection that the idea of a contract could in no way belong to it. But even here, although these duties are generally discharged from a feeling which borrows no strength from a sense of obligation, there is still such an obligation. It is implied by the cares of the past, which have perpetuated society from generation to generation; by that absolute necessity which makes the performance of these duties the condition of the preservation of human life; and by the implied obligation on the part of the unconscious objects of this care, that when by its means they shall have grown into strength, and age has brought weakness upon those to whom they are thus indebted, they will acknowledge and repay the debt. Indeed, the law recognizes and enforces this obligation, to a certain degree, on both sides, as will be shown hereafter. Further, in all the relations of social life, its good order and prosperity depend upon the due fulfilment of the contracts which bind all to all. Sometimes these contracts are deliberately expressed with all the precision of law, and are armed with all its sanctions. More frequently they are, though still expressed, simpler in form and more general in language, and leave more to the intelligence, the justice, and honesty of the parties. Far more frequently they are not expressed at all: and for their definition and extent we must look to the common principles which all are supposed to understand and acknowledge. In this sense, *contract* is coördinate and commensurate with *duty*: and it is a familiar principle of the law, of which we shall have much to say hereafter, and which has a wide, though far from a universal application, that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do."

From this rhetorical prelude, one might well infer that the author would extend the subject of Contracts in such a way as to in-

clude Torts and Crimes. Yet, in truth, the author immediately and wisely forgot his rhapsody, for though the study of legal history had not yet possibly progressed so far as to make common the knowledge that the law of Crimes and of Torts is older than the law of Contracts, the author, as a practical lawyer, knew—to quote again his own words—that "a contract, in legal contemplation, is an agreement between two or more parties for the doing or the not doing of some particular thing," and further that among "the essentials of a legal contract" is "the Assent of the Parties, without which there is in law no contract."

Without serious departure from scientific ideals, and with the result of making his work extremely useful in practice, the author has included almost every topic that is even remotely connected with the narrow subject of Contracts. Among the topics thus treated, sometimes at considerable length, are Agency, Trusts, Guardianship, Corporations, Partnership, Bills and Notes, Infancy, Coverture, Landlord and Tenant, Sales, Suretyship, Bailments, Patents, Copyright, Trade-marks, Shipping, Insurance, Conflict of Laws, Estoppel, Damages, Liens, Bankruptcy, and Constitutional Law. From this long list—which might easily be made longer by naming the topics found in all books on Contracts,—it is clear that the work might appropriately be termed an Encyclopædia of Commercial Law. This encyclopædic quality has done much towards making the book indispensable, and has also caused the task of each editor to be unusually difficult. The editor of the eighth edition, Professor Williston, besides bringing the citations down to date, added elaborate comments which caused the work to represent the present state of the law of Contracts, from both the scholarly and the practical point of view, as nearly as such a result can be accomplished upon the basis of an old-fashioned text. In the present edition, the effort of the editor has apparently not extended beyond adding citations of recent cases.

Vast as the work is, and wide as was the author's initial conception of the scope of Contracts, there is no considerable treatment of those obligations implied by law and enforced in contractual forms of action, which are now discussed by scientific authors under the head of Quasi-Contracts. It is strange that Parsons did not deal with this topic; but the successive editors have done well not to supply the omission, for in truth nothing but harm can come from overlooking the essential distinction between obligations founded on mutual assent and those founded otherwise.

CITIZENSHIP OF THE UNITED STATES. By *Frederick Van Dyne*. Rochester, New York: The Lawyers' Co-operative Publishing Company. 1904. (xxvii+385 pp.)

The citizenship of which Mr. Van Dyne treats is Federal citizenship, State citizenship being outside the province of this book. The subject is dealt with under four general heads—Citizenship by Birth, Citizenship by Naturalization, Passports, and Expatriation. Mr. Van Dyne's long experience as Assistant Solicitor of the Department of State, in which position he has had to deal with many questions relating to citizenship, has been a fitting preparation for his present work.

Perhaps the most interesting chapters are those on Naturalization by Treaty, and on the Attitude of Foreign Governments toward their citizens who have become naturalized in the United States. In the former chapter are to be found the provisions bearing on naturalization in the treaties with Great Britain in 1794, with France in 1803, with Spain in 1819, with Mexico in 1848 and 1853, with Russia in 1867, and again with Spain in 1898. In the latter chapter is given the summary, compiled by the Department of State, of laws and regulation of the principal European countries, and of Persia, concerning the status of their citizens who have become naturalized here. Of special interest are the questions of the denial by

Russia and Turkey of the right of expatriation and of the treatment of American Jews in Russia, both discussed in this chapter.

The appendix contains the laws of the United States relating to Citizenship and Naturalization, and the Naturalization Conventions to which the United States is a party.

TEXT-BOOK OF THE PATENT LAWS OF THE UNITED STATES OF AMERICA. By *Albert H. Walker*. Fourth Edition. New York: Baker, Voorhis, and Company. 1904. (cviii+775 pp.)

The volume before us is an excellent example of a good text-book, well meriting a fourth edition. The author brings to his work the experience of a patent practice extending over more than a quarter of a century. The arrangement of the book is logical, beginning with a discussion of such fundamental matters as the Subjects of Patents, Invention, Novelty, and Utility; then treating of the kindred subjects of Applications, Letter Patent, Reissues, Extensions, Title, Licenses, and Infringement; and winding up with a consideration of Courts, Parties and Causes, Action at Law, Damages, Actions in Equity, Injunctions, and Profits.

It is a pleasure to note that Mr. Walker's book is more than a mere stringing together of cases in logical order—a mere digest. It is, in truth, a valuable treatise on the subject of Patent Law, and includes intelligent discussion of principles, as well as statements of cases. Occasionally the author dissents from the conclusion reached by the court, as, for example, on the question whether the term "manufacture" "should be held to justify a patent for the invention of a new and useful human habitation, or of a new and useful improvement of such a structure," and in such cases he has the courage to state his own views—an excellent quality in a text-book writer.

The Appendix contains the Patent Statutes from the Patent Act of 1790 to date.

STREET RAILWAY REPORTS. Annotated. Reporting the Electric Railway and Street Railway Decisions of the Federal and State Courts in the United States. Edited by *Frank B. Gilbert*. Vol. I. Albany, New York: Matthew Bender. 1904. (xvi+943 pp.)

This first volume of a new series of Reports covering current cases of a special nature, contains about one hundred and fifty Street Railway cases decided in twenty-seven State Courts and the United States Circuit Court of Appeals between April 1, 1903, and the fall of the same year, the intention of the editor being to report "all the cases decided in the Federal Courts, in the courts of last resort of all the States, and the important cases decided in lower courts of original or appellate jurisdiction, relating in any way to the management, operation, or control of street railways, and the rights, duties and liabilities of street railway companies." Editorial notes are added to many of the cases. Naturally a majority of the cases are negligence and personal injury cases; but many other important classes of cases are included, as, for example, those involving franchises, and those dealing with damages to abutting owners by elevated railroads, *e. g.*, Aldis *v.* Union Elevated Railroad Company, an Illinois case, and the Massachusetts case of Baker *v.* Boston Elevated Railway Company.

STREET RAILWAY ACCIDENT LAW. By *Andrew J. Nellis*. Albany, N. Y.: Matthew Bender. 1904. (cxii+711 pp.)

This volume is, in effect, a well-arranged digest of American, including Canadian, cases, dealing with—to quote the sub-title—"the liability of street railroads for injuries to the person and property by accidents to passengers, employés, and travelers on the public streets and highways, and [with] the pleading and practice in the various jurisdictions in street railroad litigation." Within these somewhat narrow lines the author's work seems to be carefully and thoroughly done, making the book one of

practical value. We feel bound, however, to protest in a friendly spirit against calling such a volume as this—excellent and valuable as it is in its own way—"a complete treatise on the principles and rules of law applied" to the subject in hand, for such a description imports a dignity and importance to which this book, and the many books of like character which are coming constantly from the press, have no claim.

HAMILTON'S CYCLOPEDIA OF NEGLIGENCE CASES. A Century of Negligence Law, Classified According to Facts. Containing all reported negligence cases decided in all the New York State Courts from the earliest period (1802) to October 10, 1903. Prepared and edited by *T. F. Hamilton*. New York: Baker, Voorhis, and Company. 1904. (lxxxi+1083 pp.)

To the New York practitioner who has any dealing with negligence cases this volume will be a time-saver and a book of practical value; nor is its value limited to New York cases, although it deals only with decisions in that jurisdiction. The facts in each case are stated in from one to six or eight lines: the condensing is well done, and the statements of the facts involved in each case are clear and sufficiently full. There is also an excellent one-line index.

THE LAW OF CRIMES AND CRIMINAL PROCEDURE. Including Forms and Precedents. By *Lewis Hochheimer*. Second edition. Baltimore: The Baltimore Book Company. 1904. (566 pp.)

The author treats his subject under four main heads, namely, General Doctrines, Procedure, Special Proceedings (*e. g.* Search Warrants, Inquisition of Homicide, Extradition, *Certiorari*, *Habeas Corpus*), and Specific Offenses. It is obvious that a full and comprehensive treatment of the wide field of criminal law and procedure is impossible in the small compass of four hundred and fifty pages. This impossible task the author has not attempted; on the other hand, he has written an excellent concise outline of his subject, of value alike to the student who wishes to get a general knowledge of criminal law, and to the practitioner who has need of a text-book on this subject for quick reference.

THE BANKRUPTCY ACT OF 1898. Annotated and explained by *John M. Gould* and *Arthur W. Blakemore*. Boston: Little, Brown and Company. 1904. Buckram. (xvii+266 pp.)

Within this small volume the authors have given a concise and useful commentary on the present Bankruptcy Act, with its amendments, referring in the notes to the various sections of the act to the important and latest Federal and State decisions which bear thereon. Following the Bankruptcy Act itself are Forms of Bankruptcy and the General Orders and Forms established by the Supreme Court, November 28, 1898.

THE AMERICAN STATE REPORTS. Containing the Cases of General Value and Authority decided in Courts of Last Resort of the Several States. Selected, reported and annotated by *A. C. Freeman*. Volume 97. San Francisco: Bancroft-Whitney Company. 1904. (1139 pp.)

The notes in this volume cover subjects of more than usual interest; *e. g.* Actions by Stockholders on Behalf of Corporations; When the Liability of a Carrier is Reduced to that of a Warehouseman; Effect, as against Stockholder, of a Judgment against a Corporation; Liability of Carriers for Injuries done by Strikers or Mobs; What is sufficient Joinder of Husband in Conveyance of Wife's Real Estate; Adjournment of Execution and Judicial Sales; Power of Cities to Create Monopolies for the Removal of Garbage and Noxious Substances; Circumstantial Evidence; Right of Recovery of Employés accepting Extra-Hazardous Duties; and the Rights, Duties and Powers of Guardians *ad Litem* and Next Friends of Infants. The cases here reported were, for the most part, decided in 1902 and the first half of 1903.

CURRENT LEGAL ARTICLES.

"THE Succession of the Vice-President under the Constitution" is the subject of an interesting inquiry by Lewis R. Works, of the Los Angeles, California, bar, in the *American Law Review* for July—August. Mr. Works says in conclusion:

The questions that have been asked and suggested above may be concretely epitomized as follows:—

1. Would not the Constitution be more consistent and harmonious if the strict grammatical construction of the sixth paragraph of Section one of Article two were deserted, and that one adopted which would confer upon a surviving Vice-President only the right to exercise the powers and duties of the Presidency and not the office itself?

2. Do not the other parts of the Constitution render doubtful the propriety of a strict grammatical construction of the clause in Section one of Article two and force us to desert it?

3. Would the other construction be in any sense harmful to our system of government?

4. Would not the ungrammatical construction, if it may be so termed, be more consistent with the true principles of our government than the other, on the theory that the people, the source of all governmental power under our system, have reserved to themselves the right to *elect* their Presidents, in the strict and direct sense?

5. When a President dies, is the office vacant for the remainder of the term, or does the Vice-President become President and leave the Vice-Presidency vacant for the remainder of the term, or, anomalous as it may seem, does the Vice-President hold both offices?

6. When a President becomes temporarily unable to perform the duties of his office, and the Vice-President is called upon to act, does he become President?

7. If he does become President, what does the late President become, and how does he come back to his own after the removal of disability?

8. If the Vice-President does become President in such a case, does he cease to be Vice-President temporarily, and, if he does, how does he get back to the Vice-Presidency when the President's disability is removed, or does he get back at all?

9. If he does not become President in such a case, how does he become President when the latter dies, as he comes into power under the same provision in each instance?

10. Has the United States had twenty-five Presidents or only twenty?

11. Is Theodore Roosevelt President or only Vice-President performing executive duty?

As its title indicates, this paper is merely an interrogation, but, as a reading of it shows, an interrogation with many dependent branches. The writer has not found that it has ever been answered. Madison's journal of the Constitutional Convention is searched in vain for light upon it, as are also the Federalist and Story's Commentaries on the Constitution. So far as can be ascertained, the only time that the question has been even approached was when John Tyler, the first Vice-President called to executive duty, came to take the oath of office. It was taken before Chief Judge Cranch, of the Circuit Court of the District of Columbia, and the following statement is part of the Judge's certificate: "The above named John Tyler personally appeared before me this day, and, although he deems himself qualified to perform the duties and exercise the powers and office of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he has taken as Vice-President, yet as doubts may arise, and for greater caution, took and subscribed the foregoing oath before me." No doubts have ever arisen, and the other Vice-Presidents who have succeeded to the Presidential office have taken the oath as a matter of course. To end with yet one more question, was it necessary or was it even proper for them to have taken it?

The August number of *The Law Magazine and Review* (London) discusses three interesting questions of international law which have arisen in the present conflict in the Far East:

Firstly, the international position created by two Powers being engaged in hostilities in the territory of two other States, Corea and China, especially the latter, which remains neutral though having an army stationed near the boundary between Manchuria and the rest of China; and the consequent hindrance of the rights of other neutrals by treaty with China to trade at ports like Niuchwang which lie within the sphere of military operations. For practical purposes as regards neutrals Manchuria may be treated as Russian territory by occupation, whether with or without the consent of China: and at Niuchwang Russian military jurisdiction has been asserted, and neutral warships have absented themselves from the port. To the extent that such places are treated by the belligerents as falling within the sphere of warfare, the rights of neutrals must for the time yield to the necessities of war.

Secondly, the reported proclamation of the Russian Viceroy that any person transmitting news by wireless telegraphy from the Russian lines (including newspaper correspondents) are liable to be treated as spies, presumably because thereby news might thus be communicated directly or indirectly to the hostile forces. It is no doubt competent to the general of an army to give notice that the will punish any disclosure or information given by any one neutral or belligerent within the lines of the army or the limits of its operation to any other person, but no Power signatory of the Hague Convention can justify expanding the word "spy" (with its capital penalty) to include a person so offending. The Convention provides that only persons can be considered as spies who, acting secretly or under false pretexts, gather, or try to gather, information in the zone of operations with the intention of communicating it to the other belligerent: and the term is not applicable to persons sent in balloons to transmit despatches or generally to maintain communication between different parts of an army or a territory (Art. 29). By the same Convention (Arts. 30 and 31) a spy taken in the act cannot be punished without previous examination, and if he regains his army and is then captured, he is to be treated as a prisoner of war, and incurs no risk for his former espionage. By the Russian regulations issued for this war the attention of the Russian military authorities is directed to this among other International Conventions. In the Franco-German war the German military authorities took similar action to that of Admiral Alexeieff, against persons passing over the German lines in balloons, not indeed punishing them capitally but imprisoning them; but this claim is now negatived as above. Whatever the origin of capital punishment for espionage, its present justification is no doubt based on the feeling that the strongest possible deterrent is required for insidious methods of warfare; but this is an additional argument against arbitrary construction of the term. Modern opinion is more mercifully inclined, and regards imprisonment as sufficient in most cases.

Thirdly, the use of floating mines by belligerents which, whether laid or not in the territorial waters, are found on the high seas and endanger neutral shipping. The view has been expressed by high legal authority, and even officially, that such mines may be legitimately laid in territorial waters, but not in the open sea, and it has been suggested that if mines have been legitimately so laid and are afterwards carried out to sea by weather, the belligerent is not responsible for injury which they may do to neutrals, like a stray shot fired at sea which accidentally hits a neutral ship. Under modern conditions of naval warfare it seems unreasonable for neutrals to insist on the ordinary three-mile fringe of territorial waters being the limit of offensive military operations, especially when the coast is in

belligerent occupation, and to claim the free right of passage over the waters outside that boundary. Neutrals may have the right to claim that the high seas not within the immediate sphere of belligerent activity shall not be rendered unnecessarily dangerous to their ships lawfully passing, but they cannot complain of *mala fides* or recklessness of belligerents if they do not take account of new conditions of warfare. But an initial difficulty in the way of any protest by neutrals in this matter is that there is no binding limit of territorial waters in International law. It is true that more nations have accepted the three-mile limit than any other, that it was declared by the Behring Fisheries Arbitration Commission to be the "ordinary limit," and that it was adopted in the North Sea Fisheries Convention of 1883, in the Suez Canal Treaty of 1888, and by the fishery treaty of 1839 between Great Britain and France, as well as by their legislations. Official recognition of it, however, does not go further back than 1792, when the United States adopted it as being the extreme range of cannon, and it is not admitted by Norway, which claims four miles, or Spain, which claims six miles, and Russia, Germany, Austria, Italy and Denmark have refused to be bound by it and regard four miles as the minimum. An important *Projêt*, framed by Sir Thomas Barclay and accepted substantially by the Institute and the International Law Association in 1894 and 1895 respectively, proposed as the limit of territorial waters a distance of six miles from low water-mark, but allowed it to be extended to a distance corresponding to modern cannon range for purposes of neutrality by a notification from the neutral "riverian" Power to that effect; and in 1896 the Netherlands Government suggested to the other Powers the desirability of fixing such limits by International convention. Though other powers were not disinclined to the proposal, the British Government declared itself unfavorable, and it came to no result.

Of the position of belligerent ships of war which have taken refuge in neutral ports, the *Law Journal* (London) says:

If a belligerent ship which has taken refuge from the enemy in a neutral port were allowed to remain there an indefinite time, waiting to emerge when a favorable opportunity arose, the neutral Power would obviously be favoring the belligerent, and in some cases allowing him to use the port as a base of operations. As regards the repairing of a damaged ship, it may be conceded that such repairs should be allowed to be done in a neutral port as are absolutely necessary to make her seaworthy; but to allow repairs to be done for the purpose of making her efficient as a fighting machine is very much the same as allowing a new warship to be built for the belligerent. Obviously, the tendency of International law is to interpret the obligations of neutral Powers in the matter of not sheltering or repairing ships of war more strictly than in former times. The capture of the *Rechitelni* in Chifu Harbor is *prima facie* undoubtedly a violation of Chinese neutrality. Even though, as the Japanese assert, the Russians have systematically violated Chinese neutrality, this act of theirs would not be justified unless the Russian ship was herself violating Chinese neutrality, and China was unable or unwilling to carry out her duties as a neutral. If the Japanese Government cannot show conclusively that this was the case, the proper course will be to return the ship to the custody of the Chinese authorities.

A member of a recent grand jury in St. Louis thus describes "Mr. Folk in the Grand Jury Room," in *The Law Register*:

The question arises, How does Mr. Folk do it? That is what we jurymen studied over often. In the first place, he is not overburdened with details, having a strong staff. He has time for quiet thinking—the average American professional business man's characteristic lack. In his examination of a witness, Mr. Folk is direct and informal. You might think it a justice of the peace case, in-

volving four dollars, for all anxiety he shows. In a quiet fashion the questions begin. Sometimes he stands at the witness's side; oftener he leans over a near-by juryman's chair. He consults notes but rarely. Yet it is always evident that he has carefully blocked out his plan, despite all the informality.

When he leads up to the crucial question and the witness balks, he may drop that line temporarily. But sooner or later the question must be answered, or there comes virtual self-condemnation through declining to answer, on the plea that the witness will incriminate himself. Never did our jury see one or the other result fail of accomplishment on anything essential.

Mr. Folk has no set plan and conducts no two examinations in the same way. But in this respect he never varies; under no circumstances was he ever seen to lose his temper, raise his voice, or in any way show excitement. And we saw many occasions when the majority of men certainly would have lost control of themselves. It is the same way when he is trying his cases.

The one thing which most impresses the witness is Mr. Folk's quiet strength. When the witness gave way to nerves and fear and anger, and there was an explosion Mr. Folk would calmly stroll around the room, relight his cigar, and then go up to the witness and say something like this: "Now, I'm not going to argue with you. You go on record, either way."

"LIABILITY for 'The General Slocum' Holocaust" is discussed in *Case and Comment* for August:

Preliminary to the question of the limited liability law is the question of liability to an action for the death of a person. No such right of action exists by general maritime law, nor is it given by any act of Congress, unless it may be one of these mentioned below. It must, therefore, exist, if at all, by reason of State legislation. . . . But under the laws of New York there is such a right of action when death is caused by wrongful act, and this right, given by a State law, may be enforced either in the State courts, or in a court of admiralty. . . . It is therefore clear that, as this disaster occurred in the State of New York, the law of that State, creating a right of action for death, may be enforced, unless, or except so far as, it is defeated or modified by the limited liability law of Congress.

A limitation of liability to the value of the owner's interest is provided by U. S. Rev. Stat., Sec. 4283 (U. S. Comp. Stat. 1901, p. 2943), where the loss occurs without his "privity or knowledge," and this applies to all liabilities of the owner, even such as are created by State laws. Butler *v.* Boston & S. S. S. Co., 130 U. S. 527 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Craig *v.* Continental Ins. Co., 141 U S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97. The cases just cited also decide that this limitation of liability extends to liabilities for personal injury and death, as well as to all other kinds of loss or injury. The meaning of the words "privity of knowledge" is held in the case of Lord *v.* Goodall, N. & P. S. S. Co. 4 Sawy. 292, Fed. Cas. No. 8,506, to be a personal participation of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge or means of knowledge of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting means to prevent it. There must be some personal participation or concurrence of the owner himself in some fault or negligence to constitute such privity as will exclude him from the benefit of the statute; but he is bound to exercise the utmost care to provide the vessel with a competent master and crew, and to see that the ship when she sails is in all respects seaworthy, and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity within the meaning of the act But it is held in Quinlan *v.* Pew, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 111, that, if he employs a suitable agent to look after the in-

spection and equipment of the boat, he may be relieved under the statute, though the agent may in some particulars be negligent. In the case of The Annie Faxon, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 312, it was held that privity or knowledge of a defect in a steamboat boiler could not be imputed to the owner if the defect was not apparent, and was not of such a character as to be detected by the inspection of an unskilled person, and he had in good faith employed a competent person to make the inspection. The same case held that, if the government inspectors called to make an examination of the vessel failed to perform their duty, knowledge of their defective inspection could not be imputed to the owner if he had delegated the matter of the inspection to a competent employé. But where the shipowner himself undertook to examine the vessel, and failed to use proper care in doing so, it was held, in The Republic, 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 109, that he could not claim that a loss occurring from a defective condition which he failed to discover occurred without his privity or knowledge. Where the owner of the vessel is a corporation it is held, in Craig *v.* Continental Ins. Co., 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97, that the privity or knowledge referred to in the statute must be that of the managing officers of the corporation. The above cases give the substance of the law known as the limited liability law with respect to the shipowner's liability for the loss of passengers. This law, as above shown, applies to the loss of life as well as to other losses or injuries.

But there is another act of Congress which needs to be considered on this subject. It is the steamboat inspection act of February 28, 1871. Section 43 of that act provides that for damage to a passenger through any failure to comply with the requirements of that statute, or because of known defects or imperfections in steering apparatus or hull, the owner and master, as well as the vessel, "shall be liable to each and every person so injured" to the full amount of the damage. This language, strictly construed, would not seem to give a right of action for death of a passenger to his personal representatives, but it seems to be assumed without question in The Annie Faxon, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 312, that this provision does govern cases of death as well as those of personal injuries. That case does clearly hold, however, that the owner's failure to comply with the inspection law may defeat his right to the limitation of liability. The Supreme Court of the United States, in Butler *v.* Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612, left room for a doubt whether a failure to comply strictly with every requirement of this statute would necessarily defeat the owner's claim to a limitation of liability. In that case it held that under Sec. 43 of this act he could not have the benefit of limited liability if the injury or loss occurred through his fault. This seems to suggest the possibility that there might be in some instances a lack of strict compliance with the statute which would not be deemed his fault. The act of Congress of June 26, 1884, Sec. 18, which provides for the apportionment of the debts and liabilities to the individual owners, has been considered in connection with the inspection law, but was held in The Annie Faxon, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 312, to leave that act unrepealed.

"THE Legal Position of Trade Unions," in England, is thus summed up by A. Ure in *The Juridical Review* (London):

The results of the foregoing survey of the present state of the law relating to trade unions may be summarized in a few sentences. A trade union can with impunity communicate a fact to a workman, and wait about his doors to do it, but may not exercise upon him the art of peaceful persuasion however bland its accents may be, and however transitory the workmen's position may be. A gangway from ship to shore is as

much struck at as a quiet lane at the back of the workman's house. A trade union may tell a master that in a certain event his men will quit their work, even although that certain event is his, the master's, doing something he has a perfect right to do. The existence of an evil motive or of no motive at all, does not signify. A trade union may not try to make men break their contracts; nor may it counsel and persuade men to refrain from taking employment, unless it can justify its intervention to the satisfaction of the king's judges. A trade union may not, when no strike is pending, call out an employer's men and persuade his customers not to deal with him, if the object be to injure the employer's business so as to coerce his will. A trade union may not order stop-days, or any other act on the part of workmen which has the effect of causing the men to break their contracts, even although the men have themselves resolved upon this policy, and only ask the direction of the union in carrying it out. A trade union will be responsible in damages to the full extent of its resources for anv loss incurred in consequence of anv of its officials having, while acting in pursuance of its orders, overstepped legal bounds. These propositions, I think, contain a fair abridgment of the law as we see it today, viewed in the light of the decisions of the Courts.

SPEAKING of one phase of the recent Chicago strike, *The Law Register* says:

It is said to be a practice of motor-men and conductors running in the vicinity of the "stockyards" to aid the striking butchers by refusing to stop street cars at the proper corners to let on or off workmen employed at the plants. The object is to force the men to run the gauntlet of the pickets and "sluggers" who line the streets in the vicinity and waylay the men lawfully going to and returning from work. Many assaults have taken place under these circumstances, and out of them actions for damages may arise. Any lawyer engaged in prosecuting such a case would render a public service by joining the car company in such action and make it liable for these unlawful practices of its employés. It would teach public-service companies of this kind a much-needed lesson, that they are not to aid and abet the lawless in times of labor troubles. Such a practice would be quickly stopped, if the company should be compelled to pay the resulting damages.

IN an article on "The Civil Code of Louisiana as a Democratic Institution," in *The American Lawyer* for August, Charles E. Fenner, late Justice of the Supreme Court of Louisiana, gives this outline of the Napoleon and Louisiana Codes:

Let us pass in hasty review a few of the fundamental principles on which it rests:

Absolute equality of all persons before the law, with the sweeping away of all personal and class privileges, proclaimed and put into effect for the first time in the history of the world. Separation of the powers of government into Legislative, Executive and Judicial, independent of each other, and recognition of the making of laws as the exclusive function of the Legislative department.

Separation of church and State in all matters of legal right and obligation, and especially by the establishment of marriage as a purely civil contract, regulated and protected by law, and freed from all canonical interference or control.

Establishment of an order of succession based on the law of nature, with abolition of all rights of primogeniture and recognition of complete equality amongst heirs of equal degree.

Recognition of the parental power, but restricted within reasonable limits consistent with the rights and liberty of children.

Maintenance of the marital authority as an essential principle of family organization, but restrained within limits consistent with the essential personal and property rights of wives, and elevated and humanized by the grand principles of the community between spouses.

Abolition of all personal servitudes.

Freedom of testamentary disposition, restrained, however, by the provisions regulating the legitimate or forced heirship, based on the reciprocal duties of parents and children to each other, established by the law of nature, and forbidding them to disinherit each other without cause.

Freedom of contract to all persons *sui juris*, enforcing the sacredness of obligations by the just principle that all the property of a debtor is the common pledge of his creditors.

Simplification of titles to real estate by placing all on a purely allodial or free-hold basis.

Prohibition of distinctions between legal and beneficial ownership.

Prohibition of that form of trust estates known as substitutions, designed for the perpetuation of great estates by putting them out of commerce and transmitting them intact from one generation to another.

Hostility to all restraints, legal or conventional, upon the alienability of property, as contrary to public policy and to the liberty of the individual. . . .

Its leading characteristic, and the one to which I would call special attention, is the pure spirit of Democracy which informs and permeates its whole tenor. . . .

It is the most purely Democratic system of law under which any people has ever lived. . . .

The framers of our Louisiana Code made minor changes in the Napoleon Code, designed to adapt it to new conditions, to fill up *lacunae* which had been discovered, and to settle controversies which had arisen, but as a whole, it is substantially a reproduction of the Napoleon Code.

The most significant changes were two:

First: The simplification of the community system by discarding distinctions between real and personal estate, and by confining it to the community of acquets and gains during marriage.

The wisdom of this change is demonstrated by experience, the result being that in Louisiana marriage contracts are rare, and growing rarer, while in France they are almost universal, and their most frequent object is to confine the community within the same limits which are prescribed by the Louisiana Code.

Second: And by far the most important of all—the extension of the prohibition against substitution so as to embrace the prohibition of all *fidei-commissa*, the object and effect of which is to abolish and exclude from our law the whole complicated system of English trust estates, which has been the bulwark of class privileges, and the most prolific mother of untold evils.

The three principles which are the jewels in the crown of the Civil Code of Louisiana, and which in their far-reaching effects rise above the plane of mere laws into the dignity of veritable institutions, are: the community system between spouses; the system of forced heirship; and the abolition of trust estates.

I make bold to say that if our sister States had adopted these institutions when Louisiana did, our Republic would have been free, or at least comparatively free, from some of the greatest perils which today menace its existence.

In an article on "The Rule Forbidding Suits against Receivers without Leave as Applied to Receivers Managing Railroads and Like Corporations," in the current number of the *American Law Review*, W. A. Coutts says of receiverships:

In some respects receiverships exemplify the worst type of socialism—the type, namely, in which the people have no voice in the government which owns and operates all industries and organizes and controls all labor. This is socialism *minus* democracy, or rather socialism *plus* absolutism. What sort of laws could be developed under such a *régime?* Inevitably they would be such laws as a master would prescribe for his servants. What rules will a court promulgate for the management of its employés, a court whose first duty it is to make the operation of the

capital it controls "as economical, useful, and just" to its owners as possible. Naturally they will be rules calculated to achieve the avowed object of the receivership, and the court, with its threefold functions of judge, legislator and administrator, is surely clothed with sufficient power to accomplish that object. But the status of the employé in the meantime is undergoing a transition—the transition, namely, from freedom to slavery.

But the relation of the court to the trust is calculated to prejudice his action in adjudicating demands of others than employés. The duty of preserving the property for the beneficiaries would very naturally lead a judge to scrutinize closely, if not suspiciously, every claim that would take precedence of theirs. Of this nature are claims for goods lost in transportation, for damages done to property during the receiver's management, for materials used to repair or improve the property; for personal injuries, received through negligence in the management of the railway, and claims for destruction to property by fire caused by negligence of employés. In fact, claims that would, when satisfied, reduce the receivership property to the injury of the beneficiaries, constitute by far the largest class of claims that arise against a receiver. Every time, then, that such a claim is submitted to the court, it is called on to perform incompatible functions. Its first duty is to preserve the trust property for the beneficiaries, and it cannot allow a claim against the receiver without impairing that property. What must be thought of a rule of law that gives the receiver's court exclusive jurisdiction of such claims?

In closing an article in the *American Law Register* for August on "The Provability of Tort Claims in Bankruptcy," Stanley Folz says:

To summarize the results of this discussion it may be said that under the Act of 1898 tort claims reduced to judgment before the filing of the petition are provable. The rendition of a verdict prior to that time is not sufficient liquidation of such claims to render them provable as liquidated claims under Section 63, *a* (1). Tort claims unliquidated when the petition is filed are not provable if they arise from personal torts. When based upon wrongs which enriched the bankrupt the decided cases hold that unliquidated tort claims may be proved under Section 63, *a* (4), if the claimant can waive his remedy *ex delicto* and sue in *quasi*-contract. This last right is not conceded without a reservation as to its validity. It is urged that it is created only by a forced and strained construction of the act, by giving to the expression "implied contract" a meaning accorded it in no other statute. Even if this construction be correct, the remedy afforded is scarcely adequate to the relief desired. The right to prove should exist whenever the bankrupt's estate has been enriched by the unjust acquisition or conversion of the claimant's property; but under the most liberal construction of the Act of 1898 the right to prove in such cases exists only when an assumpsit action can be brought upon the tort.

In *The Law Times* (London), John Ellis writes as follows about "Esperanto for Lawyers":

Esperanto, the artificial language invented by Dr. Zamenhof, of Warsaw, is intended to be used merely as a means of international communication. Whilst it gives no encouragement to the notion that all nations should speak one tongue, the idea that everyone should learn a second language for international use is the very foundation of Dr. Zamenhof's creation.

In what way does Esperanto effect its purpose? It is marvellously easy to learn, and that by all nations. Its grammar consists of only 16 rules, with no bewildering exceptions or irregularities. These concise rules can be learnt in half an hour. The simplicity of English grammar has been outsimplified. The pronunciation is phonetic and euphonious, difficult sounds having been

avoided. Most of those who have studied the subject styled "universal language" (and amongst them are the illustrious philosophers and scholars, Bacon, Descartes, Leibnitz, Locke, Bishop Wilkins Jacob Grimm and Max Muller) are agreed that, in order to be successful any secondary or auxiliary language must be neutral. This condition is fulfilled by Esperanto, the word-material of which is, to a large extent, international. It is said that there are 29,000 words which have the same spelling and meaning in French and English. This principle of internationality has been seized upon by Dr. Zamenhof, who has reduced the national varations to a common denominator, so to speak, and at one stroke made a vast number of international words common property. The student of Esperanto finds that he knows much of it before he begins to learn it. His memory is not burdened with a host of new words. In the case of frequently-used, every-day words, where the greatest divergence in natural languages occurs, Dr. Zamenhof has selected those roots which possess the greatest internationality. By ingenious artifices, the result of years of patient labor, he suggests, either to the ear or to the eye, the original form of the national word of the widest currency. His first book contains a list of about 900 root-words, sufficient to express all ordinary ideas. Those who have an elementary knowledge of Latin and French recognize, either by sight or sound, three-quarters of these roots, leaving only some 225 words to be memorized. A larger selection of 2600 root-words, the greater part of which is already *terra cognita* to educated persons, furnishes the advanced student with a full equipment. Dr. Zamenhof has introduced some 30 affixes, the object of which is to relieve the memory of the burden of whole classes of words; for instance, *mal* signifies the contrary, and so, knowing *varma* (hot), the student has not to learn the word for cold (*malvarma*), and, knowing *alta* (high), he knows its contrary, low, etc. Each part of speech has a distinctive termination; thus, from *bankrot*, the root-word for the idea of bankruptcy, *bankroto*, (a bankruptcy), *bankrota* (bankrupt, adj.), *bankrote* (bankrupt, adv.), and *bankroti* (to become bankrupt) are immediately obtained. (The word for "a bankrupt" would be *bankrotulo*, the termination *ulo* denoting a person remarkable for the quality indicated by the root-word.) By such devices and the combination of root-words, an extensive vocabulary is created with a minimum of effort. Whilst permitting palpable metaphor, Esperanto has the advantage of being without any unintelligible idiomatic idiosyncrasies. Cheap instruction-books have appeared in 22 languages, and one for the Japanese is awaiting publication. It is possible to write in Esperanto to a person who has no previous acquaintance of it, inclosing in the letter a sixpenny instruction-book in the addressee's mother-tongue, confidently anticipating that the recipient will be able to read the letter with little difficulty. It will be seen that the simplicity and easiness of Esperanto so nearly approach the ideal that there is scarcely any cause to fear that a future invention will appreciably improve upon it. . . .

How will it prove of service to the lawyer? . . . In those departments of law which are not confined to territorial limits, such as jurprudence; international, Roman, civil, and ancient law; legal history and medical jurisprudence; and, to a less extent, maritime law, commercial law, and the laws of extradition, naturalization, and patents, legal works might be published in Esperanto, and in no other language, with benefit both to the authors and the purchasers, because the circulation would be enormously increased. For such a purpose, Esperanto would fill the part played by Latin in the pre-Reformation days. . . .

But Esperanto will be of greater service to the lawyer who has occasion to bring an action in a foreign country, to transact business relating to the acquisition or disposal of foreign property, marriage settlements between parties of different nation-

ality, in obtaining opinions as to the operation of foreign law, and, in short, in all cases involving private international law . . . It is estimated that there are now some 1500 men-of-the-law of various descriptions and grades who have a knowledge of Esperanto. If only the rest of the lawyers would spend a little of their leisure time in learning Esperanto—an agreeable pastime, requiring no serious study—they would acquire a key-language which would enable them to communicate, as occasion offered, with their foreign lawyer direct, saving themselves and their clients much unneccessary trouble and annoyance, and obtaining at the same time a more intelligent grasp of the matter in hand.

In the *Virginia Law Register* for August, "Christian Science and the Law" is discussed by Irving E. Campbell, of the Richmond, Virginia, Bar, who says in closing:

We know that the State must be guided in these matters, as in all others, by reason and experience, and where by such criteria a practice is found to be positively harmful, it should be prohibited. But since reason and experience have so often proved false standards in matters of medical practice, and theories long recognized have been abandoned by the profession, we should be very lenient toward any new development which contains anything of good, and the harmfulness of which is at most but negative. The spirit of our institutions fosters the utmost freedom of thought and action, so long as the freedom and welfare of others is not affected and no positive harm is done.

We conclude, therefore, that the Christian Scientists should be allowed to practice their system, but under reasonable and proper regulations. To insure proficiency in their own system and ability to recognize the classes of cases which they do not treat, except that in cases of children and others without volition, the State should require treatment more fully justified by its criterion of reason and experience.

The Indian witness is defended by *The Calcutta Weekly Notes*, which says:

It is a fashion in our law courts to talk of the unreliability of Indian witnesses. Interested lawyers are known to condemn native testimony before judges, who know little of this country and its people, and the latter sometimes run away with the idea that, perhaps, there is more lying in this country than there is in the English Law Courts. But we all know that respectable people in this country are most averse to depose in Court from a fear of telling an untruth, even by a lapse of memory. They regard it a dire calamity to be called as a witness, and are known to beg and pray of the parties and their friends to be spared from passing through this ordeal. Old class of people are known to bathe in the Ganges or do other penance for having deposed in Court. Formerly the sun and the moon used to be cited as witness in deeds and conveyances, and a number of them is still to be found in the possession of old families, which have never been challenged or gainsaid.

The modern law courts and their procedure have, however, to a great extent changed the private ways of the people. The prejudice against giving evidence on oath amongst respectable classes is still very strong, and as a result, a class of people have grown up, who are available for deposing in Court for a consideration. But judges can or ought to soon make out a witness of this type. There may be also interested witnesses of a better type in this country, as there is in any other, who may bear false testimony with a purpose. But from that to condemn Indian testimony as unworthy of credit is a gross calumny. . . As a matter of fact, perjury in our Law Courts is much less pronounced than it is in the English Law Courts.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ATTORNEY'S LIEN. (EXEMPTIONS AS AGAINST SUCH LIEN.)

SUPREME COURT OF MISSISSIPPI.

In Halsell *v.* Turner, 36 Southern Reporter 531, it was contended that an attorney's lien does not apply to the proceeds of a judgment in an action for the recovery of wages, on the ground that wages are exempt. The court says that a lien which an attorney has against his client applies to the money in his hands, and cannot be defeated on the ground that the client's interest therein might be exempt from seizure under legal proceedings instituted by third persons. The attorney has a prior lien granted by law and growing out of the relation between him and his client.

BARBERS. (EXAMINATION — LICENSE — CONSTITUTIONAL LAW.)

SUPREME COURT OF OREGON.

In State *v.* Briggs, 77 Pacific Reporter 750, the constitutionality of a statute (Laws Oregon 1903, p. 27), providing for the examination and licensing of barbers, was questioned. Though the law defines what shall constitute a barber, it does not prescribe the standard or degree of knowledge, learning, experience or qualification which shall be required before applicants shall be licensed to practise or follow the trade or calling, but leaves that matter to be determined by the board of examiners. This, it was argued, renders the act void because it is a delegation of legislative authority, and vests in the examining board arbitrary and unregulated powers. It is sometimes said in opinions and in law books that, where a statute undertakes to regulate the licensing of callings, trades or professions, the extent of the qualifications required of the licensee must be determined by the judgment of the Legislature; but this does not mean that the Legislature must necessarily provide in the act itself the exact qualifications required. It may delegate that power to a board or commission created and authorized by it, which, in the exercise of the authority vested in it, acts on behalf of the State; its conclusions and judgments, so long as exercised within the limits of the law, being the acts of the State, and binding as such. The nature and character of the profession, trade, or calling intended to be licensed or regulated often demands technical knowledge and learning in order to designate accurately the qualifications which should be possessed by those designing to follow it. In the nature of things, this is a matter outside the ordinary scope of legislative wisdom. The prescribing of the proper qualifications of applicants for licenses by some agent of the State, learned in such profession or calling, is not legislation, but rather the exercise of a mere administrative power. A law, when it comes from the Legislature, must be complete, but there are many matters affecting its execution and relating to methods of procedure, which the Legislature may properly delegate to some ministerial board or officer, and prescribing the qualifications of persons who shall be licensed to follow or engage in the practice of a given trade or profession is one of them. This principle the court regards as directly supported by Blue *v.* Beach, 155 Ind. 121, 133, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195; Port Royal Mining Co. *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841; Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; Georgia Railroad *v.* Smith *et al.*, Railroad Commissioners 70 Ga. 694; United States *v.* Breen (C. C.) 40 Fed. 402; Barmore *v.* State Board of Medical Examiners, 21 Ore. 301, 28 Pac. Reporter, 8; People *v.* Dental Examiners, 110 Ill. 180.

BOARDING HOUSES. (LICENSE — REASONABLE DISCRIMINATION.)

SUPREME COURT OF CALIFORNIA

In *ex parte* Lemon, 77 Pacific Reporter 455, it was contended that a city ordinance requiring a license fee of $8 per month of boarding houses where the meals are not cooked and served by the proprietor or members of his family and of $3 a month only where the meals are cooked and served by the proprietor or members of his family, is void for unreasonable discrimination. The court cites numerous authorities to the effect that the amount of license to be paid by those engaged in a certain business may be made to depend upon the amount or volume of the business done. In applying this rule the amount of the license may be made to depend on the amount of the receipts from the business (County of San Luis Obispo *v.* Greenberg, 120 California 300, 52 Pacific Reporter 797), on the amount of sales or business transacted (*Ex parte* Mount, 66 California 448, 6 Pacific Reporter 78), on the amount of stock on hand (Saks *v.* Mayer, 120 Alabama 190, 24 Southern Reporter 728), on the number of persons employed, as in the case of a laundry (*Ex parte* Li Protti, 68 California 635, 10 Pacific Reporter 113), or, as in the case of taverns, on the location, whether in a large city or village (County of Amador *v.* Kennedy, 70 California 458, 11 Pacific Reporter 757). The rule underlying these decisions appears to be, that while the State, county or city cannot discriminate in the imposition of license taxes between persons exercising the same privilege, by imposing different taxes on persons similarly situated, it may classify and tax occupations, grading the privilege tax by the amount of business done, that different methods of accomplishing this may be adopted, and that any classification reasonably designed to attain this object is within its power to make. It is clear that as a general rule a restaurant or boarding-house where the meals are wholly cooked and served by the proprietor and members of his family must be a very small affair, hardly rising to the dignity of a "restaurant" or "boarding house" Ordinarily, the accommodations and service at such a place must necessarily be very limited, and the amount of business done must consequently be very small. There may be exceptional cases, it is true, where by reason of the magnitude of the proprietor's family a very pretentious and prosperous business might be conducted without the aid of a single employé. We must, however, judge of the reasonableness of the ordinance in question by what we know of the general conditions, and not hold it void simply because in some exceptional case it may result in imposing unequal burdens. The classification here adopted is probably no more likely practically to result in unfair discrimination between those similarly situated as to the amount of business than a classification according to the number of rooms in a hotel, or the number of employés in a laundry, and the ordinary effect of the enforcement of the provision as it stands will be that those doing the greater amount of business will pay the higher tax fixed thereby.

CEMETERIES. (MONUMENTS—TITLE.)

SUPREME COURT OF RHODE ISLAND.

In McCann *v.* McGann, 58 Atlantic Reporter 458, the court announces the rule that an administratrix, in erecting a monument over the grave of deceased under authority of the probate court, does not act as administratrix in such a way as to preclude the heirs from having any title in and to the monument, or any rights or equities therein.

No authorities are cited.

FRATERNAL SOCIETIES. (INITIATION OF MEMBER — PERSONAL INJURIES — LIABILITY OF SOVEREIGN CAMP.)

SUPREME COURT OF SOUTH CAROLINA.

In Mitchell *v.* Leech, 48 Southeastern Reporter 290, the question was raised whether or not the sovereign camp of a fraternal society was liable for injuries inflicted on a member of a local camp in initiating him. It appeared that the society selected and organized local lodges for the purpose of transact-

ing the affairs of the order in various localities, and that such local lodges, and the members thereof, were under the complete direction of the sovereign camp, and that on the death of a member payment of the benefit certificate issued by the sovereign camp was made by it. This the court held to show that a person became to all intents and purposes a member of the sovereign camp on initiation into a local lodge; furthermore, that the local lodges were the agents of the sovereign camp. This being true, the sovereign camp was liable for injuries inflicted on a member of a local camp in initiating him by means of a mechanical goat, though such contrivance was not authorized by the parent camp. The acts of the local camp were binding upon the parent camp if performed within the scope of the agency, even though not authorized by the sovereign camp. In support of the holding that the local camp was the agent of the sovereign camp the court cites: Blackwell *v.* Mortgage Co., 65 South Carolina 18, 43 Southeastern Reporter 395; Supreme Lodge K. of P. *v.* Withers, 177 U. S. 260, 20 Supreme Court Reporter 611, 44 Lawyers' Ed. 762; Murphy *v.* Independent Order of the Sons and Daughters of Jacob of America (Miss.), 25 Southern Reporter 624, 50 Lawyers' Reports Annotated 111; and Bragaw *v.* Supreme Lodge K. and L. of Honor (N. C.) 38 Southeastern Reporter 905, 54 Lawyers' Reporters Annotated 602.

HIDDEN GOLD-BEARING QUARTZ. (Right of Possession as between Lessee and Lessor —"Treasure Trove"—Lost or Abandoned Property.)

Supreme Court of Oregon.

Ferguson *v.* Ray, 77 Pacific Reporter 600, involved the right to certain gold-bearing quartz found by a lessee on the premises of his lessor. The lessee while in possession of the premises discovered rich specimens of gold-bearing quartz lying on top of the ground. On investigation, he dug up a large quantity of such quartz found lying in the soil, unconnected with any ledge, pocket, placer or other natural deposit, the quartz being imbedded in the loose surface soil. The lessee disposed of part of the quartz and delivered the remainder to the lessor. Afterwards he brought this action for the quartz thus delivered to the lessor, alleging that it was obtained from him by duress and fraud. The court first reviews the authorities as to what constitutes "treasure trove" and comes to the conclusion that the quartz does not come within the meaning of that term, as it cannot be fitly or properly styled bullion. Then the court takes up the question as to whether or not the quartz was lost or abandoned property; for if it was lost property the lessee had the right to the possession thereof against all persons except the true owner, and if it was abandoned property he acquired the absolute right thereto by his occupancy. But it appeared that along with the quartz was found the remnants of a bag of some kind of cloth in which the quartz might have been buried and that the trees nearest the place of finding bore some old marks which apparently had been made and designed to aid in locating the property. This the court held to indicate that the quartz was voluntarily deposited where found. Therefore, it could not be regarded as lost or abandoned property. This being the case, the court says that the presumption is that the possession of the quartz is in the owner of the property and not in the finder. In support of this conclusion the court cites South Staffordshire Water Works *v.* Sharman, 65 L. J. (N. S. 460) and a case reported in Law Notes, volume 7, number 8, page 160, which was decided by Supreme Court Justice Forbes, of New York.

MUNICIPAL CORPORATIONS. (Contamination of Well Water by Sewage — Liability for Damages.)

Supreme Court of Pennsylvania.

Wharton *v.* Bradford City, 58 Atlantic Reporter 621, involved the question whether or not a recovery can be had against a city for the death of a child from typhoid fever, contracted from drinking impure water at a well, on the ground that the city had deposited

the contents of a sewer into an open stream above the well, and that the sewage from the stream percolated through gravelly soil into the well. The court regarded the connection between the act of the city in depositing the sewage into the stream, and the result charged as being altogether too remote and too uncertain to be permitted as a basis of recovery. There were no such connected facts as made a chain of causes so that the first could be called proximate to the end. In addition there was a very strong probability of the interposition of other entirely disconnected circumstances in producing the result—the death of the child.

NEGLIGENCE. (PAVING STREETS—LEAVING WHEEL SCRAPER UNGUARDED—INJURY TO CHILDREN PLAYING THEREON.)

KANSAS CITY COURT OF APPEALS.

Kelley *v.* Parker-Washington Co., 81 Southwestern Reporter 631, was an action to recover damages for personal injuries. Defendant had a contract with a city to pave a street. During the progress of the work it left a wheel scraper on the street without fastening the lever so as to prevent the falling of the pan, and without guarding the scraper in any way. In consequence of this, plaintiff, a child, was injured while playing on the scraper. It was contended that defendant was not liable as plaintiff was a mere trespasser. The court notes cases in which it has been held that an owner of premises owes no duty to trespassers except of not wantonly or recklessly injuring them after having discovered them to be in peril; and then says: "But it has also been held that: 'It is negligence on the part of a railroad company to omit to secure its turntables so that children cannot revolve them. If a child is injured in consequence of such omission, the company will be liable,' *etc.* Nagel *v.* Railway Co., 75 Missouri 653, 42 American Reports 418. And while the rule that 'the owner of property is under no obligation to keep it in a condition which will insure the safety of persons who go upon it without license or invitation, yet an exception to the above rule exists where the owner permits upon his premises dangerous machinery or other dangerous things likely to attract children, and does not place guards around the same so as to prevent injury to such children.' Schmidt *v.* Distilling Co., 90 Missouri 284, 1 Southwestern Reporter 865, 2 Southwestern Reporter 417, 59 American Reports 16. The distinction seems to be that it is negligence for the owner to permit on his premises dangerous machinery in a condition likely to cause injury. The case at bar falls under the latter rule; and, besides, it has another element to distinguish it from the cases first cited, in that the plaintiff was not a trespasser. It is true, the defendant was in possession of the street making the improvements, but it was not an exclusive possession as to persons whose business or inclinations might induce them to be there, and while their presence did not interfere with the work."

PEDDLERS. (LICENSE—FARMERS SELLING THEIR OWN PRODUCE.)

SUPREME COURT OF MINNESOTA.

State *v.* Jensen, 100 Northwestern Reporter 644, involved the construction of an ordinance of the city of Minneapolis, which provides that no person shall "exercise the vocation" of a wagon peddler within the city without paying a yearly license of one hundred and twenty-five dollars. It was contended that a farmer selling his own produce at retail was not a peddler within the meaning of this ordinance, and was therefore not required to pay the prescribed license. There are decisions of other courts which hold that a farmer or gardener, who, as an incident to his business, sells the product of his farm or garden at retail from door to door, should not be regarded as a peddler. At the first blush, this seems to be sound and just, because the so selling of such products is not in and of itself a harmful business, but, on the contrary, mutually beneficial to both seller and purchaser, and a matter of convenience in the smaller towns of the State. But the fact that the articles sold from house

to house are the products of the seller's own farm or garden affords no just reason why he should not be placed on the same basis as parties who purchase their stock from others. In either case the need of police regulation is the same. There can be no distinction in principle between the party who peddles his own product and the one who buys his stock from the producer and peddles it; and the court says that it cannot recognize any such distinction. It therefore holds that the ordinance applies to all persons who exercise the vocation of peddler within the city, whether they peddle their own product or that of another.

PERSONAL INJURIES. (ACTION — PHYSICAL EXAMINATION OF PLAINTIFF.)

COURT OF CIVIL APPEALS OF TEXAS.

In International & G. N. R. Co. *v.* Butcher, 81 Southwestern Reporter 819, it was determined that a court has no power to compel a party, against his consent, to submit to a physical examination by physicians. The failure of a party, upon the request of his adversary, to submit to a physical examination, by physicians to be appointed by the court, is simply a matter to be considered by the jury. In support of this ruling the court cites A. & N. W. Ry. Co. *v.* Cluck, 8 Tex. Ct. Rep. 681, 77 S. W. 403.

PHYSICIANS. (PRIVILEGED COMMUNICATIONS — CONSTRUCTION OF STATUTE.)

SUPREME COURT OF IOWA.

Battis *v.* Chicago, Rock Island & Pacific Railway Company, 100 Northwestern Reporter 543, was an action against a carrier for injuries to a passenger. It appears that the company had sent its local surgeon to see plaintiff for the sole purpose of ascertaining his condition for its benefit, and on the trial the company attempted to introduce his testimony as to the condition in which he found plaintiff shortly after the accident. The admission of this evidence was objected to by plaintiff on the ground that it came within Code of Iowa, section 4608, which provides that no practising physician shall be allowed to disclose any confidential communications properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office. The objection was sustained, it appearing that the company's surgeon had rendered plaintiff professional services when calling on him. On the appeal the company complained of this ruling, but the court says: "It may be conceded that the sole purpose of the agent in calling the physician was that the latter might ascertain the condition of plaintiff, and thus be prepared to advise the company, should occasion therefor arise, or be a witness on its behalf, if necessary. Certainly, if the visit of the physician had been confined to the limits incident to such purpose alone, his eligibility as a witness on behalf of the company might not be open to question. Without doubt, a railway company, with the utmost propriety, may thus advise itself of the fact of injury, and the character and extent thereof, in anticipation of a possible claim against it for damages. And with that end in view, it may send a physician to inspect and take notes, or otherwise inform himself of existing conditions. But this can avail the company nothing unless the physician shall strictly retain his character as an employé of company. If, upon request or upon his own motion, he assumes to advise or administer treatment to the patient, and the latter in any manner acquiesces therein, the physician thereby casts aside his relation as an employé of the company, and transfers his allegiance to the patient. In such instances a case is presented where one cannot serve two masters at one and the same time. The allegiance of the physician must be wholly upon one side or the other. It matters not, in this connection, who calls him in the first instance, or who pays him. He may present himself at the side of the patient on his own motion, and he may not expect, or in fact receive, pay. The reason for this is apparent upon a moment's reflection. If the physician assumes to advise or treat, he should be put in possession of all facts necessary or material to enable him to

do so properly. If the patient acquiesce, he should have the right to, and should, communicate freely and fully, without fear of exposure or of having his confidence made common property. It was to this end that the statute was enacted, and manifestly the purpose thereof may not be frustrated by proof that, at the time of rendering professional service, the physician was under contract of employment to serve the interest of the person or company subsequently charged with responsibility for the identical injury he is called upon or assumes to treat. Accordingly we hold that the trial court did not err in refusing to permit answers to the questions asked of the witness. The views above expressed find support, in principle, at least, in the following cases: Raymond *v.* Railway, 65 Iowa 152, 21 N. W. 495; Kiest *v.* Railway (Iowa) 81 N. W. 181; Griffith *v.* Railway (Sup.) 66 N. Y. Supp. 801; Railway *v.* Mushres, 37 N. E. 154; Pennsylvania Co. *v.* Maron (Ind.) 23 N. E. 973; Grossman *v.* Knights of Honor (Sup.) 6 N. Y. Supp. 821; State *v.* Houseworth, 91 Iowa 740, 60 N. W. 221; State *v.* Swafford, 98 Iowa 362; 67 N. W. 284."

POSSESSION OF WILD DUCKS WITH INTENT TO SELL. (VIOLATION OF LAW—CRUEL AND UNUSUAL PUNISHMENT.)

SUPREME COURT OF MINNESOTA.

In State *v.* Poole, 100 Northwestern Reporter 647, defendants were convicted of having two thousand wild ducks in their possession, contrary to law, and fined $20,000. It was contended that the statute (Laws Minn. 1903, c. 336, p. 606, § 45), under which this conviction was had, which provides that a person having in his possession wild ducks with intent to sell shall, on conviction, be punished by a fine of not less than ten dollars nor more than twenty-five dollars for each and every bird so had in his possession, was unconstitutional, on the ground that it provides for the imposition of excessive fines, and the infliction of cruel and unusual punishments. It must be admitted that the penalties fixed by the statute are drastic when imposed in cases where there has been a wholesale violation of the law. It is, however, clear that the purpose of the statute is to protect the wild game of the State, and that, if the punishment were not graduated according to the number of birds unlawfully possessed, this purpose would be defeated. If the penalty were not graduated, so that the greater the offense the greater the punishment, the statute would invite its own defeat. It would be absurd to punish the unlawful possession of 2,000 or more birds on the basis of one. It would have been competent for the Legislature to have provided that the unlawful possession of each bird should be a distinct offense, punishable by a fine of not less than ten dollars nor more than twenty-five dollars, or by imprisonment in the county jail for not less than ten nor more than thirty days. If such were the statute, it could not be fairly claimed that the fine was excessive, or the imprisonment cruel or unusual, although separate indictments might be found for each offense, and in case of convictions cumulative sentences would be legal. Now, the statute in question secures the same result by treating the unlawful possession of wild ducks, no matter how many, as one offense, and graduating the punishment according to the number of birds—that is, the number of offenses, if the possession of each were declared a separate offense—thereby avoiding separate indictments and cumulative sentences. So, in its last analysis, the fines imposed in this case are seemingly excessive, not by reason of the statute, but by reason of the magnitude of the offense, or of its equivalent, the number of offenses of which the defendants were convicted. The fault is theirs, not that of the statute. This method of fitting the punishment to the crime by graduating the penalty according to the number of animals, birds or fish unlawfully killed, taken or possessed has been adopted by the statutes of many States, and sustained as a proper exercise of legislative discretion. In support of its position, the court cites: State *v.* Lubee, 93 Maine 418, 45 Atlantic

Reporter 520; State *v.* Craig, 80 Maine 85, 13 Atlantic Reporter 129; Blydenburgh *v.* Miles, 39 Connecticut 484; State *v.* O'Neil, 58 Vermont 140; 2 Atlantic Reporter 586; 56 American Reports 557. Furthermore, the court considers State *v.* Rodman & Cobb, 58 Minnesota 393, 59 Northwestern Reporter 1098, as controlling.

RAILROADS. (ASSAULT ON PASSENGER BY BRAKEMAN—PHYSICAL EXAMINATION—INDECENT EXPOSURE.)

SUPREME COURT OF IOWA.

Garvik *v.* Burlington, C. R. & N. Ry. Co., 100 Northwestern Reporter 498, was an action against a railroad company for rape on a female passenger, alleged to have been committed by defendant's brakeman. As a defence it was pleaded that by reason of an injury, the brakeman was impotent. In support of this issue the court permitted a physical examination of the brakeman by the jury; but this examination the supreme court regards as highly improper, saying, "We do not think it should have been permitted. There was no showing that the private parts were in the same condition as they were when the assault is said to have been committed. Moreover, the ultimate question was not the exact condition of this member, but whether or not the owner was physically incapacitated from having sexual intercourse. We doubt if this could be determined by a non-expert from a mere examination of his penis. Again, the examination was indecent, and should not have been tolerated. As said by Ryan, C. J., in Brown *v.* Swineford, 44 Wis. 282, 28 American Reporter 582: 'If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts, out of court, and expert testimony be given of it.' He further said of such an examination as was here made: 'It was improper and indecent, well calculated to disgrace the administration of justice, and to bring it into ridicule, if not into contempt.' In this case expert witnesses were examined, and it was thought necessary for them, after examining the witness' private parts, to give professional opinions as to his ability to have sexual intercourse. Wounds resulting from injuries may undoubtedly be exhibited in open court to the jury, but even here no indecent exposures should be made. There is also a species of evidence denominated as 'real,' which may often be produced before a jury, but we hardly think this case comes within that rule. Authority to view the premises which obtains in a certain class of cases will not sustain the procedure adopted in this case. Moreover, the evidence was not demonstrative in character. We have found no authority which justifies the ruling made by the trial court, and doubt if there is any to be found in the books. Be it remembered that plaintiff was entitled to be present during the entire trial with her counsel, and that there were others aside from the witness Dye who were entitled to be present at the examination of his private parts. Let it be said, once for all, that we cannot lend our support to such a shocking and indecent performance as was permitted in this case."

RAILROADS. (LIABILITY OF FOREIGN RAILROAD CAR TO SEIZURE OF ATTACHMENT.)

SUPREME COURT OF MINNESOTA.

In Connery *v.* Quincy, O. K. C. R. Co., 99 Northwestern Reporter 365, it was attempted to obtain jurisdiction of a foreign railroad company by attaching a car of such company temporarily in the State. It appeared that the railroad company had sent a car into the State with freight to be delivered there, and the car was to be re-loaded and in the customary and usual course of business forwarded to the State from which it came. The court, says that, strictly speaking, the car was subject to attachment of garnishment un- a technical reading of a statute providing that a creditor of a foreign corporation may by attachment or garnishment acquire a lien on property of such corporation within the State, but does not think that this conclusion

absolutely follows in all cases. Thus it has been held that the property of a non-resident within the State, while strictly subject to garnishment, as for instance in the case of a common carrier receiving goods consigned for transit to a place outside of the State, is not amenable to such process. Stevenot *v.* Eastern Minnesota Ry., 61 Minnesota 104, 63 Northwestern Reporter 356, 28 Lawyers' Reports Annotated 600; Baldwin *v.* Great Northern Railway Co., 81 Minnesota 247, 83 Northwestern Reporter 986, 61 Lawyers' Reports Annotated 640, 83 American State Reports 370. The cases cited the court regards as indicating that it should not give to the Minnesota statute providing for the acquirement of jurisdiction by attachment such interpretation as would, in order to secure jurisdiction, overcome by artifice the mere presence of property in the State, which has practically been enforced, under exceptional circumstances that require its presence temporarily to meet the necessities of commerce. Having this limitation in view, the court notes that under the laws of the State of Minnesota common carriers doing business therein are required to transfer through carload shipments to their destination without unloading, and that the Federal government expressly requires that the movement of railway cars shall not be stopped or delayed at the point where the carrier delivers the cars to the next connecting carrier, but that shipments shall go forward from the originating point to their destination in the cars in which they are first loaded. "These well-known provisions of law are expressive of a universal condition that exists upon all the railway lines of this country, and without giving them effect and permitting the railway carriers from other States to come into our boundaries with goods which are shipped here, and return without being retarded, or so treated that the carriers must protect themselves against litigation away from home, that they would transfer the contents of such cars to others in our State would be provocative of the greatest detriment to the business interest of our citizens, and be violative of the terms and spirit of the enactments to which we have referred. It follows that we cannot justify a construction of our attachment or garnishee statutes that would effectuate such a result, and, while it was a part of the contract between the non-resident corporation in this State and the connecting carriers that the freight cars should be re-loaded, and within reasonable time returned, this custom was but a practical method of securing compensation for bringing the car into and out of the State in the necessary effort for continuous and unbroken transit, which is essential to the purposes of traffic and interstate commerce; hence it should not be treated as property subject to attachment. This subject has been thoroughly and exhaustively considered in two recent cases, and the reasoning therein within the lines above suggested meets our approval. M. C. R.R. Co. *v.* C. & M. L. S.R.R. Co., 1 Ill. App. 399-404; Wall *v.* Norfolk & Western Ry. Co. (W. Va.) 44 Southeastern Reporter 294. Had the car seized in this case been delayed longer than was necessary in the course of business to return it to the place from whence it came, or had it been diverted within the State to uses and purposes exceptional to its presence here under the demands of interstate commerce with the consent of the owning corporation, a different proposition would be presented; but practically it was engaged in a transit into and from the State upon such reasonable conditions as ought not to impose upon it such property conditions and characteristics as should subject it to seizure in coming into and returning from the State for the purposes of giving jurisdiction to litigants here who otherwise would be compelled to contest their causes of action in the tribunals where the property had its undoubted legal situs."

GEORGE FRISBIE HOAR.

The Green Bag.

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AN AUTOBIOGRAPHY OF SEVENTY YEARS.[1]

BY JAMES B. SCOTT,

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SENATOR GEORGE FRISBIE HOAR is widely known in political circles. He was at one time in high repute as a lawyer and is equally deserving of respect although his importance in national affairs has largely obscured his professional reputation. As is well known, he was born in Concord, Massachusetts, on August 29, 1826; he was educated at Harvard College and graduated with the class of 1846; he spent the next two years at the Harvard Law School and then betook himself to Worcester, where he settled and practised his profession for the twenty years before entering upon his political career in 1869 as a member of the House of Representatives.

Mr. Hoar's success in life clearly proves the wisdom of his choice of the law. Family traditions with an inherited ideal; a careful college training supplemented by a course in a law school of repute; experience in the practical work and details of a law office eminently fitted him for the law. Add to this a singularly winning presence and ability of a high order and it is evident that success and distinction in his chosen profession were only a matter of time. Family influence and politics undoubtedly counted, but native ability, industry and application undoubtedly were the controlling, if not the only factors in his success. His twenty years at the bar of Worcester made him a leader, and Mr. Hoar's complacent survey of this part of his career is clearly justified. "I have been," he says, "at some time or other in my life, counsel for every one of the fifty-two towns in Worcester County." (Vol. I., p. 159.) When the court was in session he was constantly engaged in jury trials. "Day after day, and week after week, I had to pass from one side of the court-house to the other, being engaged in a very large part of the important actions that were tried in those days. . . . General Devens [his partner] and I had at one term of the Supreme Court held by Chief Justice Bigelow twenty trial actions. . . . I used to have eighteen or twenty law cases at the fall term every year." And in a later passage, speaking of his practice, when entering Congress for the first time in 1869, he says: "My law practice was rapidly increasing. Professional charges in those days were exceedingly moderate as compared with the scale of prices now, and I had inherited the habit of charging low fees from my partner and friend, Emory Washburn. If I had the same class of clients now that I had then, I could at the present scale of charges for professional services easily be earning more than fifty thousand dollars a year, and I could earn it without going to my office in the evening, and also take a good vacation every summer."

Mr. Hoar was fortunate early in practice,

[1] *Autobiography of Seventy Years.* By George F. Hoar. With portraits. Two volumes. New York: Charles Scribner's Sons. 1903. (IX+434+VIII+493 pp.)

for within three years after admission to the bar, he was offered and accepted a partnership with Emory Washburn. Of this connection, the turning stone in his professional life, Mr. Hoar says: "Shortly after I was admitted to the Bar, good fortune brought me at once into the largest practice in the great County of Worcester, although that Bar had always been, before and since, one of the ablest in the country. Judge Emory Washburn, afterward Governor and Professor of Law at Harvard, and writer on jurisprudence, had the largest practice in the Commonwealth, west of Boston, and I suppose with one exception, the largest in the Commonwealth out of Boston. He asked me to become his partner in June, 1852. I had then got a considerable clientage of my own. Early in 1853 he sailed for Europe, intending to return in the fall. I was left in charge of his business during his six months' absence, talking with the clients about cases in which he was already retained, and receiving their statements as to cases in which they desired to retain him on his return. Before he reached home he was nominated for Governor by the Whig Convention, to which office he was elected by the Legislature in the following January. So he had but a few weeks to attend to his law business before entering upon the office of Governor. I kept on with it, I believe without losing a single client. That winter I had extraordinarily good fortune, due I think very largely to the kindly feeling of the juries toward so young a man attempting to undertake such great responsibilities."

It goes without saying that a young man of twenty-six or seven must have been remarkably well endowed to take up the practice of such a man as Emory Washburn, and conduct it so satisfactorily as not to lose a single client. A partnership with General Devens in 1856 and 1866 led to a beautiful and lifelong friendship which Senator Hoar commemorates in loving terms. (Vol. II., pp. 31-40).

But to pass from speculation to Mr. Hoar's career at the Bar during the twenty years of his active practice. The reports show that he was not only well thought of by his brethren, but that he had a large and constantly increasing clientage. A careful examination of the Reports of the Supreme Judicial Court of Massachusetts shows that he appeared for one side or the other in many of the important cases on appeal from Worcester County.[1] His statement as to his future earnings and his actual practice are indeed fully justified.

He seems always to have been in love with his profession—and his ambition was judicial, not political, although political position was repeatedly thrust upon him. At twenty-five he was nominated without his knowledge for the Legislature, and after serving his term refused reëlection. He later served a term in the State Senate in 1857, having likewise been unexpectedly nominated. In both positions he played a leading role. "I suppose I may say without arrogance that I was the leader of the Free Soil Party in each House when I was a member of it. In 1852 I prepared, with the help of Horace Gray, afterward Judge, who was not a member of the Legislature, the Practice Act of 1852, which abolished the common law system of pleading, and has been in principle that on which the Massachusetts courts have acted in civil cases ever since."

He was twice nominated Mayor of Wor-

[1] These cases are to be found in the Massachusetts Reports from 6 Cush. (1850) to 108 Mass. (1871). Mr. Hoar appeared as counsel in 2 cases in 1850, 1 case in 1851, 3 cases in 1852, 9 in 1853, 7 in 1854, 17 in 1855, 7 in 1856, 10 in 1857, 8 in 1858, 12 in 1859, 15 in 1860, 11 in 1861, 14 in 1862, 3 in 1863, 14 in 1864, 11 in 1865, 13 in 1866, 19 in 1867, 9 in 1868, 9 in 1869, 7 in 1870, 3 in 1871; making a total of 204 cases in twenty-two years.

cester when a nomination meant election, but refused. "But I preferred my profession. I never had any desire or taste for executive office, and I doubt if I had much capacity for it."

In addition to the Practice Act, the Senator exercised a decided influence on the Equity and Insolvency systems of his State. To quote his exact language: "I think I may fairly claim that I had a good deal to do with developing the equity system in the courts of Massachusetts, and with developing the admirable Insolvency system of Massachusetts, which is substantially an equity system, from which the United States Bankruptcy statutes have been so largely copied."

And at a later period as Senator he has manifested a deep, constant and enlightened interest in Bankruptcy legislation. Indeed, it is perhaps not too much to claim that the present National Bankruptcy Act of 1898 (amended in 1903), is due almost wholly to the Senator. (See Vol. II., pp. 300-303.)

With success at the Bar, the Bench loomed large before him, and the opportunity of a judgeship came more than once. "As I found myself getting a respectable place in the profession my early ambitions were so far changed and expanded that I hoped I might some day be appointed to the Supreme Court of the Commonwealth of Massachusetts. It seemed to me then, as it seems to me now, that there could be no more delightful life for a man competent to the service than one spent in discussing with the admirable lawyers, who have always adorned the Bench, the great questions of jurisprudence, involving the rights of citizens, and the welfare of the Commonwealth, and helping to settle them by authority. This ambition also was disappointed. I have twice received the offer of a seat on that Bench, under circumstances which rendered it out of the question that I should accept it, although on both occasions I longed exceedingly to do so."

The Senator's legal experience has, however, not been lost to the country, and in committee, if not on the Bench, he has had ample opportunity to show judicial qualities of a high order. "My longest service upon committees," he says (Vol. II., p. 100), "has been upon the two great Law committees of the Senate,—the Committee on Privileges and Elections, and the Committee on the Judiciary.

"I have been a member of the Committee on Privileges and Elections since March 9, 1877. I was chairman for more than ten years. I have been a member of the Committee on the Judiciary since December, 1884, and have been its chairman since December, 1891, except for two years, from March 4, 1893 to March 4, 1895, when the Democrats held the Senate." National questions, however, have not eliminated the Senator's genuine interest in his chosen profession and in his associates at the Worcester Bar, and in the Judges with whom he came into frequent and pleasing contact. These memories are still fresh within him. Two delightful chapters: "Recollections of the Worcester Bar" and "Some Judges I have Known" (vol. II., pp. 367-433) are full of local interest. A captious critic might shrug his shoulders at Mr. Hoar's generous estimates of these worthies; for if strictly true, the world has rarely seen such a Bar as Worcester County, and the Judges are easily the first of their kind. But the Senator's judgment of others as well as of himself is uniformly kind with a couple of exceptions. The adage *nihil nisi bonum*, has rarely if ever been more impartially applied, and are we not all of us in need of a good word?

Heretofore the Senator has sketched his career in Massachusetts; with the year 1869 he entered national politics, and from his

entry into the House of Representatives to the present day he has been an interesting, often a dominating, figure in our national life. As he himself says: "In the year 1868 one chapter of my life ended and a very different one began. In the beginning of that year I had no doubt that what remained of my life would be devoted to my profession, and to discharging as well as I could the duties of good citizenship in the community to which I was so strongly attached. But it was ordered otherwise. My life in Worcester came to an end, and I shall if I live to complete my present term in the Senate have spent thirty-eight years in the National service."

In the present instance as on former occasions he had no intention of renouncing his profession for a political career. His nomination for Congress was wholly unsolicited. His ambiton was, as previously stated, legal and judicial rather than political, but once in Congress he has found it either too difficult or too attractive to leave.

But the remarkable thing in the Senator's political career is the fact that he never sought a position; that the various nominations to public position came to him unsolicited, indeed unexpectedly, and that in the course of his whole public career he never asked anyone to vote for him.

Mr. Hoar was nominated for Congress in 1868, and the honor seems not to have overpleased him. He was elected but did not intend to serve more than a term or two. His interest in the "National Educational Bill" led him to accept a second term in order to carry the measure. At the end of this, his second term, he wanted to withdraw, but was persuaded to remain, and in 1874, the year in which the Republicans lost the House of Representatives, he was forced to run, lest the Democrats should carry his district. At the end of this term, he peremptorily declined and his successor was nominated and elected. Mr. Hoar thus served in the Lower House from 1869 to 1877, and during this period he met personally many of the most noted men of the day. Of some of these he has much to say in his *Autobiography*, and he not occasionally advances reasons why the popular estimation is unjust in several instances and might well be changed in whole or corrected in part. For example, Mr. Hoar frequently met President Grant at Washington, and cites instances of the President's grasp of economic conditions in his veto of the Inflation Bill during the hard times of 1873. He also shows that the President possessed a ready pen, and that the labors of composition were in Grant's case very slight. Finally the Senator cites Grant's native modesty as instanced in his repeated commendations of General Sheridan, even in those cases where Sheridan had acted either without or in reality against orders. A special chapter is devoted to Sumner and Wilson, in which it is stated that "Charles Sumner was beyond all question the foremost figure on the national stage, save Grant alone. . . . Henry Wilson was the most skilful political organizer in the country."

If Sumner was the foremost figure, and Wilson the most skilful political organizer, Mr. Blaine, then Speaker, was certainly the most brilliant and conspicuous man in the House of Representatives. Mr. Hoar, while not intimate, was on friendly terms with him during their service in the House, and he thus records his impressions of the man and of the nature and source of Mr. Blaine's influence throughout the country. "The public, friends and foes," he says, "judged of him by a few striking and picturesque qualities. There has probably never been a man in our history upon whom so few people looked with indifference. He

was born to be loved or hated. Nobody occupied a middle ground as to him. In addition to the striking qualities which caught the public eye, he was a man of profound knowledge of our political history, of a sure literary taste, and of great capacity as an orator. He studied and worked out for himself very abstruse questions, on which he formed his own opinions, usually with great sagacity. How far he was affected in his position by the desire for public favor I will not undertake to say. I think the constitution of his mind was such that matters were apt to strike him in much the same way as they were apt to strike the majority of the people of the North, especially of the Northwest, where he was always exceedingly popular" (vol. I., p. 200). This is rather an under than an overestimate; but the two men are so radically different that it is not strange that they were not drawn to one another. Mr. Hoar thinks that Mr. Blaine was not a corruptionist in any sense of the word; but that he was, while honest, so indiscreet in business methods that his nomination in 1876 would have been unfortunate for the party. Not only Caesar's wife but Caesar himself must be above suspicion to please this son of a puritan. Mr. Hoar is, however, convinced that as President Mr. Blaine would have given satisfaction to the whole country.

In another chapter the Senator pays his respects to the late Chief Justice Chase, whose political ambition and judicial inconsistencies are exposed in rather an unfavorable light. And in the same chapter Mr. Hoar ably champions and justifies President Grant's appointment of Justices Strong and Bradley against the repeated charges of corrupt interference with cases then pending before the court.

But it is safe to say that of the chapters dealing with Mr. Hoar's service in the Lower House, no chapter is more interesting to the general reader than that on "The National House of Representatives in 1869." The venerable George S. Boutwell comes in for hearty praise, and at the end of the chapter the senator rescues from oblivion William A. Wheeler, one time vice-president of the United States. That Wheeler was very much of a man the following passage shows: "He very much disliked Roscoe Conkling, and all his ways. Conkling once said to him: 'Wheeler, if you will join us and act with us, there is nothing in the gift of the State of New York to which you may not reasonably aspire.' To which Wheeler replied: 'Mr. Conkling, there is nothing in the gift of the State of New York which will compensate me for the forfeiture of my own self-respect.'" In connection with Wheeler, Senator Hoar tells an amusing story, which shows how, after all, the great people of this world are not wholly without human frailties. "As soon as the nomination of President Hayes was declared in the Convention of 1876," says Mr. Hoar, "I spent a very busy hour in going about among the delegates whom I knew, especially those from the southern States, to urge upon them the name of Mr. Wheeler as a suitable person for Vice-President. I have no doubt I secured for him a great many votes, and that those votes secured his election. Mr. James Russell Lowell was a Massachusetts delegate. He was a little unwilling to vote for a person of whom he had no more knowledge. I said to him: 'Mr. Lowell, Mr. Wheeler is a very sensible man. He knows the "Biglow Papers" by heart.' Lowell gave no promise in reply. But I happened to overhear him, as he sat behind me, saying to James Freeman Clarke, I think it was: 'I understand that Mr. Wheeler is a very sensible man.'"

Passing over the present Senator Allison (then a Congressman) and other fellow-

members, Mr. Hoar dwells upon three—Messrs. Poland, Peters, and Washburn, and connects each with an amusing anecdote or two. The description of Poland is quoted at length: "Judge Luke P. Poland of Vermont was another very interesting character. He was well known throughout the country. He had a tall and erect and very dignified figure, and a fine head covered with a beautiful growth of gray hair. He was dressed in the old-fashioned style that Mr. Webster used, with blue coat, brass buttons and a buff-colored vest. His coat and buttons were well known all over the country. One day when William Lloyd Garrison was inveighing against some conduct of the Southern whites, and said: 'They say the South is quiet now. Order reigns in Wassau. But where is Poland?' An irreverant newspaper man said: 'He is up in Vermont polishing brass buttons.'

"The judge was a very able lawyer, and a man of very great industry. He and Judge Hoar went over together the revision of the United States statutes of 1874, completing a labor which had been neglected by Caleb Cushing. Judge Poland had a good deal of fun in him, and had a stock of anecdotes which he liked to tell to any listener. It was said, I do not know how truly, that he could bear any amount of whiskey without in the slightest degree affecting his intellect. There is a story that two well-known senators laid a plot to get the Judge tipsy. They invited him to a room at Willard's and privately instructed the waiter, when they ordered whiskey to put twice as much of the liquid into Poland's glass as into the others. The order was repeated several times. The heads of the two hosts had begun to swim, but Poland was not turned. At last they saw him take the waiter aside and heard him tell him in a loud whisper: 'The next time, make mine a little stronger, if you please.' They concluded on the whole that Vermont brain would hold its own with Michigan and Illinois.

"One of the most amusing scenes I ever witnessed was a call of the House in the old days, when there was no quorum. The doors were shut. The Speaker sent officers for the absentees. My colleague, Mr. Dawes, was in the chair. Poland was brought to the bar. Mr. Dawes addressed him with solemnity: 'Mr. Poland, of Vermont, you have been absent from the session of the House without its leave. What excuse have you to offer?' The Judge paused a moment and then replied in a tone of great gravity and emotion: 'I went with my wife to call on my minister and I stayed a little too long.' The House accepted the excuse, and I suppose the religious people of the Judge's district would have maintained him in office for a thousand years by virtue of that answer, if they had had their way. A man who had been so long exposed to the wickedness and temptation of Washington, and had committed only the sin of staying a little too long when he called on his minister might safely be trusted anywhere."

The anecdote of Judge Peters is capital but too long for insertion, but the jest at Elihu B. Washburn's expense is too good to omit. "He was known," says Mr. Hoar, "as the watch-dog of the Treasury, when he was in the House. Few questionable claims against the Government could escape his vigilance, or prevail over his formidable opposition. But, one day, a private bill championed by his brother, Cadawallader, passed the House while Elihu kept entirely silent. Somebody called out to the Speaker: 'The watch-dog don't bark when one of the family goes by.'"

These are but isolated examples of amusing anecdote and clever turns with which the *Autobiography* abounds and bristles.

Other chapters, treating of the period of Mr. Hoar's public service, are valuable, for example, those on "Political Conditions of 1869," and "Reconstruction," in which the Republican view is stated—overstated the reviewer would venture to say—and supported. The passage on page 249 (vol. I.), about the Democratic party is not only unjustified but so partisan as to be almost sheer nonsense; for anybody knows that constructive legislation is impossible unless the party has a working majority in both branches of Congress as well as the Presidency. This the Republicans have had, and the Democrats have had but once and for a short period. An indirect tribute to the despised Johnson is as just as it is unexpected in this chapter. "The conflict between the Senate and the Executive which arose in the time of Andrew Johnson, when Congress undertook to hamper and restrict the President's constitutional power of removal from office, without which his Constitutional duty of seeing that the laws are faithfully executed cannot be performed, has been settled by a return to the ancient principle established in Washington's first administration."

The chapters on "Political Corruption," "Credit Mobilier," and "The Sanborn Contracts" are, however, more valuable and more interesting to the reader. The term reader is used advisedly, for the Senator has not written, nor did he intend in all probability to write, a book for the special student. The *Autobiography of Seventy Years* was probably meant to be taken up after the newspaper had been discarded, and the Senator unbosoms himself very much in the way that a distinguished and courtly gentleman might be expected to talk to a group of listeners in a drawing—or better—smoking room after a not unwelcome dinner. There is no suggestion of the class-room in it, and it does not supply grist to the investigator. The Senator's confidences, however, are accurate enough, despite slips here and there, to give a fairly good picture of public life in our day, and the reader will doubtless gather some instruction as well as pass his time very pleasantly. The three chapters last mentioned will offer him valuable and interesting information, for the Senator simply cannot be uninteresting.

But to leave the book and return to Mr. Hoar. His fourth term in Congress would expire in 1877, and he was exceedingly desirous to return to Worcester. So he stoutly refused to accept a renomination and stood by his refusal. Strange as it may appear, the genial Senator has had as hard a time to keep out of office as others have had to get in. As he himself says, speaking of the renomination: "I supposed then that my political career was ended. My home and my profession and my library had an infinite attraction for me. I had become thoroughly sick of Washington and politics and public life." And in another passage he says: "But I had an infinite longing for my home and my profession and my library. I never found public employment pleasant or congenial. But the fates sent me to the Senate and have kept me there until I am now the man longest in continuous legislative service in this country, and have served in the United States Senate longer than any other man who ever represented Massachusetts."

His selection was in a way accidental. Mr. Boutwell was Senator and would doubtless have been reëlected had it not been for the fact that he was regarded as either a partisan of General Butler, or that the two were over-intimate. Mr. Hoar was proposed by the opponents of General Butler and was elected to his present position. The office was unsought: it was really thrust upon him, and Mr. Hoar took the matter so lightly that with a single ex-

ception he never mentioned his candidacy.

It should be said in passing that his three subsequent elections to the Senate have been as a matter of course—without any effort on his own part and indeed without any opposition, personal or political. This Mr. Hoar attributes good naturedly to Massachusetts; but the fact is that had he not been the kind of man his career has shown him to be the Commonwealth would doubtless have made a different selection—witness the case of his immediate predecessor—the venerable and worthy ex-Senator Boutwell.

After describing in a simple and unaffected way his candidacy and various elections,[1] Senator Hoar describes in a series of delightful chapters President Hayes, his cabinet, the Senate and its leaders in 1877, before taking up the thread of his senatorial life.

Senator Hoar knew President Hayes intimately and has a very high opinion of him as appears from the following quotation. "President Hayes was a simple-hearted, sincere, strong and wise man. He is the only President of the United States who promised, when he was a candidate for office, not to be a candidate again, who kept his pledge. He carried out the principles of Civil Service Reform more faithfully than any other President before or since down to the accession of President Roosevelt."

Mr. Evarts, Secretary of State, was a near kinsman and intimate friend, but Mr. Hoar's account cannot be said to be colored by either circumstance. He regarded Mr. Evarts as unequalled at the bar, and feels that his services in the State Department were of the highest kind. He is equally certain that Mr. Evarts never gave his full measure in political life, and that he easily might have been not only leader of his party, but also President of the country had not his modesty and disinterestedness stood in the way. He likewise compares him to Sheridan and Sydney Smith for wit, and the recorded and floating specimens with which the public is familiar render the comparison not unlikely.

His account of Carl Schurz is probably the most important of these various after-dinner portraits as they might not improperly be termed; for a word of praise to Schurz seems by implication a criticism upon the genial biographer. Alike in fundamental views, other than on tariff matters, and in their devotion to public duty as they saw it, the careers of these two men are in vivid contrast. Mr. Hoar accounts for this difference in party esteem by the fact that Mr. Schurz opposed the corruption of the Republican Party from without, while he has opposed it betimes from within. The result was and is that Mr. Schurz lost caste and influence with the Republican organization, while Mr. Hoar's occasional criticism has been almost forgotten or forgiven by the regularity of his vote. "*On chante, mais on paie,*" said Mazarin, and after all the vote counts. Mr. Schurz's opposition to General Grant's reëlection was bad enough, but General Grant was reëlected so that Mr. Schurz's conduct on this occasion may be condoned. But his action in supporting Mr. Cleveland and contributing what was in his power to the defeat of the Republican party on two occasions—a defeat which brought so much calamity to the Republic—is deeply and duly lamented by Mr. Hoar. The Senator does not instance the various calamities referred to in general, but he could no doubt have supplied a partisan bill of particulars. Not a few think that Mr. Schurz's ability to place the public above the party is not his least claim to gratitude, and many feel that the great

[1] It is not amiss to add that Senator Hoar was twice offered the British mission,—by President Hayes and by President McKinley.

weakness of Senator Hoar is just this subordination of public to party, or rather the Senator's unwavering faith that his country's good is in some mysterious way locked up with the success of the Republican party. Mr. Schurz believes that a party recreant to the past and the needs of the present day should be chastened by defeat, and goes about to defeat it at the polls; Mr. Hoar, on the contrary, believes that the party should be chastened and reformed if possible, but kept in office. From the standpoint of the professional politician, Mr. Schurz is clearly wrong, as he has undoubtedly lost the confidence of his party, even although he has gained the respect and confidence of the nation at large. It can never be said of him that

"Born for the universe," he "narrowed his mind,
And to party gave up what was meant for mankind."

If it is indeed true, as Mr. Hoar claims, that the Republican party has heeded his voice from within in all important questions save only that of expansion—which he is pleased to regard as still open and unsettled—it is no less true that opposition such as Mr. Schurz's would appeal to many as more manly as well as more effective. Why make the blunder even although it be corrected later? Why not prevent the mistake at the time? Mr. Hoar's curious attitude in supporting Mr. McKinley in 1900, seems odd to the man in the street, and his yielding to the party whip in the Panama muddle seems strange to any one who remembers his ringing denunciation of the Government's attitude in the matter. The partisan can no doubt cry amen to the line

"His conduct still right, with his argument wrong,"

but men of an independent way of thinking would rather transpose conduct and argument.

But to pass again from the man to the book. The short chapter on the Senate in 1877 at the date of Mr. Hoar's entrance into that august body and its subsequent falling off in popular estimation gives ample food for reflection. The chapter following on the "Leaders of the Senate in 1877" is even more charming in its way than the corresponding chapter on the House of Representatives in 1869.

Mr. Hoar's relations with Senator Lamar were of the most friendly kind and he considered him an able judge, although he voted against Mr. Lamar's confirmation as Justice of the Supreme Court. Mr. Lamar's eulogy on Sumner kindled his liking into admiration and the two men, notwithstanding their radical differences on most if not all political matters, became genuinely fond of each other. Mr. Lamar's *Biography* gives evidence of an affectionate regard and Mr. Hoar's *Autobiography* is delightfully outspoken. His letter to Mrs. Lamar on the Judge's death is a delicate and beautiful tribute, and frequent utterances of Senator Hoar show how broad-bottomed and genuine was his sympathy. A single quotation will perhaps suffice. "He was, in his time, I think, the ablest representative, certainly among the ablest, of the opinions opposed to mine. He had a delightful and original literary quality, which if the lines of his life had been cast amid other scenes than the tempest of a great Revolution and Civil War, might have made him a dreamer like Montaigne; and a chivalrous quality that might have made him a companion of Athos and D'Artagnan."

Of Judge Jackson he was likewise very fond, and it was due to Senator Hoar that a Republican President appointed him to the Supreme Bench. This is perhaps the

strongest tribute that a political opponent could pay to another and it is very honorable to Senator Hoar. Although a keen partisan, there are not a few occasions on which the Senator has gone out of his way and his party to do a good turn to a Democrat. The cases of General Corse and Judge Putnam are additional instances.

The Judge did not live long to enjoy the honor, but the act of Senator Hoar was no less gracious and Judge Jackson was entirely worthy of the honor. As Senator Hoar says: "Howell E. Jackson had this ancient senatorial temperament. He never seemed to me to be thinking of either party or section or popular opinion, or of the opinion of other men; but only of public duty."

And no less a person than an Attorney General said of Mr. Justice Jackson: "He was not so much a Senator who had been appointed Judge, as a Judge who had served for a time as a Senator."

The chapters devoted to Mr. Hoar's service in the Senate from his taking the oath of office to the present day contain much interesting, even important matter; but they do not lend themselves to quotation.

The Senator would no doubt regard these various chapters and his part in them as of importance, else he would not have written them, and valuable they are. He has, however, himself singled out three incidents in his life work as of special moment, and to these the reader's attention may be briefly called. "If," he says, "on looking back, I were to select the things which I have done in public life in which I take most satisfaction, they would be, the speech in the Senate on the Fisheries Treaty, July 10, 1888; the letter denouncing the A. P. A., a secret, political association, organized for the purpose of ostracizing our Catholic fellow-citizens, and the numerous speeches, letters and magazine articles against the subjugation of the Philippine Islands."

The question of the Newfoundland Fisheries is one of peculiarly local interest, but it has certainly risen at times to national importance. Mr. Hoar does not believe that any one argument, "certainly not my argument," he says, "caused the defeat of the Fisheries Treaty, negotiated by Mr. Joseph Chamberlain and Mr. Bayard during Mr. Cleveland's first administration." But Mr. Hoar does not underestimate the value of his argument, of which he says, in his outspoken and kindly way: "I discussed the subject with great earnestness, going fully into the history of the matter, and the merits of the Treaty. I think I may say without undue vanity that my speech was an important and interesting contribution to a very creditable chapter of our history." He is not, however, unjust to Mr. Bayard's motives, but he sincerely believed that Mr. Bayard was giving away much and getting nothing in return.

His second claim to remembrance is his "A. P. A." letter given in full (vol. II., pp. 278-293).

Mr. Hoar is right in singling this out as one of his achievements, and it is a great pity that this letter is not better known than it is; for it is manly from beginning to end and shows how keenly a moral question has always roused him to the full expression of his manhood.

Mr. Hoar's third claim to consideration is probably his strongest, and one which posterity is not likely soon to forget. Whether we believe in colonial expansion or not, there is something pathetic as well as majestic in the Senator's championship of the Filipinos, for on this question his voice and his vote have not parted company.

His own party has turned a deaf ear to his arguments; the Democratic party has hardly dared to rise to the question, and his

countrymen, while they have listened to his eloquent warnings, have not, it would seem, shown any inclination to insist that that liberty and self-government won by the sword, shall be the peaceful and blessed heritage of an alien and inferior people. Stripped of argument and rhetoric, his attitude is simply this: that every nation or people has an inalienable right to govern itself in its own way and according to its own lights; that our very origin and the Declaration of Independence forbid us of all people from holding an alien race in subjection; that our duty in the light of our origin and traditions, is to enable such alien people to obtain the blessings of liberty and self government, not to annex and govern them, and that our failure to raise ourselves to the full height of this duty will eventually and inevitably blunt our own moral consciousness and lead us away from the primitive ideals for which two generations lived and died. To the plea that our government is in all probability better than any government that the Filipinos would or could organize at this time, he would reply that it is not their government. To draw an illustration from British history: the supporters of the Stuart pretender urged that Hanoverian George spoke only German, while the Pretender spoke a perfect English. To this Sir Richard Steele gave the unanswerable reply that he did not care to be tyrannized over by any man even although he spoke the best English in the world.

The Senator's noble and disinterested attitude has not as yet converted his own countrymen, but "Every Filipino," he informs us, "is in favor of his policy." The consciousness of this appreciation has consoled him in his loneliness and isolation, and he says, in speaking of it: "I would rather have the gratitude of the poor people of the Philippine Islands, amid their sorrow, and have it true that what I may say or do has brought a ray of hope into the gloomy caverns in which the oppressed peoples of Asia dwell, than to receive a Ducal Coronet from every monarch in Europe, or command the applause of listening Senates and read my history in a nation's eyes."

Enough has been said to prove, it is hoped, that the *Autobiography of Seventy Years* is a delightful book which throws a constant flood of light on its gentle and genial author. It is full of deeply interesting passages; it teems with anecdotes of men distinguished in public life, and records many and precious observations of manners in his early days at home and expressions of people and customs in his various journeys to and wanderings through the old home, as he is pleased to call England. It also throws light on public affairs in his beloved Massachusetts and in the nation at large; but it cannot be said, as previously stated more than once, to offer much to the student of affairs, or to the historian of the period of his public activity. It touches the surface of many things, but Senator Hoar never uncovers the troubled and inward currents that go to make up our history. It is rather a book to make one love the man, and the picture it gives of the kindly author, his likes, which are many, and of his dislikes, which are few; of his weaknesses, which are mainly personal and somewhat akin to childlike simplicity; of the sources of his strength, which are manly and pure in every detail, make this record a singularly delightful and at times a fascinating work. It were indeed well for the country if every man were like George Frisbie Hoar.

. . . . . .

Since the above was written Senator Hoar has departed this life, but the reviewer has been unwilling to recast th article in

the past tense and it therefore appears as written.

His own tribute to Justin Morrill fittingly describes the late Senator from Massachusetts and his place in history; for with his death "not only a great figure left the Senate chamber—the image of the ancient virtue of New England—but an era in our national history came to an end.

"He was one of the men that Washington would have loved and Washington would have leaned upon."

POINT OF VIEW.

By Albert W. Gaines,

Of the Chattanooga, Tennessee, Bar.

A husband and wife once purchased a fee,
And invited another to join,
The deed was made to the vendees three,
Each paying a third of the coin.
The land was sold, a profit was made,
But when they came to divide,
The third party said, although he had paid
But a third of the price of the "hide,"
He would have to insist, on his lawyer's advice,
As the law was perfectly plain,
On having at least one-half of the price,
And an equal share of the gain.
He quoted the rule—exceptions none—
And the law they couldn't ignore,
How baron and feme in law were one,
And they never could be any more;
And how they were simply seized *per tout*,
And to him it was clear and plain,
That the only thing that they could do
Was to cut the estate in twain.
The baron was mad, but clearly saw
That nothing else could be done,
So he roundly swore at the Common Law
For making a pair but one.
But the other one says the law is a gem,
As he goeth about in quest
Of another guileless baron and feme,
With limitless wealth to invest.
He indulges himself in a dry little laugh,
And says, as he slily winks,
The law that can change a third to a half
Is a pretty good law, *he* thinks.

THE QUALIFICATIONS OF JURORS

By Duane Mowry,
Of the Milwaukee, Wisconsin, Bar.

THE idea that jurors must be in abject ignorance of the facts of the case on which they are drawn, in order to be able to render an impartial verdict, no longer prevails in this country. Indeed, it is seriously doubted if such persons have the requisite qualifications to fit them for legal jury service. Time was, when the modern newspaper was unknown and the means of disseminating intelligence was in a primitive state, that few of the facts of important cases could, with difficulty, reach the masses. Then it was that the rule of ignorance had greater force.

We all know that the early theory of the jury system was, that the jurors were neighbors and friends of the parties litigant, and so could supplement, from their own knowledge, much of the testimony that is now presented in the shape of evidence of character. Jurors, or *compurgatores*, as they were then termed, were thus, to some intents, witnesses as well as judges. But the development of the jury system led to the complete separation of both these characters. "This," it has been well said, "no doubt, is the perfection of trial by jury. Every person that knows anything material connected with the case should not only give his evidence in open court, but also subject to the test of cross-examination." In this way, it is possible to ascertain what are the facts, and to discover the fraud and falsity of the witnesses. It is true that the jury is not likely to be wholly ignorant of the nature of the case submitted to them. But the more intelligent they are the more apt they are to render a verdict, not on what they may believe to be the fact of guilt or innocence of the accused, but upon the evidence as sworn to before them.

The sentiment in favor of intelligence in the jury box is growing in this country. Even the defense in capital cases find that they do not need to fear intelligence so much as bigotry, bias and prejudice. And the latter qualities are always present where ignorance has full sway. While admitting its prevalence in the past, it does not impress us as true today, that in criminal cases "the possession of intelligence seems to be more and more becoming an insuperable disqualification for service as juror from the standpoint of the defense." (Lesser, *History of the Jury System*, pp. 181 and 182.) And the tendency of recent legislation is to discourage challenges, except for opinions which have been formed and which the juror believes unfits him for honest jury service, opinions which the proofs would not be apt to disturb. In some States, as in Florida and Georgia, the statutes require that the person selected to serve in the jury box shall be well informed and intelligent. In other States, as in Illinois and Michigan, in addition to the foregoing qualifications, they are required to read and write in the English language. So in the city of New York, "no person shall serve as a juror unless he shall be an intelligent man, of sound mind and good character, free from legal exception, and able to read and write the English understandingly." (Proffatt, *Jury Trial*, Sec. 118.)

Mr. Lesser suggests in a note in his *History of the Jury System* that the excess to which exclusion from jury service on the ground of bias or pre-conceived opinions is carried, may in some measure be remedied by reënacting elsewhere Section 189 of the Oregon Code, which provides that although a person summoned to act as a juror "has formed or expressed an opinion upon the merits of the case, from what he may have read or heard, such opinion of itself shall not be sufficient to sustain the challenge (to

his competency); but the court must be satisfied from the circumstances that the juror cannot disregard such opinion and try the issue impartially." (Lesser, *History of the Jury System*, note p. 181.) But Mr. Lesser justly observes that "in New York the description of the citizen juror is that he should be "of fair character, of approved integrity, of sound judgment, and well informed." But everything depends on the administration of the law; if "the good moral character" is as laxly interpreted as the same phrase practically is in the naturalization proceedings, it affords but little guaranty." (Lesser, *History of the Jury System*, p. 182.) Undoubtedly, a just but rigid rule of interpretation is required in order to make these terms of qualification of any practical value in the administration of justice.

It is but a slight digression from what has already been said to the case of Jefferson Davis, who was held a prisoner for so many months, charged with treason against the general government. What citizen had not formed or expressed an opinion as to his guilt or innocence? And how was it possible to give him a constitutional trial, if this was so? Members of Congress recognized this condition of affairs, and they began at once to propose legislation which should not exclude persons from the jury box by reason of having formed or expressed an opinion upon the statements made in the public journals, or upon the common history of the times.

It was this condition of matters, while legislation was pending in the Congress, that induced a member of the Supreme Court of the United States to indite the following note to a United States senator, the manuscript of which is in the writer's possession:

"I think that experience has shown the necessity of a modification of the rule in all criminal cases, or quasi-criminal (cases), and that your law should embrace this general principle without limiting it to cases of riot, or having any relation to the rebellion.

"Placed on a foundation of principle, it would then be more satisfactory as well as more easily justified by reason.

"The immediate publication of the facts by the newspapers in all murder cases, by which means every intelligent man within the vicinage must form an opinion, has rendered the old rule productive of more injury than benefit in the administration of justice. It is now often impossible to get juries at all in cases where great crimes are in question.

"If Congress, then, should take the lead in the modification of a general rule, applying that modification to all cases in the Federal courts, it would be but a proper exercise of its preëminence as a legislative body, while an attempt to provide a rule for existing cases not likely to arise hereafter, would be liable to comment not altogether unjust.

"Yours truly,

"SAM. F. MILLER.

"I fully concur with Mr. Justice Miller.

"S J FIELD.

"P. S.—Is it necessary to make your bill apply to grand juries?"

Of course, the foregoing views of members of the Supreme Court are in the nature of the history of the times to which they relate. But they seem so opportune in connection with this discussion of the qualification of jurors, and establish the main contention, that the formation of an opinion of any case, in and of itself, is not, and ought not to be, any objection to the competency of an individual to serve as a juror, that we could not resist the opportunity to submit them. It is, however, beyond the province of this paper to trace the history of the legislation which has been barely referred to in the above note.

AN OBLIGING WITNESS.

By Edgar White.

A DAUGHTER was suing the estate of her deceased parents for services rendered during the last days of their life. The plaintiff had called a very willing witness, a Mrs. Rodgers, who claimed to be a life-long friend of the old people, and to have been with them a great deal of the time. She had testified with great fluency to conversations with the parents, in which she stated they said they "intended that Liza should be paid for her work."

At the close of the plaintiff's evidence, the defense asked the Court to rule that plaintiff had failed to make out a case on which to go to the jury. The lawyers, after having the stenographer make a transcript of Mrs. Rodger's evidence, argued the point, and the Court was handed an armload of books containing decisions on similar cases, which he read. Then he said:

"Gentlemen, it seems to me the plaintiff has failed to make a case by proving a contract. Now, taking Mrs. Rodger's evidence, she says the old folks told her they intended to provide for all their children, and that 'Liza should have pay for her work.' I do not think that implies a specific contract with Liza any more than the rest of the girls. Now, if they said (in the light of these Missouri decisions), 'Liza, you go ahead and do this work for us, and we will pay you for it,' the claimant might have a case that would entitle her to go to the jury."

Plaintiff's attorney: "Mrs. Rodgers did say that, your Honor."

The Court: "But it nowhere appears in this transcript of her evidence."

Plaintiff's attorney: "Then the stenographer failed to get it, for Mrs. Rodgers assures me she said it, and it is my clear remembrance that she did."

The Court permitted the verbose witness, who had been a most attentive listener to what had transpired since she left the stand, to be recalled. It was apparent she was extremely willing to make the facts fit the necessities of the case, and the plaintiff's attorney had the fullest confidence she would do the thing about right. So with a touch of exultation and some pomposity he said:

"Mrs. Rodgers, it seems the stenographer missed an important part of your evidence. Please clearly repeat what the old people said in regard to telling Liza to go to work and paying her for it."

"Well, sir," said the witness, as she scornfully eyed the stenographer, preparatory to annihilating him, "they said to me that day: 'In the light of these Missouri decisions, Liza, you go ahead and do this work for us and we will pay you for it.' And more than that"——

Plaintiff's attorney, in disgust: "Never mind, that's enough. We will excuse you."

The Court, dryly: "There's nothing like old people citing decisions when they make contracts with their children. I suppose they kept 'em handy, on the shelf alongside the beeswax, candles, yarn, balls, etc. This witness has an excellent memory and"—

Plaintiff's attorney: "O, well, find for the defendant, your Honor, but don't rub it in on us."

LORD BROUGHAM.

THE JUDICIAL HISTORY OF INDIVIDUAL LIBERTY.

XI.

By Van Vechten Veeder,

Of the New York Bar.

The reprehensible activities of Attorney-General Gibbs, in the second decade of the century, in attempting to suppress public criticism by means of criminal informations, may now be illustrated by some important trials during the years 1810 and 1811.

One of the most celebrated of these cases was that of Lambert and Perry, printer and proprietor respectively of the *Morning Chronicle*, for an alleged libel on the person and government of the king (31 St. Tr. 335). In the *Morning Chronicle* of October 2, 1809, at the end of a political article animadverting upon the accession of the Grenville party to the cabinet, this paragraph appeared: "What a crowd of blessings rush upon one's mind, that might be bestowed upon the country in the event of a total change of system! Of all the monarchs, indeed, since the Revolution, the successor of George III. will have the finest opportunity of becoming nobly popular." For this short passage, extracted from a long leader, Lambert and Perry were brought to trial before Lord Ellenborough on a charge of criminal libel. The information charged that the passage tended to alienate and destroy the affections of the people towards their sovereign, and to bring his person and government into discredit. The prosecution was really based upon the second sentence of the passage, which, Attorney-General Gibbs contended, "fixed the era for the enjoyment of these blessings to be the death of his present majesty." "It stirs up and influences the minds of the people against the king's person, and is, in other words (joining the two parts of the sentence together) neither more nor less than this, that a total change of system would bestow a crowd of blessings on the country; but this is not to be expected except by the removal of his present majesty." It is difficult to understand why upon such a theory, the defendants were not charged with treason. In view of the fact that his usual counsel, Jekyll, was solicitor general to the Prince of Wales, Perry defended himself and his co-defendant. He demonstrated with great ability the injustice of this attempt to distort fair comment and criticism into a personal libel. Lord Ellenborough's charge to the jury marks an epoch in State prosecutions for libel. He admitted that it might fairly be claimed that the portions selected should be taken in connection with the whole article, and left it to the jury to say whether "upon the fair construction of these words the writer meant to calumniate the person and character of the sovereign." "If," he added, "you don't see that it means distinctly and fairly to impute any maladministrations to his majesty, or to those acting under him, but is at all reconcilable to imputing only an erroneous view of public administration, I am not prepared to say that it is a libel." "The greatest of monarchs who have sat on the thrones of Europe, and who have been the promoters of the greatest blessings to their country in some respects, and who have contemplated its welfare with the greatest solicitude, have had their errors; but can a statement of that be considered disparaging them?" The effect of this charge was, therefore, that while moral blame must not be imputed to the king, it is not libellous to suggest that his measures may be mistaken. That such a judge as Ellenborough should make this concession is a striking illustration of the advance that had been made in freedom of

speech. The jury immediately returned a verdict of not guilty, and this vicious attempt to distort a political criticism into a personal libel was frustrated.

The contemporaneous prosecutions of Cobbett, Hunt and Drakard arose out of criticisms of the barbarous severity of the military punishments of the time, and the employment of German troops in suppressing outbreaks among native soldiers. In June, 1809, there was a mutiny among the soldiers at Ely, for which five of the ringleaders, under a guard of the German legion, received five hundred lashes each by way of punishment. Cobbett seized the occasion to inveigh against foreign mercenaries and military flogging; he contrasted the barbarities of English military discipline with that by which Napoleon maintained his armies. For this article in the *Political Register* he was convicted of a libel on the German legion, sentenced to two years' imprisonment, and fined one thousand pounds, (31 St. Tr. 820). The printer of his paper and two persons who had sold it were also punished.

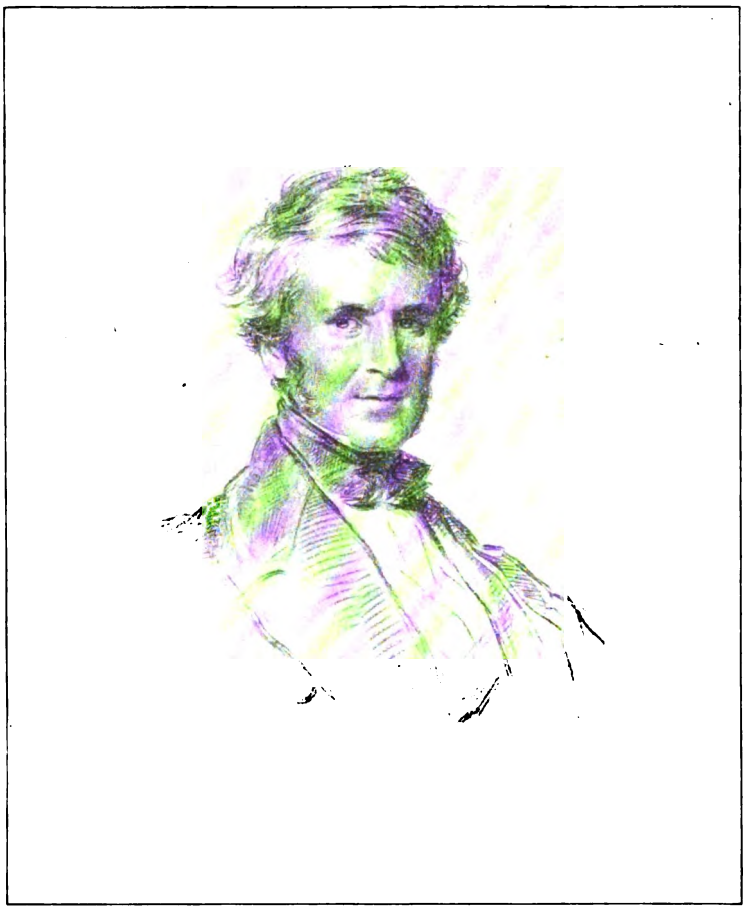
Attorney-General Gibb's speech in prosecution of Cobbett was made the subject of a savage attack by John and Leigh Hunt in the *Examiner*. A long series of instances of barbarous military punishments were collected from various sources, and commented upon in violent language. The Hunts were immediately brought to trial before Lord Ellenborough (31 St. Tr. 367). They were ably and energetically defended by Brougham, who rested the defense upon the intention of the writers. "If that," he claimed, "has apparently been good, or whether laudable or not, it has been innocent—if it has been innocent and not blameworthy—then whatever you may think of the opinion, you must acquit those who published it." To show the innocency of their intentions, without defending their language, Brougham read the published opinions of military men of high repute—Stewart and Abercrombie among others—against the prevailing system of life service and the barbarity of the lash as a punishment. He showed that almost every general officer of the army had expressed aversion to corporal punishment. If such authorities, he argued, could advance these opinions without its being imputed to them that their object was to disgust the English soldier with his service and sow dissention in the ranks, why should the same right be denied to the defendants? Lord Ellenborough, in his charge to the jury, said there was a plain distinction between such a fair and honest discussion by men capable of giving an opinion, and such an article as the one in question, the mere form of which, to say nothing of the language used, excluded it from such a comparison. Though Ellenborough told the jury that in his opinion the article had been published with the intention imputed by the information, they acquitted both defendants.

A country editor named Drakard, who had reprinted the article from the *Examiner*, with some additions of his own, was not so fortunate. On his trial before Baron Wood, at Lincoln, Brougham again defended with the same arguments that he had used in the former case; but Drakard was found guilty. In the Hunts' case Lord Ellenborough had conceded "it is competent for all the subjects of his majesty freely but temperately to discuss through the medium of the press every question connected with public policy." But in Drakard's case Baron Wood maintained a different doctrine. "It is said that we have a right to discuss the acts of our legislature. This would be a large permission indeed. Is there, gentleman, to be a power in the people to counteract the acts of the Parliament? And is the libeller to come and make the people dissatisfied with the government under which he lives? This

is not to be permitted in any man—it is unconstitutional and seditious."

During the next twenty years the only notable State prosecutions for libel were those against Burdett, in 1820, and Williams, in 1822.

Sir Francis Burdett was an aristocrat who had imbibed the spirit of the French republicans. Entering Parliament in 1796 he soon became an active critic of the government, and a versatile, if somewhat violent, advocate of free speech. Although looked upon as a radical and a visionary, he lived to see most of the reforms which he had advocated adopted by the government. When at length he found that some of his associates were bent upon revolution rather than reform, he withdrew his support, and was regarded by the advanced radicals, before his death, as a renegade. The libel for which he was prosecuted was a long letter to the electors of Westminster, which he had published in a London newspaper, denouncing in severe terms the action of the authorities in connection with the "Peterloo Massacre" at Manchester. "Will the gentlemen of England," he said, "support or wink at such proceedings—they never can stand tamely by as lookers on while bloody heroes rip open their mother's womb; they must join



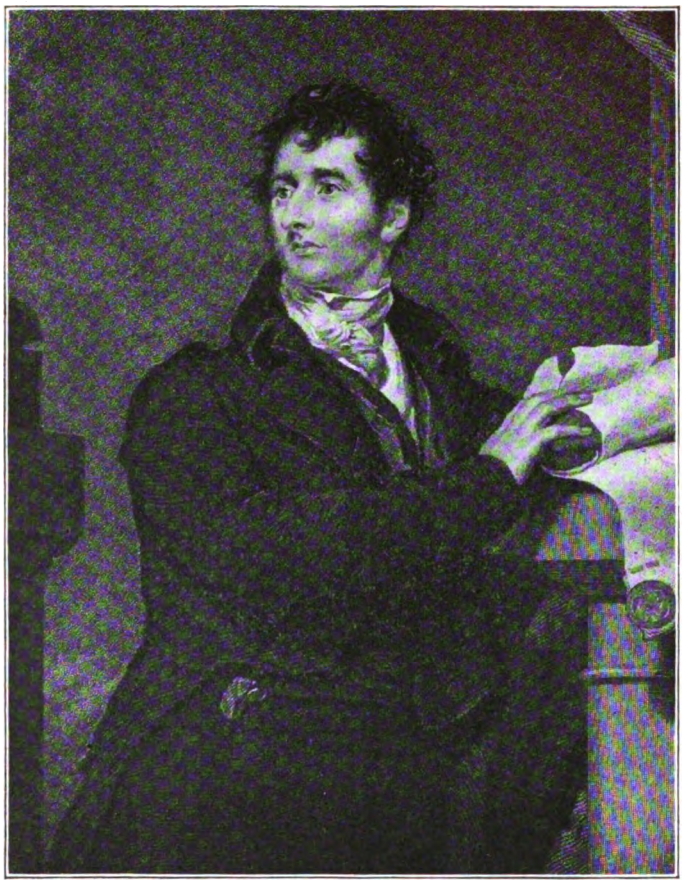
BARON WOOD.

the general voice loudly demanding justice and redress, and head public meetings throughout the United Kingdom to put a stop in its commencement to a reign of terror and of blood, and ensure legal redress to the widows and orphans—mutilated victims of this unparalleled and barbarous outrage." He then proposed a meeting in Westminster for that purpose, adding, "whether the penalty of our meeting will be death by military execution I know not; but this I know, a man can die but once, and never better than in vindicating the laws and liberties of his country." Then, professing to doubt whether what he had written was libellous, he quoted the well-known incident of the soldiers on Hounslow Heath cheering the news of the acquittal of the seven bishops, and concluded with an attack upon military punishments. "Our duty is to meet; and England expects every man to do his duty."

Doubtful of a conviction in London, where the libel had been published, the government laid the indictment in the county of Leicester, where, their evidence tended to show, the letter to the newspaper had been posted by Burdett. At the trial Best held this sufficient proof of publication in Leicester, citing the ruling in Justice Johnson's case. Burdett was defended by Denman; he also addressed the jury in his own behalf, severely censuring the device of the government and the system of *ex officio* informations. With respect to the expressions used, he declared that if Locke had written his work on Government a few years earlier it would have been proscribed as a wicked and seditious libel. Best charged the jury in unmistakable terms, asserting that "more poisonous ingredients were never condensed on paper." The jury immediately returned a verdict of guilty. A motion was made for a new trial on Best's rulings, and the arguments of counsel and opinion of the court (Abbott, Bayley, Holroyd and Best) on this motion constitute the most elaborate inquiry into the law of libel to be found in the books. The majority of the court, Bayley alone dissenting, sustained the ruling of the trial judge with respect to the publication in Leicester. The whole court agreed that the intention of a document is to be collected from the document itself, unless explained by the mode of publication, or other circumstances; that if the contents of a paper are likely to excite sedition, the writer must be presumed to have intended that which his act was likely to produce, and if the jury found such to be the fact, it was a libel (1 St. Tr. N. S. 1).

The celebrated prosecution of John Ambrose Williams for a libel on the clergy of Durham (1 St. Tr. N. S. 1291) is one of the most interesting of the modern trials. It arose out of the violent conflict of opinion over the proceedings against Queen Caroline. Upon the Queen's death the church bells in Durham had not been tolled, and the failure to observe this customary sign of mourning prompted Williams to publish in the *Durham Chronicle* a savage attack upon the clergy of that place. Its tenor may be gathered from the following passage: "We know not whether any orders were issued to prevent this customary sign of mourning; but the omission plainly indicates the kind of spirit which predominates among our clergy. Yet these men profess to be followers of Jesus Christ, to walk in his footsteps, to teach his precepts, to inculcate his spirit, to promote harmony, charity and Christian love! Out upon such hypocricy! It is such conduct which renders the very name of our established clergy odious till it stinks in the nostrils; that makes our churches look like deserted sepulchres, rather than temples of the living God; that raises up conventicles in every corner, and increases the brood of wild fanatics and enthusiasts; that causes our beneficed dignitaries to be regarded as

usurpers of their possessions. . . . Sensible of the decline of their spiritual and moral influence, they cling to temporal power, and lose in their officiousness in political matters even the semblance of the character of ministers of religion." For this publication Williams was brought to trial before Baron Wood and a special jury in August, 1822. published for the purpose of bringing into hatred and contempt any of the establishments of the country, it is a libel and ought to be punished, and if this were not so, this liberty of the press, as it is called, might pull down all our institutions." The defendant was found guilty, but he was never called up for judgment.



SIR FRANCIS BURDETT.

Scarlett and Tindal prosecuted; Brougham and Alderson defended. This cause enlisted Brougham's warmest feelings; his speech for Williams is a masterpiece of invective. Baron Wood charged the jury in his usual style. "I have no difficulty in telling you," he said, "that when anything is printed and

Two other contemporary prosecutions for libel on the sovereign may be noticed. In 1823 Harvey and Chapman, publisher and proprietor respectively of the *Sunday Times*, were tried and convicted for publishing an article intimating that George IV. was insane (2 St. Tr., N. S. 1). The defendants,

who were defended by Brougham and Denman, admitted that the imputation was untrue, but defended upon the ground that it was founded upon rumors generally believed, which the defendants did not know to be false, and was made in respectful language, without malicious intention, on a matter of great public concern. But Lord Chief Justice Abbott charged the jury that to write and publish falsely of any person that he is insane is a crime, and that, in his opinion, the article was a criminal libel.

In 1822 John Hunt was prosecuted for publishing Byron's "Vision of Judgment," which was held to be a seditious libel on the late king, George III., and calculated to defame him, to disturb and disquiet his descendants, and to bring them into public scandal, disgrace and contempt. Lord Chief Justice Abbott charged that a publication tending to disturb the minds of living individuals and to bring them into contempt and disgrace by reflecting upon persons who were dead, was unlawful. Although ably defended by Scarlett, Hunt was convicted and fined one hundred pounds (2 St. Tr. N. S., 69.)

In the domain of libel, we have illustrations of the Chartist movement in the cases of Carlile and Cobbett, in 1831, and of How-

RICHARD CARLILE.

ell, Collins, Stephens and others, in 1839.

Richard Carlile was prosecuted for an address to the insurgent agricultural laborers, in which he denied that they were incendiaries, and asserted that even if they were guilty of burning farm produce they had more just cause for it than any king ever had for levying war. After reflecting upon the unsatisfactory condition of the laboring classes and the government's inaction in the

matter, Carlile continued: "The more tame you have grown the more you have been oppressed and despised, the more you have been trampled on; and it is only now that you begin to display physical as well as your moral strength that your cruel tyrants treat with you and offer terms of pacification. Your demands have been so far moderate and just, and any attempt to stifle them will be so wicked as to justify your resistance, even to death and to life for life." Carlile defended himself well, but the jury found him guilty of seditious libel (2 St. Tr. N. S., 459).

Cobbett was prosecuted in the same year for a similar publication in the *Political Register* with reference to the fires and the destruction of threshing machines in Hampshire and Wiltshire. He was tried before Lord Chief Justice Abbott, with Denman as prosecutor. Cobbett defended himself with great ability and with even more than his customary virulence. In a speech of four and a half hours' duration he flayed the government without restraint. After fifteen hours' deliberation the jury were unable to agree, and the prosecution was dropped (2 St. Tr. N. S., 789).

In the trials of Howell, Collins, Lovett and others, for publications censuring in inflammatory language the action of the militia in dispersing a meeting at Birmingham, the law of seditious libel was formulated according to modern conceptions by such judges as Alderson and Littledale. Nothing short of direct incitement to disorder and violence is seditious libel (3 St. Tr. N. S., 1149, *et seq.*)

From about 1840 the freedom of the press and of public discussion may be said to have been completely established. The remaining anomalies of the law of criminal libel were gradually removed by legislation. By Lord Campbell's Libel Act of 1843, a defendant charged with criminal libel was allowed to plead in defense that his words were true and published with good motives; and Lord Mansfield's doctrine with respect to the criminal liability of a publisher for the unauthorized acts of his servants was altered by allowing the defendant in all cases to prove that such publication was made without his authority, consent or knowledge, in the exercise of due care on his part. The policy of repression has at length been discredited and discarded, and State prosecutions for political libel are now practically as much a thing of the past as the censorship itself. The modern doctrine was distinctly formulated in Reg. *v.* Sullivan, 11 Cox Crim. Cas. 195.

THE END.

THE FREEDOM OF THE CITY.

By John E. Macy,
Of the Boston Bar.

AMONG the memorials of antiquity abundant in American municipal institutions, is the very instructive and very interesting custom of tendering to distinguished visitors "the Freedom of the City." The ceremony is frequent. A recent occasion of it was the visit, in 1902, of Prince Henry of Prussia to New York City. Among the many notable instances of it in England, is that of the visit of General Grant to London. Minor examples in both England and America are innumerable.

But few Americans who have not pursued special lines of reading, comprehend the purport of such a courtesy. I have found many who connect it vaguely with some kind of gracious license to be at home, and at large, throughout the city—a permission similar to that given to prisoners who have the liberty of the jail yard. A Boston newspaper of highest standing recently represented the Collector of U. S. Customs in Boston as tendering to Lord Denbigh the Freedom of the Port. The attempts of another Boston paper, upon the occasion of Prince Henry's visit to New York, to define the practice by reference to ancient Greece and Rome, are quite equal in absurdity.

The custom is traceable to the most remote period of English history, to the beginning of the English people. It is a heritage from the sturdy "freemen" of the north countries of Europe, who were the progenitors of the Anglo-Saxon race. When history first regards those primitive Teuton tribes, they dwelt on the Baltic shores in little communities, which were composed of those who were bound together by bonds of blood and similar ties. Of each settlement, the rude huts clustered about a large homestead, or several of them, within which its leaders, the "eorls," resided. The cluster was surrounded by a ditch or a hedge, called a tun (town), and by a wide strip of cleared land. No stranger might cross the open space, but he must blow a horn, or give other sign that he came openly and peaceably; for, if he were taken to come by stealth or otherwise than openly and peaceably, he would at once be killed.

The inmates were not, in civil standing, equal. A large number, consisting perhaps of men taken in battle and descendants of conquered tribes who had formerly inhabited the region, were abject slaves; many others, though they were superior to mere slaves, did not possess the liberties of full freedom. Freedom was the state of that band of independent, "freenecked," men, who owned no superior, no master; and who, in proud equality, ruled, defended, and supported the settlement. Their freedom, the freedom of their community, was that exemption from all servitude which they enjoyed, and the privileges to which they held themselves entitled by virtue thereof. Only the freeman bore shield and spear, partook in depredatory excursions, joined the great war-host of the aggregate tribes; or assembled in council, or shared the fields and meadows for agriculture; for the land was not held by individual ownership, but was divided into strips, which were annually allotted for tillage.

Beneath a sacred tree the village-moots convened. There the freemen met together and deliberated upon common affairs, apportioned land, ordained rules, declared justice according to the customs of their fathers, as the elder men, "ealdermen," (alder-

men) expounded them. There they also performed the ceremony of admitting a new member to their privileges, their freedom. Strangers who came to their village met with various receptions. Marauders and the unfree of other tribes were probably held in servitude; others, who had no claim to special respect, remained in the dependent class. But now and then one sought to be received who, because of kinship or other qualifications, was to be more favored. If the assembled freemen willed it so, he was admitted into their freedom; and under the great tree, with shield and spear clashing approval, was conferred upon him the freedom of the community.

After these hardy warriors had conquered and settled Britain, the independent groups grew and united into a nation; but the customs of the homeland were the general basis of their municipal organization. The rise of kings and nobles, however, stirred this simplicity to confusion. Most villages and rural townships (tun-scipes) became subject to the nobles, as well as mediately to the king, though they clung to the remnants of their primal usages. But a class of larger towns retained, in some measure, a constitution and local government. These were the boroughs—the fortified strongholds and the commercial and political centres of the country. They remained free of feudal subjection; they knew no lord but the king. Each had its own court and assembly. Each had a market; and that was a great privilege, for, by law, trading could be done only in open market, and such a market brought much commerce to the borough. The borough was a peculiar place also in that the king's peace, the sanctity of the king's own homestead, enveloped it. Because of these characteristics it was a privileged town, a free borough; and the exemptions and privileges which it enjoyed entered into and comprised its freedom, and the freedom of its freemen, for in them were the liberties of the community vested. Admittance to burgherhood was investment with the freedom of the borough. A burgess was "free of" a certain borough; and to be made a burgess was to be "made free of" a certain borough. Those boroughs which were cathedral sites, the seats of bishops, were not only boroughs but "cities."

In later years many additional privileges were granted to boroughs and cities by charter; and most large towns, not previously boroughs, were given privileges by charter from kings and lords, and so became boroughs because they became possessed of special privileges. Under the Norman and Angevin monarchs, charters became so various and so extensive that almost every borough of importance had a large, promiscuous cluster of special customs and liberties. The burgesses might hold their houses at a fixed rent, instead of by general feudal service; sometimes power to transfer their holdings freely was added; or they might take the revenues of the court or of the market, might elect a bailiff, might be exempt from certain interferences of the king's sheriff, might be exempt from summons to other than their own court. Then they acquired the privilege of farming all the revenues of the borough; and royal edict often ordained that all the trading of a certain region should be done within the borough of that region. But even more extensive mercantile privileges were bestowed by the king. Not only might the burgesses take tolls, they might be free of paying tolls, in any part of the realm; they might also organize themselves into a merchant guild, which had power to govern all the trade of the borough. All these special privileges entered into the freedom of the community of burgesses or citizens.

Eventually, by charter, the whole bor-

ough—its government, revenues, and trade—was granted, in return for a fixed annual rent, into the hands of its burgesses. Then the freedom of the borough, or of the city, was indeed great. The burgesses elected their own officers and council—mayor, bailiffs, and chief burgesses—and elected coroners to see that the bailiffs dealt justly with rich and poor; and through those officers they governed their community and its political and commercial affairs.

Though the serf class had diminished, there was yet a great number of inhabitants in each borough or city who were not burgesses. There were foreigners, strangers, women, minors, apprentices, menial servants, and those who either could not, or desired not, to contribute towards obtaining the charter, or to pay fees for "suing out their freedom," as it was termed. The body of enfranchised burgesses became smaller and smaller in comparison with the general inhabitants. Then the governing council came more and more to exercise all the powers of the body of burgesses, among which was the power to admit new burgesses. Later, charters were often granted to certain burgesses, as officers and council, empowering them to admit such as they chose to be freemen of the borough.

The custom of summoning representatives of a borough to Parliament, and the rise of the House of Commons, gave to membership in the body of burgesses a great political value; for the burgesses, or their select body, elected those representatives. Now residence in the borough was never definitely required for burgess-ship; and the practice of admitting non-residents soon became quite general, sometimes as an honor, sometimes to control the elections. So honorary and non-resident freemen became numerous in English boroughs and cities. In the municipal reform of 1835, Parliament enacted that honorary freemen should not have a freeman's vote. Since that time the freedom of a borough or city has often been bestowed upon distinguished persons, especially guests, solely as an honor.

The customs and organization of English municipalities were transplanted to the American colonies. In the early charters of New York it is provided that the "Mayor Recorder and Alderman for the time being shall from time to time and at all times hereafter have full Power and Authority under the Common Seale to make ffree Cittizens of the said Citty and Libertyes thereof," *etc.* A similar provision is in the charter of Penn to Philadelphia, 1701, and in the charters of other colonial cities. The General Court of the Colony of Plymouth ordered "that henceforth such as are admitted to bee freemen of this Corporation; the deputies of such Townes wher such persons live shall propound them to the Court being such as have been alsoe approved by the freemen in that towne wher such persons live."

Ultimately, in America, residence took the place of formal admission; but the ancient ceremony of conferring the freedom of the city, though it has lost its old significance, is continued, as it is in England, as an honor to distinguished persons.

THE STUDENT ROWS OF OXFORD, WITH SOME HINTS OF THEIR SIGNIFICANCE.

II.

By Louis C. Cornish.

BEFORE taking up the several more important town and gown riots, we should remember that the two contending forces were engaged in a life and death struggle. The University was fighting out the problem of a corporate existence within itself, the problem that was involved in its passing from a mere gathering of unruly men to a property-holding, influence-weilding institution, and at the same time it was fighting to keep its place within the city walls. Meanwhile the Town was bent on making all it could from the University, it granted no right to these hundreds of students which they did not wrest from it, and at the same time it was seeking to preserve its ancient liberties entire. With such widely divergent interests, serious friction between Town and Gown was inevitable.

The first considerable row happened in 1209. "A most unfortunate and unhappy accident fell out at Oxford," Wood tells us, "which was this. A certain clerk, as he was recreating himself, killed by chance a woman:[1] which being done, he fled away for fear of punishment. But the fact being soon spread throughout the Town, the Mayor and several Burghers made search after him, and having received intelligence in what Hall he was resident, made their repair thither, and finding there three other Clerks laid hold on them, and though innocent yet cast them into prison. After certain days, King John, no great lover of the Clergy, being then in his Manor of Woodstock, commanded the three sd Scholars to be led out of the Town, and there to be hanged by the neck 'in contempt of Ecclesiastical liberty.' Whereupon the Scholars of the University being much displeased at this unworthy act, they, to the number of three thousand left Oxford, so that not one remained behind, but either went some to Cambridge, some to Reading, and others to Maydestone in Kent, to make a further progress in their studies."[2]

News of these events was sent to the Bishop of Lincoln, and finally to the Pope who "did forthwith interdict the Town, that is commanded religious Service to cease, Church doors to be shut up, none to be buried in consecrated ground, none to have the Sacrament administered to them, *etc.*" And we can readily believe the old record, which adds that "this dispersion of students was a great stop to the progress of Literature, and the more, because that such that lived remote and beyond the seas never returned again."

But if the University suffered, its troubles were as nothing in comparison with the punishment inflicted upon the Town. Five years after the riot, in 1214, we have a letter from the Papal Legate imposing the penalties. Half the rent payable for the halls occupied by students was remitted for ten years, or the halls were to rent for as much "as the Clerkes thought fit to pay in conscience." Fifty-two shillings was to be paid annually by the Town for the support of poor scholars, and every year on St. Nicholas' Day a hundred poor students were to be fed. The Town also had to pledge itself to furnish the University with provisions at a reasonable price. Then followed a condition which struck at the root

[1] Authorities differ as to the cause. Some claim the woman was assaulted, *etc.*, Lyte, p. 16; others that she was killed "by a scholar practising archery;" Heber I., p. 88.

[2] Wood, *Annals.* I., p. 82.

of the essential liberty of the Town. "If it should happen that any Clerk (and all the students at this time were clerks) should be taken in a fault (that is, arrested), the Commonalty should not deal with him, but cause him to be delivered to the Bishop, or the Chancellor, to be punished." An oath to keep these provisions was to be taken annually, and these pledges were to be embodied in a charter to which the Town must affix its seal. "The chiefest of the Burghers," furthermore, "must strip themselves of their apparel, and go barefoot with scourges in their hands to every Church in the Town of Oxford, and there to require of the Parish Priest the benefit of Absolution by saying the 51st Psalm 'Have mercy on me, O God,' *etc.*" And we are told that the Burghers "performed this penance in every particular, not all in one day, but in as many as there were Churches, by taking for one day, one Church, so that they, as well as others, might dread to do such wickedness again."

The Town soon transferred to the Convent of Eynsham the feast and annual payment.[1] What compensation the Town gave to the Convent does not appear. Nor is it plain just what bearing these concessions by the Town had upon existing conditions. It is only certain that the conditions were not much improved. In 1227 we find this record in Wood's Annals:[2] "This year the Town of Oxon was taken into the King's hands; but the reason unless some fray with the Scholars, I know not."

And when we come to the "latter end of next year," 1228, we find that "a dissention arose between the Scholars and Laics," which was "for a time very fierce, many of each party were wounded, and the Inns of the Scholars were broken open. For which cause the Town was interdicted by the Bishop of Lincoln. All lectures and other exercises ceased. Which interdict continuing a considerable while, the bodies of such that then deceased were buried in the highways and paths without the Town. At length the strikers and abusers of the Clerks were sent to Rome,[3] to be there examined and tried by the Pope's Court." The goods stolen from the Clerks were restored, and the Laics gave the University fifty marks to be divided among poor students. And "it was furthermore ordered, that if like matter should happen hereafter, the sd Laics should submit themselves to the abitrement of four Masters that were then the chiefest in the University, by whose judgment the fault should be canonically punished, all manner of appeal being laid aside."[4]

In the following year, 1229, a serious town and gown row in Paris, which led to the temporary dissolution of the University, and gave Henry III. the opportunity to invite foreign students to England, brought large numbers of scholars to Oxford. The increased importance thus given to the University by larger numbers may be seen in the succession of royal briefs. In 1231 the King ordered the Mayor to give the use of the town prison to the Chancellor for confinement of Clerks, and later the Constable is ordered to give the use of the prison in the Castle for the same purpose.[5] In this same year we catch a glimpse of the further difficulties of the loosely organized University in trying to keep order among its motley gathering of students. By another royal brief, the Sheriff is directed to expel all so-called scholars who were not under a

[1] Lyte, p. 21; Hulton, p. 43. "Austey (Num. Acad.) describes this as the real foundation of the University. Since the Fourteenth Century the amount has been paid punctually by the Crown."

[2] I., p. 197.

[3] "Such a thing would have been impossible a century later." Rashdall, II., 2, p. 393.

[4] Wood, I., p. 203.

[5] Rashdall, II., 2, p. 293.

regular Master.[1] Evidently such a law was needed, for the record says that among the students were "a company of Varlets, who pretended to be Scholars, shuffled themselves in, and did act much villainy in the University by thieving, whoring and quarrelling."[2]

In 1236 there was further bloodshed, peace being restored with difficulty only by royal commissioners, nobles and prelates.[3] The University was gaining in self-confidence, for the Clerks "were grown so stout and constant in vindicating one another, that nothing that savoured of an effront went down with them, but was to the utmost avenged."[4]

We have now to turn aside from the conflicts between town and gown to an event which all but ended the existence of the University, and which shows the fighting spirit among the students. Otho, Lord Legate of the Pope, was staying at Osney Abbey, whither he had come, it is said, in the hope of bettering Oxford morals. The Scholars called upon him, carrying him game for his table, but their appearance offended the Legate's Italian servant, who insulted them and refused them admittance. A fight immediately ensued, the Legate's servant was killed, and "the Legate being amazed, and jealous lest the same fate should befall him, puts on his Canonical Cope and locks himself up safe in the Tower of the Church," where he spends the night; the students meanwhile calling him names and "making diligent search after him." But in the morning he made his escape and, "conveying himself over the rivers adjoining, soon after came puffing and blowing to the King, then with his Court at Abendon Abby, five miles from Oxford, and without any demur or patience entering his presence, relates to him and the standers-by, as well as tears and sighs would permit, the great abuses that he had received from the Clerks of Oxford."[5]

The King promptly ordered the Town to arrest the culprits, sent soldiers to assist the Burghers, and it is here that our interest lies, for such an opportunity appealed strongly to the townsfolk. In their zeal lest the wrong doers might escape, they gleefully imprisoned every clerk upon whom they could lay hands. Masters and Scholars were huddled into prison with all sorts of lawless violence, and all the students who could make their escape fled the town. Excommunication and interdict followed from the enraged Legate and from the Bishops, and even the King showed marked hostility toward the University; for a year or more all lectures were suspended and many students sought other universities, never to return; but penance being done, the bans finally were removed and university life once more was resumed.

The University again gained substantial privileges from a row with the townsmen in 1248. A student was pursued and killed by the burghers, for what cause does not appear, and the University promptly suspended all lectures and threatened to leave the city unless punishment and security against future trouble should be promised. As a result, these changes were made; henceforth in cases where students were involved the Oxford juries were to be made up half of clerks, and the Mayor and Bailiff of Oxford on assuming office solemnly were to swear to respect the liberties and established customs of the university. This last promise was no mere form, for some four hundred years later the mayor sought to evade taking the oath and was brought to terms by the University.

[1] *Ibid.*

[2] Wood, I., p. 206.

[3] Lyte, p. 33.

[4] Hulton, p. 48.

[5] Wood, I., p. 223.

In 1263 we find that the town, anxious to maintain neutrality between Henry III. and the barons, refused to admit Prince Edward. "The Clerks being shut inside the Town, and denied a sight of their Prince, and their daily and usual sports in Beaumont, came to Smithgate to go out, but one of the Baillives being there, flatly denied them and bid them begone to their respective Inns. Upon this they returned, and having got axes, sledges and other weapons, as also bows and arrows, which they by force took from the Fletchers' shops, came in great multitudes and broke the gate open.

"This being done, the Mayor laid hands on and imprisoned them; with which, being not contented, *albeit* the Chancellor desired to have them set at liberty, he the sd Mayor and the Commonalty of the Town, with banners displayed and in order marshalled, intended to have set up the Scholars to beat, and despitefully use them before they were aware. But being espied at their appearance in the High street near to All Saints' Church, a certain Clerk ran and rung the Scholars' bell at St. Mary's to give notice to his fellows, being then generally at dinner; and no sooner the bell rang a minute but they all left their meat, ran to their bows, swords, slings, bills, *etc.* and gathering together in a body fought most courageously against them, wounded many and made the rest fly.

"In the conclusion the Clerks finding none to oppose them, they went about the streets, brake up many houses, spoiled and took away divers goods, and did what pleased them without any opposition. At length they went to the house of one of the Provosts of the Town, and burnt it to the ground. Then to the house of William le Espycer, the other Provost, which being situated in the Spycery, they brake it up with all the Spycery itself from one end to the other, and spoiled most of the goods therein. Then did they hasten to the house of the Mayor aforesaid, by trade a Vinter, situated in the Vintery, which place also they brake up, drank as much wine as they could, and wasted the rest." [1]

It is no wonder that "the Burghers began to build their houses of stone, and to fortify them with tile and slate."

As a result of this riot, the University might have lost some of its hard earned privileges, but this misfortune was averted by the political confusion of the times. Many students had fled the town. The King suspended all lectures and ordered all the students to leave the University until after the session of Parliament about to be held at Oxford. A month later Henry III. was a prisoner in the hands of Simon de Montfort, who, in the King's name, commanded the dispersed Scholars to return, by mid-summer the University was reëstablished, and the riot and its merits appear to have been overlooked in the new order of things.[2]

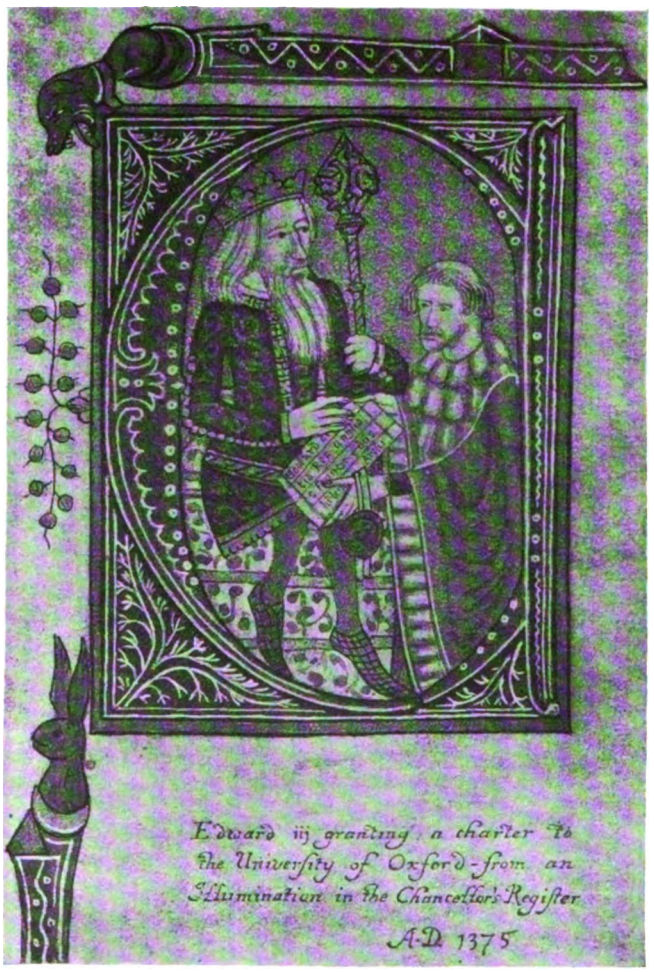
Later we find the King's Baillive at Northgate disputing the right of the University to decide cases between scholars and citizens and, although convicted of perjury, he accused the Masters of robbery, imprisoned the Bedells for two days, and even laid hands on the Vice Chancellor himself. "This crafty veterano," we are told, "did so confront and nose them in relation to their liberties, that they seriously vowed before Almighty God, that all scholastic exercises should cease, their school doors be closed, and their books flung away, unless

[1] Wood, I., p. 263.

[2] To the capture of Northampton, whither many of the students fled, and to the suppression of its schools, Rashdall attributes "the regrettable fact that England possesses no more than two ancient universities." Vol. II., 2, p. 397.

he were punished according to his crime."[1]

For once at least a town official knew how to use his power, and his exercise of it seems the more justifiable when we note the complaints the town at this time was making to the King. The townsmen claimed that the Chancellor set free criminals who justly had been imprisoned by the Mayor; that he appropriated to his own use forfeited victuals and fines, exacted heavy bail from laymen, and extended the university privileges to tailors, barbers and parchment makers, who naturally belonged within the civic jurisdiction. But perhaps the most extraordinary grievance mentioned is that the town baillives were compelled to take oath to observe the privileges of the University, without the saving clause of allegiance to the King.



Edward iij granting a charter to the Universsity of Oxford - from an Illumination in the Chancellor's Regiſter A.D. 1375

In 1286 a royal commission was appointed to investigate the conditions, but no commission could remove the cause of these troubles. The feud was too deep to be done away, and we find accounts of continual disturbances. A clerk and bailiff met in a hand to hand fight, and the clerk carried off the bailiff's official mace in triumph. A clerk

[1]Hulton, p. 61.

was rescued by force from the custody of the Mayor. Students were beaten to death by townsmen, and a trader was killed by the students. And further, the students captured a beadsman and forced him to pray for the souls of several burghers whom they intended to kill.

Matters reached a crisis in 1297, when there arose another "grievous Discord between the Clerks and Laices." The incidents from which it sprang, so trivial in appearance, show how inflammable was the feeling on both sides. Two servants fell to fighting, and "the quarrel was at length translated to those that were standers by. Toward the end, the Riot did so much increase that all the Clerks and Laices coming out of their houses, each party gathered together into a body to fight."

"The next day, being Monday and the Feast of St. Matthias, the Clerks began to gather in a great multitude, which being straightway noised among the Laices, they ordered that the common Bell of S. Martin's should be forthwith rung, and the Cornets (ox-horns) to be sounded about the streets."

The townspeople now sent into the country "for help from the rustics," while the "Rector of the Church of Pychelstorne, and many others, came into the Highstreet and there with bows and arrows, swords and bucklers, slings and stones, set upon all the Laics they could meet with, beat, wounded, and made them fly. Then they broke up their shops and houses and taking thence all goods and chattels whatsoever they laid hands on, conveyed them away. After this, when the sd Rector had shot away all his arrows, he with some of his party came to the house of one Edward, which they immediately broke up, entered and took away those goods they could see. But the sd Edward, running up into his solar or upper chamber to defend it from being rifled, took his bow, and bending it with a strong arm, shot the said Rector in the left eye, and within an hour he expired."

This was the turning point of the battle. Now that their leader was dead, the Clerks fled in all directions, while "the Laics without more ado, fell immediately, as madmen, upon them, dispersed them into several places, and executed justice upon such that had as they conceived evil treated them." Then "a numberless multitude of country clowns came in to the assistance of the Laics. Both of which parties falling with great rigor on the remaining Clerks, there happened such a terrible and dismal conflict, as before this time was never known in Oxford. Some they killed, multitudes they wounded, others they beat and kicked about the streets. Some that fled to the Churches for sanctuary and were praying at the High Altar, ready with their open breasts to receive the fatal blow, them they wounded and dragged out, and caused them to accompany those that they had before taken, to be driven to prison. Also if any of them halted, or made a demur to go, they whipped and pricked them forward with goads. The Clerks that escaped fled from Oxford."[1]

So the battle ended, but each side appealed to the Court. The University petitioned the King for £1000 damage. The Town counterclaimed for £3000. The Bishop of Lincoln ex-communicated the Laics, royal commissions awarded 200 marks to the Scholars, city baillives were removed from office, and the burghers were compelled to swear that all the liberties of the University should be observed.

In 1300 we find " the Universitie and the Town much at variance" and the King sent a Commission "to bring them into agreement;" but the Commission accomplished no more than its predecessors.

[1] Wood, I., pp. 349-352.

The next fifty years are filled with the record of similar conflicts; the University twice complained to the King "of the scarceness of vendibles in Oxford Market, and the unreasonable rates that they were sold at to the wronging of Scholars, and the dispersion of the poorer sort of them;" a Scotch student slayed a townsman, "supposing him to belong to the southern party;" the Mayor erected a pillory in a new location without the authority of the Chancellor, for which the Chancellor promptly ex-communicated him; and these are only items in long lists of grievances.

In 1327 Town and Gown joined forces and helped the people of Abendon to sack a monastery. We are told that "twelve of the ringleaders were hanged by the neck by the King's Justices." Probably all those executed were Laics.

In 1333 the University petitioned Parliament for exemption from taxes, "being like to be troubled and charged by paying tenths and fifteenths;" but the Town also petitioned, saying that "forasmuch as the Clerks had many houses, they did possess half or more of the Town." The outcome of these petitions is not clear.

The following year, 1334, a number of students and masters, "under color of some Discord" in the University, "began, renewed, or continued an Academy at Stamford, in Lincolnshire. The King ordered them to return, but it required the most strenuous exercise of royal authority to disperse those masters who persisted in lecturing, and as late as 1827 an oath not to lecture at Stamford was exacted from all candidates for the mastership of Oxford.[1]

In 1349 Oxford was swept by a pestilence, which depopulated the University and parts of the Town. All those students who were able fled to the country, and many of the halls were re-occupied by the townsfolk.

[1]Rashdall, II., 2, p. 397.

Gradually, however, the students returned.

In 1354 there took place the last and greatest of the Town and Gown rows. The brawl began in a tavern. "On Tuesday, 10th Feb., being the Feast of S Scholastica the Virgin, came Walter de Springheuse and other Clerks to the Tavern called Swyndlestock, and there calling for wine, John de Croydon, the Vinter, brought them some, but they disliking it, as it should seem, and he avouching it to be good, several snappish words passed between them. At length the Vinter giving them stubborn and saucy language, they threw the wine and vessel at his head. The Vinter therefore receding with great passion, and aggravating the abuse to those of his family and neighborhood, several came in, encouraged him not to put up the abuse, and withal told him they would faithfully stand by him." Events then quickly followed in their usual order. The Vinter's friends, "out of propensed malice seeking all occasions of conflict with the Scholars, caused the Town Bell at S Martin's to be rung, that the Commonalty might be summoned together into a body, which being begun they in an instant were in arms, some with bows and arrows, others with divers sorts of weapons." The Scholars, who it is said were without weapons of any kind, were shot at and wounded. Then the Chancellor appeared, trying "to appease the tumult," but the townsfolk shot at him and would have killed him had he not run for his life back to gown-land, where he ordered St. Mary's bell to be rung and soon was at the head of an army of scholars. The battle continued until dark, and—here is the extraordinary part of it—not a man on either side was killed.

The next day the battle began about noon, no longer bloodless, when a body of townsmen broke into the Augustinian Convent (now Wadham College). Students also were wounded and killed on Beaumont

Fields, and soon the rival bells of St. Mary's and St. Martin's again called out all men on both sides. The scholars, seeing the rustics swarming in tried to close the city gates; but some two thousand of them gained entrance, carrying the ominous black flag and crying, "Slay! Slay! Havock and Havock!" Some twenty halls were pillaged, students were killed, wounded and mutilated; food was plundered, books torn to pieces and the houses themselves set on fire.

On the following day the Chancellor tried to save the students by keeping them in their Halls, while he himself, under a guard, hurried to the King at Woodstock; but again the Halls were broken into, Scholars were killed in cold blood and their bodies were mutilated. Even the clergy were attacked and the sanctuary of the Church was disregarded. Fugitives were beaten and wounded while clinging to the altar, and to the very tabernacle itself. The Friars, for the moment forgetting their own bitter feud with the University, marched through the streets chanting a Litany for peace and carrying the Host, but one scholar was killed while clinging to the priest who bore it, and the crucifix planted in the midst of the rioters with a "*procul hinc ite profani*" was dashed to the ground. Finally, the surviving scholars fled from the town and no further mischief remained to be done.[1]

Only the students in Merton College dared to stay; their hall was built to serve for a fortress as well as for a school, and they "locked themselves up within their own gates, and spent their time in prayer, and composing tragical relations."

The Town for more than a year lay under an interdict, which was proclaimed from all the Churches with bells and extinguished tapers and curses. The Mayor and Bailives were sent to prison (perhaps to Marshalsea,[2] perhaps to the Tower of London where one tradition says they were hanged),[3] and the Sheriff was removed from office. Both University and Town surrrendered all charters and privileges into the King's hands.

Somewhat later a general pardon was published throughout the country for the offenses of scholars, an indication that they had not been so lamblike as their advocates would make them appear; but even then it seems they did not hurry back to Oxford, for as late as June in 1355, the King sent a writ to the University, entreating the Masters to resume their lectures.[4]

Meanwhile there was no general pardon for the Town. On the contrary, 250 pounds[5] had to be raised by the citizens and paid to the Chancellor in compensation for students' injuries, and all the booty had to be returned. Then the Bishop enjoined on the Town an annual penance to be performed forever, on every anniversary of St. Scholasticas' Day. The Mayor and Commonalty were further bound to pay the University 100 marks annually if they should fail in this observance.[6]

The survival of this penance shows the English love of unchanging custom, for it lasted long after all belief in its meaning had been forgotten. In early days, it is said that the Mayor was forced to wear a halter around his neck when attending these ceremonies, but that later it shrank to a silken cord. In Elizabeth's time the service was dropped, and thereupon the University

[1] Wood, I., pp. 454-469. Also Rashdall, II., 2, p. 450.

[2] Lyte, p. 165. Leland's *Itinerary*, Vol. VI., p. 141.

[3] From the nature of the penalties paid by the city corporation this is extremely unlikely. See Hulton, p. 76.

[4] Rashdall, II., 2, p. 406.

[5] A sum fully equal to twenty thousand dollars of our own money and levied upon a much less able community relatively in size and wealth than is the modern city of Oxford.

[6] Hulton, p. 78.

promptly sued the Town for fifteen hundred marks. The citizens answered that the observance "was meant literally in the bond of Masses" for the dead, and that Masses were then against the law. But the Queen's Council obligingly set at rest their religious scruples by changing the Mass into a "sermon or communion," at which the usual offertory should be taken. As late as 1800 the Town was again sued by the University for omitting the observance, and the citizens were obliged to pay their penance money. In 1825 the Town humbly petitioned the University for absolution, and the gown was pleased graciously to substitute for the service and payment an annual oath from the Town corporation that they would observe the privileges of the University. This was continued down to 1854, when the citizens ceased to do penance for the sins of their forefathers—in which no doubt the scholars were equally guilty—some five hundred years before.[1]

What really concerns us, however, is the immediate result of the riot of 1354, commonly known as "the great slaughter," or as "the massacre of St. Scholasticas' Day." It appears that no punishment was meted out to the actual criminals, and no attempt was made to bring them to justice. Indeed, any personal responsibility is not considered. The Town and the Gown stand as corporations to be fined or reimbursed. The Gown was pardoned at once, perhaps because the students had fled to the four winds, and no other course than pardon was possible; but pardon was not enough to bring the students together again. Something further was needed. So the King lavished praise on the University, more precious to the Court than gold and jewels, and, together with the Archbishop of Canterbury, he sought in every way to bring the scattered scholars back to Oxford. Meanwhile the Town possessed property and privileges within the reach of the Court, and in a new Charter the King took away their ancient liberties and passed them over to the University. "Though the Clerks or Scholars were worsted by the Townsmen" in the battle itself, says Anthony Wood, "yet it proved at length a glorious day, for the privileges of the Townsmen were laid at stake, and worthily forfeited to the King, and by him bestowed for the most part on the University."[2]

With this change of authority ended the long conflict between Town and Gown. It is true that discord showed itself in unimportant brawls from time to time. In 1364 "there was some controversy between Clerks and Laics," and in 1380 there were "great disorders in University and Town, burning of divers houses, committing of thefts, robbing and killing of men in streets and public places, great excess in apparel," and the like. There were faction fights and "national" rows among the students, contentions between the lawyers and physicians within the University and contentions between the University and the Town Corporation over the rights in the Market, already referred to; there were struggles on the part of certain "godless folk" to gain possession of college lands and struggles on the part of the colleges to get all they could and keep all they had; there were commissions and royal visitations and frequent pestilences which scattered the students to all parts of the three Kingdoms, leaving Oxford desolate for months together; but the rival bells of St. Mary's and St. Martin's no longer called Gown and Town to battle, for the contention was over, and the Gown had won.

[1] Hulton, n. 78. Rashdall, II., 2, p. 408.

[2] Wood, I., p. 456.

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

VII.

Questions Relating to Contraband of War.

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In the last issue of The Green Bag it was stated that the most important questions arising from the seizure of neutral vessels by Russian crusiers—*viz.*, those connected with the great subject of contraband—would be reserved for a separate discussion in our next paper. This pledge we shall now attempt to fulfil.

The Russo-Japanese war promises to mark an important epoch in the history of neutral rights and obligations, more particularly in definitely establishing the rights of neutral commerce in respect to articles *ancipitis usus* (double or dual use), and in extending the duties of neutral Governments in respect to the use of neutral ports by belligerent armed vessels.[1]

On February 10, 1904, Japan published the following list of contraband articles which are divided into two classes corresponding to the English and American division into absolute and conditional contraband:—(1.) "Military weapons, amnunition, explosives, and materials including lead, saltpetre, sulphur, *etc.*, and machinery for making them, uniforms, naval and military, military accoutrements, armour-plated machinery and materials for construction or equipment of ships of war, and all other goods which, though not coming under this list, are intended solely for use in war. *Above-mentioned articles will be regarded as contraband of war when passing through or destined for enemy's army, navy or territory.* (2.) Provisions, drinks, horses, harness, fodder, vehicles, coal, timber, coins, gold and silver bullion, and materials for construction of telegraphs, telephones and railways. *Above-mentioned articles will be regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy.*"[2]

It will be seen from the above list that Japan recognizes the English and American doctrine of Conditional and Occasional Contraband, so vigorously and (so it seems

[1] This subject will be discussed in the next issue of The Green Bag.

[2] For this list which, so far as I am aware, has not been reprinted by any American newspaper, see London *Times* (weekly ed.) for February 26, 1904. Cf. list published in Appendix VII. of Takahashi's *Cases on International Law During the Chino-Japanese War.* See also lists found in the *Manual of Naval Prize Law* (p. 20), drawn up by Professor Holland of Oxford in 1888 for the use of the British Admiralty, and Art. 19 of the *Instructions to Blockading Vessels and Cruisers*, issued by the United States Government on June 20, 1898. (See Appendix III. in Snow's *International Law.* The list given in the *Instructions* has also been incorporated into Stockton's *Naval War Code.*) These lists, which are those of the leading modern maritime nations who have the power to enforce their decrees, may be considered as the most authoritative. One looks in vain for agreement or consistency in treaties and amongst the authorities or publicists; but it is certainly fortunate that the leading maritime nations of the world (excepting France and Germany, perhaps), are in substantial agreement in regard to the question as to what articles may be dealt with as contraband of war. France can scarcely be cited any longer as favoring the restriction of contraband to arms and ammunition since her attempt to make rice absolute contraband in 1885. In 1870 Germany remonstrated strongly with the English Government for permitting the export of coal to France.

to the writer) vainly denied or denounced by many Continental publicists.[1]

Russia, on the other hand, published on February 28, 1904, an extensive list of contraband in which the distinction between ar-

[1]The English and American doctrine of conditional or occasional (sometimes also called accidental) contraband is based upon the Grotian division of commodities into three classes: (1) Articles of direct and immediate use in war, such as arms and ammunition which are always contraband when they have a belligerent destination; (2) things absolutely useless in warfare, such as millinery and pianos, which are never contraband under any circumstances; (3) *res ancipitis usus*—things of double or dual use, *i. e.*, equally useful in war or peace, such as coal, horses, provisions, cloth, *etc.* It is to this latter class that the English and American doctrine of conditional or occasional contraband has been applied, *i. e.*, they are only to be considered contraband, and, therefore, as subject to preëmption or confiscation, when destined to a port under blockade, a place besieged, or when clearly intended for the direct and immediate use of the army or navy of one of the belligerents. In any case, whether in the case of absolute or conditional contraband, a belligerent destination, either immediate or ultimate, is essential. It need not necessarily be a belligerent port. (See *The Commercen*, 1 Wheaton Rep. 382.) For leading cases on the doctrine of conditional or occasional contraband, see *The Staat Embden*, 1798, 1C. Robinson, 26 (masts); *The Endraught*, 1798, 1C. Rob. 22 (timber); *The Jonge Margaretha*, 1799, 1C. Rob. 189 (cheese); *The Jonge Tobias*, 1799, 1C. Rob. 329 (tar); *The Sarah Christina*, 1799, 1C. Rob. 237, 241 (tar and pitch); *The Ringende Jacob*, 1798, 3C. Rob. 86 (hemp and iron bars); *The Neptunus*, 1800, 3C. Rob. 108 (sailcloth); *The Commercen*, 1816, 1 Wheaton 382 (provisions), and *The Peterhoff*, 1866, 5 Wallace 28, 58.

The doctrine of conditional or occasional contraband is strongly opposed or denounced by many Continental publicists. Hautefeuille (*Droits des Neutres*, Tit. VIII., sect. II, 3), who relies upon an imaginary *loi primitive* to prove his case, claims that contraband is confined to arms and munitions of war or to articles expressly and uniquely destined for warlike use. (See also his *Histoire du Droit Maritime International* p. 433.) Ortolan (*Dip. de la Mer*, II., pp. 190f) is of the "opinion of those who think that the freedom of neutral commerce ought to furnish the general principle, to which only such restrictions should be applied as are an immediate and necessary consequence of the state of war between the belligerents;" but he is willing, by way of exception, to make certain concessions to belligerents, "in view of some special circumstances affecting their military operations." Klüber (§288) also admits the existence of doubtful cases which must be governed by surrounding circumstances. Bluntschli (§805) admits that such objects as "clothing, money, horses, timber for naval construction, sail-cloth, iron plates, engines, coal, and merchant vessels" (he does not include foodstuffs in this list) may "exceptionally be regarded as contraband of war expressly sanctioned by treaty, or if, in a particular case, it can be shown that they are destined to be used in an existing war, and that they are carried to one of the belligerents with the intention of rendering him aid." (For criticism of the doctrine of the intent of the owner as applied to contraband, see Kleen, *Contrebande de guerre*, pp. 37-43.)

Heffter (§ 160) admits the existence of articles of occasional or conditional contraband "in treaties and in the special regulations of several countries," and adds that "a belligerent can only interfere with them when neutral trade, in conveying them to the enemy, affords to the latter, succour of a manifestly hostile nature." The Russian De Martens (*Traite*, III., p. 351), who defines contraband as "objects which a neutral vessel is attempting to deliver (*cherche à faire entrer*) upon the territory of one of the belligerent States" (which objects, he declares, may always be seized), admits that "those (objects) which are not of direct service in war may also be seized in exceptional cases according to the character and destination of the cargo and, in general, under certain determinate circumstances." Kleen (*Contrebande de guerre*, pp. 19 and 29) would limit the seizure and confiscation of articles as contraband of war to "munitions of war properly so called, *i. e.*, objects expressly made for war or immediately and specially serviceable for warlike use in their actual state," and to "things which enter into the composition of such objects, if it be sufficient to re-unite them or to place them into juxtaposition without any other labor, transformation, or improvement."

It will thus be seen that all of the Continental publicists cited above, with the exception of Hautefeuille and Kleen (the latter of whom seems to be the only thoroughly logical and consistent opponent of the doctrine of conditional and occasional contraband), practically concede the principle underlying the British and American contention, *viz.*, that articles of dual or double use may, under certain circumstances (*e. g.*, if destined for military use), be seized and confiscated as contraband of war. Their criticism seems in reality to be directed against some of the ways in which the doctrine has been applied by English and American prize courts rather than against the principle or doctrine in itself.

It should be noted that the Institute of International Law, in its session at Vienna in 1896, attempted to abolish what it called relative and accidental contraband as applied to articles *ancipitis usus*, and limited contraband of war to (1) arms of every kind, (2) munitions of war and explosives, (3) military material such as objects of equipment, uniforms, gun-carriages, *etc.*, (4) vessels equipped for war, (5) instruments especially made for the immediate manufacture of munitions of war. But the belligerent is permitted, at the risk of having to pay indemnity, to preempt or sequester objects which, taken on their way to an enemy port, may serve equally for warlike or pacific usage. See *Annuaire*, XVI., p. 205.

ticles absolutely and conditionally contraband was apparently ignored. This list was as follows:—

1. Small arms of every kind, and guns, mounted or in sections, as well as armour plates.

2. Ammunition for fire-arms, such as projectiles, shell-fuses, bullets, priming, cartridges, cartridge-cases, powder, saltpetre, sulphur.

3. Explosives and materials for causing explosions, such as torpedoes, dynamite, pyroxyline, various explosive substances, wire conductors, and everything used to explode mines and torpedoes.

4. Artillery, engineering, and camp equipment, such as gun carriages, ammunition wagons, boxes or packages of cartridges, field kitchens and forges, instrument wagons, pontoons, bridge trestles, barbed wire, harness, *etc.*

5. Articles of military equipment and clothing, such as bandoliers, cartridge-boxes, knap-sacks, straps, cuirasses, entrenching tools, drums, pots and pans, saddles, harness, completed parts of military uniforms, tents, *etc.*

6. Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications that they have been built for warlike purposes, and are proceeding to an enemy's port in order to be sold or handed over to the enemy.

7. Boilers and every kind of naval machinery, mounted or unmounted.

8. Every kind of fuel, such as coal, naphtha, alcohol and other similar materials.

9. Articles and material for the installation of telegraphs, telephones, or for the construction of railroads.

10. Generally, everything intended for warfare by sea or land, as well as rice, provisions and horses, beasts of burden and others which may be used for a warlike purpose, if they are transported on the account of, or are destined for, the enemy.[1]

[1]This version, which differs somewhat from that published in the American newspapers, is the one given by T. J. Lawrence in his recent work, *War and Neutrality in the Far East*, pp. 152-53.

The meaning of the words *others* and *enemy* in article 10 are ambiguous. As Secretary Hay says in his note of August 30, 1904, which contains the protest of the United States against the decision of the Russian prize court at Vladivostok in the case of the *Arabia*, to Mr. McCormick, our ambassador at St. Petersburg:

"The ambiguity of meaning which characterizes the language of this clause, lending itself to a double interpretation, left its real intendment doubtful. The vagueness of the language, used in so important a matter, where a just regard for the rights of neutral commerce required that it should be clear and explicit, could not fail to excite inquiry among American shippers, who, left in doubt as to the significance attributed by His Imperial Majesty's Government to the word 'enemy'—uncertain as to whether it meant 'enemy government or forces' or 'enemy ports or territory'—have been compelled to refuse the shipment of goods of any character to Japanese ports. The very obscurity of the terms used seemed to contain a destructive menace, even to legitimate American commerce.

"In the interpretation of clause 5 of article 10, and having regard to the traditional attitude of His Imperial Majesty's Government, as well as to the established rule of International Law, with respect to goods which a belligerent may or may not treat as contraband of war, it seemed to the Government of the United States incredible that the word *autres* (others), or the word *l'enemi* (enemy), could be intended to include as contraband of war foodstuffs, fuel, cotton and all other articles destined to Japanese ports, irrespective of the question whether they were intended for the support of a non-combatant population or for the use of the military or naval forces. In its circular of June 10 last, communicated by you to the Russian Government, the department interpreted the word enemy in a mitigated sense, as well as in accordanc with the enlightened and humane principles of International Law, and, therefore, it treated the word enemy, as used in the context, as meaning 'enemy government or forces,' and not the 'enemy ports or territory.'

"But if a benign interpretation was placed on the language used, it is because such an interpretation was due to the Russian Government, between whom and the United States a most valued and unbroken friendship has always existed, and it was no less due to the commerce of the latter, inasmuch as the broad interpretation of the language used would imply a total inhibition of legitimate commerce between Japan and the United States, which it would be impossible for the latter to acquiesce in.

"Whatever doubt could exist as to the meaning of the Imperial Order has been apparently re-

To this list raw cotton was added by Imperial Order on April 21, 1904.

In the publication of this extensive list of articles (all of which she seems to have regarded as absolutely contraband) and still more in her subequent conduct, Russia not only showed that she intended to ignore the doctrine of Conditional or Occasional Contraband, but she included in her list of things absolutely contraband many articles of *ancipitis usus*, such as coal, rice, horses, provisions, telegraph and railway material, *etc.* These have always hitherto been regarded either as not contraband at all, or, if so, as subject to preëmption or confiscation only in certain contingencies or under certain circumstances, *e. g.*, when destined for a blockaded port, a place besieged, or when obviously intended for, or liable to fall into the possession of, the army or navy of the enemy. Russia will thus be seen to have gone farther than any belligerent has ever gone, at least since the time of the Napoleonic wars, in the direction of a real or threatened attack upon the rights and interests of neutral commerce. "The Russian Government, which more than a century ago was the foremost champion of the freedom of neutral commerce, put forth for, we believe, the first time in the history of civilized warfare the amazing pretension that all such goods should be considered contraband regardless of destination or circumstances."[1]

The publication of this list drew forth some severe criticism on the part of the English and American press, and what appears to have been an informal or semi-official protest on the part of our State Department at Washington,[2] but it was not before the month of June that the American and British Governments took formal action. The British Government appears to have entered its first formal protest against Russia's inclusion of rice and other foodstuffs in her list of contraband early in June.[3] On June 10, 1904, Secretary Hay sent the following circular[4] (which we reproduce in full because of its importance and because it serves to set forth the American position on the subject of contraband, together with the main arguments with which this view has been supported by one of our greatest statesmen) to American Ambassadors in Europe:

Department of State,
Washington, D. C., June 10, 1904.

To the Ambassadors of the United States in Europe:

Gentlemen: It appears from public documents that coal, naphtha, alcohol and other fuel have been declared contraband of war by the Russian Government. These

moved by the inclosure in your dispatch of the note from Count Lamsdorff, stating tersely and simply the sentence of the prize court. The communication of the decision was made in unqualified terms, and the department is, therefore, constrained to take notice of the principle on which the condemnation is based and which it is impossible for the United States to accept, as indicating either a principle of law or a policy which a belligerent State may lawfully enforce or pursue toward the United States as a neutral."—Reprinted from the Washington *Star* for September 22, 1904.

[1] From an editorial in the New York *Tribune* for August 9, 1904.

[2] "In regard to the Russian declaration of foodstuffs as contraband, it is said at the State Department that the destination of such goods must determine their character. If they are intended for either army they are contraband and subject to seizure. If they are intended for the use of civilians, except in the case of besieged towns, they must not be seized, or if seized, they must be paid for." See New York *Times* for March 1, 1904.

[3] See *e. g.*, St. Petersburg dispatch of June 12, in New York *Times*.

[4] This circular was not, however, made public before August 9, 1904. The British protest, which has not been published, so far as I am aware, is stated by the Associated Press to have been along the same lines as the American Circular. But the British protest appears to have been directed mainly against the inclusion of foodstuffs as contraband, whereas Secretary Hay confines himself mainly to coal and cotton. For his reasons, see his note of August 30, 1904.

articles enter into general consumption in the arts of peace, to which they are vitally necessary. They are usually treated, not as "absolutely contraband of war," like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, *etc.*, but rather as "conditional contraband," that is to say, articles that may be used for or converted to the purposes of war or peace, according to circumstances. They may be rather classed with provisions and foodstuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military or naval forces of the enemy.

In the war between the United States and Spain the Navy Department General Orders No. 492, issued June 20, 1898, declared, in Article 19, as follows: "The term contraband of war comprehends only articles having a belligerent destination." Among articles absolutely contraband it declared ordnance, machine guns and other articles of military or naval warfare. It declared as conditional contraband "coal, when destined for a naval station, a port of call or a ship or ships of the enemy." It likewise declared provisions to be conditionally contraband "when destined for the enemy's ship or ships, for a place that is besieged."

The above rules as to articles absolutely or conditionally contraband of war were adopted in the naval war code, promulgated by the Navy Department June 27, 1900.

While it appears that the document mentioned that rice, foodstuffs, horses, beasts of burden, and other animals which may be used in time of war are declared to be contraband of war only when they are transported for account of or destined to the enemy, yet all kinds of fuel, such as coal, naphtha, alcohol, are classified along with arms, ammunition and other articles intended for warfare on land or sea.

The test in determining whether articles *ancipitis usus* are contraband of war is their destination for military uses of a belligerent. Mr. Dana, in his notes to Wheaton's "International Law," says:

"The chief circumstance of inquiry, would naturally be the port of destination. If that is a naval arsenal, or a port in which vessels of war are usually fitted out, or in which a fleet is lying, or a garrison town, or a place from which a military expedition is fitted out—the presumption of military use would be raised, more or less strongly, according to circumstances."

In the wars of 1859 and 1870 coal was declared by France not to be contraband. During the latter war Great Britain held that the character of coal depended upon its destination, and refused to permit vessels to sail with it to the Spanish fleet in the North Sea. Where coal or other fuel is shipped to a port of a belligerent, with no presumption against its specific use, to condemn it as absolutely contraband would seem to be an extreme measure.

Mr. Hall, "International Law," says:

"During the West African conference in 1884 Russia took occasion to dissent vigorously from the inclusion of coal among articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convention or instrument whatever, which would imply its recognition as such."

We are also informed that it is intended to treat raw cotton as a contraband of war. While it is true raw cotton could be made into clothing for the military uses of a belligerent, a military use for the supply of the army or garrison might possibly be made of foodstuffs of every description which might be shipped from neutral ports to the non-blockaded ports of a belligerent. The principle under consideration might, therefore, be extended so as to apply to every article

of human use which might be declared contraband of war simply because it might ultimately become in any degree useful to a belligerent for military purposes.

Coal or other fuel and cotton are applied for a great many innocent purposes. Many nations are dependent on them for the conduct of inoffensive industries, and no sufficient presumption of an intended warlike use seems to be afforded by the mere fact of their destination to a belligerent port. The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent States of all articles which could be finally converted to military uses. Such an extension of the principle by treating coal and all other fuel and raw cotton as absolute contraband of war simply because they are shipped by a neutral to a non-blockaded port of a belligerent would not appear to be in accord with the reasonable and lawful rights of a neutral commerce. I am, your obedient servant,

JOHN HAY.[1]

Fortunately for Russia and the neutral nations, the Russians had no opportunity of making a practical application of their views on the subject of contraband until after the capture of several neutral vessels in the Pacific by the Vladivostok squadron during the months of June and July, 1904.[2] The first case which aroused controversy was that of the British collier *Allanton* which was captured in the straits of Korea on her return voyage from a Japanese port, while conveying Japanese commercial (anthracite) coal from Japan to Singapore. One of the grounds on which the vessel was condemned was that she had carried contraband (Welsh) coal to Japan on her outward voyage, *i. e.*, the *Allanton* appears to have been condemned for a past, not a present offence. The British Government refused to interfere at the time on the ground that, inasmuch as an appeal to the Admiralty court at St. Petersburg had been allowed, the case was still *sub judice*.[3]

If the facts alleged by those interested in the fate of the *Allanton* are correct, there can be no question but that Russia has been guilty of a serious violation of the law of contraband in condemning the vessel for an offence supposed to have been committed on her outward voyage. As Lord Stowell said in the case of the *Imina*[4] "the articles must be taken in *delicto*, in the actual prosecution of the voyage to an enemy's port."[5]

[1]The comment of the British and American newspapers (including those of the political opponents of the Administration) upon the position taken by Secretary Hay in this circular appears to have been uniformly favorable. I have been unable to detect a single dissenting voice amidst the general chorus of approval.

[2]As has been noted in a previous paper, the neutral colliers seized and detained as prizes in the Red Sea during the second week of the war were released in response to an order of the Czar's on the ground that these captures had been made before the formal declaration of coal as contraband of war. The later Red Sea seizures were decided on other grounds than that of their alleged carriage of contraband. See THE GREEN BAG for October, 1904.

[3]On the *Allanton* case, see especially letter of W. R. Rea, the owner of the *Allanton*, in the London *Times* (weekly ed.) for September 2, 1904, and the letter from the British Foreign Office to Mr. Stanley Mitcalfe in the London *Times* (weekly) for August 26, 1904. Some of the grounds given by the Russians for the condemnation of the vessel were very trivial, as, *e. g.*, that she had a Japanese cabin boy on board, that the official log-book had not been entered up properly, *etc.* A more serious charge was that her papers were irregular. The *Allanton* has since (October 29. 1904,) been released by the Admiralty Court of St. Petersburg.

[4]3 Rob. 168.

[5]This is the general rule, but there are exceptions. In 1816 the cargo of the *Commercen*, a Swedish vessel, was condemned by the Supreme Court of the United States because it was intended for the British fleet lying in a Spanish port during the War of 1812. The cases to which the doctrine of continuous voyage has been applied may also be said to constitute exceptions to this rule. In any case, the real or ultimate destination must be a hostile one. The case of the *Allanton* cannot be brought under any of these heads. Her destination appears to have been really as well as nominally neutral.

Under the present understanding of the law of nations you cannot generally take the proceeds on the return journey." [1]

The most important cases bearing on the subject of contraband which have so far [2] arisen during the present war are those of the *Knight Commander*,[3] the *Arabia*, and the *Calchas*—all of which are cases of prizes captured by the Vladivostok squadron in the latter part of July, 1904.

The *Knight Commander* was a British steamer with a general cargo including flour and railway material from New York consigned to various Eastern ports, *viz.*, Manila, Shanghai and Yokohama. She was sunk and afterwards condemned by a Russian prize court. The questions involved in her destruction as a neutral prize have been discussed in a previous paper.[4] Our conclusion was that there existed, under the circumstances, no justification for her destruction, even if she carried contraband. The question of apology and indemnity for the destruction of the vessel is one which primarily concerns the British Government, but the American owners of the cargo would in any case seem to be entitled to compensation or restitution even in the case of such portion of her cargo as consisted of contraband, inasmuch as it was illegally destroyed before condemnation by a properly constituted prize court.[5]

The cases of the *Arabia* and the *Calchas* may conveniently be considered in connection with each other. The *Arabia* was a German vessel with a cargo composed largely of American flour and railway material (steel rails) consigned to Hong Kong [6] and Japanese ports. There appears

[1] The rule is different in the case of an attempted breach of blockade, in which case the outward and return voyages are regarded as parts of one transaction and the offence clings to the blockade runner during the return voyage. See Lord Stowell's decision in the case of the *Juffrow Maria Shroeder*, 3 Rob. 153. But in the case of contraband the return voyage is regarded as a separate and, therefore, innocent expedition. In the case of the *Nancy* (3 Rob. 127), Lord Stowell held that the return voyage will not be regarded as a separate and innocent expedition if the "outward and homeward voyages are but parts of one transaction, conducted by the same persons and planned from the beginning as one adventure, and if on the outward voyage contraband goods and fraudulent papers are carried." Cited by Lawrence, *Principles*, p. 616. But, as Lawrence says, "it is somewhat doubtful whether this view would be acted upon at the present time. Continental publicists condemn it as an undue extension of belligerent rights, and the British Admiralty *Manual* contents itself with the statement that a commander should detain a vessel he meets on her return voyage with such a record as we have described behind her." See Holland's *Manual*, pp. 23-24.

[2] October 5, 1904.

[3] The German steamer *Thea*, which was sunk by the Vladivostok fleet at about the same time as the *Knight Commander*, is omitted because no facts have come to light which would make a discussion of this case profitable, or even possible. No question appears to have been raised regarding the legality of the capture of the *Cheltenham* early in June. It was said to have been caught in the act of conveying railway sleepers to Korea.

[4] See THE GREEN BAG for October, 1904.

[5] It was reported at the trial that a letter book, which was found in the captain's cabin, contained copies of correspondence, proving that the cargo (probably the railway material) on board the *Knight Commander* was really destined for Chemulpo. In that case, its confiscation as contraband of war by a prize court would have been entirely justifiable. See London *Times* (weekly ed.) for August 12, 1904.

[6] The *Arabia* appears, at the time of her seizure, to have been on her way to the neutral port of Hong Kong, but this fact would by no means save her cargo from condemnation if it could be shown that its real or ultimate destination was a belligerent one. The doctrine of continuous voyage has, however, no applicability to this case, and, strangely enough, no case calling for its application seems thus far (October 5, 1904,) to have arisen. The doctrine is undoubtedly sound in principle, although liable to great abuse in practice.

The doctrine of continuous voyage was first applied to contraband by a French prize court (in the case of the *Vrou Houwina*) during the Crimean War in 1855, but it did not attract general attention until the extension and publicity given to the doctrine by the decisions of the Supreme Court of the United States (in the cases of *Peterhoff, etc.*), at the close of the Civil War. The doctrine in question was approved by the Italian Council of Prizes in 1896 (in the case of the *Doelwyk*), and was sanctioned by the Institute of International Law at its session in Venice the same year. The attempt of England to enforce the doctrine (in the cases of the *Bundesrath, etc.*,) during the Boer War in 1900 failed, however, owing to the determined opposition of Germany. On

to have been no evidence that either the flour or the railway material was intended for the use of the Japanese Government.[1] The cargo was shipped in the ordinary course of trade from Portland, Oregon, and was consigned to private individuals (merchants) in Yokohama.

The Russian prize court at Vladivostok, which gave its decision in the latter part of July, condemned such portion of the cargo (flour and railway material) of the *Arabia* as had been consigned to Japanese ports; but the vessel together with the remainder of the cargo (which consisted of flour consigned to Hong Kong and which included more than one-half of its bulk and weight) was released.[2]

The *Calchas* was a British steamer with a cargo of flour, raw cotton, lumber and machinery[3] shipped from Tacoma and consigned to Yokohama, Kobe, Hong Kong and Europe. As in the case of the *Arabia*, it is claimed by the owners of the cargo[4] that the commodities shipped to Japanese ports were consigned to private individuals and that they were in no wise intended for the consumption of the Japanese army or navy. The decision of the local Russian prize court at Vladivostok[5] was the same as in the case of the *Arabia*. The vessel together with that part of the cargo consigned to neutral ports was released, but that portion of the cargo which had been consigned to Japanese ports was condemned.[6]

The only attempted justification of these decisions is the following semi-official statement by a high Russian official to the Associated Press:

"Foodstuff consigned to an enemy's port in sufficient quantity to create the presumption that it is intended for the use of the Government's military or naval forces is

"Continuous Voyage as Applied to Contraband," see especially Westlake in *Law Quarterly Review* XV., pp. 24-32; Woolsey in *Outlook*, Vol. 94, pp. 167ff, and Baty, *International Law in South Africa*, ch. 1. The latter is an extremely able attack on the doctrine. Mr. Baty, at least, shows that it is liable to great abuse.

[1] It was claimed at the time that the railway material, although primarily to be landed at a Japanese port, was to be transhipped thence to Chemulpo in Korea, where it was to be used in the construction of a railway by the Japanese Government; but the cargo does not appear to have been condemned on this ground.

[2] See New York *Times* for August 4, 1904.

[3] The cotton and machinery are said to have been of a strictly commercial character.

[4] See letter of A. Holt and Company in the London *Times* (weekly) for August 26, 1904.

[5] See New York *Times* for September 15, 1904. The *Calchas* was captured in the latter part of July and arrived at Vladivostok on August 8, but the decision of the prize court was not rendered before September 13.

The *Calchas* was, however, detained at Vladivostok until October 28, *i. e.*, a month and a half after she should have been released, on the plea of the Russian Crown Advocate that she had carried mail matter from the United States to Japan containing information of special value to the enemy addressed to Japanese officials. This fact was not made public until October 9, when it was learned that several of the Pacific mail steamship lines had notified the Postmaster-General at Washington that they would hereafter refuse to carry United States mail addressed to Japan. It was subsequently learned that the mail bags of the *Calchas* had been opened by Russian officials and that the contents of four registered mail sacks had not only been opened, but removed. The bags were then resealed and forwarded to Japan after considerable delay. Among the letters lost are said to have been some diplomatic communications (which are privileged) from the Japanese Minister at Washington. It was also reported on October 14 that a pouch containing private or domestic mail for the United States cruiser *Cincinnati*, then at Nagasaki, Japan, had been opened, subsequently resealed, and then sent on to its destination.

We are not informed as to the action taken by our State Department at Washington with regard to this matter, but if the facts have been correctly stated, there can be no doubt but that Russia has been guilty of a clear violation of the International Postal Union treaty, as well as of International Law. However far the belligerent right of search of neutral mail steamers and confiscation of noxious mail matter may extend, it cannot possibly be made to justify the detention of a mail steamer under such circumstances. The law bearing on this subject has already been discussed in a previous article of this series. See THE GREEN BAG for October, 1904.

[6] In both cases an appeal has been taken to the higher Admiralty Court at St. Petersburg, which may be expected to reverse the decisions of the local court in view of the recent concessions, in principle, made by the Russian Government to Great Britain and the United States.

prima facie contraband and sufficient to warrant holding it for the decision of a prize court. Even if consigned to private firms, the burden of proof that it is not intended for the Government rests upon the consignor and consignee. If it can be proved that it is intended for non-combatants it will not be confiscated. Small consignments of foodstuff in mixed cargoes will be considered presumptively to be regular trade shipments and will not be seized as contraband." [1]

On August 16 the British Government addressed a strongly-worded protest to the Russian Government against the Russian view of contraband, as also against the sinking of neutral merchantmen by Russian warships. In respect to contraband, Great Britain pointed out the distinction between conditioned and absolute contraband, and "with regard to foodstuffs consigned to a belligerents' port," it was maintained that "proof is necessary that the goods are intended for the belligerent's naval or military forces before they can be considered as contraband." [2]

On August 18, 1904 the United States Government protested vigorously against the confiscation of American flour and railway material on board the *Arabia*. Secretary Hay, after remarking that the "judgment of confiscation appears to be founded on the mere fact that the goods in question were bound for Japanese ports and addressed to various commercial houses in said ports," observed that "in view of its well-known attitude, it should hardly seem necessary to say that the Government of the United States is unable to admit the validity of the judgment, which appears to have been rendered in disregard of the settled law of nations in respect to what constitutes contraband of war."

After calling attention to the ambiguity of the Russian Imperial Order of February 28, in respect to the word "enemy," [3] Mr. Hay thus explained the attitude of the United States in respect to telegraphic, telephonic and railway material:

"With respect to articles and material for telegraphic and telephonic installations, unnecessary hardship is imposed by treating them all as contraband of war—even those articles which are evidently and unquestionably intended for merely domestic or industrial uses. With respect to railway materials, the judgment of the court appears to proceed in plain violation of the terms of the imperial order, according to which they are to be deemed to be contraband of war only if intended for the construction of railways. The United States government regrets that it could not concede that telegraphic, telephonic and railway materials are confiscable simply because destined to the open commercial ports of a belligerent."

This great master of International Law and Diplomacy then proceeds to furnish an explanation of the nature of contraband which we may accept as authoritative:

"When war exists between powerful States it is vital to the legitimate maritime commerce of neutral States that there be no relaxation of the rule—no deviation from the criterion—for determining what constitutes contraband of war, lawfully subject to belligerent capture, namely, warlike nature, use and destination. Articles which, like arms and ammunition, are by their nature of self-evident warlike use are contraband

[1] From the New York *Times* for August 7, 1904.

[2] See London *Times* (weekly ed.) for August 26, 1904. The British position in respect to foodstuffs was thus stated by Lord Salisbury at the beginning of the Boer War: "Foodstuffs with a hostile destination can be considered contraband of war only if they are supplied for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was, in fact, their destination at the time of seizure."

[3] See note cited above.

of war if destined to enemy territory; but articles which, like coal, cotton and provisions, though ordinarily innocent, are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.

"This substantive principle of the law of nations can not be overridden by a technical rule of the prize court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature; and it cannot be admitted that the absence of proof, in its nature impossible to make, can justify the seizure and condemnation. If it were otherwise, all neutral commerce with the people of a belligerent State would be impossible; the innocent would suffer inevitable condemnation with the guilty.

"The established principle of discrimination between contraband and non-contraband goods admits of no relaxation or refinement. It must be either inflexibly adhered to or abandoned by all nations. There is and can be no middle ground. The criterion of warlike usefulness and destination has been adopted by the common consent of civilized nations, after centuries of struggle, in which each belligerent made indiscriminate warfare upon all commerce of all neutral States with the people of the other belligerent, and which led to reprisals as the mildest available remedy."

The logical results of the new Russian doctrine are thus summarized:

"If the principle which appears to have been declared by the Vladivostok prize court and which has not so far been disavowed or explained by his Imperial Majesty's Government is acquiesced in, it means, if carried into full execution, the complete destruction of all neutral commerce with the non-combatant population of Japan; it obviates the necessity of blockades; it renders meaningless the principle of the declaration of Paris set forth in the imperial order of February 29 last, that a blockade in order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and non-contraband goods; and is in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State." And he closes with the following protest on the part of the United States:

"You will express to Count Lamsdorff the deep regret and grave concern with which the government of the United States has received his unqualified communication of the decision of the prize court; you will make earnest protest against it and say that the government of the United States regrets its complete inability to recognize the principle of that decision, and still less to acquiesce in it as a policy. I have the honor to be, sir, your obedient servant,

"JOHN HAY."[1]

In her reply of September 16 to the British protest on the subject of contraband, Russia is reported as having informed the British Government that the Russian Government had "agreed to view as of a conditionally contraband character foodstuffs and fuel,[2] and that supplementary instructions had been issued to the Russian naval commanders and prize courts, calling attention to the misinterpretation which had been placed upon the (Russian) prize regula-

[1] The Hay note or protest of August 30, 1904, which will take rank as one of the best and most authoritative utterances on the law of contraband, has, so far as I am aware, been published in full by only one American newspaper—the Washington *Star*, September 22, 1904. For an excellent summary, see the New York *Sun* for September 21, 1904.

[2] There appears to be some doubt as to whether the Russian reply is specific or satisfactory in respect to fuel. The question of the contraband character of coal was not directly raised by the Russian prize court decisions.

tions."[1] It is admitted that "shipments in the ordinary course of trade to private persons or firms, even at an enemy's port, may be considered *prima facie* not contraband," but upon this point a distinct reservation is made. "The simple fact of consignment to private persons does not preclude the possibility that the articles are ultimately destined for belligerent forces, and Russia insists that it be not necessarily regarded as conclusive evidence of the innocent character of the goods." This reservation is entirely proper. But Russia admits that in such cases the burden of proof rests upon the captor. This is a capital point.

The answer of Russia to the American protest was received on September 19 and is said to follow generally the lines of her reply to Great Britain. Count Lamsdorff stated that instructions had been sent to the prize courts and naval commanders supplementing and explaining the regulations respecting contraband of war originally issued. The conditional contraband character of articles of dual use is admitted in the new instructions. If articles of dual use are addressed to private individuals in Japan they will not be subject to seizure and confiscation unless private individuals are shown to be agents or contractors of the military or naval authorities of Japan.[2]

It will thus be seen that Russia has apparently accepted in principle the contention of the American and British Governments that articles *ancipitis usus* are only subject to confiscation when consigned to places under siege, blockaded ports, or when clearly destined for the military or naval forces of one of the belligerents, and that they are *not* subject to seizure and confiscation merely because they are consigned to a belligerent port, at least in respect to provisions. The decisions of the Russian prize court at Vladivostok will probably be reversed by the Admiralty Court at St. Petersburg, at least, in respect to the confiscation of flour, in the cases of the *Arabia* and the *Calchas*, and we have a right to expect that the conduct of Russian naval commanders and prize courts will be more circumspect in the future.

[1] New York *Times* for September 17, 1904. This communication was made verbally by Count Lamsdorff to the British Ambassador Hardinge at St. Petersburg. It will not involve, it is said, any public amendment of the Russian contraband and prize regulations, but it implies a new official interpretation of these regulations. As such it is binding upon Russian prize courts and naval commanders. Russia thus "saves her face" by not making a public surrender of her former position.

[2] New York *Times* for September 20, 1904. Nothing seems to have been said by Russia regarding machinery and railway material.

PARIS LETTER.

OCTOBER, 1904.

THE question of enlarging the functions and powers of juries in France has come up, now, under the form of a Bill to enable them to use their judgment in discriminating between the degree of guilt of a prisoner and, then, themeslves to apply the punishment specified by the Law. Juries, it will be remembered, in France, only sit in criminal matters and never in civil actions. At present the *Code d'Instruction Criminelle* limits the jury to declare whether the accused committed a crime under all the circumstances set forth in the indictment—aggravating circumstances; legal excuse; with full knowledge of what he was doing.

The foreman of the jury is bound to read to the other members a somewhat long explanation of their duties when they have retired for deliberation. The main features of this explanation are that the law does not seek to know by what process of reasoning they may arrive at their conclusion but whether they have an absolute, personal conviction of the crime of the accused. The jury is forbidden to reflect upon the consequences of their verdict; their mission is not to prosecute or punish. Such is, in brief, the position of the jury as defined by the Code.

The new Bill seeks to change all this. The supporters of the new movement assert that if the law makes a juror responsible for deciding whether there were aggravating circumstances, *etc.*, the intelligence of the juror should not be limited there. The juror should be requested to weigh in his own mind what the punishment should be, choosing from the sliding scale of punishments provided for by the Code that one which he thinks suitable.

"Let us take an example," says the "*Exposé des Motifs*" of the Bill,—"The jury is called upon to decide in the case of murder; the verdict of 'guilty' is rendered, but with recommendations to mercy. If the jury can impose a punishment according to their views, five years' prison may be meted out. At present, the Court can inflict twenty years' penal servitude. But suppose the jury does not wish such a severe punishment carried out. Up to the time of fixing the punishment, the jury is all powerful and can render a verdict without being questioned why or upon what grounds. So, a guilty man may escape scot free and a villain be restored to society; while an innocent man may be, and sometimes is, wrongly punished. We are, today, in a position to have enlightened popular judges (judicial juries). To give a jury semi-judicial powers is to make them more sensible of their high responsibilities. There are two ways to effect this change: either make the jury 'a Judge' and constitute the criminal judge a simple chairman of debates, or, make the judge and the jury a combination judicial machine."

Such is the argument of the supporters of the new jury bill to be presented to the French Parliament next session. The objections to the proposed system appear to be obvious, and I do not think the Bill will stand much chance of becoming law; but it shows the tendency of the times in France to criticise the jury system.

While, in America, there is, from time to time, a discussion as to increasing the number of judges in various States there is a movement, in France, to bring about a contrary result. A Bill is in committee for report to Parliament, which looks like having a better chance of favorable consideration than the preceding jury reform measure. The number of judges of the Court of Appeals has given rise to severe criticism.

There is no question of increasing the number of Appeal Judges, but of cutting down the existing list. This is not surprising in view of the General Term having five judges. Before the Law of August 30, 1883, this number was seven, as a minimum. Even this reduction, which would seem to have been warranted from every point of view, was regarded with apprehension by a few old-fashioned lawyers who feared that the quality of judgments delivered would suffer by the change. This proved to be far from the case. Emboldened by the experiment it is now sought to go still further and prune down a General Term Bench to three judges. The measure is to be submitted by the Government. The measure is proposed by the Government. It is thought that at Paris, while diminishing the number of judges, the great mass of cases can be disposed of satisfactorily by creating additional sections of the Court of Appeals. Something of this kind, indeed, must be done if any attempt is to be made to clear off arrears. In 1900 the Court of Appeals at Paris disposed of 3,725 civil cases and 4,240 criminal affairs. There were 3,856 cases left undisposed of. In 1902 the number of civil cases disposed of was 4,346, while those not dealt with numbered 4,101.

The Arrondissement Courts (*Tribunaux de Première Instance*) are proposed to be reduced in regard to the judges, but in not so sweeping a manner as in the case of the Court of Appeals.

I may point out here that there are 359 District Courts or Courts of *Première Instance*. As they are not properly of first "instance" or original jurisdiction *par excellence*, "arrondissement" or District Courts is the term preferred by the Law Writers.

The new Bill proposes to diminish the judges attached to these Arrondissement Courts, but only in those courts where the number of cases does not reach 450 a year. The courts themselves will not be suppressed—only the number of judges diminished.

The real object of this proposed measure is, it seems, to be to reduce expenditure. It does not seem that any prejudice will be worked in regard to suitors and, in Paris, where the courts are the busiest, the addition of new chambers or sections of the Court of Appeals, is likely to prove a satisfactory arrangement for disposing of the business of the Court.

H. Cleveland Coxe,
Officier d'Académie.

The Green Bag.

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

NOTES.

JIM JACKSON was brought before a Western Judge charged with chicken stealing. After the evidence was all in the justice, with a perplexed look, said, "But I do not understand, Jackson, how it was possible for you to steal those chickens, when they were roosting right under the owner's window and there were two vicious dogs in the yard."

"Hit wouldn't do yer a bit o' good, Jedge, for me to 'splain how I kotched dem chickens, fer you couldn't do hit yerself ef yer tried it fohty times, and yer might get yer hide full er lead. De bes way fer you ter do, Jedge, is jes ter buy yo' chickens in de market, same ez odder folks do, and when yer wants ter commit any rascality do hit on de bench whar yo' is at home."

AT Woodlawn, Missouri, there lives an eccentric character by the name of A. C. Mallory, who combines in his person the seemingly incompatible professions of the barber and the lawyer. Over the door of his combination barber shop and law office there hangs a sign bearing the words: "Attorney at Law and Tonsorial Artist." Mallory does a good business at both professions, and it is no infrequent thing for him to leave a customer, whose face is covered with lather or whose head is only partially shampooed while he draws up a deed or signs a legal paper. This story is told of him:

"Mallory was practising law exclusively twenty years ago. He was well up in the statutes, but wasn't up on the decisions much. Still, his good common sense helped him over the rough places, but once in a while he ran against the legal rocks. In his early days he defended against an attachment that had been sued out on a claim. The lawyer on the other side had a case directly in point. The old Squire asked Mallory if he had anything to say.

"'It looks like it's against me,' said Mallory, 'but I'd like for the gentleman to read that last line again.'

"'Opinion by Judge Sherwood; other judges concur,' the plaintiff's lawyer repeated.

"'Ah, I thought so,' exclaimed Mallory with much relief. 'That is Judge Sherwood's opinion, but it says the other judges conquered. There are six other judges, your honor.'

"'The way I look at it,' announced the Squire, deciding the case, 'Judge Sherwood conquered the other judges. The finding will be for the plaintiff, Mr. Mallory."

IN the district court of Des Moines, Iowa, recently, a negro preacher was indicted and placed on trial, charged with criminal libel. The prosecuting witness was a negro attorney who alleged that the preacher had libelled him by printing and circulating generally a four-page pamphlet in which he accused the attorney of being a gambler and of having been the cause of more than one happy home (among them the preacher's own) being disrupted.

The trial of the case occupied ten days and more than a hundred witnesses, all negroes, were called and testified. The defense of the preacher was that the alleged libellous pamphlet was authorized by the church at a meeting of the church board, called to investigate the matter, and that it was therefore privileged. The defense sum-

moned as a witness one H. West, a black negro, to tell of the purpose and accomplishment of the meeting called to vindicate the pastor. The short-hand transcript of Mr. West's most important and lucid testimony is as follows:

Q. Mr. West, tell the jury the purpose in view in calling a meeting of the congregation.

A. That theh meetin' was called concernin' of a pamlet that weh to be published an' circled in the community at lahg to the end that the Pastoh's fust existence in the Chu'ch could be fully accomplished an' the 'fuculty in the congregation vindicated.

Q. Who were present at this meeting to explain the difficulty in the congregation; explain about that more fully.

A. Theh was a number of them that didn't tuhn out at all, an' theh was two that was theh I know didn't commune on the occasion.

Q. Do you know why they did not?

A. Well, this 'fuculty weh up an' they didn't know how it was an' they didn't feel supposed to commune until it was satisfied.

Q. Tell us more particularly about that meeting on the first Sunday in April.

A. Theh was a meetin' concernin' of the pamlet that weh drawn up that this is brought to approval of an' with regahds of what had been goin' on heahtofoah, an' slanderin' an' arrest that had been made and hadn't even been proved bein' true, and it had been discussed several times on different 'casions to put an end to it, an' the three of us was stopped at a time to meet at this date to know what was to do about it an' we decided on him drawin' up a pamlet of any number he thought was nec'-sary to be drawn up and circled among the citizens of Des Moines to give it consideration, as to put it to sunder foh the ones that was puttin' it out who didn't seem to want to do right by it. That was the way I understood it.

It only remains to be added that the preacher was convicted and sentenced to four months in jail.

HOWELL—"That was a queer petition in bankruptcy that Rowell filed."

Powell—"What was there queer about it?"

Howell—"He gave his assets as one wife and his liabilities as alimony for three others."—*Town Topics.*

JIM WEBSTER was being tried for bribing a colored witness, Sam Johnsing, to testify falsely.

"You say the defendant offered you $50 to testify in his behalf?"

"Yes, sah."

"Now repeat what he said, using his exact words."

"He said he would give me $50 if I—"

"He didn't speak in the third person, did he?"

"No, sah; he tuck good care dat dar were no third pussons around; dar was only two—us two."

"I know that, but he spoke to you in the first person, didn't he?"

"I was the first pusson myself."

"You don't understand me. When he was talking to you did he say, 'I will pay you $50?'"

"No, sah; he didn't say nothin' 'bout you payin' me $50. Your name wasn't mentioned, 'ceptin' he told me ef eber I got into a scrape you was de best lawyer in San Antonio to fool de jedge an' de jury—in fac', you was de best in town to cover up rascality."

For a brief, breathless moment the trial was suspended.—*Chicago Post.*

WE have a crime in this city of a new kind. A murder without the *corpus delecti!* There have been crimes that could not be proved. Counselor James A. Brady went into his barber shop one morning and found the man who shaved him in a highly nervous state. The famous criminal lawyer was annoyed.

"What's the matter this morning, Fritz?" he asked.

"I have been arrested this day, Mr. Brady."

"Arrested? What have you been doing?" asked the great lawyer.

"They say I have been stealing gas," was the reply.

"But you haven't, have you?"

"Vell, I don't know; I dug out under the street and connected up der pipe; und I have been burning the gas for a year."

"If that's all I will clear you," said the counselor, seating himself in the chair. "Don't cut me and I'll get you off."

At 10 o'clock of that day everybody in the police court was surprised to see Counselor Brady walk in. When the barber's case was called, he stepped forward as his attorney.

The testimony of the gas men was heard at length. Mr. Brady did not interpose an objection. When the prosecution had its evidence in, Brady turned to the justice and said:

"I ask for the production here before you of the *corpus delecti*." The gas could not be produced and the evidence of the crime being absent the prisoner was discharged.

Mr. Brady had hardly got to his office before the gas company had an official there to ask Brady to draw a bill for the Legislature that would cover the stealing of an intangible thing. His fee was $10,000. This is a true tale because Mr. Brady told it to me himself.

This murder is of the same character.—*Brooklyn Eagle.*

"THE practice of law in the country may not be so lucrative as in the big city, but it is vastly more amusing," said a lawyer of prominence up in Senator Platt's home town, Oswego. "One experience rewarded me for all the trouble I had in getting to the scene of the trial.

"The case was going along smoothly and I was examining an important witness, when from the rear of the crowded court-room this remark was interjected in a loud voice:

"'That man's a liar.'

"I hesitated a moment, expecting the judge, a bluff country jurist, to take some action. He said nothing, so I continued to question the man on the stand.

"Presently came another outburst from the voice in the crowd. It was to the effect that the witness had no truth in his make-up and his story was an offence against justice. Still the court said not a word.

"Feeling that it was up to me to do something, I asked the judge to have the person who dared to interrupt the proceedings committed for contempt. The Judge leaned over to me and whispered:

"'I'd do it, counsellor, but I don't know how to draw the papers.'

"The court may have been weak on law, but he was strong on human nature. He pondered a moment and then turned to the witness, who was a big chap.

"'Do you know who it was that called you a liar?' he asked.

"'I do, your Honor,' said the witness.

"'Can you lick him?' the court queried.

"'That's what I can.'

"'Then you go and do it,' ordered his Honor. 'This court is adjourned for fifteen minutes until this little matter of court etiquette is adjusted.'

"The witness left the chair, singled out a pugnacious looking but under-sized man in the crowd, grabbed him by the collar and yanked him out into the sunlight. In five minutes the witness was back, slightly ruffled in his appearance, but smiling broadly. He resumed his place on the stand, the judge rapped for order, and the trial of the case went on.

"There were no more interruptions."—New York *Sun.*

AN instance of legal courtesy occurred not long ago in a Western court room. A lawyer with Mac prefaced to his name and a brother lawyer engaged in a heated discussion. The latter maintained his position claiming he could find his authority and began to turn over the pages of the statute book when quick as a flash Mac said, "You will find what you want on page —, section —."

Mac's opponent looked up the reference and found the law governing idiots.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book whether received for review or not.

ELEMENTS OF INTERNATIONAL LAW. By *Henry Wheaton.* Fourth English Edition, by *J. B. Atlay.* London: Stevens and Sons. 1904. (xxxv+848 pp.)

Doubtless Wheaton's safe title to immortality lies in his having been the reporter of the volumes of United States Reports which bear his name. Yet, for the present, he is best known—especially outside the United States—as the author of the *Elements of International Law,* for Wheaton has had the distinction of being one of the very few American lawyers whose treatises have been accepted abroad and have there been kept alive by reëditing. The work originally appeared in Philadelphia in 1836. In the same year there was a London edition. There was another American edition in 1846. There was an edition in French in 1848, and again in 1853, 1856, and 1868-80. There were two American editions by Lawrence, 1855 and 1863. There is said to have been an edition in Chinese in 1864. (See Dana's Wheaton, note 8.) An American edition by Dana appeared in 1866. English editions by Boyd appeared in 1878, 1880, and 1889. The present edition is the successor of the editions by Boyd. It gives Wheaton's text without change. In smaller type there are textual additions, partly by Boyd and partly by the present editor; and these additions, as well as the foot notes and the appendices, bring the book down to date.

A few illustrations will serve to indicate how well the editor has performed his task and how interesting is the result at the present time—a time somewhat prolific of international questions.

Just now this is a pertinent passage: "Since 1899 all persons of whatever nationality within the confines of Japan have been subject to the Japanese tribunals; as a return for this all limitations imposed upon foreigners in respect to trade, travel, and residence, have been removed. In the latter year Japan was invited to The Hague Conference, and her representatives signed the various conventions there adopted. In the Chinese War of 1894, with the grave exception of the Port Arthur massacre, Japan has striven scrupulously to comply with the highest civilized standards. Her soldiers were equally conspicuous for efficiency and humanity during the military operations which followed the Boxer rising in 1900. To her prompt despatch of a division of 21,000 splendidly-equipped troops, the relief of the Legations may be largely attributed. In 1902 an offensive and defensive treaty of alliance was concluded between Great Britain and Japan. In these circumstances it is impossible to dispute her right to rank among the powers who are, without reservation, subject to international law." (23-24). A few pages beyond one discovers this comment upon an American topic: "President Cleveland gave a startling illustration of the lengths to which the Monroe Doctrine might be pushed. In his message of December 17, 1895, he claimed for the United States the right to 'take measures to determine with sufficient certainty for its justification what is the true divisional line between Venezuela and British Guiana.'" (98.) Another American topic, the recent elevation of some of our diplomatic representatives to the rank of ambassadors, receives the brief attention of which it is worthy. (252-253.) Another American question, the dispute as to the Alaska boundary, receives a useful summary which includes the award of the tribunal on Oct. 20, 1903. (268-269.) Still another American topic, the Panama canal, receives due prominence, the editor closing his account thus: "On November 5, 1903, a revolution on the Isthmus, by which the inhabitants of the adjacent territory declared themselves independent of the Colombian Government, resulted in the proclamation of the Republic of Panama,

whose existence was recognized with remarkable promptitude by the United States; and when President Roosevelt sent his message to Congress on December 7, he was in a position to lay before the Senate a treaty with the new Republic for the building of a canal across the Isthmus of Panama." (317-320.) There is an account of that incident of the presidential campaign of 1888, which resulted in our Government's sending passports to the British minister at Washington. (338-339.) The history of The Hague Peace Conference is given, including the judgment in February, 1904, on the preferential claims made against Venezuela. (405-407.) The "pacific blockade" of Venezuelan ports is mentioned as a source of "difficulties," with the comment that, "When in December, 1902, the fleets of Great Britain and Germany instituted a pacific blockade of the ports of Venezuela, the sinking of Venezuelan ships by the latter power was an act of war which would fully have justified Venezuela in having recourse to retaliatory measures which would not have been confined to the German fleet." (415-416.) The beginning of hostilities without previous declaration of war is discussed, with references to the Transvaal war of 1899, the attack on China in 1900, and the Russo-Japanese war of 1904. (418-420.) As to privateering, there is notice of the proclamation of the United States in 1898 of an intention to abide by the Declaration of Paris. (503.) The abolition of prize money by the United States in 1899 is noticed. (520.) Appendices give the English and American statutes as to naturalization, extradition, and foreign enlistment, the English Naval Prize Act, the Treaty of Washington of 1871, the articles of The Hague Convention of 1899, the Declaration of Paris of 1856, the English Territorial Waters Jurisdiction Act of 1878, the Suez Canal Convention of 1888, and the Anglo-French Agreements of 1904 as to Newfoundland fisheries, and Egypt, Morocco, Siam, Madagascar, and the New Hebrides.

Enough has been said to indicate that the present editor has brought the book abreast of the times. It remains to add that he has written in a spirit of fairness, although even in this very creditable piece of work one sees that there is still reason why each nation should produce its own writers on International Law.

Wheaton's services to the world were not restricted to the twelve volumes of United States Reports, this famous treatise on International Law, and the less known *History of the Law of Nations*. This is not the place to attempt to do justice to his varied labors. One matter, however, must certainly not be omitted, for it is particularly appropriate at this time of discussion as to Panama, and it indicates Wheaton's desire to promote international good will through commercial intercourse, as well as through the development of law. To quote the words of Mr. W. V. Kellen, in *"Henry Wheaton, An Appreciation:"*

"He even elaborated a plan for a waterway from the North Sea across Germany to the Adriatic and the Mediterranean, forming, with a canal through the Isthmus of Suez, a route between Europe and the East Indies, as well as a second route from Europe and the United States to the Orient through the Isthmus of Panama, both these sea routes to be put under the common guarantee of all the maritime powers as a part of the great thoroughfare of Nations. 'It is a great and fine conception of yours, that of opening up a route from the North by way of Trieste to the Levant and into India. The world owes it to you,' writes his friend, Alexander von Humboldt, in 1846."

THE GOVERNMENT OF OHIO. By *Wilbur H. Siebert*. New York: The Macmillan Company. 1904. (xv+309 pp.)

This is one of a series devoted to presenting in considerable detail the governmental systems of the several States. The present volume, besides tracing, principally from the constitutional point of view, the history of the Northwest Territory and of Ohio, and describing the functions of the several departments of the State and local governments, contains an instructive presentation of the governmental functions, which by

many persons are inaccurately called socialistic, but which are by this careful author classified as "the protection of the public," "the support of public education," "the supervision of charities and corrections," and "the control of economic interests." To each chapter is prefixed a useful bibliography, valuable as the basis of study as to any State. It is pleasant to notice that the first reference in the volume cites Chase's preliminary sketch of the history of Ohio to 1833, the introduction to the future Chief Justice's painstaking edition, in three volumes, of the Statutes of Ohio.

AMERICAN RAILROAD LAW. By *Simeon E. Baldwin.* Boston: Little, Brown, and Company. 1904. (lxvi+770 pp.)

In the volume before us, Judge Baldwin has given the profession an able and comprehensive treatise on the important subject of the railroad law of this country, which will be of permanent value. The field is a wide one, covering, as it does, questions of franchises and organization, location, construction and equipment, finances, the varied problems of operation, transfers and liens, and questions—here grouped under the title of actions—of remedies, rules of evidence, receiverships, foreclosure, re-organization and the like.

It was manifestly impossible to treat in detail all of these questions in something less than six hundred pages of text (the last hundred pages of the volume being given over to forms and a full index.) What Judge Baldwin has done has been to give a clear and valuable outline of American railroad law. It is within bounds to say that no law writer in the country is better fitted for this task than the learned author whose book is before us.

The general subject of Operation is more fully treated than are other topics. Not the least important part of the book for reference is the Appendix, where are given various forms of incorporation, location and crossings, construction and equipment, conveyances, car trusts and contracts.

BRIEF UPON THE PLEADINGS IN CIVIL ACTIONS AT LAW, IN EQUITY, AND UNDER THE NEW PROCEDURE. By *Austin Abbott.* Second and enlarged edition by the publishers' editorial staff. Two volumes. Rochester, New York: The Lawyers' Co-operative Publishing Company. 1904. (xxxiii+xvii+2120 pp.)

The first edition of Mr. Abbott's well-known *Trial Brief* was published in 1891, in one volume; this second edition, by reason, chiefly, of the additional authorities cited, but partly because of new matter (*e. g.* Amendment of Pleadings), has expanded to two volumes. The first volume covers Demurrers; the second is given over to Issues of Fact. The general plan and arrangement of the book is good; the statement of propositions is clear; so that it would seem that a new edition, once in a dozen years or so, embodying pertinent cases decided in that interval, is all that is needed to make the *Trial Brief* of value to the profession for years to come.

THE LAW OF WATERS AND WATER RIGHTS. By *Henry Philip Farnham.* Three volumes. Rochester, N. Y.: The Lawyers' Co-operative Publishing Company. 1904. (clxxx+896+xvi+997+xiv +1063 pp.)

The subject of Waters and Water Rights is treated in these volumes under three principal heads, namely: Rights of States and Nations, Rights between Public and Individual, and Rights between Individuals. The discussion of the Rights of States and Nations is brief, filling a bit less than one hundred pages. The importance of these volumes lies, however, in the exhaustive treatment which the author has given to the Rights between Public and Individual and the Rights between Individuals, and to the large variety of subjects which are included under these two general heads,—for example subjects (to mention only a few) so widely different as Rights of Riparian Owners, Municipal Water Supply, Drainage, Ferries, Fisheries, Irrigation, Mill Rights, Subterranean Waters and Rights between Landlord and Tenant. Perhaps

the most valuable chapters are those on Municipal Water Supply and Drainage.

THE ART OF CROSS-EXAMINATION. By *Francis L. Wellman.* New and enlarged edition. New York: The Macmillan Company. 1904. (404 pp.)

It is not often that a law book goes into a second edition within a twelve-month; and it is probable that even this book of Mr. Wellman's, excellent as it is from a purely legal point of view, would not have enjoyed, so quickly, the good fortune of a new edition, if it had appealed solely to the members of the legal profession. Mr. Wellman has, however, performed the difficult task of writing a book which is of equal interest to the lawyer and the layman, and which is, without question, the most popular law book of the year.

This book, however, has been reviewed at length in our columns so recently (THE GREEN BAG, February, 1904), that it seems necessary to say, at the present time, only that the second edition has been re-written to a considerable extent, and enlarged, partly by the addition of new chapters on "Cross-examination to the Fallacies of Testimony" and on "Cross-examination to Probabilities,—Personality of the Examiner, *etc.*", and partly by the bringing in of fresh illustrations. In its present form the book is, more than ever, "sound, interesting and useful."

CODE REMEDIES. Remedies and Remedial Rights by the Civil Action according to the Reformed American Procedure. By *John Norton Pomeroy.* Fourth edition, revised and enlarged by *Thomas A. Bogle.* Boston: Little, Brown, and Company. 1904. (clxx+983 pp.)

Since the appearance of the first edition of Pomeroy's *Code Remedies* in 1875, each decade, roughly speaking, has produced a new edition. This is as it should be, for the work was well done in the first instance, and a revision of such a treatise as this, is necessary about once in ten years, in order that the book may keep pace with Code changes and with decisions on pleading under the Code. A volume dealing with "Reformed Procedure"— the "grand principle" of which Professor Pomeroy, in the preface to the first edition, defined as "the abolition of the distinction between legal and equitable suits, and the substitution of one judicial instrument, by which both legal and equitable remedies may be obtained, either singly or in combination"— is of practical use, of course, to the lawyer practising in those jurisdictions (about half of the entire number of States) where Code pleading has been adopted; but Professor Pomeroy has written with such enthusiasm and knowledge that his treatise is also of value to the lawyer whose interest in the subject is purely theoretical.

The editor of the present edition, Professor Bogle, of the University of Michigan, has performed his editorial duties with judgment, adding considerable new matter and bringing the citations down to date.

CYCLOPEDIA OF LAW AND PROCEDURE. Edited by *William Mack.* Volume xiii. New York: The American Law Book Company. 1904. (1049 pp.)

The thirteenth volume of the *Cyclopedia* covers topics from Damages to Descendible. The principal articles are those on Damages, by Robert Grattan and Frank E. Jennings; Death, by Joseph Walker Magrath and Frank W. Jones; Deeds, by Joseph A. Joyce and Howard C. Joyce; and Depositions, by James Peck Clark. Other important contributions are those treating of Dead Bodies, by Frank W. Jones; Action of Debt, by Frank E. Jennings; Dedication, by William Alexander Martin; Depositories, by Arthur W. Blakemore; and Deposits in Court, by Everett V. Abbot. The notes are full and valuable, as usual.

CURRENT LEGAL ARTICLES.

In the *National Review* (London) for September, the "Reminiscences of an Irish County Court Judge"—the late Judge O'Connor Morris—contain the following just estimate of one of the few great judges of the present day—Lord Chief Baron Palles:

The most brilliant figures on the Home Circuit of my day were John Thomas Ball and Christopher Palles, men of the most eminent parts, but very unlike each other. . . . Palles had a logical and most powerful intellect, extraordinary industry, immense learning; above all, a fearless and independent spirit. He brought these great qualities to the Bench he adorns. He is, perhaps, the ablest judge in the Three Kingdoms. He ought to have had the Great Seal of Ireland years ago, but lax administration and political favors have deprived him of the position to which he had a clear right. He has been supplanted and distanced by clever time-servers in their craft, who are not worthy to unloose his shoe-latchet. In Grattan's phrase "The curse of Ireland is on him." The genius of this great master of his art has been frowned down at the Castle.

The novel, but important, subject of "The Lawyer's Lachrymal Rights" is cleverly discussed by Albert W. Gaines, of the Chattanooga Bar, in the *American Law Review* for September-October. Mr. Gaines asks:

Has a lawyer, in the course of his argument to the jury, the right to cry? Has he the right, *arguendo*, to give vent to "words that weep and tears that speak?" . . .

It will tend to quiet the professional alarm, and at the same time appease the professional wrath, to know that lawyers in Tennessee, at least, have a judicial determination of the question recognizing and distinctly adjudicating the inviolable lachrymal rights of the lawyer.

In a well-considered case, which came before the court upon an assignment of errors to the effect that "counsel for the plaintiff, in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, shed tears and unduly excited the sympathies of the jury in favor of the plaintiff and greatly prejudiced them against the defendant," the Supreme Court of Tennessee, in an able opinion delivered by that erudite, discriminating jurist, Judge Wilkes, upheld the lawyer's constitutional right to cry before a jury. . . .

As counsel for appellants in the Tennessee case referred to availed themselves of the salutary rule which excuses the citing of authorities "when there are none known to counsel;" and while the court in delivering the opinion stated, that, after diligent search no authority could be found, there being no precedent, we may confidently rely upon this case as the leading case upon lachrymal rights; and, besides the guarantee of the Constitution that the citizens of each State shall be entitled to all of the privileges of the citizens of the several States, we feel that the decision is correct in principle, so sound, so broad and so universal in its application that counsel all over the land may confidently rely upon it, and, under its protection, may unrestrainedly exercise their constitutional rights and give way to the "melting mood" in the presence of the court and jury.

The right of the lawyer to cry before the jury is not only fundamental, but it is a prescriptive right, having existed from time immemorial whereof the memory of man runneth not to the contrary.

The demand for redress of all grievances at Runnymede contains no allusion to any encroachment upon the lawyer's lachrymal rights; and so the Petition of Right and the Bill of Rights are significantly silent as to the lawyer's right to cry, proving conclusively that lachrymal rights were universally recognized and were not even questioned by the most tyrannical of kings, and that, too, in the face of the fact that these rights were being constantly, openly and notoriously practised by a profession which has never yet been accused of a retiring modesty in the assertion and maintenance of its prerogatives.

Lachrymal rights are strictly personal.

The law knows no such maxim as *qui lachrimat per alium lachrimat per se.* Every lawyer has the constitutional right to cry for himself, and the presence of the official Court-Crier does not curtail his unquestioned privilege of giving vent, if he so desires, to a veritable lachrymal storm.

THE recent arrest and fining in Massachusetts of an *attaché* of the British Embassy is treated in an eminently fair manner by the English legal journals. For example, the *Law Times* says:

The arrest and imposition of fines for furious motor driving on Mr. Gurney, the third secretary of the British Legation at Washington, and for contempt of court in refusing to plead, by a magistrate at the police court at Lenox, Massachusetts, on Monday in last week, were clear violations of international amenities, and the fines have, accordingly, been remitted and a suitable apology offered. The fiction of exterritoriality has, however, been established by the consensus of nations with a view to the securing of a free and fearless discharge of diplomatic functions, unrestrained by obedience to the local jurisdiction, for ambassadors and the members of their suites possessing a diplomatic character, among whom are included secretaries of embassies, who, like the ambassador himself, hold commissions from the Sovereign. While the privilege based on the fiction of exterritoriality continues it exempts its possessors from local jurisdiction. It is, however, a privilege which might well be waived in an ordinary police case, and Mr. Gurney would probably have been more discreet, and have acted more in the spirit of international comity, if he had paid the fine for furious motoring without invoking his diplomatic character as a plea to the magisterial jurisdiction—a course which Mr. J. Mortimer, who, when an *attaché* of the American Legation at St. Petersburg in 1859, on his arrest by a policeman for violating the law prohibiting smoking in the streets of St. Petersburg, writes to the Press that he followed, "paying the fine and carefully abstaining from informing the magistrate that he was a member of the Corps Diplomatique." In ordinary cases of a violation by a diplomatic agent of the local criminal law, the correct and usual course is to ask his recall.

And in the same admirable spirit is the *Law Journal's* comment:

There is distinct authority that in the United States a diplomatic functionary is not amenable civilly or criminally (*Ex parte* Cabrera, 1 Washington, U. S. 231). In this country exemption from civil process is undoubtedly secured by the Diplomatic Immunities Act of 1708, but there is no case of authority declaring that absolute immunity from criminal process exists. The famous case of Pantaleone da Sa, in Cromwell's time, is the other way. A member of the Portuguese Embassy was tried and executed for a murder in the Royal Exchange, and the protests of Portugal were treated as unfounded in law. But in modern times it seems to have been uniformly admitted that diplomatic personages are here exempt from criminal proceedings. Attempts to hold inquests on deceased members of the Chinese Embassy have been defeated, and process for bilking cabmen, keeping fowls so as to be a public nuisance, and for park offences have failed on the ground of privilege. The jurists are not agreed as to the basis and true limits of diplomatic immunities, nor on the question whether they are to depend on the fiction of extraterritoriality or on some other more reasonable principle. But, assuming the existence of the privilege, its abuse may lead to serious consequences, and we doubt whether the British diplomatic service will gain much by possessing a person who claims the diplomatic privilege to break the police regulations of the country to which he is accredited or to scorch over its surface to the danger of its citizens.

It seems, however, that even American officials abroad are sometimes guilty of breaking speed rules, as witness the following item from the "Irish Notes" in the same issue of the *Law Times* from which is taken the extract quoted above concerning Mr. Gurney:

The campaign against furious motor driv-

ing in Dublin continues. The last person to fall into the hands of the police was the American Consul in Dublin, who has been summoned and fined. It was suggested rather than put forward that his international character gave him some sort of immunity; but, of course, such a contention could not be raised for a moment in the case of a consul.

On the question of the legal status of a consul, the *Law Times* says:

The claim of the consul-general for Spain in Liverpool for exemption *virtute officii* from rates which he has declined to pay, referring the matter to the Spanish ambassador, cannot, we submit, be sustained on grounds of international morality. Consuls are, no doubt, clothed with diplomatic functions by special conventions in non-Christian countries, where exceptional powers and immunities are rendered necessary by the absence of stable and responsible local government. Consuls commissioned by foreign States to look after the commercial interests of their citizens in Christian countries and countries possessing a stable government conducted on principles consonant with European civilization have never been charged with the conduct of foreign affairs, and have not accordingly been endowed with a diplomatic character, although by comity they enjoy certain exemptions from local and political obligations, such as exemption from personal taxes, from arrest for political reasons, and from having soldiers quartered in their houses, and, in short, from such burdens as might hinder the effective discharge of consular duties. They are not, however, withdrawn from the civil and criminal jurisdiction of the courts of the country in which they officiate. "Consuls," wrote Jefferson, "are not diplomatic characters, and have no immunity whatever against the laws of the land," while Mr. Hannis Taylor lays down the proposition that consuls who hold real property and have a fixed residence in the country cannot by reason of their consular status divest such property of its national character;" (Hannis Taylor's *Public International Law*, p. 358). For a full exposition of the consular status, see *Ibid.*, pp 357-361.

In the *Central Law Journal* Robert A. Edgar, discussing the question "Is the Presumption of Innocence in Criminal Cases to be Weighed as Evidence in the Case," says in conclusion:

It will be seen from an examinatian of the foregoing authorities that a considerable difference of opinion exists as to the nature of the presumption of innocence, and whether it can be considered "evidence" in favor of the defendant which can be "weighed" by the jury. Prior to the case of Coffin *v.* United States [156 U. S., 432] courts had reached diverse conclusions, without apparently making any examination of the question or giving reasons for their judgments. That case purports to have considered the question carefully *de novo*. The doctrine there announced has since been vigorously denied by Prof. Thayer and other text writers.

It is difficult to say where the weight of authority lies. Perhaps more adjudicated cases have decided in favor of the affirmative of the question, though in some of these the decision may have been influenced by statute. The majority of text writers seem to take the negative view. The earliest books and cases which have come under my notice appear to say little or nothing about the presumption of innocence.

In view of the wide diversity of opinion my own conclusion is of little value. Most men are innocent of crime, and from this general truth, the jury, as reasonable men, will infer or presume that it is more probable than not, that the particular man before them accused of crime is innocent. This is a natural presumption and may be "weighed" in favor of the prisoner even without a formal charge. But in so far as the presumption is one of law, it simply means, that the burden of proof is on the one asserting crime to prove it. The defendant is *prima facie* innocent, and if no evidence is brought against him, he is en-

titled to be acquitted. The presumption itself does not tell the amount of evidence necessary to overcome it. In criminal cases it is accompanied by another rule, which is that the proof against the prisoner must exclude every reasonable doubt, and in civil cases that the crime must be established by a preponderance of testimony. In each case the natural presumption of innocence may be considered as among the defendant's evidence. But I confess myself unable to see how a presumption of law which is a mere legal rule can be "weighed," how it can convince the understanding and make a man believe what he might otherwise disbelieve.

If the presumption of law is not an arbitrary one, devoid of probative force, why is it stronger in criminal cases than in civil cases? Why is the innocence of a party presumed rather than the innocence of a third person? Why should the presumption be stronger "evidence" in the one case than in the other? Is the understanding convinced in the one case more than in the other?

I do not wish to be understood as saying that the presumption of innocence should not be charged, even though the jury is correctly instructed as to the burden of proof and reasonable doubt, and though logically it adds nothing. It may tend to disabuse the jury of any prejudice against the prisoner on account of the position in which he stands, even though an instruction that the burden of proof is on the State to prove every allegation against the prisoner would be substantially the same.

WRITING concerning "Reckless Automobilists," *Case and Comment* for September says:

A supposition that automobiles can run with impunity anywhere up to the limit fixed by statute or ordinance seems to be somewhat common. Of course, it is entirely erroneous. An enactment that the speed shall not exceed a fixed maximum is by no means a license to run at that speed under all circumstances. The general principles of the law of negligence necessarily require that the speed under particular circumstances should be far less than that maximum, or indeed that the machine must be entirely stopped, if common prudence demands it in order to avoid a threatened injury to another person. There is a surprising lack of adjudications in the courts, up to the present time, in respect to the use of these machines, but the principles applicable to the subject are the same as those which govern all vehicles on highways. Outside of specific enactments, the question is simply one of negligence, and in most instances this will, of course, be a matter for the jury. It is important for the public to have the relative rights of automobilists and others very sharply defined by specific precedents, though there can be little dispute as to the general principles applicable.

UNDER the title, "Church Law and Trust Law," the *Juridical Review* for September has the following interesting note on the recent important Free Church of Scotland case (Bannatyne *v.* Lord Overtoun):

The judgment of the House of Lords in this great leading case was, in the first place, a verdict on a twofold issue of fact. It found not only that the Free Church of Scotland, at its origin in 1843, held certain articles of creed, or at least of doctrine—notably the doctrine of Church Establishment—but, secondly, that having originally accepted these articles, it had retained no power to revise them. These mere findings, in fact, applied to property accumulating and to views changing during sixty years, and to a Scottish Church known to the world chiefly by its initial sacrifices for freedom, were sufficient of themselves to convulse our ecclesiastically-minded population. But what the importance of the decision is to the law is a different question

Has this decision changed our general Church Law or Trust Law? . . . It may, probably, be laid down, to begin with, that while the judgment denies that the Free Church had in its constitution a right to change doctrine (or, at least, denies that such a right had been proved), it does not deny that a church may put exactly such a claim into its memorandum of association,

and may prove it. But it certainly goes this length—that the church must prove it. The presumption is henceforth against it, even in the case of a Scottish church, which claims in its creed a Christ-given government, and has once in its history given up everything for freedom. But does not the presumption against it go further still? Some parts of the Lord Chancellor's opinion might suggest that a creed or confession, being the foundation of a church, cannot be revised even by a body which originally claimed the right to do it. And Lord Robertson repeatedly hints, even while dealing with a church which from its birth had ear-marked its churches and manses for a future "united body," that there may be much in the view taken in the old cases of Kirkintilloch and Thurso, that unless a church is absolutely unanimous, it may be prevented from uniting with another, even when no difference in doctrine or principle is alleged between the two. But probably neither judge is quite committed to either extreme position. And neither made part of the judgment of the House. The privilege or latitude of Scottish churches may be henceforth no greater than that of ordinary trusts. But it is, at any rate, no less. And it is by no means restricted to that of statutory companies with their memorandum and prospectus.

But it is doubtful whether this judgment of our highest tribunal, assuming it to be exactly just as to all the past, has sufficient illumination for the guidance of such a future. It does not even give (as was expected, and as the Lord Chancellor's luminous opening seemed to promise) a clear decision on what has been called, in the narrowest sense, the Law of Creeds. It probably rules that these solemn documents are for ever unrevisable. But this formidable quality is apparently made common to them with some of those casual or annual "testimonies" which Presbyterian Churches put in a far lower place than the Confessions they revere—and revise. What are the documents which bind a church, is at least as doubtful after this judgment as before.

Yet, with all deductions, this was a great decision on the law, as well as on the facts. For it rules that Westminster Confession Churches (and no doubt, therefore, all churches under the law of Scotland), so far as law can compel them, must not at their own hand change the form—in particular, the doctfinal form—in which they took origin, unless they have reserved powers of change far more explicit than have hitherto been thought necessary.

In *The Commonwealth Law Review* (Australia) for August, C. E. Weigall discusses "Industrial Arbitration and Common Law Rights," under the Australian labor laws. Of the "preference clause" he says:

Under what is known as the preference clause, s. 36 of the Act, the Court is given power to direct that preference shall be given to members of an industrial union of employés, who offer their services to an employer at the same time as a non-unionist workman, other things being equal. The Arbitration Court has held, in the Bread-carters' case, that this provision does not restrict the general powers which are given in the definition of industrial matters. In that case the Court ordered that any non-unionist employé who was engaged must join the union within a certain time after he entered upon his employment. The effect of such an order is to prohibit altogether the employment of a non-unionist workman, as such. This, it is submitted, the Court has no power to do, the general power given to the Court by the definition of industrial matters being in this respect subject to the conditions laid down in s. 36 of the Act specifically dealing with such orders. The right of an employer to employ non-unionist workmen has been further restricted by the interpretation placed by the Court upon its awards which contain a preference clause. Thus, on a summons against an employer who had engaged a non-unionist workman because he said he thought him the most suitable for his requirements, the Court, in *In re* Wild, held the employer guilty of a breach of the preference clause, and laid

down the principle that an employer bound by such a clause who employs a non-unionist is liable to a penalty, if in the opinion of the Court there are at any time during the existence of the employment competent unionists available to do the work required to be performed, and that the question of the relative competency of the workman is a matter not for the employer, but for the Court, to decide. An employer bound by such a preference clause, therefore, cannot safely employ a non-unionist unless he has applied to the secretary of, the employers' union and been informed that none of his members are available, and is liable if he does not discharge the non-unionist directly a unionist is available. The secretray of the employés union is therefore clearly master of the situation, and the employer, while bound to pay the wage fixed by the award or do the work himself, cannot choose the man whom he thinks will give him the best value for his money. Further, the advances must be made by the employer, the employés union being under no obligation to see that their men are on the spot and apply for the work.

Like the prohibited immigrant, the non-unionist is "not wanted" by the ruling class, and it seems safe to predict that in a short time he will be as rare a phenomenon as, for instance, a baby.

In the *American Law Review* for September-October, Rudolf Dulon praises the decision of the Arbitration Tribunal at The Hague, which held that Great Britain, Germany and Italy—the blockading powers—"had preferential rights over the other claimant nations in the settlement of the claims against Venezuela," and states the facts in the case more fully than they have been stated heretofore. He says:

After the Venezuelan ports had been placed under blockade Venezuela asked the United States to convey to Germany and Great Britain a proposal for an arbitration. This was done. Germany and Great Britain replied that arbitration seemed to them a satisfactory basis for arriving at a settlement of their claims, but that they considered it necessary to make certain reservations. Thereupon the President of Venezuela telegraphed that he recognized in principle the justice of the claims which the allied powers had presented to Venezuela; that these claims would already have been settled if it had not been for the Civil War, and that today the Venezuelan government bowed to superior force and would send Mr. Bowen, who would be authorized to settle the whole question as the representative of Venezuela, to Washington to confer with the representatives of the powers which had claims against Venezuela in order to arrange an immediate settlement or for reference to The Hague Tribunal or other arbitrator. The German government then informed the United States that before entering into further negotiations with Venezuela it appeared necessary that President Castro should give a definite declaration that he accepted unconditionally the reservations contained in a previous communication, besides which he must specially make clear in what manner he intended to pay the demands contained in that memorandum, or to give security for the amount. In reply to this demand President Castro telegraphed to Mr. Bowen that the Venezuelan government accepted the conditions of Great Britain and Germany, and requested him to go immediately to Washington for the purpose of conferring with the diplomatic representatives of Great Britain and Germany and with the diplomatic representatives of the other nations which had claims against Venezuela and to arrange either an immediate settlement of the claims or for their submission to arbitration. This telegram was transmitted by Mr. Bowen to the Secretary of State at Washington and by the United States ambassador at Berlin by instruction communicated to the German government a part of a letter from Mr. Bowen to the Secretary of State of the United States, which was marked confidential, and in which Mr. Bowen requested that if, as he understood, Great Britain and Germany wanted to know what guaranty they would

have, they be informed that it would be the customs houses, consequently, he, Mr. Bowen, begged that the blockade be raised at once.

It was seriously claimed in the proceedings before The Hague Tribunal by Venezuela and by others of the creditor nations that the agreement of Venezuela that the blockade powers should have the customs houses as a guaranty was void because it was obtained under duress. This contention might as well apply to the protocols of February 13, 1903, and even to the submission to arbitration, because both were entered into in order to induce the three powers to raise the blockade. The contention refutes itself. . . .

Notwithstanding the pledge under his hand on January 9, 1903, Mr. Bowen, as the Venezuelan representative, at Washington on January 23, 1903, proposed to Great Britain, Germany and Italy, to the surprise of their representatives, that all claims against Venezuela should be paid out of the 30 *per cent.* of the customs revenues of La Guayra and Puerto Cabello. When this proposal was made, Mr. Bowen considered the assent of the three powers necessary. Such assent was not given. However, in the course of later negotiations on January 25 and 27, Mr. Bowen (notwithstanding the pledge) stated definitely that the 30 *per cent.* were destined not only for the blockading powers, but for all the creditor nations. The representatives of the blockading powers replied that the 30 *per cent.* could not be accepted as a sufficient security unless they were to be employed exclusively for the benefit of the blockading powers, and protested against the assignment of the 30 *per cent.* to all the creditor powers. As Mr. Bowen adhered to the position taken by him, the three powers, in the interests of peace, consented to the submission of the question to arbitration.

The *Central Law Journal* has this to say concerning "Right of Boarder to Receive Friends at his Boarding House for Immoral Purposes or at Unusual Hours:"

Until a man or woman lodges under his own vine and fig tree, no place where he may happen to abide is secure from intrusion. Further than that, it seems to be the law that a boarder's room may be broken into on suspicion and his friends or visitors be held liable as trespassers, depending upon the moral or immoral purpose of their visit. This latter rule of law was forcibly illustrated by the recent case of Watson *v.* Dilts, 100 N. W. Rep 50, where the Supreme Court of Iowa held that where a defendant went to plaintiff's house between 9 and 12 o'clock in the evening for the purpose of having sexual intercourse with a female boarder, and was admitted to the house by her, he was a trespasser.

This decision raises several important questions: *First:* What purposes are so immoral as to change an invited guest of a boarder into a trespasser? *Second:* In such cases does not the boarder himself become a trespasser, or is he only an accessory before the fact? *Third:* To what length may a landlord go to discover the purpose of any visitors who may happen to call upon any of his boarders? *Fourth:* What facts are sufficient to raise a *just* suspicion in the landlord that the purposes of his guest are immoral or illegal? *Fifth:* Must a social call on a female boarder in rural communities occur before nine o'clock in the evening to be above suspicion? *Sixth:* If such is the case, what is the time limit for social calls in a populous metropolis? All these questions, fraught with such tremendous importance, are called forth by the decision of the court, but left, unfortunately, in the most perplexing uncertainty.

On the "Restriction of Book Sales to One Price," the *National Corporation Reporter* says:

The law which has been asserted in Edison Phonograph Company *v.* Pike, 116 Fed. Rep., 863, and in Victor Talking Machine Company *v.* The Fair, 118 Fed. Rep., 609, is spreading, and at least one publisher has resorted to the expedient of controlling the price of his publication by printing on the page immediately following the title-page,

the following: "The price of this book at retail is $1.00 net. No dealer is licensed to sell it at a less price, and the sale at a less price will be treated as an infringement of the copyright."

In Bobbs-Merrill Company *v.* Snellenbrug, 131 Fed. Rep., 530, it was held in the Circuit Court for the Eastern District of Pennsylvania, that such a notice did not entitle the publishers to control the retail price of the book so as to render the sale of the book at a reduced price an infringement of the copyright.

District Judge Holland pointed out that the result of all the decisions in cases of this kind is to the effect that when the owner of a copyright transfers title to a copyrighted book, although under an agreement restricting its use, or price at which it can be sold at retail, and the book is sold in violation of this agreement, his only remedy is for breach of contract, and cannot be restrained by virtue of the copyright statutes.

But does a notice inserted in the books of a publisher amount to the retention by him of such an ownership, when the copy is transferred, as would entitle him to protection under the copyright law? This question was answered in the negative, and it was held that the copyright statutes cannot be invoked to control the retailing trade of books, the title to which the copyright owner has transferred. When a book publisher transfers his title to a copy of a book, either to reader, subscriber or retailer, he has exercised his sole liberty of vending that particular copy, and it is the only right the exercise of which is protected by the copyright law.

It is suggested by the court that if it is desirable to further control the matter of sale at retail in the possession of the retailer, it must be by agreement with the seller and his vendees, and that such a notice in the book cannot work an infringement. It would simply be a violation of contract with a purchaser, and the publisher must look for his remedy to their contract.

The attempted restriction will no doubt be fought to the bitter end, and it may require the decision of the highest court in the land to settle it.

One result of the Beck case (says *The Law Journal*, London) has been to revive the demand for the establishment of a Court of Criminal Appeal—a demand to which further force has been given by the release of Isaac da Costa. These two cases of mistaken identity go to show—what, of course, needed no demonstration—that the administration of justice is not free from error. That they are to be regarded as proving the necessity of a Court of Criminal Appeal is by no means so certain. Apart from the main ground on which the formation of such a tribunal is to be opposed—that it would, in destroying the finality of their decisions, tend to weaken the sense of responsibility under which juries now discharge their duties—there are numerous points to be disposed of before an unlimited right of appeal in criminal cases can be shown to be desirable. The great majority of prisoners are poor. A petition to the Home Office is an inexpensive thing, but an appeal to a Court of Criminal Appeal would be costly. "The door of appeal is open to the rich man, closed to the poor. In practice the result of the right of criminal appeal is that there is one law for the rich, another for the poor." That is the view expressed of the American system in a recent number of The Green Bag, and it is difficult to see how a similar result could be avoided here. Not less instructive is the experience of America in regard to delay. In New York County, during the five years from 1898 to 1902, the average interval between a conviction and the decision on appeal was fourteen months. Any considerable delay in the determination of criminal cases is bound to bring the administration of justice into disrepute.

Another point to be considered is that a Court of Criminal Appeal, like any other judicial tribunal, would be compelled to act according to the settled rules of evidence. The Home Office is unfettered in this respect; it can act on evidence which could not properly be brought before a Court of

law. Moreover, the decision of a Court of Criminal Appeal would tie the hands of the Home Secretary in the exercise of the prerogative of mercy. It would be almost impossible for him to reduce a sentence after it had been confirmed by the Court. And this question needs an answer: How can the power of reviewing an acquittal be logically withheld from a Court empowered to review a conviction? The law is certainly as much concerned with the punishment of the guilty as with setting the innocent free, and juries are not less prone to error in acquitting than in convicting a prisoner.

ONE interesting point on the question of appeal in criminal cases is brought out by the *Law Times* (London), which says:

The proposal that a power of appeal should be granted from the verdicts of juries in matters of fact in criminal cases introduces, when rightly understood, no novel principle in the law or the Constitution of the country; it would, if carried into effect, merely make the supervision which the Constitution vested in the King's Bench Division over other criminal tribunals a reality and not a mere name, by giving the power of correcting, not merely mistakes in point of form, but those errors that actually affected the substantial justice of the proceedings. This position was thus explained and illustrated by Mr. Butt in moving in the House of Commons the second reading of a New Trials (Criminal Cases) Bill on June 1, 1853:

> The law and the Constitution [said Mr. Butt] invested the Court of Queen's Bench with the superintendence and control of all inferior criminal jurisdictions—that is, of all courts except the House of Lords or the Court of the Lord High Steward for the trial of a peer. This was the principle of the law. The Court of Queen's Bench had the power to correct the erroneous judgments of all other courts. But how was this limited and made a nullity in practice? Only by this—that the Court of Queen's Bench could only know what passed in the other courts by that which is called the record—that is, the formal entry of the proceedings on parchment. The record, however, conveyed about as much information of the proceedings as the Votes, published each morning did of the debates in that House; it showed the charge, the finding of the jury, and the sentence, but it did not show one particle of the evidence or the rulings of the judge. What, then, was the result? That the power of supervision in the Court of Queen's Bench was limited to errors which, in technical language, appeared on the record. No matter whether the error was important or minute, if it found its way into the formal entry of the proceedings then it became matter for the correction of an appellate tribunal, even if it were only the misprision of a clerk. The gravest errors which did not so find their way, the court, which the law nominally invested with complete control, had no power either to remedy or correct.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ACCIDENT INSURANCE. (DEATH FROM TRIMMING A CORN.)

UNITED STATES CIRCUIT COURT, E. D. PENNSYLVANIA.

In Nax *v.* Travelers' Ins. Co., 130 Federal Reporter 985, the court is of the opinion that a death resulting from a self-inflicted knife cut made by an insured while trimming a corn, which was followed by blood-poisoning, is one from an "accidental, external and violent" injury, within the meaning of an accident policy. In support of this holding the court cites Western Commercial Travelers' Assn. *v.* Smith, 85 Federal Reporter 405, 29 Circuit Court of Appeals 223, 40 Lawyers' Reports Annotated 653.

CIGAR GUESSING CONTEST. (LOTTERY.)

NEW YORK COURT OF APPEALS.

People *ex rel.* Ellison *v.* Lavin, 71 Northeastern Reporter 753, involved the question whether or not a scheme for the distribution of money and cigars among the purchasers of certain brands of cigars, who will give the closest estimate of the number of cigars on which taxes would be collected by the government during a named month is a lottery, within the meaning of New York Penal Code §323, which defines a lottery as a scheme for the distribution of property by chance among persons who have paid a valuable consideration for the chance. The Appellate Division was of the opinion that as a knowledge of the condition of the tobacco trade, the importation of cigars, and similar matters would enable those possessing the information to estimate more accurately than others ignorant of these conditions the number of cigars on which taxes would be collected, the distribution would not depend exclusively on chance, but to some extent at least be affected by the exercise of judgment, and that, therefore, the scheme did not constitute a lottery. The Appellate Court, however, points out that the New York statute does not provide that the distribution must be by pure chance, or by chance exclusively. Therefore the rule obtaining in some jurisdictions that it is necessary that a dstribution shall be purely by chance, without any other element affecting the result, in order that it shall constitute a lottery does not govern this case. The test under the statute is whether the element of chance or the element of skill is predominating. If the element of skill predominates in estimating the number of cigars on which taxes will be paid in a month, the distribution will not be a lottery, but if the element of chance predominates in making this calculation, it will come within the statute. The court says that there are expert statisticians both in government employ and in that of private commercial houses who are known for their ability to predict the probable yield of the crops that will be harvested during the current year. If the contest for a prize was to be had among experts, the award of the prize, despite the many elements affecting the result which no one could foresee, might possibly be held dependent on judgment and not on chance. But the competition involved, the court considers to be of an entirely different character. The scheme contemplates over 35,000 competitors. From the table given in the advertisement it appears that the quantity of cigars stamped varies from month to month in the same year as greatly as 40,000,000, and between a month of one year and the corresponding month of the next year as greatly as 90,000,000. The court therefore considers it clear that if several experts should agree in estimating the output within 5,000,000, or one *per cent.*

of the number actually stamped, it would show a remarkable accuracy in their methods of calculation. Yet, with 35,000 competitors the probabilities would be that the first prize would be won by a very much closer approximation. The court therefore comes to the conclusion that the distribution intended is controlled by chance within the meaning of the statute, and hence illegal.

EMPLOYMENT AGENTS. (LAW LIMITING CHARGES — CONSTITUTIONALITY.)

SUPREME COURT OF CALIFORNIA.

The constitutionality of a statute (St. Cal. 1903, p. 14, c. 11, §4) limiting the compensation which an employment agent may receive to a certain *per cent.* of a month's wages, was involved in *Ex parte* Dickey, 77 Pacific Reporter 924. It was contended that the statute was a valid exercise of the State's police power, but the court calls attention to the fact that the due exercise of the police power is limited to the preservation of the public health, safety and morals; and notes that the business of an employment agent is not only innocent and innocuous, but is highly beneficial as tending the more quickly to secure labor for the unemployed. Therefore the court considers that there is nothing in the nature of the business which in any way threatens or endangers the public health, safety or morals. Nor is the purpose of the statute to regulate in these regards, or in any of them. The declared purpose and the plain effect of the statute is to limit the right of an employment agent in making contracts—a right free to those who follow other vocations—and arbitrarily to fix the compensation which he may receive for the services which he renders. This right of contract common to all legitimate occupations is an asset of the petitioner in his chosen occupation, and is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the class discussed by Judge Cooley in his work on Constitutional Limitations, "entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities" of one class of citizens "in a manner before unknown to the law." For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority therefor, "instead of calling upon others to show how and where the authority is negatived." And where, it may be asked, could the line be drawn, if the Legislature, under the guise of the exercise of its police power, should thus be permitted to encroach upon the rights of one class of citizens? Why should not the butcher and the baker, dealing in the necessaries of life, be restricted in their right of contract and consequently in their profits, to ten, five, or one *per cent.*? Why should not the contractor, the merchant, the professional man, be likewise subjected to such paternal laws, and why might not the Legislature fix the price and the value of the services of labor? The court, therefore, considers it clear that the statute contravenes the constitutional guaranty of protection in the possession of property.

INNKEEPERS. (LIABILITY TO GUESTS FOR TORTS OF SERVANTS.)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Clancy *v.* Barker, 131 Federal Reporter 161, was an action against the keepers of a hotel for injuries to a guest. A boy, who was a guest of defendants' at their hotel, wandered out of the room assigned to him and into a room wherein a bellboy of defendants' was amusing himself by playing a harmonica while temporarily off duty. While the guest was in this room he was either accidentally or wilfully shot by the bellboy. Action was thereon brought against the innkeepers to hold them liable for the acts of their bellboy. While there are many loose statements in the books to the effect that the lia-

bility of common carriers to their passengers and the liability of innkeepers to their guests are similar, and while that proposition may be conceded, it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because the swift movement of its passenger train is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation fraught with no extraordinary danger. Sandys *v.* Florence, 47 L. J. C. P. L. 598,600. It no more follows, from the similarity of the liability of the carrier to that of the innkeeper, that the latter is liable for the wilful or negligent acts of its servants beyond the scope of their employment, than it does that the latter is liable for a failure to exercise the highest possible care to make his hotel and its operation safe for its guests, because the carrier must exercise that degree of care in the management of its railroad, engines and trains. Again, there is a marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment at an inn, and a wide difference in the relations of the parties to these contracts. In the former the carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. For the time being all other occupations are subordinate to the transportation. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how and where he shall ride, eat, and sleep, while the passenger submits to the rules, regulations, and directions of the carrier, and is transported in the manner the latter directs. The contract is that the passenger will surrender the direction and dominion of his person to the servants of the carrier, to be transported in the car, seat, or berth, and in the manner in which they direct, and that the latter will take charge of and transport the person of the passenger safely. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who is employed to assist in the transportation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or wilful act of such a servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest, and their relations to each other, are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he shall occupy it; but they leave him free to use or to fail to use it, and all the other means of entertainment proffered, when and as he chooses, and to retain the uncontrolled dominion of his person and of his movements. The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety. The servants of the innkeeper are not placed in charge of the person of the guest, to direct, guide, and control his location and action, nor are they employed to perform any contract to insure his safety; but they are

engaged in the execution of the agreement of the master to exercise ordinary care for the comfort and safety of the visitor. The natural and logical result of this relation of the parties is that when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts. Moreover, the court considers that the authorities in the cases involving the liability of common carriers, of owners of palace cars, of steamboats, and of theaters, upon which plaintiff relied, were cases in which the servants were acting within the course or scope of their employment.

Thayer, Circuit Judge, vigorously dissents from the conclusion reached by the majority. He is of the opinion that the rule governing the liability of a carrier for injuries to passengers by the carrier's servants applies in the case of injuries to guests by the servants of an innkeeper. In support of the proposition that the relation existing between a carrier and a passenger is similar to that existing between an innkeeper and his guests, Judge Thayer cites Commonwealth *v.* Power, 7 Metcalf 596, 41 American Decisions 465; Bass *v.* Chicago & Northwestern Ry. Co., 36 Wisconsin 450, 17 American Reports 495; Norcross *v.* Norcross, 53 Main 163; Dickson *v.* Waldron, 34 Northeastern Reporter 506, and Pinkerton *v.* Woodward, 33 California 557. As to the proposition that an innkeeper is not an insurer of the safety of the person to his guest while within the hotel, which proposition the majority relied on, Judge Thayer says that the same may be said of carriers. They do not insure the personal safety of passengers, but only to exercise a very high degree of care, or, as it is sometimes said, "the utmost care," for their protection. Yet it is now well settled that this duty is so comprehensive that it renders the carrier responsible for injuries inflicted on passengers so long as the relation of carrier and passenger exists, not only by the negligent acts of its servants done while in the performance of some duty, but also by their wilful and wrongful acts, such as assaults committed on passengers or indignities offered to them. After a review of the authorities relating to the duties of an innkeeper to his guests, Judge Thayer states that he has been unable to discover any sufficient reason why an innkeeper should not be held responsible to his guests for the consequences of any wilful and wrongful acts of his servants committed within the hotel to the same extent that the carrier is responsible to its passengers for like wrongful acts of its servants, and he fully approves the doctrine of the Supreme Court of Nebraska to that effect in Clancy *v.* Barker, 98 N. W. Rep. 440, which case was adversely criticised in the majority opinion.

INSURANCE. (Mutual Benefit Association — Beneficiaries—Powers.)

United States Circuit Court, E. D. Missouri.

The power of a mutual benefit society to issue a certificate payable to a person who was married to insured, and who, in good faith, lived with him as his wife, though she was not his legal wife by reason of his having a former wife from whom he had not been divorced, was questioned in James *v.* Supreme Council of the Royal Arcanum, 130 Federal Reporter 1014. It appeared that the laws of the State wherein the society was incorporated, and the constitution and by-laws of the society, gave it express power, not only to provide for the widows, orphans, and other relatives of deceased members, but also to make provision for "any persons dependent upon deceased members." It further appeared that the beneficiary in this case was dependent on insured for her support. Hence the court concluded that she came within the designation "any persons dependent upon deceased members" and could, therefore, be designated as a beneficiary. This conclusion the court considers abundantly supported by Story *v.* Williamsburgh Masonic Mutual Benefit Association, 95 New York 474; Supreme Tent of Knights of Maccabees *v.* McAllister, 92 Northwestern Reporter 770; Senge *v.*

Senge, 106 Illinois Appeals 140; Supreme Lodge Ancient Order of United Workmen *v.* Hutchinson, 6 Indiana Appeals 399, 33 Northeastern Reporter 1124.

LITERARY CRITICISM. (LIBEL.)

NEW YORK COURT OF APPEALS.

The decision of the Appellate Division of the Supreme Court in the famous case of Triggs *v.* *Sun* Printing and Publishing Association, is reversed by the Court of Appeals in 71 Northeastern Reporter 739. This was an action for libel by Professor Triggs, an instructor in the University of Chicago, against the defendant for the publication of articles in the New York *Sun*, which ridiculed the professor's opinions and criticisms on literary topics. The Appellate Division held that the articles were not libelous *per se*, but this decision is now reversed by the Court of Appeals. The latter court concedes that when an author places his work before the public he invites criticism, and however hostile it may be the critic is not liable for libel, provided he makes no misstatements on material facts contained in the writing, and does not go out of his way to attack the author. But it is pointed out that the critic must confine himself to criticism and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation. Thus if, under the pretext of criticising a literary production or the acts of one occupying a public position, the critic takes an opportunity to attack the author or occupant, he will be liable in an action for libel. In this case the court says it is obvious that the articles complained of go far beyond the field of fair and honest criticism, and are attempts to portray the plaintiff in a ridiculous light. They represent the plaintiff as illiterate, uncultivated, coarse, and vulgar, and his ideas as sensational, absurd, and foolish. They also represent him as egotistical and conceited in the extreme, and convey the impression that he makes himself ridiculous, both in his method of instruction and by his public lectures. They also ridicule his private life by charging that he was unable to select a name for his baby until after a year of solemn deliberation. In short, they effect to represent him as a presumptuous literary freak. These representations concerning his personal characteristics were not within the bounds of fair and honest criticism, and are clearly libelous *per se*. It was contended by the respondent as a justification that the articles were written in jest, but to this the court answers: If, however, they can be regarded as having been published as a jest, then it should be said that, however desirable it may be that the readers of, and the writers for, the public prints shall be amused, it is manifest that neither such readers nor writers should be furnished such amusement at the expense of the reputation or business of another. In the language of Joy, C. B.: "The principle is clear that a person shall not be allowed to murder another's reputation in jest;" or, in the words of Smith, B., in the same case: "If a man in jest conveys a serious imputation, he jests at his peril." Donoghue *v.* Hayes [1831], Hayes, Irish Exchequer, 265, 266. We are of the opinion that one assaulting the reputation or business of another in a public newspaper cannot justify it upon the ground that it was a mere jest, unless it is perfectly manifest from the language employed that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related.

NEWSPAPERS. (CRITICISM OF JUDICIAL ACTIONS —CONTEMPT OF COURT.)

UNITED STATES CIRCUIT COURT,
E. D. NORTH CAROLINA.

The rights of a newspaper to criticise a decision of a judge of the Federal Court is discussed by Pritchard, Circuit Judge, in Cuyler *v.* Atlantic & N. C. R. Co., 131 Federal Reporter 95. The publisher of a newspaper had severely criticised the District Court for its conduct in a certain action, and the editor had been cited and punished for contempt, whereupon *habeas corpus* proceedings were brought for the discharge of the prisoner. The court considers Revised

Statutes §725, which provides that Federal courts shall have power to punish contempt by fine or imprisonment, provided the power shall not extend to any cases except misbehavior in the presence of or so near the court as to obstruct the administration of justice, the misbehavior of any of the officers of the court, and the disobedience or resistance by any such officer, party, juror, witness, or other person, to any lawful writ, order, rule, decree, or command of the county, as a limitation on the court's power to punish for contempt, and, therefore, comes to the conclusion that the Federal Court does not have power to punish a newspaper publisher for contempt for the publication of an article criticising the official conduct and integrity of the court. In support of this conclusion the court says: The inherent power of the court to punish for contempt is based upon the theory that it is essential that the court should possess ample authority to secure the free and unobstructed exercise of its functions in the enforcement of the law. Therefore, it is only such acts as tend to interfere with the orderly proceedings of the court or with the due administration of justice that can be properly punished as a contempt of court. Words written or spoken at a place other than where the court is held, and not so near thereto as to interfere with the proceeding of the court, do not render the author liable. Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for contempt. That newspapers sometimes engage in unwarranted criticism of the courts cannot be denied. In some instances they construe the liberty of the press as a license to authorize them to engage in a wholesale abuse of the court, but these instances are rare, and do not warrant a departure from the well-settled principles of the law as declared by Congress and construed by the courts. If judges charged with the administration of the law are not to be criticised on account of their official conduct, the liberty of the press is abridged, and the rights of the individuals imperiled. While all citizens should entertain due respect for the courts of the land, it does not follow that editors and public speakers are to refrain from legitimate criticism of the acts of any tribunal. Such criticism should be invited by public officials, in order that the people may fully understand what is being done by those who are acting as their agents in the administration of the law. Public questions are generally settled in the right way, and the fact that such is the case is due, in a large measure, to their free and untrammeled discussion by the press of the country. The courts are constituted for the purpose of protecting the rights and liberties of the individual, and the enactment of any law which gives a judge the power to prevent the free and unrestrained discussion of questions which may come before the court for adjudication would, in many instances, defeat the very object for which the courts were established. There may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice. The following cases are cited as sustaining the court's holding: *Ex parte* Robinson, 19 Wallace 510, 22 Lawyers' Edition 205; Case of Savin, 131 United States 274, 9 Supreme Court 701, 33 Lawyers' Edition 150; *Ex parte* Poulston, 19 Federal Cases No. 11,350, page 1206.

POLICE. (USURPATION OF AUTHORITY.)
SUPREME COURT OF NEW YORK.

Certain methods employed by the police of New York come in for a caustic criticism

by Justice Gaynor in Hale *v.* Burns, 89 New York Supplement 711. This was a suit for an injunction by the owner of a saloon and restaurant against a police captain to restrain the latter from keeping his officers permanently in plaintiff's saloon and dining-room on suspicion that gambling was carried on there. It appeared that defendant had no evidence of any gaming in plaintiff's rooms and had not arrested anyone in or about the place, nor made any complaint before a magistrate. It further appeared that defendant had said that he would keep his officers at plaintiff's place until he drove plaintiff out of his precinct, and also declared that he would keep his officers at plaintiff's place so long as he allowed certain-named persons to come in there.

The court, in granting the injunction, condemns the conduct of the police captain, saying: "He (the police captain) is acting without any warrant or authority whatever, and is evidently under the dangerous delusion that he is an official of unlimited powers, and free to exercise force or violence over any person or place in his precinct. He thinks he has the right to rule with a *shillalah* or policeman's club. He is either grossly ignorant, or else a wilful and dangerous criminal. His acts clearly constitute the crime of oppression, and it is fortunate that they have not provoked violence, and even bloodshed, for the plaintiff has the right to resist them with all the force necessary. . . .

"This case was argued before me two months ago, but I have refrained from deciding it so that those in authority over this police captain might call him to account for his lawless conduct, and make a decision here unnecessary, for it is irksome to have to repeatedly decide that the police have no right to invade any one's house or place of business without a warrant from a magistrate, except in pursuit of a fleeing criminal, or on a call for help against violence, and the like. The safeguards against such invasions, and against unlawful arrests, which are found in our Constitutions in this country, are the warp and woof of our system of government, and of free government everywhere. They mark the distinction between free government and despotism. When they are set at naught free government is gone, and government by force, or despotism, takes its place. . . .

"The notion that the police, or police officials, however high, may violate the law in their efforts or pretenses to make others obey it, is a most pernicious one. What they cannot do by keeping within the law themselves, the law does not require or suffer them to do at all. It is not for them to try to be, or pretend to be, stricter or better than the law, or resort to means which the law regards as destructive of free government, and does not permit. The law can be effective and permanently enforced only in a lawful, orderly and uniform manner. This is a case in which it is the bounden duty of the judiciary to speak out plainly, after the manner of judges in England and here from the earliest times. In a free government, the courts are the guardians of the rights and liberties of the people."

SLANDER. (PRIVILEGED COMMUNICATION.)
SUPREME COURT OF GEORGIA.

The point was raised in Flanders *v.* Daley, 48 Southeastern Reporter 327, that a minister of the gospel cannot hold a person liable for words spoken in reference to his profession, unless it appears that he is receiving profit therefrom. The court concedes that there is respectable authority supporting this view, but says that it is not prepared to adopt it. On the contrary, the court is of the opinion that a minister of the gospel, who has been the victim of slanderous words spoken in reference to his profession, should be entitled to his action against the slanderer without being compelled to show that he was receiving at the time the words were uttered emoluments or compensation from his profession. The true law protects the reputation or character of a minister of the gospel without regard to whether at the time the wrong is perpetrated upon him he

be receiving compensation for his services as such minister, or simply engaged in the work without reward or the hope thereof.

UNITED STATES SUPREME COURT. (ORIGINAL JURISDICTION — SUITS BETWEEN STATES ON STATE BONDS.)

UNITED STATES SUPREME COURT.

In State of South Dakota *v.* State of North Carolina, United States Supreme Court, 24 Supreme Court Reporter 269, it was contended that the original jurisdiction of the United States Supreme Court did not extend to a suit against one state by another state as donee of bonds originally held by individuals. The court refers to section, art. 3, of the Constitution, by which the Supreme Court is given original jurisdiction of "controversies between two or more states," and then cites Missouri *v.* Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331, wherein Justice Shiras, speaking for the court, reviewed at length the history of incorporation of this provision into the Federal Constitution and the decisions rendered by the Supreme Court in respect to such jurisdiction, closing with these words: "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants and in cases directly affecting the property rights and interests of a state." The court says that the present case is one "directly affecting the property rights and interests of a state." The court then, after reviewing the history of the adoption of the above mentioned clause in the Constitution and the adoption of the 11th Amendment, comes to the conclusion that the court has jurisdiction to entertain the suit. In support of this conclusion the court cites United States *v.* North Carolina, 136 U. S. 211, 34 L. Ed. 336, 11 Sup. Ct. Rep. 920; United States *v.* Texas, 143 U. S. 641, 36 L. Ed. 285, 12 Sup. Ct. Rep. 488; United States *v.* Michigan, 190 U. S. 379, 47 L. Ed. 1103, 23 Sup. Ct. Rep. 742.

Justice White wrote a dissenting opinion in which Chief Justice Fuller and Justices McKenna and Day Concurred. In this dissenting opinion Justice White contends that as the state of South Dakota was merely the donee of the bonds which originally were held by individuals the suit was a clear evasion of the 11th Amendment, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subject of any foreign state," and that, therefore, the Supreme Court did not have jurisdiction of the suit

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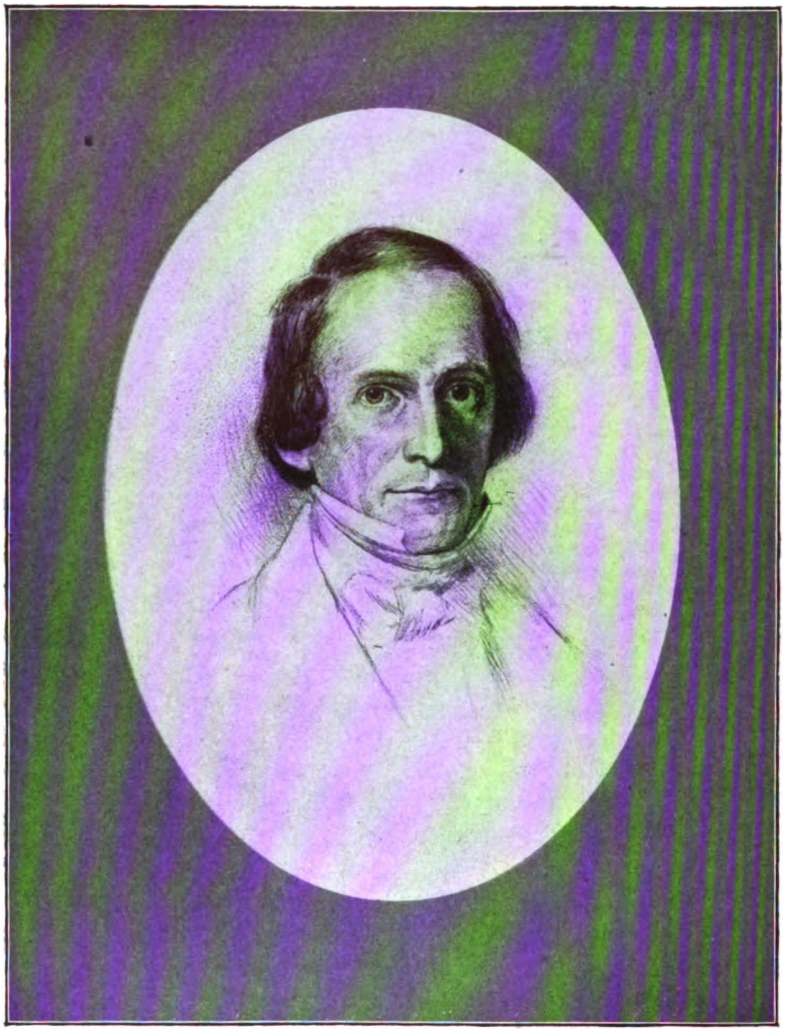
VILLAGES. (REASONABLENESS OF FRANCHISE GRANTED LIGHTING COMPANY.)

SUPREME COURT OF WISCONSIN.

In LeFeber *v.* Northwestern Light & Power Co., 97 Northwestern Reporter 203, it was contended that an ordinance adopted by the village board of West Allis, Wisconson, which granted to the Northwestern Heat, Light & Power Company the exclusive right to furnish lights for the village and its inhabitants for a period of thirty years, with a conditional right of extension for twenty years more, was invalid as being unreasonable. The court notes the fact that the longest period for which a contract to furnish a village or municipality with water has been sustained is thirty-one years, and then states as its opinion that though a contract to supply water for a period of thirty years might be sustained on the ground of the magnitude of the investment required, a contract for lighting for such a period would be unreasonable, as the investment required is much smaller. Especially does the court regard as unreasonable a contract which practically extends for fifty years.



HENRY WHEATON.

The Green Bag.

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HENRY WHEATON.[1]

BY FRANCIS R. JONES,

Of the Boston Bar.

THE attainments of Henry Wheaton, publicist, historian, reporter of the decisions of the Supreme Court of the United States, accomplished diplomat, and author of the authoritative treatise on International Law, have received inadequate recognition. The Government which he successfully served for twenty years dismissed him at the height of his influence and usefulness. No one of his many literary friends collected and preserved his voluminous correspondence, or troubled to write the record of his life, which might well have served both as an entertaining exposition of the customs and manners in the United States, Denmark, Germany, France and England during the first half of the nineteenth century, and as an inspiration to youth. Such a biography might well have been not only useful, but dramatic. Great men would have moved through its pages, Marshall and Story, Pinkney and Monroe, Webster and Washington Irving, Von Humboldt and Metternich. Great questions would have been discussed therein and an interesting period of European history. And the end would have been pathetic tragedy, bitter, but dignified, disappointment. If the materials for such a biography are still extant, it is to be earnestly wished that someone with the gift to see and the art to reconstruct Wheaton's life may take up the task and give to the world one more great biography.

The purity of Wheaton's character, his high sense of duty, his great and accurate learning, his facile pen which wrote such perspicuous English, and his pleasing modesty, are all gracious themes for a biographer. And I am persuaded that if it had been his lot to have lived a generation earlier, his name would have been engraved upon the same tablet of fame with those of Washington, Hamilton, Marshall and Jay. The heroic age of the Republic had passed when he came to manhood, and so great opportunity was lacking. But he did what came to his hand in a fashion that deserves praise, and he has left behind him a memorial of greatness that has not been superseded by any jurist of any nation.

Henry Wheaton was of Welsh descent and was born on November 27, 1785, at Providence, Rhode Island. His father was a successful merchant and after retiring became the president of the Rhode Island Branch of the United States Bank,—a position that gave him prominence in the community. The son owed much to his father, but more to his uncle, Dr. Levi P. Wheaton, to whom he was closely bound through life by strong ties of affection and common tastes, and whose daughter Catherine he married in 1811. Henry Wheaton was educated at the University Grammar School which was the preparatory school for

[1] The editor solicited this article at the last moment before going to press. The short time and small amount of space then allotable rendered a more adequate exposition of the subject impossible.—THE EDITOR.

Brown University,—at that time called the Rhode Island College,—and entered the latter institution in 1798, getting his degree in 1802. A classmate, Mr. John Whipple, has borne testimony to the serenity of his temper and studious habits. He seems, however, not to have been so much interested in the curriculum of the College, as in outside reading, and he there began the acquaintance with general literature that gave him so broad a culture. The quality of his mind was judicial, and his memory retentive. It grasped broad principles and ignored trivialities and technicalities. And his predilection for history even at the time of his graduation is shown by the title of his Commencement part: "Progress of the Mathematical and Physical Sciences during the Eighteenth Century."

From 1802 to 1805 Wheaton studied in a Providence law office and then went to France, where he passed much time at Poitiers, learning the language and translating the *Code Napoléon*. He stayed also some weeks in Paris, where he was not favorably impressed with the administration of justice, and after his arrival in England compared the English with the French judges to the disadvantage of the latter. In this connection it may be interesting to quote from a letter that he wrote some twenty years later to Mr. Justice Story, under date of November 20, 1827. Speaking of the English courts, which he had recently visited, he says:

"What I observed confirmed my former impressions that an American court of justice is a much more orderly and dignified scene than even these high tribunals, surrounded by all their pomp and paraphernalia."

Upon his return to Providence in 1806, Wheaton began the practice of law, but was not successful in acquiring a lucrative clientage. The technicalities of special pleading in Rhode Island were not congenial to him, and for seven years he filled his time with the study of history, Roman Law and languages, keeping informed on European politics by correspondence, and writing for the *Rhode Island Patriot* temperate and able articles in support of Jefferson and Madison. In 1810 he delivered a Fourth of July oration in his native city, in which he denounced with noble indignation the bloody wars of Europe and their disastrous consequences. Of this oration Jefferson expressed hearty approval.

In 1813 he moved to New York. Being prevented by the protective statute of the State from practising law there for three years, he continued his journalistic career, becoming editor of the *National Advocate*,—the organ of what was then known as the Republican Party. This he conducted with ability, fairness and success, upon a much higher plane than that of most newspapers of that day, which were given over to scurrility. The *National Advocate* naturally supported the Administration in the War of 1812, and at the end thereof Wheaton was thanked for his good offices by the Cabinet, and appointed Judge Advocate of the Army.

In 1815 he withdrew from journalism and was appointed a justice of the Marine Court of the City of New York, which commission he held four years and then resigned. It is curious to note his broad statesmanship at this time. For when he was only thirty, grasping the country's needs, he drew a national bankruptcy bill and vainly tried to procure its adoption by Congress. In this year also he published his *Treatise on the Law of Maritime Captures and Prizes*. In the following year he was appointed reporter of the decisions of the Supreme Court of the United States, which position he held for eleven years and published twelve volumes. I think that the profession are generally agreed that Wheaton's re-

ports are models of what law reports should be,—clear, concisely giving all the facts, making adequate summaries of the arguments of counsel, and embellishing the cases with valuable notes and a wealth of learned research. But he never derived the income that was his due from these labors. For his successor, Peters, reëdited and abridged his reports in a cheaper edition,—much to his indignant sorrow. He sued to stop the piracy, but Peters had the law on his side. Wheaton was a poor man with a growing family, and he sorely needed the money. While he was reporter he argued many cases before the Supreme Court of the United States with such ability and success that, upon the death of Mr. Justice Livingston in 1823, he was prominently mentioned for the vacant place, to which Mr. Justice Thompson was appointed. During these years he also served as a member of the Constitutional Convention of New York in 1821, where he advocated a general corporation law and tenure for judges during good behavior. In 1824 he was elected by the New York Legislature a member of the commission of three to draw up the civil and criminal code of the State. This was the first attempt made by any State at codification, and Wheaton brought to the aid of his colleagues, Duer and Butler, a broad and philosophical conception of jurisprudence, which was of great value. He, however, was sent to Copenhagen in 1827, two years before the code was finished.

Meanwhile Wheaton had been busy writing upon a variety of subjects. In 1820 he delivered a discourse before the New York Historical Society on *The Science of Public and International Law*, which apparently was the crystallized beginning, as his *Treatise on the Law of Maritime Captures and Prizes* was the embryo, of the great work which was to make his name famous through all time. In 1824 he made another address upon the opening of the New York Athenaeum, and in 1826 he published his *Life of William Pinkney*. Even in that he showed predilection for public law and large questions of politics by emphasizing them to the exclusion of much else.

In 1827 Wheaton entered upon a new and greater career, and one for which he was peculiarly and preëminently fitted both by temperament and education. John Quincy Adams, President of the United States, in recognition of some slight political service, as well as of his extraordinary adaptability for diplomacy, sent him to Denmark as *chargé d'affaires*. The principal work which presented itself at that time to the man occupying that mission was the adjustment of the idemnity for vessels flying the flag of the United States which had been seized by Denmark during the late war between France and England. Three years were consumed in these negotiations, and by the convention which was finally signed the Government of the United States obtained nearly all that it had demanded. This was a satisfactory exhibition of Wheaton's talent for diplomacy.

Always an accomplished linguist, during his stay at Copenhagen he did not neglect his literary pursuits or his historical researches. Assiduously he studied the literature and history of northern Europe, and as a result thereof he gave to the world in 1831 *The History of the Northmen*, which was an epoch-making work. Eleven years afterward an enlarged second edition was printed, in which Wheaton definitely gave his adherence to the proposition that the Northmen discovered America before Columbus. With these literary and scientific tastes he gained the acquaintance of the most distinguished men in Denmark, and was elected to the Scandinavian Society and Icelandic Literary Society. With what

proved to be the crowning work of his life ever in mind, he also, within a year of his arrival at Copenhagen, published an article in Danish on the Public Laws of Denmark. It is thus seen how one great purpose was ever present with him, to which the whole current of his thoughts and work ran.

In 1835 President Jackson transferred Wheaton to Berlin as Minister Resident. He was the first representative of his government for twenty-five years at the Court of Prussia, where he remained until 1846, being promoted in 1837 to the rank of Envoy Extraordinary and Minister Plenipotentiary. His chief duty in Prussia was to foster trade relations and make commercial treaties. This duty he performed with characteristic ability and success, and it was not his fault that the Senate of the United States rejected the treaties which he negotiated. His interests were world wide; and among other things that brought him to public notice was his brochure advocating the Suez and Panama canals, for which Von Humboldt hailed him pioneer. While at Berlin he extended his already wide acquaintance with the statesmen and scientists of Europe, forming a close friendship with Von Humboldt, and being elected to the French Institute and the Berlin Academy of Science. All this broad and intimate acquaintance with great men gave him extraordinary opportunities to observe and learn the real conditions of Europe. His services, therefore, to the Government at Washington, by keeping it constantly informed of the trend of sentiments and events, were of great value. Hardly a week elapsed without his making a report to the Secretary of State. Nor did his efficiency and importance stop there. For his counsel and opinion were constantly sought by all our other diplomatic representatives, because of his great ability and experience and knowledge. He expected, and had every right to expect, that his invaluable services would be retained and receive proper recognition by promotion to either Paris or London. But, in 1846 he fell a victim to that insidious spoils system which has robbed our country of so many meritorious public servants. If President Roosevelt, coming into power with the most triumphant majority in our history, a victory so sweeping that it makes him not only the dominant and paramount power in the Republican party, but the trustee of the whole people, will only correct this great abuse in the diplomatic service, he will not have been trusted in vain.

After his dismissal Wheaton spent the winter in Paris, and returned to Providence in May, 1847. The city of his birth had his portrait painted. He was given a dinner in New York, where he enunciated the doctrine that has come to be known as the fundamental one of the all successful diplomacy of the United States: "The office of a foreign minister is the office of a peacemaker. Diplomacy has been supposed to be a mantle of craft and deceit, but I believe that honor and integrity are the true arts of the diplomatist." But the honors tendered him were empty, and he settled down to prepare himself for the Professorship of International Law to which Harvard called him, having already in 1845 bestowed her highest degree upon him. While preparing his lectures he failed rapidly and died on March 11, 1848, at Dorchester, Massachusetts, a disappointed man.

Here are set down as briefly as possible the dates and chief incidents (save one, and that of the greatest moment) of Wheaton's life. Neither time nor space has permitted more. These facts are barren of dramatic quality. But to one who ponders on them, a constant purpose and growth are visible. Here was a studious gentleman, of broad and varied attainments, with a mind of

singular fineness and honorable ambitions. But Henry Wheaton's real and greatest claim to fame and the pride of his countrymen is founded upon his *Elements of International Law*, published in 1836, and its corollary, *The History of the Law of Nations*, printed in 1845. By these works he translated the ideal dreams of philosophers to a practical science. He is the real father and expounder of International Law. His work today is the standard of the civilized world, and is the guide of every Foreign Office. Its countless editions, each successively more elaborately annotated and brought to date, are the chart and basis for all international intercourse between governments and peoples. It has been translated even into Chinese. If it did not create International Law, at least it made it a science and coördinated the rules and principles thereof into an homogeneous system. It laid down the broad principles, and adduced the evidence and the authority for their validity by apposite citations. All that has since been done in the realm of diplomacy has been simply an exposition of those principles by added concrete cases. It has perhaps had more influence toward maintaining peace than any other one work or circumstance, since it has given to all governments common principles from which and on which to argue. Only a man of genius could have accomplished this. It is glory enough for any man. And it is singularly fitting that this genius should have been a citizen of the United States, which has from the time of Franklin adopted and practised a system of diplomacy that not only has been diametrically opposed to that of European states, but has been so peculiarly successful, that all foreign chancellaries, except Russia's, have come to adopt more and more the methods of that salutary system, which is based upon truth, honor and fair dealing. It is therefore not too much to say that the work of Henry Wheaton has had greater influence upon the world than that of any other man of modern times.

COMMONWEALTH v. FLYNN.

167 Mass. 460.

By Henry W. Palmer.

"Good afternoon, my pretty maid," so spake sly Daniel Flynn,
And doffing low his derby hat, he glided softly in.

"Your beauty, Lady, is renowned," so quoth the wily knave;
"Take not that beauty, Lady Fair, unpictured to the grave!

"Leave some memento of those charms, this dreary world to cheer.
Come, have your picture taken at the 'Studio Revere.'"

Fair Margaret smiled. She was beguiled by Daniel's words of honey;
She said if she but could she would; but she had little money.

"Ah, Lady," said persuasive Dan, "your beauty is so great,
We'll make your pictures at a much reduced and lowered rate.

"One dollar and a half," he said, "will cover all expense,
And all you have to pay today is five and twenty cents.
"One dozen photos, cabinet size, we'll make for this small sum.
Be wise, Fair Lady, don't refuse." Sweet Margaret sucked her thumb.

As Margaret sucked, and thought, and smiled, the foxy Dan besought her.
At last he conquered. She gave in, and handed him a quarter.

"Now, pretty maid," pursued sly Dan, "one quarter more in cash
Will buy for you six pictures more. Your beauty makes me rash!"

Sweet Margaret was a child of Eve. A bargain quite attracted her.
Then, too, Dan's words of flattery quite charmed and quite distracted her.

A dollar bill she gave to Dan. "I have no change," she muttered.
"Nor I," said Dan, "I'll get it, though," and off the villian fluttered.

One whole long day the maiden sat. She waited Dan's returning.
He did not come. She paced the floor, her cheeks with anger burning.

At last she sought a mighty Cop, relating her sad tale;
He patted her upon the cheek and started on the trail.

From clew to clew the Copper flew, until poor Dan he spotted.
He captured him and had him soon dry-breaded and hard-cotted.

In court Dan pled that when he fled
He was not like a common thief;
That Margaret D. made him trustee,
And title passed, in his belief.
He claimed that when he took the bill
He was her debtor—is so still.

But Morton, J., replied: "Nay! Nay
No title passed to you, you skin!
Of larceny you're guilty, sir!
To jail you'll have to go, D. Flynn."
And so they took Dan off to jail;
They left him there to weep and wail.

Sweet Margaret sweeps the kitchen floor;
She thinks of photographs no more.

THE SUPREME COURT: AN AMERICAN IDEAL.

By Rupert Sargent Holland,
Of the Philadelphia Bar.

AMERICANS are not given to the pursuit of political ideals; as a people we may delude ourselves with the thought; as individuals we scoff. Yet at the apex of our government we come upon an ideal, conceded to be such by the wise of all nations; an ideal which is not an illusion, which is not of the same fabric as the conception of democracy, but which stands before us in practical form. An English observer of American life said recently:—"It is a continual wonder to me that your Federal Supreme Court still exists. It is essentially an ideal body, and you Americans cherish so few political ideals." The same comment is made time and again by such of our transatlantic visitors as study the Court in its workings, but so used have we grown to taking our highest tribunal for granted we never stop to consider it. We never stop to consider if it might be mended to our material benefit.

Concerned above everything else in manufacture, agriculture and commerce, it is but natural that in city, state and national affairs we should keep our fingers close upon the machinery that is to make or mar our bank-accounts. After a municipal, a legislative, or a gubernatorial campaign it is slight wonder that visitors conclude that we do not dally with political ideals. We have been known to coerce legislatures and executives, to bring enormous private pressure on state tribunals; nothing is altogether above suspicion save one body, the Supreme Court of the land. How does it lift its head serene above the clouds? Is the Court so far removed from every day affairs that business interests give way to theoretical conceptions in that pure ether, or is it that the one august body is at the same time the desideratum of the two qualities—efficiently ideal, practically Utopian?

How has the Court stood before the world? That great French scholar of constitutional governments, De Tocqueville, writing in the early days of our nation, said of the Court that "a more imposing judicial power was never constituted by any people. The Supreme Court is placed higher than any known tribunal, both by the nature of its rights and the class of justiciable parties which it controls.

"In all the civilized countries of Europe," he continues, "the government has always shown the greatest reluctance to allow the cases in which it was itself interested to be decided by the ordinary course of justice. This repugnance is naturally greater as the government is more absolute; and, on the other hand, the privileges of the courts of justice are extended with the increasing liberties of the people; but no European nation has yet held that all judicial controversies, without regard to their origin, can be left to the judges of common law.

"In America, this theory has been actually put in practice; and the Supreme Court of the United States is the sole tribunal of the nation. Its power extends to all cases arising under laws and treaties made by the national authorities, to all cases of Admiralty and maritime jurisdiction, and, in general, to all points which affect the law of nations. It may even be affirmed that, although its constitution is essentially judicial, its prerogatives are almost entirely political. Its sole object is to enforce the execution of the laws of the Union; and the Union only regulates the relations of the government with the citizens, and of the nation with foreign powers; the relations of

citizens amongst themselves are almost all regulated by the sovereignty of the States.

" A second and still greater cause of the preponderance of this court may be adduced. In the nations of Europe the courts of justice are only called upon to try the controversies of private individuals; but the Supreme Court of the United States summons sovereign powers to its bar. When the clerk of the court advances on the steps of the tribunal, and simply says, 'The State of New York *versus* the State of Ohio.' it is impossible not to feel that the court which he addresses is no ordinary body."

The Supreme Court then first of all owes its paramount importance to the peculiar function of government which the Constitution framers purposed it to perform. A constitutional government, it should be remembered, although founded on a determinate statement of the law is in no sense necessarily immutable. The fathers of the republic realized that time would bring changes of circumstance, and that the constitution must admit of recognition of such changes. On the other hand the constitution would be the first of all the laws, the source of all later legislative inspiration, and as such no law-making body should have the power to modify it. Each act of the legislature must in principle conform to its fundamental provisions; if there were no conformity, the act could not in reality be law. In other words, the law-making body of this constitutional government could not, as in England, where Parliament was the constitution in itself, be at once the inspiration and the machinery of the law; mere enactment could not *ipso facto* create; the pronouncements of the legislature would or would not be laws according as they did or did not conform to the written constitution. It is a common saying that republics derive their motive power from the enactments of their representative assemblies, the people speaking through their delegates have been substantially the be-all and the end-all of government; in these United States the truth was that the peoples' representatives were themselves created by a higher power, their voice was not to be the voice of omnipotence, their acts must fall in certain well defined lines.

Yet, said the framers, the constitution must not itself be immutable, it must adapt itself to change. So they provided that should the people through their representatives be thwarted in some desire they might constitutionally and hence lawfully alter the charter of government by amendment. This they would not do until they discovered that their repeatedly expressed desire ran counter to the basic principle of government. And this vital question, Was the act of congress constitutional, what power should decide? This, said the makers, should be the function of the Supreme Court of the land.

The function so given is unique in history. In France the constitution is, or has always been held to be immutable; no power has the legal right to change it. Hence the tribunals of France obey the laws as they are made by legislation, and it follows that the legislature, and not the constitution is supreme. If this were not so the judges of France would take the place of the people in America, that is to say, the absolute place, inasmuch as what they pronounced to be in accord with the constitution would be law, nothing else would be, *and the constitution could not be changed.* We must then reach this conclusion, that where the constitution of a country is immutable, the courts must obey the legislative body in its interpretation; but where the constitution is subject to amendment, the courts may declare the acts of legislatures invalid as contrary to the fundamental law of the land. Where, as in England, Parliament is itself the constitution, the question never arises which way the courts shall look; whatever Parliament enacts is part and parcel of the constitution.

Genius for foresight was the great gift of our constitution makers. Much must be said in little if the wrangling statesmen of thirteen heterogeneous states were ever to agree. The yoke must be easy that should encircle so many wayward necks. Yet, if the statement of the law were brief, innumerable questions would arise; and, so, in order to bind the people to the charter under which they were to live, to stand between the legislature and the law, the Federal Supreme Court was erected. In this superlatively wise conception of the needs of a republican government lies the first reason for this political ideal.

"History," says Bryce, "knows few instruments which in so few words lay down equally momentous rules on a vast range of matters of the highest importance and complexity as the Constitution of the United States. . . . Probably no writing except the New Testament, the Koran, the Pentateuch, and the Digest of the Emperor Justinian has employed so much ingenuity and labour as the American Constitution, in sifting, weighing, comparing, illustrating, twisting and torturing its text." It is the fate of all great laws to be so handled, indeed, it is the greatest tribute to their genius.

It was inevitable that such a conception should at the beginning be bitterly opposed. From the outset the Supreme Court was criticised as being too far removed above the actual needs of government. Courts should be limited by well-defined restrictions; to place unlimited authority in any tribunal is contrary to Republican principles, said many members of the Constitutional Convention. Elbridge Gerry wrote, "There are no well-defined limits of the Judiciary Powers; they seem to be left as a boundless ocean that has broken over the chart of the Supreme Lawgiver, 'Thus far thou shalt go and no further,' and as they cannot be comprehended by the clearest capacity or the most sagacious mind, it would be an Herculean labor to attempt to describe the dangers with which they are replete." Richard Henry Lee complained bitterly that "in the judges of the Supreme Court is lodged the law, the equity, and the fact." Fought over by tooth and nail, the Court finally came into being owing its existence to the wisdom of three men, Hamilton, Madison and Marshall. Opposed on almost every other matter, these three foresaw the needs that would arise, the dangers, and the remedy. Political passions would disrupt the people of the federated States, Presidents and Congresses would be engulfed in many maelstroms of popular demand, there must be some rock from which to look far over the troubled seas. It was the view-point of this Court which gave this country the advantage, as that deep student of our institutions, Bryce, has put it, "of relegating questions not only intricate and delicate, but peculiarly liable to excite political passions, to the cool, dry atmosphere of judicial determination. The relations," the same writer continues, "of the central Federal power to the States, and the amount of authority which Congress and the President are respectively entitled to exercise, have been the most permanently grave questions in American history, with which nearly every other political problem has become entangled. If they had been left to be settled by Congress, itself an interested party, or by any dealings between Congress and the State legislatures, the dangers of a conflict would have been extreme, and, instead of one civil war there might have been several. But the universal respect felt for the Constitution, a respect which grows the longer it stands, has disposed men to defer to any decision which seems honestly and logically to unfold the meaning of its terms. In obeying such a decision they are obeying, not the judges, but the people who enacted the Constitution. To have foreseen that the power of interpreting the Federal

Constitution and statutes, and of determining whether or no State Constitutions and statutes transgress Federal provisions, would be sufficient to prevent struggle between the National government and the State governments, required great insight and great faith in the soundness and power of a principle."

Although the principle might be sound, the early practice was incontestably difficult. The Court found itself launched upon an absolutely unknown sea, with only the most vague knowledge of what their course was to be, without a compass, without a precedent to guide them. The Court might be intended to fill the most important place in Christendom, it remained for the judges to put the ideal in practice. When they assembled for the first time Chief Justice Jay declared the court ready for business, but not a single litigant appeared. After they had waited a sufficient time to prove that the Republic had no need of them at that hour of her history, the judges adjourned. "Not one of the spectators," an historian of that first session has said, "though gifted with the eagle eyes of prophecy, could have foreseen that out of that modest assemblage of gentlemen, unheard of and unthought of among the tribunals of the earth, a Court without a docket, without a record, without a writ, of unknown and untried powers, and of undetermined jurisdiction, there would be developed, in the space of a single century, a Court of which the ancient world could present no model, and the modern boast no parallel; a Court whose decrees, woven like threads of gold into the priceless and imperishable fabric of our Constitutional jurisprudence, would bind in the bonds of love, liberty and law the members of our great Republic. Nor could they have foreseen that the tables of Congress would groan beneath the weight of petitions from all parts of the country inviting that body to devise some means for the relief of that overburdened tribunal whose litigants are now doomed to stand in line for a space of more than three years before they have a chance to be heard."

No machine, even the most nearly perfect, can run without motive power; the new organ of government seemed likely to die for lack of nourishment. When the Court assembled in 1790 for the second session in its history, it was again forced to adjourn because no cases had arisen for its august determination. It is little to be wondered that the judges felt grave doubts as to the reality of the need for the Court's existence. Their judicial duties were so light that they did not hesitate to accept other offices at the same time. Chief Justice Jay held the office of Secretary of State during nearly six months of his term upon the bench; and, later, still retaining the Chief Justiceship, he accepted the diplomatic mission to England, which caused his absence from this country for more than a year. When he resigned he had already been elected Governor of New York. Oliver Ellsworth was minister to France and Chief Justice simultaneously, and Marshall acted as Secretary of State and Chief Justice at once during the end of John Adams' term as President. The members of the Court themselves felt very doubtful as to the permanency of its existence; it was a period when, as John M. Shirley wrote: "the politicians—or statesmen—of that day bivouaced in the Chief Justiceship on their march from one political position to another." John Jay wrote to President Adams: "I left the Bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the National government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess." The future of such a little-needed organ looked doubtful.

Here came the crisis in the Court's history, a crisis which was met in such a manner that intelligent statesmen thought the judges had once and for all taken leave of their practical senses, and flown to a region so remote as to be unattainable by ordinary mortals. But it was here that the Court, accepting the extraordinary position given it by the framers, took the one stand which was ultimately to give it lasting glory. The framers had done their share, the members of the Court themselves were not behind in doing theirs. In the dark days of inactivity, Washington, disturbed by the threatening appearance of public affairs, sent to the Chief Justice and his associates interrogatories upon certain public questions which were most vitally important to the nation's welfare. He requested the judicial opinion of the Court upon the legal points raised; he asked whether the principles of international law or the treaties of the United States with France gave the latter country or her citizens the right to fit out in the ports of the United States vessels of war, or to refit, re-arm, or increase their armament; whether France had a right to erect courts within the jurisdiction of the United States for the trial and condemnation of prizes taken by armed vessels in her service; whether the principle that free bottoms made free goods, and enemy bottoms enemy goods was a part of the law of nations. The Court declined to give an answer, asserting with great dignity that it would be manifestly improper for them to anticipate any case which might arise, or indicate in any way their opinion in advance of argument. Consider the situation, a Court without litigants, called upon in a dark hour of its country's history by a man universally conceded at the time to be the wisest in the land, to give advice upon international problems of law vitally important to the nation. Had the Court acquiesced in Washington's request there can be little doubt that its history would have been far different from what it has been. Instead of its magnificent independence, its aloofness from all questions of policy, its demand that President and Congress shall act before it will determine whether they had the power to act, the Court must have become the national adviser, and shared even that office in large measure with the Attorney-General. Admitting that two of the main characteristics of judicial power are that the Court shall only pronounce judgment on special cases brought before it for determination, and not upon general principles, and that it shall only act when actually called upon to do so by the presentation of a specific case at its bar, it would yet have been easy for the Supreme Court, unknown, untried, apparently unwanted, to accede to what must have seemed the cry of the nation in an hour of need.

If then our highest Federal tribunal is strikingly ideal and even more strikingly untrammeled in a country and age of intensely practical government, it must be due first to the genius of its makers who conceived a need and a place for it totally invisible to the vast majority of their fellowmen, and, second, to the genius of the men who have composed that Court, who have never served at popular demand, and who, taking the ideal the framers gave them, have practically raised it far above material concern. If the American Constitution be a marvel to its students, is not the line of its interpreters no whit less marvellous? "Why did you not tell Judge Marshall that the people of America demanded a conviction?" was the question asked of Attorney-General Wirt after the trial of Burr by the Supreme Court. "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."

THE "BLACK BOOKS" OF LINCOLN'S INN.

By Edward Manson,
Of the Middle Temple, Barrister at Law.

ONE of the things which strike us most in a survey of mediæval London is the little community with its compact corporate life. Whether its *raison d'etre* is trade as in the City Guild, or religion as in the monastery, or learning as in the college, or law as in the Inns of Court and Inns of Chancery, we find the same characteristics—a small society—complete in its constitution, living together in close intimacy, with its hall or refectory to minister to the needs of the body, its library to minister to the needs of the mind, its chapel to minister to the needs of the soul. The same tendency to associate for a common end shows itself today. Societies to promote politics and education, charity and religion, art and philanthropy, are legion: the difference is that there is not today that social life in common symbolized in the word company or guild—the breaking of bread together—which characterized the early societies. The Inns of Court furnish a good illustration of the change. The life in one of the Inns of Court of the Fifteenth Century as we have it pictured for us in, for example, the "Black Books" of Lincoln's Inn was much more like what life is now, at an Oxford or Cambridge college than in Lincoln's Inn of today. Just as in Oxford or Cambridge you have the undergraduates, the graduates and the Dons, so in the Inns of Court you had the "clerks," the "utter barristers" and the Masters of the Bench. All were *socii* of the "Felyschippe" and all lived under strict rules, none the less binding that many of them were unwritten and customary like the common law itself.

CHIEF JUSTICE FORTESCUE ON THE INNS OF COURT.

The earliest general account we have of the Inns of Court and Chancery is that of Sir John Fortescue—the Chief Justice of the King's Bench under Henry VI. in the *De Laudicus Angliæ Legum*—written by him when in exile in France after the crushing defeat of the Lancastrians at Towton in 1461. Fortescue was himself one of the Benchers of Lincoln's Inn at the date when the "Black Books" begin (1431) and there is, therefore a special interest in comparing his account of the Inn with that of the Records themselves.

"There belong," he says, "to it—that is to the system of legal education in England—ten Lesser Inns which are called the Inns of Chancery (Furnival's Inn, Thavies' Inn, Barnard's Inn, Staple's Inn, Clement's Inn, New Inn, Lyon's Inn, Dane's Inn, Clifford's Inn and Strand Inn), in each of which there are a hundred students at the least and in some of them a far greater number, though not constantly residing. The students are, for the most part, young men; there they study the nature of original and judicial writs which are the very first principles of the Law. After they have made some progress here and are more advanced in years they are admitted into the Inns of Court properly so called. Of these there are four in number (Lincoln's Inn, Gray's Inn, the Inner and the Middle Temple.) In that which is the least frequented there are about 200 students. In these greater Inns a student cannot well be maintained under eight and twenty pounds a year ("about £500 of our money") and, if he has a servant to wait on him—as for the most part they have—the expense is proportionably more. For this reason the students are sons to persons of quality, those of an inferior rank not being able to bear the expenses of maintaining and edu-

cating their children in this way, so that there is scarce to be found throughout the Kingdom an eminent lawyer who is not a gentleman by birth and fortune; consequently these have a greater regard for their character and honor than those who are bred in another way." Knights, Barons and the greatest nobility of the Kingdom, sent their sons to the Inns of Court, both to get a tincture of the laws and to form their manners. This is Fortescue's outline. The details we get from the records of the Inns themselves: in the case of Lincoln's Inn from the "Black Books."

LIFE IN AN INN OF COURT IN 1430.

It is altogether a quaint and delightful picture which we get from these records. The society numbered in the middle of the Fifteenth Century, some 160 resident members—13 Masters of the Bench, 47 "utter" barristers and 100 inner barristers or "clerks"—students we should call them now. All these lived within the precincts of the Inn in the Chambers, of which there were 92, each chamber being divided into two. They went to chapel at 6 o'clock every morning, winter and summer—later on it was relaxed to 7 in winter. They had their commons from the buttery, breakfasted together on bread and beer in the Hall,—when breakfast was supplied by the Inn, dined together at 12.30 and supped together on bread and beer again at 6.30. They frequented the Courts at Westminster when the Courts were sitting; attended the Readings and moots; and they amused themselves in the intervals of study in the bowling green of the Inn (*spheristerium*) and with cards and dice in the Hall in an evening, but not later than 9 o'clock, until the Benchers came to the decision that these evening amusements were not a very fit preparation for Sunday and forbade play on Saturday nights, for the Benchers were very solicitous about religion and morals. "All vice," as Fortescue says "is there discouraged and banished."

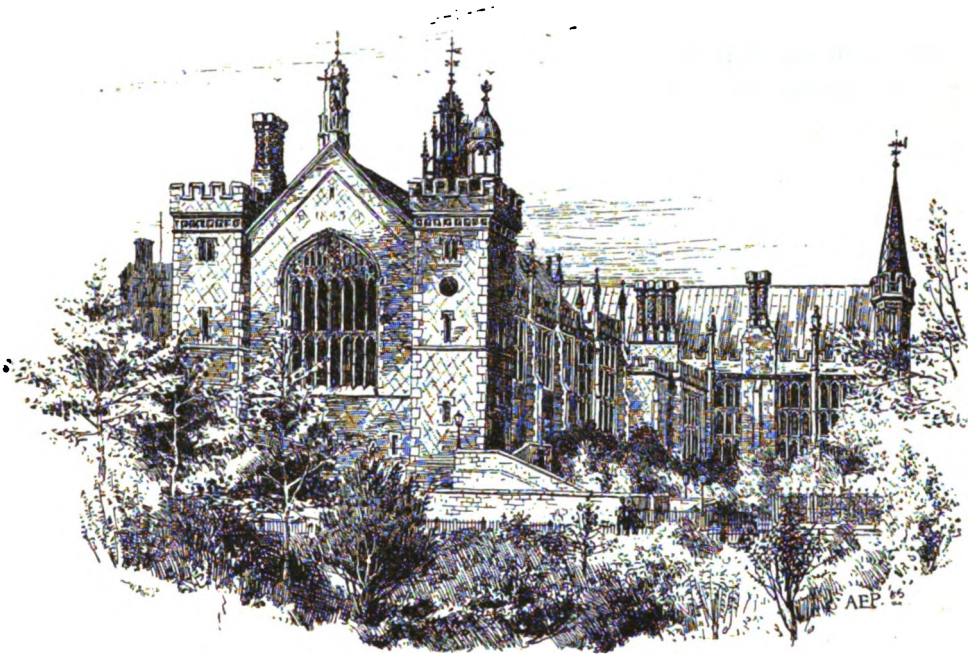
LEGAL EDUCATION—THE "MOOT" AND THE "BOLT."

The Benchers in those days took legal education also very seriously. The student could not—as in later days—"eat" his way to the Bar. He had to be constant in his attendance at Westminster, at "moots" and "bolts" and "readings" and his education did not end with call, it continued for three years at least after. Neglect was visited with fines and other penalties as appears by this "mem." "No utter barrister to be allowed to have any Boyer pot (*i. e.*, his pint and a half of ale or beer after evensong) unless he give his diligent attendance at all learnings and especially in the learning vacations as well within this house as at Chancery moots." Chancery moots were the moots held in the Inns of Chancery which each Inn of Court had attached to it—in the case of Lincoln's Inn, Furnival's Inn and Thavies' Inn. A moot was first "assigned," that is, the subject and the persons to argue it were settled at a preliminary meeting in the evening in the Hall at which the butler was ordered to attend with "the Candle and the Book." The case was cast in the form of pleadings and when it came on was argued first by the Bar and afterwards by the Bench. At the upper end of the Hall sat the Benchers on the Bench, a bar running between them and the rest of the Hall. Opposite the Bench sat on forms the outer and the inner Barristers who were engaged in the moot. The origin of this term outer or "utter" barrister is not clear. Mr. Douglas Walker thinks it arose from the fact of the form extending beyond the bar both ways. Hence those who sat outside were called the outer bar.

The subjects of the moot of those days would have finely puzzled the modern law-

yer. Take as an example the legal point which Sir Thomas More—himself a member of Lincoln's Inn at this time—propounded to the wiseacres of Bruges' *utrum averia in witheramia sint irreplegiabilia*—whether beasts of the plough taken in reprisal are repleviable. To bring into a moot matter which was no matter of law was finable. There was also a sensible rule that a moot was not to contain more than two points. The following entry suggests an amusing scene—"Whereas Mennell, one of the Utter Barristers, was negligent and toke lytyl study in his last moote and was not conformabyll to the saying and orders of the Bench in his lernying and motyng but presumptuously seyd to the Benche that they coude not brynge in the learnying better than it was brought in"—he was put out of commons. The "Bolt" was a sort of Moot in which a person call "Putcase" was requisitioned. "Putcase" started the discussion and then—by a prudent provision of the Bench—was "to sit down betweene the two gentlemen (who argued) during the argument."

So keen were the Benchers to encourage the learning of the law that, not content with Courts, and moots, and bolts, they ordered that at dinner every four sitting at one table were to argue a case put by the puisne of the four. This proved unpopular, at least we find Thomas Morsse put out of Commons because he had been notified by the Society to communicate instruction after dinner and "he gave the felows opprobrious and presumptious words." He no doubt resented it as talking "shop," but we need not interpret "opprobrious words" too seriously; for we have one, Barnard, fined 5 marks for refusing the office of "Master of the Revels" with opprobrious words which were nothing worse than that "he could not nor would not exercise the said office." Those times were much more punctilious in the matter of language than we are today.



NEW HALL AND LIBRARY, FROM NEW SQUARE.

THE READER AND OTHER OFFICERS OF THE SOCIETY.

With this high esteem for learning, the office of Reader was naturally one of distinction—the most important, in fact—in the Society. Unfortunately it was also an expensive one. Custom had decreed that a Reader must give a dinner and a supper to the company during his reading and he had to do it handsomely. If the preparation for the dinner was "miserable and miserly" the steward of the Reader's dinner might be fined. The result was that members of the Society often declined the office and were heavily fined in consequence. Sir Robert Rich, for instance, in 1621 is fined 100 marks "for not reading in his turne" and the said Sir Robert being impenitent, his chambers are sold towards paying the fine.

Besides its Reader the Inn had its Dean of the Chapel—who was paid the same as the Manciple—its Treasurer, its Keeper of the Black Books, its Marshal, its Pensioner, its Butler, its Steward, its Master of the Revels, its Escheator, who brought the fuel for Christmas and Torches for the Chapel, its Master and Under Cook, its Turnbroche, its Manciple, its Clerk of the Pantry, its Pannierman, its Laundress, its Beadle, its Fool and its Minstrels. It seems rather a superfluity of offices for so small a society, but many of them were honorary and served by members of the Society. For example, we find Sir Thomas More acting successively as Auditor of the Society, Pensioner, Butler, Reader, Marshal and Governor. The stewardship was a post of danger. If the unfortunate steward spent more than he ought, that is, if his "apparels" or disbursements exceeded his receipts or "emendals" he got no wages.

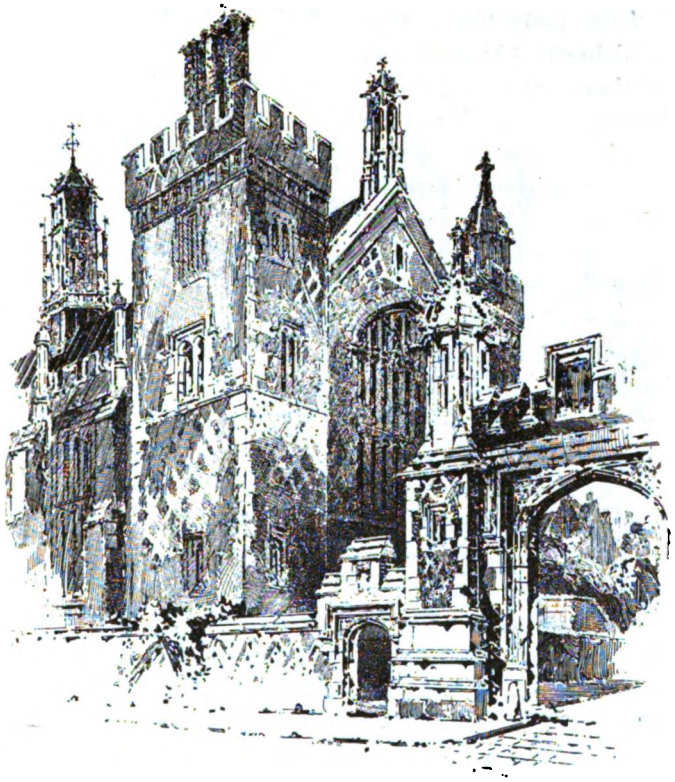
A YEAR'S EXPENSES.

The steward's account of payments for the Inn for the year is interesting as a specimen of the Society's expenditure:

	£	s.	d.
Bread	33	11	1
Ale	58	13	4
Beer (25 Barrells)	3	6	8
Cheese	7	3	6½
White Cups	3	8	9
Goddards		15	9
Bere pottes		13	
Candles		48	11
Rushes		10	9
Holline (Holly)			6
Wine		37	2
Wafers			16
Spices for Christmas		17	3
To the Minstrels		16	
To the Waytes		4	8
The Singer for his "Carell" at Christmas		3	4

But there was better cheer than beer and bread and cheese. The Steward's chief item was the amount paid to the Manciple "for victuals bought and for fuel and for divers condiments (*sanciamentis*) and other necessaries in the kitchen as appears in the Kitchen book, £150 5s. 3½d. Then, too, members who wanted to be excused keeping vacations often compounded for the exemption by such things as a "hoggishead of red Gascon wine" or a "buk and doewe;" we know that there was once a swan also in the Society's larder, because three of the young gentlemen—Woodhouse, Fermor and Dysney—were fined ten shillings each "because they brake the larder house and took from thens a swan and buk in Lamasse vaceyon last"—on another occasion some quince pies were abstracted from the oven, but a worse occurrence was the window of the buttery being broken "whereby certeyn persons of the Cumpanie unknowyn interid in to the sed buttery and brake the scler dore and lett out the wynne and spoyled and spylte ytt in the flore." This offence was deemed so serious that the Benchers agreed that "the hoole Com-

panye shall be sworne uppon the Evangeliste to tell what they knowe concernying that act." The offenders were at length discovered by this means and expelled, but were afterwards re-admitted at the intercession of the King's Sergeants, on paying fines. Alas! these were only a few of the escapades on the part of the young gentlemen which vexed the righteous souls of the Benchers from day to day.



GATEWAY TO LINCOLN'S INN.

"HEARING THE CHIMES AT MIDNIGHT."

In fact, Master Justice Shallow's recollections of the wildness of his youth when he "lay at Clement's Inn and his feats about Turnbull Street" do not seem to have been at all over colored. For instance, one Hobart, a member, is fined 20 pence "for fighting with the Society of Gray's Inn at nyght"—reminiscent of Master Shallow's exploit with "Sampson Stockfish, behind Gray's Inn." Then we have another young gentleman breaking the doore of the White Hart in Holbourne at night and beating the housewife of the same "to the scandal of the Society." One Norton, "confessyd that he, Copleton and Gascon divers tymys have gone forth in the nyght to make mery;" and again, John Bradshaw makes his humble confession "of having pleyed at the cards at the porter house of the Rolles in the Chancelare Lane with dyvers of his felyship," and promises being re-admitted that he will "never hereafter do so more." On another occasion a young gentleman of the Inn was caught "in *domo suspecta*" near Newgate by the Constable and Beadle of the Ward and, but for the Alderman's "reverence for the Society" would have been sent to Newgate.

What Master Justice Shallow calls the *bona robas* was indeed a subject on which

as "contrarie to the good and laudable rules of this Housse" the Benchers were very strict—so far, at least, as the Inn and its precincts were concerned—and many are the fines recorded in respect of the surreptitious introduction of the fair sex into the Inn.

THE "CONEY GARTH."

The greater part of the Town was rented from the Bishop of Chichester—at 20 marks (£6-13-4) a year, but there was a small strip on the north held at 9s a year from the Prior of St. Giles, which contained a "coney garth," or rabbit warren, with seven elms and an ash growing in it. This "coney garth" was a source of much temptation to the young gentlemen of the Inn with sporting proclivities and of corresponding trouble to the Benchers. For instance, in 1483, two gentlemen of the Town, Arundel and Knevet, are put out of commons "for hunting and killing coneys in the coney garth;" and the chasing of the coneys became so common that at last the Bench had to order that "if anyone of the society shall hunt or kill any coney within the coney garth or within the metes and bounds of the same he shall forfeit on each occasion 20s," and this had shortly after to be supplemented by a further order that "none of the Companie shall have hys bow bent withyn the coney yard nor hunt nor kill coneys upon payne of Xld."

ORDER IN HALL.

Keeping order and decorum in Hall, too, was no easy matter. The young gentlemen, instead of the proper costume of cap and gown, would wear "hattes" in Hall—even in Chapel, or "redd" coates, or, later, "long heare or great Ruffes," or "goe booted" or with "their rapyer under the gowne." In 1509 it is recorded by the Benchers that "in future no one may be at Clerk's commons unless he be decorously clad and not with his shirt in public view beyond his doublet at his neck." It was also agreed at a Benchers' Council "that no gentleman beying a felowe of this Housse shall ware any cut or ponsyd hosyn or bryches or ponsyd doublett upon payne of puttyng out of the house." In 1520 we have the following entry: "Mem: to call the Companie and to exhort them to leave knockyng on the pottes and makyng of noyse in the Hall and not to inquyett Mr. Reder in the vacation of his study." Making wagers in Hall was likewise forbidden as being a practice wherof "insuyth moche dyscencyon." One of the duties of the "butteler" and of the steward also was to report those that "speake loud and high at meal time in the Hall and cause such persons to cease their high speech." Possibly this may have been the cause of one of the young gentlemen being fined 12d "for gyvyng off one off the buttelers a blowe on the ere." Another "lately admitted" is fined for committing a "fowle affray" upon the person of the steward, and shortly after another is suspended "for his disorder in throwing a dish of butter at the steward in Hall time." This was certainly worse than "giving the Panierman a slap in Hall."

The officers of the Society evidently needed special protection at Christmas, for we find a resolution of the Benchers that "it be pronouncyd to the Companie that they myshandell not the officers of the Housse this tyme of Chrystimasse upon payne of grievous amercyamentes."

"THE PUMPEING OF THE PORTER."

Then comes the expulsion of another gentleman for "pumpeing of the Porter." The worst of this affair was that he was assisted in it, the pumpeing, by two other barristers, one of whom actually boasted of the feat and gloried in it before the Council. This was a Mr. Heron, and his being in consequence put out of commons, led to an

émeute among the gentlemen of the Inn which is thus described: "Divers of the young gentlemen of this Societie to the number of 20 at the least (havynge formerly, as it seemeth, confederated themselves) did upon warninge given by a great noyse made by the breakinge of a pott in the Hall in dinner time suddenly draw themselves into a company and rush up to the Bench tables, Bench sittinge in the upper messe to whom they addressed themselves for their comeing upp in that rude manner, and being answeared by them that they would take time to consider of their demands, one of them replied that they would give them time." A "counsell' of Benchers was accordingly called, and not agreeing to the rebels' demands, "shortlie after there en-

CORNER OF OLD BUILDINGS, LINCOLN'S INN.

and thereby Mr. Coe and Mr. Garland, their spokesmen, did in a bould manner expostulate with the Masters of the Bench touching theire puttinge Mr. Edward Heron out of commons and fyneinge of him, demandinge of them what reasons moved them soe to doe and urginge and pressinge them to restore Mr. Heron againe. But beinge reprehended by the Masters of the sued a notorious misdemeanor committed in the Hall by breaking the Bench table tressells and forms and by removeinge part of the Bench itself from the wall and in tearinge the lyneings from the bench and the formes. Of which great disorder the Lordes the Judges takeinge notice it pleased the Lord Chiefe Justice of the King's Bench to send a messenger to the Masters of the

Bench as they sate at supper in the Hall on Monday following, wishinge them to cause 4 or 5 of those gentlemen who came up to the Bench in that disorderly manner to bee warned to appeare before his Lordship and some other of the Judges at Serjeant's Inn in Fleete Streete on Wednesday followinge in the afternoone." The result was that the ringleaders in this rebellion, including Mr. Heron, Mr. Coe and Mr. Garland, were committed to the prison of the King's Bench till they should find baile for their good behavior.

THE STAR CHAMBER MESSENGER.

This Mr. Edward Heron had only a short time before, August, 1629, figured in another disorderly scene by laying violent hands with some others on a messenger of the Privy Council, who, according to the version of the Benchers, endeavored to make an arrest in the House and was therefore disgracefully handled. The Attorney General's account in writing to the King was rather different. It was this: The messenger, who had been sent to make the arrest, "not knowinge the gentelman, found him in Lincoln's Inn Walks, and ther the party was shewed unto him, but out of respect to the place he then there forboare to attach him. Notwithstanding when the Messenger was quietly gone out of there gates into the street, about thirty gentelmen fett him into the House violently, pumpt him, shaved him and disgracefully used him, after they sawe his warrant and otherwise carried themselves rudely and unworthily. I propose, goes on the Attorney General, to proceed as roundly as I may against the offenders, to let them and others see theire error; but I thought it my duty to acquaint your Majesty with the truth thereof." Nothing more, however, is heard of the matter. The probability is that the messenger's story was wrong and that he *was* attempting to execute the Star Chamber process within the Inn. If so, it was a clear invasion of the privileges of which the members were justly jealous.

THE "REVELS."

Chaucer in describing his "yonge Squier" among the Canterbury pilgrims says:—

"He caudé songés make and well indite
Just and eke dance and well portray and write."

Dancing in those days was deemed one of the necessary accomplishments of a gentleman, and it formed an important part of the Revels of the Inns, not only of Lincoln's Inn, but of the two Temples and Gray's Inn. Was it not Sir Christopher Hatton's graceful dancing at the Christmas revels of the Inner Temple which won, as everyone knows, the heart of the Virgin Queen and laid the foundation of that lucky gentleman's fortunes? The word "Revels" is apt, however, to mislead. It conveys the idea that the Inns of Court were much addicted to feasting and revelry, or as John Evelyn calls it, "dancing and fooling." In truth the Revels were but part of the system of education of the Inns of Court, designed to form the complete gentleman. "There is," says Fortescue, "both in the Inns of Court and the Inns of Chancery, a sort of an Academy or Gymnasium fit for persons of their station, where they learn singing and all kinds of music, dancing, and such other accomplishments and Diversions (which are called Revels) as are suitable to their quality and such as are usually practised at Court." So the Inns danced, and masqued, and sang, and generally cultivated the Muses, as well as the stern Goddess Themis.

THE MASQUE OF 1613.—DANCING BY THE LAWYERS.

Here is an account of the grand Masque given by the Middle Temple and Lincoln's

Inn to King James on Feb. 18, 1613. "Yt went from the Rolles all up Fleet Street and the Strand and made such a gallant and glorious show that yt is highly commended. They had forty gentlemen of best choise out of both Houses rode before them in thayre best array upon the King's horses and the twelve maskers, with their torch bearers and Pages, rode likewise upon horses exceedingly well trapped and furnished, besides a dozen little boyes drest like babones that served for an anti-maske and they say performed it exceedingly well when they came to ytt, and three open chariots drawne with foure horses apeece that carried theyre musicians and other personages that had parts to speake. All which, together with theyre Trumpetters and other Attendants, were so well set out that yt is generally held for the best show that hath ben seen many a day. The King stoode in the Gallerie (at Whitehall) to behold them, and made them ride about the Tillyard, and then were received into St. James' Parke and went along the Galleries into the Hall, where themselves and theyre devises which they say were excellent, made such a glittering show that the King and all the Companie were exceedingly pleased, and specially with theyre dauncing, which was beyond all that hath ben yet. The King made the Maskers kisse his hand at parting and gave them many thanckes, saying 'he never saw so many proper men together,' and himself accompanied them at the Banket and took care yt should be well ordered." The narrator adds that "to gaine the more roome no lady or gentleman was

LINCOLN'S INN GATEWAY, CHANCERY LANE.

admitted with a verdingale (farthingale—a hooped petticoat).

On one of these festive occasions, it was Candlemas Day, and the Judges were present, an unfortunate contretemps occurred. The whole Bar refused to dance, much to the mortification of the Benchers who had to do the dancing themselves, and "for example sake" they, the Bar, were put out of commons with a threat that "yf the like fault be committed herehence they shall be fyned or disbarred." The dances most affected were the Galliard and the Coranto. On these occasions of revelling the fair sex, at Lincoln's Inn at all events, were severely excluded, except as spectators. The Chief Butler is ordered "to keepe lockt the stayre foot doore leading to the gallery where they stoode."

THE NEW CHAPEL.

In 1518 the Society had built the great Gateway which still forms the most interesting portion of the Inn. A hundred years later on the strength of its increasing prosperity the Benchers determined to build a new chapel. It was to be a "fair large chapel" with double chambers under it, afterwards abandoned in favor of cloisters. It was to cost £2000 and to be designed by Mr. "Indicho" (Inigo) Jones. We have the result before us today. Such was the throng of noblemen and gentlemen at the consecration, May 22, 1623, that several were "taken up dead for the time with the extreme press and thronging." The opening sermon was preached by Dr. Donne, the Dean of St. Paul's, whilom a valued member of the Society, a master of poetical conceits, a distinguished civilian, a great divine and preacher. To his contemporaries Donne was a much greater man than Shakespeare, and today—so the whirligig of time brings about its revenges—who knows anything of the learned and eloquent Dean except as the subject of one of old Isaak Walton's charming biographies? The Bible in 6 volumes, with a Latin inscription presented to the Society by Dr. Donne and gratefully acknowledged by the Benchers, may still be seen in the Library.

Of these and many other matters we may read in his quaint commentary on the times: how frequent were the visitations of the Plague in London and how the Benchers had to "take to flight" to escape them, how Queen Elizabeth went to St. Paul's to return thanks for the defeat of the Spanish Armada; how "slack" some of the gentlemen of the Inn were in "receiving of the Communion," and how that slackness caused them to incur the suspicion of being Popish recusants and to have interrogatories administered to them by Lord Burleigh; how Prynne, the intrepid author of the "Histrio-Mastix,"—dedicated by the way to the Benchers—was "utterly expelled out of the Societie," after the Star Chamber's sentence; how Sir Matthew Hale began his career in a half chamber in the Garden Court, "in the third staircase, three stories high;" how the Society tried to get the learned Selden's library on his death, but had to give it up, owing to "soe many difficultyes;" how Mr. Speaker Lenthall would not return the Society its "three dripping pans" lent to him; how Mr. William Ashley, the Chapel Reader, was allowed twenty nobles in addition to his stipend "by reason of his great chardge of his dyett in the vacacyon tyme and for the furnishinge of his chamber and to supply himselfe with books to enable him for the due performance of the wighty charge that lyeth uppon him;" of these and many other matters equally instructive and amusing we may read in these pages. Not the least delightful part of them, to the modern eye, weary of sameness, is the refreshing unconventionality of the spelling, inexhaustible in its variety.

IN RE J. S.

(A Christmas Greeting to a Learned Colleague.)

By E. W.

A Judge there was—I wish there had been mö,—
  And unto lawë had he long y-go.
Wide was his law, and wide his common sense—
  For learning could not make that sound head dense.
Wide was his taste for men and eke for reading—
  Old heads and young, old books and new, all leading
Unto the wisdom of the perfect man,
  And all him keeping young as he began,
Till you 'gan wonder, all that you were able,
  How one so young could be so venerable.
And, best of all, his charity was kind—
  In all the world no enemy could find.
From Hampshire came he, where they breed great men.

Old Chaucer died too soon, alas, or then
This had been better writ, though not, I ween,
With truer words than you have just now seen.

THE EVOLUTION OF AARON BURR BIRD, ATTORNEY-AT-LAW.

By John Jordan Douglass.

HE was a red-headed, freckle-faced little fellow of thirteen, with an inquisitive nose, and eyes bright as new-minted pennies. He lived on his father's farm near the drowsy village of Breakerton, spending his time principally in instigating sparring matches between turkey-cocks and game roosters, with occasional persecution of a bob-tailed cur dog by way of refreshment.

The neighbors at first agreed that the boy would develop into a prize-fighter, but a shrewd J. P., who had spent many years of his judicial life in watching the wily ways of the country lawyers, declared that Aaron Burr Bird had in him the mettle and making of a lawyer.

"Jist look at thet thar boy," the J. P. observed to the elder Bird one morning as Aaron Burr Bird triumphantly paused at the foot of a cherry tree, up which he had sent a stray tom-cat in a swift streak of yellow terror, "jist look how he likes ter git er critter up er tree. That's er lawyer up 'n down—I mean down 'n up—allus er gittin' er poor divil in trouble up er tree. Whar, ef he cums down, he gits the hide tore off 'n him; er ef he jumps out he breaks his neck; er ef he stays up thar he'll starve. Thet boy's er born lawyer, I sez, an' when thet sort uv er humor's (an' I declare ter grashus them lawyers does sometimes tickle er body half ter death) in the blood you caint fairly git it out."

Aaron Burr turned his attention from the tom-cat a moment to gaze quizically into the visitor's face, and as he did so the cat slid down the tree. Aaron Burr, however, had caught a glimpse of him out of the tail of his eye, and wheeling suddenly, gave him a resounding slap with a shingle.

"See thet!" chuckled the J. P., "you cain't

fairly fool er born lawyer. He allus knows whar, when an' whicher way er cat's goin' ter jump. Tawk erbout er lawyer hangin' out his shingle! Thet's jist er blind—the shingle stays right in hand ready fer ter *kiver* er ter *kill.*"

Aaron Burr was now gazing eagerly into the old J. P.'s blue-goggled visage. The squire represented to his mind the entire law of the county—one big, fat folio of justice journeying from place to place like a traveling library.

"Do I look like er man thet's been picked by sharp-tongued lawyers, son?" queried the J. P. at length. He had removed his hat to wipe the perspiration from his bald head with a red bandanna handkerchief.

"No, but yer head does," snickered the boy, unaware that he was committing a breach of propriety.

"What'd I tell yer erbout respectin' you' elders?" cried Aaron Burr's father, catching up a brush. "Ain't yer never goin' ter larn no sense. You ain't been no manner er count since I bought thet last almanac."

"Let him erlone, Robey," interposed the kindly old J. P. "I axed him er pinted question an' he giv me er pinted answer. Thet told me stronger than ever thet he'd be ekal to ther courthouse tricks. Er lawyer, Robey Bird, er lawyer must be quick on ther trigger er he won't fire his gun.

"Gimme thet boy fer erwhile an' I'll carry him through ther acts uv the last legislatur (ef they don't ruin him by showin' him gimlet-holes fer rascals ter crawl out uv payin' ther debts), an' portions uv Blackstone (who must hev dried up an' blowed away), with a taste uv Bancroft's history. You needn't laugh. I studied law an' wuz admitted ter ther bar before I wuz permoted ter er J. P."

The portly J. P. adjusted his blue goggles and gazed with supreme dignity into the farmer's face. "What say you?" he continued. "I'm gettin' up er law school. Can I have Aaron Burr er not?"

"Wal, he's no count fer nothin' else. Ef you don't git him I reckin the divil will. He kin go."

"You hear that, A. B. Bundle up an' let's be goin'," said the J. P., triumphantly.

Aaron Burr, being highly elated, dashed toward the house, and soon reappeared with the necessary paraphernalia; to wit, a few hickory shirts and extra breeches, with a plentiful sprinkling of hooks, pins, jackknives and a long spear to torture flies.

"Red-headed, all wool an' er yard wide!" exclaimed the J. P., as he patted Aaron Burr on the head. "Jist the stuff ter weave inter er slick an' shiny piece uv lawyer goods."

Then the preceptor and pupil drove off toward Breakertown.

Something like seven years managed to get up and go off from the honorable J. P. of Breakerton, leaving him grimmer, grayer and lamer in the joint, but not a whit less discerning in his cases. He still looked at the world through his big blue goggles. He had done his part in stocking the State with lawyers, sending them off with heads full of Blackstone and "Bankrupt" history, as he now called it.

Aaron Burr Bird had evoluted from a legal tadpole to a full-grown frog with big bass voice and swelling shirt front before the jury, though his legal associates called him "Red Bird." He had won many important cow and hog cases at the "Breakerton Bar," notably one in which he represented the plaintiff in a suit to recover damages for a "yearling" calf which had tried to butt the local freight off the track. The railroad people claimed self-defence. But Aaron Burr got them "up a tree" by developing on the cross-examination that the engineer had boasted to the fireman that he didn't propose to be "bull-dozed any longer."

Old J. P.'s face beamed with pride when the jury brought in a verdict for the plaintiff. He smiled broadly, reminiscently, at the consternation of the railroad attorneys. "Up a

tree?" he chuckled. "I knowed it wuz in him. I seed it ther day he got the tom-cat up the cherry tree on his daddy's farm. Hit's Aaron Burr, attorney-at-law; but the shingle's allus in his han' ter slap 'em when they jump."

HARVEY STEEL COMPANY v. UNITED STATES.

By Lincoln B. Smith.

(In the case of Harvey Steel Company *v.* United States, the Court of Claims recently rendered a judgment, by a majority of four of the five judges, the majority opinion being written by Nott, Chief Justice, and a dissenting opinion by Wright, Justice. The following lines are dedicated to Mr. Justice Wright.)

That Wright is Wright and Nott is Nott
  Logicians must concede.
That Nott is right and Wright is not
  Four judges have decreed.

That Nott is right, and Wright is not,
  We all must now agree;
Then Nott is right and Wright is Nott—
  The same thing, to a t.

If Nott is Nott and Wright is Nott,
  It comes without a wrench
That we have not, if not two Notts,
  Five judges on the bench.

If only four, as shown before,
  And three agree with Nott,
The judgment is unanimous,
  And Wright's dissent is naught.

The knot is not, is Nott not Nott?
  But, is Wright right, or Nott?
Is Nott not right? What right has Wright
  To write that Nott is not?
Do *I* do right to write to Wright
  This most unrighteous rot?

THE STUDENT ROWS OF OXFORD, WITH SOME HINTS OF THEIR SIGNIFICANCE

III.

By Louis C. Cornish.

THE preceding papers have attempted to show two aspects of the long and troubled history of Oxford, how the town was at war with the gown, and the students were at war with each other, and how behind all this contention were the larger issues of the little nations, who slowly were being welded together into that greater nationality which we now call English. These brief gleanings from the vast literature of Oxford serve to remind us that the massive walls of the colleges were built, not for academic seclusion as we now understand it, but for protection from direst peril. They testify, not of the past of romance in which our fancy wanders at will, but of a past filled with mortal combat. These quiet Oxford streets, these very cloisters which allure us with their beauty, have resounded to the cry, "Slay! Slay! Havock and Havock!"

At every turn Oxford tells us of that time happily gone by when there was in truth "a whole sublunary unseasonableness." And yet the memorials of that very unseasonableness, things in the doing that were not then accomplished, are among the greatest charms of this most alluring of universities. Here may be seen the history of the English nation written so plain that men may read. And here, furthermore, are the letters from which future history will spell out new words of civilization. If mediaeval Oxford carried through all her contentions and trials the promise of the present, so none the less surely the Oxford of today contains the possibliities of what in the centuries to come shall be realities. He who sees in modern Oxford only the memorials of by-gone time misses half the wonder of the place; for here, too, is the witchery, the mystery of the future.

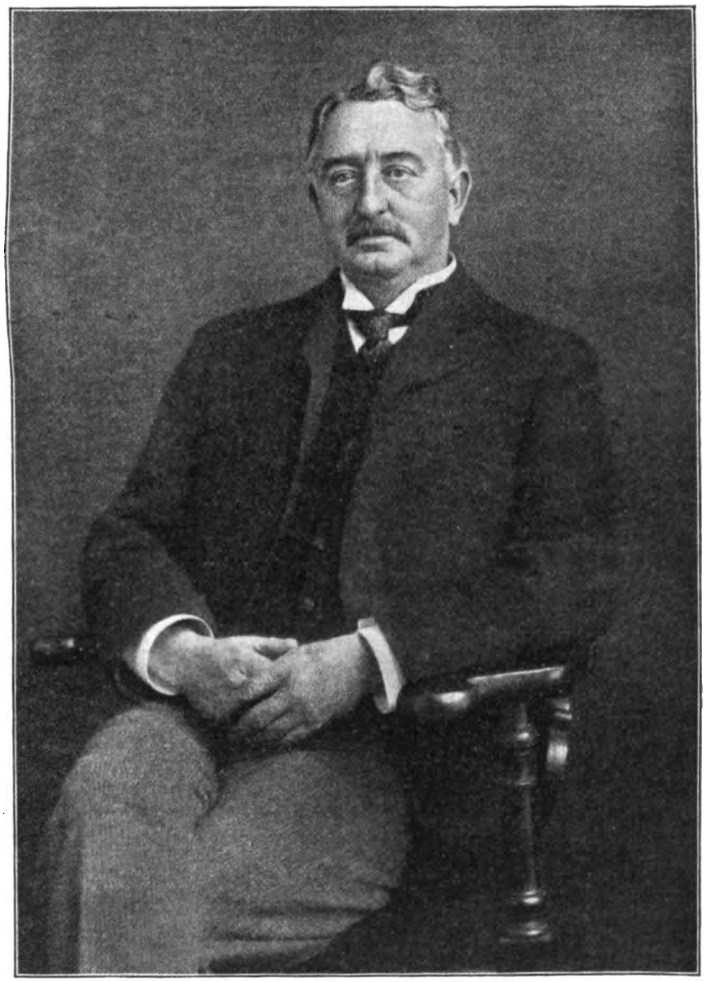
Hard it is to read this future, yet now and again plans are formed and beginnings are made of which all men should take note. And to one such aspect of the future, vaguely noised abroad and perhaps but vaguely understood, Oxford must now address herself; namely, the proposed knitting together of English speaking people through the munificent gift of Cecil John Rhodes.

Doubtless our opinion of this bequest, and its potency, will depend on our belief in that larger movement of which this undertaking is but a part. But even if we have small faith in the many signs that men of English lineage tend the world over to draw together, it surely is permissable in view of past history to say that this meeting of many representatives of many peoples appears at least more significant for the future than did that first gathering of students at Oxford long ago seem significant for the present. And whether or not we grant to the Rhodes Scholarships the likelihood of wide influence in the future, we must remember that at least it was the deliberate aim of the founder to project such efficiency. It will be to the profit of England and the United States if thoughtful men in both countries clearly understand his purpose.

Whatever may be the final verdict of history on the career of this remarkable man, to whom our generation has given so lavishly of hatred and of love,—and it is quite too early to judge him impartially—of this

we may be sure. The future historian needs must grant to Mr. Rhodes a far-reaching statesmanship, in which a definite aim was recognized clearly and unfalteringly followed. That purpose found its final expression in the scholarships which bear his name. The reasoning which led him to his conclusion is worthy of our consideration.

"I contend," says Mr. Rhodes, "that we are the first race in the world, and that the more of the world we inhabit the better it is for the human race. I contend that every acre added to our territory means the birth of more of the English race who otherwise would not be brought into existence. The absorption of the greater portion of the world under our rule simply means the end of all wars. The furtherance of the British Empire, for the bringing of the whole uncivilized world under British rule, for the recovery of the United States, for the making of the Anglo Saxon race but one Empire. What a dream! But yet it is probable. It is possible."[1] (p. 59).



CECIL JOHN RHODES.

To this vast dream of Empire Mr. Rhodes gave the last years of his life, and to it he

[1]This and all following references are to *The Last Will and Testament of Cecil J. Rhodes*, by W. T. Stead. London: Review of Reviews. 1902.

devoted the greater part of his fortune. But to see the vision as he saw it, we must at the outset clearly understand that he had no wish to build an empire that should be subject to the British Crown, whose centre would be the Buildings of Parliament in London. The Monarchy, Parliament, even the Constitution, were to him but present social adjustments, which might or might not serve in the future. These were details. His conception was far greater. He conceived the whole English-speaking race as one family. Once gain the family consciousness throughout the race, and it might be trusted adequately to express itself in governmental institutions. The location and form of government were incidental. "His fatherland," says Mr. Stead (p. 52) "is coterminous with the use of the tongue of his native land. He was devoted to the old flag, but in his ideas he was American, and in his later years he expressed to me his unhesitating readiness to accept the reunion of the race under the stars and stripes, if it could not be obtained in any other way. Although he had no objection to the Monarchy, he unhesitatingly preferred the American to the British Constitution, and the text-book which he laid down for the guidance of his novitiates was a copy of the American Constitution."

This feeling of Mr. Rhodes is more clearly set forth in his own words. "If even now we could arrange," he says, "with the present Members of the United States Assembly and our House of Commons, the peace of the world is secured for all eternity! We could hold our Federal Parliament five years at Washington and five years at London. The only thing feasible to carry this idea out is a secret society gradually absorbing the wealth of the world to be devoted to such an object. . . . Fancy the charm to young America, just coming on and dissatisfied. . . . For the American has been taught the lesson of home rule and the success of leaving the management of the local pump to the parish beadle. . . . What a scope and what a horizon for work, at any rate, for the next two centuries, the best energies of the best people of the world; perfectly feasible, but needing an organization, for it is impossible for one human atom to complete anything, much less such an idea as this requiring the devotion of the best souls of the next 200 years. There are three essentials: (1) The plan duly weighed and agreed to. (2) The first organization. (3) The seizure of the wealth necessary." (pp. 73-76.)

The due weighing of the plan, his first essential, shows with what earnestness Mr. Rhodes gave himself to the undertaking. "The first thing that impressed him," says Mr. Stead (p. 94), "as a result of a survey, of the ways of God to man, is that Diety. must look on things on a comprehensive scale. If Mr. Rhodes thinks in continents, his Maker must at least think in planets. The Divine plan must be at least co-extensive with the human race. . . . Hole-and-corner plans of salvation, theological or political, are out of court. . . . The Divine plan must be universal.

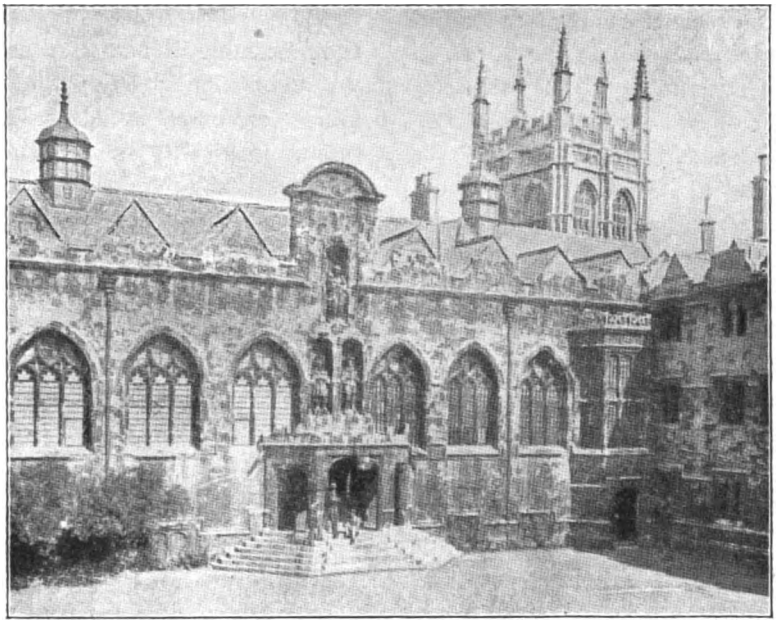
"The planet being postulated as the area of the Divine activity, perfecting the race by natural selection and the struggle for existence being recognized as favorite instruments of the Divine Ruler, the question immediately arose as to which race seems most likely to be the Divine instrument in carrying out the Divine idea over the whole planet. . . . There are various races—the Yellow, the Black, the Brown, the White. Numerically, the Yellow race comes first. But if the test be the area of the world and the power to control its destinies, the primacy of the White race is indisputable. The Yellow race is massed on half a single continent; the White exclusively

occupies Europe, practically occupies the Americas, is colonizing Australia, and is dominating Asia. In the struggle for existence, the White race had unquestionably come out on top." (pp. 95-96.)

Accepting these conclusions, Mr. Rhodes asks, "what is the ultimate aim of this evolution?" "'What,' he asked, 'is the highest thing in the world? Is it not the idea of Justice? I know none higher. Justice between man and man, equal, absolute, impartial; that surely must be the first note of perfected society. Secondly, there must be Liberty, for without freedom there can be no justice. . . . And the third note of the ultimate, toward which our race is blending, must surely be that of Peace, the industrial commonwealth as opposed to the military clan or fighting Empire. . . . Justice, Liberty, Peace, these three!'" (p. 97.)

"Which race in the world most promotes, over the widest possible area, a state of society having these three as corner stones? Mr. Rhodes had no hesitation in arriving at the conclusion that the English-speaking man, whether British, American, Australian, or South African, is the type of the race which does now, and is likely to continue to do in the future, the most practical, effective work to establish justice, to promote liberty, and to ensure peace over the widest possible area of the planet."

"'Therefore,' said Mr. Rhodes to himself, 'if there be a God, and he cares anything about what I do, I think it is clear he would like me to do what he is doing Himself. As he is manifestly fashioning the English-speaking race as a chosen instrument by which he will bring in a chosen state of society, based upon Justice, Liberty and Peace, he must obviously wish me to do as much as I can, to give as much scope and power to that race as possible. Hence, if there be a God, I think that what he would like me to do is to paint as much of the map of Africa red as possible, and to do what I can elsewhere to promote the unity



ORIEL COLLEGE, OXFORD.

and extend the influence of the English-speaking race.'" (p. 98.)

Whether one accepts these broad notions concerning the destiny of the English-speaking race, hinging as they do on hasty and inconclusive judgments of that most complex of questions, the relative value of the divisions of the human family; or, indeed, granting for the moment that the premises laid down adequately support these vast conclusions, whether one feels their allurement, or instead is incensed by them: all this does not here concern us. Imperialism here appears before us stripped of industrial politics and clad in the robes of justice and liberty and peace for all mankind. Whether or not our hearts go out to the vision, is beside our point. If we would understand what he was trying to do, we must remember that to this dream of the future Mr. Rhodes dedicated himself. It became nothing less than his religion. To such a conclusion the "due weighing and agreeing to the plan" brought him.

The second and third essentials, namely "the first organization and the seizure of the necessary wealth," except so far as the latter touches the distribution of his own property, may be briefly stated.

For some years he seems to have considered the formation of the secret society. It was to be to the future what the Society of Jesus under Loyola's leadership was to the Papacy, or what Caesar's legions were to the Roman Empire. To the moral force of the one should be added the material strength of the other. The difficulties involved in such a scheme of organization were, of course, enormous. Upon its members it would lay the obligation of a clearly stated purpose with the minimum opportunity of doing anything toward its fulfillment. Some hints of these difficulties appear in quotations from Mr. Rhodes which Mr. Stead gives us. And it would seem fair to infer that nothing came of this far-reaching scheme.[1]

It remains only to deal with the last essential, "the seizure of the necessary wealth," and to show how Mr. Rhodes so far as his own means permitted sought to make his dream come true.

In his will, as published,[2] he first provides for a trust fund, from which the "Trustees shall in such manner as in their uncontrolled discretion they shall think fit cultivate (certain estates) for the instruction of the people of Rhodesia." He gives a park at Bulawyo, and also directs that a railroad be built thence to Westacre "so that the people may enjoy the glory of the Matoppos[3] from Saturday to Monday." To the same locality he gives an agricultural college. He provides that Groote Schuur, his beautiful homestead, shall become the residence of the Federal premier. He gives outright to Oriel, his own college at Oxford, half a million dollars; to be spent for college buildings, the maintenance of Resident Fellows, for the High Table, and for a Repair Fund.[4]

He then proceeds to establish the Scholarships. "Whereas, I do consider that the education of young colonists at one of the Universities in the United Kingdom is of great advantage to them for giving breadth to their views for their instruction in life and manners and for instilling into their minds the advantage to the Colonies as well

[1] Whether or not this inference is correct is hardly to be gathered from Mr. Stead's pages; and so far as known by the writer of this article, no other authority is accessible.

[2] At this writing the will in full has not been made public.

[3] A range of gigantic barren rocks or mountains, where, at his suggestion, his body was buried.

[4] "As the college authorities live secluded from the world," he adds, "and so are like children as to commercial matters, I would advise them to consult my trustees as to the investment of these various funds. They would receive great assistance from my trustees in such matters." Perhaps Mr. Rhodes did not over-estimate the value of academic judgment.

as to the United Kingdom of the retention of the unity of the Empire.

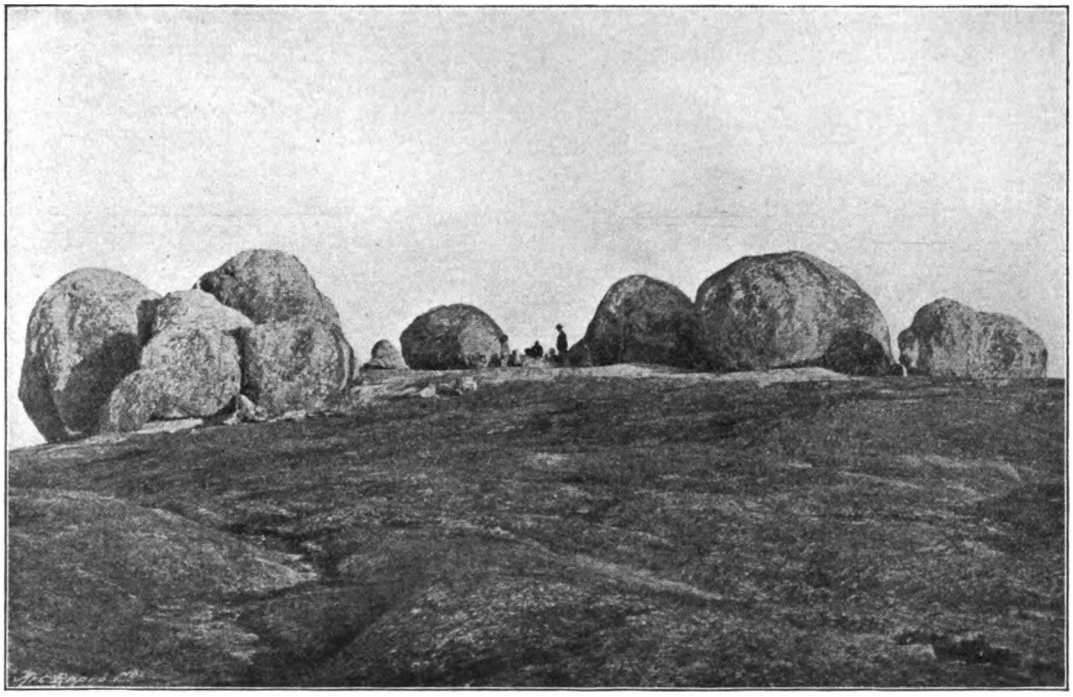
"And whereas . . . I attach very great importance to the University having a residential system such as is in force at the Universities of Oxford and Cambridge. . . . And whereas my own university has such a system.

"And whereas I also desire to encourage and foster an appreciation of the advantages which I implicitly believe will result from the union of the English-speaking peoples throughout the world and to encourage in the students from the United States of North America who will benefit from the American Scholarships to be established for the reason above given at the University of Oxford under this my will an attachment to the country from which they sprung but without I hope withdrawing them or their sympathies from the land of their adoption or birth.

"Now therefore I direct my trustees . . . to establish for male students the scholarships hereinafter directed to be established, each of which shall be of the yearly value of £300 and be tenable at any college in the University of Oxford for three consecutive academical years. . . .

"I direct my trustees to establish . . . 'the Colonial Scholarships.'

"The appropriation . . . shall be in accordance with the following table: (to South Africa 24, of which 9 are assigned to Rhodesia; 21 to Australasia, which includes the several divisions of the Australian Federation besides Tasmania and New Zealand; 6 to Canada, 3 each to the Provinces of Ontario and Quebec; 6 to the Atlantic Islands, 3 each to Newfoundland and Bermudas; and 3 to the West Indies.)[1]



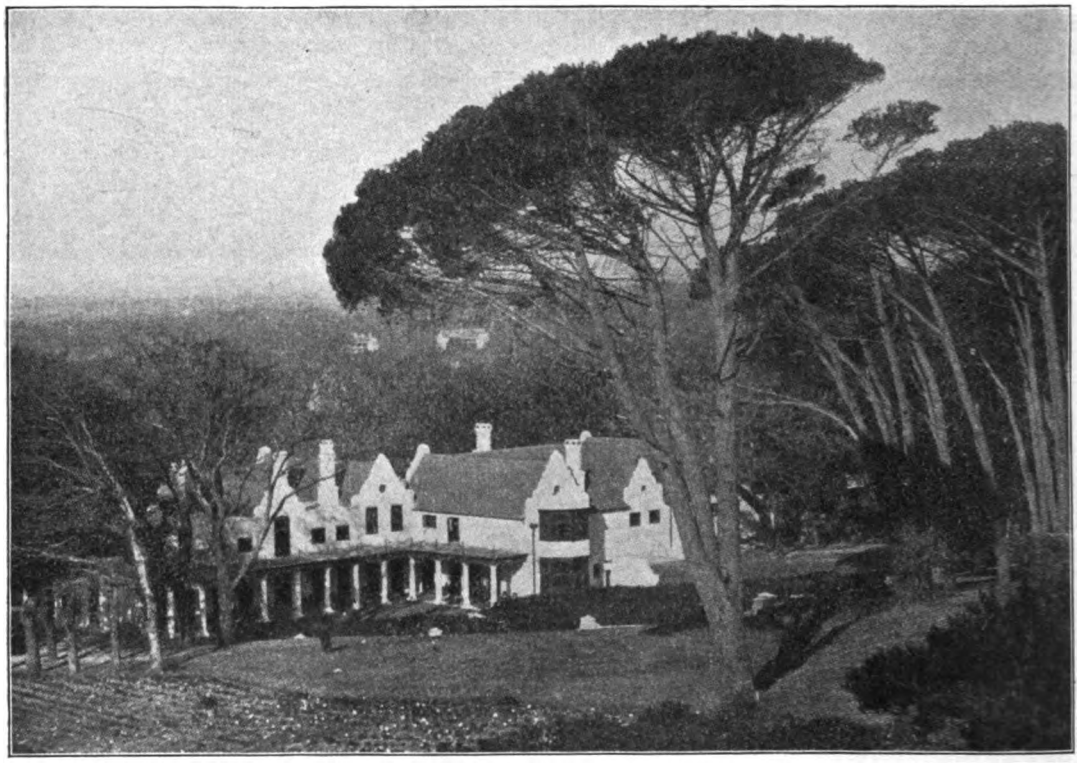
THE SUMMIT OF "WORLD'S VIEW," MR. RHODES' BURIAL PLACE.

[1]Table condensed from much longer form in the will. The following colonies have received *no* scholarships;—in Canada, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba,

"I further direct my trustees to establish . . . 'the American Scholarships.' I appropriate two of the American Scholarships to each of the present States and Territories of the United States of North America."[1]

To these Colonial and American Scholarships, by a codicil to his will, Mr. Rhodes adds fifteen other scholarships at Oxford, "a good understanding between England Germany and the United States of America will secure the peace of the world and educational relations form the strongest tie."

Having apportioned the scholarships, Mr. Rhodes states the qualifications. "My desire being that the students . . . shall not be merely bookworms I direct that in the election of a student . . . regard shall be



GROOTE SHUUR.

each of £250 value, for students of German birth to be nominated by the Emperor, for

Northwest Territories, and British Columbia; in the West Indies, Bahamas, Leeward Islands, Windward Islands, Barbadoes, Trinidad and Tobago; in the Mediterranean, Gibraltar, Malta, and Cyprus; in the Indian Ocean, Mauritius and Ceylon; in the far east, Borneo, New Guinea and Hong Kong. The Indian Empire, Egypt, and the Soudan are also unmentioned in the bequest.

The average of scholarships to population is one in 760,000 in the United States, and one in 224,000 in the fifteen British Colonies to which they have been allotted. If the omitted colonies were dealt with on the same basis, 33 new scholarships would be needed.

had to

i his literary and scholastic attainments

ii his fondness of and success in manly outdoor sports such as cricket and football and the like

iii his qualities of manhood truth courage devotion to duty sympathy for the protection of the weak kindliness unselfishness and fellowship

iv his exhibition during school days of

[1]At the time of the last census there were forty-five States and five Territories.

moral force of character and of instincts to lead and to take an interest in his schoolmates for those latter attributes will be likely in after life to guide him to esteem the performance of public duty as his highest aim."

"No student shall be disqualified for election . . . on account of his race or religious opinions."

While the selection of the student varies in the several Colonies and States, it is left largely to the local universities. In this country it is either vested in the State Universities, or in those universities which enjoy similar prominence within their own commonwealths,—as Yale in Connecticut and Harvard in Massachusetts.

Arrived at Oxford, the student is in the same position as any undergraduate ("commoner") of the University. "The duties of a Rhodes Scholar are not different from any other member of a college," says the Rhodes Agent in Oxford. "The receipt of the Scholarship does not bind him to do anything in particular."

Such are the provisions made by Mr. Rhodes to put his vast plan at least partly into execution. Last September the first American Scholars met in Boston and thence sailed together for Oxford. At the same time the Colonial Scholars were beginning their journey from these fifteen British Colonies. Surely, to quote Milton's phrase, here is a faith manifested in "God's Englishmen."

To what endeavor and achievement in the far future will this perpetual session of an international conference lead? Who shall say! And yet the comment of Mr. Stead (p. 52) offers some suggestion. "Once each year Founder's Day will be celebrated at Oxford; and not at Oxford only, but wherever on the broad world's surface half a dozen old Rhodes Scholars come together they will celebrate the great ideal of Cecil Rhodes—the first of modern statesmen to grasp the sublime conception of the essential unity of the race. Thirty years hereafter there will be between two and three thousand men in the prime of life scattered all over the world, each one of whom will have had impressed upon his mind in the most susceptible period of his life the dream of the Founder."

If in the quarrels of mediaeval Oxford we have seen our modern social adjustments working themselves into definition, if therein we have seen the English nationality slowly emerging; then are we not warranted in seeing in this present movement, in this mere fragment of the Founder's dream come true, the promise of the time when "God's Englishmen" shall establish justice and liberty and peace in a far broader fellowship?

"Steeped in sentiment as she lies, spreading her gardens to the moonlight, and whispering from her towers the last enchantments of the Middle Age," says Matthew Arnold, "who will deny that Oxford, by her ineffable charm, keeps ever calling us nearer to the true goal of all of us. . . ."

THE END.

SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

VIII.

The Rights and Privi eges of Belligerent Armed Vessels in Neutral Ports.

By Amos S. Hershey,
Associate Professor of European History and Politics, Indiana University.

NEXT to the questions relating to contraband, the most important issues raised during the present war from the standpoint of International Law have thus far[1] been those connected with the rights and privileges of belligerent armed ships in neutral ports.

One of these questions was raised almost at the very beginning of the war when the Russian gunboat *Mandjur* remained in the neutral harbor of Shanghai where she was lying at the outbreak of hostilities) in defiance of the orders which had been issued by the Chinese authorities, acting upon the representations of the Japanese consul, that she leave that port within twenty-four hours.[2]

Japan repeated her demands at Peking and is even said to have threatened a resort to force, but the conduct of the Chinese Government seems to have been extremely weak and vacillating. After prolonged negotiations and repeated agreements to disarm on the part of the Russian authorities—agreements which do not appear to have been effectively carried out—the *Mandjur* was finally disarmed and dismantled, and the important parts of her machinery and armament were placed in the custody of the Chinese Government toward the end of March.[3]

Another case of the abuse of the hospitality of neutral ports on the part of a Russian vessel arose in February. The *Dmitri Donskoi*, a cruiser belonging to the Russian Mediterranean fleet, obtained coal at Port Said on the plea that it was needed to enable her to steam to Cadiz on her return voyage to Russia. But the coal thus obtained for an innocent purpose was used in stopping and overhauling several neutral vessels in the vicinity of the Mediterranean entrance to the Suez Canal. "It is quite clear," says Lawrence[4] "that the neutrality of Egypt was violated in a gross and open manner. It is an accepted rule that no proximate acts of war must take place in neutral waters, and they must not be used as a base of operations by either party."

An Associated Press dispatch of February 20, 1904, stated that friendly communications between France and Japan had been exchanged with respect to the stay of the Russian Mediterranean squadron at Jibutil in French Somaliland—a stay which exceeded the twenty-four hours supposed to be prescribed by International Law. But the explanation of France for not ordering the Russian vessels to leave Jibutil within that period of time was said to have been entirely satisfactory to the Japanese Government. It appears that the French au-

[1] November 5, 1904.

[2] The reluctance of the *Mandjur* to leave Shanghai appears to have been due to the fact that a large Japanese cruiser was said to have been lying outside the harbor. Mr. De Lessar, the Russian minister at Peking, maintained, however, that the presence of the *Mandjur* in Shanghai was necessary for the protection of the Russian Consulate there. This question derived additional importance from the fact that the neutrality of China had in a sense been guaranteed by the Powers. The solution of the problem was anxiously awaited by the whole world. See The Green Bag for June, 1904, for the second article of this series entitled, "The Hay Note and Chinese Neutrality."

[3] On the case of the *Mandjur*, see the newspapers from February 19 to March 26, 1904. See especially an article in *Collier's Weekly* for April 9.

[4] *War and Neutrality*, p. 116.

thorities at that port also permitted the Russian vessels to take in a full supply of coal.[1] The British Government, on the other hand, not only insisted upon the enforcement of the twenty-four hour rule, but refused to supply Russian warships with more coal than was needed to carry them to some nearer neutral destination.

The right of belligerent warships to coal in neutral ports has been much discussed during the present struggle. It has derived particular interest and importance from frequent reports that the Russian Baltic fleet intended speedily to leave the Baltic Sea for the Far East—a departure repeatedly announced, but always deferred until the middle of October. It is well known that Russia has no coaling stations of its own, and that if the Baltic Fleet ever proposes to reach its destination, it must depend upon accompanying colliers for its coal—a difficult and dangerous expedient—or upon neutral ports for sufficient supplies.[2]

It is generally believed that the French and German Governments[3] would raise no objections to the granting of supplies of coal to Russian vessels at French and German ports, at least in quantities sufficient to enable them to reach the next neutral ports, but the British Government has taken much more advanced ground. In her Neutrality Proclamation of February 10, 1904, Great Britain instructed the authorities in British ports not to permit belligerent warships to take on more coal than is necessary to carry them to the nearest home port, "or to some nearer named neutral destination,"[4] and in a more recent set of instructions, sent to the Governors of British Colonies and Dependencies, even more advanced ground than this was taken. The British authorities were advised that they were in the future to refuse to grant facilities for coaling or provisioning in British ports to belligerent vessels "proceeding to the theatre of war or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contraband of war."[5]

[1] Lawrence, *op. cit.*, pp. 120 and 123. This corrects a previous statement made by the writer in The Green Bag for July, 1904. See p. 458 of Vol. XVI.

[2] The Spanish Government was at first reported to have refused to permit the Baltic Fleet to coal at Vigo on October 26, but the following day it was announced that the Spanish authorities at Vigo had permitted each vessel to take on 400 tons. See New York *Times* for October 27 and 28. The Spanish Government is also said to have "authorized the Russian warships at Vigo to remain in port and complete repairs on condition that they leave immediately after repairs are completed." Chicago *Tribune* for October 28, 1904. The Baltic fleet remained several days at Vigo and then proceeded to Tangier where it was apparently permitted to take on a full supply of coal and provisions by the Moorish authorities on October 30. Numerous complaints have since been made by the *Japanese Press*, of the facilities for coaling afforded to the Baltic fleet in French ports.

[3] See especially the London *Times* (weekly ed.) for September 30, 1904 for a summary of documents published on this subject by M. Hutin in the *Echo de Paris*. The German Government let it be known, however, as early as February that the Baltic Fleet would not be permitted to pass through the Kiel Canal. In this respect at least, as also in disarming the Russian warships at Tsing-Tau, Germany has perhaps more than fulfilled her neutral obligations.

[4] This phrase is omitted in the American proclamation of neutrality.

[5] From the text of a proclamation issued by the Governor of Malta on August 12, 1904. See London *Times* (weekly ed.) for August 26, 1904. The "Instructions" themselves have not been published, so far as we are aware. The Proclamation of the Governor of Malta also declares that "such fleet shall not be permitted to make use in any way of any port, roadstead, or waters subject to the jurisdiction of His Majesty for the purpose of coaling either directly from the shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to any such port or roadstead or within the said waters at the same time or successively."

The Egyptian Neutrality Order of February 12, 1904, provides that "before the commander of a belligerent ship-of-war is allowed to obtain coal in any port of Egypt, he must obtain a formal authorization from the authorities of the port, specifying the amount he may take. Such authorization is to be granted only after the receipt from the commander of a written statement, setting forth the name of the port to which he is

The question of the rights and privileges of belligerent armed ships in neutral ports came up in a very acute form in the month of August when a number of vessels belonging to the Russian Fleet at Port Arthur succeeded in escaping to various neutral ports on the Chinese coast after their defeat at the hands of the Japanese on August 10. The Russian torpedo boat destroyer *Ryeshitelni*, which had taken refuge in the Chinese port of Che-Foo, was seized and towed out of the harbor by several Japanese destroyers on the night of August 11, in spite of the fact that the Russian vessel was partially disabled and that she had been at least partly disarmed,[1] in accordance with the demand of the Chinese Admiral at Che-Foo. This was an undoubted violation of Chinese neutrality and of the law of nations on the part of Japan, the serious character of which has in nowise been weakened by the specious grounds on which it has been defended.

The Japanese are said to have attempted to justify their action on the ground that China had failed to enforce her neutrality over against Russia[2] that the neutrality of China was plainly imperfect inasmuch as she was incapable of fulfilling her neutral obligations, and that, in the face of plain proofs of such incompetence, Japan was compelled to enforce her belligerent rights. It was also said that Japan did not intend to repeat the *Mandjur* farce, and that she could not afford to break up her fleet for the purpose of watching Chinese ports in which Russian vessels are abusing the privileges of asylum and taking advantage of China's inability to enforce neutral rights.[3]

Without examining into the truth or seriousness of these charges, it is sufficient to observe that none of them, even if fully proven, would justify the violation of Chinese territorial sovereignty. One international wrong does not justify another, and there are other ways of obtaining redress for violations of neutrality, which are not too gross or serious, than that of an attack upon territorial sovereignty. As stated by Daniel Webster, then (1841) Secretary of State, in the case of the *Caroline*,[4] in order to excuse such an act as the violation of neutral territorial sovereignty, one must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means

to go next, and the amount of coal he has at the moment in his bunkers. He will then be permitted to take what is sufficient for the purpose declared to be in view, and no more." Lawrence, *War and Neutrality*, pp. 134-35. But, as Lawrence points out, experience has shown that this rule may be evaded as in the case of the *Dimitri Donskoi*. (See above.) He suggests (p. 136) that there be added to the rule "a clause to the effect that any coal obtained by means of them for cruising purposes, or for steaming to a different destination, unless in the event of chase by an enemy, shall disqualify both the vessel and her commander from receiving further supplies in any port of the same neutral during the same war." "This," he thinks, "would put an end to evasions." It seems to us, however, that even this amendment would be insufficient. It would not prevent the Baltic Fleet from making use of neutral ports to speed it on its destination to the Far East. Only such total prohibitions as are contained in the Proclamation by the Governor of Malta would appear to be sufficient for this purpose.

[1] This was the case, at least, according to the statements of the Russian commander and Admiral Alexieff. But the fact of disarment was denied by the Japanese Navy Department. For the official statements on both sides, see London *Times* (weekly ed.) for August 19, 1904. See also New York *Times* for August 15. The fact that the *Ryeshitelni* was partly disarmed was practically admitted by M. Takahira, the Japanese Minister at Washington, in an interview published in the New York *Times* for August 28, 1904. See also Count Cassini's interview in the New York *Herald* for August 19.

[2] Amongst the violations of Chinese neutrality by Russia were enumerated the constant violations of the neutrality of Chinese territory between the Great Wall and the Liao river, Russia's disregard of the neutrality of the treaty-port of Niu-Chwang, the sinking of a Chinese vessel named the *Hipsang*, and the use by Russian agents of the Chinese port of Che-Foo as a base of supplies and military operations during the war. (It is claimed that Che-Foo has been used by Russia as a wireless telegraphy station, and that Chinese junks have been using this port as a base for the blockade of Port Arthur.)

[3] See Tokio Correspondent to the London *Times* (weekly ed.) for August 19, 1904.

[4] See Wharton's *Digest*, I., §50c.

and no moment for deliberation." And as our most eminent jurist[1] has well said in a famous case, "if there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and remain in them while allowed to remain, under the protection of the Government of the place." "It is the duty of the belligerent to refrain from the exercise of hostilities within the shelter of neutral territorial waters,[2] and, if any vessel, whether belligerent or neutral, be assailed within such limits, it is incumbent on the neutral Government in the first instance to defend her against her assailant, and, if she be captured, to exert itself to the utmost to effect restitution or otherwise to secure redress for the injury."[3]

The Japanese Government refused to offer any apology, disavowal or restitution for this gross violation of Chinese neutrality, and it must be admitted that her conduct in this matter, although altogether exceptional, constitutes a blot upon a record which is, thus far, otherwise remarkably clean and spotless from the standpoint of International Law.

Three of the escaped vessels of the Russian fleet at Port Arthur sought refuge at the German harbor of Tsing-Tau near the entrance of Kiao-Chow Bay (the German concession on the Shan-Tung peninsula) on the night of August 11, *viz.*—the battleship *Czarevitch*, the protected cruiser *Novik* and several torpedo-boat destroyers. The *Novik*, which was not seriously injured, was ordered to leave within twenty-four hours, in accordance with the instructions of the German Government; but the *Czarevitch* and several of the torpedo-boat destroyers, being in an unseaworthy condition, were permitted to remain to the end of the war on condition that the vessels be disarmed and their crews kept in the custody of the German authorities until the end of the war.[4]

On August 12 the Russian cruiser *Askold* and the destroyer *Grosovoi* arrived at Shanghai—the former vessel being badly damaged, but the latter apparently in fairly good

[1] Chief Justice Marshall in Exchange *v.* McFaddon, 7 Cranch 116.

[2] See the opinion of Sir W. Scott (later Lord Stowell) in the case of the *Anna* (5 C. Rob. 373), where it was held that the capture of an enemy's ship in neutral waters is illegal, and that such a vessel must be restored by the prize court of the captor. Sir W. Scott gave it as his opinion that this would be so even if the vessel had been pursued into neutral waters. Instances of the violation of neutral territory have not been altogether rare, even in the present century. They were perhaps the rule rather than the exception in the eighteenth century. The United States was guilty of at least two such violations during the Civil War—the *Florida* in Brazilian, and the *Chesapeake* in British waters; but in both these cases, the acts were disavowed and ample apology and reparation were made.

The case of the *General Armstrong* (see Wharton's *Digest*, II., §227), in which Louis Napoleon acted as arbitrator in 1852, has been cited in support of the action of the Japanese, but the case is not at all analogous. Besides, although the decision was doubtless right, it appears to have been based on a wrong principle. In that case it was decided that the Portugese Government could not be held responsible for the destruction of the American privateer *General Armstrong* in consequence of an attack by a British fleet in Portugese waters in 1814, inasmuch as the American vessel had begun the actual attack and because her captain had not applied "from the beginning for the intervention of the neutral sovereign." As Lawrence (*Principles*, p. 541,) points out, while this award was right, the principle of the decision was wrong in so far as it appears to support the broad doctrine laid down by some writers (see Hall, p. 628), that a "belligerent, who, when attacked in neutral territory, elects to defend himself, instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility." Whether we accept or reject the principle supposed to underly the decision of Napoleon in the case of the *General Armstrong*, it has no applicability in the case of the *Ryeshitelni*. In the latter case, Japan was clearly the actual as well as the real aggressor, and the Russian commander had placed himself under the protection of the Chinese Admiral who proved to be a weakling or a coward.

[3] Walker, *Science*, p. 451.

[4] See the London *Times* (weekly ed.) for August 19, 1904 The German Government is said to have taken the position that belligerent warships may repair damages for purposes of navigation in any neutral port, but that their armament must not be repaired or augmented. See New York *Times* for August 14, 1904.

condition. The Russian consul was at once requested by the Chinese authorities at Shanghai to arrange for their departure from that port within twenty-four hours. He replied that, inasmuch as the ships needed repairs, the Chinese demand was not in accordance with the laws of neutrality, and that reasonable time must be allowed for the necessary repairs. Upon demand of the Japanese consul that the Russian warships leave Shanghai forthwith or disarm, the Chinese local authorities requested the Commissioner of Customs to report upon their condition and ascertain the period required for repairs. That official, having inspected the *Grosovoi* on August 16, reported that the destroyer's boilers and machinery needed repairs. On the other hand, it was admitted that she had come to Shanghai without reducing her speed.

In the meantime the situation was changed by the receipt of telegraphic instructions from the Wai-wu-pu and the Nanking Viceroy directing that both vessels forthwith disarm or leave port, and an intimation on the part of Japan that unless this were done, she (Japan) would send a portion of her fleet into the port and capture these vessels, as in the case of the *Ryeshitelni*. In no case, it was announced, would the Japanese Government tolerate a state of affairs which permits Russian vessels to find asylum in Chinese harbors and make repairs that would enable them to resume belligerent operations. Upon the downright refusal of the Russian Consul General to agree even to discuss this proposition, the Chinese authorities again changed front and ordered that a reasonable time be allowed for necessary repairs. But on August 19, after another threat on the part of Japan, the Chinese authorities at Shanghai demanded that the destroyer *Grosovoi* leave that port within twenty-four hours, and that the cruiser *Askold* complete her repairs within forty-eight hours and afterwards depart within twenty-four hours, or that both vessels disarm. Upon the second refusal of the Russian Consul General to discuss such a proposition, the question was referred to the Consular Body as a whole. This body met on August 22, but failed to accomplish anything, owing to the inflexible opposition of the Japanese Consul to any action affecting the rights of belligerents. On August 24, apparently after the Czar had ordered the disarmament of the vessels, the Chinese executed another *volte face*, and extended the time for the departure of the warships. On August 27 the Japanese Government addressed a note to the Powers informing them that, unless Russia forthwith disarm her warships at Shanghai, Japan would be forced to take whatever steps she deemed necessary to protect her interests in that quarter.[1] This veiled threat seems to have had the desired effect, for the *Askold* and *Grosovoi* were finally dismantled and disarmed during the first week of September, although not until after further delays and a long controversy between the Japanese, Russians and Chinese authorities with respect to the disposal of the crews of these vessels. It was at last agreed that the crews be interned in such Chinese treaty-ports as contained Russian consulates.[2]

The last case to be considered in this con-

[1] See New York *Times* for August 28, 1904.

[2] The Russians proposed that the precedent set in the case of the *Mandjur* be followed, and that the crews be sent home at the first opportunity which presented itself. The Japanese insisted, however, that the same procedure be followed as in the cases of the Russian vessels at the German port Tsing-Tau, *viz.*, that the crews be retained on Chinese territory. It is claimed by the Japanese that the Russians violated their parole in the case of the paroled crews of the *Variag* and the *Korietz* who have been drafted into the service of the Baltic Fleet. See Shanghai Dispatch to the Chicago *Tribune* for August 29, 1904. See New York *Times* for October 27, 1904. for confirmation of this report.

For the facts bearing on the whole controversy see especially London *Times* (weekly ed.) for August 19 and 26 and September 2 and 9, 1904.

nection is that of the armed transport *Lena*, a converted cruiser of the Russian Volunteer Navy, which arrived at the port of San Francisco on September 11. Her captain stated that the ship's engines and boilers needed repairs. It was believed at the time that the vessel was on a cruising expedition with the object of preying upon neutral commerce or of capturing Japanese vessels in the Pacific. The Japanese Consul at San Francisco promptly demanded that the vessel be required to leave within twenty-four hours. Mr. Stratton, the Collector of the Port, refused to permit an inspection of the ship by the Japanese Consul, rightly insisting that "the neutrality of the United States will be maintained without regard to any request or act of the Japanese Consul," and that "this matter is between the United States and the Russian Government."[1] An inspection of the vessel by the American naval authorities showed that the boilers were in such a bad condition that, although the ship could make ten knots an hour with them, it would not be seaworthy in a storm. It was estimated that she would need six weeks for temporary repairs. In the meantime all necessary precautions were taken to prevent interference or the sending in to the vessel of unauthorized supplies.

Acting upon the written request of the commander of the *Lena* addressed to Rear Admiral Goodrich, President Roosevelt issued an order on September 15 that the Russian cruiser be disarmed and taken in custody by the United States naval authorities until the close of the war between Russia and Japan.[2]

In stating the law or custom which has hitherto been generally supposed to govern such cases, it should be observed in the first place that the so-called Right of Asylum of belligerent armed ships in neutral ports only exists, as a matter of strict law, in cases where the vessels are driven into port by stress of weather or when they have been otherwise reduced to an unseaworthy condition; but permission to enter a port and enjoy its hospitality, at least for a short time, is assumed in the absence of any express notice to the contrary.[3] "Nevertheless it is a privilege based upon the consent of the neutral, and therefore capable of being accompanied by any conditions he chooses to impose."[4] As stated by Hall, it has hitherto generally been held that "a vessel of war may enter and stay in a neutral harbor without any special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety; she may take in such provisions as she needs, and if a steamer she may fill up with coal; nor is

[1] See the New York *Times* and Chicago *Tribune* for September 13, 1904.

[2] "The main features of the conditions prescribed are that the *Lena* be taken to the Mare Island Navy Yard and there disarmed by removal of small guns, breech blocks of large guns, small arms, ammunition and ordnance stores and such other dismantlement as may be prescribed by the commandant of the navy yard; that the captain give a written guarantee that the *Lena* shall not leave San Francisco until peace shall have been concluded; that the officers and crew shall be paroled not to leave San Francisco until some other understanding as to their disposal may be reached between the United States Government and both the belligerents; that after disarmament the vessel may be removed to a private dock for such reasonable repairs as will make her seaworthy and preserve her in good condition during her detention, or may be so repaired at the navy yard if the Russian commander should so select; that while at a private dock the commandant of the navy yard at Mare Island shall have custody of the ship and the repairs shall be overseen by an engineer officer to be detailed by the commandant and that, when so repaired, if peace shall not then have been concluded, the vessel shall be taken back to the Mare Island Navy Yard and be there held in custody until the end of the war."—From the *Army and Navy Journal* for September 17, 1904. It was finally agreed between the United States and Russia that the "officers and crews of the *Lena* shall have the freedom of San Francisco, but that they may not go beyond the bounds of the city during the present war nor return to Russia, except upon the conclusion of an agreement upon this point between Russia and Japan." Washington Dispatch to the London *Times* for September 19, 1904.

[3] See Exchange *v.* McFaddon, cited above.

[4] Lawrence, *Principles*, p. 509. Such conditions must, however, be impartially applied to both belligerents.

there anything to prevent her from enjoying the security of neutral waters for so long as may seem good to her."[1]

It has generally been assumed in current discussions (and Japan appears to have acted on this assumption) that it would be a breach of International Law for a neutral State to permit belligerent warships to remain in a neutral port longer than twenty-four hours, except in case of necessity, or to allow such vessels to take in supplies of coal oftener than once in three months, and then only in quantity sufficient to take them to the nearest home port or to some nearer neutral destination. It is true that neutral States are under an international obligation to prevent their ports from being used as a base of military operations or as a constant and regular base of supplies (whether of arms, coal or supplies), or for the purpose of augmenting the force of an armed vessel in the service of a belligerent or of increasing its military efficiency. It is also true that a considerable practice has grown up in recent times in favor of the twenty-four hour rule and in favor of strictly limiting the supply of coal permitted to belligerent vessels in neutral ports. But the details and specific content of such means or measures for carrying out their international obligations has been left by International Law to neutral Governments.[2]

[1]Hall, §231, p. 630. But Hall (p. 631) admits that "in the treatment of ships. as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency toward the enforcement of a harsher rule becomes more defined with each successive war." As everyone knows, the rule is entirely different with respect to belligerent troops which have been driven into neutral territory or which have sought refuge on neutral soil. Such troops are interned and kept there until paroled or until the close of the war. See Arts. 57 and 58 of the *Regulations Respecting the Laws and Customs of War on Land* adopted by The Hague Conference, Holls, p 160.

Dana (note 208 to Wheaton, p. 524) thus defines the obligations of neutrals in respect to the use of its ports by belligerent cruisers: "It may be considered the settled practice of nations, intending to be neutral, to prohibit belligerent cruisers from entering their ports, except from stress of weather or other necessity, or for the purpose of obtaining provisions and making repairs requisite for seaworthiness. They must not increase their armament or crew, or add to their belligerent efficiency. It is now the custom to fix a short time for the stay of such vessels, after they have done what is permitted them, or the marine exigency has passed,—usually twenty-four hours. These rules are, however, at the option of the neutral."

Taylor (p. 690) lays down the following rules: "In addition to the observance of all quarantine rules, local revenue and harbor regulations, the belligerent ship must respect all prohibitions designed to prevent the use of the neutral port for purposes other than those of immediate necessity. While the fighting force of such a ship may not be reinforced or recruited in such a port, nor supplies of arms and warlike stores or other equipments of direct use for war obtained, such supplies and equipments may be purchased as are necessary to sustain life or carry on navigation. If she is in need of repairs she may procure whatever is needful to put her in a seaworthy condition, including masts, spars and cordage. But she cannot make such structural changes as will increase her efficiency as a fighting machine, either of offense or defense. She may take in such provisions as she needs; and, if a steamer, she may purchase enough coal to enable her to reach the nearest port of her own country."

[2]The rule limiting the stay of belligerent armed vessels in a neutral port to twenty-four hours, "except in the case of stress of weather, injuries or exhaustion of provisions necessary for the safety of the voyage, save that an interval of twenty-four hours must elapse between the sailings of vessels of opponents," was first introduced into international practice by France in 1861. See Walker, *Science*, p. 455. Similar regulations were adopted by Great Britain, Spain, and Brazil. On January 31, 1862, the British Government published a series of neutrality regulations more stringent than any heretofore issued. They provided that "war vessels of either belligerent should be required to depart within twenty-four hours of their entry, unless they needed more time for taking in innocent supplies or effecting lawful repairs, in which case they were to obtain special permission to remain for a longer period, and were to put to sea within twenty-four hours after the reason for their remaining ceased. They might freely purchase provisions and other things necessary for the subsistence of their crews: but the amount of coal they were allowed to receive was limited to as much as was necessary to take them to the nearest port of their own country. Moreover, no two supplies of coals were to be obtained in British waters within three months of each other." Lawrence, *Principles*, pp. 310-11.

These restrictions upon the liberty of belligerent ships in neutral ports were adopted by the United States in 1870, and they have been reimposed by Great Britain and the United States in successive wars. They have also been copied, either in whole or part, by other States, *e. g.*, by Spain and Brazil. It is well known that the twenty-four-hour rule was enforced by Great Britain and Portugal during the Spanish-Ameri-

As has been said, neutral Governments may impose such conditions upon belligerent armed vessels in their ports as they deem necessary or advisable for the purpose of enforcing their neutral obligations provided such rules or regulations as they choose to make are impartially enforced against both belligerents. But they are bound by the law of nations to make such rules and provide such means for their enforcement as may be necessary to insure a strict and impartial neutrality—a neutrality which consists in absolute abstention from any acts or services which would tend to strengthen the fighting forces of either belligerent or which would amount to an actual or potential participation in the war. For this reason a belligerent armed vessel should not be allowed to remain in a neutral port for a longer period of time than is absolutely necessary in order to procure innocent supplies or to effect necessary repairs (*i. e.*, those absolutely necessary); and steamships should not be allowed to coal except in case of necessity, and then only in quantity sufficient to take them to the nearest home port or (better still) to the nearest available neutral destination.[1]

The measure or amount of repairs permitted or supplies allowed to belligerent armed vessels in neutral ports should be determined by what is absolutely needed to make them navigable or seaworthy as distinct from rendering them more efficient as fighting machines or increasing their warlike capacity.[2] "Speaking generally, we may say that a belligerent ship must not leave a neutral port a more efficient fighting machine than she entered it, except in so far as increased efficiency may come from increased seaworthiness or a better supply of provisions. On the other hand, neutrals may permit the supply of things necessary for subsistence, and they may repair in their ports and waters damage due to the action of the sea. A distinction is drawn between what is necessary for life and what is necessary for war."[3]

can war in 1898. The provisions of the British Neutrality Regulations of 1862 were repeated in the Neutrality Proclamations issued by Great Britain and the United States at the opening of the present war, and, as has been noted, Great Britain issued still more stringent instructions in August, 1904. The Scandinavian States have also issued very stringent rules regulating the admission and conduct of belligerent vessels in their ports, Sweden, as it appears, going to the extent of excluding them altogether. See an article by the eminent German jurist Laband in *Die Woche* for May 28, 1904. Cf. Lawrence *War and Neutrality*, p. 133, whose statement that all the Scandinavian States "have closed their ports to the public vessels of both belligerents, with the exception of hospital ships," appears to be incorrect. "The French Circular of Neutrality, issued on February 18, 1904, limited permissible supplies and repairs to those necessary for 'the subsistence of the crews and the safety of the navigation,' and forbade the use of French waters for warlike purposes, or for the acquisition of information, or as bases of operation against the enemy." Lawrence, *op. cit.*, p. 123. The vessels belonging to the Russian Mediterranean fleet at Jibutil were, however, as we have seen, permitted to fill their bunkers with coal and they were allowed to enjoy the hospitality of that port for more than twenty-four hours. All such details are said to be omitted in the German Proclamation of Neutrality, issued on February 13, 1904, according to the terms of which all Germans, whether at home or abroad, are simply enjoined to observe "the strictest neutrality in all their relations," officers of the Crown being charged with the enforcement of such neutrality. See Chicago *Record-Herald* for February 14, 1904. Germany, as has been noted, enforced the twenty-four-hour rule in the case of the Russian cruiser *Novik* at Tsing-Tau, although she appears to take a more lenient view of her neutral obligations in respect to the coaling of the Baltic fleet. Spain also at first showed a disposition to enforce the twenty-four-hour rule in the case of the Baltic Fleet at Vigo, and only extended the time for a special purpose and after consulting the Powers. A limited supply of coal is said to have been furnished to Russian vessels belonging to this fleet during its stay at that port in October.

[1] It has also been customary to interpose a time limit of twenty-four hours between the sailings of two or more hostile ships in belligerent waters. The object of this rule is to prevent fighting in the neighborhood of neutral waters. It dates from the middle of the eighteenth century. This is the custom which is generally referred to in treatises as the twenty-four-hour rule.

[2] Under this rule the engines and boilers of such a vessel might be repaired, but not so her guns or armament.

[3] Lawrence, *War and Neutrality*, p. 121. Lawrence adds, "It is not very logical, because a man must live before he can fight, and those things

It appears from the foregoing account that a new series of precedents have been created in this war in favor of the view that belligerent armed vessels seeking refuge in neutral ports ought to be dismantled and disarmed, and their crews paroled or detained until the end of the war, as in the analogous case of defeated or fugitive troops seeking refuge from defeat or pursuit on neutral territory in warfare on land. But the force of these precedents is perhaps somewhat weakened by the fact that the majority of the Russian vessels cited sought refuge in Chinese territory under the shadow of a Government which was incapable of guaranteeing a perfect neutrality or of perfectly fulfilling its neutral obligations. It may also be suspected that the Russian Government was under the circumstances not wholly averse to disarmament under proper guarantees of protection from attack, such as could be furnished by the Governments of Germany and the United States."[1]

In any case the force and validity of the twenty-four hour rule has been greatly strengthened during this war, and the conduct of the Powers in refusing or strictly limiting supplies of coal to Russian warships of the Baltic Fleet shows that modern Governments are becoming more fully alive to their neutral duties in this respect. It looks as though a new chapter in the history of International Law was being written, and it would seem that Governments are beginning to take a very different view of their neutral obligations than they did in the days when Confederate cruisers, built or purchased in foreign ports, were able to begin and complete their errands of destruction without ever having as much as touched at a Confederate port.

which keep him in health fit him to perform his duties as a combatant. But, such as it is, it has to be observed." The rule seems to be a sort of compromise between the obligations of humanity and comity on the one hand and of neutrality on the other. Cf. Taylor, p. 690.

[1] In the case of the *Lena*, at any rate, this action was taken at the express request of the Russian commander.

THE END.

PARIS LETTER.

NOVEMBER, 1904.

THERE seems to me to be some necessity to point out that many—lawyers and laymen—often refer to the French Civil Code as if it were practically entirely the work of Napoleon Bonaparte, somewhat in the same way that Sunday School scholars refer to the Law of Moses. And only the other day Prince Napoleon wrote to M. Albert Vandal, of the *Académie Francaise*, a letter in connection with the Centenary of the Code, in which that impression referred to is rather encouraged than otherwise. Napoleon should have his due but no more in this matter.

Not to mention the study of Justinian which became so popular in France toward the end of the eleventh century and which is supposed to have laid the foundations of the work connected with the Civil Code to come after, it is safe to say that the reign of Louis XI. saw the first serious beginnings when that monarch desired Commines to edit all the French Customs in a "beautiful volume." Time went on and then Louis XIV. was reminded by the sagacious Colbert that the unification of legislation would be a work worthy of the grandeur of his name, and the *Code Louis* became the pride and the dream of the French lawyers of that brilliant epoch. In the reign of

Louis XV. the work went on apace when Pothier illumined the world with his work on Roman Law, and d'Agguesseau edited his three great ordinances on *donations*, wills and *substitutions*. Gradually were being collected together those precious foundations for what was to come after. Everywhere lawyers and statesmen were in accord as to the necessity of arriving at something which would break down barriers between provinces and unite them under one system of justice.

In 1791 primogeniture was removed from the laws of France and equality in descent was introduced. A year later trusts (*substitutions*), which were so much in vogue among the families of the nobility to perpetuate their wealth and name and fame, were abolished. The Constitution of 1791 made marriage a civil contract and twelve months after, divorce came into the Civil Courts for adjudications, and at the same time the ecclesiastical authorities resigned to the State their ancient prerogatives as registrars of births, deaths and marriages (*registres de l'état civil*). "The Revolution," says M. Vallé, "was not contented with having emancipated the citizen from the tyranny of the Lords, secularized the public or civil service, abolished primogeniture and the preference of men to women in many respects, ameliorated the position of natural children, trampled on the feudal system, *etc.*, the Revolution looked further still and would separate the Church from the State, equalize the rights of all men before the law, and then in a tone of command, the Convention ordered the French jurists to formulate Codes."

The learning and experience of Cambacérès, lawyer and statesman and enthusiastic codifier, now came into play. Thirce did Cambacérès present his draft code to the Convention, and thrice in vain. His political views appeared not to have satisfied the minds of those suspicious times, and his favorite hobby, as far as he was himself personally concerned, was not crowned with success. It was left to others to profit by his work and that of his predecessors, and perfect this magnificent task. Now come the learned trio, Tronchet, Portalis and Bigot-Préameneu on the scene. But who knows what would have become of *their* work, had not Bonaparte taken it into his head that enough time and study had been expended on the project? "Hope deferred maketh the heart sick," so that when some one, like Napoleon, puts his foot down and commands action, he is likely to make his name distinguished. This is, perhaps, the real value of Bonaparte's work in connection with the Civil Code.

Did Napoleon have nothing to do, then, with the editing of the Civil Code? The learned M. Vallé, present Minister of Justice remarks as follows: "Undoubtedly, in certain moments, the First Consul flashed out with either his domineering egoism, which meddled in everything, and is seen conspicuously in the articles on 'Marriage' and 'Adoption,' or in that fear of the unknown (to be found in conservative minds), and manifested itself in regard to 'Foreigners.' In spite of these personal creations of Bonaparte, they were *effaced*, however, *for the most part*, by the continual introduction of new laws."

Enough, perhaps, has been said about the sources from which the Civil Code has been derived in this passing notice. It is evident, however, that the Code was the work of many years and of many minds; of the collected wisdom of Rome and of a collection of psychological, ingenious customs of that ingenious race of men—the French. Whatever Napoleon had to do with "editing" the Code, has vanished from its pages to a very large extent. His name, however, should be revered for what he accomplished,

and what he accomplished was the command to publish—"to go to press."

All this, and much besides, was alluded to in choice, elegant French, at the celebration of the centenary of the Code the other day. Such distinguished men as M. Vallé, Minister of Justice, M. Ballot-Beaupré, Presiding Justice of the *Cour de Cassation*, M. Glasson, Dean of the Faculty of Law of Paris, and M. Bourdillon, *Batonnier* of the Order of *Avocats* of the Court of Appeals of Paris, were present and delivered choice orations appropriate to the occasion.

But the men who took part in the celebration of the hundredth anniversary of the Civil Code were something more than a mutual admiration society, a something more than *laudatores temporis acti*. They represented a body of learned legal minds who frankly realize the imperfections of their Code of civil law, but who earnestly set their minds together to find a way to improve what exists, and to introduce where there is an imperative gap in the system. Such improvements are the heritage of a century's growth of civilization, such revision is not so much a recognition or confession of original imperfection. To keep up with the times is the indication of mental activity of our age and the glory of the modern strenuous life. In another century posterity may be compelled to legislate and codify laws consequent on the solution of, for instance, aerial navigation and all the problems inherent therein. Today the legal work of our time is to legislate and codify in regard to the problems of that labor by which aerial navigation can be made a successful, accomplished fact. One hundred years ago the cry of patriots in America and in France was "Let all men be equal." . . . Today, after a century of industrial growth and development we have to ascertain how to give effect to that equalizing sentiment. The protection of property was the science of our legal forefathers, the protection of labor is the study of modern jurist. The contemplated Labor Code in France must, indeed, have a great influence in the laws of legislation in connection with labor throughout the world. There is no doubt that the future Code will be worthy of its authors and compilers.

An incident in connection with the celebration of the Centenary of the Civil Code deserves to be mentioned. This is the demonstration made by some score of Women's Rights ladies against the celebration of the Centenary and against the Civil Code. An attempt was made by them to burn a copy of the Code in the Place Vendome, which is opposite the Offices of the Minister of Justice. The Police suppressed the demonstration and no harm was done. The significance of this little demonstration lies not in the fact that it was made, but rather in the fact that the Paris newspapers in commenting on the event treated the affair very temperately and admitted that the position of women under the Civil Code was not what it should be. Time will show whether the position of women in French Law will alter for the better. The indications are that this will be the case.

H. Cleveland Coxe,
Officer d'Académie.

The Green Bag.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, THOS. TILESTON BALDWIN, 53 State Street, Boston, Mass.

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

With this number, which brings the sixteenth volume to a close, the present editor retires from the editorial management of THE GREEN BAG. His editorial duties during the past four years have been made especially pleasant by the cordial co-operation of contributors, old and new, in the attempt to make THE GREEN BAG, in fact, as well as in name, a "magazine covering the higher and the lighter literature pertaining to the law." Beginning with the January issue, the editorial direction of this not uninteresting experiment will be in the hands of the new editor, Sydney R. Wrightington, a graduate of the Harvard Law School and a member of the Boston Bar,—a gentleman eminently fitted for this work by legal and literary instincts and training.

NOTES.

THE United States bankruptcy law had just gone into effect, and they were waiting for the newly-appointed referee to open the hearing.

"What shall we call him?" asked one attorney of his neighbor. "He isn't a judge, you know, and I don't exactly like to address him as 'Your Honor.'"

"Well, I don't know," was the reply. "How would 'Your Reference' do?"

THE defendant's attorney came hurrying in a few minutes late, and found the court waiting for him. As soon as he got his breath, he said:

"Your Honor, on the way from my office just now, a brother attorney asked me where I was going in such a hurry, and upon my saying that I was going to finish an argument before the chief justice, he said: 'The chief justice is a very patient man.' I took it, then, as a compliment to your Honor, but I am now in doubt as to whether it was that or merely a reflection upon me."

MULCAHY was standing on the courthouse steps, and a friend remarked that he looked tired.

"That I am," he replied. "I was on a jury and we was eleven to one and was out from three o'clock yesterday afternoon till nine o'clock this morning."

"And who," said his friend, "was the pig-headed son-of-a-gun that kept eleven gentlemen out all night that way?"

"That was me."

HE was fresh from the law school and had been told to have a certain criminal case continued. When the case was called, he arose and said, rather timidly:

"Your Honor, I move for a continuance in this case."

"I can't hear you, sir," said the judge.

"Your Honor, I move for a"—— he began in a much louder tone.

"I can't hear you, sir," from the bench cut him short.

"Your Honor, I move"—— he started once more, embarrassed, but determined, and in a voice that he felt must reach any judge, however deaf, and which could certainly be heard out on the street. At this point, however, he felt a pull at his coat-tail, and heard the voice of some good Samaritan behind him saying in a loud whisper:

"Sit down, you darned fool. He means you should go to the district attorney for continuance. Why don't you read the rules?"

In North Carolina before the adoption of Code pleading, or as they say in the South, "before the war," the pleadings in civil cases were mere memoranda entered on the Court docket. It so happened in Robeson County, that an old maiden lady named Miss Margaret Patterson sued one William McKay in an action of Trover for the conversion of her slave. The suit was stated on the Court docket as follows:

Margaret Patterson *v.* William McKay.
Trespass on the Case—Trover.

Defendant's Attorney wrote in verse the following on the docket:

Billy McKay, for his satisfaction,
Demands of Miss Margaret the cause of her action,
And wants to know why in this public place,
She has undertaken to sue him *in case.*

Plaintiff's Attorney replied:

Miss Margaret replies with a kind of a snigger,
Why, Billy, you know you converted my nigger,
Converted him, not to the God of the sinner,
But converted him to Cash—and you're the winner,
So, having received and failed to pay over,
You're therefore sued in an action of *Trover.*

The Supreme Judicial Court of Massachusetts, having held that the noise of the elevated railroad in Boston was an element of damage to abutters, an assistant city solicitor was asked if the decision affected the city in any way. "Well," he replied, "there is a burial ground up on Washington street, on the line of the road, that belongs to the city, but so far I have heard of no complaints about noise from any of the occupants."

The sudden illness of the minister had made it necessary to call in "Lawyer Brown" to perform the marriage ceremony as a justice of the peace. Brown was very much at home in the court-room, but this work was new to him, and it made him a trifle nervous. He did pretty well, nevertheless, making up his form of service as he went along, and succeeded in pronouncing the happy pair man and wife without any serious difficulty. Then, it suddenly struck him, that the words at the tip of his tongue, "And whom God hath joined let no man put asunder," and which he had thought of as an impressive ending, would not do for a civil ceremony like this. He was stuck and the pause was getting more than painful, when he had an inspiration and used the most impressive formula he could think of, the words of the court crier: "God save the Commonwealth of Massachusetts."

"There's a fellow making love to my wife," explained the indignant client.

"Does your wife encourage him?" asked the lawyer.

"She seems to. He takes her riding, sends her flowers, and the other day I saw him kissing her; and she seemed to like it."

"You saw him kissing her and she didn't object?" said the lawyer. "Well, we can get you a divorce without any trouble."

"Thunder!" said the husband, "I don't want no divorce. I want an injunction."

The following Southern stories are told in the *Saturday Evening Post:*

Representative John Sharp Williams tells of a negro in Mississippi who had trouble with a bellicose dog belonging to a neighbor. The darky shot the dog as soon as he discovered that the beast was not friendly, and promptly found himself in a justice's court.

"What sort of a gun did you have, Sam?"

"A double-barrel shotgun, sah!"

"Don't you think you could have scared the dog off?"

"Ya-as, boss," said the negro; "I mighter done dat, only I was so scared myself."

"Why didn't you take the other end of the gun and frighten him away?"

The darky scratched his head. "Boss," he said, "ef de dawg wanted me to do dat way wif de gun why didn't he come fo' me de other end fust?"

Senator Lindsay of Kentucky, has a story of a judge in that State who, by reason of his own ill-temper, found considerable difficulty in controlling individuals in the court-room. On one occasion there was unusual disorder. At last the judge could stand it no longer. "It is impossible to allow this persistent contempt of court," exclaimed his Honor, "and I shall be forced to go to the extreme length of taking the one step that will stop it!"

There followed a long silence in the court. Finally, one of the leading counsel arose, and without the suspicion of a smile asked:

"If it please your Honor, on what date will your resignation take effect?"

CORRESPONDENCE.

To the Editor of THE GREEN BAG:

Sir:—I have been in hope that I should see in your excellent publication some treatment of what seems to me to be the kernel of the Gurney incident in its application of international law to the facts.

The arrest of a secretary of the British legation for furious motor driving was a clear violation of international amenities. The contempt which he showed for the court, and his behavior in the court room, clearly in contempt of court, and the action of the Justice in treating them as such, were other clear violations. The fines have been remitted, a suitable apology offered, and Mr. Gurney in return has expressed in conditional language his regret "if he did anything wrong."

As the London *Law Times* says, if Mr. Gurney did break the law of motor driving he would probably have been more discreet and have acted more in the spirit of international comity if he had paid his fine without invoking his diplomatic character. There are a number of instances where gentlemen have pursued that course, and there must be a number of other instances where they have not only pursued that course but kept a complete silence upon the subject.

But the meat of the matter was not presented for consideration until some time after the incident itself. Then, in a dispatch which the Associated Press and other authoritative sources of news-supply treated as semi-official, we were told that the reason that Mr. Gurney had not been disciplined by the British Embassy was the circumstance that it was not he who had committed the offence. Mr. Gurney was praised for his chivalry in shielding a young American who was in fact the person who directed the motor car, exceeded the speed limit, and broke the law. But this version of the affair presents a far more serious breach of international comity than any which has been previously set before us. Clearly it was the duty of Mr. Gurney, while residing in the United States of America, to obey the reasonable laws and regulations which he found there in force. Clearly also his immunity was given not even to him, but only to his superior officer the Ambassador, and it was given to the Ambassador only for the necessary purpose of keeping him free from all entanglements with local matters. When such a privilege in the Ambassador, continued in the Secretary, is used as a means of saving one of the inhabitants of the country to which the Ambassador is accredited from responsibility for an admitted criminal act, then a grave breach of international law is committed.

It is impossible to speak with authority upon a subject where our information comes only from the newspapers and where from the nature of the case, and of the courtesy which Mr. Gurney tried to show, the facts will probably never be made clear. But it seems to me that some legal authority like your excellent publication should place itself upon record and call attention to this gross violation of international law. It is scarcely right that such action, which may serve as a precedent for other courtesies like it should pass without comment upon its far-reaching possibilities and its grave character. Yours respectfully,

H. R.

Boston, November 30, 1904.

NEW LAW BOOKS.

It is the intention of The Green Bag to have its book reviews written by competent reviewers. The usual custom of magazines is to confine book notices to books sent in for review. At the request of subscribers, however, The Green Bag will be glad to review or notice any recently published law book whether received for review or not.

A TREATISE ON THE CONSTITUTIONAL LIMITATIONS. By *Thomas M. Cooley*. Seventh edition edited by *Victor H. Lane*. Boston: Little Brown, and Company. (1903.) (cxiii +1036 pp.)

The first edition of Judge Cooley's masterpiece was published in 1868, and the work has gone through no less than seven editions in the comparatively short period of thirty-five years. Many a good book lives but a day and is buried long before its author. If a treatise survives the writer and justifies a new edition, without a change of text, the book must have had substantial merits. All this and more can be said of Judge Cooley's *Treatise on Constitutional Limitations*. It fell from the press a legal classic and in the lifetime of the author the book was given over to posterity. Famous and authoritative at home, the treatise was cited with approval on the continent, and the present reviewer has often heard German writers or teachers of constitutional law speak of the work with unstinted praise.

Thirteen years have elapsed between the appearance of the sixth and seventh editions of the *Treatise*, and in these years the courts, by a multitude of decisions, have attempted to bring into clearer light, and state with greater precision, the somewhat invisible line between Federal and State sovereignty and jurisdiction. In order that text and notes should state the law of the present day, the decisions of the courts should be placed before the intelligent reader by the text. Hence, the present edition.

It was singularly appropriate that the labor of revision and annotation should be confided to a professor of the Michigan Law School, and Professor Victor H. Lane has admirably performed his editorial duties. The text is untouched; the original footnotes have been retained but added to by the editor, who prevents confusion by inclosing his various additions in brackets. In many cases the editor has made original notes to the text. These are, likewise, inclosed in brackets, and are printed across the page in a single column. As the original and added notes are in double columns, these wholly original references to and interpretations of the text may be seen at a glance.

In speaking of the new matter and the selection of cases, Mr. Lane modestly says, in the preface: "The particular experience, or better judgment of some, will suggest a different selection in some cases, but it is hoped that what has been done will meet reasonably well the common need." A careful examination of selected passages from Mr. Lane's additions leads the reviewer to state that the editorial work is far in excess of Mr. Lane's modest hopes, for the citations of authority are not only accurate, but apt, and the views expressed are as clear in style as they are sound in law.

An idea of the extent of the editor's contributions will be gained by a mere comparison between the sixth and the present edition, which contains slightly more than a hundred and fifty pages of additional matter.

In a word, the work of Judge Cooley has not suffered at Mr. Lane's hands. Higher praise than this cannot well be given to an editor.

AMERICAN DIPLOMACY IN THE ORIENT. By *John W. Foster*. Boston. Houghton, Mifflin, and Company. 1903. (xiv+498 pp.)

After a lifetime devoted to public affairs and to the cares of an exacting profession. General Foster takes up the pen and handles it as dexterously and gracefully as ever a young man wielded a sword. Indiana men, it would seem, take kindly to literature after winning distinction in other fields. The names of General Lew Wallace and Maurice Thompson will occur to the reader. The younger generation seems inclined to re-

verse the order, for is not Mr. Booth Tarkington—tyro though he be in politics—thought to have his eye on the Governorship of his State?

But to return to General Foster. The *Century of American Diplomacy*—an excellent outline, although faulty on the Whitman question—was a book that one might expect from a former Secretary of State. His present work—*American Diplomacy in the Orient*—springs as naturally from the author's experiences, for Mr. Foster has long been interested in the Orient, and was at one time—and that a very important one—legal adviser of the Chinese Government in its foreign relations. Mr. Foster knows, therefore, the Oriental from frequent and practical contact, and the present book shows that he likewise knows the Oriental's history. Add to this that the author has a thorough grasp of American diplomacy and history; that he has represented the United States in both the new and old world, and it will be seen at once that ideal conditions of authorship obtained in this case.

The appearance of the book is timely, as well as fortunate; for the American people have been moving westwardly with feverish rapidity ever since the independence of our country. The Pacific cannot be said to have opposed a barrier, for Caleb Cushing had negotiated a treaty with China in 1844, before California had been added to the Union and Commodore Perry opened Japan to the world in 1852, before the Pacific coast had more than a handful of settlers.

The Far East fascinated and dazzled the imagination half a century ago. Senator Seward gave expression to a general feeling in the following glowing and prophetic utterances: "The Pacific Ocean, its shores, its islands, and the vast regions beyond, will become the chief theatre of events in the world's great hereafter." (Am. Dip. p. 135.)

And again, in 1852, he said: "We are rising to another and a more sublime stage of national progress—that of expanding wealth and rapid territorial aggrandizement. Our institutions throw a broad shadow across the St. Lawrence, and stretching beyond the Valley of Mexico, reaches even to the plains of Central America; while the Sandwich Islands and the shores of China recognize its renovating influence. . . . Expansion seems to be regulated, not by any difficulties of resistance, but from the moderation which results from our own internal constitution. No one knows how rapidly that restraint may give away. Who can tell how fast or how far it ought to yield? Commerce has brought the ancient continents near to us, and created necessities for new positions—perhaps connections or colonies there. . . . Even prudence will soon be required to decide whether distant regions, East or West, shall come under our protection, or be left to aggrandize a rapidly-spreading and hostile domain of despotism. Sir, who among us is equal to these mighty questions? I fear there is no one." (Am. Dip. pp. 401-402.)

The outlook that gave the father pause has failed to impress the son, who finds himself securely possessed of Porto Rico and Panama in the East, the Sandwich and Philippine Islands in the West. The Spanish-American War of 1898 has resulted in extensive acquisitions of territory, notwithstanding the solemn statement that the war was one of humanity, not of conquest. Had it not been wisely restricted at the outset or had it degenerated into conquest pure and simple, we might probably have added a continent or two to our domains instead of contenting ourselves with a few insignificant islands.

But whether the policy of expansion be wise or otherwise, it is a fact, and motives of self-interest, as well as curiosity, demand that we inform ourselves of our new neighbors. Hence it is that the appearance of General Foster's book is so timely alike for author and nation.

As to the book. It consists of thirteen chapters dealing with American and (in a lesser degree), European relations with China, Japan, Korea and its neighbors, Hawaii, the Samoan complication and the results of the Spanish War. An appendix of some thirty-five pages gives the various treaties and documents necessary to a correct understanding of the text.

Considering the largeness of the theme and its importance in the world, the book is kept within remarkably short compass. There is, however, no sign of compression in the text, which reads like a flowing narrative, always interesting and not seldom quaint and amusing as in the description of the Russian ambassador's reception (pp. 19-21).

The necessary limitations of the text are, however, remedied in the footnotes, where General Foster has given so many and so detailed references to available sources that the student may continue profitably his studies without serious difficulty.

It would be invidious, perhaps, to draw a comparison between General Foster's two volumes. Both are good, but the reviewer is inclined to think that *American Diplomacy in the Orient* is a more finished, a more authoritative and a fresher piece of work. The two books are, however, a great boon to the public. The various pen portraits of Caleb Cushing (pp. 94-95), Commodore Perry (pp. 147-169), Townsend Harris (pp. 172-186), and of Anson Burlingame (pp. 257 *et seq.*), are charmingly done, and it may confidently be said that there is not a dull page in the book. Add to this the fact that it is really the only work of its kind, and its value is clear. It has the field to itself and it fills it in a worthy manner.

A Treatise of the System of Evidence in Trials at Common Law. By *John H. Wigmore*. Vol. I. Boston: Little, Brown, and Company. 1904. (lv+1002 pp.)

There are to be four volumes of this treatise. The table of contents contains unusual nomenclature, of which the most striking examples are "prospectant evidence," "concomitant evidence," "retrospectant evidence," "testimonial rehabilitation," "autoptic proference," "rules of auxiliary probative policy," "prophylactic rules," and "viatorial privilege." This nomenclature, though certainly not attractive, causes very slight annoyance, for it seldom appears in the text. The present volume is largely devoted to historical and metaphysical discussion, and will be of much interest to persons of scholarly taste.

The American Law of Landlord and Tenant. By *John N. Taylor*. Ninth edition, by *Henry F. Buswell*. Boston: Little, Brown, and Company. 1904. Two volumes. (cxv+541+xv+592 pp.)

At this late date it is hardly necessary to say a word in commendation of a book that has so long had a high place. In the present edition an error has crept into §22, which ought to read, "New England States where tenancies *from year to year* are unknown." Part of the usefulness of this favorite treatise lies in its departures from the strict limits of its subject. Thus one finds here Division Fences, Party Walls, Nuisances, and Easements, in addition to conscientiously full treatment of Easements, Emblements, Fixtures, and forms of action.

A Treatise on Damages. By *Joseph A. Joyce* and *Howard C. Joyce*. New York: The Banks Law Publishing Company. 1903. Three volumes. (clxxv+cliv+cxxxvii+2669 pp.)

This is a treatise for practitioners. It states the doctrines well, occasionally discusses decided cases, and gives numerous citations in the footnotes. In §2034 there are very obvious shortcomings in the discussion of a master's liability to pay exemplary damages because of his servant's acts; but in almost all instances the treatment of topics is good.

Chancery Practice. With especial reference to the Office and Duties of Masters in Chancery, Registers, Auditors, Commissioners in Chancery, Court Commissioners, Master Commissioners, Referees, *etc.* By *John G. Henderson*. Chicago: T. H. Flood and Company. 1904. (lxxiii+1087 pp.)

This treatise on Chancery Practice is laid out on broad lines, dealing with the subject, both from the historical point of view and from the standpoint of modern equity practice. This makes the book of value to the student and to the lawyer in practice. And

what adds especially to its practical value is the care and thoroughness with which are indicated the differences existing in the various State courts and the Federal courts in matters of practice and procedure, and in the application of legal principles.

An examination of the book makes evident the fact that the author has chosen his subject because of real interest in it, and that he has given it careful study.

NOTES ON THE CONSTITUTION OF THE UNITED STATES. By *William A. Sutherland.* San Francisco: Bancroft-Whitney Company. 1904. (xv+973 pp.)

This book arranges under the several clauses of the Constitution brief notes of the pertinent decisions. There is a slip on p. 527, where, in a comment on Const., article III, section 2, first clause ("The judicial power shall extend . . . to controversies between two or more States"), it is too broadly stated that "a suit by a State on claims assigned to it, against another State, is not a suit between States within the meaning of this clause," citing New Hampshire *v.* Louisiana, 108 U. S. 76 (1883). The case cited shows that the proposition does not go beyond instances where the assignment is merely illusory, the apparent assignee having no real interest. Such a slip, however, simply indicates that this book, like all others, must be used cautiously. Taken as a whole, the book is painstaking, convenient, and trustworthy.

THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND HISTORY OF THE MONROE DOCTRINE. By *John A. Kasson.* Boston: Houghton, Mifflin and Company. 1904. Cloth. (xviii+273 pp.)

The main portion of this book was written and published as part of the official proceedings, in 1887, at the centennial celebration in Philadelphia of the formation of the Constitution. It is a clear and readable, rather than a dry legal story of the constitutional history, briefly told, of the colonies leading up to the Constitutional Convention of 1787, and, in more detail, of the Convention itself —its members, its proceedings, and its debates; and a discussion of the various provisions of the Constitution, with the Amendments. The chapter on the Monroe Doctrine is added to the present volume, says the author, because its influence "has become almost equal to that of a provision of the national Constitution."

AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES. By *Henry Flanders.* Fifth edition. Philadelphia: T. and J. W. Johnson, and Company. 1904. (xii+326 pp.)

This book is adapted to the needs of the general reader. It is to be regretted that §152 does not very clearly define police regulations; but this shortcoming is hardly the fault of the author. When a new edition is prepared it may be well to recast the chapter on the courts in such a way that all passages will describe the courts as they are now constituted. Yet, in spite of occasional shortcomings, the book is worthy of commendation as comprehensive and useful.

THE DECLARATION OF INDEPENDENCE. An Interpretation and an Analysis. By *Herbert Friedenwald.* New York: The Macmillan Company. 1904. Cloth. (xii+299 pp.)

Dr. Friedenwald first traces the growth of the sentiment for independence and its relation to "the development of the authority and jurisdiction of the Continental Congress." Then, after a chapter on "Adopting and Signing the Declaration," he takes up its critics, and later discusses its purpose and its philosophy, and explains the grievances recited in the Declaration. In an appendix Jefferson's Draft and the Engrossed Copy of the Declaration are given on opposite pages.

THE MONROE DOCTRINE. By *T. B. Edgington.* Boston: Little, Brown, and Company. 1904. (viii+344 pp.)

This is a rhetorical, but readable and useful, account of the rise and development of the foreign policy of the United States. It is unfortunate that the author considers the Monroe Doctrine principally as a declara-

tion of our duty toward South America and not as a declaration of the interest which we ourselves have in saving the United States from the burden of great armies and navies.

GERMANY'S CLAIMS UPON GERMAN-AMERICANS IN GERMANY. By *Edward W. S. Tingle.* Philadelphia: T. and J. W. Johnson. 1903. Cloth. (xv+121 pp.)

The sub-title shows what is the scope of this book, namely, "a discussion of German military and other laws which may affect German-Americans temporarily in Germany, together with some comments upon existing treaties." The author was formerly United States consul at Brunswich, Germany, and his work had the advantage of revision by German jurists, and has been accepted by the State Department at Washington for use in the Consular Service. On reading the advice—doubtless good—in the chapter on "Behavior which should be observed by German-Americans returning to Germany to avoid conflict with German law," one wonders how such a traveller, unless dumb, escapes the clutches of the law.

THE EXPANSION OF THE COMMON LAW. By *Sir Frederick Pollock.* London: Stevens and Sons. 1904. Cloth. (vii+164 pp.)

It is with genuine pleasure that we welcome the appearance of the slender volume of which Sir Frederick Pollock's four lectures on "The Expansion of the Common Law," delivered a year ago before several of our American Law Schools, form the principal contents. Sir Frederick's earlier address, delivered in 1895 before the Harvard Law School Association on "The Vocation of the Common Law," is here reprinted, and is a fitting introduction to the series of lectures from which this book takes its title; and his article on "English Law Before the Norman Conquest," originally published in the *Law Quarterly Review*, is reprinted in the appendix. The high scholarly attainments and charming literary style of Sir Frederick Pollock make these essays delightful reading as well as valuable contributions to legal literature.

A TREATISE ON THE NEW YORK EMPLOYERS' LIABILITY ACT. By *George W. Alger* and *Samuel S. Slater.* Albany, N. Y.: Matthew Bender. 1903. Buckram. (xxvii+218 pp.)

This *Treatise* is, in fact, of somewhat broader scope than its title leads the reader to expect. It deals primarily with the New York Employers' Liability Act, but the texts of the English Employers' Liability Act (now superseded by the Workingmen's Compensation Act of 1897), and the kindred acts in Alabama, Massachusetts, Colorado and Indiana are given, and cases under these various statutes are freely cited. Indeed, it would seem that this short *Treatise* would be of as much value to the lawyer in either of the four states last mentioned as to the New York practitioner.

THE INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS. By *William L. Snyder.* New York: Baker, Voorhis, and Company. 1904. Buckram. (xxiii+380 pp.)

The book before us is a clear and concise commentary on the Interstate Commerce Act and kindred laws, including the Sherman Act and the Elkins Act. To the various sections of these acts are added notes, sufficiently full, of all Federal decisions under these statutes. We note with interest the list of bills pending in Congress designed to increase the power of the Interstate Commerce Commission (pp. 193, *et. seq.*), and the map showing the enormous stretch of territory affected by the Merger decision.

A SUMMARY OF THE LAW OF PRIVATE CORPORATIONS. By *Leslie J. Thompkins.* New York: Baker, Voorhis, and Company. 1904. Buckram. (xxxi+264 pp.)

Professor Thompkins has achieved a good measure of success in summarizing in comparatively few pages a large and important subject. He does not aim to treat the Law of Private Corporations with the fulness which marks the larger treatises of Mr. Morawetz and the late Judge Thompson on the same subject; but from this smaller volume the student may obtain an

excellent general knowledge of a branch of the law which, year by year, is becoming of increasing importance to the practising lawyer.

THE NATIONAL BANK ACT. By *John M. Gould.* Boston: Little, Brown, and Company. 1904. Buckram. (xvi+288 pp.)

In this handy volume Mr. Gould has annotated the National Bank Act of 1864 (Title 62 of the Revised Statutes of the United States), and the amendments thereto, with all pertinent decisions of Federal and State courts to September of the current year. The Constitution and Rules of the American Bankers' Association and of the New York, Boston and Chicago Clearing Houses are added by way of an appendix.

THE AMERICAN STATE REPORTS. Containing the Cases of General Value and Authority Decided in the Courts of Last Resort of the Several States. Selected, reported and annotated by *A. C. Freeman.* Volume 98. San Francisco: Bancroft-Whitney Company. 1904. (1112 pp.)

The cases in this latest volume of *American State Reports* are chosen with the same good judgment which has governed the selection of cases for the earlier volumes. The principal notes, which are exceptionally full and valuable, deal with the following subjects: Actions for Contribution not Founded on an Express Promise; Convicting on the Testimony of an Accomplice; Executors *de Son Tort*; Liability of a Master to his Servant for Injuries Resulting from Defective Machinery and Appliances; Implied Authority of Wife to Act for Husband and Charge Him for Necessaries; Practice of Osteopathy, Christian Science, Magnetic Healing, or Clairvoyance as Practice of "Medicine or Surgery"; When *Mandamus* is Proper Remedy Against Public Officers; and Croppers.

A TEXT-BOOK OF LEGAL MEDICINE AND TOXICOLOGY. Edited by *Frederick Peterson, M.D.*, and *Walter S. Haines, M.D.* Two volumes. Philadelphia: W. B. Saunders and Company. 1903. Cloth. (730+825 pp.)

This is, we believe, the most thorough and comprehensive treatise on Legal Medicine and Toxicology which has recently been published in English. The fifty articles are contributed by forty or more physicians of high standing, most of them members of the faculties of various leading medical schools. The text is illustrated with cuts and full-page colored prints. The work is of equal value to the legal and to the medical professions.

The wide range of subjects covered by this text-book is seen by the following titles of articles in Part I., taken almost at random: Expert Evidence; Railway Injuries; The Medical Jurisprudence of Life Insurance, and of Accident Insurance; Medico-legal Aspects of Vision and Audition; The Stigmata of Degeneracy; Insanity; Feigned Mental and Bodily Disorders; Birth and Legitimacy; Medico-legal Relations of Venereal and Genito-urinary Disorders; Marriage and Divorce; Civil and Criminal Malpractice; Laws of the Various States Relating to the Commitment and Retention of the Insane. Part II. is devoted to Toxicology, and contains, in part, valuable articles on Inorganic, Alkaloidal, Non-alkaloidal, and Gaseous Poisons, Food Poisoning, Ptomains, and Medico-legal Examinations of Blood and Blood Stains, Seminal Stains, and Hair.

A MANUAL OF MEDICAL JURISPRUDENCE. INSANITY AND TOXICOLOGY. By *Henry C. Chapman.* Third edition. Philadelphia: W. B. Saunders and Company. 1903. Cloth. (329 pp.)

This Manual is based on a course of lectures delivered at the Jefferson Medical College, now for the second time revised, and brought down to date. The author was Coroner's Physician of the City of Philadelphia for several years. Part I. deals with Medical Jurisprudence; Part II., with Insanity, and Part III., with Toxicology. The volume is fully illustrated.

TEXT-BOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY. By *John J. Reese.* Sixth edition revised by *Henry Leffman.* Philadelphia: P. Blackiston's Sons and Company. 1902. Cloth. (xvi+660 pp.)

The progress and development of the subject of Toxicology warrants the publication, from time to time, of a new edition of this standard work. This present edition takes note of this advance, and considers recent cases. It is a volume of value, both to the lawyer and to the physician.

CRIME IN ITS RELATIONS TO SOCIAL PROGRESS. By *Arthur Cleveland Hall.* New York: The Columbia University Press. 1902. Cloth. (xv+427 pp.)

This book is Volume XV. in the series of "Studies in History, Economics and Public Law," edited by the Faculty of Political Science of Columbia University. It is both a history of crime and a philosophic study of it. Starting with an introductory chapter on "The Evolutionary Function and Usefulness of Crime and Punishment," Dr. Hall considers, in the first place, "Social Punishment among Animals," and then, beginning with "Crime among Savages," among the "Savage Races in Australia, America, Asia, and Africa," and among "The European Aryans," traces the history of crime in England down through the periods when England was under the Normans and Plantagenets, the Tudors, and the Stuarts, until finally he comes to the consideration of crime in Modern England. Taking up in turn the interesting questions, "Has Crime Increased During the Nineteenth Century?" "Is Punishment Powerless against Crime?" and "The Trend of Crime in Modern Times," he arrives finally at the enunciation of "An Ethical Theory of Crime." What this theory is is shown by the following quotations: "Crime . . . results from the limitation of nature's law of self-interest by her altruistic law. The anti-social individual who will not submit himself to these limitations, but insists upon acting in opposition to social necessity, he is the typical criminal" (p. 393). "Crime is, in large part, a social product, increasing with the growth of knowledge, intelligence and social morality—increasing because of this growth. The persistent enlargement of the field of crime is a necessity for all truly progressive nations. . . . Society's conflict, with its criminal members, due to the enforcement of new social prohibitions, is one of the chief means by which humanity, in every age, has risen from a lower to a higher plane of civilization, from almost uncontrolled license, selfishness and hate, into true liberty, love and mutual helpfulness" (p. vi).

A HISTORY OF MATRIMONIAL INSTITUTIONS, Chiefly in England and the United States, with an introductory Analysis of the Literature and the Theories of Primitive Marriage and the Family. By *George Elliott Howard.* Three volumes. Chicago: The University of Chicago Press: Callaghan and Company. 1904. (xv+473+xv+497+xv+449 pp.)

It is hard to conceive of a more thorough, systematic and scholarly study of Matrimonial Institutions than is presented in these three volumes. The amount of research work has been great. Fortunately, the result is commensurate with the labor, and as a result this History will stand as a permanent and valuable contribution to sociological and legal literature. In the limited space at our disposal it is possible only to indicate the wide scope of the work.

The History is divided into three parts. Part I. is an "Analysis of the Literature and the Theories of Primitive Matrimonial Institutions," treated under the five heads of "The Patriarchal Theory," "Theory of the Horde and Mother-Right," "Theory of the Original Pairing or Monogamous Family," "Rise of the Marriage Contract," and "Early History of Divorce." Part II. deals with "Matrimonial Institutions in England," starting with wife-purchase, tracing, in turn, the "Rise of Ecclesiastical Marriage," "The Protestant Conception of Marriage," and the "Rise of Civil Marriage," and finally setting forth the "History of Separation and Divorce under English and Ecclesiastical Law."

For the American lawyer, Part III., which discusses "Matrimonial Institutions in the United States," is naturally, of most immediate interest. Marriage laws and customs in the New England Colonies, in the Colonies of the South, and in the Middle Colonies, are treated in separate chapters, and a further chapter is devoted to "Divorce in the American Colonies." The last chapter in Volume II. gives the history of "Marriage Legislation in the United States, 1776-1903," while the first chapter of Volume III. is devoted to "Divorce Legislation in the United States" during the same century and a quarter. What has gone before leads up to a valuable study of the "Problems of Marriage and the Family," which is the concluding chapter of the work.

For the student the exhaustive "Biographical Index," filling one hundred and forty pages, will prove of great value, while to the lawyer the "Case Index," of some five hundred cases (in addition to one hundred and forty-seven Massachusetts cases of divorce and annulment tabulated elsewhere, in Volume II.), is of importance. As might be expected in a work so thorough and scholarly, the Index is full and satisfactory.

TRIBAL CUSTOM IN ANGLO-SAXON LAW. By *Frederick Seebohm.* London: Longmans, Green, and Company. 1902. Cloth. (xvi+538 pp.)

This volume is the third essay in a trilogy, the two earlier essays dealing with "The English Village Community" and "The Tribal System in Wales." "The object of this third essay (to quote the author), is to approach Anglo-Saxon laws from the point of view of tribal custom." Three introductory chapters deal with "The Currency in which Wergelds were Reckoned and Paid," with Cymric tribal customs, and tribal usage regarding the blood feud as shown by passages from Beowulf. Then follow studies of tribal customs among Irish tribes, among the Franks, among the tribes conquered by Charlemagne, under the oldest Scandinavian laws, and in Scotland. This brings the reader to an interesting chapter on "Early Anglo-Saxon Custom," while valuable light is thrown on the main subject of the essay by three short chapters on Anglo-Saxon custom, from the Norman, Danish, and Viking points of view, respectively. The final chapter deals with "The Laws of the Kentish Kings." This brief outline gives an idea of the thoroughness with which the subject in hand is treated.

THE SILENT TRADE. A Contribution to the Early History of Human Intercourse. By *P. J. Hamilton Grierson.* Edinburgh: William Green and Sons. 1903. Cloth. (x+112 pp.)

This little book is an interesting study of one of the earliest forms of exchange, the Silent Trade, and of the outgrowth of that, the Primitive Market. An introductory chapter presents the characteristics of primitive society which have a bearing on the main subject of inquiry, and another chapter is given to the consideration of Primitive Hospitality.

ESSAYS IN LEGAL ETHICS. By *George W. Warvelle.* Chicago: Callaghan and Company. 1902. Cloth. (xiii+234 pp.)

The subject of Legal Ethics is approached by Mr. Warvelle in a common-sense, practical spirit, mindful all the time of the best traditions of the profession. His moderate and sensible treatment of the question of contingent fees is a good example of the tone of the whole book. We commend these essays to the attention of every young attorney.

OFFICE BOY'S DIGEST. Selected and compiled by The Office Boy. With an introduction by *B. A. Milburn.* Charlottesville, Va.: The Michie Company. 1904. Buckram. (vii+319 pp.)

The American, English and Canadian Reports have been gutted by the compiler for the good things which go to make up the gayety of the law. Much interesting law and much valuable information may be learned from this Digest; for example, "A bankrupt's wife is not property belonging to his estate in bankruptcy;" "adultery is the highest invasion of property;" "courts

will not pretend to be more ignorant than the rest of mankind;" "a man does not court and marry a woman for the mere pleasure of paying for her board and washing;" "the law abhors an inconvenience;" "in taking a wife a man does not put himself under an overseer;" "false teeth furnished a wife are necessaries for which the husband is liable if he allows her to wear them;" "a venereal disease is individual property;" "it is impossible to divide an annual rent of six cents between seventy-five persons;" "courts may refrain from *obiter dicta*, because 'sufficient unto the day is the evil thereof.'"

Would that all decisions were touched with humor! And congratulations to Mr. Milburn who possesses an office boy capable of extracting from the reports the wit of Bleckley, C. J., and his fellow humorists on the Bench!

LITERARY NOTES.

The best literary traditions of the Bar are maintained by Adrian H. Joline, of the New York Bar, in *The Diversions of a Book-Lover* (Harper and Brothers). Mr. Joline chats, in most charming fashion, of books and authors, with a wealth of literary knowledge which reminds one of the elder Disraeli. Would that more of our leaders at the Bar indulged their literary bent, as Mr. Joline has done to such good purpose! In his case Scholarship is, indeed, the "Handmaiden of the Lawyer." It is a pleasure to add that the make-up of the book is in the best of taste.

For the American lawyer, as well as for his English brother, the recently published *Reminiscences of Sir Henry Hawkins, Lord Brampton*, edited by Richard Harris, K. C. (Longmans, Green and Company), are without question the most interesting volumes which have come from the press during the last twelve-month. Called to the Bar of the Middle Temple in 1843, appointed in 1876 to the Bench, from which he retired in 1898,—a man of the world, brilliant in intellect, an untiring worker at his profession, the shrewdest cross-examiner of his time, one of the ablest judges on the Bench, —Sir Henry Hawkins for half a century has been a very important figure at the Bar and on the Bench; and it was inevitable that his *Reminiscences*, well told and crammed as they are with legal anecdotes, should be of absorbing interest.—Of wholly different character, but of especial importance to the American lawyer, is Henry Flander's *Life of John Marshall* (T. and J. W. Johnson and Company), which has been reprinted from his *Lives of the Chief Justices*. It is a full and satisfactory account of the great Chief Justice, though it lacks the charm of Professor Thayer's shorter Life. A reproduction of the well-known Inman portrait of Marshall is used as the frontispiece in this reprint.—The admirable *Life of John A. Andrew*, by Henry Greenleaf Pearson (Houghton, Mifflin and Company), deals chiefly with the four years, 1861-1865, when Andrew was the War Governor of Massachusetts. Of his strictly professional work there is little to be said, but his services to the anti-slavery cause before the war and to the Commonwealth and the Federal Government during the war owed much of their effectiveness to his legal training.—Three excellent biographies lie before us, *William Hickling Prescott*, by Rollo Ogden, *Francis Parkman*, by Henry Dwight Sedgwick (both in the "American Men of Letters" series, Houghton, Mifflin and Company), and *John Greenleaf Whittier*, by Thomas Wentworth Higginson ("English Men of Letters," The Macmillan Company). With these may be placed the volume containing the scholarly address, *William Ellery Channing*, His Message from the Spirit, delivered by Paul Revere Frothingham shortly before the unveiling of Channing's statue in Boston.—Of intense human interest is *The Story of My Life*, by Helen Keller, with her Letters (1887-1901), and a Supplementary Account of her Life and Education, by John Albert Macy (Doubleday, Page and Company). In Mr. Macy's excellent account of Miss Keller's personality, speech, education and literary style, one is especially impressed with the extraordinary ability and patience of Miss Keller's teacher, Miss Sullivan. In speaking of the difference between Helen

Keller and Laura Bridgman Mr. Macy says: "Laura always remained an object of curious study. Helen Keller became so rapidly a distinctive personality that she kept her teacher in a breathless race to meet the needs of her pupil, with no time or strength to make a scientific study." This difference is apparent when one compares *The Story of My Life* with *Laura Bridgman*, Dr. Howe's Famous Pupil and What He Taught Her, by Maud Howe and Florence Howe Hall (Little, Brown and Company).—Perhaps the most difficult American biography to write is one of Washington. Norman Hapgood has essayed this task, and in his *George Washington* (The Macmillan Company) has given us the picture of a man, courageous, self-sacrificing, human, which bears the earmarks of truth.—Especially for "young Americans" is a recent volume, *Daniel Webster* (Little, Brown and Company), containing an introduction on "Webster, the American Orator," by Professor Charles F. Richardson, of Dartmouth College, Edwin P. Whipple's essay on "Webster as a Master of English Style," and about twenty of Webster's speeches. The small portraits scattered through the book are abominable (*e. g.*, Franklin, p. 102, J. Q. Adams, p. 129).—Of deep interest at the present time is Dr. K. Asakawa's volume on *The Russo-Japanese Conflict*, its Causes and Issues (Houghton, Mifflin and Company). In the author's view it is a "dramatic struggle between two civilizations, old and new, Russia representing the old civilization and Japan the new." Dr. Asakawa's account of the diplomatic struggles which have centered around Korea and Manchuria since the intervention of the Powers in 1895, at the close of the Chinese-Japanese War, is of great value to the student of international law and of Eastern affairs.—*American History and its Geographic Conditions*, by Ellen Churchill Semple (Houghton, Mifflin and Company), is a careful study of American growth and development. "The most important geographical fact in the past history of the United States (says the author) has been their location on the Atlantic opposite Europe; and the most important geographical fact in lending a distinctive character to their future history will probably be their location on the Pacific opposite Asia."—Professor Albert Bushnell Hart's *The Foundations of American Foreign Policy* (The Macmillan Company) reprints from various magazines eight articles, all related to the subject indicated in the title to the volume. Like all of Professor Hart's work these studies are the result of careful research; but we must dissent from his statement (p. 167) that "The annexation of territory and acceptance of protectorates which result from the Spanish war are . . . not signs of a new policy, but the enlargement of a policy long pursued."—In *The Loyalists of the American Revolution* (The Macmillan Company), Claude Halstead Van Tyne tells the dramatic story of the persecution and banishment or death of the most conservative element in the community at the time of the Revolution.—Vigorous and suggestive is Brooks Adams' *The New Empire* (The Macmillan Company), "an attempt (to quote the author's own words) to deal, by inductive methods, with the consolidation and dissolution of those administrative masses which we call empires." In two hundred pages he traces, from the standpoint of trade, the march of human progress from the earliest Egyptian civilization to the present time.—In *Our Benevolent Feudalism* (The Macmillan Company), W. J. Ghent sets forth what he believes to be, in the United States, "an irresistible movement—now almost at its culmination—toward great combinations in specific trades; next towards coalescence of kindred industries, and thus toward the complete integration of capital," all of which is resulting in "a renascent Feudalism," "based upon the same status of lord, agent, and underling," as was the old Feudalism.—*Irrigation Institutions*, by Elwood Mead ("The Citizens' Library," The Macmillan Company), is an intelligent study of "the economic and legal questions created by the growth of irrigated agriculture in the West." While not in a strict sense a law book, the discussion of the various statutes bearing on irrigation is an essential part of this volume.—One of the recent volumes in "The Citizen's Li-

brary" (The Macmillan Company) is Professor Edward Alsworth Ross' study in sociology entitled *Social Control.* It is "a survey of the foundations of order," in which the author seeks "to determine how far the order we see about us is due to social influences."—Of especial interest to the lawyer is the chapter on "Early Laws and Customs" in Frank B. Sanborn's *New Hampshire* (Houghton, Mifflin and Company). Among other facts is noted the last claim in that State to benefit of clergy, in 1776. In this same series of "American Commonwealths" another recent volume is Professor George P. Garrison's *Texas,*—an interesting and romantic history of a "Contest of Civilizations."—The need of control of monopolies and of reform of the tariff is set forth by George L. Bolen in his *Plain Facts as to the Trusts and the Tariff* (The Macmillan Company). The book contains much valuable information.—*The Blow from Behind,* by Fred C. Chamberlin (Lee and Shepard), is a childish and bitter attack on Anti-Imperialists. Doubtless those who take pride in the exploits of General Funston will enjoy the flamboyant patriotism of the book.—The student of Dante will welcome the translation of the *De Monarchia,* with introduction and notes by Aurelia Henry (Houghton, Mifflin and Company). As the editor well says: "Never has ideal civil polity been imaged forth in more simplicity and beauty, and never perhaps has one been more utterly impracticable."—Under the title *Napoleon and Machiavelli* are gathered together five suggestive essays by Frank Preston Stearns,—"The Man of Destiny," "The Waterloo Campaign," "Goethe's Position in Practical Politics," "The Politics of 'The Divina Commedia,'" and "Machiavelli's 'Prince.'" Whether writing on art, on literature, or, as here, on political science, Mr. Stearns' admirable literary style, keen insight, and independence of view compel and hold the reader's attention.—For one who appreciates keen wit Samuel M. Crothers' *The Gentle Reader* (Houghton, Mifflin and Company), is a godsend. In the ten or a dozen essays here collected Mr. Crothers gives full play to humor as fanciful as it is delicate.—To all college students, and to their parents as well, is to be commended the little book of essays *Routine and Ideals,* by Le Baron R. Briggs (Houghton, Mifflin and Company). Professor Briggs writes on college and college education with the authority which comes from long service as Dean of Harvard College.—A recent course of lectures on *Ultimate Conceptions of Faith,* delivered at Yale University on the Lyman Beecher foundation, by the Reverend George A. Gordon, have been published by Houghton, Mifflin and Company. The same publishers have also brought out *The Beauty of Wisdom,* a volume of daily readings from some ancient writers, compiled by the Reverend James De Normandie; *Conquering Success,* or Life in Earnest, by William Matthews.—Edmund Burke's *Letter to the Sheriffs of Bristol,* with notes and introduction by James Hugh Moffatt, is published in convenient form for school use by Hinds, Noble and Eldridge.—*The Queen's Progress* (Houghton, Mifflin and Company), is an attractively gotten up and well illustrated holiday volume of Elizabethan sketches, by Felix E. Schelling.—Two recent volumes in "The American Sportsman's Library" (The Macmillan Company), which will interest every fisherman, are those on *Bass, Pike and Perch,* by James A. Henshall, and on *The Big Game Fishes of the United States,* by Charles Frederick Holden. The authors are experienced sportsmen, and the books are fully illustrated.—In a small volume which should be in the hands of every parent with young children Dr. Samuel A. Hopkins, Professor of Theology and Practice of Dentistry in Tufts Dental College, gives sound advice on the important question of *The Care of the Teeth* (D. Appleton and Company). Dr. Hopkins, who speaks with the authority of over twenty years' practice, believes that with proper care "the decay of the teeth, may, in great measure, be prevented," and points out in detail what this care should be.—J. B. Mackenzie has collected his more serious poems in a volume entitled *Alfred the Great and Other Poems.*

CURRENT LEGAL ARTICLES.

THE London legal journals print interesting comments on the appointment of an International Commission of Inquiry in the North Sea matter.

Says *The Law Times:*

The International Commission of Inquiry into the North Sea incident must not be placed in the category of international courts of arbitration. The functions of the tribunal will be confined to an inquiry and a report with reference to all the circumstances relating to the disaster and the apportionment of the responsibility for its occurrence. It will, in the words of Mr. Balfour, have "nothing to do with arbitration." Its functions will be confined to the elucidation of facts. The commission is, however, as powerful a factor "in the peaceful adjustment of international differences" as a tribunal of arbitration. It is not perhaps generally known that Great Britain has amply availed herself of the privilege of submitting international disputes to arbitration. Disputes between Great Britain and the United States have been on no fewer than twelve occasions submitted to arbitration, and on five occasions disputes between Great Britain and Portugal have been thus settled. Germany, France, Chili, Spain, and Brazil have each twice been opposed to Great Britain in an arbitration court, while Holland, Nicaragua, Peru, Liberia, and Columbia have submitted disputes with Great Britain to arbitration.

The Law Journal comments as follows:

The agreement to appoint an International Commission of Inquiry to report on the facts of the North Sea outrage has been hailed as the greatest triumph which the cause of arbitration has achieved. We trust that this belief will be justified by the result. This is, indeed, the first case in which two great Powers on the verge of war have agreed to refer a dispute as to facts to a tribunal constituted in accordance with the recommendations of The Hague Convention, in the hope that its findings will establish a basis for the settlement of their quarrel. Yet it will be well not to expect too much from this reference.

IN the *Yale Law Journal* for November, Judge Simeon E. Baldwin, of the Yale Law School, gives an interesting account of "The Hague Conference of 1904 for the Advancement of Private International Law":

The final outcome of the conference of 1904 was, beside this revision [of the convention on matters of civil procedure], the proposition of four new conventions: on succession, bankruptcies, the relations between husband and wife established by their marriage, and lunatics.

The convention as to civil procedure, if amended as proposed, will effectually settle the mode of service of process to subject non-resident defendants to the jurisdiction of the courts; the manner of bringing suits by foreigners; the execution of foreign judgments, and the methods to be pursued under rogatory commissions to take evidence. Among other things, it will sanction the service of citations on subjects of the power under whose authority they may be issued, made in another country through the diplomatic or consular representatives of the former. . . .

The conventions on successions, marital relations and lunatics, are all bottomed on the application of the law of a party's nationality.

England and the United States have always stood for the law of domicil or that of the seat of a transaction, as the proper rule for regulating the rights of a person or the effects of a legal act. The person whose relations may be in question may thus freely select the applicable law; for he may change his domicil at pleasure, and enter into contracts or do a non-contractual act, wherever he thinks proper.

Italy has been equally persistent in maintaining the right of his own state to dictate the applicable law. Her jurists have rejected the principle of freedom of personal choice for that of national subjection. . . .

While Germany was a loose confederation, she adhered to the Anglo-American view, and for similar reasons. Her present imperial constitution and her imperial code of 1900, with its centralizing provisions, have now made it her policy to prefer nationality.

The other continental nations represented in the conferences agreed on the same view, and it has thus now become (though with certain exceptions) the general law of Europe.

The convention on successions has also departed widely on another point from the principles of Anglo-American law.

It disregards the distinction between real and personal estate, or moveables and immoveables; and upon the death of the owner of property sends it all, whatever be its character, to those (subject to certain minor exceptions) to whom the law of his nationality would give it. . . .

The fundamental principles asserted [in the convention of 1904] are few. They may not unfairly be reduced to these: that a man, for certain purposes, remains subject to the law of his nation when he goes to live elsewhere; that a man's estate, for purposes of succession, is to be regarded as a unit, and not split up into two parts because some of his property is in land; and that conflicts of laws upon any subject are to be avoided, not by agreeing on one universal law on that subject, but by agreeing as to which of several conflicting laws, under which claims might be set up, shall apply to the case, and be given a controlling effect.

In the *Michigan Law Review* for November, under the title, "Russian Raids on Neutral Commerce," Professor Edwin Maxey, of the University of West Virginia, discusses the question: Are foodstuffs contraband? He closes his article in these words:

From the above precedents, treaties, opinions of text-writers and decisions of courts, selected, not because they favor the one side or the other, but because they throw light on the question at issue, we discover a definite tendency toward an increase of neutral rights. This is due partly to the increased ratio of neutral to belligerent trade and partly to a general desire to ameliorate the harsh conditions of war which has manifested itself in many directions and particularly as regards non-combatants. So that in the present stage of development of International Law the weight of authority is clearly against considering foodstuffs as contraband of war; and it is doubtful if neutrals will ever permit the opposite rule to be revived,—their opposition to it on the ground of both sentiment and interest is too strong. If this conclusion is correct, the Russian seizures of neutral ships laden with foodstuffs, and such was the cargo of the most of those seized, billed to neutral ports such as Manila or Hong Kong or to commercial ports in Japan, constitute an extreme stretch of the power of a belligerent which cannot be said to be justified by International Law. Were the goods billed to the commissary department of the Japanese army their seizure would be warranted, or if billed to any one else but captured under circumstances which made it clear that they were destined for use by the Japanese army they could be lawfully seized. But the location of the Russian fleets, particularly the one in the Red Sea, was such as to make it impossible for them to say with any degree of assurance that the goods were not going to the points to which they were billed.

In the fourth of a series of valuable papers on "Russian Civil Law," William W. Smithers, in the November *American Law Register*, gives an account of the development of the Russian judicial system during the period of the Tzarinas, 1725-1796. Of the unfortunate effect of the French Revolution on Russia the article says:

The educational movement was the crowning act of Catharine's reign. The clouds of discontent, outspoken complaint, and revolt began to gather over France in angry premonition of the coming storm. The philosophy of her Gallic friends was bearing fruit, which astonished the Semiramis of the North. The governed were asserting as actual rights things that had only been dallied with in theory. Under the shock of the first news that the French people not only considered themselves oppresssed but had dared to say so, Catharine issued a *ukase* (1788), revoking the right of Crown peasants to remove and tightening

the chain about every serf throughout all the Russias.

The fall of the Bastille aroused her fear and indignation and forever shattered all her dreams of betterment for the burgher and the peasant. "She, who had been the friend and disciple of the French speculative writers, now wished to be reënveloped in the ages of barbarism . . . and the legislatrix of the North, forgetting her own maxims and philosophy, was no longer anything more than an old cybil." So complete was her volt-face that she publicly condemned even the American Revolution, which she had formerly pretended to approve, called Washington a rebel, declared that no honorable man could wear the order of Cincinnatus, and forbade the insignia to be worn by the few Russians upon whom it had been conferred.

No more reform measures were instituted, and the ancient administrative and judicial vices were permitted to reappear without rebuke, while she furiously entered into the Polish intrigues and imprisoned or exiled every Russian author of liberal word in speech or book.

THE Free Church of Scotland case calls forth the following sharp comment from the *Law Magazine and Review* (London):

To the vast majority of the Scottish people, apart altogether from religious creed, the result appears in the light of a great wrong committed in the name of the law. Whatever may be said of the law, the judgment of the House of Lords is glaringly inequitable, for let us see what it means. It means that a minority represented by 27 out of 670 members of the Free Church Assembly of 1900 are to have the whole church funds and buildings, variously estimated to be worth between seven and ten millions sterling, handed over to them to propagate the narrow Calvinistic doctrine of Predestination. It means that the well-appointed churches of the cities and large centres, now held by the United Free Church, are in future to be controlled by ministers and elders from remote highland parishes, who certainly could not be comfortable in the possession of organs or choirs, or cushioned pews or stained glass windows, all of which are, in their opinion, the direct inventions of Satan. It means that only one out of every thirty-six of the churches will have a congregation of worshippers, for it is notorious that the huge money and property bribe which is now daily dangled before the erring majority has met with scant response. It means, finally, that the educational colleges of the church at home, and its whole missionary enterprise abroad are paralyzed, for they cannot be maintained without students and missionaries, and of these only an insignificant sprinkling belong to the victorious minority. . . .

There is, however, one aspect of the case which we cannot altogether ignore. It is said that gifts should, as far as possible, be regulated by the donor's intention; but is it possible to believe that any considerable section of those who from 1843 onwards contributed money and property for the establishment and enlargement of the Free Church intended that they and their successors should be bound by the letter of a dogma, which, however it may have suited the age in which it was framed and the mental temperament of the framers, was, in many parts, utterly revolting to nine-tenths of those who, since the great disruption, built up the Free Church? . . The decision is to be regretted, not only because it introduces into Scotland a state of chaos which only legislation can remedy, but because it strikes at the foundations of equity, and destroys, or at least seriously imperils, the long-established legal principle that in the interpretation of a gift the donor's intentions are of the first importance.

"PUTTING in One's Own Case on Cross-Examination" is the title of an able article by Professor John H. Wigmore, Dean of Northwestern University Law School, in the *Yale Law Journal* for November. To quote from the article:

The Orthodox Rule and the Federal Rule. The great question that arises as to the scope of the cross-examination is whether the opponent may, upon the cross-examina-

tion, elicit the witness' knowledge as to facts that constitute part of the opponent's own case, or whether he is confined to the matters already dealt with in the direct examination, or, at least, to topics connected therewith.

(a) In England, and in the United States down through the first quarter of the 1800s, there was apparently but one view upon this subject. There seems, indeed, to have been no question at all; so that in English judicial opinions an express statement of the rule is scarcely to be found. That rule—which may be termed the orthodox one—adopted the former of the above alternatives.

(b) But in the year 1827, Chief Justice Gibson of Pennsylvania, in dealing with a related point, chanced to remark (without citing an authority) that, as the ordinary rule, the cross-examining party should not "prove his case by evidence extracted on cross-examination," and also that a witness may not be cross-examined to facts which are "wholly foreign to what he has already testified." . . .

Original Form of the Federal Rule. Before considering the respective policies of these opposing rules, it is necessary to keep in mind that in their original form they were never put forward by their eminent sponsors [Gibson, C. J., and Story, J.,] as anything but rules of customary and normal practice, subject always to the general principle that the trial Court may, in its discretion, allow exceptions. Chief Justice Gibson, the very progenitor of the Federal rule, declared radically that he "would not, without further consideration, pronounce the exercise of the discretion, depending as it does upon circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions." In the Pennsylvania and the Federal Supreme Courts—the two most notably associated with this rule—this controlling principle of discretion has from time to time been expressly emphasized. . . . But, unfortunately, this same qualification, always assumed by the inventors of the rule as an inseparable part of it, has usually been lost sight of by their followers—at least among the adherents of the Federal rule. While seldom expressly denying the principle of discretion, they have come practically to ignore it. . . .

Furthermore, the rule has suffered degeneration in another respect, in the hands of most of its modern adherents. For it would seem that both of the eminent judges, Gibson and Story, who promulgated it, understood it to exclude only the putting in of the opponent's own case—*i. e.*, the new facts constituting his affirmative defense (whether strictly appropriate to an affirmative plea or not); yet their language made it possible for their followers to forbid an examination to anything but the precise matters testified by the witness on the direct examination, even to matters which properly concerned the calling party's own case under the allegations of his pleading.

In an interesting article in the *Virginia Law Register* on "Federal Common Law," Hunsdon Cary, of the Richmond Bar, holds that, without question, "the Federal Courts have no common law criminal jurisdiction," but that "both on principle and authority there is a recognized Federal common law in civil cases." As to Wheaton *v.* Peters, 8 Pet. 658, and Smith *v.* Alabama, 124 U. S. 478, which are usually cited as denying the latter proposition, the author maintains that the parts of those opinions bearing on the point in question are *obiter dicta*. In support of the proposition that there is a Federal common law in civil cases he cites a few of the more important cases, relying especially on Murray *v.* Chicago and N. W. Ry., 62 Fed. Rep. 24, quoting from Mr. Justice Shiras' able opinion in that case, as follows:

We cannot better conclude our position on the question of Federal common law than by adopting the language of Judge Shiras as our own: "The true doctrine, in my judgment, is that the Constitution of the United States, when it was adopted, gave full recognition to the existing systems of the law of nations, of admiralty and maritime, of the common law, and equity. It apportioned to the national government, then

created, control over certain subjects, exclusive as to some, concurrent as to others. This apportionment of control over certain subjects necessitated the exercise of both legislative and judicial powers, and provision was made for the former in the creation of Congress, and for the latter in the creation of the Supreme Court, and by conferring authority on Congress to create other courts. The courts thus created were vested with jurisdiction in admiralty and at common law and in equity."

AN article in the November *Columbia Law Review* on Article IV., Section 1, of the Constitution, by George P. Costigan, Jr., of the Denver Bar, is summed up by the author as follows:

First—That the fundamental difference between strictly foreign judgments and those American judgments which we have denominated sister-state judgments, lies in the fact that the standing of the former rests on comity, while that of the latter is protected by constitutional and statutory provisions.

Secondly—That Article IV., Section 1, of the United States Constitution, like its prototype in the Articles of Confederation, was framed for the express purpose of giving sister-state judgments a favored footing over strictly foreign judgments, and that the acts of Congress carried out the purpose by providing a mode of authentication, which, when resorted to, would entitle them to that favored footing.

Third—That Article IV., Section 1, of the United States Constitution applies only to State judgments when proved in other States, but that the acts of Congress go farther and give effect to State judgments in the territories and insular possessions, as well as in other States, and likewise, in aid of the general judicial power of the United States, give the same conclusive effect in the States to the judgments of our territorial and insular possession courts.

Fourth—That by judicial legislation the judgments of United States Courts are held to be as conclusive in the States as are sister-state judgments.

Fifth—That the acts of Congress provide a mode of authentication which would seem erroneously to be deemed by some courts to be applicable to judgments of courts of record alone; and that since it has never been determined by the United States Supreme Court that Article IV., Section 1, of the Constitution, is self-executing, there is a conflict of State authority as to whether a judgment of a Justice of the Peace of one State rendered with jurisdiction is conclusive evidence when proved in the courts of another.

Sixth—That the favored standing of sister-state judgments does not exist as to certain strictly foreign judgments made conclusively by comity; does not extend to sister-state judgments rendered without jurisdiction over the person or the *res;* may not exist as to judgments obtained by fraud, except in cases where our own judgments, when sued on in the country from which the foreign judgment comes, are not protected from reëxamination as to matters of fraud already passed upon by the courts rendering the judgments, and does not apply to sister-state judgments which are penal in the international sense, or which are sued on by foreign corporations.

ON the question of "Diverting Interstate Streams," *Case and Comment* says:

One of the greatest and most difficult questions that has been presented in recent years to the courts is that of the relative rights of States and the inhabitants of different States in respect to the waters of interstate water courses. The case that has been for some time pending in the United States Supreme Court between Kansas and Colorado to determine whether or not the people of Colorado have a right to appropriate the waters of the Arkansas river, to the detriment of the people of Kansas, involves interests of vast importance to the people of those States. The question there to be decided is also of great importance in other localities. A decision pertinent to the case was rendered by the circuit court of appeals for the second circuit in the case of Pine *v.* Mayor, *etc.*, of the city of New York, 112

Fed. 98. That court held that the State of New York could not, under its power of eminent domain, authorize water to be taken from a non-navigable stream having its source in New York for the purpose of supplying a municipal corporation at a distance therefrom, if the effect would be materially to diminish the flow of the stream, to the injury of the rights of riparian owners on that stream in Connecticut. It further held that a Connecticut riparian owner might maintain a suit in equity to enjoin the diversion of the water from the stream in New York State to his injury, although the diversion was made under an attempted exercise of the right of eminent domain, and that he was not bound to seek as his remedy compensation in the eminent domain proceedings. This decision was rendered by two of the judges of the court, with one dissenting. The effect of the decision, however, is left in some doubt by reason of the fact that the case was taken to the United States Supreme Court, and the decision reversed on other grounds in 185 U. S. 93, 46 L. ed. 820. The Supreme Court withheld any opinion on the question of the right of the complainant in the case to damages for the reversion of the water, but held that the decree of the lower court was erroneous in the measure of relief given, even if it were assumed that the diversion of the water violated a legal right of the complainant. As the case stands, therefore, it is not of much weight as an authority, but it has certainly opened up a subject of far-reaching importance.

In an article on "The Exclusive Power of Congress to Regulate Interstate Commerce," David Walter Brown, in the November *Columbia Law Review*, quotes with approval the rules laid down by Mr. Justice Story in Cooley *v.* Board of Wardens, 12 How. 299 (1851), namely:

Whether the power of Congress to legislate upon a given subject under the commercial clause of the Constitution is or is not exclusive, depends upon the nature of the subject.

Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, are of such a nature as to require exclusive legislation by Congress.

Whatever subjects of the power are in their nature local and not national, and are such as may be best provided for by different systems of regulation enacted by the State in conformity with circumstances existing within their limits, may, in the absence of legislation by Congress, be regulated by the States.

And the opinion is an authority for the proposition that, not the mere legislation by Congress upon a local subject, but the direct conflict between the law of the Congress and the law of the State, renders the latter void.

The writer then formulates the following rules in explanation of and supplemental to those of Cooley *v.* Board of Wardens, above given:

Commerce with foreign nations and among the several States, being in its nature national, its direct regulation is exclusively in the power of Congress.

The incidents of such commerce,—the commodity, instrument, agent,—being local in nature, their regulation is generally within the power of the State, in the absence of conflicting legislation by Congress, except when the State regulation (1) imposes a tax upon an incident of that commerce in its quality as such, or (2) is discriminating, or (3) exceeds what is reasonably necessary to the protection of persons or property and to orderly government within the State.

The November *Yale Law Journal* contains a vigorous article on "Gambling and Cognate Vices," by John R. Dos Passos, of the New York Bar. He says:

Gambling, prostitution and offenses growing out of the use of intoxicating liquors, are not crimes against nature, but offenses against society. They are not *mala in se*—wrong in themselves; but they have been declared crimes, like many other acts, because the predominating moral sense of the community, operating through the Legislature, has condemned them as detrimental

to its welfare; just as swearing, expectorating in certain public places, violation of building laws, *etc.*, *etc.*, are forbidden. Morality and ethics, although kindred sciences, are perfectly distinct from jurisprudence. The latter sometimes assists the former by embodying their principles in a prohibitory statute.

Gambling, the keeping of houses of ill fame and the violation of the Excise laws, are acts *mala prohibita* because of legislative prohibition. . . .

So far as the regulation of the subject of gambling has been guided by principle or rule, the view has been followed not to punish private or individual gambling, but to make professional gambling and the keeping of gambling houses or instruments of gambling, criminal. At common law the whole subject was treated under the head of public nuisances, being such inconvenient and troublesome offenses as annoy the whole community in general. And all disorderly inns or ale houses, bawdy houses, gambling houses, stage plays, unlicensed booths and stages for rope dancers, and the like, were public nuisances and indictable as such.

The principle underlying the punishment of these offenses was that they were flaunted in the face of the public and tainted the tastes, habits and morals of the people. The law seemed satisfied to shut them out from public gaze. But law is a potent factor, and by indirectly making them disgraceful it may have aided the public conscience.

The distinction between these several acts when conducted in private and when carried on as a business or profession in a way that would or might offend the eye, taste or sense of the community, runs through all intelligently-framed statutory law on these subjects. . . .

To sum up, gambling, amateur or professional, public or private, thrives because the laws are unnaturally harsh, confused and conflicting, and convictions cannot be obtained against technical defenses skilfully pleaded. But soaring far above all of these considerations is the impressive fact that this vice is deeply intrenched in the habits of the people. Now and then some Chivalric Knight, like District Attorney Jerome, will leap into the area and begin a fruitless and expensive campaign for the total extinction of all vices; but after he is fatigued, or becomes *functus officio*, or the people tire of the subject, they will still be found to exist.

Nothing in the history of modern legal reform has been found, in the treatment of the acts of gambling, prostitution and the illegal sale of intoxicating liquors, more efficacious than the remedies of the old common law. The mischief sought to be remedied was not to sanction any of these acts, but to sternly keep them from public view. The persons guilty of committing these offenses were justly characterized as disorderly persons and persons guilty of disorderly conduct, and punished as misdemeanants.

In the *Law Magazine and Review* (London), W. D. Morrison, in an article on "The Report of the Commissioners of Prisons, 1903-4," takes up the important question: "Why it is that the number of sentences to imprisonment have increased during the last three years?" He says:

A continental statistician of considerable eminence (Dr. Starcke, I think,) pointed out some years ago, in the *Bulletin of International Statistics*, that one of the results of war was to increase the volume of crime. Dr. Starcke produced a striking body of facts to show that after continental wars crime had always increased among the population affected by these operations, and in the absence of any other cause it is exceedingly probable that the recent Transvaal War has produced the same effects in this country, so far as regards the increase of crime, as continental wars have produced on continental communities. We cannot with impunity familiarize a population with the horrors of war. Constant tales of blood and slaughter, of disease and death, of the letting loose of the elemental passions of human nature, tend to deaden our higher susceptibilities and to excite the slumbering savage in the human breast. Lowering of the general tone of the community during the

war, combined with the discharge of a vast number of the actual combatants after its close, is quite sufficient to account for the rise in the prison population which we have witnessed during the last three years. It is to be anticipated that this increase will be of a temporary character; the forces of civilization and humanity will in time re-assert themselves and assume their old sway in the public conscience; but it must be recollected that a moral setback takes some time and effort to overcome, and until it has been overcome we must be prepared to face the unwelcome fact that there will be no diminution in the volume of crime.

In an article in the November *American Law Register* on "Individualism *v.* Law," Judge William T. Thomas, of Montgomery, Alabama, after giving many striking statistics of crime—*e. g.*, tables showing that in the German Empire there are annually per million population 4.85 homicides, and in the United States 129.5; that homicides *per annum* number 2.34 *per* 50,000 population in New England and 14.71 in the Pacific States, and that in the United States the ratio of prisoners to population has increased from one to 3443 in 1850, to one to 757 in 1890,—sets down the following conclusions:

First—Variations in the enforcement of law are not so much due to climate, race, density of population, illiteracy, form of government, length of governmental experience, as to a varying leniency in the spirit of its administration.

Second—This varying toleration of crime is largely the result of an impatient desire for individual power, born of unlimited opportunities, causing men to disregard their duties to the social compact.

Third—Beneath it all is a moral unrest, a process of adjustment in individual conceptions of, and cravings for, absolute truth, not yet so crystallized in the aggregate of individual souls as to become the fixed ideals of the people.

From a second article on "The Gage of Land in Medieval England," by Harold D. Hazeltine, in the November *Harvard Law Review*, we quote the following extract:

The history of gages to secure loans where the debtor remains in possession of the gaged land until default, begins with the coming in of the Jews and of foreign merchants from Italy and other countries. In the centuries that immediately follow the Norman Conquest it is English policy to foster industry and commerce. Foreigners are induced to visit the realm, and it is sought to make up for deficiencies in English production by bringing in the goods of other countries. Systems of banking and insurance take root. In the interest of creditors new and more efficient processes of judicial execution are established. The Exchequer of the Jews is set up as a branch of the Great Exchequer. A system of registering debts owing to Jewish creditors and the gages that secure them is perfected, this system allowing a free buying and selling of Jewish obligations and efficient execution on default. The needs of other creditors are supplied by giving them, on judgments or enrolled recognizances of debt, new writs of execution in addition to the old common law writs of *fieri facias* and *levari facias:* these new writs enabling the creditor to reach the lands and chattels and body of the debtor. The writ of *elegit* is introduced by the Statute of Westminster the Second for creditors generally. Merchant creditors, if they get their debtors to make recognizance of debt before courts of record or certain public officials, may obtain, on the default of their debtors, even more effective remedy. Merchant creditors may reach, among other things, not only half the land, as under the Statute of Westminster the Second, but all the land of the debtor. These merchant securities are known as "statutes merchant" and "statutes staple," the former being introduced by the Statute of Acton Burnel and the Statute of Merchants in the reign of Edward I., the latter by the Statute of the Staple under Edward III. The advantages of the merchant securities are given to all creditors by the Statute 23, Henry VIII., introducing the secu-

rity known as a "recognizance in the nature of a statute staple."

A gage of land with possession of the debtor to secure money obligations is, therefore, rendered necessary and possible by this development of credit and of processes of judicial execution; and, very largely for the benefit of the mercantile classes, an hypothecation of land may now be created by judgment and by the registration or enrolment of contracts under seal. The publicity essential to this form of gage is thereby obtained; but it should be well observed that the new security breaks in upon the old law with its restraints on alienation and its requirement that livery of seisin is necessary to the conveyance of rights in land. The old feudal polity is attacked and attacked successfully by commercialism.

JUDGE Epaphroditus Peck, of the Yale Law School, contributes to the *Yale Law Journal* for November an appreciative article on "The Massachusetts Proposition for an Employers' Compensation Act," in which he says:

Compensation to the employé for injuries received by him is no longer to rest on the imputation of fault, negligence or other, to the employer. The occurrence of injuries is treated, rather, as an inevitable incident of modern industrial activity, the cost of which should be borne by the business, and be paid for by the consumer in the cost of the article. Every extensive factory must each year spend a considerable sum in the repair and replacement of machinery; but the business involves not only the breaking of machinery; but also the maiming and killing of men. Why is not the latter as much an expense of the business, which should be borne by it, and charged into the price of the product, as the former? Why should the manufacture be carried on so as to be beneficial to the general public and profitable to the proprietor, but to cast a heavy weight of loss upon a few individuals the least able to bear it?

These questions are answered in the proposed "Employers' Compensation Act" by the concise provision in the first clause:

"If an employé in any employment to which this act applies receives personal injury while performing duties growing out of or incidental to such employment, he shall be paid compensation by the employer in accordance with the scale and conditions of compensation hereinafter provided."

This removes all questions of the employer's tortious negligence, and also all questions of the employé's contributory negligence, or "implied assumption" of risks. The single exception is made in section 4 of injuries received "by reason of his own wilful or fraudulent misconduct." Except for this the only question is, did the injury occur in the course of the employment?

To obviate the natural opposition of employers actuated by fear of having the cost of manufacture greatly increased by this comprehensive liability, the act provides a scale of compensation which seems small indeed in comparison with the verdicts now sometimes recovered in personal injury cases, but which would probably compare more favorably with the net result which now comes into the hands of the victorious plaintiff after paying all his bills of litigation. The basis of computation is not the very difficult standard of the money value of the life of the deceased, of the pain and suffering undergone by him, or of the grief of his surviving relatives. The effort is rather to make good to those who have suffered it the support of his wages which they have lost, so far as that may be done without too great hardship upon the employer.

In case of fatal injury, his dependents, if any, receive an amount approximately equal to his aggregate wages for three years, "or the sum of one thousand dollars, whichever of these sums is the larger, but not exceeding in any case two thousand dollars." If there are no dependents, only the expenses of sickness and burial are to be paid, not exceeding two hundred dollars.

In case of total or partial disability, the injured man is to be paid a weekly payment, not exceeding fifty *per cent.* of his earnings, nor exceeding ten dollars a week, for the period of his disability, not exceeding four years.

In an article on "The Doctrine of Waiver," in the *Michigan Law Review* for November, Colin P. Campbell says, in part:

Upon the inquiry whether a waiver is a contract or an estoppel we may reply shortly in the words of an Egyptian parable that it is both but is neither, and may be either. An express waiver is ,without doubt, a contract, and this waiver is, strictly speaking, the only true one, the implied waiver being no waiver at all in a literal sense; although because of the language of the courts we must so consider it. To no other waiver would the language of the cases be appropriate. . . .

Having concluded that an express waiver must present the essentials of a contract it behooves us to briefly consider the so-called waivers, which for convenience we have called implied waivers. As to these but little can be said at this point, although they constitute by far the most important class of waivers. It must be sufficient to say of them here that in the main they should be referred to the principle of estoppel, for upon that doctrine they must rest, and this shows that waivers of this class are not true waivers, but are in reality estoppels, since waiver by the very force of the term implies voluntary action directed toward the purpose of waiving, while a waiver under the doctrine of estoppel is imposed from principles of justice and is enforced by operation of law. It is, in short, an involuntary, compulsory relinquishment of a right. . . .

On the question whether it is essential that the one against whom the waiver is asserted shall have intended the waiver, the article says:

The true rule, then, is that there must have been an intention to waive in order that a waiver shall be effectual; or there must be such conduct on the part of the party desiring to assert the right relied upon by the party against whom the right is sought to be asserted as will make it inequitable to any longer claim that the right exists.

The next principle in point of importance under this general doctrine is necessity for a knowledge of the facts upon the part of the one against whom the waiver is asserted. Briefly stated, the rule is this: That either there must be an intention to waive the right or there must be such conduct on the part of the possessor of the right with knowledge of the facts and of the right which it is claimed that he has waived that it will be inequitable and unjust to the adverse party for him longer to assert it.

To recapitulate: We have then a waiver consisting of a relinquishment of a right or claim, possible to be made either orally or in writing, and to be either expressed or implied, requiring a consideration or facts equivalent to an estoppel to support it, only possible to be made with knowledge of the facts by a person of full age, sound mind, and under no restraint, and only valid when not contrary to public policy or the rules of law.

Several interesting questions relating to "Recission by Parol Agreement" are discussed by Professor Samuel Williston, of the Harvard Law School, in the November issue of the *Columbia Law Review*; for example:

More difficult questions are presented when the subsequent oral agreement does not purport totally to rescind, but only to vary some of the terms of an original bargain, which was within the Statute of Frauds, but of which a memorandum had been made, it seems clear on principle that no right of action can lie for breach of the second agreement or of the first and second combined. To allow such a right would be to enforce a contract within the statute when some terms at least of the contract were oral. On the other hand, if the terms of the oral contract have been performed, such performance operates as a satisfaction of the liability on the original contract. The Statute of Frauds does not apply to executed contracts, so that when the oral agreement is performed its performance has the effect which the parties agreed it should have. If the terms of the oral agreement have not been performed, the original contract still remains in force. Though an oral agreement to rescind without more would

be effectual, where the rescission is to be effected only by the necessary implication contained in the agreement to substitute a new contract differing in some of its terms from the old one, there can be no rescission if the agreement for substitution is invalid. Even if one party offers to perform his promise under the new agreement, the other party may, according to the better view, still insist on the original contract, and refuse to accept the substituted performance to which he had orally agreed. In an early case, however, the Supreme Court of Massachusetts adopted a distinction that was suggested by Lord Ellenborough in Cuff *v.* Penn, between the contract and its performance. "The statute," Wilde, J., says, "requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance." The court then proceeds to argue that as a substituted performance would operate as a satisfaction of the original contract, and tender is equivalent to performance, the plaintiff could sue on the original contract and prove in support of it an offer to perform with the alterations later agreed upon. But the prevailing view is that even in the case of a binding contract of accord, tender is not equivalent to performance, and there is no satisfaction even if the tender is wrongfully refused. However this may be, a tender where there is no obligation to accept it cannot possibly have the effect of performance. The learned author of the leading text book on the subject [Browne on the Statute of Frauds] gives his approval to the decision, but the current of authority seems strongly against it.

PROFESSOR C. C. Langdell contributes to the *Harvard Law Review* for November, a scholarly article on "Equitable Conversion," from which the following extract is taken:

There is one notable exception to the rule that when land is exchanged for money the money belongs to the person who owned the land when the exchange was made; for, when an ordinary bilateral contract is made for the sale and purchase of land, and, pending the contract, the vendor dies, and then the contract is performed, the land will have to be conveyed to the purchaser by the vendor's heir or devisee to whom it will have devolved on the vendor's death, and yet the money will have to be paid to the vendor's executor. Why is this? Primarily, it is because the land of a deceased person devolves upon his heir or devisee, while his personal estate, including his *choses in action*, devolves upon his executor. Consequently, when a vendor dies, pending a contract for the sale of his land, the land will devolve on his heir or devisee, and he alone, therefore, can convey it to the purchaser, while the contract, in respect to the right which it confers upon the vendor as well as the obligation which it imposes upon him, devolves upon his executor, and, therefore, he alone is entitled to receive the money from the purchaser. Yet, if the executor attempt to enforce the contract at law, he will encounter an insuperable obstacle, for he cannot show a breach of the contract by the purchaser without showing, on his own part, ability, willingness, and an offer to convey the land on receiving the money, and that, of course, he cannot show. His only remedy, therefore, is a bill in equity for specific performance, and equity permits him to file such a bill against the purchaser, making the vendor's heir or devisee a co-defendant, and a decree is made against each defendant, namely, that the purchaser pay the money to the plaintiff on receiving a conveyance of the land, and that the heir or devisee convey the land to the purchaser on his paying the money to the plaintiff; and, though the plaintiff does not accomplish this result on the strength of his legal right alone, yet the only principle of equity which he has to invoke is the principle that the vendor's heir or devisee, not being a purchaser for value of the land, stands in the shoes of the vendor, and so must perform his contract to convey the land.

The foregoing exception has, however, been unwarrantably extended to a class of cases to which it is not at all applicable, namely, to cases in which an owner of land gives to another person an option of pur-

chasing the land at a certain price and within a certain time, and dies, pending the option, and then the option is exercised and the land conveyed; for it has been held that, while the land has devolved upon the heir or devisee of the deceased, and so must be conveyed by him, yet the money must be paid to the executor. In short, it has been held, as to the point now under consideration, that there is no difference between an unilateral contract giving an option of purchasing land, and the ordinary bilateral contract for the sale and purchase of land. There is, however, this very important and radical difference between these two species of contract, namely, that in the latter the vendor is not only under an obligation, but also has a correlative right, his obligation being to vest in the purchaser a good title to the land on receiving the purchase money, and his right being to receive the purchase money on performing his obligation, while in the former the giver of the option, though he is under an obligation, has no right whatever.

THE November *Michigan Law Review* contains a valuable paper on "Surrender," by Herbert Thorndike Tiffany. After discussing "Surrender by Acceptance of New Interest" and by "Transfer of Possession to Landlord," Professor Tiffany says of "Surrender by New Lease to Third Person":

A third mode of surrender by operation of law occurs in the case of a new lease by the landlord to a third person, accompanied by the former tenant's relinquishment of possession in favor of such third person. The question whether such a new lease and relinquishment of possession would thus operate was at one time the subject of considerable question in England, but, by later cases there, seems to be regarded as settled that, where a tenant assents to the making of a lease to another, and yields possession to the new lessee, there is a surrender by operation of law, the theory thereof being explained as follows: "As far as the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the tenant's term. As far as the new tenant is concerned, the same is true. As far as the owner of the particular estate in question is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession and so enabling the new tenant to enter." In this country, likewise, it has been stated that "an unconditional agreement between a landlord and a third person, with the assent of the tenant, during the term, to rent the premises to such third person, followed by a change of possession and the payment of rent by the tenant, will amount to a valid surrender of the old lease, and an acceptance thereof on the part of the landlord," and approximately similar statements have been made. In one State [New Jersey] the courts have questioned the validity of such a mode of surrender, without, however, positively deciding the question.

"THE Employment of Counsel" is thus discussed editorially by the *Australian Law Times:*

The fixed belief in the public mind that if counsel are dispensed with the decision will be arrived at more expeditiously upon the real merits of the case is almost impossible to remove. In an Utopian Court of Law, where plaintiff and defendant would each state his case, his whole case, and nothing but his case without being prodded or assisted or contradicted, the duties of an advocate would indeed be superfluous. But one has only to hear the same incident related by two honest witnesses who regard it from different points of view to realize how exaggeration, inaccuracy, stupidity, or cleverness unconsciously color their narrative. Of the dishonest or uncandid witness it is unnecessary to speak. Again, in most human affairs time is, of the essence of the contract; and one has only to listen to the litigant in person having his fling in the ordinary courts to gain some conception of the time likely to be spent by a Court in its endeavors to unravel a complication of

facts, when those facts are placed before it by persons unskilled in rules of procedure and unable to estimate the relevancy or irrelevancy of evidence. The Police Court affords an excellent illustration. There the parties delight to worry through the life-history of their opponents for hours together without approaching within reasonable distance of the matter in controversy.

Another glaring fallacy that apparently nothing will eradicate is the idea that the employment of counsel tends to prevent a reasonable settlement of the dispute. It is probably the experience of every counsel at the Bar, and it is assuredly notorious to the Bench that in almost every case the client is responsible for refusing a fair offer of settlement. So far from the fact being that counsel is generally engaged in urging on the unwilling litigant, in the majority of cases it is the litigant himself with a firm belief in his own case, who, in spite of counsel's advice, insists on going on to his own destruction.

"CONTINGENT Fees" are upheld by the *Central Law Journal* in these words:

The only serious objection to the contingent fee is the fact that it makes the advocate a party to the litigation; it gives him a direct pecuniary interest in the result; so that instead of assuming a disinterested attitude, the advocate is compelled to inject his own personality, which, from the standpoint of the highest ideals of advocacy, is always to be avoided. Nevertheless, the exception to the general rule in this particular case is dictated by so many considerations of expediency and public policy that the exception to the rule may now be said to be as firmly established as the rule itself. . . .

The final argument in favor of the contingent fee is that the public favors contracts for compensation on that basis. Where claims are uncertain, or where the parties plaintiff are in poor circumstances, the request is nearly always made by the client that the advocate undertake to prosecute the case on a contingent fee. Coming from the client at no solicitation from the advocate it can be hardly said that any advantage has been taken of the client's necessities or that the advocate has sought to obtain a personal interest in the litigation. The profession cannot set itself against the almost universal demand of the public, without incurring the latter's ill-will and loss of patronage, as the public always has a way of getting what it wants sooner or later, and it would be far preferable, in our opinion, if the public were assured that the best and most reputable members of the profession would, in cases of necessity, enter into arrangements for contingent compensation, rather than to consign this class of litigation wholly to shysters and "ambulance chasers."

CONCERNING "The Clergyman's Duty Under the Law," the *Chicago Law Journal* says:

While the statutes of most of the States are permissive in character, in which the privilege is given to certain public officers, ministers of the gospel, and others, to perform the marriage ceremony, and while the words "may solemnize" usually appear in the preface of the code giving them the right to perform the marriage ceremony, it appears to us, that whenever the ministers of any denomination accept the benefits of the statute, they accept it *cum onere*, in other words, that the burdens attendant upon the granting of so great a privilege are those which church canons cannot destroy, for the law fixes the qualifications essential to and required of those proposing to enter into the marriage contract, and when the law says that a certain man and a certain woman may marry, it appears to us, that it is beyond the power of any church to forbid its ministers to perform the service, provided the proper license from the proper authority is presented, and the other legal formalities complied with. . . .

We believe that the permissive words of the several statutes where they say "may" are imperative words, and mean "shall." If so, while it would be impossible to oblige the minister of the gospel to perform the religious ceremony, he cannot lawfully refuse to perform the legal service which

makes the parties husband and wife, and if he does, it is our opinion that it is possible to obtain writs potent enough to oblige the minister to perform it, if the parties desiring to marry choose to apply for them.

"THEY order this matter better in France,'" said I—it is Sterne who is speaking in his "Sentimental Journey." The sentence remained unfinished, but the matter in question might very well have been the institution known as the Mont de Piété—the equivalent of the English pawnshop. The theory of the Mont de Piété (says *The Law Journal*, London,) is that such a matter as small loans to poor folk should be in the hands of the State, and that private persons should not be allowed to prey on their necessities. It is just one of those matters in which the State may properly control contracts, and our Legislature has admitted the principle in the Moneylenders' Act; but though the Mont de Piété flourishes in France and Italy—so much so that, according to the *Charity Organization Review*, close upon 4,000,000*l* was loaned upon pledges in one year in France, and still more in Italy; though the Government Loan Office flourishes equally in Germany, Austria, and Holland, England still stands aloof, in its usual splendid isolation, content to leave things to manage themselves at the sign of the Three Balls. Is there not a chance for the model municipality of the future to make a new departure here? It may be said that easy borrowing is a temptation to improvidence. The pawnshop has been called the "bank of the unthrifty;" and no doubt the Post-Office Savings Bank and the Credit Bank are more to be desired. But the pawnshop, in some form or other, will never be exterminated so long as we have the poor with us—so long as the struggle for existence continues; and the sooner the poor man's bank is run by the State or the municipality the better.

ON the question of "Christian Science Principles before the Courts," the *New York Law Journal* says:

In view of the fact that Christian Science goes counter to the general results of human experience and therefore necessarily involves all manner of logical inconsistency, we doubt the wisdom of attempting to effectuate its policies by legal analogies.

In ordinary religious and theological controversies the courts have always sought, as far as possible, to remit parties to ecclesiastical remedies. It will be found necessary to follow this policy even more stringently with regard to Christian Science. Of course, legislatures or courts should not interfere with the adherents of this school in their purely religious beliefs or harmless religious practices. But their speculative faith had best, as far as possible, be ignored in passing upon questions of civil rights or criminal wrongs. That is to say, the courts should refuse to recognize the teachings of Christian Science as a defense to infractions of the criminal law and should refrain from granting affirmative relief in civil cases based upon interpretations of the principles of the system.

NOTES OF RECENT CASES OF IMPORTANCE FROM THE NATIONAL REPORTER SYSTEM.

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

ALIENS. (MARRIAGE TO CITIZEN.)
U. S. DISTRICT COURT.

Hopkins *v.* Fachant, 130 Federal Reporter 839, when compared and contrasted with Hoaglin *v.* S. M. Henderson & Co., 94 Northwestern Reporter 247, elsewhere considered in these notes, shows a different phase of the question of the merger of the entity of a married woman in that of her husband. While the Iowa case shows an extension of the wife's powers and privileges with respect to the making of contracts and indicates a further recognition of her as a separate entity, the Federal case illustrates the fact that however much her individuality may be regarded as separate and apart from that of her husband with respect to her contract relations with him and with third parties, she is, when considered merely as a member of the body politic, still merged in the personality of her husband so as to acquire his political status and become vested with his political rights. We may, perhaps, be excued for referring to one or two facts which, while possibly not absolutely essential to the decision, nevertheless lie at the foundation of the case and cast a glamour of romance over the otherwise abstract principles involved. Blanche Masclez entered into a contract of marriage with Alexander Fachant in the Republic of France and by agreement came to the United States to consummate the marriage. On arrival in this country the faithless Alexander refused to make her his wife and she brought suit against him to recover $15,000 damages for a breach of the marriage contract. Pending this suit proceedings were begun for the deportation of Mlle. Masclez on the ground that she came into the United States contrary to the immigration laws. Pending this proceeding, Alexander's heart having softened, they were married. Under these circumstances it is held that she at once acquired the status of her husband, who was a citizen of this country, and the following cases are referred to as supporting the decision: Leonard *v.* Grant, 5 Federal Reporter 11; Kelly *v.* Owen, 7 Wall. 496; United States *v.* Kellar, 13 Federal Reporter 82; Ware *v.* Wisner, 50 Federal Reporter 310; Broadis *v.* Broadis, 86 Federal Reporter 951; Tsoi Sim *v.* United States, 196 Federal Reporter 920.

CHILD LABOR. (EMPLOYMENT AS EVIDENCE OF NEGLIGENCE.)
NEW YORK COURT OF APPEALS

The effect of a penal statute in creating a civil liability, though not a new question, is developed in a novel form in Marino *v.* Lehmaier, 66 Northeastern Reporter 572, where the court of appeals of New York is called upon to determine the effect in a civil case of a violation of the child labor law of that State which makes it a misdemeanor to employ children under a certain age in factories. The court determines in effect that the act while penal in its nature, creates a civil liability and affects two different phases of the law of master and servant operating not only as a determination that the child under the prohibited age does not possess the judgment and discretion necessary for the pursuit of a dangerous work so that he is not, as a matter of law, chargeable with contributory negligence or assumption of risk, but also to make the unlawful employment in and of itself evidence of negligence. In the course of the opinion, in support of the holding, the court cites Willy *v.* Mulledy, 78 N. Y. 310, where a recovery of damages caused by violation of a charter provision requiring fire escapes was upheld; Stewart *v.* Ferguson, 104 N. Y. 553, 58 Northeastern Reporter 662, where a recovery was allowed for violation of a law prohibiting the furnishing of unsafe or un-

suitable scaffolding; and Pauley *v.* Steam Guage & Lantern Co., 131 N. Y. 90, 29 Northeastern Reporter 999; Huda *v.* American Glucose Co., 154 N. Y. 414, 48 Northeastern Reporter 897; Pitcher *v.* Lennon, 12 App. Div. 356, 42 New York Supplement 156; McRickard *v.* Flint, 114 N. Y. 222, 21 Northeastern Reporter 153; and Hover *v.* Barkhoof, 44 N. Y. 113, in all of which recovery has been permitted under a more or less similar state of facts.

CONTRACT. (MADE IN CONSIDERATION OF MARRIAGE TO THIRD PARTY.)
ILLINOIS SUPREME COURT.

In Austin *v.* Kuehn, 71, Northeastern Reporter 841, the Supreme Court of Illinois had before it for consideration a claim presented against a decedent's estate, which was stated as follows: "The claimant, Catherine M. Austin, was a servant employed in the family of Baker, and she relied and depended greatly upon his advice and counsel. She was sought in marriage by two men. Baker volunteered to investigate the character and standing of the two men for her benefit. He afterwards informed her that one of them, named Diamond, was of better character and standing and more suitable as a husband than the other. He stated and represented to her that if she would marry Diamond, and refrain from marrying the other man, he would bequeath and leave to her, by his last will and testament, the sum of $10,000, and thereupon, relying upon his promise, she entered into marriage with Diamond, and lived with him as his wife during his lifetime." This contract the court held to be one in consideration of marriage, and hence within the statute of frauds. It is of some interest, owing to the fact that the marriage, in consideration of which the promise was made, was not one to be entered into with the promisor, but with a third party, towards whom the promisor appears to have stood in no relation whatever.

CORPORATIONS. ("OUT OF THE STATE"—STATUTE OF LIMITATIONS.)
KANSAS SUPREME COURT.

A recent Kansas case, entirely dissimilar in its facts but somewhat analogous in the principles involved with the case of Simmons *v.* Georgia Iron & Coal Co., 43 Southeastern Reporter 780, elsewhere referred to in these notes, is that of Williams *v.* Metropolitan St. Ry. Co., 74 Pacific Reporter 500. Here as in the Simmon's case the decision is grounded upon a recurrence to the primary principle of corporation law that the corporation is an entity, distinct from any of its members. Under the Kansas statute of limitations, providing that if when a cause of action accrues against a person, he be out of the State, limitations shall not begin to run until he comes into the State, the question arises as to whether a foreign corporation carrying on business in Kansas is out of the State within the meaning of the statute of limitations. Attention is directed to the fact that a corporation must be thought of without reference to the persons who compose it and that the residence of a corporation is not determined merely by the place where it transacts business. The early Kansas case of Lane *v.* Bank, 6 Kan. 74, where it was held that the personal absence of the debtor from the State, even if he retain a residence at which process against him might be served, was sufficient to take the case out of the statute is referred to and approved. It is held that the corporation must be regarded as residing in the State of its organization and hence is "out of the State" within the meaning of the statute of limitations.

HABEAS CORPUS. (WRIT DIRECTED TO CORPORATION.)
GEORGIA SUPREME COURT.

As illustrating one of the limitations which inhere in the nature of corporations despite the extensions of corporate capacity and liability which have grown up to correspond with the wider field occupied by corporations in the modern commercial structure, the case of Simmons *v.* Georgia Iron & Coal Co., 43 Southeastern Reporter 780, is somewhat instructive. The petitioner in that case applied for a writ of *habeas corpus* to obtain the release of her husband who had been convicted of four separate

misdemeanors and sentenced in the alternative to a period of labor in the chain gang. Under a contract between the county commissioners and a corporation, convicts were hired to the corporation at a stated sum per month, and this corporation was made respondent to the writ. In view of these facts the court of its own motion raises the question of the capacity of a corporation as respondent to such a writ and states that it not only finds no precedent in the books for directing the writ to a corporation, but that from the very nature of the case it is clear that it cannot be so directed, and in this connection cites Hall Machine Co. *v.* Barnes, 115 Ga. 945, 42 Southeastern Reporter 276. A corporation, says the court, is an artificial being,—an entity, and it is not conceivable how it can restrain the liberty of anybody. It, of course, can authorize the detention and would doubtless be liable in a civil action for so doing, but how could a judgment ordering a corporation to discharge a person wrongfully held in custody be enforced? The corporation could not be attached for contempt and it is not probable that an officer or servant of the corporation could be attached for refusing to obey a writ directed to the corporation. It is, however, held that inasmuch as the writ in question was directed to the corporation and its officers and agents, and was served upon one of such agents who responded, the irregularity in the address of the writ was immaterial although such a method of addressing it was irregular and improper.

INSURANCE. (MURDER OF INSURED BY BENEFICIARY.)

TENNESSEE SUPREME COURT.

A holding which in its practical effect would appeal as strongly to the layman as to the lawyer, although the former might hardly grasp the legal principles which gave rise to it, is that contained in Box *v.* Lanier, a Tennessee case reported in 79 Southwestern Reporter 1042. Some of the facts in this case would have been quite as fitting as a foundation for a full page story in a Sunday edition of a yellow newspaper as for the basis of a law suit, and briefly were as follows: A husband procured an insurance policy on his life, payable to his wife if she should survive him, otherwise to his personal representatives or assigns. As the result of various domestic difficulties which culminated in the filing of a bill for divorce by the wife the husband lay in wait for and shot her, inflicting a mortal wound, and immediately thereafter committed suicide. The proceeds of the policy were paid to the administrator of the husband, and the administrator of the wife brought suit for the same. The defendant claimed that under the common law rule that a husband who survives his wife becomes the owner of her choses in action the proceeds of the policy became a part of the husband's estate. This contention, however, is negatived by resort to the principle that no one shall be permitted to profit by his own fraud, take advantage of his own wrong, found any claim upon his own iniquity or to acquire property by his own crime. This principle must be applied to whatever new conditions may arise, demanding its application. It is, says the court, universally conceded that the fundamental principles of the common law are unchangeable, yet the courts recognize the necessity of flexibility in the application of old rules to new cases so as to enable them to adapt these rules to the ever varying conditions and emergencies of human society. On this ground it is argued that the common law rule entitling the husband to the choses in action of his deceased wife is to be governed in its application by the other rule preventing a person from profiting by his own crime, and it is held that the present case is one calling for a limitation on the former rule which will prevent it from applying where it has been called into being by the crime of her husband. Supporting the ruling the English case of Cleaver *v.* Mutual Reserve Fund Life Association L. R. 1 Q. B. Div. 147, is cited, involving very similar facts arising upon the death of James Maybrick, husband of Mrs. Florence E. Maybrick, whose subsequent prosecution and imprisonment have been a matter of general public interest in this country for many years.

JURIES. (Sovereign Power of State to Regulate Procedure.)

Missouri Supreme Court.

The right of the State to control methods of procedure and prescribe remedies is again presented in a different form in Roenfeldt *v.* St. Louis & Suburban Railway Company, 72 Southwestern Reporter 706. That action was commenced prior to the adoption of the constitutional amendment authorizing nine of a jury in a civil case to render a verdict, and it was contended that the case could only be tried under the mode of procedure existing when the suit was brought so that the constitutional amendment did not apply to it. But the well-known principle which has been often adhered to in cases involving the statute of limitations and the statute of frauds was again applied, and it was declared that no one has a vested right to have his cause tried by any particular mode of procedure, but that the State has the sovereign power to prescribe the mode of trying cases in its courts and to alter the same from time to time as it may see fit.

LOTTERIES. (Guesses at the Number of Cigars Stamped in a Given Month.)

New York Court of Appeals.

The decision in People *ex rel.* Ellison *v.* Lavin, 87 New York Supplement 776, an elaborate note of which appeared in the July number of The Green Bag, was reversed on appeal to the New York Court of Appeals, the opinion being reported under the same title in 71 Northeastern Reporter 753. Reference may be had to the former note for the facts involved, a complete statement of which requires considerable space. It was there held in effect that where prizes were offered to those sending bands of certain makes of cigars for the closest estimates of the number of cigars on which tax would be paid in a certain month, the number on which tax was paid in each month for three years being published in connection with the offer, the distribution of prizes was not by chance within the section of the New York Penal Code defining lotteries as a distribution of money by chance. In the opinion of the Court of Appeals, Black's *Law Dictionary* is cited, where "pure chance" is defined to be the entire absence of all means of calculating results, and the court's holding is made to turn largely on the fact that the New York statute does not provide that in order to constitute a lottery the distribution must be by "pure chance," or by "chance exclusively," but merely by "chance." The court reviews a number of cases bearing upon the distinction between games of chance and games of skill and upon the legality of schemes for the distribution of prizes in accordance with guesses which may be partly the result of chance and partly of calculation, and it is concluded that the test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game. Attention is directed to the fact that the scheme under consideration contemplates many thousand competitors, and it is said that though if such a contest were limited to expert statisticians the award of the prize, despite the many elements of chance affecting the result, might possibly be held to be dependent on judgment and not on chance. The number of cigars stamped varies, however, from month to month in the same year as greatly as 40,000,000, and between a month of one year and the corresponding month of the next year as greatly as 90,000,000, and the number stamped in the month immediately previous to that for which the estimate is called was 562,000,000. It would seem perfectly clear that if several experts should agree in estimating the output within 5,000,000, or one *per cent.* of the number actually stamped, it would show a remarkable accuracy in their methods of calculation. Yet, with 35,000 competitors the probabilities are overwhelming that the first prize will be won by a very much closer approximation. If the difference between the estimate which won the first prize and that which secured the second prize should be only 10,000 or even 100,000, would any one deny that the

result occurred through pure chance, as defined, and that it did not proceed from the possession of superior information or the exercise of greater judgment or skill?

MARRIED WOMEN. (BUSINESS PARTNERSHIP WITH HUSBAND.)

IOWA SUPREME COURT.

That a married woman, at least in her business relations with third persons, is slowly recovering her identity and emerging as a separate individual from the composite and fictitious personage which, under the common law, was created by marriage, is indicated by Hoaglin *v.* C. M. Henderson & Co., 94 Northwestern Reporter 247. This is an Iowa case, and the statute of that State gives married women the right to acquire, own, and dispose of property and make contracts and incur liabilities as if unmarried, and their legal powers and rights are otherwise extended by statute. Under these provisions it is held that a married woman may enter into a business partnership with her husband. The court takes the view that inasmuch as the common law disability of a married woman to contract has been removed by statute, almost any ordinary contract may be made by a married woman with her husband. In this connection it is pointed out that it is not open to question that a wife may become a surety for her husband and be liable generally on such contract of suretyship, may become the general creditor of her husband, may be joint owner of property with him, and may be his agent or make him her agent in the transaction of business. From these facts the court's argument is convincing that inasmuch as the essential characteristics of a partnership are the joint ownership of property and authority of each partner to bind the other by his acts with reference to the partnership property and to impose partnership liability on the other, and as these relations may be separately sustained between husband and wife as just pointed out, there is no reason why they may not be collectively created by entering into and carrying on the relation involved in the formation of the entity known as a partnership. The only objection, says the court, which occurs to us is that involved in the denial of the capacity of husband or wife to maintain a suit against the other. Inasmuch, however, as the wife's right to contract with the husband was now unquestionably established, the inability to maintain a suit cannot be regarded as preventing the formation of the partnership.

MUNICIPAL CORPORATIONS. (PERSONAL LIABILITY OF OFFICERS FOR DAMAGE.)

ILLINOIS SUPREME COURT.

A rather interesting case is that of Gage *v.* Springer, 71 Northeastern Reporter 860, which was an action on the case brought by a property owner against certain members of a village board of local improvements.

The questions involved arose out of the action of the lower court in sustaining a demurrer to the declaration, which alleged that plaintiff's property was specially assessed to pay for a certain improvement, which, by the ordinance providing for the same, was to be caried out in a particular manner by the use of materials of a certain quantity and quality, and which was to be done under the supervision of the board of improvements. Defendants, who constituted a majority of the board of improvements, colluded and conspired with the contractor and unlawfully permitted him to construct the improvement in a different, inferior and cheaper manner than was provided for by the ordinance, and in violation of their duty accepted such cheaper improvement as a compliance with the terms of the ordinance, and issued to the contractor bonds largely in excess of the contract price of the improvement. Damage to plaintiff's property resulting from depreciation in value, the Supreme Court held that under the facts stated in the petition defendants were individually liable to plaintiff for the damages sustained.

In so holding the court said in part: "The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the pub-

lic duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its non-performance. But where a duty to improve or repair a road or street is an imperative one, and is one in which an individual has a particular private interest as distinguished from that which he has in common with other members of the community, the officer who negligently performs or corruptly refuses to perform the duty so enjoined upon him must make good to the individual any special loss or damage that he may have sustained. The plaintiff cannot recover unless the defendant owed to her the duty other than that owing to the public generally, and unless a special injury has resulted to her from a breach of that duty. No private action will lie for damages of the same kind as those sustained by the general public, although the plaintiff may be damaged in a much greater degree than any other person. . . .

"In carrying out the contract for the improvement, where, as here, it is for a pavement, in accordance with the ordinance and the contract, the contractor and the board of local improvements are performing a duty which they owe to the public generally, of providing a paved street upon which travel and the transportation of property will be promoted. That duty they owe to the entire community, but they also owe a special duty to the owner of the property assessed to comply with, and to enforce compliance with, the ordinance and the contract for the purpose of benefiting and increasing the value of that property. That is a duty they do not owe to the general public. The law does not require that the improvements should benefit any property except the property specially assessed. It is apparent, therefore, that the members of the board of local improvements not only owe a special duty to the owner of the property specially assessed, but that the substitution by them of an improvement of a different and inferior character from that to which such property owner is entitled and for which he has paid, visits an injury upon him of a kind not sustained by the general public."

Several cases and text-books were cited in support of the propositions advanced.

NOTICE. (By Telegraph — Statutory Requirements.)

Supreme Court of Georgia

That a telegraph line may in its legal aspect be often regarded as an elongated penholder, is again illustrated in Western Union Telegraph Company *v.* Bailey, 42 Southeastern Reporter 89. It is required by statute in Georgia that a plaintiff in *certiorari* shall cause written notice of the sanction of the writ and of the time and place of hearing to be given the defendant, and pursuant to this statute a message containing a proper notice and signed by a plaintiff in *certiorari* was sent by telegraph, and after having been transcribed in writing was properly delivered, and it is determined that such a notice is a written notice within the meaning of the statute. The object of the notice, says the court, is to give the opposite party timely information that the judge has sanctioned the writ and that it will be heard at a certain time and place. The object of requiring it to be in writing is to prevent, as far as possible, all disputes as to the correctness and sufficiency of the notices and as to whether it was given. It is said that if the plaintiff were to write the notice himself and send it by another, it would clearly be sufficient, as would also be the case if his attorney were to write it and have it delivered by a messenger, or if the attorney authorized his clerk to write and deliver the notice. From these considerations it is argued that the telegraph company may in the same manner be employed as agent, it being said that though this mode of service is not the usual one, yet the telegraph and telephone are used daily in all business transactions, and have been recognized by the courts. Croswell on Electricity, §690, and Joyce, Electric Law, §901, supporting the doctrine that a contract made by telegraph is a contract in writing within the meaning of the statute of frauds, are referred to in support of the holding.

ORIGINAL JURISDICTION. (STATE SUPREME COURT — PREROGATIVES OF STATE.)

WISCONSIN SUPREME COURT.

An interesting question as to the original jurisdiction of the State supreme court was developed by the recent factional contest in the Republican organization in Wisconsin which gave rise to the case of State *ex rel.* Cook *v.* Houser, Secretary of State, 100 Northwestern Reporter 964. Those persons claiming seats in the Republican State Convention called to choose State nominees to go on the official ballot at the next general election and delegates to the next Republican National Convention organized in two different bodies, each claiming to be regular and executing the purposes of the call. The National Convention decided the contest thus created so far as it affected that body, and thereafter the State nominees of the convention so held to be regular commenced suit in the Supreme Court in the name of the State against the Secretary of the State for a mandatory injunction, claiming in the complaint that unless the court interfered such nominees would be irreparably injured by defendant's recognizing as regular in certifying names for the official ballot the convention which had been decided by the National Convention to be irregular. Facts were alleged to show that the convention which the national body had decided was regular was, in fact, composed of a majority of those entitled to execute the purposes of the aforesaid call, and that the decision of the national body was conclusive as to the right of the matter. Defendant answered, alleging facts tending to show that the convention held by the National Convention to be irregular was composed of a majortiy of those entitled to execute the purposes of the call. It is provided by statute in Wisconsin that, when a conflict shall arise as to the use of a particular party designation in certifying names for the official ballot, preference shall be given to the nominees of the convention certified by the committee which had been officially certified to be authorized to represent the party. This statute defendant alleged provided the sole remedy for determining such disputes, and it was averred that the tribunal therein referred to had assumed jurisdiction of the matter. Plaintiff by amendment claimed that this tribunal was disqualified because of the prejudice and indirect interest of its members, but that, nevertheless, such tribunal had assumed to act in the matter and had decided contrary to the decision of the National Convention. Defendant admitted that the National Convention had passed upon the dispute as alleged, and after a motion by plaintiff's counsel for judgment as prayed for in the complaint, the defendant's counsel moved to dismiss for want of jurisdiction. Upon this motion it was held that the controversy shown to exist sufficiently concerned the prerogatives of the State and affected the liberties of the people, and was of so grave a character and of such public importance as to warrant the court in exercising its original jurisdiction.

POLICE POWER. (LAW REGULATING HORSESHOEING UNCONSTITUTIONAL.)

NEW YORK SUPREME COURT APPELATE DIVISION.

That even the police power, that elastic governmental prerogative, which is very nearly as all embracing as charity and has been somewhat aptly, if not absolutely, accurately defined, as "the power to pass unconstitutional laws," has its limitations is maintained by the Supreme Court of New York in People *v.* Beattie, 89 New York Supplement 193. In recognition of the valuable work of the horse in the development and maintainance of civilization the New York Legislature passed an act regulating the business of horseshoeing and requiring a person practising such business to be examined and to obtain a certificate from a board of examiners and file the same with the county clerk where the person proposes to practise his trade. In considering the constitutionality of this statute as an exercise of the police power, attention is called to the fact that regulations under this power must have reference to the comfort, safety and welfare of society, and it is submitted that it is difficult to see how the regulation of horseshoeing has any tendency to pro-

mote the health, comfort, safety or welfare of society. The strongest argument in this case seems to have been made upon the proposition that the law was sustainable on the ground that it operated in the prevention of cruelty to animals, the claim in this respect being that as the health and comfort of animals is one of the recognized subjects of legislative control, so likewise their health and comfort tend to promote the health, comfort and welfare of the community, and that the exercise of the power may be made to rest on broad humanitarian grounds. Much of the court's answer to this contention is worth repetition *verbatim*. "For centuries horses have been shod and we may take notice that during that period no cruelty has resulted from the act which has caused comment among men, or which has destroyed the usefulness of the animal, or in a substantial sense caused it pain or suffering. Indeed, it may be doubted whether more discomfort, pain and suffering have not been occasioned by the harness which it wears and by the food which it eats than by the shoes which it wears. Under such circumstances to attribute cruelty to animals by shoeing seems fanciful in the extreme. It may be said with as much foundation for the assertion that if the shoeing of horses can be considered as cruelty, so likewise can their harness, feeding, watering and cleaning be denominated as cruelty, for certainly as much suffering to the animal flows from such sources. To undertake the regulation of these subjects would inject into the body politic a paternalism which is repugnant to free institutions."

PROXIMATE CAUSE. (LIVE WIRE v. FALL FROM LADDER.)

PENNSYLVANIA SUPREME COURT.

An exemplification of the ever-vexing question of proximate cause is afforded by Elliott *v.* Allegheny County Light Co., 54 Atlantic Reporter 278, the facts in which render the case worthy of notice though the principle involved has been familiar since long before the time of its notorious application in the "Squib case." A painter, working on a ladder, fell from it, clutched at a live wire, was shocked thereby and brought suit against the electric light company which owned the wire, on the ground that his injuries were caused by defective insulation. The existence of the wire was held not to be in any sense the efficient responsible cause of the injury, the fall from the ladder being the proximate cause of all the injuries.

WITNESS. (IMPEACHMENT — FORMER CONVICTION — PARDON.)

ILLINOIS SUPREME COURT.

In Gallagher *v.* People, 71 Northeastern Reporter 842, the State offered in evidence the record of a former conviction of defendant for the purpose of impeaching him as a witness, and his counsel thereupon offered to show that he had been pardoned, which the court refused to allow.

The Supreme Court said, "The ruling was clearly right. Formerly a person who had been convicted of any crime was incompetent to testify upon the trial of a criminal case, but that disability was removed by our statute, with the qualification that such conviction might be shown for the purpose of affecting his credibility. 1 Starr. & C. Ann. St. 1896, c. 38, div. 13, §6, p. 1397. Under the statute, the guilt or innocence of the defendant of the crime for which he has been convicted, his punishment, his term of service, *etc.*, are wholly immaterial and incompetent. That he may have been pardoned proves nothing as to his credibility, and to permit evidence of that fact would simply be to introduce into the case a collateral issue"